IN THE SUPREME COURT OF FLORIDA

NO. SC08-2068

MICHAEL PENZER, as assignee of SOUTHEAST WIRELESS, INC.,
Plaintiff/Counter-Defendant/Appellant,

v.

TRANSPORTATION INSURANCE COMPANY,
Defendant/Counter-Plaintiff/Appellee.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No.: 07-13827

APPELLANT'S REPLY BRIEF

MARC A. WITES
Florida Bar No. 24783
WITES & KAPETAN, P.A.
4400 North Federal Highway
Lighthouse Point, Florida 33064
Tel: (954) 570-8989
Fax: (954) 354-0205

DOUGLAS S. WILENS
Florida Bar No. 0079987
STUART A. DAVIDSON
Florida Bar No. 0084824
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
120 East Palmetto Park Road
Suite 500
Boca Raton, Florida 33432
Tel: (561) 750-3000
Fax: (561) 750-3364

Attorneys for Appellant Michael Penzer

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REPLY ARGUMENT AND CITATIONS OF AUTHORITY

A layperson reading the phrase "written publication of material that violates a person's right to privacy" could reasonably understand it to include the mass transmission of unsolicited facsimile advertisements. Transportation Insurance Company ("TIC") is unable to dispute that this common understanding of the policy language covers Michael Penzer's ("Penzer") claims, and is unable to distinguish the multitude of federal and state courts that have reached the same conclusion based on identical claims and identical policy language. Instead, TIC asks this Court to apply a myopic and tort-based interpretation of its policy that ignores well-settled Florida precedent regarding the broad construction of insurance policies against insurers that have the knowledge and resources to craft unambiguous language. Perhaps most striking is that TIC completely ignores that the Eleventh Circuit in *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303 (11th Cir. 2008)("*Penzer*"), in certifying the instant question to this Court, rejected virtually ***every argument*** TIC raised there, and continues to argue here.

TIC also ignores that utilizing the very same principles of policy interpretation that this Court employs, federal courts of appeal in the Eleventh, Fifth and Tenth Circuits, along with the Illinois Supreme Court and the Massachusetts Supreme Judicial Court, have found that ***identical*** policy provisions afforded insurance coverage for ***identical*** claims for violation of the Telephone

Consumer Protection Act, 47 U.S.C. §227, *et seq.* (the "TCPA"). The reason is simple. There is simply no retort for the fact that the best evidence that an ordinary person could read the instant provision to find coverage is that many judges have found that ***identical*** policy provisions afforded coverage for ***identical*** TCPA claims.

Instead, TIC asks this Court to adopt the inapposite minority view set forth by the Seventh and Fourth Circuits. As recognized in *Penzer*, the Seventh Circuit case relied on by the district court is no longer good law, and the Fourth Circuit decision concerned inapposite policy language.

TIC then suggests that even if this Court is inclined to answer the certified question in the affirmative, it should decline based on a wholly unrelated argument regarding the underlying facts of this case that is not before this Court, and based on an analysis of a legal claim not at issue. In so doing, TIC ignores that Penzer has not asserted a claim for the tort of invasion of privacy, but rather a federal statutory claim for violation of the TCPA, a recognized "privacy" statute. TIC's desperation is understandable, given that all of its arguments have been rejected by the Eleventh Circuit in *Penzer* and *Hooters, Inc. v. Am. Global Ins. Co.*, 157 Fed. Appx. 201 (11th Cir. 2005), and by the many federal and state courts that have ruled accordingly.

I. APPELLEE'S MISSTATEMENT OF THE CASE AND FACTS

Although not relevant to the certified question, Penzer notes that TIC's Answer Brief begins with an inaccurate rendition of the record. Contrary to TIC's suggestion, it did not first learn of Penzer's suit on February 3, 2004, and the *Coblentz* Agreement at issue was not entered two days later. Ans. Br. at 4-5. In fact, Southeast placed TIC on notice of Nextel's third-party complaint on December 2, 2003, from which TIC learned of Penzer's suit. (R.1 at Exh. B). On December 12, 2003, Penzer filed a Third-Party Class Action Complaint against Southeast. (*Id*. at Exh. D). On December 18, 2004, Defendant acknowledged its receipt of Southeast's December 2 letter and accompanying copy of Penzer's initial complaint, and at that time refused to provide a defense or coverage. (*Id*. at Exh. E).

