No. 12-4340

In The
United States Court of Appeals
For The Sixth Circuit

MDC Acquisition Co., nka WBC Group, LLC; RGH Enterprises, Inc.,

Plaintiffs-Appellants,

v.

Travelers Property Casualty Company of America,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT OF TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

Pursuant to Fed. R. App. P. 26.1 and 6th Cir. R. 26.1, Defendant-Appellee Travelers Property Casualty Company of America makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Travelers Property Casualty Company of America is a wholly owned subsidiary of The Phoenix Insurance Company, which is a wholly owned subsidiary of The Travelers Indemnity Company, which is a wholly owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly owned subsidiary of The Travelers Companies, Inc. (*See* Case: 12-4340, Document: 006111507483, Filed: 11/20/2012).

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

The Travelers Companies, Inc. indirectly owns 10% or more of Travelers Property Casualty Company of America's stock and is a publicly held company. (*See id.*).

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. Civ. App. P. 34(a) and Cir. R. 34(a), Appellee Travelers Property Casualty Company of America ("Travelers") respectfully requests that the Court schedule this case for oral argument. The issues presented involve factual details and Ohio law regarding receipt and adequacy of a notice that an endorsement would become part of a renewal insurance policy. The issues require detailed explanation, suggesting to Travelers that the Court would benefit from an opportunity to ask questions about these and related issues. Oral argument would therefore substantially aid and enhance this Court's decisional process.

JURISDICTIONAL STATEMENT

(A) District Court Jurisdiction. Pursuant to 28 U.S.C. § 1332(a)(1), the district court had subject-matter jurisdiction based on diversity of citizenship. Appellants originally commenced suit in Ohio state court. (State Complaint, R.1-3, PageID #30). Travelers timely removed it to the Northern District of Ohio. (Removal, R.1, PageID #1).

(1) Complete Diversity of Citizenship.

Defendant-appellee Travelers Property Casualty Company of America is an insurance company organized and existing under the laws of the State of Connecticut, with its principal place of business in Hartford, Connecticut. Plaintiff-appellant MDC Acquisition Co., n.k.a. WBC Group, LLC, is an Ohio limited liability company organized and existing under the laws of the State of Ohio, with its principal place of business in Summit County, Ohio. RGH Enterprises, Inc. is an Ohio corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Summit County, Ohio. (Removal, R.1, PageID #2; Amended Complaint, R.25, PageID #349). Complete diversity of citizenship exists between plaintiff-appellants and defendant-appellee.

(2) Amount in Controversy Exceeds $75,000.

This is a declaratory judgment in which plaintiff-appellants MDC and RGH assert that Defendant-appellee Travelers owed MDC and RGH a defense and

indemnification in an underlying (and now-settled) class-action lawsuit. The class sought statutory damages for appellants' violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), as amended by the Junk Fax Protection Act of 2005 ("JFPA"), 47 U.S.C. § 227. Pursuant to the TCPA, the class-action complaint sought damages against plaintiffs of not less than $500 for each violation of the TCPA, in an amount not less than $3,000,000. (UHR Complaint, R.36-2, PageID #461). The amount in controversy exceeds $75,000, exclusive of interest and costs.

(B) Appellate Jurisdiction. This Court has jurisdiction under 28 U.S.C. § 1291. Appellants seek review of a final decision of the United States District Court for the Northern District of Ohio. Appellants appeal from the district court's Memorandum Opinion and Order, entered September 27, 2012. The order granted summary judgment in favor of Travelers and dismissed Plaintiffs' complaint for declaratory relief. (Decision, R.55, PageID #3027; Judgment, R.56, PageID #3049). This final decision disposed of all the parties' claims before the district court. Plaintiffs timely filed their Notice of Appeal on October 29, 2012. (Notice of Appeal, R.58, PageID #3075).

STATEMENT OF LEGAL ISSUES

1. Did appellants raise a genuine issue of material fact as to whether they received notice that a policy exclusion called the Unsolicited Communications Endorsement would become part of their policy at the 2005 renewal?

   The district court ruled "no" because appellants failed to rebut the presumption of receipt under Ohio law and because they admitted receiving the notice from their insurance agent.

2. Was the notice appellants received adequate under Ohio law?

   The district court ruled "yes."

3. Did the Unsolicited Communications Endorsements preclude Travelers' duties to defend and indemnify appellants in the underlying class action?

   The district court ruled "yes" as a matter of law.

4. In the alternative, did appellants fail to establish Travelers' duty to defend under the policies' "property damage" and "advertising injury" coverages?

   The district court did not reach these issues because its ruling disposed of the entire case in Travelers' favor.

STATEMENT OF THE CASE

Appellee Travelers Property Casualty Company of America provided liability coverage to appellants under a series of commercial general liability and commercial excess policies. This is a declaratory judgment action to determine whether Travelers must provide coverage under those policies – defense and

indemnity – for an underlying (and now-settled) class-action lawsuit seeking statutory damages for appellants' violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), as amended by the Junk Fax Protection Act of 2005 ("JFPA"), 47 U.S.C. § 227. The district court, Hon. David D. Dowd, Jr., ruled that Travelers had no duty to defend or indemnify appellants in the underlying class action because a policy exclusion called the "Unsolicited Communications Endorsement" applied as a matter of law to preclude any such duty. (Decision, R.55, PageID #3034, 3047).

The conduct typically giving rise to such TCPA class claims is called "blast-faxing," a practice that involves the sending of commercial facsimiles to tens of thousands, or even hundreds of thousands, of recipients. For example, appellants' brief states that discovery in the underlying class litigation showed that they sent some 645,000 commercial faxes during the class period. (Appellants' brief, p. 22).

The appellants, MDC Acquisition Company and RGH Enterprises, are sister corporations. (Amended Complaint, R.25, PageID #349). MDC sells chiropractic and podiatric supplies, while RGH sells durable medical goods. (Id.). Appellants state that a significant part of their business strategy is blast-faxing. (Appellants' brief, p. 22). As explained below, the TCPA regulates unsolicited commercial facsimiles and provides a private cause of action to those receiving transmissions violating the act. The underlying class action asserted a TCPA cause of action as

its sole legal basis for recovery. (UHR Complaint, R.36-2, PageID #447, 461-62).

Among other provisions, all of Travelers' relevant policies include an Unsolicited Communications Endorsement, which states, in part, that "[t]his insurance does not apply to [any defined injury] arising out of . . . communications which are made or allegedly made in violation of the Telephone Consumer Protection Act and any amendments." (Policy (2006-'07), R.36-4, PageID #529; Policy (2007-'08) R.36-5, PageID #636; Policy (2008-'09), R.36-6, PageID #745; Policy (2009-'10), R.36-7, PageID #844). When this exclusion was first added to the appellants' policies in 2005, Travelers mailed a separate notice to them titled:

IMPORTANT NOTICE TO POLICYHOLDERS

EXCLUSION – UNSOLICITED COMMUNICATIONS

* * *

PLEASE READ THIS NOTICE CAREFULLY

(Wenger Aff., R.36-17, PageID #1213) (emphasis and all caps in original).

Among other things, the notice states that it "is intended to make you aware that this exclusion is being added to your policy." (Id.).

Appellants tendered the underlying class action to Travelers for defense and indemnity. Travelers denied coverage on grounds that included, among other provisions, the Unsolicited Communications Endorsement. Appellants then commenced an action for declaratory judgment in Ohio state court. (State

Complaint, R.1-3, PageID #30). Appellants alleged that the 2005 policy changes were unenforceable under Ohio law for lack of notice. (Id., PageID #33-35). Travelers timely removed the action to the Northern District of Ohio. (Removal, R.1, PageID #1). After discovery, Travelers moved for summary judgment seeking a ruling that the 2005 policy changes were enforceable and that it had no duty to defend or indemnify appellants in the underlying class action. (Motion, R.36, PageID #413; Memorandum, R.36-1, PageID #416-440). The magistrate judge, Hon. George J. Limbert, recommended that the motion be granted pursuant to the Unsolicited Communications Endorsement. (Report and Recommendation, R.46, PageID #1932). The district court agreed and so ruled. (Decision, R.55, PageID #3034).

STATEMENT OF THE FACTS

I. The parties

MDC Acquisition Company and RGH Enterprises ("appellants") are sister corporations that conduct business in northeastern Ohio. (Amended Complaint, R.25, PageID #349). MDC sells chiropractic and podiatric supplies, while RGH sells durable medical goods. (Id.). Appellants concede that a significant part of their business strategy is blast-faxing, a practice that involves the "blasting" of commercial facsimiles to tens of thousands, or even hundreds of thousands, of recipients. (Appellants' brief, p. 22). Blast faxing has been regulated by federal

statute since 1991. *See* Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

Sometimes called "junk faxes," these facsimiles give their senders a cost advantage because they are sent electronically en masse and, upon arrival, use the recipients' paper and toner to deliver a commercial message. (See, e.g., UHR Complaint, R.36-2, PageID #448). As an example, one of the junk faxes at issue in the underlying case implored the recipient to "Offer Your Patients Restorative Sleep and Proper Body Alignment with Japanese Buckwheat Pillows from CAROLINA Morning!" (Complaint, R.54-1, PageID #2553). Between August 2006 and December 2009, appellants blasted some 645,000 such commercial junk fax messages. (Appellants' brief, p. 22).

Travelers has insured appellants since the early 2000s. At issue in this case are commercial general liability and commercial excess liability policies issued for annual policy periods from May 15, 2006 through July 15, 2010. (Amended Complaint, R.25, PageID #350). The relevant provisions are set forth in detail below.

II. The Telephone Consumer Protection Act

The TCPA became law in 1991. In 2005, the Junk Fax Protection Act ("JFPA") became law as an amendment to the TCPA. (UHR Complaint, R.36-2, PageID #455). As amended, the TCPA prohibits the use of "any telephone

facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). Section (b)(2) further authorizes the Federal Communications Commission to prescribe regulations for enforcing the JFPA. The FCC did so. *See* 47 C.F.R. § 64.1200.[1] All of this occurred before appellants sent the first blast fax at issue in the underlying class action. (UHR Complaint, R.36-2, PageID #456).

