

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Junk Fax Prevention Act of 2005 ) CG Docket No. 05-338  
 )  
Rules and Regulations Implementing the ) CG Docket No. 02-278  
Telephone Consumer Protection Act of )  
1991 )

**Declaration of Glenn L. Hara**

I, Glenn L. Hara, declare as follows:

1. I am an attorney with the law firm of Anderson + Wanca, attorneys of record for certain TCPA Plaintiffs, including Cin-Q Automobiles, Inc. and Medical & Chiropractic Clinic, Inc.

2. I submit this Declaration in support of TCPA Plaintiffs' Comments on the Petitions for Retroactive Waiver filed by Buccaneers Limited Partnership.

3. I have attached true and correct copies of the following documents filed in *Cin-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, No. 8:13-cv-01592 (M.D. Fla.):

<u>Document No.</u>	<u>Description</u>	<u>Exhibit Letter</u>
207	Plaintiffs' Motion for Class Certification	A
207-2	Deposition of Matthew Kaiser	B
	BLP 000029, 000038, 000040-42, 000069, 000093, 00136, 00310, 00676	Group C

<u>Document No.</u>	<u>Description</u>	<u>Exhibit Letter</u>
	RMI00221	D
138-7	Affidavit of Phyllis J. Towzey	E
	Deposition of Manual Alvare	F
	Commission FOIA Response (March 20, 2014)	G
	FTC FOIA Response (Jan. 9, 2013)	H
70	Second Amended Complaint	I
119	BLP's Amended Answer, Affirmative Defenses and Demand for Jury Trial	J
138	Plaintiffs' Motion and Memorandum of Law in Support of Summary Judgment	K

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2016

s/Glenn L. Hara

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**EXHIBIT A**

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

CIN-Q AUTOMOBILES, INC. and MEDICAL & )  
CHIROPRACTIC CLINIC, INC., individually and as )  
representatives of a class of similarly-situated persons, )

Plaintiffs, )

v. )

BUCCANEERS LIMITED PARTNERSHIP and )  
JOHN DOES 1-10, )

Defendants. )

Civil Action No.:  
8:13-CV-01592-AEP

**DISPOSITIVE MOTION**

**PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION**

Pursuant to Fed. R. Civ. P. 23, Plaintiffs, Cin-Q Automobiles, Inc. and Medical & Chiropractic Clinic, Inc., move the Court to certify the following three classes:

Class A:

All persons or entities who were successfully sent facsimiles offering tickets to Tampa Bay Buccaneers games from July 14, 2009, through July 16, 2009, which contained the following statement at the bottom of the fax: “To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. Removaltech@FaxQom.com.”

Class B:

All persons or entities who were successfully sent facsimiles offering tickets to Tampa Bay Buccaneers games from August 17, 2009, through August 20, 2009, which contained the following statement at the bottom of the fax: “To immediately and permanently remove your fax number from our opt-in compiled database, please call 888-703-9205. Removaltech@FaxQom.com.”

Class C:

All persons or entities who were successfully sent facsimiles offering tickets to Tampa Bay Buccaneers games from May 24, 2010, through June 9, 2010, which contained the following statement at the bottom of the fax: “If your office has decide to opt-out of further faxes please call 866-247-0920. Thank you.”

As argued in Plaintiffs’ memorandum of law, these classes easily satisfy the requirements of Rule 23(a) and (b)(3). Pursuant to L.R. 4.04(b), Plaintiffs state “the number of persons” in the

classes, according to the evidence gathered in discovery and reviewed by Plaintiff's expert, Robert Biggerstaff, is approximately 131,011, to whom BLP successfully sent 343,122 faxes offering tickets to Tampa Bay Buccaneers football games from July 2009 through June 2010.

### MEMORANDUM OF LAW

“Class certification is normal” in TCPA cases “because the main questions, such as whether a given fax is an advertisement, are common to all recipients.” *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013). This is “an archetypical example of a case in which the class action mechanism is superior to that of individual litigation of each claim.” *Hazel's Cup & Saucer, LLC v. Around the Globe Travel, Inc.*, 86 Mass. App. Ct. 164, 166 (2014). Courts in this circuit regularly certify TCPA fax classes. *See Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688 (S.D. Fla. Aug. 5, 2015), on remand from 771 F.3d 1274 (11th Cir. 2014); *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255 (S.D. Fla. Dec. 24, 2014); *C-Mart, Inc. v. Metro. Life Ins. Co.*, 299 F.R.D. 679 (S.D. Fla. 2014); *A Aventura Chiropractic Ctr., Inc. v. Med Waste Mgmt. LLC*, 2013 WL 3463489 (S.D. Fla. July 3, 2013).

The issue this Court identified for trial in denying summary judgment is whether the faxes were sent “on behalf of” BLP. That is a classwide question; the answer will not vary from one class member to another. The only other liability issues are whether the faxes are “advertisements” and whether the opt-out notice on the faxes violates FCC regulations, thus precluding a defense of “established business relationship” or “prior express invitation or permission.” The answers to these questions will be the same for every class member. The Court should certify the classes and proceed to trial so a jury can decide BLP's liability as to all class members in one fell swoop. If BLP prevails, the judgment will bind every class member. If the

classes prevail, the Court should decide whether the violations were “willful or knowing” and, if so, whether to increase statutory damages from the \$500 per-violation minimum.

### **Facts Supporting Class Certification<sup>1</sup>**

#### **A. BLP decides to advertise by fax and hires FaxQom.**

In early 2009, Matt Kaiser, BLP’s Director of New Business Development, pitched an idea to his superiors to “generate some ticket sales” by sending advertisements to fax numbers in and around Tampa, Florida. (Kaiser Dep. at 68). Kaiser had access to the team’s “existing contacts,” but wanted to drum up “new business” by targeting new customers. (*Id.*) Kaiser was authorized by BLP to hire a fax broadcaster to execute the advertising campaign. (BLP Resp. First Req. Admissions, No. 117). Kaiser conducted internet research on fax broadcasters and settled on a company called FaxQom. (Kaiser Dep. at 66).

On July 9, 2009, BLP and FaxQom executed a “Fax Indemnity Agreement,” with an “addendum” drafted by Kaiser to give BLP greater “comfort.” (*Id.* at 108). The addendum provides (1) FaxQom will “stop the campaign and refund all monies” at BLP’s request, (2) FaxQom indemnifies BLP “from any and all complaints or litigation that may arise as a result of this campaign,” (3) FaxQom will charge only for “successfully delivered faxes,” (4) FaxQom will “send all faxes at the times and dates” specified by BLP, (5) “all faxes have been collected according to the best industry practices,” and (6) “FaxQom will agree to and abide by all laws

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<sup>1</sup> Attached in Plaintiffs’ Appendix of Exhibits are the following: Ex. 1, Deposition of Matthew Kaiser (“Kaiser Dep.”); Ex. 2, BLP Resp. First. Req. Admissions; Ex. 3, Compilation of BLP Documents Produced in Discovery; Ex. 4, Expert Report of Robert Biggerstaff (“Biggerstaff Report”); Ex. 5, Declaration of Robert Biggerstaff (“Biggerstaff Decl.”); Ex. 6, Supplemental Report of Robert Biggerstaff (“Biggerstaff Supp. Report”); Ex. 7, Declaration of Ian Jenkins (“Jenkins Decl.”); Ex. 8, Deposition of Ian Jenkins (“Jenkins Dep.”); Ex. 9, Deposition of Craig Cinque (“Cinque Dep.”); Ex. 10, Deposition of Michelle Zakrzewski (“Zakrzewski Dep.”); Ex. 11, Firm Resume of Anderson + Wanca (“A+W Firm Resume”); Ex. 12, Brief Biography of Michael C. Addison (“Addison Biography”); Ex. 13, Proposed Class Notice.

associated with facimile [sic] marketing.” (BLP000069). BLP General Counsel, Manuel Alvare, reviewed and approved the agreement. (BLP00136).

**B. BLP orders fax broadcasts on July 14, 15, and 16, 2009.**

On July 9, 2009, Kaiser directed FaxQom to send advertisements for Buccaneers tickets to over 100,000 fax numbers in the Tampa area on the following schedule: area code 727 – July 14, 2009; area code 813 – July 15, 2009; area codes 352 and 941 – July 16, 2009. (BLP000067). BLP paid FaxQom \$15,336.80 for these first three broadcasts. (BLP000038).

On July 13, 2009, BLP sent FaxQom the final version of its first fax advertisement. (BLP000040–42). The fax was two pages, with the first page stating, “save up to \$16 per ticket” by purchasing “group tickets” and a second page with a stadium diagram and ticket prices. (*Id.*) The second page states: “To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. [Removaltech@FaxQom.com](mailto:Removaltech@FaxQom.com).” (*Id.*; BLP000029). Kaiser told FaxQom that this fax was “for tomorrow only” and he would “send you the ones for Wednesday and Thursday after this one goes out.” (*Id.*) Kaiser later sent FaxQom “the Wednesday and Thursday faxes (marked as 7/15 and 7/16).” (BLP000044).

On July 15, 2009, Plaintiff Medical & Chiropractic received an advertisement for Buccaneers tickets on its fax machine in area code 813, according to the schedule BLP dictated. (M. Zakrzewski Dep. at 9–10, 121; SAC., Ex. A). The fax is identical to the “7/15” fax Kaiser sent FaxQom the previous day. (BLP000045–46).

For the July 2009 faxes, FaxQom used another company called USADatalink, which provided the lists of fax numbers and in turn used a fax broadcaster called 127 High Street to physically transmit the faxes. Plaintiff subpoenaed USADatalink, and it produced a computer hard drive, which was reviewed by Plaintiff’s expert, Robert Biggerstaff. (Biggerstaff Report ¶ 19). This district has found that Biggerstaff is “amply qualified” and his “relevant experience,

education, and training” makes him “competent to offer expert testimony in TCPA cases.” *Shamblin v. Obama for Am.*, 2015 WL 1909765, at \*3 (M.D. Fla. Apr. 27, 2015); *see also Hunt v. 21st Mtg. Corp.*, 2014 WL 1664288, at \*3–4 (N.D. Ala. Apr. 25, 2014) (rejecting *Daubert* challenge to Biggerstaff in TCPA action). BLP did not depose Biggerstaff during expert discovery, which closed December 14, 2015. (Amended Case Mgmt. Order, Doc. 190).<sup>2</sup>

In analyzing the hard drive, Biggerstaff found a “Tampa Bay Bucs” directory with three subdirectories: “July 14-09,” “July 15-09,” and “July 16-09.” (Biggerstaff Report ¶ 21). Biggerstaff states each subdirectory contained two files: “a list file containing fax numbers and a document which contained a 2-page flyer for Tampa Bay Buccaneers tickets, with a stadium diagram on the second page.” (*Id.*) Biggerstaff also found on the hard drive emails from 127 High Street to USADatalink relating to three BLP fax broadcasts, on July 14, 15, and 16, 2009, consisting of (1) emails confirming the fax job submissions and identifying the filename of the list of target fax numbers and the document to be transmitted and (2) “exception” reports, which “identify individual failed fax transmissions for the corresponding broadcast.” (*Id.* ¶ 19).

Biggerstaff compared the 127 High Street exception reports showing failed transmissions with the target lists and concluded these records “document 102,526 successful error-free transmissions, received by 102,524 unique fax numbers.” (*Id.* ¶ 22). Biggerstaff also found Medical & Chiropractic’s fax number in the list of fax numbers associated with the “7-15\_buc\_doc.pdf” file, and stated he “found no exception report” indicating the transmission was unsuccessful, meaning “that a fax was sent to this number and was a successfully received error-free transmission of the document ‘7-15\_buc\_doc.pdf.’” (*Id.* ¶ 27).

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<sup>2</sup> Plaintiffs deposed BLP’s expert witness at the time, David Canfield, on December 10, 2015, but BLP has since sought to replace Canfield, which Plaintiffs will likely object to at this late date.

**C. BLP orders broadcasts on August 17–20, 2009, and May 24–June 9, 2010.**

On August 13, 2009, BLP directed FaxQom to send a one-page advertisement for “individual game tickets” on the following schedule: area code 727 – August 17, 2009; area code 813 – August 18, 2009; area code 352 – August 19, 2009; area code 941 – August 20, 2009. (BLP000087). BLP paid \$7,668.40 for this round of broadcasts. (*Id.*)

On August 19, 2009, Plaintiff Cin-Q received the “individual game tickets” fax at its area code 352 fax number, according to schedule. (Cinque Dep. at 268; SAC, Ex. B). The opt-out notice states, “To immediately and permanently remove your fax number from our opt-in compiled database, please call 888-703-9205. Removaltech@FaxQom.com,” which is the same as the July faxes except with a different phone number. (*Id.*)

On May 18, 2010, BLP directed FaxQom to send a two-page fax advertising “group tickets” to fax numbers in area code 813 – May 24, 2014; area code 727 – May 25, 2014; and area codes 352 and 941 – May 26, 2014. (BLP000107). BLP paid FaxQom \$14,766.92 for this round of broadcasts. (*Id.*)

On May 24, 2010, Plaintiff Medical & Chiropractic received the group tickets advertisement at its area code 813 fax number, according to schedule. (Biggerstaff Decl. ¶ 7). The opt-out notice states, “If your office has decide to opt-out of further faxes please call 866-247-0920. Thank you.” (Biggerstaff Report, Ex. 2, at RMI00221). FaxQom changed the opt-out notice at Kaiser’s direction to “keep it simple and only related to opting out” (BLP00310), removing the reference to an “opt-in compiled database” from the previous two notices.

On May 28, 2010, BLP ordered “group tickets” faxes to be sent the following “tuesday through friday,” June 1–4, 2010. (BLP00325). On June 1, 2010, Kaiser complained that FaxQom had not sent “a signed copy of the order form” (BLP00326) with new indemnification language Kaiser had written, extending to BLP “employees” (BLP00306). On June 3, 2010, Kaiser told

FaxQom not to send any more faxes until it sent back the signed indemnification language. (BLP00330). FaxQom obeyed. (BLP00336). On June 7, 2010, FaxQom sent its signature on the new indemnification language, and BLP authorized FaxQom to resume faxing. (BLP00343).

On June 7, 2010, FaxQom reported area code 352 “will complete tomorrow morning,” and Kaiser told FaxQom to “finish 727 on Tuesday, Wednesday, and Thursday.” (BLP00631). The opt-out notice on the June 2010 faxes states, “If your office has decide to opt-out of further faxes please call 866-247-0920. Thank you.” (Biggerstaff Report, Ex. 2, at RMI00265, 276, 283, 290). On June 9, 2010, Kaiser told FaxQom to stop faxing, and FaxQom obeyed. (BLP00350).

Beginning with the August 2009 faxes, FaxQom began using a company called Rocket Messaging, Inc. (“RMI”) to transmit BLP’s faxes. (Jenkins Declaration ¶¶ 2, 5). Plaintiffs subpoenaed RMI, and its keeper of records, Ian Jenkins, produced transmission logs, billing statements, and the images sent in 22 broadcasts of BLP faxes from August 17, 2009, through June 9, 2010, along with a Declaration authenticating the documents and explaining the sequence of the BLP faxes. (*Id.* ¶¶ 14–36).

BLP took Jenkins’s deposition, individually and as RMI’s corporate representative. (Jenkins Dep. at 6). Jenkins testified that RMI provides a “fax messaging service,” allowing “wholesale customers” to send a “high volume” of faxes and “retrieve results on if those faxes were delivered or not.” (*Id.* at 31–32). Jenkins testified that his role at RMI is “application developer” and he developed RMI’s “fax broadcasting platform.” (*Id.* at 33–34).

Jenkins testified that RMI’s platform automatically creates a “call detail record” for each fax broadcast, which includes the target fax numbers, the date and time of transmission, and a “status code” for each individual transmission. (*Id.* at 112). Jenkins testified the “call detail records” are the same documents he referred to as “transmission records” in his declaration. (*Id.*

at 148). Jenkins testified the “status code” in the call detail/transmission records reflects “the outcome of the fax,” where “a status code of zero is a successfully delivered fax” and “[a]nything other than zero is an error code that has different reasons,” such as “busy, no answer, things of that nature.” (*Id.* at 112). Jenkins testified “the fax protocol is a very standard thing,” and “[s]o long as the recipient fax machine says it received the fax, we will get a status code of zero,” regardless of what device is on the receiving end. (*Id.* at 113). Jenkins testified the transmission records also contain a field for the “CSID” of each transmission, which is “a call subscriber identifier” that is sent by the receiving device to the sending device. (*Id.* at 119).

Jenkins testified that he “actually look[ed] at the images that were sent out” and “compare[d] each and every one of them” with the transmission records. (*Id.* at 161). Jenkins could not recall a client asking “about whether or not the transmission record is accurate about the number of successful transmissions” but testified that if ever asked whether a particular number received a fax, RMI would simply “provide the transmission record,” since “one of the pieces on there is the CSID which is information that we can’t fabricate that has to come from that receiving machine.” (*Id.* at 165).

Biggerstaff reviewed the RMI transmission records and concluded they show “120,232 unique fax numbers received 240,596 successful error-free transmissions, indicated by STATUS ‘0’ in the logs, ranging in dates from August 17, 2009, to June 9, 2010 (inclusive).” (Biggerstaff Report ¶ 16). Biggerstaff explained that facsimile machines communicate using the “T.30” protocol, “whereby a fax transmission is positively confirmed by the receiving machine before the sending machine will record the transmission as successful,” through a “positive confirmation of receipt of the transmission (e.g. the message confirmation or ‘MCF’).” (*Id.* ¶¶ 29, 46). Biggerstaff stated that in his experience transmission records are “highly reliable and

accurate, particularly when identifying particular fax transmissions as fully received error-free transmissions.” (*Id.* ¶ 53).

Combining the USADatalink/127 High Street transmissions and the RMI transmissions, Biggerstaff concluded that “[t]he records I examined identified 131,011 unique fax numbers that received a combined 343,122 successful error-free transmissions containing advertisements for Tampa Bay Buccaneers tickets.” (*Id.* ¶ 54).

### **Relevant Procedural History**

Plaintiff Cin-Q filed this action on June 15, 2013, with a Second Amended Complaint (“SAC”), adding Medical & Chiropractic on January 3, 2014 (Doc. 70). On April 8, 2014, BLP filed an Amended Answer, denying the faxes attached to the SAC are “advertisements” (Doc. 119 ¶ 38), denying BLP “sent” the faxes (*id.* ¶¶ 14–15), and denying the faxes lack compliant opt-out notice (*id.* ¶ 24). BLP asserted 15 affirmative defenses, including that “BLP is not vicariously liable” for the faxes (Third Aff. Defense), that “Plaintiff and potential class members had an established business relationship with BLP” (Eleventh Aff. Defense), and that “Plaintiff and potential class members invited faxes by advertising or displaying their fax numbers publicly” (Twelfth Aff. Defense). BLP demanded a trial by jury. (Doc. 119 at 9).

BLP sought leave to seek summary judgment against Plaintiffs individually on “vicarious liability” prior to class certification, which the Court allowed, and the parties filed cross-motions for summary judgment. (Docs. 129 & 138). BLP argued it cannot be held “vicariously liable” for the faxes. (Doc. 129). Plaintiffs argued BLP is directly liable as the “sender” as defined by FCC regulation, 47 C.F.R. § 64.1200(f)(10), because it is the person or entity “on whose behalf” the faxes were sent and, independently, because BLP is the person or entity “whose goods or services are advertised or promoted” in the faxes. (Doc. 138 at 10–13).

On December 17, 2014, the Court denied both parties summary judgment. (Order, Doc. 167). The Court held BLP was incorrect that a plaintiff must prove vicarious liability, given that the FCC explained as amicus in *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), that the “sender” is directly liable and the Eleventh Circuit accepted that position. (*Id.* at 7–8). The Court also held Plaintiffs were incorrect that BLP is the “sender” under the 2006 regulation solely because its “goods or services” are advertised in the faxes, holding the sender must also be the person “on whose behalf” the fax is sent. (*Id.* at 9–10). The Court declined to decide whether BLP is the person “on whose behalf” the faxes were sent, ruling that a jury should decide the question. (*Id.* at 15–16).

On January 8, 2015, BLP filed a Motion to Bifurcate and Proceed Directly to Trial on Liability as to Plaintiffs individually. (Doc. 169). On January 14, 2015, Plaintiffs moved to reconsider the denial of summary judgment or certify questions for appeal. (Doc. 170). On May 5, 2015, the Court denied both motions. (Doc. 181). On July 28, 2015, the Court directed Plaintiffs to file their motion for class certification by January 14, 2016, which the Court later extended twice at the parties’ request to March 25, 2016. (Docs. 200 & 202).

### **Argument**

To obtain class certification on their TCPA claims,<sup>3</sup> Plaintiffs must establish the Rule 23 elements by a simple preponderance of the evidence. *See In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 624 (N.D. Ala. 2009). There are four Rule 23(a) requirements: numerosity, commonality, typicality, and adequacy of representation; and two Rule 23(b)(3) requirements: that common questions “predominate” and that a class action is “superior” compared to the

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<sup>3</sup> Like the plaintiff in *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 692 n.6 (S.D. Fla. 2015), Plaintiffs do not seek class certification on their conversion claims, Count II of the SAC.

alternatives. There is also an implied requirement that the classes be “ascertainable.” As argued below, these standards are easily satisfied here.

**I. The proposed classes are “ascertainable.”**

**A. The circuit split on ascertainability and Eleventh Circuit authority.**

There is a circuit split on what “ascertainability” means in a Rule 23(b)(3) class action. In *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015), the Seventh Circuit concluded ascertainability concerns “the adequacy of the class definition itself” and is limited to whether the class is “defined clearly and based on objective criteria.” The Seventh Circuit held ascertainability does *not* ask whether “it would be difficult to identify particular members of the class” and rejected the Third Circuit’s “heightened” approach, which requires a “reliable and administratively feasible way to identify all who fall within the class definition.” *Id.* (rejecting *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)).

The Seventh Circuit held “[n]othing in Rule 23 mentions or implies this heightened requirement” and “existing requirements already address” class-member identification for providing the “best notice practicable” and distributing any recovery, primarily the “manageability” aspect of Rule 23(b)(3) superiority. *Id.* The Seventh Circuit concluded a class of “purchasers” was ascertainable under the traditional standard because the definition was (1) not “vague,” (2) not based on subjective criteria “such as a person’s state of mind,” and (3) not a “fail-safe class,” where the class is defined in terms of success on the merits. *Id.* at 660–61.<sup>4</sup>

In *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015), the Sixth Circuit agreed with *Mullins*, holding “[w]e see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts,” and affirmed classes of persons who “purchased” the

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<sup>4</sup> The Supreme Court denied certiorari in *Mullins*. 2016 WL 763259 (Feb. 29, 2016).

defendant's products, even though they purchased through retailers and the defendant manufacturer did not have records of purchase. The Sixth Circuit held an "identification" requirement would allow a "systemic failure" in a defendant's "records management" to defeat class certification and "undermine the very purpose of class action remedies." *Id.* at 525–26. The Sixth Circuit noted no other circuit has adopted the heightened standard and the Third Circuit itself has backed away from it. *Id.* at 526, n.10 (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154, 170–71 (3d Cir. 2015) (reversing order finding subclass of "household members" unascertainable, holding "a process of identification does not require a 'minitrial,' nor does it amount to 'individualized fact-finding,'" and "indeed must be done in most successful class actions"))).

The Eleventh Circuit has only one published decision mentioning "ascertainability," stating in dicta that a class must be "adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (quoting *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)). The Eleventh Circuit did not analyze ascertainability in *Little*, holding it could "assume" the district court was "wrong about whether the class was ascertainable and numerous" yet still affirm the denial of class certification because the plaintiffs failed to dispute on appeal that predominance was lacking. *Id.* at 1307–08.

In *DeBremaecker*, the pre-1980 Fifth Circuit case cited in *Little*, the district court ruled a class of "residents of this State active in the 'peace movement'" who had been harassed by Houston police was not ascertainable. 433 F.2d at 734. The Fifth Circuit affirmed, holding the class definition was "overbroad" for two reasons: (1) the "uncertainty of the meaning of 'peace movement'" and (2) the fact that harassment by Houston police could not have harmed "residents of this State" (Texas) who resided "outside the City of Houston." *Id.*

Since *Little* associated ascertainability with whether the class as defined was sufficiently “numerous” and *DeBremaecker* focused on whether the definition was “overbroad,” it appears the Eleventh Circuit follows traditional ascertainability, focusing on whether the class is defined objectively, and considers identifying class members for purposes of giving class notice or distributing any recovery under Rule 23(b)(3) manageability, like the Sixth and Seventh Circuits.

Nevertheless, the Seventh Circuit observed in *Mullins* that the Eleventh Circuit applied “a fairly strong version of an ascertainability requirement in a non-precedential decision” in *Karhu v. Vital Pharm., Inc.*, 2015 WL 3560722, at \*2 (11th Cir. June 9, 2015) (unpublished) (affirming denial of certification to class of “purchasers” of dietary supplement, where defendant’s records showed sales only to retailers, not end-user consumers).<sup>5</sup> *Mullins*, 795 F.3d at 661. Therefore, Plaintiff addresses both traditional ascertainability and the heightened Third Circuit standard below. Both standards are satisfied in this case.

**B. The class definitions satisfy traditional ascertainability.**

Plaintiffs seek to certify three classes of persons “successfully sent” faxes, with the definitions reflecting the dates the faxes were sent and the three varieties of opt-out notice. A class of persons “successfully sent” faxes containing particular content during a particular time frame is defined by “objective” criteria. *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014). As in *Mullins*, the proposed class definitions are not “vague,” but rather “identif[y] a particular group,” that was “harmed in a particular way” during “a specific period.” 795 F.3d at 660–61. The definitions are not based on a subjective “state of mind,” but on objective criteria of whether a person was sent one or more of the identified faxes.

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<sup>5</sup> Unpublished Eleventh Circuit decisions are not binding on the Eleventh Circuit or this Court. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1215 n.10 (11th Cir. 2011).

*Id.* And the definitions are not “fail-safe,” since they do not entail any conclusions on the merits, such as whether the faxes are “advertisements” or whether the opt-out notice is non-compliant.

*Id.* The class definitions are therefore ascertainable under the traditional standard.

Two district courts in the Eleventh Circuit have applied traditional ascertainability, focusing on whether the class definitions were objective, in certifying TCPA fax classes. First, in *A Aventura Chiropractic Ctr., Inc. v. Med Waste Mgmt. LLC*, 2013 WL 3463489, at \*5 (S.D. Fla. July 3, 2013), the court certified a class of persons “sent” the faxes, holding that “[d]efining the class as those to whom Med Waste sent the offending facsimiles is a concrete way to identify Med Waste’s intended recipients and obviates the need for considering multiple ownership of fax machines or instances where the owners themselves may not have experienced a loss upon receipt of a non-compliant fax advertisement” and that “[d]efining the class in this way is also consistent with the text of the TCPA,” which prohibits the “sending” of a fax.

Second, in *C-Mart, Inc. v. Metro. Life Ins. Co.*, 299 F.R.D. 679, 689 (S.D. Fla. 2014), the court held a class of persons “sent” the defendants’ faxes was “ascertainable and adequately defined,” because “to define class membership as those whom Defendants sent the fax is in line with TCPA’s language regarding sending faxes, and would allow a concrete way to identify Defendants’ intended recipients.” The court held that “[t]o define the class otherwise would ignore the TCPA’s emphasis on prohibiting parties from sending offending faxes.” *Id.*

Defendants sometimes argue a TCPA class is not ascertainable because individualized inquiries are required into which class members had an EBR with the defendant or gave “prior express invitation or permission.” That objection fails at the starting gate because it has to do with whether common issues “predominate” under Rule 23(b)(3), not “ascertainability.” More important, neither EBR nor prior express permission are available to BLP because its faxes lack

compliant opt-out notice. *A Aventura*, 2013 WL 3463489, at \*3 (“[T]he sole issue in ascertaining class membership is whether in solicited and unsolicited advertisements the required opt-out language was included.”); *C-Mart*, 299 F.R.D. at 688 (rejecting ascertainability challenge because “established relationship or voluntary consent defenses are unavailable where, as here, the opt-out requirement is alleged to have been violated”).

In sum, the proposed classes are defined by objective criteria and the definitions easily meet traditional ascertainability. The Court should proceed to consider the Rule 23(a) factors.

**C. The classes satisfy heightened ascertainability.**

On remand from the Eleventh Circuit’s decision reversing summary judgment for the defendant in *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), the district court applied heightened ascertainability at class certification, requiring the plaintiff to show that “identifying class members” would be “a manageable process that does not require much, if any, individual inquiry.” *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 693 (S.D. Fla. Aug. 5, 2015) (quoting *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 Fed. App’x 782, 787 (11th Cir. 2014) (unpublished)).

The plaintiff in *Sarris* defined the class as “[a]ll persons who were sent one or more facsimiles on December 13, 2005 or December 14, 2005, from ‘John G. Sarris, D.M.D., P.A.’ offering ‘Family, Cosmetic & Reconstructive Dentistry’ and serving as a \$50 ‘Gift Certificate.’” *Id.* at 692. The plaintiff relied on Biggerstaff’s testimony that the transmission logs obtained from the fax broadcaster showed “an error-free transmission of a one-page fax to 7,058 unique fax numbers,” including the plaintiff’s number. *Id.* The defendant argued the class was not ascertainable because (1) it could be held liable only for faxes it “authorized” and so the definition was overbroad and (2) “the identifying information in the Biggerstaff report is out of

date and extremely unreliable,” since “33-40% of the fax numbers are no longer in use, making it difficult to locate and identify a substantial portion of the class.” *Id.* at 693.