On February 3, 2004, Southeast ***again*** contacted TIC and (a) reminded TIC that Southeast had previously submitted Penzer's complaint where Nextel sought indemnity from Southeast, (b) provided a copy of Penzer's third-party complaint where Penzer asserted claims against Southeast, (c) enclosed a copy of Southeast's Civil Remedy Notice to the Department of Insurance based on TIC's failure to provide a defense, and (d) placed TIC on notice that it was in breach of the insurance contract. (*Id*. at Exh. F and G). TIC ***never*** responded to Southeast's

February 3 correspondence, never provided a defense to Southeast, and never provided any coverage.

When Penzer and Southeast began negotiations to resolve the action, over two months had passed since TIC had been put on notice of Penzer's claim, and approximately six weeks had passed since TIC had declined to provide a defense or coverage. It was not until April 21, 2004, that Penzer and Southeast entered the *Coblentz* Agreement (*Id*. at Exh. I), and TIC during this time made no effort to alter its denial to Southeast of a defense or coverage.

II. Florida's Rules of Interpreting Insurance Policy Provisions Compel a Finding of Coverage

A. TIC's Limited Reading of the Policy

For TIC to prevail, it must show that the policy language is unambiguous (*i.e*., that the ***only*** reasonable interpretation of the provision precludes coverage). TIC cannot do so, if for no other reason then multiple federal and state courts have found identical policy language to provide coverage for Penzer's TCPA claim. If learned federal circuit and district court judges, and state supreme court justices, have found coverage, certainly an ordinary person on the street would reach the same conclusion, or at worst the language is ambiguous such that coverage must be provided.

TIC tacitly concedes this point as it offers no legitimate argument to support its suggestion that this Court ignore the overwhelming case law militating a finding

of coverage. Instead, TIC points to a string of cases on unrelated facts and different policy provisions where the courts found the policy and provisions did not afford coverage or specifically excluded coverage. Ans. Br. at 12. TIC does not discuss the facts or holdings of these cases because they offer no support for TIC's position here. Indeed, they are of no import to the instant case.

B. The "Plain Language" of TIC's Policy Provides Coverage, and at Worst Is Reasonably Susceptible to More Than One Meaning

TIC's suggestion that the Court interpret the policy language at issue based on language in other sections of the same policy provision ignores that each provides a separate and independent basis for advertising injury coverage under the policy. Coverage is available here because the advertising injury arises out of "oral or written publication of material that violates a person's right of privacy." Contrary to TIC's suggestion, it is ***this*** grouping and string of words that must be read together to determine if coverage exists, and not the words of other provisions that provide wholly separate bases for coverage.

TIC's suggestion that the meaning of surrounding, non-modifying provisions should be read into the provision at issue finds no basis in the law, was rejected in *Penzer*, and should also be rejected by this Court. *See Penzer*, 545 F.3d at 1307 n.4 ("The authority relied on by the district court does not support this conclusion, as noted by Penzer."). TIC's reasoning is yet another attempt to read

policy terms according to their technical, legal meanings rather than according to their plain and ordinary ones.

The Illinois Supreme Court in *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307 (Ill. 2006) rejected a similar argument. As here, the insurer argued that an identical policy provision should be read as limited to revealing private information because neighboring provisions in the policy were limited to "content-based" offenses. *Id.* at 318. The court found that construing the policy as a whole did not support the insurer's argument because "[i]nterpreting the clause 'written…publication…of material that violates a person's right to privacy' to encompass [plaintiff's] TCPA fax-ad claim...does not, in any way, prevent the policies' alternative definitions of 'advertising injury' from being given effect or thwart their respective purposes." *Id.* It is equally true here that reading all of the "advertising injury" provisions in the policy together does not support restricting subparagraph (a) to only publications of private facts, because reading it to include TCPA fax-ad claims does not prevent subparagraphs (b), (c) or (d) from being given effect.

Numerous courts have rejected similar arguments that the provision here only applies when the "contents" of the "material" violates a person's right to privacy and, as such, is limited to tort claims based on the publication of private facts. *See, e.g., Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 574 (Mass.

2007); *Valley Forge*, 860 N.E.2d at 317-18; *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 847 (N.D. Tex. 2003), *aff'd*, 96 Fed. Appx. 960 (5th Cir. 2004). This Court should reach the same conclusion.