The TCPA defines "unsolicited facsimile" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). In addition to circumstances where the sender has the recipient's prior express permission, the TCPA permits commercial fax transmissions where the sender can show an "established business relationship" with the recipient. *Id.* at 47 U.S.C. § 227(b)(1)(C)(i)-(iii). Neither exception is effective, however, unless the transmitted facsimile contains a qualified "opt-out" notice. 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(3)(iv). To qualify, the opt-out notice must be conspicuous; it must state that the recipient is *legally* entitled to opt out of future faxes; it must state that an opt-out request must be honored within 30 days

[1] The FCC prescribed these regulations in its 2006 Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, 21 F.C.C.R. 3787, 2006 WL 901720 (FCC Rcd. Apr. 6, 2006).

and that failure to do so is unlawful; it must state that the recipient is entitled to opt out as to all of its facsimile telephone numbers; and it must contain both a domestic telephone number and fax number for opt-out requests. 47 U.S.C. § 227(b)(2)(D)(i)-(iv)(I), (b)(2)(E); 47 C.F.R. § 64.1200(a)(3)(iii)(A)-(D)(1), (a)(3)(v). None of appellants' blast-fax transmissions complied with any of these requirements. (Complaint, R.54-1, PageID #2565-75).[2]

The TCPA gives commercial fax recipients a private cause of action against senders who violate the act. 47 U.S.C. § 227(b)(3). The act provides for $500 in statutory damages per violation, an amount that can be trebled for willful violations. 47 U.S.C. § 227(b)(3)(B)-(C).

III. The underlying class-action suit

In June 2009, a California company called Universal Health Resources sued appellants in a putative class action ("the UHR class action"), alleging violations of the TCPA, as amended by the JFPA. (UHR Complaint, R.36-2, PageID #446-47). Filed in California state court, the class complaint alleged that the first illegal transmission occurred on August 1, 2006 "in furtherance of [appellants'] promotional campaigns." (Id.). It expressly alleged that appellants failed to comply with any of the statutory opt-out requirements. (Id., PageID #459).

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[2] Appellants' brief implies the contrary, but notably it fails to include any supporting citation to the record. (Appellants' brief, pp. 18-19). Travelers invites the Court to compare the TCPA's requirements, listed above, with the facsimiles in the record at the above-cited pages.

The UHR class complaint was styled "Complaint for Violations of the Junk Fax Prevention Act (47 U.S.C. § 227)." (Id., PageID #446). It asserted a TCPA cause of action as the class's sole legal basis for recovery. (Id. at PageID #455) (asserting sole cause of action as: "Cause of Action for Violations of 47 U.S.C. § 227."). The complaint's first sentence stated: "[UHR] brings this action as a class action on its own behalf and on behalf of a class of persons and entities to whose telephone numbers defendants sent unsolicited advertisements via facsimile transmission in violation of the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 . . . and the regulations promulgated under the Act by the Federal Communications Commission." (Id., PageID #447). Each of the complaint's 17 pages contained a footer stating "Complaint for Violations of the Junk Fax Prevention Act – Class Action." (Id., PageID #446-462). In addition to these footers, the class complaint used the terms "violation of the TCPA" or "violation of the JFPA" (or other roots of "violate") another 24 times, and the term "unsolicited" 16 times. The only relief sought in the class complaint's "Prayer for Relief" was grounded in the TCPA. (Id., PageID #448, 461-62). Finally, appellants' amended complaint in this action affirmatively alleges that "[t]he asserted cause of action against MDC and RGH in the California Complaint was for an alleged violations [sic] of the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2003 [sic]

(47 U.S.C. § 227)." (Amended Complaint, R.25, PageID #349-50). Travelers' answer admitted this allegation. (Answer, R.27, PageID #373).[3]

IV. The insurance policies

Travelers provided liability insurance to appellants at least since the early 2000s. (Packer Aff., R.43-1, PageID #1363). For purposes of the UHR class action, the relevant time period is August 1, 2006 through December 31, 2009. (Brief (opposing S.J.), R.43, PageID #1341). During that time, Travelers insured appellants under consecutive annual commercial general liability ("CGL") and commercial excess liability policies. (CGL policies, R.36-4 to R.36-8, PageID #476, 583, 692, 788, 880; commercial excess liability policies, R.36-9 to R.36-13, PageID #987, 1030, 1070, 1109, 1150).[4]

Subject to all policy terms, the CGL coverage applies to the insured's liability for five defined types of injury: "bodily injury;" "property damage;" "personal injury;" "advertising injury;" and "web site injury." (Policy, R.36-4,

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[3] While this action was pending, plaintiffs in the underlying class action settled their case for approximately $6 million, consisting of $4.1 million in damages and $1-2 million in attorney fees. (Decision, R.55, PageID #3029). Because this amount is within Travelers' policy limits, appellants dismissed Count II of their amended complaint in this action, which had alleged a separate claim for coverage against North River Insurance Company. (Amended Complaint, R.25, PageID #354-55).

[4] Because the provisions for both the CGL and the excess policies remained constant over the time period defining the underlying class (2006-09), going forward this brief will provide only a single record citation for the recited policy terms.

PageID #489, 520). Subject to all policy terms, the commercial excess coverage applies to the insured's liability for the same five defined types of injury. (Policy, R.36-9, PageID #994, 1013).

The CGL policies each contain an endorsement titled "EXCLUSION — UNSOLICITED COMMUNICATIONS." (Policy, R.36-4, PageID #529). The endorsement, first added to the policies at the 2005 renewal, applies to communications made or allegedly made in violation of the TCPA and any of its amendments, and it excludes coverage for all five defined types of injury that may arise from such violations:

EXCLUSION – UNSOLICITED COMMUNICATIONS

> * * *
>
> This insurance does not apply to "bodily injury," "property damage," "personal injury," "advertising injury" or "website injury" **arising out of unsolicited communications by or on behalf of any insured. Unsolicited communications means** any form of communication, including but not limited to facsimile, electronic mail, posted mail or telephone, in which the recipient has not specifically requested the communication. Unsolicited communications also include but are not limited to **communications which are made or allegedly made in violation of the Telephone Consumer Protection Act and any amendments**. . . .

(Id.) (emphasis added). The commercial excess policies each contain a substantively identical provision. (Policy, R.36-9, PageID #1019).[5]

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[5]The district court based its ruling only on the above exclusion and did not reach other grounds on which Travelers asserted a right to summary judgment. In keeping with that procedural posture, provisions supporting Travelers alternative grounds for affirmance will be provided in conjunction with those arguments.

V. The 2005 renewal and Travelers' notice to appellants of the Unsolicited Communications Endorsement.

As a sizeable and sophisticated commercial enterprise, appellants retained an insurance broker, Palmer & Cay of Ohio, LLC, to be their agent. In early 2005, Travelers began negotiating with appellants and their agent about the annual renewal. (Wenger Aff., R.36-17, PageID #1205-1206). Appellants have acknowledged that Palmer & Cay was their insurance agent. (Packer Aff., R.43-1, PageID #136 (Chief Operating Officer stating appellants received 2005 renewal documents "from their insurance agent, Palmer & Cay of Ohio, LLC."); Appellants' brief, p. 20 (same statement)). On March 11, 2005, in conjunction with the renewal process, one of Travelers' account managers, Brenda Wenger, mailed a policyholder notification to Edgepark Surgical[6] at the address listed in the policy's declarations, notifying appellants of changes in the forthcoming renewal policies. (Wenger Aff., R.36-17, PageID #1205-1206). She sent a separate copy of that notification to Palmer & Cay. (Id., PageID #1206). Wenger executed a contemporaneous affidavit of mailing for the notification.

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[6] Edgepark Surgical was a d/b/a of RGH Enterprises, Inc. (Policy, R.36-4, PageID #483). The policy in effect at the time of the notice listed Edgepark Surgical, Inc. on the Declarations page as the Named Insured. (Policy, R.43-6, PageID #1655).

(Id., PageID #1210).[7]

The March 2005 letter states that "we are providing you with advance notice of a change affecting your renewal polic(ies)" and that "[t]he attached policyholder notice(s) and/or cop(ies) of the endorsement(s) provide details of the changes." (Id. at PageID #1209). Of special note, the attached materials included the following:

IMPORTANT NOTICE TO POLICYHOLDERS

EXCLUSION – UNSOLICITED COMMUNICATIONS

* * *

PLEASE READ THIS NOTICE CAREFULLY.

> We are now attaching an exclusion of unsolicited communications to selected Commercial General Liability [and] Commercial Excess Liability (Umbrella) Insurance . . . policies. This notice is intended to make you aware that this exclusion is being added to your policy.

(Id., PageID #1213) (bold and all caps in original). The notice went on to describe the exclusion, stating that "[m]any of these types of communications are now illegal under the Telephone Consumer Protection Act . . . ." (Id.). Attached to this notice was a specimen of the exclusion itself, for both the CGL and the commercial excess policies. (Id., PageID #1214-15).

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[7] Several weeks later, Wenger also sent a renewal proposal to Palmer & Cay. (Wenger Aff., R.36-17, PageID #1206). For both the CGL and the commercial excess policies, the proposal listed "Exclusion – Unsolicited Communications" under the category "Amendments." (Id., PageID #1225, 1230).

Appellants do not dispute actual receipt of the March 11, 2005 notification. Indeed, they produced *from their own files* copies of all the documents discussed in the preceding two paragraphs. (Notice, R.36-18, PageID #1234-1257, esp. PageID #1237-39). Appellants concede that Palmer & Cay separately provided them, and they actually received, the bold-faced notice with the attached specimen copies of the exclusion. (Appellants' brief, p. 20). Palmer & Cay provided these documents to appellants in a binder containing all of the materials for the 2005 renewal. (Id.). RGH's Chief Operating Officer was responsible for that renewal. (Packer Aff., R.43-1, PageID #1363).

Instead of contesting actual *receipt*, RGH's COO stated in an affidavit that the "addition of the Unsolicited Communications Exclusion . . . was never sent to any *individual* at either company." (Packer Aff., R.43-1, PageID #1365) (emphasis added). The affidavit does not dispute actual receipt of the March 2005 notification, either from Travelers or separately from their agent.