The district court rejected both objections, certifying the class and holding (1) the “authorization” issue was a merits question, and if the defendant established it was not liable for certain transmissions, the court could “modify the class definition to comport with the evidence and exclude those transmissions” and (2) the court could “address any issues or due process concerns with respect to locating and notifying class members after the class is certified.” *Id.* at 694. The court held the proposed class, when “supported by a report like the Biggerstaff report,” satisfied the “implicit ascertainability and administrative feasibility requirement.”<sup>6</sup> *Id.*

In *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255, at \*4 (S.D. Fla. Dec. 24, 2014), the district court applied the heightened ascertainability standard in a TCPA fax class action, requiring the plaintiff to show it was “possible to identify the class members on the basis of ‘objective criteria’ and through a ‘manageable process that does not require much, if any, individual inquiry.’” The plaintiff relied on Biggerstaff’s analysis of the fax logs and his opinion that the fax “was successfully sent to and received by 4,324 unique recipients.” *Id.* The court ruled ascertainability was satisfied and certified a class of persons who “received” faxes, holding “Biggerstaff’s methodology is sound and reliable, and it provides a manageable process for identifying class members using objective criteria.”<sup>7</sup> *Id.*

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<sup>6</sup> Following class certification, the defendant won partial summary judgment that it was not the “sender” with respect to more than half the faxes at issue. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, No. 12-80178, Order, Doc. 174, at 23 (S.D. Fla. Mar. 10, 2016).

<sup>7</sup> Following class certification, the sole remaining defendant prevailed at trial, obtaining a classwide judgment that he was not a “sender” of any of the faxes. *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2015 WL 3644598, at \*4 (S.D. Fla. June 10, 2015).

District courts in the Third Circuit, the only circuit that has adopted the heightened standard, have reached different results in TCPA fax class actions depending on whether the target fax numbers and/or transmission logs are available. In *City Select Auto Sales, Inc. v. BMW Bank of N. Am. Inc.*, 2015 WL 5769951, at \*7 (D.N.J. Sept. 29, 2015), the court held the class was not ascertainable where there was no “master list” of fax numbers and no transmission logs. The plaintiff had billing invoices from the broadcaster showing “the total number of faxes sent on various dates,” but they did not “reflect the individual fax numbers to which the faxes were sent” and so the district court held the heightened standard was not satisfied. *Id.*

In contrast, the same court in *City Select Auto Sales, Inc. v. David Randall Assocs., Inc.*, 296 F.R.D. 299, 313–14 (D.N.J. 2013), held that a class of persons “successfully sent” faxes was ascertainable where the plaintiff had the transmission logs “showing 29,113 unique fax numbers” successfully sent faxes and held the numbers were objective evidence that would allow identification of class members “through the claims administration process,” after class members were sent notice and filed claims for any recovery. *Id.*

In this case, with respect to Class A, covering persons sent faxes July 14–16, 2009, Plaintiffs have the lists of fax numbers and the “exception reports” showing unsuccessful transmissions. (Biggerstaff Report ¶ 19). Biggerstaff explains that in his experience the presence of a number on the target list but not the exception reports indicates that “a fax was sent to this number and was a successfully received error-free transmission” of a BLP fax. (*Id.* ¶ 27). Thus, even under the heightened Third Circuit standard, ascertainability is met for Class A.

With respect to Class B, covering persons sent faxes August 17–20, 2009, Plaintiffs have the transmission logs from RMI, showing the fax numbers and the date, time, and “status code” of each transmission showing whether it successfully completed the T.30 protocol. (*Id.* ¶ 46).

The same is true for Class C, consisting of persons sent BLP faxes from May 24, 2010, through June 9, 2010, for whom Plaintiffs also have the RMI transmission records.<sup>8</sup> (*Id.*)

Transmission records are definitive evidence in a TCPA fax case. Biggerstaff explains that under the T.30 protocol, “a fax transmission is positively confirmed by the receiving machine before the sending machine will record the transmission as successful.” (*Id.* ¶ 29). These records are “highly reliable and accurate, particularly when identifying particular fax transmissions as fully received error-free transmissions.” (*Id.* ¶ 53). “Transmitting a fax requires a sending and a receiving machine to communicate using a standard protocol,” and “no reasonable juror could conclude that these data are inaccurate.” *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684–85 (7th Cir. 2013) (affirming class certification and summary judgment for plaintiff class based on transmission records and Biggerstaff’s report). The transmission records for Classes B and C satisfy any standard for ascertainability, even the Third Circuit’s heightened standard. *See David Randall Assocs.*, 296 F.R.D. at 313–14.

**D. There is no need to amend the class definition in the SAC.**

Plaintiffs’ three-class proposal differs from the singular definition in the SAC by specifying the dates of the faxes and quoting the three varieties of opt-out notice, rather than referring generally to persons “sent facsimile advertisements offering group tickets or individual game tickets for the Tampa Bay Buccaneers games and which did not display the opt out language required by 47 C.F.R. 64.1200.” (SAC ¶ 25). Such modifications are common in class litigation to focus the class definition as the case develops. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000) (“Rule 23(c)(1) specifically empowers district courts to alter or amend class certification orders at *any* time prior to a decision on the merits.”); *Shin v.*

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<sup>8</sup> Plaintiffs propose separate classes B and C to reflect the different time periods and opt-out notice.

*Cobb Cnty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th Cir. 2001) (court retains “the ability, and perhaps even a duty, to alter or amend a certification decision” as case develops).<sup>9</sup>

Nevertheless, defendants sometimes argue a class definition cannot be altered from complaint to class certification without amending the pleadings. There is no such requirement. *Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015) (holding a complaint need not contain a class definition at all under Rule 8 and “motions practice and a decision under Rule 23 do not require the plaintiff to amend the complaint”). Also, the SAC states “Plaintiffs reserve the right to amend the class definition upon completion of class certification discovery,” putting BLP on notice. (SAC ¶ 25). In *C-Mart*, 299 F.R.D. at 685 n.5, the court certified a TCPA fax class over the defendants’ objection that the definition improperly differed from the complaint where the complaint advised “that the class definition might be modified . . . after discovery.”

In sum, the proposed classes are objectively defined and “ascertainable” under both the traditional standard and the heightened Third Circuit standard, and Plaintiffs need not amend the SAC to obtain class certification. Alternatively, if the Court believes an amendment is necessary, Plaintiffs seek leave to file a Third Amended Complaint pleading the three class definitions. The Court should hold ascertainability satisfied and proceed to the Rule 23(a) factors.

## **II. The Rule 23(a) elements are met.**

### **A. The class is sufficiently numerous.**

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” A plaintiff need not show the “exact number” or “identity of the class members,” and the district court may make common-sense estimates. *A Aventura*, 2013 WL 3463489, at \*3;

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<sup>9</sup> See also *Powers v. Hamilton Cnty. Pub. Defender Comm’n*, 501 F.3d 592, 618–19 (6th Cir. 2007) (court had “obligation to make appropriate adjustments to the class definition as the litigation progressed”); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) (courts “permitted to limit or modify class definitions to provide the necessary precision”); *Smith v. Pennington*, 352 F.3d 884, 894 (4th Cir. 2003).

*Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003). The Eleventh Circuit presumes that “less than twenty-one is inadequate, more than forty adequate.” *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.1986). In this case, the evidence shows 343,122 fax transmissions sent to 131,011 fax numbers in the Tampa area from July 2009 to June 2010. (Biggerstaff Report ¶ 54). There is no reasonable basis to dispute numerosity.

**B. There is at least one common question of law or fact.**

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” There need only be “at least one” common question. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009). Here, there are four common questions:

(1) whether the faxes are “advertisements” as defined by 47 C.F.R. § 64.1200(f)(1), which BLP denies (Amended Answer, Doc. 119, ¶ 38);

(2) whether BLP is a “sender” of the faxes, defined as any “person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement,” 47 C.F.R. § 64.1200(f)(10), which is the issue the Court identified for trial (Order, Doc. 167, at 15–16);

(3) whether the opt-out notice on the faxes violates the governing FCC regulations, thus precluding BLP’s affirmative defenses of EBR or “prior express invitation or permission,” 47 C.F.R. § 64.1200(a)(4)(ii)–(iv);<sup>10</sup> and

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<sup>10</sup> EBR and “prior express invitation or permission” are defenses on which the fax sender bears the burden of proof. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, ¶ 12 (Apr. 6, 2006) (“[T]he burden will be on the sender to show that it has a valid EBR with the recipient.”); *id.* ¶ 46 (“In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given.”).

(4) whether BLP “willfully or knowingly” violated the TCPA or FCC regulations and, if so, whether the Court should increase statutory damages from \$500 per violation to up to \$1,500 per violation,<sup>11</sup> along with whether injunctive relief is appropriate and the scope of such relief.

The Court need not, and should not, decide these questions now. It need only determine whether the “*answers*” to these questions are “apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). There is no reasonable basis to dispute that at least one common question of law or fact exists in this case under Rule 23(a)(2). The more demanding standard of whether common questions “predominate” over individual questions is addressed under Rule 23(b)(3), below.

**C. Plaintiffs’ claims are typical of the other class members.**

Rule 23(a)(3) requires the plaintiff’s claims be “typical” of the class. A plaintiff’s claim is “typical” where it shares “the same essential characteristics as the claims of the class at large.” *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). A “strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences.” *Id.* A “sufficient nexus” is established “if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.” *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

In this case, Plaintiffs’ claims are typical of the “class at large” because they were sent BLP’s fax advertisements. Medical & Chiropractic’s claims are especially “typical” of Class A because it received a BLP fax on July 15, 2009, during the campaign from July 14–16 promoting group tickets to Buccaneers games. (Biggerstaff Report ¶ 27). Medical & Chiropractic’s claims

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<sup>11</sup> In *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1106 (11th Cir. 2015), the Eleventh Circuit held the TCPA provides \$500 per “violation,” with “no language limiting the recovery to \$500 per ‘call’ or ‘fax,’” and found the defendant liable for two TCPA violations in a single fax transmission.

are also typical of Class C because it received another BLP fax on May 24, 2010, in a multi-day campaign to promote Buccaneers group tickets. (Biggerstaff Decl. ¶ 7). Plaintiff Cin-Q's claims are typical of Class B because it received a BLP fax on August 19, 2009, as part of a four-day faxing campaign promoting individual tickets. (Biggerstaff Report ¶ 25).

Although Plaintiffs were not targeted in every broadcast, since BLP targeted different area codes on different days, that does not make their claims atypical. In *A Aventura*, 2013 WL 3463489, at \*4, the court noted the plaintiff's "fax number does appear on earlier versions of the list of numbers," but held that merely "confirm[ed] that multiple fax blasts were sent out" for the same product, thus "resolving any concerns about typicality." The court held that, although the plaintiff was not targeted in every broadcast, "the course of conduct that produced its TCPA claim also produced the claims of the proposed class," making its claims typical. *Id.* Here, BLP's "course of conduct" in sending faxes advertising Buccaneers tickets to numbers in the Tampa area gave rise to Plaintiffs' claims and the claims of the classes, and typicality is easily satisfied.

**D. Plaintiffs and their counsel will adequately represent the class.**

**1. Plaintiffs are adequate class representatives.**

Rule 23(a)(4) adequacy aims to prevent "conflicts of interest between the named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The required "threshold of knowledge" is low; a "working knowledge" of the case is enough. *Bacon v. Stiefel Labs., Inc.*, 275 F.R.D. 681, 694 (S.D. Fla. 2011). A plaintiff generally need not "pursue with vigor the legal claims of the class." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987). An attack on "lack of knowledge" is "particularly meritless" where "investigation and discovery by counsel against a background of legal knowledge" is required. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) (*Surowitz v. Hilton Hotels Corp.*,

383 U.S. 363 (1966), “expressly disapproved of attacks on the adequacy of a class representative based on the representative’s ignorance”). Here, Plaintiffs exceed these minimal standards.

Plaintiff Cin-Q is a small business in Gainesville, Florida, that sells used cars and recreational vehicles. (Cinque Dep. at 65). Cinque’s president, Craig Cinque, sat for a 6.5-hour deposition on February 14, 2014, where defense counsel questioned him extensively on subjects ranging from his days as a bar owner in the 1990s, to his wife’s talent agency, to whether his eight-year-old son is a Buccaneers fan. (*Id.* at 25–31, 46, 123).

With respect to this case, Cinque testified he remembers receiving the individual game tickets fax dated August 19, 2009, on Cin-Q’s fax machine at fax number (352) 377-9774. (*Id.* at 46–47, 49–50, 268). Cinque testified this fax “stuck out” to him because most junk faxes do not “say who it is” the fax is from, but this fax made clear it was from the Buccaneers. (*Id.* at 55–56). Cinque testified that, shortly after receiving the Buccaneers fax, he complained about junk faxes to an attorney who had come into the shop on an unrelated matter, and the attorney asked him if he wanted to “do something about it.” (*Id.* at 41, 54). Cinque testified one reason he decided to pursue this action is that small businesses like his have to comply with the law and a big business like BLP should “be on the same level playing field as everybody else.” (*Id.* at 217).

Cinque testified he understands this is a class action, “where it’s not feasible . . . to name every single plaintiff” and “it’s not worth to have 10,000 cases of the exact same case brought to court.” (*Id.* at 160–61). Cinque understands this case is brought under the TCPA, which provides damages of “500 to 1500” per fax. (*Id.* at 148–49). Cinque believes he and “[e]verybody else that got a fax” from BLP have “the same shared interest” and answered “no” to defense counsel’s question, “[i]f you could get money but they don’t get money, will you settle the case?” (*Id.* at 151). Cinque is willing to travel to Tampa for hearings or trial if necessary. (*Id.* at 216).

Plaintiff Medical & Chiropractic is a small chiropractic clinic with offices in Tampa and Zephyrhills, co-owned by married couple Michelle Zakrzewski and Dr. Gregory Williams. (Zakrzewski Dep. at 21). Zakrzewski testified as Medical & Chiropractic’s corporate representative on February 12, 2014, where she testified that Medical & Chiropractic received the July 15, 2009, fax on its fax machine at the Tampa location connected to fax number (813) 237-3792. (*Id.* at 9–11). Zakrzewski testified that Medical & Chiropractic has had that fax number since 1994. (*Id.* at 122). Zakrzewski testified she has been to two Buccaneers games in her life and agreed with defense counsel that the tickets purchased for those games constituted a “good or a service offered by the Buccaneers . . . .” (*Id.* at 115).

Asked by defense counsel whether “if you were offered to be made whole for whatever your losses are to the extent there are any, would you be willing to walk away?,” Zakrzewski answered “I’d have to think about all the other people that might be involved.” (*Id.* at 192). Informed by defense counsel that BLP would seek its “fees and costs if you lose”<sup>12</sup> and that the amount of those fees and costs could threaten “the risk of your business,” Zakrzewski stated, “I started this, so I have to stand behind it.” (*Id.* at 200–01).

The named Plaintiffs in this case will be exceptional class representatives, and the Court should appoint them. Plaintiffs have demonstrated they will not allow BLP to buy them off or intimidate them, they have been engaged in this case, devoting the time to sit for full-day depositions, and they have the basic “working knowledge” necessary. Medical & Chiropractic received faxes in the July 2009 and May–June 2010 broadcasts, making it an ideal representative for Classes A and C. Cin-Q received a fax in the August 2009 broadcasts, making it an ideal

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<sup>12</sup> The TCPA does not allow fee shifting. *Bauer v. Midland Credit Mgmt., Inc.*, 2012 WL 6733649, at \*7 (M.D. Fla. Dec. 4, 2012); 47 U.S.C. § 227(b)(3).

representative for Class B. If for any reason the Court finds these representatives inadequate, Plaintiffs request 30 days to substitute new class representatives.

**2. Plaintiffs' attorneys are adequate class counsel.**

Proposed class counsel Anderson + Wanca consists of seven experienced TCPA and class-action litigators. (*See* A+W Firm Resume). A+W has regularly been appointed class counsel in TCPA actions, including in this circuit. *E.g.*, *Doctor Diabetic*, 2014 WL 7366255, at \*6 (“Anderson & Wanca is one of very few firms that specialize in TCPA class actions and so is knowledgeable of the applicable law and experienced in litigating TCPA classes.”); *A Aventura*, 2013 WL 3463489, at \*4. A&W has been appointed in dozens of federal cases outside this Circuit. *E.g.*, *In re SamMichaels, Inc.*, No. 12-0110, 2013 WL 1760353, at \*1 (6th Cir. Apr. 25, 2013) (rejecting appeal challenging A+W’s adequacy); *Siding & Insulation Co. v. Combined Ins. Grp., Ltd., Inc.*, 2012 WL 1425093, at \*4 (N.D. Ohio Apr. 24, 2012) (finding A+W “sufficiently experienced and qualified to handle class actions” and “[t]here is no indication Counsel will be unable to commit the necessary resources to properly represent the class”). A+W has devoted significant resources to this case, and it will continue to do so.

Proposed co-class counsel, Michael Addison, is a Board Certified Civil Trial Lawyer and Board Certified Business Litigation Lawyer and practices exclusively in litigation and appellate practice, with a focus upon complex commercial matters and representation of claimants in consumer class action litigation. (*See* Addison Biography). Mr. Addison has played a central role in the litigation over BLP’s fax campaign since he filed the first such lawsuit in August 2009.

**III. The Rule 23(b)(3) elements are met.**

**A. Common issues predominate over individual issues.**

Rule 23(b)(3) requires that common questions “predominate” over individual questions. Predominance “asks whether the common, aggregation-enabling, issues in the case are more

prevalent or important than the non-common, aggregation-defeating, individual issues.” *Tyson Foods, Inc. v. Bouaphakeo*, --- S. Ct. ---, 2016 WL 1092414, at \*7 (U.S. Mar. 22, 2016).

Common issues predominate in TCPA fax cases, since “[t]he facts necessary to establish liability relate to Defendant’s common course of conduct and the transmissions of the faxes, and not to issues with individual class members” and “class members’ claims are brought under the same federal statute and based on the same legal theories.” *Sarris*, 311 F.R.D. at 699.

In this case, the answers to four common questions will determine liability and damages for every class member: (1) whether the faxes are “advertisements,” (2) whether BLP is the “sender,” (3) whether the faxes lack compliant opt-out notice, and (4) whether the violations were willful or knowing. There is nothing “individualized” about these issues.

First, the faxes are either advertisements or they are not. The answer will not vary by class member, and it is unclear on what basis BLP intends to dispute this point, given that the faxes plainly offer tickets to Buccaneers football games for commercial sale.

Second, BLP is either the “sender” or it is not. Plaintiffs maintain that BLP is the sender under the plain language of 47 C.F.R. § 64.1200(f)(10) because its “goods or services are advertised or promoted” and BLP cannot challenge the validity of that regulation in this Court. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119–20 (11th Cir. 2014); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015). Plaintiffs recognize this Court disagreed in its summary-judgment ruling, but that order was based on the Eleventh Circuit’s decision in *Sarris*, which applied a 1995 FCC ruling to faxes sent before the definition of “sender” was promulgated in 2006. 771 F.3d at 1284 & n.7. Since then, the Sixth Circuit has held in a case involving post-2006 faxes that “[t]he pertinent FCC regulations are explicit that the party whose goods or services are advertised . . . is the sender” and held the

defendant “directly liable” solely because the faxes advertised its restaurant. *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 636 (6th Cir. 2015).<sup>13</sup> On remand, the district court certified the class, holding “the TCPA provides for direct liability against a defendant whose goods or services are advertised in the fax at issue, even if that party did not broadcast the fax.” *Avio, Inc. v. Alfoccino, Inc.*, 2015 WL 8731983, at \*3 (E.D. Mich. Dec. 14, 2015).

Even if this Court limits the “sender” inquiry to whether the faxes were sent “on behalf of” BLP, the answer to that question does not require individualized inquiries. This Court held “on behalf of” liability turns on a “totality test based loosely on agency principles, aimed at establishing the origin of the offending behavior.” (Doc. 167 at 13). There is no reason a jury would find BLP the “origin of the offending behavior” with respect to one class member but not another. BLP maintains that *none* of the faxes were sent on its behalf, not that some were and some were not. Plaintiffs contend BLP’s arguments fail on the merits, given that BLP hired a fax broadcaster, designed the advertisements, and controlled the timing of the broadcasts and the area codes targeted. But this is the question the Court identified for trial. (*Id.*)

The “persuasiveness” of the evidence at trial is “the near-exclusive province of the jury.” *Tyson Foods*, 2016 WL 1092414, at \*11. But for purposes of class certification, where “the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs’ cause of action— courts should engage that question as a matter of summary judgment,” or trial on the merits, “not class certification.” *Id.* at \*9; *id.* at \*11 (“The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that

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<sup>13</sup> The Sixth Circuit also noted the defendant could not challenge the validity of § 64.1200(f)(10) in private litigation “because the Hobbs Act confers jurisdiction on Courts of Appeal to review FCC regulations only by direct appeal from the FCC.” *Imhoff*, 792 F.3d at 637.

the employees spent roughly equal time donning and doffing.”). In sum, there is nothing class-member specific about the parties’ arguments for or against “on behalf of” liability, and the jury can decide the issue without individualized inquiry.

BLP might argue a jury could reach different conclusions based on whether faxes were sent through USADatalink/127 High Street (July 2009), or through RMI (August 2009 and May–June 2010). Plaintiffs do not see why that would be the case, but their proposed three-class structure accommodates the possibility. If the jury finds the USADatalink/127 High Street faxes were sent “on behalf of” BLP, but not the RMI faxes, then Class A will prevail on the “sender” issue but Classes B & C will not. If the jury finds the RMI faxes were sent “on behalf of” BLP, but not the USADatalink/127 High Street faxes, then Classes B & C will prevail but Class A will not. Regardless of the outcome, the “sender” issue is capable of classwide determination.

Third, the opt-out notice on the faxes is either compliant or it is not. With respect to the notice on the faxes sent to Classes A & B, which differ only in the phone number provided, the notice (1) is not “clear and conspicuous,” (2) does not provide a fax number for opt-out requests, (3) does not advise that a sender’s failure to comply with an opt-out request within 30 days is unlawful, and (4) does not advise that the recipient must use the means identified on the fax to make an enforceable request, all in violation of 47 C.F.R. § 64.1200(a)(4)(iii). The notice on the second page of the two-page faxes sent to Class A also violates the requirement that the notice be “on the first page of the advertisement.” *Id.* The opt-out notice on the one-page faxes sent to Class C suffers all the same flaws, except it is on the first page of the advertisement.

Without compliant opt-out notice, BLP cannot maintain an affirmative defense of EBR or “prior express invitation or permission” as to any class member. 47 C.F.R. § 64.1200(a)(4)(ii) & (iv); *A Aventura*, 2013 WL 3463489, at \*4 (“[T]he singular issue of the absence of the correct

opt-out language does not portend individual trials or individualized inquiries.”); *C-Mart*, 299 F.R.D. at 691 (same); *Doctor Diabetic*, 2014 WL 7366255, at \*5 (“Courts routinely certify TCPA class actions precisely because the requirement of an opt-out notice obviates the need to consider consent or established business relationships.”); *Turza*, 728 F.3d at 684 (“Because Top of Mind omitted opt-out notices, it does not matter which recipients consented or had an established business relation with Turza.”).<sup>14</sup>

Fourth, if the Classes prevail on liability, the Court can decide classwide whether BLP’s violations were “willful or knowing” and, if so, whether to increase the automatic \$500 per-violation damages. The Eleventh Circuit held in *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1106–07 (11th Cir. 2015), that a “willful or knowing” violation requires “the violator to know he was performing the conduct that violates the statute.”

BLP claims it believed it was sending faxes to persons who had “opted in” to receive faxes in general, but not advertisements from BLP specifically. (Order, Doc. 167 at 14). Assuming that is true, it simply means BLP thought it had *implied* permission, not “express” permission. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd 3787, 3812 ¶ 45 (Apr. 6, 2006) (express permission is “a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements *from that company or organization*”) (emphasis added); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 484, 497 (W.D. Mich. 2014) (permission was at best “indirect,” and not *express*, where plaintiff gave fax number to American Medical Association, which then sold lists of numbers to third parties).

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<sup>14</sup> *Sarris* did not address this issue because the faxes were sent before the 2006 effective date of the opt-out notice regulations, which were issued in the same FCC order promulgating the definition of “sender.”

Moreover, this Court held at summary judgment that there is “ample evidence” BLP “decided to turn a blind eye” to its violations, “hiding behind a promise of indemnity.” (Order, Doc. 167 at 15–16). Regardless whether BLP had actual knowledge it was violating the TCPA, or mistakenly believed it was legal to send faxes with implied permission, or simply did not want to know the truth, the Court can decide whether the violations were “willful or knowing” classwide. The question has nothing to do with particular class members.

TCPA Defendants sometimes argue individualized questions predominate over whether each class member remembers receiving the fax or whether it printed from the class member’s fax machine. The Eleventh Circuit eliminated these arguments in *Sarris*, holding there was no requirement that the fax be “printed or seen by” the plaintiff where the transmission logs showed “that the fax information was successfully transmitted by [the fax broadcaster’s] fax machine and that the transmission occupied the telephone line and fax machine of [the plaintiff] during that time,” which is all that is necessary to establish a TCPA violation. *Sarris*, 781 F.3d at 1252.

In sum, the common questions of (1) whether the faxes are advertisements, (2) whether BLP is the “sender,” (3) whether the opt-out notice is non-complaint, and (4) whether BLP’s violations were “willful or knowing” predominate. There are *no* individualized issues. The Court should hold Rule 23(b)(3) predominance satisfied and proceed to the “superiority” prong.

**B. A class action is “superior” to the alternatives.**

“Superiority” addresses “the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs.” *Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004). Courts have consistently found a class action the superior way to resolve TCPA claims and deter unlawful fax advertising. *See Sarris*, 311 F.R.D. at 299 (“[A]ll of the faxes at issue were sent to Florida-specific zip codes and the prevalence of class-wide issues suggests that a class action would be the superior method.”); *Doctor Diabetic*, 2014 WL

7366255, at \*9 (“Congress expressly created the TCPA as a ‘bounty’ statute to increase the incentives for private plaintiffs to enforce the law.”); *C-Mart*, 299 F.R.D. at 691 (noting the “large number of claims, along with the relatively small statutory damages”); *A Aventura*, 2013 WL 3463489, at \*4; *Jay Clogg Realty Grp., Inc. v. Burger King Corp.*, 298 F.R.D. 304, 310 (D. Md. 2014) (class action more effective to eliminate “scourge” of unsolicited faxes); *Critchfield Physical Therapy v. Taranto Grp., Inc.*, 263 P.3d 767, 778 (Kan. 2011) (denial of certification would “frustrate the intent of the TCPA” and “protect junk fax advertisers from liability”).

Rule 23(b)(3) states that relevant factors in determining superiority include (1) class members’ interests in pursuing individual actions, (2) any existing individual litigation, (3) judicial efficiency, and (4) the “likely difficulties in managing a class action.” Rule 23(b)(3)(A)–(D). Here, class members have little incentive to sue individually, there are no existing individual lawsuits, and judicial efficiency is best served by adjudicating all claims in one proceeding.

The fourth factor, “manageability,” requires balancing “the likely difficulties in managing a class action” against the “countervailing interests” in a class action, such as the deterrent purpose of the underlying statute. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015). The Eleventh Circuit holds manageability “will rarely, if ever, be in itself sufficient to prevent certification of a class,” and “where a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions.” *Klay*, 382 F.3d at 1272–73. Manageability typically concerns three categories: “potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages.” *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir. 1990). None of these concerns is present here.

First, there will be no unusual complications in providing class notice. Rule 23(c)(2) requires only the “best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) (noting “even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice” and collecting cases); *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014) (affirming class and individual notice sent to target fax numbers, holding notice “need not be perfect, but simply ‘the best notice that is practicable under the circumstances’”).

Pursuant to Local Rule 4.04(b), Plaintiffs suggest the best and most cost-effective notice under the circumstances is a combination of fax, mail, and publication notice in substantially the form of Exhibit 13. (*See, e.g., Sarris*, No. 12-cv-80178, Order on Class Notice & Opt-Out Date, Doc. 134 (Oct. 22, 2015)). Plaintiff proposes disseminating notice by (1) faxing the notice to the numbers targeted in the broadcasts, (2) for any numbers to which the notice is not successfully transmitted after three attempts, mail notice using addresses associated with the subscriber of the target telephone number,<sup>15</sup> and (3) given the geographically limited nature of the classes, publication notice in a major Tampa newspaper, such as the Tampa Bay Times.

Second, there will be no complications in calculating damages, since the TCPA is “relatively straightforward” in providing a fixed amount of statutory damages per violation. *C-Mart*, 299 F.R.D. at 692 (holding “the Court cannot see how it would become complicated” to calculate statutory damages in TCPA fax class action).

---

<sup>15</sup> Biggerstaff explains that subscriber names and addresses can be obtained, if necessary, “given that the numbers in this case are all in a small geographic region which is served by a single incumbent carrier (AT&T).” (Biggerstaff Supp. Report ¶ 13).

Third, there will be no complications in distributing damages. Since the TCPA provides statutory damages, Plaintiffs will seek an “aggregate award.” *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003). In *Allapattah*, 333 F.3d at 1258, n.13, the Eleventh Circuit declined to allow an aggregate award in an antitrust class action where actual damages varied widely by class member. *Id.* The Eleventh Circuit distinguished *Six Mexican Workers*, 904 F.2d at 1306–07, where the Ninth Circuit affirmed an aggregate statutory-damages award for a class of undocumented workers, the majority of whom could not be located, holding that “where the statutory objectives include enforcement, deterrence or disgorgement,” a class action “may be the ‘superior’ and only viable method to achieve those objectives, even despite the prospect of unclaimed funds,” with a cy pres “distribution of unclaimed funds to indirectly benefit the entire class.” *Id.* The Eleventh Circuit also distinguished *Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977), *aff’d* 444 U.S. 472 (1980), where “the precise aggregate damages of the class could be ascertained easily by a simple mathematical calculation.” *Id.*

As in *Six Mexican Workers*, this case involves statutory damages with a deterrent purpose, and as in *Van Gemert*, the aggregate award can be determined through “simple mathematical calculation” by multiplying the number of violations found by the jury by \$500 (or whatever increased amount the Court awards if it finds the violations willful or knowing). Whatever money remains in the fund after deducting attorney fees and expenses and paying class claims can be distributed via cy pres. *Six Mexican Workers*, 904 F.2d at 1303–04; *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (“In a class action the reason for a remedy modeled on cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds,” especially in cases involving statutory damages, which have an inherent “deterrent objective.”).