To support its ill-fated conclusion, TIC misapplies the doctrine of *noscitur a sociis*, one of many tools of statutory construction, which requires that "one examines the other words used within a string of concepts to derive the legislature's overall intent." *Nehme v. Smithkine Beecham Clinical Lab*., 863 So. 2d 201, 205 (Fla. 2003) (Ans. Br. at 13). In applying the doctrine, this Court examined a string of words in the ***very same sentence***, and within the very same sub-provision of Florida's statute of limitations statute. *Id*. Similarly, the court in *Aerothurst Corp. v. Granda Ins. Co,*, 904 So. 2d 470, 472 (Fla. 3d DCA 2005), Ans. Br. at 13, examined a string of terms within the ***same sentence*** of an insurance policy. These cases do not support an expansion of the doctrine to cover separate provisions of an insurance policy that provide independent bases for coverage. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923).

TIC's reliance on the "doctrine of the last antecedent" to argue that the words "that violates a person's right of privacy" modifies the term "material" and does not refer to the act of "publication of material" fares no better. Ans. Br. at 4. That doctrine cannot be applied to eviscerate the natural reading of the phrase at issue. *Fortune Ins. Co. v. Dep't of Ins*., 664 so. 2d 312, 316 (Fla. 1st DCA 1995)

("The rule is not applicable where a further extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by the entire act.... 'When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.'") (citation omitted).

To find, as TIC suggests, that the ***only*** way to read the policy provision is that it requires that the unsolicited fax ad reveal "private information" so that the ***content*** of the material violates a right of privacy would require this Court to ignore the natural construction of the language that an "ordinary person" would attach to the policy language, and instead ***rewrite*** the policy, such that "publication of material that violates a person's right of privacy" actually means "publication of material ***the contents of which*** violates a person's right of ~~privacy~~ ***secrecy***." TIC could have inserted these words into its policy, or defined terms to unambiguously limit coverage as it argued to the district court and Eleventh Circuit, but it did not.[1]

Tellingly, TIC's policy reveals that it knows how to write a policy provision to limit the offenses for which coverage is available. In the subsection

[1] It also requires ignoring that many courts have found identical policy language to implicate coverage under identical facts, and ignores that, at worst, the divergence between the district court's view and the majority of courts that have found coverage shows that there is an ambiguity that mandates a finding of coverage. Thus, TIC's claim that the provision is "clear and unambiguous" and covers only "secrecy-based invasion of privacy claims (Ans. Br. 8) is wrong.

immediately preceding the provision at issue, TIC ***chose*** to attach a definition to the term "material," writing that coverage is available for an "advertising injury" arising out of "[o]ral or written publication of material that slanders or libels...or disparages...." (R. 1, Exh. C at 10 of 13). In contrast, the provision at issue contains no such limitation on, or restrictive definition of, the ***type*** or ***content*** of material that violates a person's right of privacy, such that an ordinary person would reasonably read the provision to mean that the publication of ***any*** material that serves to violate a person's right of privacy is a covered offense.

Indeed, subsections (c) and (d) of TIC's "advertising injury" definition – regarding misappropriation of ideas and copyright infringement – have nothing to do with the "content" of the injury, but rather address the acts of misappropriation and infringement. (R-1, Ex. C at 10-13). Contrary to TIC's argument (Ans. Br. at 13), these offenses, like the one at issue here, are not content based.

Most importantly, when these "strings" of independent coverage offenses are read together, they reveal only that the provision here does not tie the resulting "invasion of privacy" to the content of the material published. At a minimum, it would be entirely reasonable for a "man on the street" in Florida to understand the term "right of privacy" to include the right to be free from a privacy intrusion caused by the publication of unsolicited fax ads, just as numerous other courts have

found regarding laypersons in their respective states. Thus, neither the doctrines of the last antecedent nor *noscitur a sociis* support TIC's position.

Finally, TIC's reliance on the Second DCA's interpretation of the word "publication" in the context of a taxpayer dispute is without merit. Ans. Br. at 16-17 (citing *Dep't of Revenue v. Val-Pak Direct Mktg., Sys., Inc.*, 862 So. 2d 1, 3 (Fla. 2d DCA 2003)). *Val-Pak* addressed whether a taxpayer that published an "assortment of separate printed advertisements on separate pieces of paper" was entitled to an exemption from sales tax under a provision that covered a regularly "circulated" publication "composed of 'primarily advertising.'" *Id.* at 2-3. Unlike insurance policies, which are construed against the drafter (*i.e.*, the insurer) and where ambiguities favor the insured, "[d]oubtful language in a statutory provision granting a tax exemption is to be construed against the taxpayer." *Id.* at 5.