VI. Appellants' tender the UHR class action and Travelers denies coverage

Appellants tendered the UHR complaint to Travelers for defense and indemnity. Travelers denied coverage because the UHR complaint contained no allegations of "bodily injury," "property damage," "personal injury," "advertising injury," or "website injury," and because the Unsolicited Communications Endorsement excludes coverage for claims based upon

violation of the TCPA or its amendments. (Denial letter, R.6-1, PageID #238-244).

VII. Appellants commence suit seeking defense and indemnity

Appellants commenced this declaratory judgment action in Ohio state court in 2010. (State Complaint, R.1-3, PageID #30). After Travelers' timely removal (Notice of Removal, R.1, PageID #1), appellants filed an amended complaint in early 2011. (Amended Complaint, R.25, PageID #349). In both its original and amended complaints, appellants asked only for a declaratory judgment that (1) the Unsolicited Communications Endorsement be ruled void and that coverage be restored to that which existed prior to the endorsement being added; (State Complaint, R.1-3, PageID #33; Amended Complaint, R.25, PageID #354); and (2) in the absence of the exclusion Travelers is obligated to indemnify them in the UHR class action. (Id.). Neither complaint specified a policy provision under which appellants claimed to be entitled to coverage. Shortly after appellants filed their amended complaint, they filed "Plaintiffs' Position Paper," in which they identified the policies' "advertising injur[y]" coverage as the basis for their claim. (Position Statement, R.36-3, PageID #472).

SUMMARY OF ARGUMENT

The 2005 modification adding the Unsolicited Communications Endorsement to appellants' CGL and commercial excess liability policies was valid because the undisputed facts establish that appellants received actual notice of the forthcoming modification. First, under Ohio's "mailbox rule," the undisputed facts establish an unrebutted presumption that appellants received a separate mailing from Travelers notifying them of the forthcoming exclusion. Travelers deposited the policyholder notification (and attached specimen copies of the exclusion) in the U.S. mail, addressed to the named insured at the address listed in the declarations, in a sealed envelope, and bearing proper postage. Appellants submitted no evidence of non-receipt; therefore, Travelers established receipt by unrebutted presumption under Ohio law.

Second, appellants produced *from their own files* copies of the policyholder notification and the attached specimen copies of the exclusion. And appellants conceded that their insurance agent provided the notice documents to them during the 2005 renewal process. Therefore, Travelers established a second undisputed factual basis showing that appellants actually received the 2005 modification notice.

The content of the modification notice satisfied Ohio law because it included a short, separately attached, boldly worded notification. The notice calls the

reader's attention to an "**IMPORTANT NOTICE**" about "**EXCLUSION – UNSOLICITED COMMUNICATIONS.**" It expressly states that the exclusion will be added to the renewal policy, and it expressly mentions the Telephone Consumer Protection Act. And the appended specimens directly state in easily understood terms that the policies will provide no coverage for liability resulting from any violation or alleged violation of the TCPA.

Finally, as a matter of Ohio law the Unsolicited Communications Endorsement precluded Travelers' duty to defend or indemnify appellants in the UHR class action. The exclusion provides that "[t]his insurance does not apply to 'bodily injury,' 'property damage,' 'personal injury,' 'advertising injury' or 'website injury' arising out of unsolicited communications by or on behalf of any insured." And it defines "unsolicited communication" to include "communications which are made or allegedly made in violation of the Telephone Consumer Protection Act and any amendments. . . ." The sole cause of action alleged in the UHR class complaint was for appellants' violation of the TCPA and its amendments. Under Ohio law, if it is established that the claim falls within an exclusion to coverage, the insurer is under no obligation to defend. As a matter of law, Travelers had no duty to defend appellants in the UHR class action. When an insurer has no duty to defend, as a matter of Ohio law it has no duty to indemnify. The district court therefore correctly ruled that

"Travelers has no duty to defend or indemnify with respect to the underlying action." (Decision, R.55, PageID #3047).

ARGUMENT

I. Standard of Review

This Court's "review of the district court's decision granting summary judgment is *de novo*." *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, *Pa*., 691 F.3d 821, 826 (6th Cir. 2012). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Bondex Int'l, Inc. v. Hartford Accident & Indem. Co*., 667 F.3d 669, 676 (6th Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). This means that the district court may properly order summary judgment for the defendant where "there is no genuine issue of material fact," which is defined as a lack of evidence "such that [no] reasonable jury could return a verdict for the nonmoving party." *Wasek v. Arrow Energy Servs., Inc.,* 682 F.3d 463, 467 (6th Cir. 2012) (quotation omitted). "The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Dorn Sprinkler Co*., 669 F.3d 790, 793 (6th Cir. 2012) (quotation omitted).

"The interpretation of an insurance contract is a legal question." *GenCorp, Inc. v. Am. Intern. Underwriters*, 178 F.3d 804, 817 (6th Cir. 1999). Ohio law governs the parties' policy disputes. *Bondex Int'l*, 667 F.3d at 676 (citing *U.S. v. A.C. Strip,* 868 F.2d 181, 184 (6th Cir. 1989) (recognizing Ohio law applies to insurance policies issued in Ohio)). Therefore, this Court "must determine how the Ohio courts would interpret the policy by looking first to Ohio law as determined by the Ohio Supreme Court, and then to all other sources." *Retail Ventures*, 691 F.3d at 826.

II. The district court correctly ruled as a matter of law that the Unsolicited Communications Endorsement precluded Travelers' duty to defend or indemnify appellants in the UHR class action.

A. The district court correctly ruled that appellants received the March 2005 notification and that it was adequate under Ohio law as notice that the endorsement would become part of the 2005 renewal.

Notice plays a central role in disputes over renewal modifications because policyholders are entitled to assume that the terms of a renewal are unchanged from the existing policy unless they have notice to the contrary. *Thomas v. Connally*, 43 Ohio Misc. 5, 332 N.E.2d 87, 89 (1974) (quoting *J.R. Roberts & Son v. Nat'l Ins. Co. of Cincinnati*, 2 Ohio App. 463, 470 (1914), *affirmed*, No. 33887, 1975 WL 182783 (Ohio App. Feb. 27, 1975)). Absent proper notice, renewal modifications are unenforceable. *Allstate Ins. Co. v. Croom*, No. 95508, 2011-Ohio-1697, at ¶¶11-12, 2001 WL 1327425, at *2 (Ohio App. Apr. 7, 2011). When

an insurer provides notice by mail, proof of notice entails a two-step analysis – receipt of the notice and adequacy of the notice.

1. Appellants failed to raise a genuine issue of material fact as to their receipt of notice that the endorsement would become part of the 2005 renewal.

When mailing is involved, the sender may prove receipt in two ways: actual receipt or presumed receipt. In this case, the district court ruled that Travelers established appellants' receipt in both ways. (Decision, R.55, PageID #3036-37 (ruling Travelers established receipt by presumption, which appellants failed to rebut); PageID #3037-38 (ruling as a matter of undisputed fact appellants received notice from Palmer & Cay.)). These rulings are correct as a matter of fact and law and should be affirmed.

Ohio follows the common law "mailbox" rule that receipt is presumed when the sender brings forth evidence that it properly addressed the letter; that it affixed proper postage; and that it deposited the letter in the U.S. mail. *City of Toledo v. Schmiedebusch*, 192 Ohio App. 3d 402, 949 N.E.2d 504, 509-10 (2011); *Simpson v. Jefferson Standard Life Ins. Co.*, 465 F.2d 1320, 1323 (6th Cir. 1972); *Griffin v. Gen. Acc. Fire & Life Assur. Co.*, 94 Ohio App. 403, 116 N.E.2d 41, 45 (1953).

Here, the undisputed facts show that on March 11, 2005, the Travelers' account manager for appellants, Brenda Wenger, deposited in the U.S. mail the policyholder notification (and specimen copies of the exclusion) addressed to

Edgepark Surgical (the named insured under the then-current policy) at the address listed in the policy's declarations, in a sealed envelope, and bearing proper postage. (Aff. of mailing, R.36-17, PageID #1210; 2004 Policy declarations, R.43-6, PageID #1655 (showing Edgepark Surgical as named insured and listing mailing address as 1810 Summit Commerce Drive, Twinsburg, Ohio, 44087); Policyholder notice, R.36-17, PageID #1209 (showing notice addressed to Edgepark Surgical at 1810 Summit Commerce Drive, Twinsburg, Ohio, 44087)).

The undisputed facts also show that Wenger mailed a copy of the notification to Palmer & Cay, and that appellants, in turn, actually received the notice from Palmer & Cay. (Wenger Aff., R.36-17, PageID #1206; Packer Aff., R.43-1, PageID #1365 (acknowledging appellants received notification from Palmer & Cay as part of 2005 renewal documents); Appellants' brief, p. 20 (conceding appellants actually received notice from Palmer & Cay)).

Thus, the record establishes three bases for affirming the ruling below that appellants received the notice: (1) an unrebutted presumption (discussed in detail below); (2) as a matter of undisputed fact the agent designated to negotiate appellants' coverage received the notice (see Decision, R.55, PageID #3037-39 and n.5) (finding it undisputed that appellants designated Palmer & Cay to negotiate the 2005 renewal). *See State ex rel. Nicodemus v. Industr.*

Comm'n, 5 Ohio St. 3d 58, 60, 448 N.E.2d 1360, 1362 (1983) (holding principal chargeable with and bound by notice to its agent regarding matters within agent's authority); and (3) as a matter of undisputed fact appellants received the notice from Palmer & Cay.

On the latter point, the district court expressly ruled that Travelers established receipt in this manner, and appellants offered no argument or authority on appeal challenging that ruling. (Decision, R.55, PageID #3037-38) (stating "receipt of a second policyholder letter by the named insured is undisputed.").[8] As a result, this Court need go no further to affirm the district court's ruling that appellants received the notice. *Inland Tugs Co. v. Ohio River Co.* 709 F.2d 1065, 1074 (6th Cir. 1983) (stating "[t]he burden is upon . . . appellant[], to demonstrate clear error."); *Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 995 (6th Cir. 2009) (holding where appellant fails to "specifically discuss why the district court

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[8] To make this point unmistakably clear, the district court later reiterated that it had found receipt in two ways:

> As set forth above, there are two theories that establish Plaintiffs' receipt of the Policyholder letter as a matter of law. First, as set forth in I. A., there is the unrebutted presumption that the Policyholder letter mailed March 11, 2005 to the named insured was received by the named insured, Edgewater Surgical, Inc. Second, as set forth in I. B., Plaintiffs concede they received physical delivery of the Policyholder letter in a notebook containing their insurance policies for 2005.