BLP may complain that its potential liability is substantial, with 343,122 faxes translating to \$171,561,000 at \$500 per fax.<sup>16</sup> But the magnitude of the exposure does not affect superiority. *See Klay*, 382 F.3d at 1274 (“It would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous.”). In *Doctor Diabetic*, 2014 WL 7366255, at \*9–10, the court held a class was superior under *Klay*, rejecting the “ruinous liability” argument because the TCPA “reflects Congress’s judgment that defendants should face \$500 in liability for each fax advertisement that fails to include an opt-out notice.” *See also Manno v. Healthcare Rev. Recovery Grp., LLC*, 289 F.R.D. 674, 681–82 (S.D. Fla. 2013) (TCPA class superior under *Klay*, and “larger” liability does not mean “disproportionate,” where Congress has determined the “proportionate and appropriate” damages)

BLP is worth approximately \$1.5 billion, with annual revenue of \$313 million and \$55.2 million in operating income. Forbes.com, *The Business of Football*, <http://www.forbes.com/teams/tampa-bay-buccaneers/> (last visited Mar. 24, 2016). BLP generated substantial revenue from the fax advertisements giving rise to this action (*see, e.g.*, BLP00676), and it should not be permitted to avoid the consequences.

### **Conclusion**

For the foregoing reasons, the Court should certify Classes A, B, and C, appoint Plaintiffs as class representatives, appoint A+W class counsel and Michael Addison co-class counsel, approve class notice substantially in the form of Exhibit 13, and set the case for trial.

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<sup>16</sup> Damages are actually per “violation” of the regulations, not per fax. *Lary*, 780 F.3d at 1106.

Respectfully submitted,

s/Glenn L. Hara

Glenn L. Hara (pro hac vice)

Ryan M. Kelly

Florida Bar No. 90110

**ANDERSON + WANCA**

3701 Algonquin Rd., Suite 500

Rolling Meadows, IL 60008

Tel: (847) 368-1500

Fax: (847) 368-1501

Email: ghara@andersonwanca.com

Michael C. Addison

Florida Bar No. 0145579

**ADDISON & HOWARD, P.A.**

400 N. Tampa St., Suite 1100

Tampa, FL 33602-4714

Tel: (813) 223-2000

Fax: (813) 228-6000

Email: m@mcalaw.net

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 25, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the persons listed below:

Mark S. Mester  
Kathleen P. Lally  
Latham & Watkins LLP  
330 North Wabash Avenue, Suite 2800  
Chicago, IL 60611  
Telephone: 312/876-7700  
Facsimile: 312/993-9767  
[mark.mester@lw.com](mailto:mark.mester@lw.com)  
[kathleen.lally@lw.com](mailto:kathleen.lally@lw.com)

Barry A. Postman  
Justin C. Sorel  
Cole, Scott & Kissane, P.A.  
222 Lakeview Avenue, Suite 120  
West Palm Beach, FL 33401  
Telephone: 561/383-9200  
Facsimile: 561/683-8977  
[barry.postman@csklegal.com](mailto:barry.postman@csklegal.com)  
[justin.sorel@csklegal.com](mailto:justin.sorel@csklegal.com)

David S. Cohen  
Buccaneers Limited Partnership  
One Buccaneer Place  
Tampa, FL 33607  
Telephone: 813/870-2700  
Facsimile: 813/554-1351  
[dcohen@buccaneers.nfl.com](mailto:dcohen@buccaneers.nfl.com)

David C. Borucke  
Cole, Scott & Kissane, P.A.  
4301 West Boy Scout Blvd., Suite 400  
Tampa, FL 33607  
Telephone: 813/289-9300  
Facsimile: 813/286-2900  
[david.borucke@csklegal.com](mailto:david.borucke@csklegal.com)

s/Glenn L. Hara

---

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

CIN-Q AUTOMOBILES, INC. and MEDICAL &	)	
CHIROPRACTIC CLINIC, INC., individually and as	)	
representatives of a class of similarly-situated persons,	)	
	)	
Plaintiffs,	)	Civil Action No.:
	)	8:13-CV-01592-AEP
v.	)	
	)	
BUCCANEERS LIMITED PARTNERSHIP and	)	
JOHN DOES 1-10,	)	
	)	
Defendants.	)	

**PLAINTIFFS' APPENDIX OF EXHIBITS TO MOTION FOR CLASS CERTIFICATION**

1. Deposition of Matthew Kaiser (w/o exhibits)
2. BLP Resp. First. Req. Admissions
3. Compilation of BLP Documents Produced in Discovery
4. Expert Report of Robert Biggerstaff
5. Declaration of Robert Biggerstaff
6. Supplemental Report of Robert Biggerstaff
7. Declaration of Ian Jenkins
8. Deposition of Ian Jenkins (w/o exhibits)
9. Deposition of Craig Cinque (w/o exhibits)
10. Deposition of Michelle Zakrzewski (w/o exhibits)
11. Firm Resume of Anderson + Wanca
12. Brief Biography of Michael C. Addison
13. Proposed Class Notice

**EXHIBIT B**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

CIN-Q AUTOMOBILES, INC.	)	Case No.
and MEDICAL & CHIROPRACTIC	)	8:13-cv-1592-17AEP
CLINIC, INC., Florida	)	
corporations, individually	)	
and as the representative of	)	
a class of similarly-situated	)	
persons,	)	
	)	
Paintiffs,	)	
	)	
vs.	)	
	)	
BUCCANEERS LIMITED PARTNERSHIP	)	
and JOHN DOES 1-10,	)	
	)	
Defendants.	)	
	)	

---

VIDEOTAPED DEPOSITION OF MATTHEW KAISER  
LOS ANGELES, CALIFORNIA  
TUESDAY, MARCH 25, 2014

REPORTED BY:  
SYLVIA POLLICK  
CSR #1826, RMR, CRR

Page 2

1 VIDEOTAPED DEPOSITION OF MATTHEW KAISER, taken on  
 2 behalf of the Plaintiffs, at 5757 West Century  
 3 Boulevard, Seventh Floor, Los Angeles,  
 4 California, on Tuesday, March 25, 2014, at  
 5 9:19 a.m., before Sylvia Pollick, CSR #1826,  
 6 RMR, CRR, pursuant to Notice.  
 7  
 8  
 9 APPEARANCES OF COUNSEL:  
 10  
 11 FOR THE PLAINTIFFS:  
 12 Anderson & Wanca  
 13 BY: Ryan M. Kelly, Esq.  
 14 Ross M. Good, Esq.  
 15 3701 Algonquin Road  
 16 Suite 760  
 17 Rolling Meadows, Illinois 60008  
 18 Telephone: (847) 368-1500  
 19  
 20 Addison & Howard, P.A.  
 21 BY: Michael C. Addison, Esq.  
 22 400 North Tampa Street  
 23 Suite 100  
 24 Tampa, Florida 33602  
 25 (813) 223-2000  
 [Present telephonically]

21 FOR THE WITNESS AND THE DEFENDANTS:  
 22 Law Offices of  
 23 Cole, Scott & Kissane, P.A.  
 24 BY: Barry A. Postman, Esq.  
 25 1645 Palm Beach Lakes Boulevard  
 2nd Floor  
 West Palm Beach, Florida 33401  
 (561) 366-4700

Page 3

1 APPEARANCES OF COUNSEL CONTINUED:  
 2  
 3 ALSO PRESENT:  
 4 Tampa Bay Buccaneers  
 5 BY: David S. Cohen, Esq.  
 6 General Counsel  
 7 One Buccaneer Place  
 8 Tampa, Florida 33607  
 9 Telephone: (813) 870-2700  
 10  
 11 THE VIDEOGRAPHER:  
 12 BY: Spencer Benveniste  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

Page 4

1 I N D E X  
 2  
 3  
 4 WITNESS EXAMINATION PAGE  
 5 Matthew Kaiser By Mr. Kelly 11  
 6 Afternoon Session 204  
 7  
 8 E X H I B I T S  
 9 PLAINTIFFS': PAGE  
 10 1 E-mail from Sales at FaxQom.com 64  
 11 dated January 23, 2009  
 12 BLP 000001  
 13 2 E-mail from Sales at FaxQom.com 98  
 14 dated June 16, 2009  
 15 BLP 000010  
 16 3 E-mail dated June 24, 2009 from 132  
 17 Matt Kaiser to sales@faxqom.com  
 18 BLP 000011  
 19 4 E-mail dated June 10, 2010 from 144  
 20 sales@faxqom.com to Matt Kaiser  
 21 5 E-mail dated August 3, 2009 from 151  
 22 Matt Kaiser to Manny Alvare, etc.  
 23 BLP 000066  
 24 6 Two checks, CinQ001914 161  
 25 ///

Page 5

1 I N D E X  
 2 (Continued)  
 3  
 4 E X H I B I T S  
 5 PLAINTIFFS': PAGE  
 6 7 E-mail from Matt Kaiser 164  
 7 to sales@faxqom.com, dated  
 8 August 13, 2009, etc.  
 9 BLP 000086 - BLP 000091  
 10 8 2010 Group Ticket Order Form, etc. 171  
 11 9 E-mail dated August 11, 2009 212  
 12 to FaxQom from Matt Kaiser  
 13 BLP 000082  
 14 10 E-mail dated September 1, 2009 to 246  
 15 FaxQom from Matt Kaiser to FaxQom  
 16 11 Letter dated August 20, 2009, 249  
 17 from the Law Offices of Phyllis J.  
 18 Towzey to Brian Ford  
 19 12 Letter dated December 16, 2009 259  
 20 to Manny Alvare from person  
 21 complaining of receiving faxes  
 22 13 Letter from Ms. Towzey to Steve 263  
 23 Simms, dated September 11, 2009  
 24 ///  
 25 ///

1 I N D E X  
 2 (Continued)  
 3  
 4 E X H I B I T S  
 5 DEFENDANTS': PAGE  
 6 A Full set of all of the documents 274  
 7 sent to Plaintiffs last night,  
 8 March 24, 2014  
 9  
 10 INFORMATION REQUESTED  
 11 (None)  
 12  
 13 QUESTIONS INSTRUCTED NOT TO ANSWER  
 14 Page Line  
 15 112 16  
 16 120 2  
 17 210 3  
 18 211 15  
 19 214 1  
 20 215 7  
 21 215 15  
 22 216 4  
 23 217 11  
 24 219 18  
 25 223 25

1 LOS ANGELES, CALIFORNIA  
 2 TUESDAY, MARCH 25, 2014  
 3 9:19 A.M.  
 4 MR. POSTMAN: We're here today for  
 5 Mr. Kaiser's deposition. He's being produced as the  
 6 30(B)(6) witness. We had received a Notice with 52  
 7 different subject matters that the Plaintiff has  
 8 asked us to produce a witness to testify on behalf  
 9 of. He is that person.  
 10 I object generally, as I've said to  
 11 Counsel, to the concept of there being a 30(B)(6)  
 12 with 52 different subject matters, but in the effort  
 13 of cooperation, in an effort to try to resolve  
 14 differences without having court intervention,  
 15 Mr. Kaiser is being produced as that person.  
 16 We are not waiving our right to object to  
 17 the effort of having 52 different subject matters  
 18 being a part of a 30(B)(6). But having said that,  
 19 he's here to testify.  
 20 Second thing I wanted to comment on the  
 21 record is I sent Counsel an e-mail last night. In  
 22 my meeting with Mr. Kaiser I was a little concerned  
 23 that perhaps not all of the e-mails were produced.  
 24 So I wanted to give them a copy of a complete set of  
 25 the documents. I e-mailed it last night. I have an

1 I N D E X  
 2 (Continued)  
 3  
 4 QUESTIONS INSTRUCTED NOT TO ANSWER  
 5 Page Line  
 6 232 14  
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1 e-mail record of the time it was sent.  
 2 But I also indicated in an e-mail that I  
 3 would bring a hard copy of the documents and attach  
 4 it as an exhibit. If either of you want the hard  
 5 copy -- Ross, you indicated you printed it out -- I  
 6 have a copy here for you, and I will attach it as an  
 7 exhibit when I question the witness. If you need to  
 8 see this copy, I'm offering it to you. I wanted to  
 9 give you as much notice as I had prior to the depo  
 10 so you could have those documents.  
 11 Having said that, we're ready to proceed.  
 12 MR. KELLY: Okay. Just in response, we  
 13 did receive the e-mails or the documents that were  
 14 attached to the e-mail. There are new e-mails that  
 15 were not previously produced that should have been  
 16 produced. You know, I'm just going to keep the  
 17 deposition open for us to review those e-mails and  
 18 attachments and to ask any questions that we may  
 19 have regarding the new production.  
 20 MR. POSTMAN: So just so you understand, we  
 21 don't believe you have the right to keep it open. I  
 22 understand that you're saying that, and I'm letting  
 23 you know that our position is you can't. But I  
 24 wanted you to have them, and you have had them in  
 25 advance. If you feel you need to take a break to

1 review them, we're happy to let you take a break.  
2 **MR. KELLY:** Okay. And we do have Mike on  
3 the phone. You know that.  
4 **THE VIDEOGRAPHER:** We're on the record.  
5 The time is 9:22 a.m. The date is March 25, 2014.  
6 This is the video deposition of Matthew Kaiser,  
7 Volume I, in the matter of CIN-Q Automobiles, Inc.,  
8 et al., versus Buccaneers Limited Partnership,  
9 et al., in the United States District Court, Middle  
10 District of Florida, Tampa Division, Case No.  
11 8:13-cv-1592-17AEP. This deposition is being held  
12 at the offices of L.A. Reporters.  
13 My name is Spencer Benveniste from L.A.  
14 Reporters, with offices located at 5757 Century  
15 Boulevard, Seventh Floor, Los Angeles, California.  
16 This is the start of Volume I, Tape No. 1.  
17 Counsel, if would you introduce yourselves  
18 and state your affiliations, please.  
19 **MR. KELLY:** Ryan Kelly and Ross Good from  
20 Anderson & Wanca representing the plaintiffs.  
21 **MR. POSTMAN:** Mike, do you want to  
22 introduce yourself?  
23 **MR. ADDISON:** Michael Addison of the firm  
24 of Addison & Howard, P.A., in Tampa, representing  
25 CIN-Q Automobiles.

1 She is going to take down what people say in the  
2 room here today. She'll also take down anything  
3 that Mr. Addison says over the telephone.  
4 Keep your answers out loud. Don't  
5 shrug your shoulders, nod your head to any of my  
6 questions, because the court reporter only takes  
7 down what people say.  
8 Do you understand that?  
9 **A Understood.**  
10 Q Allow me to finish asking a question before  
11 you start giving an answer to it. That way we're  
12 not talking over each other, and the court reporter  
13 can take down my full question and your full answer.  
14 Okay?  
15 **A Sounds good.**  
16 Q If you don't understand a question of mine,  
17 let me know. I'll be happy to rephrase or restate  
18 any question. But if you do give an answer to a  
19 question that I did ask, I'm going to assume that  
20 you understood the question. Is that fair?  
21 **A That's fair.**  
22 Q If you need to take a break at any time,  
23 just answer any question that's currently pending.  
24 Okay?  
25 **A Understood.**

1 **MR. POSTMAN:** Barry Postman from Cole,  
2 Scott & Kissane, as attorney for the witness, as  
3 well as the Buccaneers Limited Partnership.  
4 And joining with me is my client, David  
5 Cohen, general counsel for the Tampa Bay Buccaneers.  
6 **THE VIDEOGRAPHER:** Will the court reporter  
7 please swear in the witness.  
8 **THE REPORTER:** Mr. Kaiser, would you raise  
9 your right hand, please.  
10 Do you solemnly state the testimony you are  
11 about to give in your deposition will be the truth,  
12 the whole truth, and nothing but the truth?  
13 **THE WITNESS:** I do.  
14 **THE REPORTER:** Thank you.  
15  
16 MATTHEW KAISER,  
17 having been duly administered an oath  
18 in accordance with CCP 2094, was  
19 examined and testified as follows:  
20  
21 **EXAMINATION**  
22 **BY MR. KELLY:**  
23 Q Can you state your name, please.  
24 A **Matthew Kaiser.**  
25 Q Mr. Kaiser, there's a court reporter here.

1 Q All right. You're here as the Tampa Bay  
2 Buccaneers' Rule 30(B)(6) witness?  
3 **A Correct.**  
4 Q And you understand as the Rule 30(B)(6)  
5 witness for the Tampa Bay Buccaneers any testimony  
6 you're giving would bind the corporation.  
7 Do you understand that?  
8 **A Understood.**  
9 Q And the corporation is called Buccaneers  
10 Limited Partnership. That's your understanding?  
11 **A Yes.**  
12 Q And you're here as the Rule 30(B)(6) for  
13 the Buccaneers Limited Partnership; correct?  
14 **A Correct.**  
15 Q Are you currently employed?  
16 **A I am.**  
17 Q By whom?  
18 **A The Tampa Bay Buccaneers, Buccaneers**  
19 **Limited Partnership.**  
20 Q And if I refer to "Tampa Bay" or the  
21 "Buccaneers," you'll understand that I'm actually  
22 referring to the Buccaneers Limited Partnership?  
23 **A Okay.**  
24 Q And how long have you worked for the  
25 Buccaneers?

1 A **13 years.**  
2 Q So you first started in 2001?  
3 A **2001, correct, May.**  
4 Q Now you live in California?  
5 A **I do.**  
6 Q And how long have you lived in California?  
7 A **Since August 2002. So coming up on 12**  
8 **years.**  
9 Q So where did you live in 2001?  
10 A **In Tampa.**  
11 Q Are you originally from Tampa?  
12 A **I'm not, no.**  
13 Q Where did you grow up?  
14 A **I grew up in Dallas.**  
15 Q And when did you move to Tampa?  
16 A **1996, I believe.**  
17 Q Where did you go to high school?  
18 A **Central High School in Brooksville,**  
19 **Florida. That was for my junior and senior year.**  
20 Q Did you go to college?  
21 A **I did.**  
22 Q Where did you go to college?  
23 A **University of South Florida.**  
24 Q And that's in Tampa; right?  
25 A **In Tampa; correct.**

1 Q Let's talk about 2001.  
2 A **It was also referred to as "One Buccaneer**  
3 **Place." It was the old headquarters, which has**  
4 **since moved.**  
5 Q And where was that located? Was that by  
6 the stadium?  
7 A **It was by the airport, off of West Shore**  
8 **Boulevard, I believe. It was the original.**  
9 Q All right. And then where did the  
10 Buccaneers move after that?  
11 A **I want to say the physical address is 3101**  
12 **Martin Luther King, which is on -- close to the**  
13 **stadium.**  
14 Q And that's where it is right now?  
15 A **Correct.**  
16 Q And do you know when that office moved?  
17 A **I believe it was 2004.**  
18 Q All right. So in 2001 you were hired.  
19 What was your job title?  
20 A **Acquisitions manager.**  
21 Q And who was your immediate supervisor?  
22 A **Ed Glazer.**  
23 Q What did you do as acquisitions manager?  
24 A **We would source commercial real estate,**  
25 **shopping centers, to purchase on behalf of First**

1 Q And what did you study there?  
2 A **Economics and international studies.**  
3 Q And you got a degree; correct?  
4 A **Correct.**  
5 Q And where did you work coming out of  
6 college?  
7 A **Immediately I took a position with the**  
8 **SunTrust Bank.**  
9 Q Where was that?  
10 A **It was in Downtown Tampa.**  
11 Q And what did you do for SunTrust?  
12 A **I forget the exact title. Kind of a**  
13 **Tele-Banker, an account representative in the lobby.**  
14 Q And then where did you work after that?  
15 A **The Tampa Bay Buccaneers.**  
16 Q And that was in 2001; correct?  
17 A **Correct.**  
18 Q All right. And you worked -- did you work  
19 at the Tampa Bay location for the Buccaneers in  
20 2001?  
21 A **I did.**  
22 Q And did they have a corporate office there?  
23 A **Correct.**  
24 Q And where is the corporate office?  
25 A **The former one or the --**

1 **Allied Corporation.**  
2 Q What is First Allied Corporation?  
3 A **It's a company owned -- a corporation owned**  
4 **by the Glazer family.**  
5 Q Okay. Were you being paid by the  
6 Buccaneers in 2001?  
7 A **I was.**  
8 Q Have you always been paid by the  
9 Buccaneers?  
10 A **I have.**  
11 Q Have you ever worked for First Allied  
12 Corporation?  
13 A **I do work with First Allied Corporation.**  
14 Q You're just not paid by them?  
15 A **Correct.**  
16 Q How long were you the acquisitions manager?  
17 A **Three or four years.**  
18 Q So about 2005?  
19 A **Yes, maybe 2005, when I was promoted at**  
20 **that point.**  
21 Q All right. Well, you moved to California  
22 in August of 2002; is that right?  
23 A **Correct.**  
24 Q And you still did work as acquisitions  
25 manager?

1 A Correct.

2 Q Did you work in an office in California

3 when you moved?

4 A I did.

5 Q What was the office or where was the

6 office?

7 A It was 9601 Wilshire Boulevard. That was

8 in Beverly Hills.

9 Q And is that a First L.A. Corporation

10 office?

11 A No. It was an Ed Glazer office.

12 Q How did you come to know Ed Glazer?

13 A I think the first time I met him was

14 through an interview that I had with him, which

15 was --

16 Q Back in 2001?

17 A Back in -- 2000, I believe. Maybe it was

18 early 2001.

19 Q Do you still work at the Wilshire Boulevard

20 location?

21 A I don't. We've moved offices.

22 Q And where is the new office?

23 A It's in Century City. The address is

24 10250 Constellation Boulevard, and that's L.A.

25 Q And when did you move to that office

1 A Correct.

2 Q How long did you hold the job title of

3 vice president of acquisitions?

4 A I still currently hold it.

5 Q And how about director of New Business

6 Development?

7 A I still currently hold it.

8 Q And currently your immediate supervisor is

9 Ed Glazer?

10 A Correct.

11 Q Where does Ed Glazer live?

12 MR. POSTMAN: Well, are you asking for his

13 address or a general location?

14 MR. KELLY: Just general location.

15 Q Is he in Tampa or California?

16 A He's here in California.

17 Q Has he always maintained a residence in

18 California?

19 A Yes.

20 Q Ed Glazer has worked for the Tampa Bay Bucs

21 since 2001?

22 A Correct.

23 Q Has he always worked at the California

24 locations?

25 A No. I believe he had a residence in Tampa

1 location?

2 A 2010.

3 Q All right. So you worked at the Wilshire

4 location from 2002 till about 2011?

5 A Correct.

6 Q All right. What's at the Century City

7 location? Is it just another Ed Glazer office?

8 A Yes. Just a primary office for Mr. Glazer

9 and employees of -- his employees.

10 Q Have you ever worked for any other

11 companies or been paid by any companies other than

12 Tampa Bay Buccaneers from 2001 through the present?

13 A No.

14 Q What was your next job title after

15 acquisitions manager?

16 A I was promoted to the vice president of

17 acquisitions.

18 Q And who was your immediate supervisor at

19 that time?

20 A Still Ed Glazer. And that was either on or

21 before the time that I also acquired the title of

22 director of New Business Development with the Tampa

23 Bay Buccaneers.

24 Q When you held that job title, your

25 immediate supervisor was also Ed Glazer?

1 when I was first hired and moved to California.

2 Q When did he move to California?

3 MR. POSTMAN: I think it's appropriate to

4 get some general background information.

5 MR. KELLY: That's what I'm doing.

6 MR. POSTMAN: Okay. But you're

7 borderlining on -- where he lives is completely

8 irrelevant to this case.

9 MR. KELLY: It's not. Since he's the

10 immediate supervisor of the witness, I need to find

11 out where he's working and at what location.

12 MR. POSTMAN: So you asked him where he

13 lived.

14 MR. KELLY: Yes. Where does he live? I'm

15 not asking for a specific address.

16 MR. POSTMAN: I'm going to let him answer

17 this question but --

18 MR. KELLY: Is it California or Tampa?

19 That's what I'm asking.

20 MR. POSTMAN: So I'll let him answer this

21 question, but to the extent you're getting into the

22 personal life of Mr. Glazer, we're going to have a

23 problem.

24 But this question I'll allow.

25 THE WITNESS: He resides in California.

1 I don't recall specifically when he moved to  
2 California. I was only working in Tampa a  
3 very short period before I, myself, moved to  
4 California --  
5 **BY MR. KELLY:**  
6 Q All right. And --  
7 A -- **which is where he was.**  
8 Q And he works for the Tampa Bay Buccaneers;  
9 correct?  
10 A **Correct. I'm not sure exactly what --**  
11 **chairman, owner.**  
12 Q Does he work full time for the Buccaneers  
13 from 2001 through the present?  
14 A **Yes.**  
15 Q All right. And where does he work when  
16 he's in California? Did he work at the Wilshire  
17 Boulevard location and the Constellation location?  
18 A **Correct.**  
19 Q Any other locations that he worked in  
20 in California?  
21 A **Not that I'm aware of.**  
22 Q So is he in California working at the  
23 offices full time?  
24 A **Yes. Yes, I'd say that's accurate.**  
25 Q So in 2009-2010, he was working in

1 **in California.**  
2 Q Well, let me ask you about the California  
3 location, 2009-2010 time frame.  
4 A **I'm going to say Chris Orpia was an**  
5 **acquisitions manager. Ryan Abelman was also an**  
6 **acquisitions manager, in addition to one of the**  
7 **executive assistants for Mr. Glazer. You said 2010**  
8 **time frame?**  
9 Q 2009-2010.  
10 A **Yes, I think it was just the two of them.**  
11 Q Did you have a secretary?  
12 A **I did not, no.**  
13 Q Did you have an office?  
14 A **I do.**  
15 Q All right. What were the names of some of  
16 the other acquisition managers in Tampa?  
17 A **Back in 2001, there was Sean Ward, Scott**  
18 **Henard, which is H-e-n-a-r-d, and Josh Granger.**  
19 Q Why did you move to California?  
20 A **I believe at that time Mr. Glazer decided**  
21 **that California was going to be his primary**  
22 **residence and made me an offer to move out.**  
23 **(Whereupon, a discussion was held off**  
24 **the record.)**  
25 ///

1 California?  
2 A **Correct.**  
3 Q And if you had a question about an issue  
4 relating to the Tampa Bay Buccaneers, you can call  
5 him up and ask him questions or see him; correct?  
6 A **Correct. We were in the same office. Or**  
7 **else I had people in Tampa that I could discuss or**  
8 **talk to.**  
9 Q All right. How many other people worked at  
10 the Wilshire Boulevard location that also worked for  
11 the Tampa Bay Buccaneers?  
12 A **Well, Mr. Glazer always had an assistant**  
13 **so I would consider that a -- you know, an employee**  
14 **of the Buccaneers. We had a couple of other**  
15 **acquisition managers from time to time that dealt**  
16 **really more specifically with First Allied.**  
17 Q What was Mr. Glazer's secretary's name?  
18 A **Actually, I don't remember. He's had a**  
19 **couple of different ones so -- there was one, Ryan**  
20 **Abelman. There was an Allen V. Goss. There was a**  
21 **Dennis Tanquito I think was his last name. I don't**  
22 **remember the pronunciation or...**  
23 Q All right. And how about the other  
24 acquisition managers?  
25 A **There were a few from Tampa and then also**

1 **BY MR. KELLY:**  
2 Q All right. I'm going to just give you some  
3 names and ask you what their job titles are and what  
4 they do for the Buccaneers.  
5 A **Okay.**  
6 Q Jason Layton.  
7 A **He's no longer with the Buccaneers.**  
8 Q When did he work for the Buccaneers?  
9 A **I believe he was hired before I was. I'm**  
10 **going to say he left -- I don't recall specifically.**  
11 **In the ballpark of a couple of years ago.**  
12 Q Was he the senior director of Sales and  
13 Advertising?  
14 A **That sounds correct.**  
15 Q Did he work at the Tampa Bay location?  
16 A **He did.**  
17 Q Are there any other locations where the  
18 front office worked or people that worked with Ed  
19 Glazer other than California and Tampa?  
20 A **Not that I'm aware of, no.**  
21 Q Do you know what Jason Layton specifically  
22 did in the 2009-2010 time frame?  
23 A **I think he was in charge of our sales as**  
24 **his title suggests, kind of overseeing sales.**  
25 Q And who was his immediate supervisor in

1 2009 and 2010?  
2 **A I believe it was Brian Ford.**  
3 Q Does Brian Ford still work at the  
4 Buccaneers?  
5 **A He does.**  
6 Q Is he the vice president of Business  
7 Administration?  
8 **A I believe he's been promoted to the C.O.O.**  
9 Q And what is C.O.O.?  
10 **A Chief operating officer.**  
11 Q What did Brian Ford do in 2009-2010?  
12 **A He may have been the vice president of --**  
13 Q Business Administration?  
14 **A -- Business Administration. I don't recall**  
15 **specifically what else.**  
16 Q What did he specifically do in the  
17 2009-2010 time frame?  
18 **A I think he was in charge of just overseeing**  
19 **the administration side of the organization. So**  
20 **nothing specific to football operations. More**  
21 **overseeing the different departments within the**  
22 **organization.**  
23 Q Jeffrey Ajluni, A-j-l-u-n-i. Do you  
24 recognize that name?  
25 **A I do.**

1 **time frame, if I recall.**  
2 Q So sometime in 2010?  
3 **A Yes.**  
4 Q Was he terminated?  
5 **A I don't recall.**  
6 Q Do you know one way or the other?  
7 **A I don't.**  
8 Q 2009-2010, specifically, what did  
9 Mr. Alvare do for the Buccaneers?  
10 **A He was the general counsel. You know, I**  
11 **can't say for certain how much involvement he had**  
12 **on the football side of the business; but on the**  
13 **administrative side, I know, in general, he would --**  
14 **you know, he would review certain documents and, you**  
15 **know, contracts and, you know, agreements that we**  
16 **had, just the general responsibilities of whatever**  
17 **general counsel would be.**  
18 Q Do you recognize the name Ben Milsom?  
19 **A I do.**  
20 Q And does he still work for the Buccaneers?  
21 **A He does.**  
22 Q Is his job title the director of Ticket  
23 Sales?  
24 **A Yes. And he's been promoted since to the**  
25 **chief ticketing officer, I believe.**