Further, in *Val-Pak*, the requirement that the publication include content of "primarily advertising" was plainly defined, whereas here TIC chose to include no such definition. Similarly, the *Val-Pak* decision rested on the finding that the type of publication (*i.e.*, a "circulated publication") was clearly defined, while no such definition or restriction is present here. *Id.* at 4. If TIC had wished to likewise limit the "advertising injury" provision here to include "only secrecy-based invasion of privacy claims involving the content of the insured's advertising" – or

perhaps exclude TCPA claims all together – it could have done so. Having failed to do so, TIC cannot now re-write its insurance policy.

In sum, neither the plain language of TIC's policy nor Florida law support the limited "content-based" requirement that TIC belatedly seeks to impose. The certified question should, therefore, be answered in the affirmative.

C. The Eleventh Circuit in *Penzer* Correctly Found *Compupay* Inapposite and the District Court's Reading of *Compupay* Infirm

The Eleventh Circuit in *Penzer* found that *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So. 2d 944 (Fla. 3d DCA 1995) is inapt, as it involved a completely different type of conduct and a wholly different policy provision:

> *Compupay* does not appear to be directly on point, as it involved whether there was a duty to defend sexual harassment claims under a policy provision providing coverage for "the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy." *Compupay*, 654 So. 2d 946, n. 2. As the allegations at issue in *Compupay* involved only the *physical* invasion of the complainant's person, there were no "allegations of *publication* which would bring the claim within this provision." *Id*. at 949. (emphasis added). As the case involved a different type of conduct, the court had ***no*** occasion to consider whether the publication of unsolicited material into a recipient's private domain violates that person's right to privacy based on interests in seclusion.

Penzer, 545 F.3d at 1309 (emphasis added). Undeterred, TIC makes no attempt to distinguish, let alone mention, *Penzer*. As the Eleventh Circuit acknowledges, 545 F.3d at 1309, the district court erred in relying on *Compupay*. *Compupay*'s holding was ***not*** that the policy provision there could only apply to a claim that the

insured publicized private facts, but rather that the plain language of the provision required that the conduct involved not only an invasion of privacy, but also publication. *Compupay* ***rejected*** the ***insured's*** argument that the court should look to tort causes of action rather than the plain language of the policy, which was consistent with this Court's guidance. *See Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993) (ignored by TIC). The Third DCA had no occasion to consider whether only a ***subspecies*** of one tort could ever be covered under the provision, only whether the provision covered a claim that did not allege publication in connection with an invasion of privacy. Thus, *Compupay* did not, and could not, decide whether coverage would be available where, as here, the underlying claims alleged ***both*** publication ***and*** violations of rights of privacy.

Moreover, TIC's policy significantly differs from that in *Compupay*. *Cf. Hooters*, 157 Fed. Appx. at 208 (discussing significance of differences in policy language). First, the policy in *Compupay* covered "the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy" while the policy here covers "[o]ral or written publication of material that violates a person's right to privacy[.]" As this Court has recognized, *Compupay*'s holding was limited to the "specific language of the insurance policy at issue in that case[.]" *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003). Second, the *Compupay* provision

covered "personal injuries" while the policy here covers "advertising injury." Penzer's state court claims alleged that Southeast's advertising (via unsolicited facsimiles) violated his privacy and alleged a violation of the TCPA. Thus, *Compupay* is not on point as it did not address, and could not decide, the issue in this case. This Court should reject the district court's error in relying on *Compupay* as precedent for this case. *See Penzer*, 545 F.3d at 1309 & n.6.

III. TIC's Argument That Penzer Fails To State A Cognizable Claim Is Outside The Scope Of This Court's Review And, In Any Event, Is Frivolous As No State Can Reject Or Refuse To Recognize Federal Law

Evidently concerned that this Court will answer the certified question in the affirmative, TIC unabashedly asks this Court to exceed the scope of its review and find that Penzer's complaint does not state a valid cause of action under Florida law. Ans. Br. at 21. At the outset, this Court's review is limited to the certified question before it. *Williams v. State*, 889 So. 2d 804, 806 n.2 (Fla. 2004) ("We decline to address the other claim asserted by the appellant…because it is outside the scope of the certified question and was not the basis of our discretionary review."); *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1079 n.26 (Fla. 2001) (same). The question of whether Penzer alleged a valid cause of action was never raised by TIC in the district court or before the Eleventh Circuit, and is clearly outside the scope of the Eleventh Circuit's certified question. Penzer is, however, constrained to respond to TIC's argument, but such response should not be construed as a concession that

the issues were ever properly raised by TIC in the record or are otherwise properly before this Court.