(Decision, R.55, PageID #3042).

allegedly erred in granting summary judgment" and fails to "cite any relevant authority on point," appellant waives issue and court will not consider it.).

If the Court proceeds to the presumption of receipt established by Travelers' proper mailing of the notice, the result is the same. A presumption of receipt, once properly established, can be rebutted with evidence of non-receipt. *Schmiedebusch*, 949 N.E.2d at 510 (stating rule that "a sworn denial of receipt by the addressee creates a question of fact for the jury as to whether the letter was actually mailed or delivered") (citations omitted). Appellants' brief implies that paragraph 9 of the Packer affidavit (R.43-1, PageID #1365)[9] provides evidence of non-receipt, arguing that "[a]ppellants never received actual notification of the TCPA Exclusion at the time such renewal coverage was purchased." (Appellants' brief, p. 21) (citing paragraph 9 of Packer affidavit). This sentence is the only argument appellants made on this point. But what's missing from their one-sentence argument – indeed, from their entire brief – is the actual language from what the district court graciously described as Packer's "carefully worded affidavit." (Decision, R.55, PageID #3036). In fact, the affidavit says absolutely nothing about whether appellants *received* the notice. Instead, it deceptively states that the "*addition* of the Unsolicited

[9] Kurt Packer is the Chief Operating Officer of RGH Enterprises, Inc., d/b/a Edgepark Surgical, Inc. (Packer Aff., R.43-1, PageID #1363).

Communications Exclusion . . . was never *sent* to any *individual* at either company." (Packer Aff., R.43-1, PageID #1365) (emphasis added).[10] This statement not only fails to mention the March 11, 2005 notice, it fails to provide any rebuttal evidence that the notice letter was not received.[11] Instead, it addresses the entirely different question of whether an individual's name appeared as an addressee.

Rejecting Packer's carefully worded Affidavit, the district court ruled: "[Packer] does not dispute that [the notification] was sent to or received by Edgepark Surgical, Inc., the named insured. Thus, in this case the presumption of delivery to the named insured is unrebutted; there is no conflicting evidence." (Decision, R.55, PageID #3037). In addition, the court ruled that Travelers was "entitled to give notice to the named insured" and rejected the notion that Travelers was required to address the notice to Packer or some other person employed by the named insured. (Id.). The court stated: "That is not the law and the position is untenable." (Id.).[12]

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[10] Even this statement contradicts the record, given its passive voice and the undisputed fact that Palmer & Cay sent the notice and all other renewal-related documents to Packer.

[11] What Packer meant in stating that "the addition" was not sent to an individual is unknown.

[12] The district court's reasoning on this point is very insightful:

The district court expressly ruled that paragraph 9 of the Packer affidavit provides no evidence of non-receipt (Decision, R.55, PageID #3037), but appellants' brief says nothing in response. (Appellants' brief, pp. 19-23). Appellants do state that "Travelers could have easily addressed the letter to Mr. Packer or to some other living soul at its insured's business" (id., p. 23), but they say nothing about the district court's ruling that the law does not require that step. Nor do they provide even a single authority or any supporting analysis to challenge either of those rulings. As such, appellants have waived the issue of whether the undisputed facts establish an unrebutted presumption of receipt of the March 2005 policy modification notice. *Hunter*, 565 F.3d at 995 (holding issue waived when appellant fails to specifically address district court's alleged error and fails to cite supporting authority).

In addition to waiver, the rulings are plainly correct. Nothing beyond casual inspection is needed to determine that the Packer affidavit does not deny receipt of the notification, either by the named insured or, indeed, by Packer himself. In

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> Organizational charts change, people retire, or go on vacation. Travelers cannot be expected to contact every corporation or business they insure every year to find out the appropriate individual to address. Travelers is entitled to give notice to the named insured; after the notice reaches the company it is the company's responsibility to ensure it is routed to the correct person. The problem here is not with Travelers' notice but with [appellants'] mail room.

(Decision, R.55, PageId #3037).

addition, controlling Ohio law requires notice to the insured at the address stated in the policy, and that is precisely what Travelers provided. *See, e.g.*, *Griffin*, 116 N.E.2d at 45. The district court correctly ruled, as a matter of unrebutted presumption and as a matter of undisputed fact, that appellants received the March 2005 notification, which provided notice that the Unsolicited Communications Endorsement would become part of their renewal policy. Those rulings should be affirmed.

2. The district court correctly ruled, as a matter of law, that the March 2005 notification provided appellants with adequate notice that the endorsement would become part of the 2005 renewal.

Notice under Ohio law requires more than transmitting the revised policy with instructions to read the policy carefully. *Connally*, 332 N.E.2d at 89. Instead, Ohio courts have followed the tenth circuit's standard, which upholds a renewal modification when the insurer provides notice in a "short, separately attached boldly worded modification." *Gov't Emps.' Ins. Co. v. U.S.,* 400 F.2d 172, 175 (10th Cir. 1968) ("GEICO") (cited in *Croom*, 2011 WL 1327425, at *2); *Allstate Ins. Co. v. Zampedro*, No. 3247, 1983 WL 6040, at *2 (Ohio App. Dec. 30, 1983)). The district court found that *Croom* provides Ohio authority "directly on point," stating that the notice must be in a document separate from the policy itself and be "clearly worded and presented in sufficiently bold manner as to bring the insureds' attention to the modification." (Decision, R.55, PageID #3043-44). The court also

ruled that *both* notices satisfied this requirement; that is, the notice Wenger mailed to appellants and the notice that Palmer & Cay provided to appellants in a renewal binder that also included the renewal policies. Therefore, the court concluded that knowledge of its content would be *twice* imputed to the appellants under *Croom.* (Id. at PageID #3038-39 (ruling that because notice Palmer & Cay sent to appellants was separately presented from renewal policies in renewal binder, it was a "separate, valid notice of exclusion"); PageID #3042 (ruling Travelers' mailing to appellants satisfied Ohio law of notice and notice itself was sufficiently clear). These rulings are correct and should be affirmed.

a. Appellants received notice separate from the policy itself.

The district court correctly decided that Travelers complied with Ohio law by providing notice of forthcoming policy modifications separate from the policy itself. First, Wenger's March 2005 mailing to appellants undisputedly provided separate notice. The mailing included only the policyholder notification letter and the corresponding notices and policy specimens. (Wenger Aff., R.36-17, PageID #1206). By definition, this was notice separate from the renewal policy itself. *E.g.*, *GEICO*, 400 F.2d at 175 (stating transmission of modified policy not enough; but separate boldly worded notification is). And like most of the district court's other rulings, appellants' brief provides no argument and no authority challenging the district court's ruling on this point. *Hunter*, 565 F.3d at 995 (holding issue

waived when appellant fails to specifically address district court's alleged error and fails to cite supporting authority). As a matter of law, undisputed fact, and party waiver, Wenger's March 2005 mailing satisfied the separate notice requirement.

The notice appellants received from Palmer & Cay also satisfied the separate notice requirement. It is undisputed that the March 2005 policyholder letter, including its attachments, appeared in the notebook Palmer & Cay provided to appellants for the renewal that year. (Decision, R.55, PageID #3037-3038) (stating appellants "do not deny the physical receipt and possession of these [notice] documents."). It is further undisputed that the notice documents appeared in the notebook separate from the policies themselves. (Id., PageID #3038) (stating "the Policyholder letter was not part of an integrated 573 page document. * * * The Travelers' comprehensive and excess policies were separate documents in the [renewal] binder.").

Appellants argue that the "lengthy and fine-printed insurance proposal" from Palmer & Cay provided insufficient notice, but this one-sentence argument contradicts Ohio law. (Appellants' brief, p. 23). As the district court pointed out, Ohio courts have followed the tenth circuit's decision in *GEICO*. (Decision, R.55, PageID #3041). That case, in turn, makes it clear that attaching a separate modification notice *to the renewal policy itself* is valid notice so long as it is otherwise sufficient to call the insured's attention to an imminent change. The

court there stated: "[W]hen coupled with the fact that the endorsement excluding the United States [as an additional insured] was attached *as a separate addition to the contract*, it becomes apparent that even a casual reading of the mailed material would result in informing the insured of the change." 400 F.2d at 175 (emphasis added). Lest there be any doubt what the court meant by separately attaching the notice "to the contract," the corresponding footnote to the above statement begins as follows: "Annexed separately *to the insurance policy* was the endorsement reading as follows: . . ." *Id.* at 175 and n.11 (emphasis added).

The Ohio appellate court examined similar controlling facts in *Croom*, where the insured was bound by a renewal modification that was separately attached *to the renewal policy itself. Croom*, 2011 WL 1327425, at *2-3 (stating that insured acknowledged probably receiving notices *with renewal policies* but did not read them and that insurer validly provided "IMPORTANT NOTICE" separately attached *to renewal policy*). In other words, as the district court ruled, "[t]here is no case law that supports [appellants'] position" that separately attaching a notice to the policy itself somehow invalidates it under Ohio law. (Decision, R.55, PageID #3039). As a matter of law and undisputed fact, the policy proposal that Palmer & Cay provided to appellants satisfied Ohio law.