1 Q Does he still work for the Buccaneers?  
2 **A He does not.**  
3 Q When did he leave?  
4 **A I don't recall. I want to say it was prior**  
5 **to Jason Layton, not by much time. So let's kind of**  
6 **put it in maybe the two- to three-year time frame.**  
7 Q All right. And was he the director of  
8 Marketing and Business Development?  
9 **A That sounds correct.**  
10 Q Specifically, what did he do in 2009-2010?  
11 **A I believe that was his title, to go out**  
12 **and source partnership opportunities with corporate**  
13 **sponsors.**  
14 Q All right. Manny Alvare?  
15 **A I think it's Alvare (pronunciation).**  
16 Q Alvare (pronunciation). He was general  
17 counsel for the Buccaneers?  
18 **A That's correct.**  
19 Q And he no longer works for the Buccaneers?  
20 **A That's correct.**  
21 Q And when did he leave?  
22 **A You know, I want to put it in that same**  
23 **time frame. Perhaps prior to Jeff Ajluni.**  
24 Q Okay.  
25 **A Maybe put him in the three- to four-year**

1 Q Was his job title in 2009-2010 director of  
2 Ticket Sales?  
3 **A I can't confirm. I'm confident it probably**  
4 **was.**  
5 Q Specifically, what did Mr. Milsom do in  
6 2009-2010?  
7 **A He was -- I would say he would be in charge**  
8 **of kind of overseeing ticket operations, specific**  
9 **to ticket sales, as opposed to all general sales,**  
10 **for suites or club tickets or, you know, general**  
11 **tickets that we would sell.**  
12 Q All right. Darren Morgan -- do you  
13 recognize that name?  
14 **A I do.**  
15 Q And does he still work for the Tampa Bay  
16 Bucs?  
17 **A He does not.**  
18 Q Do you know when he last left?  
19 **MR. POSTMAN:** When he was last employed I  
20 think is what he's asking.  
21 **BY MR. KELLY:**  
22 Q Yes, when he was last employed.  
23 **A I want to put him in the 2010-2011**  
24 **time frame. Maybe 2011.**  
25 Q And, specifically, in 2009-2010, I have

1 here his job title is director of Creative Services;  
2 is that right?  
3 **A It sounds correct.**  
4 **Q** What did he do in 2009-2010?  
5 **A As a director of Creative Services I think**  
6 **he would be responsible for a lot of the graphic**  
7 **artwork that would go on Websites or different print**  
8 **materials perhaps that we would use.**  
9 **Q** And he worked at the Tampa Bay location?  
10 **A He did.**  
11 **Q** Okay. Who were the people at the Tampa Bay  
12 location that you worked more closely with in  
13 2009-2010?  
14 **A I would say the names that we just**  
15 **discussed. Brian Ford, one of those. There was a**  
16 **handful of just different people, kind of, you know,**  
17 **depending on whatever the projects or, you know,**  
18 **whatever I was working on, you know, at the time.**  
19 **MR. POSTMAN:** Don't cross your arms.  
20 **THE WITNESS:** Oh, sorry. A little more  
21 comfortable?  
22 **MR. POSTMAN:** Well, I want you to feel  
23 comfortable, but it looks better that way.  
24 **BY MR. KELLY:**  
25 **Q** For ticket sales did the Buccaneers have a

1 call center or people answering the phones?  
2 **A I believe we did, yes.**  
3 **Q** Is that in a department that the Buccaneers  
4 had?  
5 **A I believe it was a department under Ben**  
6 **Milsom.**  
7 **Q** Was the call center at the corporate  
8 location?  
9 **A Yes.**  
10 **Q** Was there somebody in charge of the call  
11 center other than Ben Milsom?  
12 **A I don't know exactly how the hierarchy of**  
13 **the call center was. The call center would have**  
14 **been overseen by either Ben Milsom or Jason Layton.**  
15 **There could have been a couple of other directors**  
16 **involved, overseeing different parts of the call**  
17 **center.**  
18 **Q** Have you ever heard of the name Alyssa  
19 Chinous (phonetic)?  
20 **A I have not.**  
21 **Q** Do you know of any of the people that  
22 worked at the call center?  
23 **A By name?**  
24 **Q** By name.  
25 **A I really can't -- I can't recall.**

1 **MR. POSTMAN:** Feel comfortable. That's the  
2 most important thing.  
3 **THE WITNESS:** Oh, I'm fine.  
4 **MR. POSTMAN:** Okay.  
5 **THE WITNESS:** I'm fine.  
6 **MR. POSTMAN:** If you need to cross your  
7 arms, you can, but --  
8 **THE WITNESS:** I switched my legs. That  
9 helps a little bit.  
10 **BY MR. KELLY:**  
11 **Q** All right. So if somebody would call  
12 877-649-BUCS, do you know who would answer that  
13 phone call?  
14 **A I don't know who would answer.**  
15 **Q** Would that go to the call center?  
16 **A I'm not sure.**  
17 **Q** Is the call center staffed all year round?  
18 **A I believe so. That would really be a**  
19 **question for Ben Milsom.**  
20 **Q** But I assume they added a few employees  
21 right before the season; is that your understanding?  
22 **A Not necessarily. I don't know if we hire**  
23 **people more seasonally, you know, than year round.**  
24 **Again, probably a better question for Ben Milsom.**  
25 **You know, the sales is really kind of a year-around**

1 **project.**  
2 **Q** The telephone number (813) 870-2700, do you  
3 recognize that phone number?  
4 **A I do.**  
5 **Q** And if someone called that number, who  
6 would answer or what department?  
7 **A I think that's just the general phone line**  
8 **for the Tampa Bay Buccaneers. So whoever was**  
9 **working, you know, at the general reception would**  
10 **answer that call.**  
11 **Q** Anyone else that we haven't mentioned that  
12 you worked with in 2009-2010?  
13 **MR. POSTMAN:** Object to the form.  
14 You can answer.  
15 **THE WITNESS:** There's just probably  
16 hundreds of people, to be honest, over the course of  
17 those two years that I've worked with. Specifically  
18 departments or within the Buccaneers organization or  
19 in my office or --  
20 **BY MR. KELLY:**  
21 **Q** Well, let me ask you this. In 2009-2010,  
22 you were an employee of the Buccaneers; correct?  
23 **A Correct.**  
24 **Q** And your immediate supervisor was Ed  
25 Glazer; correct?

1 **A Correct.**  
2 Q Now, I know you were the director of New  
3 Business Development in 2009-2010; correct?  
4 **A Correct.**  
5 Q Were you also the vice president of  
6 acquisitions at that time?  
7 **A I believe so. I don't remember**  
8 **specifically when that promotion came, but I believe**  
9 **it was in or around that time or prior to.**  
10 Q Is there an evaluation that is done by the  
11 Tampa Bay Buccaneers regarding your work?  
12 **A Not specific to mine that I'm aware of.**  
13 Q Are there any annual reviews or audits of  
14 your work?  
15 **A Not that I'm aware of.**  
16 Q Is there an employment file that relates to  
17 your work?  
18 **A I couldn't say if something's kept in**  
19 **Tampa. I'm confident there's a file with a drawer**  
20 **of everyone's name and, you know, information and**  
21 **stuff in it but --**  
22 Q Do the Buccaneers have a Human Resource  
23 Department?  
24 **A We do.**  
25 Q Who is in charge of the Human Resource

1 **A No.**  
2 Q Have you ever done any work in Tampa at  
3 that office?  
4 **A I have.**  
5 Q How much time did you spend in California  
6 as opposed to Tampa in 2009-2010?  
7 **A I would say the majority of the time is**  
8 **spent in California. Vast majority of the time; you**  
9 **know, 95 percent of the time.**  
10 Q On what different occasions would there be  
11 for you to travel to Tampa to do work?  
12 **A You know, it would really depend on really**  
13 **what we were working on at the time. It could be**  
14 **different events that are going on. It could be**  
15 **kind of in and around the season or games, perhaps,**  
16 **that I would fly into. I still have a lot of family**  
17 **in Tampa, so sometimes on vacations I would make**  
18 **it a point to go into the office for a day**  
19 **or two, you know.**  
20 Q In 2009-2010, did you have an office at the  
21 corporate headquarters at Tampa?  
22 **A I did not, no.**  
23 Q So where would you work?  
24 **A Just different offices or, you know, vacant**  
25 **cubicles or conference rooms I would sit in.**

1 Department?  
2 **A We just hired a gal. I don't remember --**  
3 **I believe her last name -- Christine Houston, I**  
4 **believe, is currently there. I believe that's**  
5 **correct. David could confirm.**  
6 Q And that person's in Tampa?  
7 **A Yes.**  
8 Q Have you ever been suspended from the  
9 Buccaneers?  
10 **A No.**  
11 Q Reprimanded from the Buccaneers?  
12 **A No.**  
13 Q And you've always worked full time?  
14 **A I have.**  
15 Q Is there a way to determine the hours that  
16 you worked for the Buccaneers in 2009-2010?  
17 **A I've always been a full-time employee.**  
18 Q Let me ask you this. Do you time in and  
19 time out?  
20 **A No, no. But I'm -- you know, I'm pretty**  
21 **punctual and, you know, adamant about being in the**  
22 **office at a certain time and not leaving, you know,**  
23 **before a certain time.**  
24 Q All right. So there's never been a problem  
25 with attendance at work at all?

1 Q Did you have a computer?  
2 **A I would usually bring my laptop.**  
3 Q In California, did you have a desktop  
4 computer?  
5 **A I do.**  
6 Q And did you send e-mails while you worked  
7 at the Tampa Bay Buccaneers?  
8 **A From that computer?**  
9 Q Yes, from that computer.  
10 **A Yes.**  
11 Q And what was your e-mail address?  
12 **A It was MKaiser. So first initial, last**  
13 **name, @BuccaneersNFL.com.**  
14 Q Do the e-mails have a different address?  
15 Were you also using the First Allied e-mail address?  
16 **A I do. I use that. That's actually my**  
17 **default e-mail address when I send e-mails out.**  
18 Q All right. And what's that e-mail address?  
19 **A It's the same. First initial, last name.**  
20 **So MKaiser@FirstAllied -- A-l-l-i-e-d -- corp --**  
21 **which is c-o-r-p -- .com.**  
22 Q So the First Allied e-mail address is your  
23 primary e-mail address?  
24 **A Primary, default. You know, when you go**  
25 **in to start an e-mail address, that's the one that**

1 pulls out.

2 Q And do you use any other e-mail addresses  
3 for work done for the Buccaneers?

4 A I don't currently, no.

5 Q What e-mail system do you use?

6 MR. POSTMAN: For the Buccaneers?

7 MR. KELLY: Well, no, him, personally in  
8 California.

9 MR. POSTMAN: If you're asking him his  
10 personal e-mail address, I'm not --

11 MR. KELLY: I'm not asking his personal  
12 e-mail. I said is it Outlook --

13 THE WITNESS: The e-mail that I currently  
14 use?

15 BY MR. KELLY:

16 Q Well, let's say 2009-2010.

17 A I don't recall if it was Outlook or exactly  
18 what it was then. I use MCmail now.

19 Q When did you first start using MCmail?

20 A I don't recall specifically. We actually  
21 kind of moved over from a PC to MC. So I don't  
22 recall specifically when that was, or if I continued  
23 to use Outlook on a Macintosh for awhile. But I use  
24 MCmail now, and I have, I'd say, for the last three  
25 or four years, at least, if not longer.

1 things or projects that I've worked on. So some  
2 folders I'd say are active and still get things  
3 filed into, and some are probably just a little bit  
4 older, just easy reference.

5 But the great thing about MCmail is you  
6 can -- you know, you can search different things  
7 or -- you know, by key words so you don't really  
8 have to archive a specific way.

9 Q Well, this case involves the allegation of  
10 sending unsolicited advertisements by fax. You  
11 understand that; right?

12 A I do.

13 Q And was there a specific name of the  
14 project that dealt with that work that was done?

15 A There's not a specific folder that I kept  
16 or have created.

17 Q Were you able to retrieve e-mails that  
18 related to the Buccaneers contracting to send  
19 advertisements by fax?

20 A The Buccaneers never -- well, I guess --  
21 yes. Yes, I'm going back, just doing the search for  
22 FaxQom or Steve Simms would -- you know, would  
23 provide certain -- you know, the e-mails or the  
24 correspondence, you know, that I had.

25 Q All right. And you did that search?

1 Q All right. Do you have your e-mails dating  
2 back to 2008?

3 A All of my e-mails?

4 Q Yes.

5 A I can't confirm that I have every e-mail  
6 back to 2008 but --

7 Q Do you have access to your e-mails going  
8 back to 2008?

9 A Yes, I have some that date back to 2008 or  
10 some that probably date back a little longer.

11 Q Do you archive your e-mails?

12 A I do.

13 Q And how do you archive your e-mails?

14 A I have folders under each of the e-mail  
15 addresses. So in MCmail you can just create a  
16 folder. So I would title it, you know, whatever I'm  
17 working on or -- you know, really, I guess kind of  
18 depending on the role or the responsibility. So  
19 there's folders called "Buccaneers" or folders  
20 called "First Allied" or -- you know.

21 Q Okay. So you wouldn't archive by year;  
22 you'd be archiving by different projects?

23 A Really different projects, or I'd say the  
24 subject of the project. So, you know, having been  
25 employed for 13 years, there's just a number of

1 A I have several times, yes.

2 Q All right. And you were able to find some  
3 e-mails -- correct? -- or at least you were able to  
4 find e-mails that you believe were responsive to  
5 your search terms; right?

6 A I would -- you know, I would take that a  
7 step further and I would say that I have probably  
8 located every piece of correspondence that -- you  
9 know, that I had with FaxQom and the majority of it  
10 so...

11 Q Well, did you use search terms, or did  
12 eyeball all of the e-mails back in 2009-2010?

13 A I don't remember specifically how I  
14 searched. I likely would have used the word  
15 "FaxQom," which would have resulted in certain  
16 things or "Steve Simms" or even an e-mail address,  
17 you know, at FaxQom to kind of see what -- you know,  
18 what would have come up.

19 Q Now, there were additional documents that  
20 were produced in this case just yesterday. I think  
21 most of them were from 2000- -- the new ones were  
22 from 2010. Is there a reason why you didn't  
23 retrieve those e-mails prior to the last few days?

24 MR. POSTMAN: Well, I'll answer that,  
25 in all fairness to the witness, not that it's

1 particularly relevant for him, but it may have  
2 been a switch when it went from one firm to the  
3 law firm handling the case. In all fairness to him,  
4 he produced them.

5 As I was going through them with him, I  
6 wasn't confident that you had seen everything and,  
7 as a courtesy, to make sure that you had seen  
8 everything, since they weren't Bates stamped --  
9 apparently, you hadn't seen them; I wanted you to  
10 have them.

11 But it had nothing to do with the witness  
12 not doing his job of properly producing them, I  
13 think, to the prior counsel. So it is what it is.  
14 But, in all fairness to this witness, it wasn't him  
15 that didn't properly produce it.

16 **MR. KELLY:** No, no. I'm not suggesting he  
17 did anything wrong. I just --

18 **MR. POSTMAN:** I just wanted you to know  
19 what happened.

20 **MR. KELLY:** Okay.

21 **MR. POSTMAN:** And I wanted the record to be  
22 clear that it's not his responsibility or it wasn't  
23 his fault.

24 **BY MR. KELLY:**

25 Q All right. There was a mention of a

1 **MR. POSTMAN:** To the extent that -- I know  
2 you're not going to do this, but to the extent you  
3 need to contact him, it obviously has got to come  
4 through me.

5 **MR. KELLY:** That's not the reason why I'm  
6 asking the question.

7 **MR. POSTMAN:** I just want to make sure that  
8 the record is clear.

9 **BY MR. KELLY:**

10 Q And is that a direct line?

11 A **It's a direct line to my office.**

12 Q Has that been your direct line since 2008?

13 A **Yes.**

14 Q Does your office have a fax machine?

15 A **We do. I believe our number -- our fax now  
16 goes into our e-mail, so I don't --**

17 Q I'll ask you about that next, but I guess  
18 my question is does the office have a stand-alone  
19 fax machine?

20 A **Yes. It's kind of an all-in-one machine.**

21 Q Is there a designated fax number to that  
22 machine?

23 A **For someone to send to?**

24 Q Or to receive.

25 A **Are you asking what my fax number is?**

1 previous counsel. Do you recognize the name of the  
2 previous counsel?

3 A **Which name?**

4 Q Well, Tim Hunt from Hill Ward?

5 A **I don't recall working with Tim.**

6 Q All right. The attorney for the Buccaneers  
7 is Barry Postman; is that right?

8 A **Correct.**

9 Q But there was a prior counsel that also  
10 represented the Buccaneers; correct?

11 A **I'm not sure to what extent, to be honest.  
12 If I could refer to them if -- by memory, I believe  
13 it was Hill, Ward, Henderson had some involvement,  
14 but to what extent I'm not sure, and individually  
15 who was working on it I couldn't tell you.**

16 Q You don't recognize any of the names  
17 from --

18 A **No.**

19 Q Okay. What's the phone number that you use  
20 at the California location?

21 A **For --**

22 Q Well, you have an office --

23 A **My primary telephone number?**

24 Q Yes.

25 A **(310) 275-8944.**

1 Q Well, I'm asking about --

2 A **I'll give it to you. I just -- I don't --  
3 and I think there's also an 800 number that goes  
4 directly into my e-mail.**

5 Q I'm going to ask you about that --

6 A **Okay.**

7 Q -- but I'm just asking you about the  
8 stand-alone fax machine at this point.

9 A **Well, it's not a stand-alone. It's kind of  
10 an all-in-one copier. So I can send faxes out. We  
11 get faxes on it.**

12 Q Okay. What's that number?

13 A **I believe (310) 275-8995. And the truth is  
14 I don't really use faxes very often anymore.**

15 Q I think I have that number as your MyFax  
16 account.

17 A **And that's the point I was making. The  
18 MyFax, I think, goes into your e-mail. So I don't  
19 know --**

20 Q Well, I'm asking you about the all-in-one  
21 machine that may receive faxes. Do you know the  
22 number for that machine?

23 A **Then I don't know. It would be that or --**

24 Q All right.

25 A **-- an 800 number, perhaps, that we set up**

1 **at some point. I'm really not sure.**

2 Q Okay. So you do receive faxes via e-mail;  
3 correct?

4 **A I do.**

5 Q And have you received faxes via e-mail  
6 since 2008?

7 **A I believe, yes. I still do.**

8 Q And has the software program been -- or  
9 strike that. Is the software program MyFax?

10 **A I don't know currently what we use. I**  
11 **think one of Mr. Glazer's assistants set it up at**  
12 **some point.**

13 Q Has it been the same software program since  
14 2008?

15 **A I don't know when it was set up. I think**  
16 **at one point the 310 was a hard fax line; so we**  
17 **would actually receive, you know, a piece of paper**  
18 **on a machine. I don't know when it was transferred**  
19 **over to the MyFax or whatever numbers at that point**  
20 **were added or even consolidated. I think we add**  
21 **a couple of different numbers, perhaps. We're such**  
22 **a -- you know, a small office. I don't -- you know,**  
23 **I don't -- they may have all been consolidated to a**  
24 **machine. I don't know.**

25 Q Do you still have access to any faxes that

1 **so --**

2 Q Okay. Because I read through the e-mails,  
3 and you gave the number (310) 275-8995 to Mr. Simms,  
4 and I think the reason why you did that is because  
5 you wanted to receive one of the faxes that were  
6 being sent.

7 **A Correct.**

8 Q So, in knowing that, does that jog your  
9 memory in receiving those faxes via a computer or a  
10 stand-alone fax machine?

11 **A I honestly don't recall.**

12 Q Do you know what company took out the  
13 (310) 275-8995 number? Would it be First Allied, or  
14 would it be the Buccaneers?

15 **A What do you mean? Took out as far as --**

16 Q Well, I guess somebody has to subscribe  
17 to that number. You had said it was Mr. Glazer's  
18 secretary or assistant. Do you know if, in  
19 contacting MyFax, the company that would be paying  
20 for the line would either be First Allied or the  
21 Buccaneers?

22 **A I couldn't tell you with certainty, but**  
23 **the numbers used on my business -- or both of my**  
24 **business cards -- or was at one point is a fax. So**  
25 **it's been used interchangeably with the Buccaneers**

1 you received in 2009-2010?

2 **A No, I don't believe so.**

3 Q Well, they would go to your e-mail;  
4 correct?

5 **A Well, I don't know when the switch-over**  
6 **happened. So any faxes that I have received, like**  
7 **in the last year, perhaps -- I really don't receive**  
8 **a lot of faxes so, to be honest, most of it's spam.**  
9 **So I would just delete it, as opposed to, you know,**  
10 **archive any fax that I would get today, unless it**  
11 **was legitimate, in which case I would, you know,**  
12 **forward to whatever folder or print out, perhaps.**

13 Q How can you tell a fax came to your e-mail?  
14 What would be the subject line?

15 **A I don't know specifically what it says. I**  
16 **think it may say "fax" or something in the "Subject"**  
17 **or whatever it does.**

18 Q Did you look for any faxes that you may  
19 have received in 2009-2010 relating to any of the  
20 issues in this case?

21 **A I did. And, again, I think at that**  
22 **point -- I believe at that point our telephone**  
23 **number or MyFax number, I should say, was still kind**  
24 **of a physical fax number. I don't know that we had**  
25 **converted it at that point to the digital e-mail**

1 **and First Allied.**

2 Q So you can't tell me who the subscriber to  
3 that number is?

4 **A Subscriber as far as who's paying the bill?**

5 Q Yes. Who's paying the bill or what name  
6 was given to MyFax to set up the account?

7 **A I don't know if they needed a company -- I**  
8 **don't recall because I didn't set it up. As far as**  
9 **who's paying for it, I couldn't tell you with**  
10 **certainty. Likely, the Buccaneers, but I couldn't**  
11 **tell you.**

12 **MR. POSTMAN:** Don't guess. If you don't  
13 know, don't guess.

14 **BY MR. KELLY:**

15 Q Do you maintain any paper files in your  
16 office relating to any of the issues in this case?

17 **A Not paper files, no.**

18 Q It's all electronic files?

19 **A It is.**

20 Q When you send an e-mail, do you print it  
21 out?

22 **A No, typically not.**

23 Q When you receive an e-mail, do you  
24 typically print it out?

25 **A Depends on the circumstance or, you know,**

1 **if it's something -- I follow up with them, kind of**  
2 **a creature of habit. So to print it out to me is**  
3 **kind of more of an action item. So it's something**  
4 **that has to be addressed, usually, when I print an**  
5 **e-mail out.**

6 Q Are there any documents that were printed  
7 out that relate to any of the issues in this case?

8 A Documents such as?

9 Q Well, any documents that may have been put  
10 in a paper file, like the indemnity agreement or  
11 anything like that?

12 A I don't believe so. I think it was all  
13 electronic, and once having an electronic record of  
14 something -- I don't say it's always the case but,  
15 you know, by having an electronic copy of something,  
16 sometimes having a physical copy -- unless there's a  
17 physical signature, you know, by both parties,  
18 that's different. That would usually be something I  
19 would hold onto. But --

20 Q Do you ever save any of the documents that  
21 were attachments to e-mails to the hard drive of  
22 your computer?

23 A I don't believe specifically saving it in  
24 a different area if it's already included in an  
25 e-mail.

1 Q Well, that's all right. I just wanted to  
2 ask generally. I think the e-mails said that the  
3 reports were going to be faxed to you.

4 Do you ever recall receiving any reports  
5 that were faxed to you?

6 A I do recall receiving a fax summary report.  
7 I can't remember exactly when it was, but I do --  
8 yes, I do remember receiving one -- requesting and  
9 receiving one from him.

10 Q And was that received by you by fax or by  
11 e-mail?

12 A I couldn't tell you. I don't recall.

13 Q All right. How many employees are at the  
14 California location? Actually, let me just make  
15 sure I have the California location correct, because  
16 you had moved to the Century City location, and I  
17 think you had said 2010?

18 A You know, it was actually -- probably more  
19 like 2012, I think.

20 Q Oh, okay. So I guess the issues involved  
21 in this case involve, like, 2009-2010. Do you agree  
22 with that?

23 A Yes.

24 Q So during that time frame you were at the  
25 Wilshire Boulevard location; correct?

1 Q All right. So all of the documents that  
2 you retrieved in this case came from your e-mails;  
3 correct?

4 A Yes.

5 Q All right. And you retrieved those from  
6 the Firstalliedcorp.com e-mail address?

7 A I believe it was all through them. I don't  
8 believe I had any e-mails through the Buccaneers  
9 directly to FaxQom, Steve Simms.

10 Q Did you look?

11 A I did, yes. The search on MCmail will  
12 actually search all of your different accounts. So,  
13 as I went through, I didn't see any through the  
14 Buccaneers.

15 Q All right. I read through the e-mails that  
16 Mr. Simms was to provide you with a report following  
17 a broadcast. Do you know what I'm referring to?

18 A It's something we had requested from him.

19 Q Yes. Did he ever provide you with those  
20 reports?

21 A Which? Do you have a copy of which  
22 reports?

23 Q Yes, I guess --

24 A I can think I have one look here  
25 (indicating).

1 A That's correct.

2 Q How many employees were also at the  
3 location?

4 A Sorry. I had moved to the Century City  
5 offices -- I had moved -- I was thinking. I'm  
6 sorry. What was your question?

7 Q So 2009-2010, how many employees were  
8 working at the Wilshire Boulevard location?

9 A I'd say three to five.

10 Q Okay.

11 A You know, depending on when during the  
12 time.

13 Q And if there was a computer problem at the  
14 office, who would generally handle that issue?

15 A It depends on the problem. You know, if it  
16 was more of an IT-network-related issue on a  
17 computer, we have people in Tampa, you know, that we  
18 can contact.

19 If it was specific, you know, to the  
20 computer itself or software, I think we're all  
21 pretty -- we're very resourceful. So I can't recall  
22 any specific issues or situations where we had to  
23 call or, you know, bring a third company or a third  
24 party or a different company in.

25 Q So you're not aware of any third-party

1 vendors that managed the e-mails or anything like  
2 that?  
3 **A For our e-mails?**  
4 Q Yes.  
5 **A No. Not during that time, no.**  
6 Q You had said that the Buccaneers had a IT  
7 Department in Tampa; is that right?  
8 **A We do, correct.**  
9 Q Who is responsible for the IT Department  
10 currently?  
11 **A We have a director of IT. I don't know if**  
12 **he's responsible for the entire department. His**  
13 **name is Ed Johnston.**  
14 Q In 2009-2010, if you had a problem  
15 receiving or sending e-mails, who would you call?  
16 **A It would probably be Ed Johnston.**  
17 Q And does he still work for the Buccaneers?  
18 **A He does.**  
19 Q Do you know if the e-mails that you receive  
20 in the First Allied e-mail address are backed up by  
21 the server in Tampa?  
22 **A I couldn't tell you.**  
23 Q Did you ask Mr. Johnston or anybody at the  
24 Tampa location to retrieve any of your e-mails from  
25 2009-2010?