Unable to rewrite its policy, TIC attempts to replead Penzer's complaint, arguing that Penzer failed to state "a ***cause of action*** for a seclusion-based 'violat[ion of] a person's right of privacy.'" (emphasis added) Ans. Br. at 21. Of course, Penzer's complaint does not assert a tort claim for invasion of privacy, but a claim under the TCPA. It is only through such machinations – which allows TIC to ignore Penzer's federal TCPA claim that Florida is obligated to follow and enforce under the Supremacy Clause – that TIC can argue that Penzer did not assert a claim that he admittedly did not plead in his complaint.

Similarly, TIC's expedient of re-casting Penzer's complaint as a claim for the tort of invasion of privacy also allows TIC to ignore the Congressional finding that the TCPA was enacted to protect a person's privacy, that many federal and state courts have recognized the TCPA is a privacy statute, and the multitude of cases finding that a TCPA violation for the transmission of unsolicited fax ads does, indeed, violate a person's right of privacy, as that term is commonly understood. Likewise, this straw man position allows TIC to contrast Penzer's TCPA claim with cases that did assert tort claims for invasion of privacy.

TIC's efforts to replead Penzer's complaint fare no better then its efforts to suggest that an ordinary person would not find the clause at issue to provide

coverage. TIC cannot escape that the phrase "right of privacy" is not defined in its policy. (R. 1, Ex. C at 10-13 of 13). As a result, there is no requirement that Penzer's TCPA claim fit the narrow reading TIC seeks to impose. Rather, consistent with Florida insurance law, resolving ambiguities in favor of coverage, transmitting unsolicited fax advertisements violates a person's "right of privacy."

The Eleventh Circuit in *Hooters* reached the same conclusion. The *Hooters* insurer argued that the unsolicited transmission of a fax ad does not violate a privacy right because it "would not constitute a ***common-law tort*** for invasion of privacy under Georgia law." *Hooters*, 157 Fed. Appx. at 207. (emphasis added). The court expressly rejected the insurer's interpretation because the phrase "right to privacy" is susceptible to more than one interpretation, and under Georgia law, such phrases must be construed in favor of the insured. *Id.* at 205.

Under Florida law, the same result follows. Similar to Georgia law, Florida law eschews reading policy provisions according to the limitations of tort causes of action. *Swindal*, 622 So. 2d at 470 ("Florida law has long followed the general rule that tort law principles do not control judicial construction of insurance contracts."). Instead, under Florida law, like Georgia law, policy provisions are to be understood as a layperson would view them, in Florida law's parlance, as a "man on the street" would understand them. *Hyman v. Nationwide Mut. Ins. Co.*, 304 F.3d 1179, 1188 (11th Cir. 2002). A "right of privacy" is susceptible to more

than one interpretation, and "it is at least as reasonable" to interpret it to include TCPA violations. *Hooters*, 157 Fed. Appx. at 205. Thus, under Florida law, the term must be construed in favor of the insured, as including TCPA violations.

While TIC wishes to restrict this Court's review of the policy to a tort lens, TIC ignores that it did not write its policy in such fashion. Having failed to do so, and as this Court made clear in *Swindal*, a court should ***not*** look to tort law to determine the scope of coverage. However, even if the Court were to look to Florida's invasion of privacy tort, Florida tort law recognizes "Intrusion, i.e., invading plaintiffs' physical solitude ***or seclusion***" as an invasion of privacy tort. *Ginsberg*, 863 So. 2d at 161 (emphasis added).