Nor is there authority supporting appellants' implied argument that the size of its many renewal policies somehow invalidates a separate, boldly worded

modification notice attached thereto. (See appellants' brief, p. 20) (complaining that notice received from Palmer & Cay was part of "a nearly 600-page insurance policy binder Appellants received from their insurance agent."). The renewal binder was large because appellants are a sophisticated commercial enterprise with multiple operations in multiple states.[13] But this fact should enhance, not diminish, their obligation to read the documents attached to the renewal. *See, e.g., Trepp, LLC v. Lighthouse Commercial Mortg., Inc.*, Nos. 09AP-597,09AP-850, 2010-Ohio-1820, at ¶23, 2010 WL 1664901, at *6 (Ohio App. Apr. 27, 2010) (Case, R.44-3, PageID #1903). ("With the reasonable diligence expected of a sophisticated business party, Lighthouse could have, and should have, discovered the one-year term in the contract."); *J.G. Wentworth LLC v. Christian,* No. 07 MA 113, 2008-Ohio-3089, at ¶57, 2008 WL 2486552, at *11 (Ohio App. June 17, 2008) (Case, R.44-4, PageID #1910) ("J.G. Wentworth was a sophisticated party who should have ascertained ownership of the annuity and should have realized the existence of the beneficiary issue from the language of the annuity contract and application."). After all, appellants have an insurance agent to negotiate for, and advise them about, changes in their renewals. And they have a Chief Operating Officer charged with determining what those changes are. As the district court put it, "[p]laintiffs'

[13] In fact, a company called Cardinal Medical recently purchased Edgepark Medical (n/k/a AssuraMed) for $2.07 billion. A company of that size should not be complaining about how big its renewal insurance policies are. http://www.crainscleveland.com/article/20130214/FREE/130219901#

failure to even flip open the notebook and look at the materials relating to the renewal of the comprehensive and excess liability policies it claims were central to its continued operation should not invalidate Travelers' separate, valid notice of exclusion." (Decision, R.55, PageID #3039).

And attaching a separate notice to the renewal policy – even a big renewal – is far different from making the change part of the policy itself and advising the insured to "Read Your Policy Carefully." *See, e.g., Connally*, 332 N.E.2d at 89; *GEICO*, 400 F.2d at 175. In the latter situation, the insured would need to read and compare each renewal provision with each provision in the expiring policy. Then the size of the renewal policy *would* matter. But that's not what occurred here. Just because a renewal policy is large does not mean the insured has no obligation to "flip open the notebook" and examine each of the *separate* documents attached to it. The district court was correct in ruling that the proposal Palmer & Cay provided to appellants satisfied the separate notice requirement, notwithstanding appellants' complaint that some of the documents in the binder were large. The Court should affirm Travelers' compliance with the separate notice requirement, both under Wenger's mailing and under Palmer & Cay's delivery of the renewal binder.

b. The content of the notice satisfies Ohio law.

The Ohio Court of Appeals has stated that notice is sufficient if given in a separately attached and clearly worded letter describing the modifications. *Croom*,

2011 WL 1327425, at *2; *see GEICO,* 400 F.2d at 175 ("[W]hile it is inequitable to require an insured to search the fine print of each renewal policy, to require that he be aware of a short, separately attached boldly worded modification, seems clearly appropriate."). Here, appellants' brief says nothing about the adequacy of the boldly worded and emphatically presented notice:

IMPORTANT NOTICE TO POLICYHOLDERS

EXCLUSION – UNSOLICITED COMMUNICATIONS

* * *

PLEASE READ THIS NOTICE CAREFULLY.

> We are now attaching an exclusion of unsolicited communications to selected Commercial General Liability [and] Commercial Excess Liability (Umbrella) Insurance . . . policies. This notice is intended to make you aware that this exclusion is being added to your policy.

(Policyholder notification, R.36-17, PageID #1213) (bold and all caps in original). The notice went on to describe the exclusion, and it provided an attached specimen for both the CGL and commercial excess policies. (Id., PageID #1213-15).

The district court closely examined the notice and ruled:

> Travelers' notice satisfies all of the requirements established in *Croom*: it is on separate paper, and uses bold type and capital letters to call attention to the important changes described in the notice. Indeed, Travelers' notice even goes farther, by using a separate mailing and attaching the short, clear endorsement itself. Such notice is more than sufficient to give actual notice under Ohio law.

(Decision, R.55, PageID #3042) (citation omitted). Like so many of their other arguments, appellants' argument about the adequacy of the notice consists of a single sentence. (Appellants' brief, p. 22) (stating rule that "[n]otice of the change in coverage must be presented in such a way so as to call attention to any material change in the terms of the contract.") (citations omitted). Yet again, though, appellants failed to present any argument suggesting an error in the court's ruling. Nor did they present legal authority from which an error might be surmised. Again, therefore, this argument is waived. *Hunter*, 565 F.3d at 995 (holding issue waived when appellant fails to specifically address district court's alleged error and fails to cite supporting authority).

In addition, the district court's analysis is plainly correct under Ohio law. Even to a casual browser, the notice loudly calls one's attention to an "**IMPORTANT NOTICE**" about "**EXCLUSION – UNSOLICITED COMMUNICATIONS.**" (Policyholder notification, R.36-17, Page ID #1213). It expressly states that the exclusion will be added to the renewal policy, and it expressly mentions the Telephone Consumer Protection Act. (Id.). Plus, the appended specimens directly state in easily understood terms that the policies will provide no coverage for liability resulting from any violation or alleged violation of the TCPA. (Id. at PageID #1214-15). The district court correctly ruled that the content of the notice satisfies Ohio law.

3. Appellants' renewal of the policies in 2005, 2006, 2007, and 2008 constitutes their consent to the policy modifications.

The exclusion became effective with the 2005 renewal. UHR commenced its putative TCPA class action in June 2009. (UHR Complaint, R.36-2, PageID #446-47). Before the class action, therefore, appellants renewed their policies four times without questioning or rejecting the 2005 modifications.

Appellants argue that they did not agree to the modifications (appellants' brief, p. 21), but they don't disclose the facts or the law they rely on for that contention. The Ohio appellate court's decision in *Croom*, however, holds that the insured's renewal after receiving adequate notice of a forthcoming modification constitutes its consent to the change:

> [W]e agree with the trial court that Croom had notice of the lead exclusion. He never rejected the changes but continued paying the premiums for several years, thus indicating to Allstate that he consented to the changes. Therefore, the lead exclusion that was added to Croom's policy is enforceable. . . .

Croom, 2011 WL 1327425, at *3. Appellants' argument that they didn't agree to the 2005 modifications contradicts Ohio law and should be rejected.

In sum, both Wenger's mailed March 2005 notice and Palmer & Cay's separate notice satisfied Ohio law, making the Unsolicited Communications Endorsement a doubly valid and enforceable part of the policies at issue. The district court correctly so ruled, and its decision should be affirmed.

B. As a matter of law, the Unsolicited Communications Endorsement precludes both Travelers' duty to defend and its duty to indemnify appellants in the UHR class action.

The district court ruled that "Travelers has no duty to defend or indemnify with respect to the underlying action." (Decision, R.55, PageID #3047). Travelers can find no request in appellants' brief for a reversal on the question of indemnity. (Appellants' brief, p. 8 (contending in one-sentence Summary of Argument "Appellants' claim for reimbursement of defense costs should be overturned"); p. 10 (contending they presented sufficient evidence to require trial on claim that "Travelers' breached its obligation to provide them with a defense"); p. 12 (contending "Travelers had a duty to defend"); p. 19 (contending "Travelers had no right to deny defense"); p. 27 (asking Court to "remand the case for further proceedings."). *See* Fed. R. App. P. 28(a)(10) ("The appellant's brief must . . . stat[e] the *precise relief* sought. . . .") (emphasis added); *U.S. v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (ruling appellant must "stat[e] the precise relief sought," and finding "[appellant]'s original brief failed to satisfy [that] requirement[] . . . in a way that would properly present to [the Court] the error"). For thoroughness, however, Travelers will address both issues.

Under Ohio law, an insurer's duty to defend is broader than, and distinct from, its duty to indemnify. *Ferro Corp. v. Cookson Group*, 561 F.Supp.2d 888, 898 (N.D.Ohio 2008) (citing *Ohio Gov't Risk Mgmt. Plan v. Harrison,* 115 Ohio

St. 3d 241, 245, 874 N.E.2d 1155 (2007)). An insurer's duty to defend "is initially determined by the scope of the pleadings." *Id.* "The duty to defend arises when the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy." *Id.* (citing *Cincinnati Ins. Co. v. CPS Holdings, Inc.,* 115 Ohio St. 3d 306, 307, 875 N.E.2d 31 (2007)).

But an "insurer need not provide a defense if there is no set of facts alleged in the complaint which, if proven true, would invoke coverage." *Cincinnati Indem. Co. v. Martin*, 85 Ohio St. 3d 604, 710 N.E.2d 677, 678 (1999). Therefore, "if it is established that the claim falls within an exclusion to coverage, the insurer is under no obligation to defend." *Id.* (citation omitted).

The exclusion provides that "[t]his insurance does not apply to 'bodily injury,' 'property damage,' 'personal injury,' 'advertising injury' or 'website injury' arising out of unsolicited communications by or on behalf of any insured." (Policy, R.36-4, PageID #529; see also Policy, R.36-9, PageID #1019). Appellants argue that the exclusion "only applies to unsolicited communications, not communications that were solicited but may have *violated the TCPA for some other reason.*" (Appellants' brief, p. 16-17) (emphasis added). This statement is demonstrably untrue. The exclusion *defines* "unsolicited communication" to include "communications which are made or allegedly made in *violation* of the Telephone Consumer Protection Act and any amendments. . .

." (Policy, R.36-4, PageID #529) (emphasis added). *See Kasakaitas v. Heritage Mut. Ins. Co*. 107 F.Supp.2d 866, 869 (N.D.Ohio 1999) ("When a contract term is defined in the policy, that definition controls what the term means."). The *reason* a communication violates the TCPA (or its amendments) is immaterial to the exclusion's application, and appellants' argument to the contrary seems at least misleading, if not facially frivolous.

The underlying complaint is the focus of any duty-to-defend analysis. Given the exclusion's application to violations or alleged violations of the TCPA, it would be difficult to imagine a complaint that more clearly triggers the exclusion as a matter of law. First, the UHR class complaint was styled "Complaint for *Violations* of the Junk Fax Prevention Act (47 U.S.C. § 227)." (UHR Complaint, R.36-2, PageID #446) (emphasis added). It asserted a TCPA cause of action as the class's sole legal basis for recovery. (Id., PageID #455) (asserting: "Cause of Action for *Violations* of 47 U.S.C. § 227") (emphasis added). The first sentence of the complaint stated: "[UHR] brings this action as a class action on its own behalf and on behalf of a class of persons and entities to whose telephone numbers defendants sent unsolicited advertisements via facsimile transmission in *violation* of the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005. . . ." (Id., PageID #447) (emphasis added).