1 server?  
2 **A I believe our server is through Tampa.**  
3 **I want to call it a kind of a virtual server. The**  
4 **acronym is escaping me, but I believe we're on their**  
5 **network.**  
6 Q When you say, "their network," you're  
7 referring to the Buccaneers?  
8 **A The same network; correct.**  
9 Q All right. And is that e-mail server  
10 housed within the Buccaneers' location, or does a  
11 third party manage it?  
12 **A It's within One Buc Place.**  
13 Q And Ed Johnston would have the best  
14 knowledge regarding that e-mail server?  
15 **MR. POSTMAN:** Object to the form.  
16 **THE WITNESS:** He would, yes. I believe  
17 he'd likely be the person who would know the most  
18 about it.  
19 **BY MR. KELLY:**  
20 Q Okay. Did you look anywhere else in order  
21 to retrieve any relevant documents for this case?  
22 **A I don't recall. You know, I can say with**  
23 **certainty the majority of the dialogue or the**  
24 **conversation was via e-mail and just being adamant**  
25 **and organized, you know, as I am and going through**

1 **A I don't recall doing so.**  
2 Q Was there ever a time that you needed to  
3 call Tampa to retrieve e-mails from years ago?  
4 **A Not that I recall.**  
5 Q Do you have an understanding that the IT  
6 Department in Tampa has access to your e-mails in  
7 2009-2010?  
8 **A I don't recall. I don't know if they do or**  
9 **what -- if they have access to only the Buccaneers**  
10 **or First Allied or if both. I don't know what**  
11 **server the different accounts are sitting on and,**  
12 **honestly, who manages the First Allied account. I'm**  
13 **not sure if it's managed in Tampa or managed by Ed**  
14 **Johnston.**  
15 Q Would the best person to ask would be Ed  
16 Johnston relating to the backing up of your e-mails?  
17 **MR. POSTMAN:** Object to the form.  
18 You can answer.  
19 **THE WITNESS:** I believe that's one of his  
20 responsibilities is to provide backup, you know, for  
21 the entire company. To what extent that includes  
22 e-mails and to what extent -- how long he keeps  
23 them, I don't know. You'd have to ask him.  
24 **BY MR. KELLY:**  
25 Q Does the California location have an e-mail

1 **and looking at the different documents, you know,**  
2 **since this case came up, it's consistently been the**  
3 **same documents. And I think the documents that are**  
4 **there really encompass -- gee, I'd say most of --**  
5 **you know, most of the dialogue between myself and**  
6 **Steve Simms.**  
7 Q Well, you say, "most." The other e-mails  
8 regarding the dialogue between you and Steve Simms,  
9 would they have been lost in some way?  
10 **MR. POSTMAN:** Object to the form.  
11 You can answer.  
12 **THE WITNESS:** I don't think anything was  
13 lost. You know, we're talking about e-mails from  
14 five years ago. So, I mean, the reality is if --  
15 you know if there was an e-mail or something that,  
16 you know, was not included, I don't have any  
17 knowledge of it. There's no other place that I  
18 would store them.  
19 And, again, having gone through the  
20 exercise of printing the e-mails out and reviewing  
21 the e-mails, I consistently came up with -- you  
22 know, with really the same -- the exact same  
23 documents and e-mails and correspondence.  
24 **BY MR. KELLY:**  
25 Q Well, in order to access the e-mails that

1 were produced in this case, did they need to be  
2 archived?  
3 **A I don't believe so. Again, a computer**  
4 **expert with MCmail, I believe you could just search**  
5 **and no matter where the e-mail is, as long as it**  
6 **hasn't been deleted from a server, it comes up, and**  
7 **it pops up, and it's a very quick and easy process.**  
8 Q Okay.  
9 **A You know, as opposed to the old way that**  
10 **Outlook was. You'd have to go through all your**  
11 **"sents" and I don't know -- sent e-mails. I don't**  
12 **know if there's a way to sort or -- I don't know how**  
13 **it was before but --**  
14 Q All right. Well, is there a possibility  
15 that the Tampa IT Department has e-mails that you  
16 weren't able to find?  
17 **MR. POSTMAN:** Form.  
18 **THE WITNESS:** I would doubt it. Again, I'm  
19 not sure exactly what the policy is as far as the  
20 e-mails that they hold onto or that they have.  
21 **BY MR. KELLY:**  
22 Q Well, assume they have all of the e-mails.  
23 **A And I think -- I believe the Buccaneers'**  
24 **Web mail could be managed by the NFL directly. That**  
25 **was a transition that happened.**

1 Mr. Simms?  
2 **A I don't recall.**  
3 Q Did Mr. Simms ever fax anything to you?  
4 **A I don't recall. You had asked about the**  
5 **report, how it was sent.**  
6 Q Yes. You said --  
7 **A I don't recall if he sent anything. I**  
8 **don't see any reason that I had to fax him.**  
9 Q Do you recall ever retrieving any documents  
10 coming from your MyFax account?  
11 **A You know, I really don't recall.**  
12 Q If somebody would call your direct line and  
13 leave a voice mail, does that voice mail go to your  
14 e-mail?  
15 **A No, it's not set up that way.**  
16 Q All right. So you'd have to call in and  
17 retrieve the voice mail?  
18 **A Retrieve it physically, yes.**  
19 Q Do you ever save any of the voicemails?  
20 **A I'm sorry.**  
21 **MR. POSTMAN:** No, you're doing perfect. I  
22 want the jury to see your handsome face.  
23 **THE WITNESS:** Oh, thanks.  
24 No, I can't say that I have. I don't know  
25 that there is a way for me -- if there's a way to

1 **So, to go back to your other question, I**  
2 **think Ed Johnston oversees it, handles it, manages**  
3 **the servers, but to what extent the archive and**  
4 **everything is owned, I don't know if it's through**  
5 **the League or --**  
6 Q Okay. Well, you've read through the  
7 e-mails before the deposition; correct?  
8 **A I have.**  
9 Q Anything in reading through the e-mails  
10 that jogs your memory that other e-mails -- you've  
11 written other e-mails or received other e-mails that  
12 weren't contained in the production?  
13 **A Not that I'm aware of. And, again, I've**  
14 **produced these documents on a couple of different**  
15 **occasions, and, you know, everything has been very**  
16 **consistent with them.**  
17 **So there's no other rocks where documents**  
18 **are -- you know, are hiding or other places I would**  
19 **think to check or think to consider, you know, for**  
20 **these.**  
21 **So I had all the correspondence with them**  
22 **and, again, just being very organized and detailed**  
23 **like I am, I'm confident that this is everything**  
24 **that we have.**  
25 Q Now, did you ever do any faxing to

1 save, other than archive -- but, you know, to kind  
2 of save or anything with a voice mail. If there's  
3 a new voice mail, I check it and, really, I address  
4 it.  
5 **BY MR. KELLY:**  
6 Q There's only so many voicemails that you  
7 can maintain; correct?  
8 **A Yes. I don't know if there's a limitation**  
9 **on the voice mail system, but I'm just...**  
10 Q Okay. Do you use any software that you  
11 record communications between you and other people?  
12 **A Not that I'm aware of. I'm not aware of**  
13 **any that I use or the company uses.**  
14 Q I believe you have spoken to Mr. Simms,  
15 you know, during 2009-2010 -- correct? -- over the  
16 phone?  
17 **A I can't recall how many conversations we**  
18 **had. I think there were a handful. Say, maybe less**  
19 **than five oral conversations, I think, initially.**  
20 Q All right. Well, I guess my question is,  
21 after talking to Mr. Simms, did you record anything  
22 that you said to him or what he said to you?  
23 **A No.**  
24 Q So it would be based strictly on memory?  
25 **A And, you know, the e-mails, which, again,**

1 is really how we communicated, I would say.  
2 MR. KELLY: Okay. Let's take a short  
3 break.  
4 THE VIDEOGRAPHER: The time is 10:20 a.m.  
5 We are off the record.  
6 (Whereupon, a recess was taken from  
7 10:20 a.m. to 10:29 a.m.)  
8 THE VIDEOGRAPHER: Back on the record. The  
9 time is 10:29 a.m.  
10 BY MR. KELLY:  
11 Q In using your MyFax account in receiving  
12 a fax via e-mail, the image that was faxed is an  
13 attachment to the e-mail; correct?  
14 A I believe it's a separate attachment. With  
15 MCmail, though, sometimes they'll show you the  
16 attachment, depending on how many pages, so it looks  
17 like it's kind of embedded in the e-mail.  
18 Q You don't have to go to a separate place to  
19 retrieve the image that was sent to you; correct?  
20 A Outside of the e-mail itself?  
21 Q Yes, outside of the e-mail.  
22 A No. If there was an attachment in the  
23 e-mail, I guess that would be all that...  
24 Q Okay. Do you ever back up your computer at  
25 work?

1 A May have at some point. I don't -- I don't  
2 recall. I don't actively do it. Again, it sounds  
3 like I'm trying to sell MC computers here. They  
4 have an automatic backup.  
5 MR. POSTMAN: My office may go to MC when  
6 this depo's over.  
7 BY MR. KELLY:  
8 Q Well, was there anything that you saved  
9 that relates to this case to your computers at all?  
10 A Not that I'm aware of. There may be the  
11 attachment of the word "Document" for Exhibit A, the  
12 original. There may be a signed quote and a PDF,  
13 which I think, we've -- you know, we produced.  
14 Oh, I'm sorry. But back to the question,  
15 you know, I've been keeping electronic files of  
16 the e-mails that I printed out, scanning those,  
17 you know, as PDF files. You know, any other  
18 correspondence I get from my attorneys, you know,  
19 I've been holding onto, that kind of stuff. I  
20 created a folder for that, yes.  
21 Q All right. Now, we mentioned a person by  
22 the name of Steve Simms.  
23 A Yes.  
24 Q You understand that he worked for a company  
25 called FaxQom; is that right?

1 A I understood he owned FaxQom.  
2 Q FaxQom is spelled F-a-x-Q-o-m.  
3 A Q-o-m, yes.  
4 Q And he had a Website, FaxQom.com?  
5 A I believe so, yes.  
6 Q Now, the earliest correspondence I have  
7 between you and him is January 23, 2009. Is that  
8 consistent with your understanding of when you first  
9 had e-mail contact with him, or could it have been  
10 before?  
11 A Do you mind if I see this?  
12 Q Yes. Let's mark it as Exhibit 1 to the  
13 deposition first.  
14 MR. POSTMAN: So here's what happens. She  
15 marks it --  
16 MR. KELLY: This is off the record.  
17 (Whereupon, a discussion was held off  
18 the record.)  
19 \* \* \*  
20 (Whereupon, the document referred  
21 to was marked for identification  
22 as Plaintiffs' Exhibit No. 1.)  
23 \* \* \*  
24 BY MR. KELLY:  
25 Q All right. I'm showing you what's

1 been marked as Exhibit 1. It's an e-mail from  
2 sales@faxqom.com to you. Do you see that?  
3 A I do.  
4 Q In sales@faxqom.com did you understand that  
5 to be the e-mail address for Steve Simms?  
6 A Correct.  
7 Q Now, this is dated January 23, 2009. So  
8 is this consistent with your understanding of your  
9 first contact with this company?  
10 A I believe so, yes.  
11 Q Is there a way --  
12 A I'm sorry. Let me retract for a second.  
13 First contact. There may have been some  
14 oral conversations. Clearly, there's many ways that  
15 we have spoken before. This being the first e-mail,  
16 I would -- you know, the earlier conversations must  
17 have been on the phone.  
18 Q All right. So you're not aware of any  
19 e-mail correspondence between yourself and FaxQom in  
20 2008?  
21 A Not that I'm aware of, no.  
22 Q Now, how did you first come into contact  
23 with Steve Simms?  
24 A Well, specifically, Steve Simms, I think  
25 I was looking for some companies that did fax

1 marketing. I don't remember, it being five years  
2 ago, honestly, how that came about. There were  
3 likely searches, you know, on the Internet, you  
4 know, looking at, you know, different companies that  
5 would specialize, you know, in this.

6 Q Was there a project that was created for  
7 the Buccaneers to do fax marketing?

8 A It was discussed to look into some  
9 different sales initiatives I think for the upcoming  
10 2009 season. So --

11 Q Was this --

12 MR. POSTMAN: Wait. You've got to let him  
13 finish. Maybe he is -- I don't know -- but you've  
14 got to let him finish.

15 THE WITNESS: I could be finished.

16 MR. POSTMAN: Well, if you're done, that's  
17 fine.

18 BY MR. KELLY:

19 Q And if I do start a question where you're  
20 not done answering, you can actually tell me "I'm  
21 not done answering the question," if you need to  
22 finish the answer. You have that right.

23 A Okay.

24 Q So I guess my question is: there was a  
25 discussion between people at the Buccaneers

1 It may have been a videoconference call, where I had  
2 presented some different marketing ideas. I joke.  
3 I like to think of myself as an idea guy. So I was  
4 excited, I think, at the time to show some different  
5 things that I was thinking that could possibly  
6 generate some ticket sales.

7 Q Were you the person that worked at the  
8 Buccaneers that came up with the idea of fax  
9 marketing?

10 MR. POSTMAN: Object to the form.

11 THE WITNESS: I believe it was my idea,  
12 yes.

13 BY MR. KELLY:

14 Q Did you also consider e-mail marketing?

15 A Yes. I believe it was something, yes,  
16 we also had talked about at the time. E-mail  
17 marketing?

18 Q And text messaging?

19 A I'm not sure on e-mail marketing. Text  
20 messaging was also something we were discussing at  
21 the time.

22 Q Did the Buccaneers ever do text messaging?

23 A Yes, we had a text campaign. I don't know  
24 exactly when it was.

25 Q Was the company that did the text messaging

1 regarding some promotional activities for the  
2 upcoming 2009 season?

3 A Correct.

4 Q Can you tell me when those discussions  
5 first took place. Were they in January 2009?

6 A I don't remember specifically when they  
7 were. Just the nature of the business we're in,  
8 there's a lot of work that kind of begins during  
9 the off season so it makes sense that, you know, in  
10 January we're kind of already thinking ahead to the  
11 next year.

12 Q Tampa Bay was not in the Superbowl in 2008.

13 A No. Unfortunately not.

14 Q So I guess on January 23, 2009, the  
15 Buccaneers didn't have any more games to play;  
16 correct?

17 A I believe so. I believe that was Jon  
18 Gruden's last year, and we didn't make the playoffs,  
19 I guess.

20 Q All right. And you had said that there  
21 were discussions between you and other people  
22 regarding next year's marketing projects. Who  
23 specifically did you speak to?

24 A I recall presenting some ideas to  
25 Mr. Glazer. Jason Layton, I believe, was on a call.

1 a 1 Touch?

2 A That sounds correct.

3 Q Were you the contact at the Buccaneers that  
4 dealt with the text messaging with 1 Touch?

5 A Yes.

6 Q Did 1 Touch provide any fax marketing?

7 A Not that I believe.

8 Q Who was your contact at 1 Touch?

9 A I don't recall, to be honest.

10 Q Is there e-mail correspondence between  
11 yourself and 1 Touch for the text messaging?

12 A I'm sure there is.

13 Q Any other companies that the Buccaneers  
14 contracted with to send text messaging?

15 A Not that I'm aware of, no.

16 Q All right. Had the Buccaneers ever done  
17 any fax marketing prior to 2009?

18 A I couldn't answer that. To be honest, I,  
19 you know, began my employment in 2001. So to what  
20 extent they did something, you know, prior to that,  
21 I don't know.

22 Q How about from 2001 up until --

23 MR. POSTMAN: Again, just make sure you're  
24 done. If you're not done, let me know.

25 THE WITNESS: Well, I would say that I --

1 if there was additional fax marketing done, I wasn't  
2 directly involved until -- you know, until the -- I  
3 think the 2009 campaign. I wasn't aware of any.  
4 **BY MR. KELLY:**  
5 Q Okay. So you're not aware of any fax  
6 marketing from 2001 through 2008; correct?  
7 **A Correct.**  
8 Q In coming up with the idea of fax  
9 marketing, did you provide any documents to Jason  
10 Layton or Ed Glazer regarding your research?  
11 **A I don't remember specifically what I**  
12 **provided them. You know, thinking off memory, we**  
13 **may have had a big -- you know, one of the wet**  
14 **chalkboards where maybe I, you know, had put a few**  
15 **things down. Again, going off memory, I believe**  
16 **there was a videoconference that we had where --**  
17 **because we were in California, and Jason and Ben**  
18 **were in Tampa, because I wanted to kind of show that**  
19 **in the background and some different ideas that I**  
20 **had. So...**  
21 Q Are the videoconferences taped?  
22 **A No.**  
23 Q There's no audiotape or video of any of the  
24 conferences?  
25 **A Not that I'm aware of.**

1 you aware that there was a Federal statute that  
2 prohibits the sending of unsolicited advertisements  
3 by fax?  
4 **MR. POSTMAN:** Object to the form.  
5 **THE WITNESS:** I was aware of the TCPA,  
6 which I believe I reviewed at the time, not being  
7 an attorney, you know, looked at some general  
8 guidelines, you know, just to understand the  
9 limitations or the type of company, really, that I  
10 should, you know, begin to look for or the type of  
11 questions I should be asking the company before  
12 hiring somebody. It was my understanding that  
13 people needed to opt-in to receive faxes.  
14 **BY MR. KELLY:**  
15 Q In gathering this knowledge regarding the  
16 TCPA, were you doing that in preparation to approach  
17 Ed Glazer and Jason Layton regarding your ideas?  
18 **MR. POSTMAN:** Form.  
19 You can answer.  
20 **THE WITNESS:** I don't remember when the  
21 research was done, if it was prior to presenting an  
22 idea. Just, generally, it's kind of my nature.  
23 I like to do a little homework prior to, you know,  
24 throwing something on the table for -- you know, for  
25 anyone to consider.

1 Q Is there any way to determine what was  
2 discussed at any of the conferences that used the  
3 videoconferences?  
4 **A Just based on my memory.**  
5 Q When conducting the videoconference with  
6 respect to the fax marketing program had you already  
7 done some research?  
8 **A On?**  
9 Q On fax marketing.  
10 **A Fax marketing? You know, I had looked**  
11 **into -- I can't remember specific. I remember**  
12 **looking into the DMA, the Direct Marketing**  
13 **Association, you know, for general guidelines.**  
14 **I can't say specifically, but normally I wouldn't**  
15 **present different ideas without -- you know, without**  
16 **having done some due diligence or, you know, some**  
17 **work on them or maybe getting some quotes on them or**  
18 **that kind of stuff. So...**  
19 Q All right. And this was a project that you  
20 were working on in early 2009; correct?  
21 **A I don't remember specifically when the**  
22 **project was or when the videoconference was or even**  
23 **if -- remembering a videoconference, but I couldn't**  
24 **tell you exactly -- exactly when it was.**  
25 Q Well, in researching fax marketing, were

1 Mr. Glazer's a busy person. Jason Layton  
2 is a busy person. I'm a very busy person. So to  
3 save everyone the time, rather than go on a wild  
4 goose chase but -- so I don't remember specifically  
5 if the research was prior to or after or exactly  
6 when it was. But I don't remember.  
7 **BY MR. KELLY:**  
8 Q Well, you had said that you reviewed the  
9 TCPA. Did you actually review the statute of the  
10 TCPA?  
11 **A I don't recall if there was a Website or**  
12 **what exactly there was. It's possible they could**  
13 **have had, you know, a drop-down, you know, general**  
14 **information. I'm not an attorney so I likely would**  
15 **not have gone through, you know, whatever statute**  
16 **was out there in very technical language of exactly**  
17 **what it was.**  
18 **What I took away from that was, again, kind**  
19 **of more of the general rules and regulations. And**  
20 **even further, in doing research in the DMA, took a**  
21 **lot of it -- you know, the best practices, you know,**  
22 **as I kind of understood them to be, I think, in**  
23 **preparation for calling -- sourcing a fax company**  
24 **so that I would have questions to ask them and be**  
25 **able to confirm, really, their legitimacy.**

1 Q All right. So I guess to summarize your  
2 understanding of the fax laws in early 2009 is that  
3 you did a preliminary research, and that was it?

4 **MR. POSTMAN:** I'm sorry. Object to the  
5 form of the question.

6 **THE WITNESS:** Well, again, I'm not an  
7 attorney. You know, I wanted to hire a company that  
8 understood the law and that used the best practices.  
9 And in FaxQom, I thought I had found one that had,  
10 you know, been doing this legitimately for -- you  
11 know, for 18 years, had a solid reputation.

12 So, you know, I really kind of relied  
13 on them and their knowledge, their expertise to  
14 understand, you know, that law and exactly how --  
15 you know, how it was -- you know, how it may or may  
16 not affect us or how they could conduct, you know,  
17 their faxes.

18 **BY MR. KELLY:**

19 Q How much time did you spend researching the  
20 different fax marketing companies?

21 **A I couldn't recall. I mean, it was five**  
22 **years ago. So, generally, any company that we come**  
23 **across for any type of business, we're going to look**  
24 **at a couple different companies to make sure that,**  
25 **you know, we're getting competitive quotes and, you**

1 **up the phone." It's easier than, you know,**  
2 **e-mailing back and forth, kind of get to the point**  
3 **quicker, and, you know, get what you're looking for,**  
4 **I think, a little bit quicker.**

5 Q Are you aware of any fax marketing  
6 companies that you e-mailed in early 2009 to gather  
7 information?

8 **A Not that I'm aware of. Again, my practice**  
9 **would generally be for new business or, you know,**  
10 **for introducing my company as being interested in a**  
11 **service is to pick up the phone and talk to someone.**

12 Q Did you look at your e-mails from early  
13 2009 or possibly late 2008 regarding any contact  
14 that you had with any other fax marketing companies?

15 **A I did when I went through the MCmail and**  
16 **searched FaxQom and sales of FaxQom and Steve Simms**  
17 **and -- you know, to be sure that -- again, being**  
18 **five years ago, I wanted to kind of jog my memory**  
19 **and, you know, I was asked to provide all the**  
20 **correspondence that I had. Fax marketing, I think,**  
21 **was also a search that I had or that I did.**

22 Q You weren't able to find any e-mails from  
23 you to any other fax marketing company?

24 **A I was not, no.**

25 Q Can you recall any specific instance where

1 **know, some consistency kind of in what we're looking**  
2 **for.**

3 Q In finding the fax marketing companies, did  
4 you Google the company, or did you Google to gather  
5 that information?

6 **A Again, I don't recall. I'm confident there**  
7 **was, you know, some sort of Internet search or**  
8 **something, but I don't recall who contacted who**  
9 **first. FaxQom could have reached out to me. You**  
10 **know, there are a lot of people that reach out to**  
11 **us, you know, trying to -- you know, trying to**  
12 **promote their sales or different business**  
13 **opportunities and things constantly all -- the next**  
14 **time we take a break, I'll have ten more e-mails**  
15 **from people. So...**

16 Q Well, can you identify another fax  
17 marketing company that you spoke to, you know, in  
18 2009?

19 **A I wouldn't be able to. I don't recall.**

20 Q Was it your typical practice to call up the  
21 fax marketing companies to get some information from  
22 them or e-mail them?

23 **A Generally to get on the phone I think,**  
24 **at least to start. A policy, you know, I have is to**  
25 **tell people -- people have told me, you know, "pick**

1 you talked to another fax marketing company in late  
2 2008, early 2009?

3 **MR. POSTMAN:** Object to the form.  
4 You can answer.

5 **THE WITNESS:** Not specifically. I'm  
6 confident there was. It's just I would do business  
7 today with any new person or look into any type of  
8 new business. It's just kind of my policy or, you  
9 know, policy procedure to talk to a couple of  
10 different companies to get several quotes on  
11 anything we're looking to do. So recalling any  
12 specific names of other companies five years later,  
13 I couldn't tell you.

14 **BY MR. KELLY:**

15 Q Can you recall any specific conversations  
16 that you had with any other fax marketing company in  
17 late 2008, early 2009?

18 **A I don't recall.**

19 Q When you say you're confident that there  
20 were other companies, would you have obtained that  
21 information through Internet searches?

22 **A Likely. Likely. Do Internet searches or**  
23 **referrals or -- yes, I think that's kind of -- or if**  
24 **people had contacted us, you know, prior, you know,**  
25 **maybe, you know, it would have saved an e-mail or**

1 something and would have had that to kind of go back  
2 to and hold onto if I wanted to reach out or contact  
3 them in the future.

4 Q All right. In contacting fax marketing  
5 companies there's some things that you'd probably  
6 want to know. Number one, the price; correct?

7 MR. POSTMAN: Object to the form.

8 You can answer.

9 THE WITNESS: It would be one of the  
10 things. I think our initial concern -- and I can  
11 say this with some confidence because I believe the  
12 e-mail I have here -- and if you want to use that as  
13 an exhibit, you can; it was one of the earliest  
14 e-mails I had to FaxQom -- I wanted to be confident  
15 that whoever we were using was aware of all the  
16 legislation regarding "spam marketing," as I put it.  
17 I wanted to know that a hundred percent of the  
18 numbers that FaxQom or anyone I was working with had  
19 opted in to receive the faxes. That was really kind  
20 of the initial concern. I wouldn't use the word  
21 "concern." The initial, I guess, due diligence  
22 that, you know, that we had, you know, wanting to  
23 make sure that we had someone that was aware of you  
24 know, the regulations, aware of the best practices,  
25 and was practicing, you know, using those.

1 And I think there was a quote from Steve  
2 Simms in one of the e-mails. He said that's the  
3 reason they've been in business for 18 years. So I  
4 took a good level of comfort in that.

5 Q All right. Can you recall a specific  
6 instance where you called another fax marketing  
7 company where they told you there's no such thing as  
8 an opt-in fax list?

9 MR. POSTMAN: Object to the form.

10 THE WITNESS: No, I don't recall. I  
11 don't know where that situation would, I guess,  
12 be applicable if I was looking for someone who  
13 promoted fax marketing for them to say that "we  
14 don't" -- you know, "we don't do fax marketing."  
15 I don't know. So I don't recall.

16 BY MR. KELLY:

17 Q Well, there are situations where a fax  
18 marketing company would use a list from the actual  
19 customer, as opposed to the fax marketing company's  
20 fax list. You understand that that's a --

21 A I don't understand the difference.

22 Q You know, there's ways in which you can  
23 send faxes. One can be from a purchased list; or,  
24 No. 2, it can be from a list that was compiled by  
25 the client.

1 Q Did the Buccaneers have any lists of fax  
2 numbers that it had available?

3 A Not that I'm aware of. To the extent  
4 customers of ours -- what information's on file. If  
5 collecting faxes was -- you know, was part of what  
6 we retained in -- you know, in a contact or in a  
7 database, I'm not sure. I didn't handle that so --

8 Q Did the Buccaneers ever use those fax  
9 numbers from prior -- or from existing customers to  
10 send them an advertisement by fax?

11 A Nothing I was involved with.

12 Q So in reaching out to the --

13 A I'm not aware of any.

14 Q So, in reaching out to the fax marketing  
15 companies, one of your concerns was the fax lists;  
16 correct?

17 A Well, yes. After doing the research with  
18 the TCPA and the DMA, I wanted to make sure that we  
19 were using someone who could validate everything  
20 that I kind of, you know, learned, you know, from  
21 those sites, who was aware, who had some knowledge  
22 of it.

23 And, in talking to FaxQom, they, you know,  
24 represented that they were very aware and, you know,  
25 they knew all of that and they used best practices.

1 MR. POSTMAN: Is that a question you're  
2 asking him --

3 MR. KELLY: Yes.

4 MR. POSTMAN: -- or a statement?

5 I object to the form.

6 THE WITNESS: I now understand the  
7 difference.

8 BY MR. KELLY:

9 Q All right. But, in reaching out to the fax  
10 marketing companies, the Buccaneers didn't have a  
11 fax list that it wanted to use; correct?

12 A I wouldn't say that's accurate, that we  
13 didn't want to use a fax list. I don't know if,  
14 perhaps -- I believe -- I don't want to speculate,  
15 but any fax numbers that we would have I would  
16 assume would already have been existing contacts;  
17 thus we wouldn't necessarily feel the need to  
18 remarket to existing customers so...

19 Q You wanted to reach out to other people and  
20 not your existing customers; correct?

21 MR. POSTMAN: Object to the form.

22 THE WITNESS: Yes, I believe the intent was  
23 to generate some new business.

24 BY MR. KELLY:

25 Q Were you aware that the Buccaneers can

1 purchase fax numbers from third-party vendors?  
2 **A I believe -- and I could be mistaken, but I**  
3 **believe in part of the research I did with the TCPA**  
4 **indicated that that wasn't a best practice -- or it**  
5 **could have been the DMA; I don't recall -- which is**  
6 **why it was important that we found a company that**  
7 **had contacts of people that had agreed to receive**  
8 **faxes and who had opted in to receive those faxes.**  
9 Q Did you ever contact any third-party  
10 vendors that sold lists?  
11 **A "Sold" -- when you say "sold" --**  
12 Q Sold fax lists.  
13 **A Like, sold their telephone number or their**  
14 **fax numbers?**  
15 Q Right. Did you ever reach out to them  
16 to --  
17 **A I don't -- I don't recall. It's possible**  
18 **that I, you know, may have come across a company or**  
19 **two that did that. However, had I, it wouldn't have**  
20 **been of interest to us because we don't have -- we**  
21 **didn't have, to my knowledge, the wherewithal to be**  
22 **able to send those faxes out, you know, albeit the**  
23 **software or the computer or however it's done.**  
24 **So...**  
25 Q Well, you could have --

1 for the DMA and the TCPA to go that was really the  
2 requirement for hiring or using a legitimate fax  
3 broadcast company.  
4 **BY MR. KELLY:**  
5 Q Now, you used the term "opted in." What do  
6 you mean by a fax list where people had opted in?  
7 **A Agreed to receive faxes. Had an existing,**  
8 **you know, relationship with -- you know, with FaxQom**  
9 **or with the company.**  
10 Q Was that --  
11 **A Just like -- you know, just like the text**  
12 **messages, you know, today. You opt in to certain**  
13 **things or whatever it is.**  
14 Q Was that term of an opt-in fax list  
15 first represented to you by Steve Simms, or is it  
16 something that you had read in the TCPA?  
17 **MR. POSTMAN:** Object to the form.  
18 You can answer.  
19 **THE WITNESS:** I have an e-mail dated  
20 June 24 from Steve Simms that says, "100 percent of  
21 our data is compiled opt in," in quotes.  
22 **BY MR. KELLY:**  
23 Q Right. So I guess --  
24 **A So I believe "opt in" would be his term,**  
25 **but a term I would have also been familiar with.**

1 **A -- had I come across them, I don't believe**  
2 **I would have pursued any in-depth conversation, you**  
3 **know, with them on that.**  
4 Q Well, why not call a third-party vendor  
5 that sold fax lists to purchase that list and then  
6 use a fax marketing company to send the images to  
7 those lists?  
8 **MR. POSTMAN:** Object to the form.  
9 I'm sorry. Are you done?  
10 Object to the form.  
11 **THE WITNESS:** The important thing for us  
12 was to contract with a company that had customers  
13 that agreed to receive faxes from them.  
14 With FaxQom -- and one of the requirements  
15 I had in hiring them was for them to provide us an  
16 indemnification of any potential issue, which was,  
17 basically, them guaranteeing, as I understood, that  
18 the fax numbers they had were all from people that  
19 opted in.  
20 So I received that in writing from him,  
21 and then further in that same indemnification it  
22 says specifically that Steve Simms -- that all the  
23 faxes would be under his management, his personal  
24 management, and he was a 17-year veteran of FaxQom.  
25 So as I understood the general regulations

1 **BY MR. KELLY:**  
2 Q Well, that's what I'm asking about. So  
3 were you familiar with the term "opt in" prior to  
4 reaching out to FaxQom?  
5 **MR. POSTMAN:** Form.  
6 You can answer.  
7 **THE WITNESS:** I'm sure I've heard the  
8 phrase before or prior to --  
9 **BY MR. KELLY:**  
10 Q Okay. Now --  
11 **A -- or understood it. It could be possible**  
12 **I came across that language in looking into the DMA**  
13 **or TCPA.**  
14 Q Okay. Have you ever reviewed the FCC  
15 regulations regarding junk faxing?  
16 **MR. POSTMAN:** Prior to the existence of  
17 this case?  
18 **MR. KELLY:** Yes. Well, this is -- we're  
19 talking --  
20 **MR. POSTMAN:** Yes. I just --  
21 **MR. KELLY:** -- late 2008, early 2009.  
22 **THE WITNESS:** I --  
23 **MR. POSTMAN:** Do you understand what he's  
24 saying? Before this lawsuit began and you got  
25 correspondence from them is what he's asking you.