It is only through calling Penzer's TCPA claim a common law claim for invasion of privacy and attempting to analogize his TCPA claim to invasion of privacy actions for unwanted physical touching under far different policy provisions, that TIC can then argue that *Ginsberg* does not support Penzer. Ans. Br. at 27. However, TIC ignores that *Ginsberg* held that the species of invasion of privacy tort to which intrusion into seclusion "refers is into a 'place' in which there is a reasonable expectation of privacy and is not referring to a body part," and while stating that this was the "focus" of the tort, the Court did not find that this

focus was the outer limits of the tort. *Ginsberg*, 863 So. 2d at 162, 168.[2] Here, it is reasonable to conclude that an ordinary person has a reasonable expectation of privacy in their home and workplace, and that the unwelcome transmission of an unsolicited fax ad is an intrusion upon their right to seclusion.

To the extent the Court finds that "right of privacy" is susceptible to only one interpretation, this Court should look to the dictionary to find the "plain and ordinary" meaning. *Reform Party of Fla. v. Black*, 885 So. 2d 303, 313 (Fla. 2004). The dictionary definitions of "privacy" and "right of privacy" encompass the right not to have one's seclusion invaded. The term "privacy", according to Webster's, is "the quality or state of being apart from the company or observation of others: seclusion." Webster's Third New Int'l Dictionary 1804 (2004). In Black's, the listing for "right of privacy" contains the definitions "the right to personal autonomy" and "[t]he right of a person and the person's property to be free from unwarranted public scrutiny or exposure" and refers readers to the listing for "invasion of privacy". Black's Law Dictionary 1350 (8th ed. 2004). In turn, "invasion of privacy" is defined as including "invasion of privacy by intrusion" as well as "invasion of privacy by disclosure of private facts." *Id.* at 843. Thus, the

[2] TIC also ignores that *Ginsberg*, like *Compupay*, is factually distinguishable. *Ginsberg* concerned a common law tort claim for invasion of privacy based on allegations of unwelcome touching and sexually offensive remarks. *Ginsberg*, 863 So. 2d at 158-59, 162-63.

dictionary definition of "invasion of privacy" encompasses unwanted intrusions. It is unsurprising, then, that courts have found that "[t]he plain and ordinary meaning of privacy includes the right to be left alone, unburdened by unsolicited facsimiles." *Park Univ. Enters. v. Am. Cas. Co. of Reading*, 442 F.3d 1239, 1249 (10th Cir. 2006); *see also Valley Forge*, 860 N.E.2d at 317 (finding the dictionary definition of "'right of privacy' connotes both an interest in seclusion and an interest in the secrecy of personal information.... Unsolicited fax advertisements, the subject of a TCPA fax-ad claim, fall within [seclusion].")[3]

Indeed, in passing the TCPA, Congress found that the transmission of unsolicited fax ads is an invasion of privacy. *E.g.*, *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network*, 401 F.3d 876, 881 (8th Cir. 2005) (finding that the TCPA's legislative history makes clear that Congress considered the transmission of unsolicited fax ads an invasion of privacy); *see also TSA Stores, Inc. v. Dep't of Agric. & Consumer Serv.*, 957 So. 2d 25, 27 (Fla. 5th DCA 2007) (reviewing the legislative history of the TCPA and noting that Congress considered unrestricted telemarketing – which include unsolicited facsimile advertisements – "an intrusive invasion of privacy"). Similarly, numerous courts have found that TCPA violations

[3] *See also Universal Underwriters*, 401 F.3d at 881 (finding unsolicited fax advertisements fell under provision covering "private nuisance" and "invasion of privacy"); *W. Rim*, 269 F. Supp. 2d at 847 (finding an unsolicited fax advertisement is "material that violates a person's right to privacy").

are right of privacy claims. *E.g.*, *Hooters, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365, 1372-74 (S.D. Ga. 2003); *Hooters*, 157 Fed. Appx. At 205-06. Thus, properly analyzed under Florida's principles for interpreting insurance policies, this Court should find that Southeast's unsolicited fax ads were materials that violated persons' (recipients') right of privacy, just as was concluded in *Hooters* and by numerous other courts.[4]

Ultimately, TIC's efforts to replead Penzer's complaint is just another version of the argument presented in Section I of its Answer Brief, that "[o]ral or written publication of material that violates a person's right to privacy" actually means "[o]ral or written publication of material th[e] contents of which violate[] a person's right to privacy." In so doing, and what is truly at the heart of TIC's argument, is that this Court should depart from well-settled principles of construction of insurance contracts that are viewed from the standpoint of the ordinary person on the street, and instead apply only technical, tort definitions or simply allow the insurer to rewrite its policy when faced with a claim it does not like or perhaps did not anticipate. Having failed to write the policy in such fashion, TIC was, and remains, without any basis to disclaim coverage.