Next, each of the complaint's 17 pages contained a footer stating "Complaint for *Violations* of the Junk Fax Prevention Act – Class Action." (Id., PageID #446-462) (emphasis added). In addition to these footers, the class complaint used the terms "violation of the TCPA" or "violation of the JFPA" (or other roots of "violate") another 24 times. The only relief sought in the class complaint's "Prayer for Relief" was premised solely on *violations* of the TCPA. (Id., PageID #448, 461-62) (seeking "the minimum amount of $500 for each *violation* of the Act" and asking for an injunction to prohibit "further *violations* of the Act.") (emphasis added).

Finally, appellants' amended complaint in this action affirmatively alleges that "[t]he asserted cause of action against MDC and RGH in the California Complaint was for an alleged *violations* [sic] of the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2003 [sic] (47 U.S.C. § 227)." (Amended Complaint, R.25, PageID #349-50) (emphasis added). Travelers admitted this allegation in its Answer. (Answer, R.27, PageID #373). *See Barnes v. Owens-Corning Fiberglas Corp*., 201 F.3d 815, 829 (6th Cir. 2000) ("Factual assertions in pleadings . . . , unless amended, are considered judicial admissions conclusively binding on the party who made them.").

Under Ohio law, "if it is established that the claim falls within an exclusion to coverage, the insurer is under no obligation to defend." *Martin*, 710

N.E.2d at 678. The UHR class complaint triggered the exclusion as a matter of law because, as the district court put it, and as shown conclusively above, "[e]very allegation in the underlying action is of a violation of the TCPA and its amendments." (Decision, R.55, PageID #3047). The district court correctly ruled as a matter of law that the Unsolicited Communications Endorsement precluded Travelers' duty to defend the UHR class action.

Appellants try to argue that a duty to defend existed because maybe they had some defenses to the excluded TCPA cause of action. (Appellants' brief, p. 18) (arguing about effect of opt-out notices on TCPA liability). But this argument misses the mark for two reasons. First, the controlling question under Ohio law asks whether the allegations, *if proven true*, would invoke the policy's coverage, not whether claims that are excluded from coverage might be proven false. *Martin*, 710 N.E.2d at 678.[14] Here, not only do the allegations themselves trigger the exclusion – because the exclusion applies to *alleged* violations – but if the allegations were proven true they would become proven TCPA violations, the other thing for which the endorsement excludes coverage. (Policy, R.36-4,

[14] This should not be confused with the rule that *when* the duty to defend applies, it applies regardless of whether the claim is groundless or false. *See Socony-Vacuum Oil Co. v. Cont'l Cas. Co.*, 144 Ohio St. 382, 59 N.E.2d 199, 203 (1945) (explaining that insurer's obligation to defend groundless claims "does not require the insurer to defend a groundless action *which is not within the coverage of the policy*") (emphasis added).

PageID #529) (excluding coverage for "communications which are *made* or *allegedly made* in *violation* of the [TCPA]") (emphasis added). Appellants' discussion of the opt-out notices is a red herring because the merits of an excluded TCPA claim are beside the point under the exclusion and under Ohio law.

Second, the opt-out clauses in appellants' blast faxes not only *allegedly* violated the TCPA (UHR Complaint, R.36-2, PageID #459 (alleging that appellants "failed to comply with the Opt-Out Requirements in connection with the [UHR] faxes")), they in fact failed *on their face* to comply with any of the TCPA's five opt-out requirements. (Compare Fax specimens, R.54-1, PageID #s 2553-2575, with TCPA opt-out requirements, *supra*, p. 9). Thus, appellants' discussion of the opt-out notices not only is legally irrelevant (because Ohio duty-to-defend law focuses on the effect *proven* allegations would have on coverage), but factually it seems designed to mislead the Court into believing that their faxes satisfied TCPA opt-out requirements.

At bottom, the district court correctly ruled that the Unsolicited Communications Endorsement applies to the UHR class action as a matter of law. Because the UHR suit falls within an exclusion to coverage, as a matter of law Travelers was under no obligation to defend. *Martin*, 710 N.E.2d at 678. And because the duty to defend is *broader* than the duty to indemnify, when an insurer has no duty to defend, it follows as a matter of law that it has no duty to

indemnify. *See St. Thomas Hosp. Med Ctr. v. Liberty Mut. Ins. Co*., No. 16249, 1993 WL 526706, at *4 (Ohio App. Dec. 15, 1993) ("Having determined that Liberty was under no duty to defend, it necessarily follows that Liberty breached no duty to indemnify St. Thomas. . . .") (citing *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St. 3d 17, 540 N.E.2d 266, 271-72 (1989)); *Westfield Ins. Co. v. HealthOhio, Inc*., 73 Ohio App. 3d 341, 597 N.E.2d 179, 183 (1992) ("Because [the insurer] had no duty to defend [the insured] in the underlying action, it has no duty to indemnify. . . .").

The district court correctly ruled that "Travelers has no duty to defend or indemnify with respect to the underlying action." (Decision, R.55, PageID #3047). The court's order and judgment should therefore be affirmed.

III. In the alternative, Travelers had no duty to defend or indemnify appellants under either the policies' "property damage" or "advertising injury" coverage.

The Unsolicited Communications Endorsement applies to exclude coverage for the insureds' liability for all types of potentially covered injury or damage, including "property damage" and "advertising injury." (Policy, R.36-4, PageID #529; Policy, R.36-9, PageID #1019). As a result, if this Court affirms the decision below under that endorsement, it need not reach specific issues appellants raise regarding coverage for "property damage" and "advertising injury." If the Court were to reach those issues, however, the outcome is the

same: Travelers had no duty to defend or indemnify appellants in the UHR class action. *See Shah v. Deaconess Hosp.*, 355 F.3d 496, 498 (6th Cir. 2004) ("[B]ecause a grant of summary judgment is reviewed *de novo*, [this Court] may affirm the judgment of the district court on any grounds supported by the record, even if they are different from those relied upon by the district court.") (quotation omitted).

A. As a matter of law, Travelers had no duty to defend or indemnify appellants under the policies' "property damage" coverage.

The CGL policies provide that Travelers "will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." (Policy, R.36-4, PageID #489). The coverage only applies to "'property damage' [] caused by an 'occurrence.'" (Id.). The policy defines "occurrence" to mean "an accident." (Id. at PageID #502). In addition, the policy excludes coverage for "'property damage' expected or intended from the standpoint of the insured." (Id. PageID #490). The commercial excess policies have substantively identical provisions. (Policy, R.36-9, PageID #994-95, 1004).

When used in a liability policy, the term "accident" means "[a]n event proceeding from an unexpected happening or unknown cause without design and not in the usual course of things; an event that takes place without one's

expectation; an undesigned, sudden, and unexpected event." *Am. States Ins. Co. v. Guillermin*, 108 Ohio App. 3d 547, 671 N.E.2d 317, 323 (1996) (quotation omitted). The intentional-injury exclusion applies when the insured intends the resulting injury. *Physicians Ins. Co. of Ohio v. Swanson*, 58 Ohio St. 3d 189, 569 N.E.2d 906, 909-911 (1991). Ohio courts have treated the two provisions similarly. *Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34, 665 N.E.2d 1115, 1119 (1996).

Ohio courts have not addressed this issue in a TCPA context, but the overwhelming majority of courts to address it have held that the insured's consumption of a blast-fax recipient's paper and toner is not an "accident" and/or triggers the intentional-injury exclusion.[15] Appellants contend that maybe they

[15] *See, e.g., St. Paul Fire & Marine Ins. Co. v. Brother Int'l. Corp*., 319 Fed.Appx. 121, 127 (3d Cir. 2009) (holding St. Paul had no duty to defend or indemnify Brother against TCPA claims under policy's property-damage provision because "Brother must have expected or intended [the consumption of paper and toner] to occur when it engaged in blast-faxing"); *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.,* 407 F.3d 631, 639 (4th Cir. 2005) (affirming district court's ruling that GL Policy did not provide "property damage" coverage for the class-action TCPA claims); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc*., 392 F.3d 939, 943 (7th Cir. 2004) (holding no coverage under policy's property-damage clause for TCPA claims, which fell within intentional-injury exclusion in CGL policy); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.,* 269 F.Supp.2d 836, 843-45 (N.D.Tex. 2003) (holding no duty to defend arose under property-damage clause because underlying complaint alleged no occurrence), *aff'd*, 96 Fed.Appx. 960 (5th Cir. 2004); *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 551 (7th Cir. 2009) (no coverage for TCPA violation under property damage); *St. Paul Fire & Marine Ins. Co. v. Brunswick Corp.,* 405 F.Supp.2d 890, 895-96 (N.D.Ill. 2005) (rejecting duty to defend under

didn't intend their 645,000 blast faxes to consume the recipients' paper and toner in violation of the TCPA because they must have had an established business relationship with, or prior express permission from, at least some of the recipients. (Appellants' brief, p. 14-16). But this argument ignores the allegations in the UHR class complaint: "[Appellants] failed to comply with the Opt-Out Requirements [under the TCPA]." (UHR Complaint, R.36-2, PageID #459). The complaint further alleges: "[A]ny sender of a junk fax who fails to comply with the Opt-Out Notice Requirements has, by definition, transmitted an 'unsolicited advertisement' under the JFPA. This is because such a sender *can neither claim that the recipients of the faxed advertisements gave 'prior express invitation or permission' to receive the fax, nor successfully invoke the [established business relationship] defense contained in section (b)(C)(1).*" (Id.) (emphasis added).