1           **THE WITNESS:** I may have. You know, my  
2 role of responsibility with the company, you know,  
3 puts me in a lot of different directions. So it's  
4 possible that I came across some FCC information  
5 at some point or TCPA or at college. We could have  
6 studied it or looked into it.  
7 **BY MR. KELLY:**  
8     Q Does the TCPA use the term "opt in"?  
9           **MR. POSTMAN:** Object to the form.  
10           **THE WITNESS:** I'm not sure. I'd have to  
11 look at the Website.  
12 **BY MR. KELLY:**  
13     Q Does the FCC use the term "opt in"?  
14     **A I'm not sure. I'd have to look at the**  
15 **Website.**  
16     Q Did you review any case law from various  
17 courts around the country regarding junk faxing?  
18     **A I may have. There may have been cases on**  
19 **those Websites as reference. I don't recall.**  
20 **And if I did, it, you know, would have been as a**  
21 **reference. I'm not an attorney so I'm not really**  
22 **well versed in case law.**  
23     Q Okay. In late 2008, early 2009, what  
24 was your understanding of how someone can send a  
25 legal advertisement by fax?

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1           **MR. POSTMAN:** Object to the form.  
2 You can answer.  
3           **THE WITNESS:** I'm just kind of -- I guess  
4 I'm trying to -- I don't know what my understanding  
5 was at that time. You know, since this case has  
6 been presented, clearly my memory of what I  
7 understand to be right or wrong, you know, may  
8 have -- you know, may have changed.  
9           At that time what I understood would have  
10 been, you know, based on -- you know, based on what  
11 I was told, based on what was represented to me  
12 by -- you know, by the company, FaxQom, that I  
13 worked with, or whatever general understanding or  
14 information that -- you know, that I received  
15 from -- you know, from the side.  
16 **BY MR. KELLY:**  
17     Q And that's what I'm trying to ask you.  
18 What other information on the side did you have with  
19 respect to the fax laws that were not represented to  
20 you by FaxQom?  
21     **A I'm not sure what other information I would**  
22 **have.**  
23     Q Can you think of any specific statute,  
24 regulation, or any other statement that you had  
25 an understanding that was not provided to you by

1 FaxQom?  
2     **A Are we talking about --**  
3     Q Back in --  
4     **A -- what was provided by FaxQom or prior**  
5 **knowledge of or --**  
6     Q Well, I was --  
7     **A I'm just trying to understand what you're**  
8 **asking.**  
9     Q Yes. I'm trying to break it up because you  
10 had said that you learned about the TCPA through  
11 FaxQom through their representations.  
12     **A No.**  
13           **MR. POSTMAN:** Object to form. Sorry.  
14           **THE WITNESS:** I'm sorry. I don't know that  
15 they're the ones that taught me about the TCPA. I  
16 believe there was some research done prior to even  
17 reaching out to FaxQom, just to be clear.  
18 **BY MR. KELLY:**  
19     Q And that's my --  
20     **A I don't recall specifically.**  
21     Q Okay. So, as you sit here --  
22     **A It's possible that I had gone and looked at**  
23 **the TCPA or the DMA prior to contacting FaxQom. I'm**  
24 **confident that's the way that it went because, when**  
25 **I spoke with FaxQom, a lot of what they represented**

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1 **and stated in the conversations we had orally or,**  
2 **you know, it was clear as these e-mails here, was**  
3 **consistent with those practices.**  
4     Q Okay. Can you think of any specific  
5 instance, based upon your knowledge back in early  
6 2009, regarding the fax laws that was inconsistent  
7 with what FaxQom had told you?  
8     **A I don't recall any, no; and not in 2009,**  
9 **no.**  
10           **THE VIDEOGRAPHER:** Can I change the tape  
11 now?  
12           **MR. KELLY:** All right.  
13           **THE VIDEOGRAPHER:** The time is 11:03 a.m.  
14 This is the end of Tape 1. We're going off the  
15 record.  
16           (Whereupon, a recess was taken from  
17 11:03 a.m. to 11:05 a.m.)  
18           **THE VIDEOGRAPHER:** Back on the record. The  
19 time is 11:05 a.m. This is the beginning of Tape 2.  
20 **BY MR. KELLY:**  
21     Q All right. From what I understand now is  
22 that you were having conversations with Steve Simms  
23 in early 2009, and he made certain representations  
24 to you; correct?  
25     **A Correct.**

1 Q All right. Now, did you have a discussion  
2 with Steve Simms regarding FaxQom's opt-in list?  
3 **A I don't remember specific conversations**  
4 **regarding the numbers or the list itself, but I do**  
5 **specifically remember discussing how he obtained the**  
6 **list, you know, as far as the customers that he had,**  
7 **people who had agreed to receive faxes, people who**  
8 **had an existing -- I don't know if he said business**  
9 **or just an existing relationship.**  
10 Q Well, let me ask you this. What do you  
11 mean that he had a business relationship with?  
12 **A Let me go through. I believe I have an**  
13 **e-mail where he represents that everyone who he**  
14 **sends to -- it says:**  
15 **"A hundred percent of our data compiled**  
16 **is opt-in. That's how the company survived**  
17 **18 years strong."**  
18 **And then furthest:**  
19 **"FaxQom is a legal compiler of fax**  
20 **databases and has been using the same**  
21 **compiling techniques since 1991, which**  
22 **was the same year that the TCPA was in**  
23 **force. Using legal techniques in compiling**  
24 **fax data has enabled FaxQom to be 18 years**  
25 **strong, with a solid reputation in**

1 **A I don't recall, no.**  
2 Q Did you have an understanding that there  
3 was anyone else other than Steve Simms that operated  
4 FaxQom?  
5 **A I believe there was a check that was sent**  
6 **to a different name. So I assumed that it was, you**  
7 **know, another employee under him or with him.**  
8 Q Well, that --  
9 **MR. POSTMAN:** Let him finish.  
10 **MR. KELLY:** Okay.  
11 **THE WITNESS:** I can answer, at the very end  
12 of 2010, where we had received the complaint and I  
13 told Steve to cease sending any faxes out until we  
14 had investigated, you know, his company or our  
15 understanding of the laws further, there was some  
16 conversation where I think he referred to a "boss"  
17 needing to okay the refund of the remaining check,  
18 the balance I think that we had in the account.  
19 So I guess that would be a total of three  
20 people that I would have been aware of, you know,  
21 perhaps at his company. But it was Steve who I  
22 dealt with a hundred percent of the time.  
23 Q So back in January of 2009, you only spoke  
24 with Steve Simms; correct?  
25 **A Correct.**

1 **broadcast marketing."**  
2 **Further, that's not what you asked, but:**  
3 **"Your account will be handled directly**  
4 **by Steve Simms."**  
5 Q Okay. But I guess my question to you is  
6 you're using this, the term "existing business  
7 relationship." In what context is that significant  
8 in opt-in fax lists?  
9 **A I understand it to be the same. If**  
10 **somebody opted in or agreed to receive something,**  
11 **then they have some type of a relationship. So,**  
12 **as opposed to business, it would be personal. So,**  
13 **like, I would call it a "business relationship."**  
14 Q Was it your understanding that FaxQom had  
15 called the entities, asking whether or not they  
16 would agree to receive faxes?  
17 **A I don't recall specifically what he told**  
18 **me, how they had created their database, you know,**  
19 **with regard to how they sourced it or how they**  
20 **maintained it. I don't remember specifically what**  
21 **he said except that they were all his clients or**  
22 **customers or people who had agreed to receive the**  
23 **faxes.**  
24 Q Did you have an understanding in January of  
25 2009 as to how many employees FaxQom had?

1 Q And at that point in time you were unaware  
2 of any other employees that were working at FaxQom;  
3 correct?  
4 **A Correct.**  
5 Q Did Steve Simms ever send you any documents  
6 as to how he compiled what he claims was an opt-in  
7 list?  
8 **A I don't recall, other than the**  
9 **indemnification agreement.**  
10 Q Now, the Buccaneers wanted to market to  
11 certain area codes near Tampa; is that right?  
12 **A In the Tampa Bay area, correct.**  
13 Q Actually, if you look at Exhibit 1, the  
14 Buccaneers wanted to market, obviously, Tampa;  
15 correct?  
16 **A Correct.**  
17 Q And that's Area Code 813?  
18 **A That is correct.**  
19 Q And then the Buccaneers wanted to market  
20 Clearwater and St. Pete, and that's the 727 Area  
21 Code?  
22 **A That's correct.**  
23 Q And then the Buccaneers want to market  
24 Sarasota. That's the 941 Area Code?  
25 **A It probably encompasses more than Sarasota,**

1 **but, yes, that's correct.**

2 Q And then the Buccaneers wanted to market  
3 Orlando, which is the 407 Area Code?

4 **A Yes. I'm not sure on Orlando because**  
5 **this was the first e-mail that he provided me. So**  
6 **we had requested a handful of different area codes.**  
7 **To what extent the actual ones that we did market**  
8 **to, I don't recall if Orlando was in there or not.**

9 Q Okay. And it also says Gainesville here  
10 and surrounding area codes. Do you understand that  
11 to be 352?

12 **A Yes. And I just know. I used to live in**  
13 **the 352 Area Code in Spring Hill so that's, you**  
14 **know, County, just 30 minutes north of, you know,**  
15 **Raymond James Stadium and the Tampa Bay area. So it**  
16 **goes as high as Gainesville, but it's much closer to**  
17 **Tampa than the 352.**

18 Q All right. So was there an occasion where  
19 you would ask Steve Simms how many opt-in fax  
20 numbers he had available in those areas?

21 **A How many --**

22 Q How many fax numbers he had in those  
23 different areas?

24 **A Yes. I would have requested that, I think,**  
25 **to get a sense of, you know, the scope and the cost.**

1 **BY MR. KELLY:**

2 Q Yes. In January of 2009, your  
3 understanding as to the 305,489 fax numbers that  
4 are identified in Exhibit 1 -- you're not sure if  
5 those numbers are opted-in fax numbers or other fax  
6 numbers?

7 **MR. POSTMAN:** Object to the form.

8 You can answer.

9 **THE WITNESS:** I have no way of confirming,  
10 again, what was represented on the phone call that  
11 we had which prompted this e-mail. I don't know  
12 specifically -- I can't recall specifically what he  
13 said.

14 So to answer your question, I had no way of  
15 determining who's opted in or who's not. I trusted  
16 him.

17 **BY MR. KELLY:**

18 Q Did you ever have a conversation with Steve  
19 Simms regarding whether or not the Buccaneers wanted  
20 to send out faxes to people who had opted in, as  
21 opposed to fax numbers that had not?

22 **A Conversations with Steve Simms?**

23 Q Yes.

24 **A I think the only conversation that I had**  
25 **with Steve Simms was that we wanted to use best**

1 Q Now, according to Exhibit 1, Steve Simms  
2 sent you an e-mail and stated that he had 305,489  
3 fax numbers to those various areas. Do you see  
4 that?

5 **A I do.**

6 Q Did you have an understanding that those  
7 fax numbers were opt-in fax numbers?

8 **A At this time, on January 23, 2008 --**

9 Q Or 2009.

10 **A I'm sorry, 2009. I don't know. Again, I**  
11 **don't recall specifically what oral conversations we**  
12 **had when we first spoke. This e-mail seems to be a**  
13 **response to -- you know, to a verbal conversation.**  
14 **So I don't remember if that was something he, you**  
15 **know, warranted and represented on the phone to me.**  
16 **But, regardless, prior to anything going out, he**  
17 **certainly put it in writing.**

18 Q All right. So, in January of 2009, as  
19 you sit here today, you can't say that your  
20 understanding was that the 305,000 fax numbers were  
21 numbers that had opted in?

22 **MR. POSTMAN:** Object to the form.

23 **THE WITNESS:** I'm sorry. Would you mind  
24 asking again.

25 ///

1 **practices, you know, as outlined, I think, by the**  
2 **DMA, and I think the only numbers we were interested**  
3 **in FaxQom sending faxes to were numbers of contacts**  
4 **that had agreed to receive from FaxQom.**

5 Q Were you surprised by the number -- the  
6 quantities in the various area codes that are  
7 identified in Exhibit 1?

8 **A No, not necessarily.**

9 Q Why not?

10 **A I had no way of -- in gauging how many**  
11 **faxes, you know, that represents. I would imagine**  
12 **there are probably many more telephone numbers than**  
13 **what's shown as fax numbers.**

14 **And I don't know if this initial estimate**  
15 **included all fax numbers or just business fax**  
16 **numbers. I believe our campaign was targeted just**  
17 **towards more business.**

18 Q Well, fax numbers are generally assigned  
19 to businesses, as opposed to residential homes;  
20 correct?

21 **MR. POSTMAN:** Object to the form.

22 **THE WITNESS:** I would say that's, yes, much  
23 more likely. I know a lot of people, though, that  
24 have or had at some point their own individual fax  
25 number, though, just -- you know, a private business

1 or small businesses.

2 **MR. KELLY:** Let's mark this.

3 **THE REPORTER:** Marked Exhibit 2.

4 \* \* \*

5 (Whereupon, the document referred  
6 to was marked for identification  
7 as Plaintiffs' Exhibit No. 2.)

8 \* \* \*

9 **BY MR. KELLY:**

10 Q I'm going do show you what's been marked as  
11 Exhibit 2. It's Bates labeled BLP 10. It's an  
12 e-mail from Sales at FaxQom.com. You understand  
13 that to be the e-mail address associated with Steve  
14 Simms; correct?

15 **A I believe so, yes. He may have used info  
16 with FaxQom.com as well.**

17 Q All right. At the top says it's an e-mail  
18 from you to Jason Layton. Do you see that?

19 **A I do.**

20 Q That's an e-mail that was sent a few hours  
21 after the 6:15 a.m. e-mail; correct?

22 **A Correct.**

23 Q All right. So you received the 6:15 a.m.  
24 e-mail; correct?

25 **A Yes, because I forwarded this to Jason**

1 **collected? I have no way to tell.**

2 Q Did you ever ask him if he personally made  
3 all 8.2 million calls?

4 **A I don't recall what we discussed, again,  
5 orally the first time that we talked. So I may  
6 have. Maybe not using those exact words, or there  
7 may have been conversations on exactly how things  
8 were opted in, but the subject of the conversation  
9 was always, you know, people who have opted in.**

10 Q Well, did he ever tell you that he  
11 personally made the 8.2 million calls?

12 **MR. POSTMAN:** Form.

13 You can answer.

14 **THE WITNESS:** I don't recall. Yes, I don't  
15 recall. You know, I don't know. His company -- the  
16 size of his company at this time -- I wouldn't think  
17 to question because we had not agreed, I think,  
18 really to do any business. So at this point FaxQom  
19 could have been a company of 150 people or one  
20 person at the time. So I don't know.

21 **BY MR. KELLY:**

22 Q But when you were speaking to Steve Simms  
23 in January of 2009, you didn't have an understanding  
24 that it was any more than him individually working  
25 FaxQom; correct?

1 **Layton. I am assuming so, yes.**

2 Q So it says;  
3 "Advertising By Fax Services  
4 14.8 Million U.S. Fax Database  
5 8.2 Million Solicited (opt in)  
6 Database."

7 Do you see that?

8 **A I do.**

9 Q So, in June of 2009, did you have an  
10 understanding that FaxQom had an opt-in database of  
11 8.2 million fax numbers?

12 **A That's what's shown in the e-mail. You  
13 know, as far as my understanding, I didn't use this  
14 e-mail as -- you know, as the basis of the dialogue  
15 I had with FaxQom. I think this was a follow-up,  
16 kind of a general marketing technique that they must  
17 have sent out just for...**

18 Q Well, did you believe Steve Simms in his  
19 statement that he had 8.2 million opted-in fax  
20 numbers?

21 **A I didn't have any reason not to. He had  
22 been in business for 18 years so, you know, it  
23 seemed reasonable. It's 8.2, a big number. Is it a  
24 small number compared to the number of faxes that --  
25 you know, that are there or that he could have**

1 **MR. POSTMAN:** Object to the form of the  
2 question.

3 **THE WITNESS:** My initial conversations  
4 with Steve Simms, I don't remember specifically  
5 discussing how many employees he had. I don't  
6 really remember discussing specifically how many  
7 employees FaxQom had, I think, at any point.

8 But the only authorization I ever gave  
9 FaxQom or Steve Simms was for Steve Simms to  
10 personally deal with, you know, our account.

11 **BY MR. KELLY:**

12 Q When you would call Steve Simms -- I see a  
13 508 number on Exhibit 1. Do you see that?

14 **A I do.**

15 Q Would he typically answer the phone?

16 **A I don't remember if I got voicemails or if  
17 he answered the phone. I remember there being a  
18 couple of different numbers. There was a FaxQom,  
19 you know, more kind of headquarter office, their  
20 general line. And then I remember using his  
21 cell phone. I don't know the 508 -- I thought his  
22 cell phone was a Houston number or a Texas number.  
23 I recall. I grew up in Texas and that's why I would  
24 know.**

25 Q Do you have the understanding that we did

1 take Steve Simms' deposition about two weeks ago?

2 **MR. POSTMAN:** So -- hold on.

3 I have no problem with that question, but  
4 that does seek attorney-client information, but  
5 you're just trying to get a series of other  
6 questions. So as long as you agree that's not a  
7 waiver of the attorney-client privilege, just to  
8 get to the next predicate, I have no problem with  
9 him answering; is that fair?

10 **MR. KELLY:** That's fair.

11 **THE WITNESS:** I will say I do, and I was  
12 absolutely shocked, to be honest.

13 **BY MR. KELLY:**

14 Q Did you read the transcript?

15 A **I did last night just kind of briefly.**  
16 **Just kind of, you know, went through it.**

17 Q Well, let me ask you this.

18 A **I actually thought it was Barry asking**  
19 **him the questions that you were asking him just --**  
20 **you know, because of just how crazy some of the**  
21 **responses and things were. I was just -- I was kind**  
22 **of surprised, to be honest.**

23 Q Well, let me ask you this. Steve Simms  
24 is actually Michael Clement. Do you have that  
25 understanding?

1 kind of unveiled a couple of weeks ago after they  
2 had met with him.

3 **BY MR. KELLY:**

4 Q Well, what surprised you the most about his  
5 testimony?

6 A **Wow. I'm shocked that, you know, he used**  
7 **an alias. I think I'm shocked that he ended up**  
8 **using other companies to send the faxes out. You**  
9 **know, he only had the authority -- limited authority**  
10 **that I gave him to send things, so I was surprised**  
11 **to see how -- you know, the trail -- how far the**  
12 **trail went.**

13 **I was surprised by the inconsistency of a**  
14 **lot of the answers he gave. I could go through -- I**  
15 **could probably find some more surprises now, too.**

16 Q Yes, there were surprises, but I don't want  
17 to go through everything in that transcript. But I  
18 guess my question is: Were those answers in the  
19 transcript inconsistent with your understanding of  
20 the way he operated his business?

21 **MR. POSTMAN:** Form.

22 You can answer.

23 **THE WITNESS:** In general -- again, I just  
24 kind of perused the transcript for 30 minutes and,  
25 you know, it's the kind of document I could spend

1 A **I do now, yes.**

2 Q He was deposed about a year ago, maybe two  
3 years ago by my office, in which the Buccaneers  
4 weren't involved at that time. Did you read that  
5 transcript?

6 A **I did not. No, I don't think I have that.**

7 Q All right. But you did read his transcript  
8 that was taken a few weeks ago?

9 A **I just kind of perused it over the last --**  
10 **that was a lot of stuff. I may have spent 30**  
11 **minutes just kind of scanning through it.**

12 Q What were you shocked about?

13 A **Well, I wasn't in shock last night because**  
14 **I had already been informed by our attorneys --**

15 **MR. POSTMAN:** You agree it's not a waiver?

16 **MR. KELLY:** Well, I don't know what he's  
17 going to say.

18 **MR. POSTMAN:** Well, he's just going to say  
19 what I told him.

20 **THE WITNESS:** I was going to say they had  
21 told me kind of the highlights of the deposition.

22 **MR. POSTMAN:** That's fine.

23 **THE WITNESS:** So, with that, I wasn't as  
24 shocked last night in actually going through and  
25 reading everything because the surprise element was

1 three hours on, you know, to kind of break down  
2 specifically things he said that were inaccurate or  
3 probably not true in the transcript. There's a few  
4 things I remember seeing.

5 But, yes, I -- yes, in large part, I was  
6 very surprised by a lot of the -- a lot of the facts  
7 of what happened here.

8 **MR. POSTMAN:** F-a-c-t-s on that one.

9 **THE WITNESS:** Sorry.

10 **MR. POSTMAN:** No. Great. I just want to  
11 make sure the court reporter gets it.

12 **BY MR. KELLY:**

13 Q Did you ever have an opportunity to  
14 question his statements in working with FaxQom?

15 A **I'm not sure what you mean by questioning**  
16 **his statements.**

17 Q Well, did he ever make a statement to you  
18 that you questioned as being untruthful?

19 A **I don't recall.**

20 **MR. POSTMAN:** Form.

21 You can answer.

22 **THE WITNESS:** Yes, I don't recall  
23 specifically an instance. General nature that I  
24 have, if somebody tells me something that doesn't  
25 sound believable, I typically question it.

1 **BY MR. KELLY:**

2 Q Did you question the quantity of 8.2  
3 million solicited or opt-in fax lists?

4 **MR. POSTMAN:** Form.

5 **THE WITNESS:** I don't recall. I may have.

6 **BY MR. KELLY:**

7 Q Did you ever question the 305,000 opt-in  
8 fax lists for the various area codes?

9 **MR. POSTMAN:** Form.

10 **THE WITNESS:** I requested the counts so --

11 **BY MR. KELLY:**

12 Q Did you ever question --

13 **MR. POSTMAN:** Wait. He said, "So." He may  
14 be done --

15 **THE WITNESS:** So I'm just kind of -- trying  
16 to -- I'm just trying to kind of think. It was five  
17 years ago, so the reality is I'm trying to be as  
18 forthright as I can and provide you with as much as  
19 I can, but I just -- you know, just, again, trying  
20 to jog my memory from five years ago.

21 Did I question the total number of 305-? I  
22 don't recall, but it was a question in the first  
23 place in order to get the 305- was "how many do you  
24 have?" So...

25 ///

1 **due diligence. Most of what I had learned to be the**  
2 **best practice was confirmed or seemed confirmed**  
3 **through Steve Simms. I was comfortable with**  
4 **receiving an indemnification and even took that a**  
5 **step further by attaching an Exhibit A that I put**  
6 **there as well.**

7 Q We'll get into that.

8 **MR. POSTMAN:** Well, you didn't let him  
9 finish, unless you want to withdraw the question.

10 **THE WITNESS:** Well, the Exhibit A answers  
11 that question because it says -- I put this in here.  
12 It says:

13 "FaxQom confirms that all faxes have  
14 been collected according to the best  
15 industry practices as outlined by the  
16 DMA."

17 That was in addition to the TCPA language  
18 he gave me. So I felt this really was a sense of  
19 confirmation. I was comfortable with this. It also  
20 said that FaxQom will agree to abide by all laws  
21 associated with fax marketing, and I felt that was  
22 sufficient.

23 **BY MR. KELLY:**

24 Q Did you understand Steve Simms as being an  
25 attorney?

1 **BY MR. KELLY:**

2 Q Did you ever ask for any documents to  
3 support the representation that there was an opt-in  
4 fax list?

5 **A I don't recall.**

6 Q Did Steve Simms ever provide you with any  
7 documents to support his representation that he had  
8 an opt-in fax list?

9 **A He did, yes. He provided me with the**  
10 **indemnity agreement. He provided to me. And in**  
11 **addition to indemnifying us from any legal issues**  
12 **that could arise, he confirmed that he was in**  
13 **compliance with the TCPA. He's been using these**  
14 **same legal compiling techniques since 1991 and that**  
15 **they had a solid reputation. My account would be**  
16 **handled directly by Steve Simms. They would all be**  
17 **under his management and that he was a 17-year vet.**  
18 **So...**

19 Q Well, did he ever -- when he represented to  
20 you that he had an opt-in fax list, did you then  
21 go back to statute or FCC regulations even to  
22 determine if there's any significance to an opt-in  
23 fax list?

24 **A I think we were -- I don't recall. I think**  
25 **we were beyond that at that point. I had done my**

1 **A I don't recall him being an attorney, no.**

2 Q Did he ever represent to you that he was an  
3 attorney?

4 **A I don't believe so, no.**

5 **MR. POSTMAN:** And smilingly, because  
6 whatever he represented to you -- he's a motorcycle  
7 guy; right?

8 **BY MR. KELLY:**

9 Q In 2009, the Buccaneers had general  
10 counsel; is that right?

11 **A I believe so. There were some periods kind**  
12 **of between, but, yes, I believe so.**

13 Q And the general counsel for the Buccaneers  
14 in 2009 was Manny Alvarez?

15 **A He would have -- yes, he would have been**  
16 **the guy then.**

17 Q In 2000- -- let's say early 2009, before  
18 contracting with FaxQom, did you ever have any  
19 contact with Manny Alvarez regarding the legality of  
20 sending the advertisements by fax?

21 **MR. POSTMAN:** Objection. I'm going  
22 to instruct you not to answer based on the  
23 attorney-client privilege.

24 **MR. KELLY:** I'm not asking the actual  
25 conversations, just whether or not there was

1 contact.

2 **MR. POSTMAN:** The question that you phrased  
3 was with regard to a certain subject matter, and  
4 I've instructed him not to answer.

5 So if you're going to ask him if he ever  
6 spoke to Manny Alvare, I'll let him answer that.  
7 But if you say he spoke to Manny Alvare with regard  
8 to X, Y, Z, then you're asking my client about a  
9 conversation he had with counsel, and I'm going to  
10 instruct him not to answer.

11 You can ask him if he ever spoke to Manny  
12 Alvare.

13 **MR. KELLY:** Well, that's not my question.

14 **MR. POSTMAN:** I know.

15 **MR. KELLY:** Let me ask it again. You can  
16 object, and I'll just certify the question. I  
17 just want to make sure I get the question out, the  
18 question I want to ask.

19 **MR. POSTMAN:** Okay. You don't have to  
20 certify it in Florida, but you can do it if you want  
21 to. I'll agree that it's certified. You don't need  
22 that. But I'm happy to let you do it again.

23 **MR. KELLY:** All right.

24 Q Prior to contracting with FaxQom, did you  
25 ever contact Manny Alvare for his input in whether

1 But I do think it's inappropriate. It's  
2 not worth fighting over, and I think I have an  
3 obligation as an Officer of the Court to find out if  
4 there's a reason for us to fight something.

5 And so having said all of that, if you want  
6 to read back the question, he'll answer it, I  
7 believe.

8 (Record read as follows:

9 "Q Prior to contracting with FaxQom,  
10 did you ever contact Manny Alvare for his  
11 input in whether or not the sending of  
12 those advertisements by fax would be  
13 legal?")

14 **THE WITNESS:** I don't recall.

15 **BY MR. KELLY:**

16 Q Had you contacted any lawyer prior to  
17 contracting with FaxQom to determine whether or not  
18 the advertisements by fax were being sent legally?

19 **MR. POSTMAN:** Okay. I probably shouldn't  
20 have let you answer the last question. I was trying  
21 to be nice about it.

22 I'm going to object and instruct him not to  
23 answer.

24 **MR. KELLY:** Do you understand the question?

25 **MR. POSTMAN:** Well, if --

1 or not the sending of those advertisements by fax  
2 would be legal?

3 **MR. POSTMAN:** So let me just talk to him  
4 for a second. It may be that I can waive the  
5 objection, depending on what the answer is. So I  
6 think I'm allowed to with a pending question, with  
7 there being a privilege, to find out. It may be  
8 that he doesn't know, or it may be that he knows.

9 Let me see if I can resolve the answer. I  
10 do think that's an objectionable one, but if it's  
11 something that we can avoid -- let me just talk to  
12 him outside for a second.

13 **THE VIDEOGRAPHER:** The time is 11:31 a.m.  
14 We are off the record.

15 (Whereupon, there was a pause in the  
16 proceedings from 11:31 a.m. to 11:33 a.m.)

17 **THE VIDEOGRAPHER:** Back on the record. The  
18 time is 11:33 a.m.

19 **MR. POSTMAN:** So I think it's inappropriate  
20 for you to ask my client when he talked to his  
21 lawyer about any specific subject matter.

22 But, in all fairness, I've asked him. He  
23 doesn't recall. So there's no reason for us to  
24 fight over something he doesn't remember. So I'll  
25 have him say that on the record.

1 **MR. KELLY:** I want to make sure that the  
2 witness understands the question.

3 **THE WITNESS:** I understand the question.

4 **MR. KELLY:** So I'll certify the question.

5 **MR. POSTMAN:** All right.

6 **BY MR. KELLY:**

7 Q Is your cell phone number (310) 980-4068?

8 **A That's correct. Again, I'll contact him --**  
9 **I think you wrote it down, "4068" --**

10 **MR. POSTMAN:** Don't contact him without  
11 going through my office. That includes you, Madam  
12 Court Reporter. Although he's married, but don't  
13 contact him.

14 **THE WITNESS:** Somebody had contacted me  
15 years ago on this. My office had called.

16 **MR. POSTMAN:** These lawyers -- they won't  
17 do that.

18 **THE WITNESS:** Not these gentlemen. I think  
19 it was the attorney for CIN-Q called me directly.

20 **BY MR. KELLY:**

21 Q All right. Now, do you have an  
22 understanding of what else was discussed -- well,  
23 strike that.

24 What else was discussed regarding FaxQom's  
25 representation that they had an opt-in fax list?

1 **MR. POSTMAN:** Form.  
2 **THE WITNESS:** Specific to the opt-in list,  
3 I think it was -- again, what I would have stated  
4 was that he had been in business for 18 years. He  
5 had collected fax numbers lawfully with people who  
6 had agreed to receive faxes; that he was aware of  
7 all the best practices, as outlined in the DMA,  
8 Direct Marketing Association; and that he was very  
9 familiar with the laws of the TCPA, specifically  
10 because his company was started or incorporated the  
11 year that that Act came out.  
12 **BY MR. KELLY:**  
13 Q After Steve Simms represented that he had  
14 an opt-in fax list, did you then go back to any of  
15 the other fax broadcasters that you may have spoken  
16 to and asked them about the existence of any opt-in  
17 fax list?  
18 **MR. POSTMAN:** Object to the form.  
19 **THE WITNESS:** I don't recall. I think we  
20 may have been beyond that at that point, but I don't  
21 recall.  
22 **BY MR. KELLY:**  
23 Q What do you mean you may have been beyond  
24 that?  
25 A Well, you're asking as far as the language

1 Q Was there ever a situation that you  
2 seriously considered another fax marketing company?  
3 A I don't believe so.  
4 Q And just so I'm clear, you don't know how  
5 you first came into contact with FaxQom?  
6 A I don't recall.  
7 Q Okay.  
8 A I really don't recall.  
9 Q Do you know that FaxQom was even on the  
10 Internet in 2009?  
11 A I believe so. Either they had reached out  
12 to me as some sort of, you know, e-mail advertising  
13 of who they were, and I held onto it, or I had  
14 Googled -- I think it was Google that was used --  
15 Googled "fax marketing companies." At some point I  
16 came across FaxQom. So I do recall them having a  
17 Website, yes.  
18 Q Did you rely on anything on the Website in  
19 contracting with FaxQom?  
20 A You know, I don't remember specifically  
21 when this case came about. I remember trying to go  
22 to the FaxQom Website and it not being there. So  
23 that would have helped, I think, jog my memory a  
24 little bit, but I don't recall. There could have  
25 been testimonials.

