

**EXHIBIT M**

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR  
HILLSBOROUGH COUNTY, FLORIDA  
GENERAL CIVIL DIVISION

CRAIG CINQUE, an individual, and CIN-Q  
AUTOMOBILES, INC., a Florida corporation,  
individually, and as the representatives of a class of  
similarly-situated persons,

Plaintiffs,

v.

Case No. 09-CA-21839  
Division C

BUCCANEERS LIMITED PARTNERSHIP,

CLASS REPRESENTATION

Defendant.

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**BUCCANEERS LIMITED PARTNERSHIP'S MOTION TO DISMISS COMPLAINT**

Defendant, BUCCANEERS LIMITED PARTNERSHIP ("BLP"), through its undersigned attorneys, moves this Court for the entry of an Order dismissing the Amended Class Action Complaint (the "Complaint") filed by the Plaintiffs, Craig Cinque and Cin-Q Automobiles, Inc. ("Cin-Q Automobiles") under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. Section 227 (the "TCPA"). Grounds for this Motion and the substantial matters of law to be argued are set forth below.

1. Plaintiffs, Craig Cinque and Cin-Q Automobiles, claim they received unsolicited facsimile advertisements from BLP for the sale of football tickets. However, contrary to Rule 1.110(b)(2), Florida Rules of Civil Procedure, there are no ultimate facts pled by Plaintiffs that would show that the sender of the facsimile was BLP.

2. Florida law is clear that every fact essential to a cause of action must be stated distinctively, definitely and clearly, or the complaint will be properly dismissed by the court. See Loving v. Vicelli, 164 So. 2d 560 (Fla. 3d DCA 1964).

3. The Complaint reflects that the facsimile in question was allegedly sent by an entity called FaxQom and not BLP. There are no ultimate facts pled by Plaintiffs suggesting any relationship whatsoever between FaxQom and BLP.

4. The facsimile attached to the Complaint as Exhibit A reflects the name and phone number of FaxQom at the bottom of the facsimile and suggests a call to FaxQom to remove the recipients facsimile number. Exhibit A to the Complaint contains no reference whatsoever suggesting that BLP sent the facsimile to Plaintiffs. Therefore, this facsimile Exhibit specifically contradicts the legal conclusions in the Complaint suggesting that BLP sent Plaintiffs an unsolicited advertisement. Where the exhibits contradict the allegations set forth in a complaint, the pleading is rendered a nullity and should be dismissed by the court. See Andre Fladell v. Palm Beach County Canvassing Board, 772 So. 2d 1240 (Fla. 2000).

5. The Complaint also fails to state a cause of action against BLP because it fails to properly identify the claimants bringing the action. Although there are two alleged Plaintiffs named in the case style (Craig Cinque and Cin-Q Automobiles), there is only one facsimile attached to the Complaint with only one corresponding facsimile number. In addition, although the introductory paragraph of the Complaint names Craig Cinque and Cin-Q Automobiles as Plaintiffs, the section addressing "Jurisdiction And Venue" names another Florida corporation known as "Cinque Holdings Inc." Further, in the "Prayer For Relief," the Complaint seeks relief for Craig Cinque only and does not request relief for either corporation mentioned in the

Complaint (Cinque Holdings or Cin-Q Automobiles). As a result of these inconsistencies, the Complaint fails to state a cause of action against BLP.

6. In any event, the TCPA does not authorize class actions. In holding that a class action could not proceed under the TCPA, one Federal District Court stated that:

The Statute provides for a *minimum* recovery of \$500 for each violation as well as treble damages if the plaintiff can prove willful or knowing violation. 47 U.S.C. Section 227(b)(3). This most likely exceeds any monetary loss in paper, ink or lost facsimile time suffered by most plaintiffs in such a case. The statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf. . . . A class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements.

Forman v. Data Transfer, Inc., 164 F.R.D. 400, 404-405 (E.D. Pa. 1995).

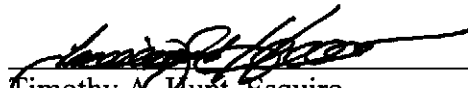
7. Even if class actions were authorized under the TCPA, the Complaint fails to state a cause of action because it is clear from the face of the Complaint that the resolution of common issues depends on factual determinations that will be different for each class plaintiff. Here, defining the purported class as persons whom BLP “did not have prior express permission or invitation for the sending of such faxes” requires addressing the central issue of liability to be decided in the case. Determining a membership in the class would essentially require a mini-hearing on the status of each facsimile recipient. Liability arises only if a transmitted advertisement is *unsolicited*. Therefore, the essential question of fact that each potential plaintiff must prove is whether a specific transmission to its machine was without express invitation or permission on its part. Plaintiffs’ proposed “common questions” are inherently individualized, requiring inquiry into the particular circumstances of each facsimile transmission. Given the individual proof necessary to establish liability, the commonality requirement can never be met.

See Forman v. Data Transfer, Inc., 164 F.R.D. at 404-405.

8. When inquiring into the typicality requirement for class actions, the court in Forman noted that proof of plaintiff's claims would not necessarily prove all the proposed class members' claims. That analysis is particularly true here since many of the purported class members may have provided express permission or invitation for the sending of such facsimiles. Thus, the Plaintiffs' claims are not typical of the purported class. See Forman v. Data Transfer, Inc., 164 F.R.D. at 404.

9. Even if Plaintiffs could meet the commonality and typicality requirements, class resolution is not superior to other available methods for the fair and efficient adjudication of the controversy. Specifically, the fundamental basis of Plaintiffs' Complaint is not a common course of conduct by the defendant, but rather a series of individualized facsimile transmissions under individual circumstances, each of which may or may not be an alleged violation of the statute. Lacking a single set of operative facts, it is difficult to see how common questions, if any, predominate. See Forman v. Data Transfer, Inc., 164 F.R.D. at 404.

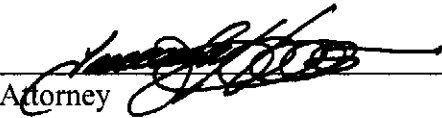
WHEREFORE, BLP respectfully requests that this Court enter an Order dismissing the Complaint. BLP also respectfully requests an award of its costs for defending this action, and such further relief as the Court may deem equitable and proper.

  
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**Attorneys for Buccaneers Limited Partnership**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been furnished by Telecopy and U.S. Mail on this 2<sup>nd</sup> day of October, 2009 to Michael C. Addison, Esquire, Addison & Howard, P.A., P.O. Box 172535, Tampa, Florida 33672-0535.

  
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Attorney