As established in detail above, an "insurer need not provide a defense if there is no set of facts alleged in the complaint which, if proven true, would invoke coverage." *Martin*, 710 N.E.2d at 678. Here, the UHR class complaint

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policy's property-damage clause, as well as policy exclusion, holding that use of ink and paper was a normal and expected outcome and, accordingly, not covered); *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 3d 786, 800 (Cal. App. 2007) (holding "property damage" provision in commercial liability insurance policy did not cover suit against insured software company for sending unsolicited advertisements to fax machines in violation of TCPA); *Terra Nova Ins. Co. v. Fray-Witzer,* 869 N.E.2d 565, 570-71 (Mass. 2007) (determining that policy's property-damage coverage did not extend to TCPA claims because the injury was expected or intended from standpoint of the insured).

expressly alleged that appellants were precluded from claiming the PEP and EBR defenses.[16] If proven true, these allegations would establish that appellants sent their blast faxes with not even the potential for a claim of right to do so. Under these circumstances, every court, including the lone court appellants cite in their brief as support, has agreed that a liability policy's "occurrence" requirement is unsatisfied, and the intentional-injury exclusion applies as a matter of law. In such circumstances, Travelers can have no duty to defend or indemnify appellants under the policies' coverage for "property damage" caused by an "occurrence." *Illinois Union Ins. Co. v. Shefchuk*, 108 Fed.Appx. 294, 304 (6th Cir. 2004) ("If the duty to defend arises only when the allegations potentially state a claim that is within the policy's coverage, it follows that there is no duty to defend when there is no possibility that the insurance company will have to pay damages."); *Martin*, 710 N.E.2d at 678 ("[I]f it is established that the claim falls within an exclusion to coverage, the insurer is under no obligation to defend. . . .") (citation omitted). As a matter of law, Travelers had no duty to defend or indemnify appellants under the policies' "property damage" coverage.

[16] In legal substance, appellants' argument about the opt-out notices is no different here than it was in conjunction with the Unsolicited Communications Endorsement. Because Ohio duty-to-defend law focuses on the effect *proven* allegations would have on coverage, the merits (or defenses to the merits) of a non-covered or excluded TCPA claim are irrelevant under Ohio law.

B. As a matter of law, Travelers had no duty to defend or indemnify appellants under the policies' "advertising injury" coverage.

Recall that the Unsolicited Communications Endorsement became part of appellants' policies with the 2005 renewal. One year before that, other policy modifications took effect, including a provision called the Web Xtend Liability Endorsement. This endorsement changed the policies' "advertising injury" coverage, a change that remained in place for five consecutive renewals before the 2009 UHR class action. The importance of the 2004 change to the "advertising injury" coverage is this: In 2009, the Ohio Court of Appeals ruled that language from the *pre-modified* (*i.e.*, 2003 and before) Travelers' policies would trigger an insurer's duty to defend an action alleging violations of the TCPA. *See Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.,* 182 Ohio App. 3d 311, 912 N.E.2d 659 (2009), *appeal allowed,* 123 Ohio St. 3d 1406, 914 N.E.2d 204 (2009), *cause dismissed,* 123 Ohio St. 3d 1499, 916 N.E.2d 1078 (2009). Thus, appellants argue on appeal that the 2004 modification was invalid for lack of notice, thereby restoring the "advertising injury" coverage to the 2003 language. (Appellants' brief, p. 24-26).

Travelers accepts that if the now-decade-old 2003 policy language were reinstated, a federal court sitting in diversity would have no option but to apply *Dandy-Jim* to this case. Therefore, Travelers' response to appellants' argument

is three-fold. First, Travelers' 2004 modification notice was valid, making the Web Xtend Liability Endorsement an enforceable part of appellants' policies. Second, the Web Xtend "advertising injury" coverage is inapplicable as a matter of law to the UHR class action, thus providing alternative grounds for affirming the district court's judgment. Third, because the Unsolicited Communications Endorsement applies to exclude coverage for the insureds' liability for all types of potentially covered injury, including "advertising injury," the order and judgment below must still be affirmed even if this Court were to disagree with Travelers' arguments presented below.

The policies' *pre-modified* definition of "advertising injury" included injury arising out of "oral, written or electronic publication of material that violates a person's right of privacy." (Packer Aff., R.43-5, PageID #1613). For ease of reference, this is the "2003 'AI' definition." The policies' modified definition of "advertising injury" included injury arising out of "written or electronic publication of material that appropriates a person's likeness, unreasonably places a person in a false light, or gives unreasonable publicity to a person's private life." (Web Xtend Endorsement, R.36-4, PageID #523). For ease of reference, this is the "2004-09 'AI' definition."

1. Travelers' 2004 notice of the Web Xtend Liability Endorsement was valid notice that the endorsement would become part of the 2004 policy.

Appellants make many of the same arguments about the 2004 notice as they do about the 2005 notice. To avoid duplication, Travelers will refer the Court to previous pages of this brief where appropriate. As with the 2005 notice issue discussed at length above, the effectiveness of Travelers' 2004 notice involves the questions of receipt and adequacy.

a. Appellants failed to raise a genuine issue of material fact as to their receipt of notice that the Web Xtend endorsement would become part of the 2004 renewal.

Appellants' argument on this point is two sentences, with no authority and no citation to the record. (Appellants' brief, p. 25-26). They argue summarily that notice of the Web Xtend Endorsement "was never actually communicated to Appellants at the time such coverage was purchased" because it was "buried within a nearly 600-page policy binder provided to Appellants." (Id.). First, this argument utterly ignores Brenda Wenger's affidavit testimony that on March 3, 2004 she deposited in the U.S. mail a policyholder notification (and specimen copies of the Web Xtend Endorsement itself) addressed to Edgepark Surgical (the named insured under the then-existing policy) at the address listed in the policy's declarations, in a sealed envelope, and bearing proper postage. (Aff. of mailing, R.44-1, PageID #1841; Policy declarations, R.36-4, R.36-5, PageID

#476, 483, 583 (showing Edgepark Surgical as named insured and listing mailing address as 1810 Summit Commerce Drive, Twinsburg, Ohio, 44087); Policyholder notice, R.44-1, PageID #1839) (showing notice addressed to Edgepark Surgical at 1810 Summit Commerce Drive, Twinsburg, Ohio, 44087)).[17]

Had they cited to the record, appellants presumably would have cited to the Packer affidavit, in which Packer said the identical thing about the 2004 notice as he said about the 2005 notice – *i.e.*, that the Web Xtend notice "was never sent to any individual at either company." (Packer Aff., R.43-1, PageID #1365). As before, this statement says nothing about whether appellants received the notice because it discusses the completely different (and legally irrelevant) question of whether an individual was an addressee on the notice. Given the absence of any facts of record supporting a finding that appellants did not *receive* Travelers' March 3, 2004 notice, the law and analysis provided in this brief at pages 24-28 requires the conclusion that Travelers' established an unrebutted presumption that appellants received notice that the Web Xtend Liability Endorsement would become part of their policies at the 2004 renewal.

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[17] As with the 2005 notice, Wenger also testified by affidavit that she separately mailed a copy of the 2004 notice to appellants' insurance broker. (Wenger affidavit, R.44-1, PageID #1837).

Second, Packer admits in his affidavit that he received the notice from appellants' insurance brokers as part of the 2004 renewal notebook. (Packer Aff., R.43-1, PageID #1366). Because Packer's actual receipt is an undisputed fact, the law and analysis provided in this brief at pages 22-24 requires the conclusion that Travelers' established as a matter of undisputed fact that appellants received notice that the Web Xtend Liability Endorsement would become part of their policies at the 2004 renewal.

Finally, appellants' renewal of their policies containing the Web Xtend Liability Endorsement five times establishes their consent to the modification. *Croom*, 2011 WL 1327425 at *3 (holding that continued renewal as a matter of law establishes insured's consent to renewal modifications.).

b. The 2004 notification provided appellants with adequate notice that the Web Xtend Liability Endorsement would become part of the 2004 renewal.

Ohio courts have followed the tenth circuit's standard, which upholds a renewal modification when the insurer provides notice in a "short, separately attached boldly worded modification." *GEICO,* 400 F.2d at 175 (cited in *Croom*, 2011 WL 1327425, at *2); *Zampedro*, 1983 WL 6040, at *2). The 2004 notice meets these requirements as a matter of law.

i. Appellants received the 2004 notice separate from the policy itself.

Both Wenger's March 2004 mailing and the notice Packer admits receiving satisfied Ohio's separate notice requirement. Because appellants' brief makes no argument and provides no authority to the contrary, the law and analysis provided on pages 29-34 of this brief establishes Travelers' compliance with this requirement.

ii. The content of the 2004 notice satisfies Ohio law.

Appellants contend that the 2004 notice is misleading, but their argument fails to include what the notice entailed. The first sentence of the policyholder letter informs the reader that "we are providing you with advance notice of a change affecting your renewal policy(ies)." (Policyholder letter, R.44-1, PageID #1839). It continues: "Please consult your agent or broker for guidance in reviewing changes pertaining to any important information contained in this notice." (Id.). Then:

> Your renewal policies provide coverage on a more restrictive and/or broadened basis than your present contract because an endorsement will be added to your renewal policies which has both broadened and restrictive features. The attached policyholder notice(s) and/or copy(ies) of the endorsement(s) provide details of the changes.

(Id.).[18] The 2004 modifications were extensive. The CGL notice announces:

IMPORTANT NOTICE TO POLICYHOLDERS

BROADENINGS, RESTRICTIONS AND CLARIFICATIONS OF COVERAGE

(Id., PageID #1842) (bold and all caps in original). Under the heading "**REDUCTIONS IN COVERAGE**," the notice states: **COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY** has been completely restructured . . . . Details on [this] endorsement[] . . . appear in this notice." (Id., PageID #1847-48) (bold and all caps in original). The notice for the commercial umbrella policy has a similar "**IMPORTANT NOTICE TO POLICYHOLDERS**," including a notice under "**REDUCTIONS IN COVERAGE**" stating that changes to the advertising injury coverage would be consistent with those in the CGL policy. (Id., PageID #1856-1858) (bold and all caps in original).

The Web Xtend specimen attached to the notice states that "**COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY (SECTION I – COVERAGES)** is deleted in its entirety and replaced by the following:" (Web Xtend specimen, R.44-1, PageID #1865). Under **"SECTION V –**

[18] One important broadening of coverage was the addition of an entirely new set of covered offenses called "web site injury." (Policyholder notice, R.44-1, PageID #1864).

DEFINITIONS," the specimen states that "[t]he definition of '**Advertising injury' (SECTION V – DEFINITIONS)** is deleted in its entirety and replaced by the following:" (Id. at PageID #1867) (bold and all caps in original).