1 with Steve. We had -- again, to my knowledge, had  
2 an oral conversation prior to the e-mail in January,  
3 the first, I guess, written correspondence we had.  
4 I don't recall how many subsequent conversations  
5 he and I had, you know, discussing the lawfulness  
6 of -- you know, of his practices and, you know, the  
7 guidelines he followed. So I guess -- what was the  
8 question now?  
9 Q Well, the question was, after he  
10 represented to you that he had an opt-in fax list,  
11 did you then go back to any other fax marketing  
12 companies and ask them if they had any opt-in fax  
13 list?  
14 **MR. POSTMAN:** Form.  
15 **THE WITNESS:** I don't recall. I think it  
16 was -- I don't recall. I don't think it was a  
17 situation where I would have gone back to ask the  
18 question. I think that question was the primary  
19 question that I had for any of these companies that  
20 I had -- or would have contacted.  
21 **BY MR. KELLY:**  
22 Q Is FaxQom the only fax marketing company  
23 that represented to you that they had an opt-in fax  
24 list?  
25 A I don't recall.

1 I can just speak for myself when looking  
2 into different, you know, companies that we're  
3 looking to do business with. You know, the Website,  
4 the quality of the Website, the responsiveness --  
5 you know, these are all things that we consider.  
6 Q Did FaxQom ever send you any references?  
7 A I don't recall.  
8 Q Did you have an understanding that Steve  
9 Simms was operating near Houston, Texas?  
10 A I don't remember where or really having  
11 given thought where he was himself operating out of.  
12 I remember I recognized a 617 number as I remember  
13 from Boston. I just -- I know area codes very well  
14 as part of personal items.  
15 So, generally, the company, at least being  
16 incorporated or having an office or something there,  
17 I think, to my recollection. Where he was, myself,  
18 I don't think I gave it much concern. I get  
19 questions a lot of times how I work for the Tampa  
20 Bay Buccaneers in California. In this day and age,  
21 you know, with these machines and the telephones  
22 and videoconferences, it wouldn't be something  
23 that I would have given a whole lot of concern to or  
24 question to.  
25 Q Prior to contracting with FaxQom, do you

1 have an understanding of where their business was  
2 operating out of?  
3 **A I don't -- prior to contacting them?**  
4 **Q Contracting.**  
5 **A Oh, contract. I think -- I don't recall.**  
6 **I probably would have assumed it was -- you know, it**  
7 **was in Boston. I think it was -- again, it was a**  
8 **617 number on the Website so --**  
9 **Q Did you ever search the Boston Secretary**  
10 **of State to see if FaxQom was a legal incorporated**  
11 **business?**  
12 **A Unlikely that I did.**  
13 **Q Did you ever check the Better Business**  
14 **Bureau, you know, for any complaints related to**  
15 **FaxQom?**  
16 **A I don't recall. No, I don't recall.**  
17 **Q Did you ever ask Steve Simms whether or not**  
18 **he maintained liability insurance?**  
19 **A I don't recall.**  
20 **Q Did Steve Simms ever tell you that he**  
21 **maintained liability insurance?**  
22 **A I don't recall. If he did, it would have**  
23 **been on an oral -- a conversation over the phone,**  
24 **because I don't have any representation from him**  
25 **that's in writing that he did.**

1 **BY MR. KELLY:**  
2 **Q What is the compensation for an unsolicited**  
3 **advertisement by fax?**  
4 **MR. POSTMAN:** Is the only way you know that  
5 based upon either communication or letters from me  
6 and/or from your general counsel?  
7 **THE WITNESS:** Perhaps.  
8 **MR. POSTMAN:** If the only way you know the  
9 answer to that question is because of what we've  
10 told you, I'm going to instruct you not to answer.  
11 **THE WITNESS:** Okay.  
12 **MR. POSTMAN:** Whether it be told written or  
13 orally, based upon communications that have been  
14 written.  
15 **THE WITNESS:** I think perhaps -- I'm not a  
16 hundred percent. Perhaps. So if you don't want me  
17 to answer because of that, then that's fine --  
18 **MR. POSTMAN:** I don't want you to answer  
19 because you're not allowed to talk about information  
20 you learned from me or from Mr. Cohen or --  
21 **THE WITNESS:** Right.  
22 **MR. POSTMAN:** -- from any of your  
23 predecessor firms.  
24 **THE WITNESS:** I don't know. I'm sure I  
25 could Google on my phone in two seconds so -- your

1 **Q Prior to contracting with FaxQom did you**  
2 **have an understanding of how much is awarded to a**  
3 **recipient of an unsolicited advertisement by fax?**  
4 **MR. POSTMAN:** Object to form.  
5 **THE WITNESS:** Prior to contacting him?  
6 **BY MR. KELLY:**  
7 **Q No -- well, yes.**  
8 **A Or contracting or contacting?**  
9 **Q Yes.**  
10 **A I don't believe so. I may have come across**  
11 **it in my review of the TCPA or DMA. I could tell**  
12 **you I think I know the answer to that now just based**  
13 **on this case, but I can't speak for five years ago**  
14 **what I knew regarding that.**  
15 **Q So you didn't know what the award is for**  
16 **an unsolicited advertisement by fax prior to**  
17 **contracting with FaxQom?**  
18 **MR. POSTMAN:** Form.  
19 **THE WITNESS:** Again, it may have been  
20 something that I came across and understanding parts  
21 of it, TCPA and the outlines of the TCPA and the  
22 DMA. I can't answer with certainty if I knew  
23 exactly what that number was or what it was five  
24 years ago. Again, I can tell you what it is today,  
25 I think.

1 question wasn't about whether I know it now. Your  
2 question was whether that I knew it then, and I  
3 can't recall if it was something that I was aware of  
4 at that point.  
5 **BY MR. KELLY:**  
6 **Q Did Steve Simms ever tell you what could be**  
7 **awarded for each violation?**  
8 **A Again, I don't recall because I don't**  
9 **remember an amount. So if he told me what could**  
10 **have been awarded -- if he did, I don't remember**  
11 **being told a specific amount or figure or number.**  
12 **Q Well, you were aware prior to contracting**  
13 **with FaxQom that there was a statute that prohibited**  
14 **the sending of advertisements by fax --**  
15 **MR. POSTMAN:** Object to the form.  
16 **BY MR. KELLY:**  
17 **Q -- generally?**  
18 **MR. POSTMAN:** Object to the form.  
19 **THE WITNESS:** No. My understanding was  
20 that there was liability associated with the  
21 unsolicited sending of faxes --  
22 **BY MR. KELLY:**  
23 **Q Okay.**  
24 **A -- potentially.**  
25 **Q Right. Did you have an understanding**

1 that a recipient can go into court and seek money  
 2 damages?  
 3 **A It would have been an assumption that**  
 4 **I -- yes, I would assume by just definition of**  
 5 **"liability" and there being laws associated with**  
 6 **it and just the nature of the TCPA coming into**  
 7 **existence, I would assume that, yes, by going**  
 8 **against that, there would be legal repercussions.**  
 9 **I don't know specifically what they could be or how**  
 10 **large they could be or if it's jail time or if it's**  
 11 **court or what it is but...**  
 12 **Q Did you know what a class action was prior**  
 13 **to contracting with FaxQom?**  
 14 **A I'm sure I probably did, yes.**  
 15 **Q And you do understand this case is being a**  
 16 **proposed class action?**  
 17 **A It's my understanding, correct.**  
 18 **Q Can you tell me what your understanding of**  
 19 **what a "class action" is.**  
 20 **MR. POSTMAN:** So if it's only based upon  
 21 information you learned from lawyers --  
 22 **THE WITNESS:** I don't -- no, I don't think  
 23 so. My understanding -- I don't know specifically  
 24 how many members of the class there have to be.  
 25 I mean, I get things from the credit cards, you

1 **e-mail that I brought, you know, I put -- well,**  
 2 **there's a quote. I have:**  
 3 **"Steve, after reading some literature**  
 4 **on legislation regarding to spam marketing**  
 5 **as it relates to faxes, I am concerned**  
 6 **with moving forward. Can you please**  
 7 **tell me if a hundred percent of your**  
 8 **numbers have opted in."**  
 9 **So I guess, to answer your question, it**  
 10 **was -- yes, I think it was a concern we had before**  
 11 **getting into this space or engaging anybody. It was**  
 12 **something that we were aware could have, you know,**  
 13 **some potential liability, and with that we wanted to**  
 14 **be as diligent as -- you know, as really we could be**  
 15 **to make sure that we had the correct company and**  
 16 **that they used the best practices.**  
 17 **Q So you were aware that recipients could**  
 18 **file proposed class actions for violating the TCPA?**  
 19 **MR. POSTMAN:** Object to the form.  
 20 **THE WITNESS:** I was -- my research into the  
 21 TCPA was more kind of a general understanding. So  
 22 I don't know where you're headed with this, but if  
 23 specifically what the amount or how it takes place  
 24 or exactly how, you know, liability is assessed,  
 25 again, not being an attorney, I, you know, relied

1 know, all the time in the mail. I usually just  
 2 throw them out. But my understanding of a class  
 3 action is -- are you asking my understanding of  
 4 other class actions or my understanding of how many  
 5 parties it takes?  
 6 **BY MR. KELLY:**  
 7 **Q Well, just generally what a class action**  
 8 **is.**  
 9 **A It's usually a large -- my understanding, a**  
 10 **firm representing a certain number of people who --**  
 11 **you know, who all have a valid or a legal, you know,**  
 12 **complaint.**  
 13 **Q Were you aware that lawyers had filed**  
 14 **class action complaints against entities who sent**  
 15 **unsolicited advertisements by fax prior to you**  
 16 **contracting with FaxQom?**  
 17 **A Not specifically. If there were specific**  
 18 **cases -- I don't recall having any knowledge at all,**  
 19 **and if there was a knowledge, I don't recall any**  
 20 **specific knowledge, you know, of certain cases or**  
 21 **things that may have existed.**  
 22 **Q Did you ever discuss with Steve Simms the**  
 23 **possibility that someone could file a class action**  
 24 **lawsuit?**  
 25 **A That was -- I think to go back to the first**

1 upon, you know, FaxQom and their representations,  
 2 you know, on that.  
 3 I had a general understanding of kind of  
 4 what the best practices were, the right way to do  
 5 things, which is kind of what navigated my search  
 6 and pushed me towards, I think, FaxQom.  
 7 **MR. POSTMAN:** At the right time, I need to  
 8 take a break, but whenever you're ready.  
 9 **MR. KELLY:** You want to take -- go for  
 10 lunch?  
 11 **MR. POSTMAN:** I've got to go to the  
 12 Bathroom.  
 13 **MR. KELLY:** Okay. Let's just take a  
 14 break --  
 15 **MR. POSTMAN:** But I want to -- do you have  
 16 a couple of more questions?  
 17 **MR. KELLY:** No. I mean, I've got more  
 18 questions on that issue.  
 19 **MR. POSTMAN:** You want to finish it? It's  
 20 up to you.  
 21 **MR. KELLY:** No. I've got more questions  
 22 where I don't want you to feel uncomfortable during  
 23 that.  
 24 **MR. POSTMAN:** Okay, because I have to go.  
 25 **MR. KELLY:** But I think we should probably

1 break for lunch if --  
2 **MR. POSTMAN:** So you could not -- just tell  
3 me, what's your time frame? I mean, do we want to  
4 take a lunch break, or I'm happy to take my client  
5 out to lunch and we can take an hour, or do you want  
6 to -- if you're going to be all day, maybe the best  
7 thing we do is bring food in, if you're intending on  
8 being seven hours.  
9 **MR. KELLY:** Well, we've got -- well, we've  
10 got -- well, we don't need this on the record.  
11 **MR. POSTMAN:** Okay.  
12 **THE VIDEOGRAPHER:** Off the record or --  
13 you said, "off the record"?  
14 **MR. KELLY:** Off the record's fine, yes.  
15 **THE VIDEOGRAPHER:** The time is 11:50 a.m.  
16 We are off the record.  
17 (Whereupon, a recess was taken from  
18 11:50 a.m. to 12:13 p.m.)  
19 **THE VIDEOGRAPHER:** Back on the record. The  
20 time is 12:13 p.m.  
21 **BY MR. KELLY:**  
22 Q Okay. We were talking about, prior to  
23 contracting with FaxQom, your understanding of the  
24 general fax laws.  
25 My question to you is did you have

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1 an appreciation as to whether or not these  
2 advertisements by fax were sent illegally, how much  
3 the Buccaneers can be fined or have to pay out?  
4 **MR. POSTMAN:** Form.  
5 **THE WITNESS:** Well, I don't claim to -- you  
6 know, to specifically understand all of the laws. I  
7 would use the word, you know, "guidelines" perhaps  
8 for the DMA and for the TCPA.  
9 I understood there to be some liability  
10 as, you know, there's liability for doing anything  
11 illegal. Clearly, there was some sort of law or act  
12 in place that kind of set the guidelines and imposed  
13 liability. So that's, I think, what we were --  
14 you know, really what we were aware of and concerned  
15 with when choosing -- you know, when choosing a fax  
16 marketer.  
17 **BY MR. KELLY:**  
18 Q Prior to contracting with FaxQom, did you  
19 have an understanding that the Buccaneers would have  
20 to pay out hundreds of millions of dollars if the  
21 faxes were sent illegally?  
22 **MR. POSTMAN:** Object to the form.  
23 **THE WITNESS:** No. Again, I wasn't aware of  
24 what specifically that the liability is or could be  
25 so I didn't -- I don't imagine I had assumed any

1 calculations on what a total amount for liability  
2 could be.  
3 **BY MR. KELLY:**  
4 Q Well, prior to contracting with FaxQom, did  
5 you have an understanding that a recipient could be  
6 awarded \$500 for each unsolicited advertisement  
7 by fax?  
8 **MR. POSTMAN:** Object to the form.  
9 **THE WITNESS:** Again, I don't recall if I  
10 was aware at the time what that amount is or was,  
11 and it was my understanding that a company -- the  
12 company that would be liable would be the company  
13 that sent the faxes out.  
14 **BY MR. KELLY:**  
15 Q And was that your understanding prior to  
16 contracting with FaxQom?  
17 **A Yes.**  
18 Q Okay. Why did you believe that it would be  
19 the company that would send out the faxes that would  
20 be liable, as opposed to the Buccaneers?  
21 **MR. POSTMAN:** Object to the form.  
22 **THE WITNESS:** I don't know specifically  
23 what perhaps I read. I think it's safe to say  
24 that my assumption would be if a legitimate company  
25 like the Buccaneers hired another legitimate company

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1 that followed the rules, followed the regulations,  
2 indemnified us from any harm, had no problem  
3 representing that what they were doing was legal,  
4 was forthright, was with the compliance of the law,  
5 I think it was a reasonable assumption at the time,  
6 if that is what I made, that we would have no reason  
7 to be liable for taking the measures that we took  
8 and the assurances that we have in writing.  
9 **BY MR. KELLY:**  
10 Q Are you drawing the distinction between the  
11 representations that FaxQom made to you, as opposed  
12 to the person hitting the "Send" button in the  
13 context of who would be liable under the TCPA?  
14 **MR. POSTMAN:** Form.  
15 **THE WITNESS:** I'm not sure if I understand  
16 the question. Let me try to answer it.  
17 FaxQom was the person sending the "Send"  
18 button, to my knowledge, and they were the only one  
19 who had the limited authority to do so. I was only  
20 made aware that there were other companies in the  
21 past couple of weeks.  
22 **BY MR. KELLY:**  
23 Q My question to you is did you feel that the  
24 Buccaneers could be liable, regardless of who would  
25 press the "Send" button?

1 **MR. POSTMAN:** Form.  
2 **THE WITNESS:** I understood that there was  
3 some liability associated with not following the  
4 best practices. Now, exactly how that broke down,  
5 who could be liable, you know, really where the road  
6 ends -- you know, what kind of a -- you know, the  
7 trail leads. Again, I'm not an attorney. I don't  
8 know if at the time or even now I understand  
9 specifically, you know, how that ends up.  
10 It was our concern initially, understanding  
11 that there could be some liability to somebody for  
12 not following, which is why we -- again, we took the  
13 measures to make sure that we were indemnified; we  
14 were working with a legitimate company. As Steve  
15 put it, "had been in business for 18 years." He  
16 said a hundred percent of their data compiled is  
17 opted in and a few other representations I know that  
18 he made. Let me just -- I'll just touch base on the  
19 ones that he put in writing.  
20 "FaxQom will agree and abide by all  
21 laws associated with fax marketing" --  
22 facsimile marketing; right? Facsimile? I just sort  
23 of used that term.  
24 **BY MR. KELLY:**  
25 Q Did you do anything to verify that FaxQom

1 **and represented.**  
2 Q Were you ever provided the names and  
3 addresses to those fax numbers that were used for  
4 the fax broadcasting?  
5 **A No. I never even saw the fax numbers.**  
6 **MR. KELLY:** Let's mark this as the next  
7 number. I think it's "3."  
8 **THE REPORTER:** Yes, it's "3."  
9 \* \* \*  
10 (Whereupon, the document referred  
11 to was marked for identification  
12 as Plaintiffs' Exhibit No. 3.)  
13 \* \* \*  
14 **MR. POSTMAN:** On the record, I do want to  
15 appreciate Counsel's professional courtesy having a  
16 copy for me and for my client.  
17 **BY MR. KELLY:**  
18 Q All right. I'm showing you what's been  
19 marked as Exhibit 3. It's an e-mail from you to  
20 FaxQom dated June 24, 2009. Do you see that?  
21 **A I do.**  
22 Q You state that "After reading some  
23 literature on legislation regarding spam marketing  
24 as it relates facsimile" -- do you see that?  
25 **A I do.**

1 had been in business for 18 years?  
2 **A I don't recall specifically what I**  
3 **did to confirm. I think we felt that with**  
4 **the conversations we had -- that I had, the**  
5 **representations that they made and the**  
6 **indemnification that we received and whatever**  
7 **research we did at the time and our own due**  
8 **diligence of going through the DMA and the TCPA**  
9 **and -- I think I felt that was sufficient.**  
10 Q Did you do anything to verify that the fax  
11 lists that were going to be used were people who had  
12 opted in?  
13 **MR. POSTMAN:** Form.  
14 **THE WITNESS:** Yes. I received in writing  
15 from FaxQom or Steve Simms that:  
16 "All faxes have been collected  
17 according to the best industry practices  
18 as outlined by the Direct Marketing  
19 Association."  
20 **BY MR. KELLY:**  
21 Q Other than Steve Simms' representations to  
22 you, did you do anything else to verify that FaxQom  
23 was using an opt-in list?  
24 **A Not that I recall. I don't feel that at**  
25 **that point it was necessary with what I was given**

1 Q And your concerns with moving forward with  
2 the list. Do you see that?  
3 **A I do.**  
4 Q Do you know, specifically, what literature  
5 you were reviewing?  
6 **A I don't recall. Being five years ago, gee,**  
7 **I could probably assume it was the TCPA or the DMA**  
8 **or those items because it was, you know, those two**  
9 **items that made it onto the indemnification, the**  
10 **exhibit that -- the paperwork that we had executed**  
11 **with him. I assume it was them. What other**  
12 **literature -- there may have been some other**  
13 **literature or Websites or things that perhaps**  
14 **I researched and looked into.**  
15 Q All right. Now, this e-mail is dated  
16 June 24. Do you see that?  
17 **A I do.**  
18 Q The contact that you had with Steve Simms,  
19 the initial e-mail contact was January 23, 2009. Do  
20 you see that?  
21 **A I do.**  
22 Q So that's about a six-month gap in time.  
23 Do you have an understanding as to what transpired  
24 from January to June 24, 2009?  
25 **MR. POSTMAN:** I'm sure you're doing this --

1 there's an e-mail below it that appears.  
2 **MR. KELLY:** There is, yes.  
3 **MR. POSTMAN:** I'm sure that you did it  
4 unintentionally, but there's an e-mail below it  
5 that appears to be a response to, but I think that's  
6 copied somewhere in here, too.  
7 **THE WITNESS:** You know, I could speak in  
8 generality. A lot of things that I work on, you  
9 know, take some time to come to fruition. I think  
10 we would agree that even though we perhaps set out  
11 to begin looking forward to season ticket sales and  
12 things, that January is probably not the best time  
13 to have, you know, sent them.  
14 **BY MR. KELLY:**  
15 Q All right. So was it your --  
16 I thought you were going to object.  
17 **A Well, I was actually just going to take it**  
18 **a step further. I don't know if this is relevant or**  
19 **not, but the e-mail in January showed 305,000 fax**  
20 **numbers. And I only bring this up because you had**  
21 **asked about it earlier. This e-mail here shows, as**  
22 **a response on May 12, 2009, 306-.**  
23 **So, again, it just helps to solidify that**  
24 **it looks like they're continuing to add to this**  
25 **list. And in six months' time, a thousand extra**

1 actually referring to faxing; right?  
2 **A Correct. You know, above it I said, "spam**  
3 **marketing" -- I'm sorry. I'm just going to turn my**  
4 **phone off. I thought I had.**  
5 **MR. POSTMAN:** If you need to take a call --  
6 **THE WITNESS:** No, I'm fine. I'm fine. I  
7 just want to turn it off.  
8 **BY MR. KELLY:**  
9 Q So spam mail --  
10 **MR. POSTMAN:** Well, you've got to let him  
11 finish.  
12 **THE WITNESS:** Well, I would just say  
13 I -- "spam mail" and "spam marketing" I use  
14 interchangeably. I'm sitting in a roomful of  
15 attorneys, so I'm sure there are differences between  
16 the two. I think my intent was, yes, the spam --  
17 the marketing or the spam mail or -- that is what I  
18 was referring to is the faxes.  
19 **BY MR. KELLY:**  
20 Q Why did you want FaxQom to indemnify the  
21 Buccaneers from any complaints?  
22 **A You know, I don't recall if it's perhaps**  
23 **something that I gathered from the research with the**  
24 **DMA or some of these other sites I may have gone on,**  
25 **or it could very well have been some conversations**

1 accounts seemed very reasonable to me, and I  
2 remember specifically looking at that. It seemed  
3 like they were continuing their practices of -- you  
4 know, of opting in. I know you were questioning the  
5 8.2 before so...  
6 Q Well, yes, that was my question. That  
7 didn't raise any red flags to you about the 8.2  
8 million?  
9 **MR. POSTMAN:** Form.  
10 **THE WITNESS:** I don't recall, and I don't  
11 remember specifically referring to the 8.2 in  
12 Exhibit 2. I don't know how much attention I paid  
13 to what was sent in here because it was not an  
14 e-mail addressed directly to me.  
15 **BY MR. KELLY:**  
16 Q All right. So in your June 24 e-mail  
17 you go on to say:  
18 "Also, would you be willing to  
19 indemnify us from any complaints or  
20 potential financial recourse as it  
21 relates to the fines imposed for spam  
22 mail?"  
23 Do you see that?  
24 **A I do.**  
25 Q When you refer to "spam mail," you're

1 that I had with some of the other fax companies  
2 that, you know, I may have contacted. I don't  
3 remember specifically, but I felt if FaxQom was so  
4 confident with their practice that he would have no  
5 problem, you know, putting -- you know, putting his  
6 money where his -- you know, where his mouth was and  
7 indemnifying and standing behind his representations  
8 that everything was done lawfully.  
9 Q You never asked him whether or not he had  
10 liability insurance, did you?  
11 **MR. POSTMAN:** Object to the form.  
12 **THE WITNESS:** I don't recall. It may have  
13 been a conversation that was had. It may not have  
14 been.  
15 **BY MR. KELLY:**  
16 Q Did you ever request for him to provide  
17 you with any insurance policies regarding liability  
18 insurance?  
19 **MR. POSTMAN:** Object to the form.  
20 **THE WITNESS:** Again, I don't recall. If  
21 I did, I don't recall receiving anything. So I'm  
22 confident it would be -- you know, it would have  
23 been provided in these documents.  
24 **BY MR. KELLY:**  
25 Q Did you ever ask FaxQom to put the

1 Buccaneers as an additional insured on their policy?  
2 **MR. POSTMAN:** Object to the form.  
3 **THE WITNESS:** I don't recall.

4 **BY MR. KELLY:**

5 Q Did you have an understanding of whether or  
6 not FaxQom could even reimburse or pay for any of  
7 the potential financial recourse as it relates to  
8 the fax broadcasting?

9 **A I don't recall. You know, I -- I don't**  
10 **recall. As I understood, it would be FaxQom that**  
11 **would be liable if they were not following the**  
12 **regulations they represented. So it would be their**  
13 **issue as far as their insurance or how they wanted**  
14 **to deal with that.**

15 Q Does the fact that FaxQom did or did not  
16 have insurance or did or did not have the ability to  
17 pay on a judgment -- did that have any relevance to  
18 you?

19 **MR. POSTMAN:** Object to the form.

20 **THE WITNESS:** I don't know whether they did  
21 or didn't or what their ability was or wasn't to  
22 pay. You know, they seemed like a very legitimate  
23 company, having -- you know, having understood the  
24 TCPA, the DMA, having been in business for 18 years.  
25 It would be a reasonable assumption for me to assume

1 **BY MR. KELLY:**

2 Q In your June 24 e-mail you state that  
3 you're concerned with moving forward with your list.  
4 What was your concern at that time?

5 **A It may not have been the best words to**  
6 **use. I think FaxQom and I were still having a**  
7 **conversation. Nothing had been decided. I don't**  
8 **recall any specific concern with his list. More**  
9 **of just a concern in general. You know, "Gee, guys,**  
10 **after really looking into this TCPA and this DMA, I**  
11 **just want to be a hundred percent sure here." So I**  
12 **think that was more the intent of what was written**  
13 **there, as opposed to having a specific concern on**  
14 **his list.**

15 **You can see his response immediately after**  
16 **that confirms that a hundred percent of the data is**  
17 **compiled, is opted in, and that's how they, again,**  
18 **survived 18 years. He says he has no problem**  
19 **indemnifying us in a broadcast relationship, and**  
20 **then asked if we wanted to continue.**

21 Q Did Steve Simms ever represent to you that  
22 he called all of the entities associated with the  
23 fax numbers seeking permission for the Buccaneers to  
24 send them an advertisement by fax?

25 **MR. POSTMAN:** Object to the form.

1 that, you know, a business would carry a policy.

2 But as far as any specific conversations I  
3 had with them requesting it or not requesting it, I  
4 don't specifically recall; or, to your point, their  
5 ability to be able to pay. I don't recall.

6 **BY MR. KELLY:**

7 Q All right. According to Exhibit 1, there  
8 were 300,000 and change counts of fax lists. At  
9 this point was there a discussion regarding that  
10 these fax lists were opted-in fax lists?

11 **MR. POSTMAN:** Form.

12 **THE WITNESS:** I don't recall with regard  
13 to this initial quote. However, just kind of  
14 going back on memory, the direction we headed in  
15 contacting and engaging fax marketing companies  
16 was based off of our general -- I keep saying  
17 "our" -- my general understanding of the TCPA and  
18 the outlines set forth in the DMA.

19 So, as I recall, most conversations that  
20 were had with any fax companies were kind of  
21 based or predicated upon that knowledge or that  
22 understanding or that qualification, where I could  
23 confidently say I don't believe I would have  
24 continued to speak to companies that couldn't offer  
25 that or represent that or warrant that.

1 **THE WITNESS:** Well, the Buccaneers never  
2 sent anyone a fax. It was faxed on the CIN-Q faxes.  
3 But did he represent that he had called and spoken  
4 to each of the business -- I think we're referring  
5 to businesses; I'm not sure of the total number of  
6 faxes at that point -- did he represent that to me?  
7 I don't recall, other than what he represented  
8 already in writing, which was that everyone was  
9 opted in and that he had, you know,  
10 an existing relationship or -- let me get exactly  
11 what he says here. Let me just go back.

12 And that they were using legal techniques  
13 in compiling fax data, that Steve Simms would  
14 directly handle our account, and that they were in  
15 compliance with the TCPA Act from 1991.

16 **BY MR. KELLY:**

17 Q Well, in January he gave you a quote of  
18 300,000 fax numbers; correct?

19 **MR. POSTMAN:** Object to the form.

20 **THE WITNESS:** Correct.