[4] Similarly, TIC misconstrues Penzer's argument that Florida's constitution demonstrates that Floridian's have a right of privacy that is at least equal, if not greater then, those of Georgians. Ans. Br. at 30. Unlike Georgia's right of privacy, Florida's right of privacy is embedded in the state's constitution. Georgia has not such similar constitutional provision.

IV. Numerous Courts Construing Identical Policy Language And Facts Have Found That TCPA Claims Are Covered

While chastising Penzer for pointing out that the district court is the only court to reject *Hooters*, TIC does not, because it cannot, point to any other opinion that disagreed with *Hooters*. In fact, numerous courts have followed it and found it persuasive. *See, e.g., Park Univ. Enters., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1249 (10th Cir. 2006).

In fact, contrary to TIC's argument, there is no "split" on the claim and policy language at issue. Ans. Br. at 10. TIC fails to note that virtually all of the cases on which it relies are based on ***different*** policy language or were abrogated by *Valley Forge*, 860 N.E.2d at 307. Ans. Br. at 14 & 32-34 (citing inapposite cases); *see also Penzer*, 545 F. 3d at 1308 n. 5 (stating that "[m]any of the coverage denial cases construe policy language that uses the words "making known to any person or organization" in place of "publication."). Thus, this Court should not accept TIC's invitation to become the lone minority appellate court on the issue.

CONCLUSION

For the foregoing reasons, and those set forth in Penzer's Initial Brief, the Eleventh Circuit's certified question should be answered in the affirmative, and the case should be returned to the Eleventh Circuit for the issuance of instructions to the district court to enter judgment in favor of Penzer as to coverage.

Respectfully submitted by:

MARC A. WITES
Florida Bar No. 24783
WITES & KAPETAN, P.A.
4400 North Federal Highway
Lighthouse Point, Florida 33064
Tel: (954) 570-8989
Fax: (954) 354-0205

DOUGLAS S. WILENS
Florida Bar No. 0079987
STUART A. DAVIDSON
Florida Bar No. 0084824
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, Florida 33432
Tel: (561) 750-3000/Fax: (561) 750-3364

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2009, I served a true and correct copy of the foregoing Appellant's Reply Brief by U.S. Mail upon:

Laura Besvinick
Hogan & Hartson, LLP
1111 Brickell Avenue
Mellon Financial Center, Suite 1900
Miami, FL 33131
Telephone: 305/459-6500
305/459-6550 (fax)

Arthur J. McColgan II
Ryan M. Henderson
Walker Wilcox Matousek, LLP
225 West Washington St., Suite 2400
Chicago IL 60606
Telephone: 312/244-6700
312/244-6800 (fax)

Alan M. Burger
McDonald Hopkins, LLC
505 S Flagler Drive, Ste 300
West Palm Beach, FL 33401
Telephone: 561/472-2121
561/472-2122 (fax)

Attorneys for Southeast Wireless, Inc.

Laura A. Foggan
Parker Lavin
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: 202/719-7000
202/719-7049 (fax)

Raoul G. Cantero, III
White & Case, LLP
200 South Biscayne Blvd., Suite 4900
Miami, FL 33131-2352
Telephone: 305/371-2700
305/358-5744 (fax)

Attorneys for Defendant Transportation Insurance Company

Ronald L. Kammer
Maureen G. Pearcy
Hinshaw & Culbertson LLP
9155 S. Dadeland Blvd., Suite 1600
Miami, FL 33156
Telephone: 305/428-5100
305/577-1063 (fax)

Attorneys for Amicus Curiae Complex Insurance Claims Litigation Association

Eugene R. Anderson
William G. Passannante
Jane A. Horne
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020-1182
Telephone: 212/278-1000
212/278-1733 (fax)

Amy Bach, Esq.
United Policyholders
222 Columbus Ave., Suite 412
San Francisco, CA 94133
415/677-4170 (fax)

R. Hugh Lumpkin
Michael F. Huber
Ver Ploeg & Lumpkin, P.A.
100 S.E. Second Street, 30th Floor
Miami, FL 33131-2158
Telephone: 305/577-3996
305/577-3558 (fax)

Attorneys for Amicus Curiae United Policyholders

Marc A. Wites

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with all requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2) and this Court's order extending the page limitation to 20 pages.

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Marc A. Wites