The Ohio Court of Appeals has stated that notice is sufficient if given in a separately attached and clearly worded letter describing the modifications. *Croom*, 2011 WL 1327425, at *2; *see GEICO,* 400 F.2d at 175 ("[W]hile it is inequitable to require an insured to search the fine print of each renewal policy, to require that he be aware of a short, separately attached boldly worded modification, seems clearly appropriate."). Here, Travelers' notification to these multi-billion-dollar companies advised of both broadening and restricting features; notified the insureds that the advertising injury coverage would be completely restructured; notified the insureds that this restructuring would result in a reduction in coverage; and provided the insureds with the precise policy language, including direct notice that certain parts of the policy had been deleted in their entirety and replaced with new provisions. Both Wenger's mailed 2004 notice and appellants' agent's separate – and undisputedly received – notice satisfied Ohio law, making the Web Xtend Liability Endorsement a doubly enforceable part of the policies at issue in this case.

2. As a matter of law, the Web Xtend Endorsement precluded both Travelers' duty to defend and its duty to indemnify appellants in the UHR class action.

To establish a duty to defend under Ohio law, appellants bear the burden of establishing that the UHR complaint implicated the policies' "advertising injury" coverage such that their resultant liability, if proved, would be potentially within that coverage. *Martin*, 710 N.E.2d at 678. Under the policy terms, then, appellants must establish that the UHR class action was one for "injury arising out of one or more of the following offenses." (Web-Xtend Endorsement, R.36-4, PageID #523). The enumerated offenses include "publication of material that appropriates a person's likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person's private life; . . ." (Id.). Because the TCPA liability alleged in the UHR class action was not "one of the following offenses" within the meaning of the policies, Travelers had no duty to defend or indemnify appellants under the advertising injury coverage.[19]

[19] Appellants provided no response in the district court to the arguments presented below. Their brief on appeal is also silent on the Web Xtend's "advertising injury" coverage.

a. TCPA liability is not potentially within the policies' coverage for "publication of material that ... gives unreasonable publicity to a person's private life."

Ohio law recognizes two types of privacy rights — the right of seclusion and the right of secrecy. *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 182 Ohio App. 3d 311, 912 N.E.2d 659, 663 (2009). "A person asserting the privacy right of seclusion asserts the right to be free, in a particular location, from disturbance by others." 912 N.E.2d at 664. "A person claiming the privacy right of secrecy asserts the right to prevent disclosure of personal information to others." *Id.*

Both Ohio and other state and federal courts have concluded as a matter of law that the TCPA protects only the right of *seclusion. See id.* ("The TCPA protects a person's privacy interest in seclusion."); *State Farm Gen. Ins. Co. v. JT's Frames, Inc.,* 104 Cal. Rptr. 3d 573, 586 (Cal. App. 2010) ("JT's claims in the Illinois action involved violation of the TCPA, which protects the right to seclusion."); *St. Paul & Fire Marine Ins. Co. v. Brother Int'l Corp.*, 319 Fed.Appx. 121, 123 (3d Cir. 2009); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307, 315-16 (Ill. 2006).

Under Ohio law, however, it is settled that the covered offense of giving unreasonable publicity to a person's private life is actionable only as an infringement upon the privacy interest in *secrecy. See, e.g., Sustin v. Fee*, 69 Ohio St. 2d 143, 431 N.E.2d 992, 993 (1982). In *Sustin,* the Ohio Supreme Court

recognized as actionable an invasion of privacy in the nature of "unreasonable publicity given to [another person's] private life." *Id.* (quoting *Restatement (Second) of Torts* § 652 (1977). *See also, Jackson v. Playboy Enters., Inc.*, 574 F.Supp.10, 12 (S.D.Ohio 1983) ("[T]he Ohio Supreme Court made it clear in *Sustin* that it was adopting the rule of the *Restatement (Second) of Torts* § 652 (1977), for what constitutes an actionable invasion of privacy in Ohio."). Under the *Restatement,* the "publicity" element requires communicating information to the public at large, and the "private life" element requires disclosure of information *about the plaintiff* concerning his or her private (as opposed to public) life. *Killilea v. Sears, Roebuck & Co.,* 27 Ohio App. 3d 163, 499 N.E.2d 1291, 1295 (1985). And the matter publicized must be "highly offensive" to a reasonable person. *Id*

The UHR action, however, has nothing to do with disclosure of information about anyone.[20] The faxed advertising consisted of commercial messages about medical and chiropractic goods, information that has nothing to do with someone's "private life." *See Whole Enchilada, Inc. v. Travelers Prop. Cas. Co.*, 581 F.Supp.2d 677, 701 (W.D.Pa. 2008) (denying coverage for

[20] Indeed, it is doubtful that UHR can even be regarded as having a "private life." *See, e.g., FCC v. AT&T Inc.,* 131 S. Ct. 1177, 1185 (2011) (holding that corporations do not have a personal-privacy right for Freedom of Information Act purposes).

underlying TCPA suit under identical Web-Xtend Endorsement and stating that "the plain language 'material that . . . gives unreasonable *publicity* to a person's life' clearly requires an allegation that an individual's private information was somehow made known to the public") (emphasis in original). The stark contrast between what the policies require and what the UHR complaint alleges is as plain as the difference between the privacy interest in secrecy (what an action for publicity given to a person's private life protects) and the privacy interest in seclusion (what an action for violating the TCPA protects).

If the allegations in the UHR complaint had been proved, appellants' resulting liability would not even potentially be within the coverage for "publication of material that . . . gives unreasonable publicity to a person's private life." As a matter of law, therefore, Travelers had no duty to defend or indemnify appellants in the UHR class action.

The decision in *Dandy-Jim* does not support a contrary result. It's true that the *Dandy-Jim* court found a duty to defend an underlying TCPA action, but the policy language at issue there was decidedly different. The policy in that case defined "advertising injury" as an injury arising out of the "oral or written publication of material that violates a person's right of privacy." 912 N.E.2d at 663. Here, just as in *Dandy-Jim,* the issue is not whether some other policy provides coverage, it is "whether the *policy in question* provides coverage for

TCPA-based claims that allege invasion of one's right of privacy in terms of seclusion." 912 N.E.2d at 665 (quoting *Schuetz v. State Farm Fire & Cas. Co.,* 147 Ohio Misc. 2d 22, 890 N.E.2d 374, 389 (2007) (emphasis in the original). *See also, Velvet Ice Cream, Inc. v. Wausau Ins. Cos.*, 698 F.Supp. 128, 130-31 (S.D.Ohio 1988) (ruling that a different outcome from previous case followed from difference in policy language). In fact, the *Dandy-Jim* court declined to follow one line of TCPA coverage decisions "because the policy language at issue in those cases was different from the language at issue here." 912 N.E.2d at 665. Focusing on the specific policy language at issue in that case — *i.e.,* the phrase "right of privacy," a phrase not present in the Travelers' policies — the *Dandy-Jim* court agreed that the term "privacy" can refer to the right of privacy in both the sense of seclusion and in the sense of secrecy. *Id.* Therefore, the court concluded that the coverage was broad enough to potentially cover TCPA liability.

This case is not subject to *Dandy Jim's* analysis because the term "privacy" appears nowhere in the policy. Instead, coverage is limited to specifically enumerated types of conduct. And, as the Western District of Pennsylvania has concluded, for a duty to defend to exist under the identical Web-Xtend language at issue here, the underlying complaint must include "an allegation that an individual's private information was somehow made known to

the public." *Whole Enchilada,* 581 F.Supp.2d at 701. The UHR complaint, however, alleges the transmission of unsolicited commercial facsimiles about medical and chiropractic goods (Buckwheat pillows from Carolina Morning, and the like). It alleges nothing about any individual's private information. As a matter of law, the allegations in the UHR complaint, if proved, could not potentially lead to appellants' covered liability under the policies' "advertising-injury" coverage. Travelers therefore had no duty to defend or indemnify appellants under that coverage.

b. TCPA liability is not potentially within the Policies' coverage for "publication of material that appropriates a person's likeness [or] unreasonably places a person in a false light."

Ohio law is settled that the covered offense of appropriating a person's likeness is actionable only when the plaintiff's "name or likeness has some intrinsic value, which was taken by defendant for its own benefit." *Seifer v. PHE, Inc.*, 196 F.Supp.2d 622, 630 (S.D.Ohio 2002). The intrinsic value may include the plaintiff's "reputation, prestige, social or commercial standing, public interest or other values . . . ." *Jackson,* 574 F.Supp. at 13 *(quoting Restatement (Second) of Torts* § 652B, cmt. C (1977)). The UHR complaint alleges no such offense. It alleges TCPA liability, a theory that has nothing to do with UHR's name — it has no "likeness" — the intrinsic value of its name, or the appropriation of its name. As a matter of law, the allegations in UHR complaint, if proved, could not

potentially lead to appellants' covered liability under the policies' "Advertising-Injury" coverage. Travelers therefore had no duty to defend or indemnify appellants in that action.

Ohio law is equally settled that the covered offense of placing a person in a false light requires "a major misrepresentation of [the plaintiff's] character, history, activities or beliefs . . . ." *Patrick v. Cleveland Scene Publ'g*, 582 F.Supp.2d 939, 954 (N.D.Ohio 2008) *(quoting Welling v. Weinfeld*, 113 Ohio St. 3d 464, 866 N.E.2d 1051, 1058 (2007).). Given the undisputed subject matter of the UHR complaint, appellants could not even potentially be liable within the policies' "Advertising-Injury" coverage. Travelers therefore had no duty to defend or indemnify appellants in the UHR action.

In sum, appellants failed the burden to establish that their liability as alleged in the UHR complaint, if proved, would be potentially within Travelers' "advertising-injury" coverage. As a matter of law, therefore, Travelers had no duty to defend or indemnify appellants under that coverage.

CONCLUSION

Appellee Travelers Property Casualty Company of America respectfully requests that the order and judgment of the district court be affirmed in all respects.

Respectfully submitted,

Dated: February 27, 2013 By s/William M. Hart

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CERTIFICATE OF COMPLIANCE
Required by Fed. R. App. P. 32(a)(7)(C)

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Dated: February 27, 2013 s/William M. Hart

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2013 , I electronically filed the Brief of Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/William M. Hart