21 **BY MR. KELLY:**

22 Q All right. You didn't have the  
23 understanding that he called these 305,000  
24 businesses associated with the fax numbers,  
25 specifically asking them if the Buccaneers can send

1 them a fax; correct?  
2 **MR. POSTMAN:** Object to the form.  
3 **THE WITNESS:** Well, again, the Buccaneers  
4 didn't send the faxes out. This is the -- some of  
5 the first dialogue that I had with Steve Simms so --  
6 I recall some subsequent oral conversations, and  
7 then there's a whole trail of some further e-mails.  
8 I can read each, if you'd like, to kind of go  
9 through how we got to the point of requesting the  
10 indemnification and him confirming that they were  
11 using legal techniques and that everyone was "opted  
12 in," I think as he put it.  
13 **BY MR. KELLY:**  
14 Q You know, my question is a little bit more  
15 specific. Whether or not he represented to you  
16 that he picked up the phone and called the 300,000  
17 businesses associated with the fax numbers, asking  
18 each one of them whether or not they would agree to  
19 a Tampa Bay Buccaneers fax.  
20 **MR. POSTMAN:** I think he's answered that  
21 question, I think, probably eight times. I'm only  
22 allowed to object to the form at some point until it  
23 gets to harassment. You've suggested this depo will  
24 be seven hours. You have a right, in all fairness,  
25 under the rules, taking seven hours, but if the way

1 **talked to each of those people, other than just that**  
2 **FaxQom had received permission to send.**  
3 **BY MR. KELLY:**  
4 Q Did he explain to you how FaxQom compiled  
5 the list of fax numbers?  
6 **A He did.**  
7 Q Let me show you this document (indicating)  
8 and ask you if it's consistent with your  
9 understanding.  
10 **MR. POSTMAN:** Wait. Do you want to  
11 withdraw the question?  
12 **THE WITNESS:** Just to answer your question,  
13 the way he said he compiled it was that they used  
14 legal techniques in compiling -- he used the word  
15 "compiling" -- fax data and that has enabled FaxQom  
16 to be 18 years strong, with a solid reputation in  
17 broadcast marketing. He said, "legal techniques."  
18 So that's how he used it.  
19 **MR. KELLY:** Can we mark this as the next  
20 number (indicating).  
21 \* \* \*  
22 (Whereupon, the document referred  
23 to was marked for identification  
24 as Plaintiffs' Exhibit No. 4.)  
25 \* \* \*

1 to get there is to ask the same question over and  
2 over again, that might border on the line of  
3 harassment.  
4 I'll let him answer it because, in the  
5 spirit of cooperation, we want to be agreeable and  
6 we want the Court to know that we're agreeable. But  
7 if the entire seven hours is going to be made up of  
8 asking questions over and over and over again so you  
9 can use your seven hours, at some point we're going  
10 to terminate it.  
11 Having said that, I apologize for the long  
12 objection. Perhaps the court reporter can read it  
13 back. I'll have him answer it again, and I'll  
14 object to the form.  
15 **THE WITNESS:** Well, I understand. Your  
16 question is did he specifically state that he picked  
17 up the phone and called -- and I guess maybe that's  
18 where my confusion is or why I'm not answering  
19 the question as direct as I could be. Are you  
20 referring to the Exhibit 1, or are we referring to  
21 the order form that was actually --  
22 **BY MR. KELLY:**  
23 Q Yes. I --  
24 **A In either case, I don't recall if he**  
25 **specifically said or stated that he had personally**

1 **THE REPORTER:** Exhibit 4.  
2 **MR. POSTMAN:** I can't get mad at you for  
3 not giving me a copy if you got it yesterday; right,  
4 Ross?  
5 **MR. GOOD:** You should see the bill for  
6 printing this one.  
7 **MR. POSTMAN:** I told you I was going to  
8 give it to you.  
9 **MR. GOOD:** I know, but I wanted to look at  
10 them.  
11 **MR. POSTMAN:** You're the computer guy. I  
12 know you had them all in the computer.  
13 Which one is it?  
14 **THE REPORTER:** Exhibit 4.  
15 **MR. POSTMAN:** Then I know.  
16 **MR. KELLY:** It's a June 10 e-mail.  
17 **MR. POSTMAN:** Okay. And we marked this as  
18 "Exhibit 1," or whatever mine are, but I have it.  
19 **MR. KELLY:** Well, I don't have another  
20 copy so --  
21 **MR. POSTMAN:** Do you want me to give this  
22 to the witness?  
23 **MR. KELLY:** Can I use it?  
24 **MR. COHEN:** Do you want us to get them to  
25 make a copy?

1 **MR. KELLY:** No. It's going to be two  
2 seconds.  
3 **Q** Now, I show you what's been --  
4 **MR. POSTMAN:** Do you have that in here?  
5 **BY MR. KELLY:**  
6 **Q** -- marked as Exhibit 4 --  
7 **A** You know, I might actually have a copy of  
8 this. I believe that I do. But it doesn't matter.  
9 But, okay. Exhibit 4 here. Oh, this was 2010. So,  
10 yes.  
11 **MR. POSTMAN:** Is that it?  
12 **THE WITNESS:** Yes, right here (indicating).  
13 **BY MR. KELLY:**  
14 **Q** In his June 10, 2010 e-mail to --  
15 **A** I'm sorry. Did -- this is the same stuff  
16 that you have here. So I just thought if you had  
17 any question with what I was looking at or anything,  
18 it's the same thing.  
19 **Q** No. I know what you're looking at.  
20 **A** Okay.  
21 **Q** There's a paragraph that says:  
22 "Our compiling center uses a 12 to  
23 15-second script in compiling fax numbers  
24 when calling companies and receiving the  
25 fax numbers verbally from company owners/

1 **Q** My question to you, though, is did you have  
2 any understanding prior to contracting with FaxQom  
3 as to how he obtained the fax numbers?  
4 **MR. POSTMAN:** That's number nine. Object  
5 to the form.  
6 You can answer.  
7 **THE WITNESS:** Yes. I must have in the  
8 conversations I had with him. I don't recall  
9 specifically what he told me his method was, just  
10 that it was -- it was -- you know, it was legal and  
11 in compliance with the TCPA.  
12 **BY MR. KELLY:**  
13 **Q** But the paragraph regarding "compiling the  
14 fax numbers" in Exhibit 4, is that consistent or  
15 inconsistent with your --  
16 **A** It's inconsistent, and if you'll notice --  
17 **MR. POSTMAN:** I object to the form.  
18 Keep going.  
19 **THE WITNESS:** It's inconsistent, and it  
20 only shows up at the very end of the dialogue that  
21 he and I had; so it's inconsistent.  
22 And, again, just to further note, I think,  
23 as I look at this now, he may have been confused  
24 with what I was actually asking for in my request  
25 of him.

1 employees. This is the legal procedure  
2 we use in receiving them."  
3 Do you see that?  
4 **A** I do.  
5 **Q** Was that statement consistent with your  
6 understanding as to how FaxQom compiled the fax  
7 numbers before contracting with FaxQom?  
8 **A** No. I would like to point out, I believe,  
9 that this e-mail was towards the end of our  
10 relationship. This is one of the last e-mails or  
11 correspondence I had with Steve Simms. So even if  
12 this was something new or a new way he was referring  
13 to, it was after what we had already discussed as  
14 far as the legal ways.  
15 I think he's confused. This 12- to  
16 15-second script -- he was trying to sell us a  
17 telephone -- kind of like a voice mail thing, you  
18 know; whereas, we could use a player, a message for  
19 tickets that he had telephone numbers as well, and  
20 that if we wanted to, we could engage him into that.  
21 So I don't know why he's using this.  
22 Maybe he was confused, but this was a response to  
23 an e-mail that I had sent him. So maybe he was  
24 confused. But, nonetheless, this was, I think, one  
25 of the last e-mails that I sent to Steve Simms.

1 **BY MR. KELLY:**  
2 **Q** All right. Did you ever ask Steve Simms  
3 for any of the fax numbers?  
4 **MR. POSTMAN:** I think you asked that.  
5 Object to the form.  
6 **THE WITNESS:** No, I don't believe so.  
7 **BY MR. KELLY:**  
8 **Q** Did he ever provide you with any of the fax  
9 numbers?  
10 **MR. POSTMAN:** Object to the form.  
11 **THE WITNESS:** No, I don't believe so.  
12 **BY MR. KELLY:**  
13 **Q** Did the Buccaneers ever provide any fax  
14 numbers to Steve Simms?  
15 **A** Well, when the campaign started I believe  
16 there was a person that said that they received a  
17 fax, did not want to receive it, and asked to be  
18 taken off the list.  
19 So I forwarded Steve that fax number that  
20 was initially his. So I was just sending it back  
21 to him for two reasons: Anything else that we  
22 did, I wanted to make sure that that person  
23 didn't receive another fax; and just for his own  
24 information, other clients and things, that that  
25 person didn't -- really didn't want to receive

1 faxes.

2 Q There's an e-mail that has the "Michael  
3 Clement" on it. Have you seen that e-mail before?

4 A I have not.

5 Q Okay. You always believed that you were  
6 speaking to Steve Simms?

7 A Steve Simms, yes.

8 Q When is the first time you heard of the  
9 name Michael Clement?

10 A A couple of weeks ago. I think -- it would  
11 be after the deposition. I forget exactly, David,  
12 when you and I spoke.

13 MR. POSTMAN: Oh.

14 THE WITNESS: Just that we spoke, but it  
15 would have been after the deposition of Steve Simms  
16 or Michael Clement, and I'm not sure what e-mail  
17 you're referring to.

18 MR. POSTMAN: It's an e-mail where you sent  
19 a check to him.

20 THE WITNESS: Not to Michael Clement.

21 MR. POSTMAN: Well, either way. It is what  
22 it is.

23 MR. KELLY: Let me get the order forms.  
24 (Whereupon, a discussion was held off  
25 the record.)

1 did it. If the answer requires you to say what  
2 Manny and you talked about, I'm going to instruct  
3 you not to answer.

4 THE WITNESS: Understood.

5 I don't recall specifically. He may  
6 have requested a copy just for his documentation  
7 purposes. As practiced currently today, any  
8 contracts and things that I sign, I usually send a  
9 copy to our accounting and/or our general counsel,  
10 kind of depending on the...

11 BY MR. KELLY:

12 Q Have you spoken to Manny Alvare after he  
13 was ter- -- after he left?

14 A No, I don't believe so. I don't recall  
15 talking to him if I did.

16 Q All right. The Buccaneers contracted with  
17 FaxQom to send faxes; is that right?

18 A Correct.

19 Q And the images that were requested to be  
20 sent identified Tampa Bay Buccaneers individual  
21 ticket sales and season ticket sales; correct?

22 A Are you referring to the -- what we  
23 actually -- what was --

24 Q What was sent.

25 A What we understood to be being sent out?

1 MR. KELLY: Mark this next in order  
2 (indicating).

3 \* \* \*

4 (Whereupon, the document referred  
5 to was marked for identification  
6 as Plaintiffs' Exhibit No. 5.)

7 \* \* \*

8 THE REPORTER: Exhibit 5.

9 BY MR. KELLY:

10 Q I'm showing you what's been marked as  
11 Exhibit 5. This is an e-mail from you to Manny --  
12 Alvare (pronunciation)? Is that how you pronounce  
13 it?

14 A Alvare (pronunciation), I think it was,  
15 yes.

16 Q Okay. And it's dated August 3, 2009. Do  
17 you see that?

18 A I do.

19 Q Why did you send the agreement and  
20 indemnification to Manny Alvare?

21 A I don't recall specifically. He may  
22 have --

23 MR. POSTMAN: I don't want you to talk  
24 about any conversations you had with him. The  
25 question he asked is permissible in terms of why you

1 Q Right.

2 A I have a copy of them so I just want to  
3 make sure that I'm answering your question in the  
4 right way. I don't know what you're referring to.  
5 Do you have a Bates stamp number or --

6 Q You can identify them by Bates-labeled  
7 numbers.

8 A Okay.

9 Q So the question is can you identify those  
10 images that the Buccaneers contracted with FaxQom to  
11 send by fax?

12 A Going off memory, this -- yes, this looks  
13 accurate as to --

14 MR. POSTMAN: That's the Bates stamp number  
15 (indicating).

16 THE WITNESS: Bates stamp 75 looks accurate  
17 to the campaign --

18 MR. POSTMAN: By the way, that -- there  
19 may be multiple copies of Bates stamp 75, in all  
20 fairness.

21 THE WITNESS: Right. And here's one for  
22 103, so that would have gone after, but it looks  
23 like the same document.

24 So, going back specifically, exactly what  
25 we decided, what and when, as you're aware, there

1 was 2009 and 2010. So 2009, this looks like was  
2 what was sent out. I'm just trying to recall if  
3 there were two different forms or if maybe, you  
4 know, we changed something on a form. I don't  
5 recall --  
6 **BY MR. KELLY:**  
7 Q We can match up what was contracted to be  
8 sent out by looking at the e-mails; correct?  
9 **A Yes.**  
10 Q And that's the best way to figure out what  
11 image was contracted to be sent out?  
12 **A Yes.**  
13 Q So let's go to Exhibit 5. I'm just going  
14 to ask you generally about this Fax Broadcast Order  
15 Form. That's something that would be typically  
16 filled out prior to any broadcast?  
17 **MR. POSTMAN:** Object to the form.  
18 **THE WITNESS:** This is what Steve Simms  
19 required prior to, I guess, you know, saying that he  
20 would send any faxes out.  
21 **BY MR. KELLY:**  
22 Q All right. So this is a blank order form.  
23 There's writing on it. Is that your writing?  
24 **A It is.**  
25 Q Okay.

1 **A Yes, that would be correct. Yes, the**  
2 **upcoming season.**  
3 **MR. POSTMAN:** I'm sure it's unintentional,  
4 but that's the first version. There's a different  
5 version of it. You know that; right? I mean, you  
6 have this (indicating)? Because I know I've seen  
7 it, too. This is in the documents you brought.  
8 **THE WITNESS:** Well, yes, because this  
9 e-mail we're referring to went to --  
10 **MR. GOOD:** Look at the bottom left-hand  
11 corner.  
12 **MR. POSTMAN:** This is 8/11/09.  
13 **MR. GOOD:** This is July 9, '09.  
14 **THE WITNESS:** Yes. I guess that was my --  
15 well, okay.  
16 **MR. POSTMAN:** In all fairness to you, I  
17 should let you take your deposition. I'm just  
18 trying to make sure there's no confusion about  
19 anything.  
20 **MR. KELLY:** All right.  
21 Q So the writing at the bottom, "Tampa Bay  
22 Buccaneers," is that your writing?  
23 **A I'm sorry. I just lost the page here.**  
24 **Yes, that looks like my writing.**  
25 Q All right. And there's a "page 1 of 3,"

1 **A Are you referring to the top?**  
2 Q Yes. That's your writing. And then  
3 there's typed in quantities and area codes. Do you  
4 see that?  
5 **A I do, which I believe he typed in there**  
6 **before sending it over.**  
7 Q All right. And then it says:  
8 "Total faxes ordered: 613,472."  
9 Do you see that?  
10 **A "613,472"; correct.**  
11 Q All right. The total cost of that was  
12 \$15,336.80. Do you see that?  
13 **A Correct.**  
14 Q And then the schedule identifies when the  
15 faxes would be sent out and to what area codes. Do  
16 you see that?  
17 **A It does.**  
18 Q So July 14, July 15, and July 16 there, the  
19 first three days in which the Buccaneers contracted  
20 with FaxQom to send faxes; correct?  
21 **A I believe that's accurate.**  
22 Q And do you understand that the image that  
23 was sent was to promote season ticket sales?  
24 **A We're referring again to Bates stamp 75?**  
25 Q Yes.

1 and then there's an initial. Do you see that?  
2 **A Yes.**  
3 Q Is that your writing?  
4 **A That's my initial and my writing; correct.**  
5 Q And there's the Indemnity Agreement.  
6 That's page 2 of 3. Do you see that?  
7 **A I do.**  
8 Q Is this language that Steve Simms provided  
9 in the Indemnity Agreement, or did you provide this  
10 language?  
11 **A I believe he provided it and for two**  
12 **reasons: One, initially, he had First Allied**  
13 **Corporation, not understanding kind of who was doing**  
14 **the faxes or who this was for. So I had him change**  
15 **that to "Buccaneers."**  
16 **And then, two -- I have to go find the**  
17 **e-mail, but I'm sure there's an e-mail where I**  
18 **requested the indemnification, and he responded**  
19 **saying he would send his standard form over**  
20 **tomorrow, and I might have that e-mail here.**  
21 Yes, June 25, 2009:  
22 "I will have an indemnity form  
23 for you this evening for you to sign  
24 and fax back to me."  
25 Q And what Bates label is that?

1 **A This was 15.**  
2 Q All right. Along with the Indemnity  
3 Agreement, there was also an Exhibit A. Do you see  
4 that?  
5 **A Correct. And, I'm sorry, Bates stamp 16**  
6 **is the attachment of his standard indemnification**  
7 **agreement which, again, had "First Allied Corp." at**  
8 **the top, which was changed.**  
9 **MR. POSTMAN:** And just so you don't get  
10 confused -- I'm sorry for doing this -- the Bates  
11 stamp numbers don't reflect the dates on anything.  
12 It's a separate lawyer thing --  
13 **THE WITNESS:** Oh, I understand. So I  
14 understood.  
15 **MR. POSTMAN:** Some may be Bates 1 --  
16 **THE WITNESS:** These are kind of all over  
17 the place.  
18 **MR. POSTMAN:** -- and then Bates 15.  
19 **THE WITNESS:** Right.  
20 **MR. POSTMAN:** It doesn't mean "1" came  
21 before "15." I just don't want you to get confused.  
22 **THE WITNESS:** Right. And I've always kept  
23 everything kind of in -- you know, in order of  
24 conversation, you know, kind of first to the last.  
25 So...

1 Buccaneers contracted with FaxQom to send 613,472  
2 faxes promoting season ticket sales with FaxQom?  
3 **MR. POSTMAN:** Object to the form.  
4 **THE WITNESS:** Well, I wouldn't agree to  
5 that. The 600,000 I think was in reference to the  
6 total number of pages, not faxes. It may say,  
7 "Total faxes ordered," but they were all, I believe,  
8 two-page faxes.  
9 **BY MR. KELLY:**  
10 Q Okay.  
11 **A So the number would have been in half.**  
12 Q All right. So about 300,000 faxes were  
13 contracted?  
14 **A I assumed; correct.**  
15 Q Okay. And there was a total cost of  
16 \$15,336.80; correct?  
17 **A Correct.**  
18 Q And that was paid to FaxQom; correct?  
19 **A Correct.**  
20 Q And that was paid by check?  
21 **A I believe so. I'd -- just to familiarize**  
22 **myself, I'd want to kind of go through the stack**  
23 **and -- I believe so.**  
24 **MR. POSTMAN:** There's a check somewhere in  
25 here.

1 **BY MR. KELLY:**  
2 Q All right. So let me ask you about  
3 Exhibit A that's attached to Exhibit 5.  
4 **A Okay.**  
5 Q Is that a document that was created by you  
6 or the Buccaneers?  
7 **A I created it.**  
8 Q And that Exhibit A is designed to be the  
9 document that was typed in on the Fax Broadcast  
10 Order Form; correct?  
11 **A I'm sorry. I was looking at it when you**  
12 **asked.**  
13 Q So page 1 of 3 -- Exhibit 5 contains four  
14 pages. The first page is just an e-mail cover  
15 sheet?  
16 **A The e-mail, right. The attachment was**  
17 **these three pages.**  
18 Q So if you look at the Fax Broadcast Order  
19 Form, it says:  
20 "The acceptance of this agreement  
21 and payment is subject to the conditions  
22 set forth in Exhibit A."  
23 Is Exhibit A the fourth page of Exhibit 5?  
24 **A Yes.**  
25 Q Okay. And would you agree that the

1 **THE WITNESS:** I just want to make sure that  
2 that check was consistent with his question on this  
3 particular campaign.  
4 **MR. KELLY:** Let's mark this (indicating).  
5 \* \* \*  
6 (Whereupon, the document referred  
7 to was marked for identification  
8 as Plaintiffs' Exhibit No. 6.)  
9 \* \* \*  
10 **THE REPORTER:** Exhibit 6.  
11 **MR. KELLY:** Great. Let me get that back,  
12 Barry.  
13 **MR. POSTMAN:** Oh, you don't want me to look  
14 at it?  
15 **MR. KELLY:** No.  
16 **MR. POSTMAN:** I didn't look at it.  
17 (Whereupon, a discussion was held off  
18 the record.)  
19 **BY MR. KELLY:**  
20 Q All right. I'm showing you what has been  
21 marked as Exhibit 6.  
22 **A Okay.**  
23 Q These are bank records from FaxQom's bank.  
24 There's a copy of a check for \$15,336.80. Do you  
25 see that?

1 A Yes, yes.

2 Q In looking at this would you agree that the  
3 Buccaneers had paid \$15,336.80 to FaxQom for sending  
4 of faxes June 14, June 15 -- I'm sorry -- July 14,  
5 July 15, and July 16 of 2009?

6 MR. POSTMAN: Form.

7 You can answer.

8 THE WITNESS: I would agree that that's  
9 what was contemplated. I would say, though --  
10 and, again, just going off of memory, there was a  
11 campaign or two -- and I don't know if this was one  
12 of those campaigns -- where not all faxes went  
13 through or were assumed to have gone through. So I  
14 don't know if -- let me take a step back.

15 I believe there was some credit remaining  
16 from the campaign according to some e-mails. So I  
17 don't know if that's what you're asking or not.

18 BY MR. KELLY:

19 Q That credit occurred in 2010, as opposed to  
20 2009; correct?

21 A I think it was rolled over to 2010 from the  
22 campaign in 2009, based on the total number of faxes  
23 that we were told went out.

24 Q Do you have any reason to dispute that  
25 FaxQom did not send a Buccaneers fax to the area

1 Again, I'm just kind of going off of memory.

2 MR. POSTMAN: Make sure you have the  
3 following number just to be sure. It's one e-mail.

4 THE WITNESS: Can I take a look at that,  
5 just to --

6 MR. KELLY: Yes.

7 THE WITNESS: There's another one  
8 underneath. Right here (indicating).

9 MR. POSTMAN: This is all of your notes,  
10 yes.

11 THE WITNESS: I've got to do everything in  
12 order. I can't go by -- so, I'm sorry. What was  
13 the question? Was August?

14 BY MR. KELLY:

15 Q So August of 2009.

16 A Looking back on Exhibit 5 --

17 Q It's August 13, 2009.

18 A Do you have a copy of this? Do you want me  
19 to save some time? I mean, it's up to you.

20 MR. KELLY: Well, we'll mark it as an  
21 exhibit.

22 \* \* \*

23 (Whereupon, the document referred  
24 to was marked for identification  
25 as Plaintiffs' Exhibit No. 7.)

1 codes and to the quantity of fax numbers identified  
2 on Exhibit 5 in the Fax Broadcast Order Form?

3 A You know, to be honest, I didn't think  
4 that's any reason to dispute. I would kind of word  
5 it that, you know, I don't have any confirmation  
6 really that anything went out. You know, as you  
7 saw, I had requested that my fax number -- and we  
8 talked about this earlier, whether it was a MyFax or  
9 a digital fax was on the list. That's the only fax  
10 that I received so it's the only one that I could  
11 really say with certainty that we received.

12 I can assume other people received faxes  
13 because, as we go through this, we'll see that, you  
14 know, there was a person that called and complained,  
15 and I don't think we'd be sitting here today if  
16 maybe your clients didn't -- you know, didn't  
17 receive a fax.

18 So -- but the only one I can say with  
19 certainty that went out is the one that I received.

20 Q The Buccaneers continued to use FaxQom  
21 after July 14 through 16th of 2009; correct?

22 A There was a campaign in 2010.

23 Q Well, there was also a campaign in August  
24 of 2009; correct?

25 A I have to go through and take a look.

1 MR. POSTMAN: This is Exhibit 7?

2 MR. KELLY: Yes.

3 THE WITNESS: Are you saying that you know  
4 that there were two separate '09 transmissions?  
5 Okay. I'm sorry. Because tickets on sale, things  
6 for e-mail --

7 MR. POSTMAN: You know, just ask him.

8 MR. KELLY: You don't have to put that on  
9 the record.

10 MR. POSTMAN: For the record, what he  
11 says -- if he's going to talk, I need it --

12 MR. KELLY: He's not really saying  
13 anything. He's speaking --

14 THE WITNESS: I'm just trying to confirm --  
15 yes, your question was how many campaigns did we do.  
16 Was there another campaign in 2009? And, yes, it  
17 appears there were. My numbers in my head were just  
18 confused. I forgot how many we did in 2009.

19 BY MR. KELLY:

20 Q All right. So let's take a look at  
21 Exhibit 7.

22 A Okay. That's 5, 3 -- I don't have a copy  
23 of 7.

24 Q I have it. There you go.

25 A Thank you.

1 Q So if you take a look at the second page,  
 2 there's an e-mail from you to FaxQom, and Jason  
 3 Layton's cc'd.  
 4 A Yes.  
 5 Q All right. So, in August of 2009, did the  
 6 Buccaneers contract with FaxQom to send faxes to the  
 7 area codes that are on Exhibit 7?  
 8 A Yes, it appears so.  
 9 Q And those area codes are 727, 813, 352, and  
 10 941. Do you see that?  
 11 A I do.  
 12 Q And that's Bates labeled BLP 87; correct?  
 13 A Correct.  
 14 Q All right. The total numbers are  
 15 identified, the dates identified, including when the  
 16 broadcast would start; correct?  
 17 A Correct.  
 18 Q And then there was an agreement for payment  
 19 of \$7,668.40. Do you see that?  
 20 A I'd have to go through my notes to confirm  
 21 that a check was sent, but there's a note that a  
 22 payment was sent.  
 23 Q Well, go to Exhibit 6. I'll show you the  
 24 check.  
 25 A Okay. I didn't have that check.

1 A That's an image -- I would want to just go  
 2 through my information to confirm that that was,  
 3 indeed, the image that went out, but, yes. It  
 4 appears to be consistent with the order form.  
 5 Q Okay. And this time the document to be  
 6 faxed dealt with individual ticket sales, as opposed  
 7 to season ticket sales; correct?  
 8 A I would have to look at the -- sorry.  
 9 I just want to look at the last campaign.  
 10 Yes, it says, "Individual game tickets on  
 11 sale now," which would make sense because, based on  
 12 the date, we're already into the season, I believe,  
 13 August -- no, it's still the Florida season. I just  
 14 want to look at the old one that was sent out, what  
 15 was said. Sorry. Just a second here.  
 16 Correct.  
 17 Q And do you have the image in front of you?  
 18 A This image you're referring to here  
 19 (indicating)?  
 20 Q Yes. What Bates label is that?  
 21 A 90.  
 22 Q So that was the image that was sent out  
 23 for individual game tickets for the August 2009  
 24 broadcast; correct?  
 25 MR. POSTMAN: Object to the form.

1 7,668, again to FaxQom.  
 2 Q All right. So looking at the bank records  
 3 that are identified as Exhibit 6, would you agree  
 4 that the Buccaneers sent a check in the amount of  
 5 \$7,668.40 to FaxQom?  
 6 A Yes, I would agree.  
 7 Q And would you agree that check was in  
 8 response to the August 2009 fax broadcast?  
 9 A Yes. That was the purpose of the check.  
 10 Q All right. And the area code numbers and  
 11 dates to which the faxes would be sent are included  
 12 in Exhibit 7, Bates labeled BLP 87; correct?  
 13 A I'm sorry. The first part of your  
 14 question?  
 15 Q My -- the area codes --  
 16 A The area codes are included. Yes, they are  
 17 included in Exhibit 7.  
 18 Q And the total numbers and the dates are  
 19 identified in Exhibit 5 (sic) and Bates labeled BLP  
 20 87; correct?  
 21 A Exhibit 5?  
 22 Q Exhibit 7. I'm sorry.  
 23 A Oh, 7. BLP 87, correct.  
 24 Q Now, the image that was sent is identified  
 25 in BLP 88 and BLP 89; correct?

1 THE WITNESS: Correct. Again, I just  
 2 wanted to -- I'm sure it is the one. I just -- I  
 3 have my things kind of organized a certain way, so  
 4 if -- give me -- I'm sorry. Give me just one more  
 5 second. I just want to confirm that this is exactly  
 6 what went out. I don't know if it matters or not to  
 7 where you're going, but I just don't want to give  
 8 you the wrong information here.  
 9 So August 10. "Thanks for the e-mail.  
 10 This is what's sent out. Individual" -- yep, that  
 11 looks like that's correct. Sorry.  
 12 MR. KELLY: Okay. So let's change the  
 13 tape.  
 14 THE VIDEOGRAPHER: The time is 1:01 p.m.  
 15 This is the end of Tape 2. You're off the record.  
 16 (Whereupon, a recess was taken from  
 17 1:01 p.m. to 1:07 p.m.)  
 18 THE VIDEOGRAPHER: Back on the record. The  
 19 time is 1:07 p.m. This is the beginning of Tape 3.  
 20 BY MR. KELLY:  
 21 Q Do you have any reason to believe that  
 22 FaxQom did not send out the faxes as instructed for  
 23 the August 2009 broadcast?  
 24 MR. POSTMAN: Object to the form.  
 25 THE WITNESS: I don't have any reason to

1 believe that they didn't. I just don't have any  
2 confirmation other than, again, the one fax that I  
3 received that they actually did.  
4 **BY MR. KELLY:**  
5 Q The Buccaneers did contract with FaxQom in  
6 August of 2009 for a second time; correct?  
7 **A Correct.**  
8 Q In knowing that the Buccaneers contracted  
9 a second time with FaxQom, would you agree that  
10 they performed to your standards for the July 2009  
11 broadcast?  
12 **A I don't know what that means.**  
13 Q Well, you used them again. So I assume  
14 that you were happy with the work that they did?  
15 **A Well, we didn't have any issues.**  
16 Q All right. Do you have any evidence that  
17 FaxQom acted outside of their authority in either  
18 the July or August 2009 broadcast?  
19 **MR. POSTMAN:** Object to the form. Now or  
20 then?  
21 **THE WITNESS:** Yes, that's what I was going  
22 to ask.  
23 **BY MR. KELLY:**  
24 Q Then.  
25 **A Then, no.**

1 them --  
2 **THE WITNESS:** I happen to have those  
3 documents here.  
4 **MR. POSTMAN:** I think the use of them in  
5 this case might suggest otherwise. But having said  
6 that, we'll again play it out to the presence of  
7 everybody.  
8 **THE WITNESS:** Wouldn't the simplest thing  
9 to do is just to take the stack and the other stack  
10 and just cross, cross, cross, get one in the room  
11 and nothing --  
12 **MR. POSTMAN:** We lawyers like to do things  
13 complicated.  
14 **THE WITNESS:** -- three seconds which  
15 documents may or may not have been?  
16 **MR. POSTMAN:** It's what we do for a living.  
17 We keep things more complicated if it was less  
18 complicated.  
19 **BY MR. KELLY:**  
20 Q All right. We're looking at a May 18, 2010  
21 e-mail. Did the Buccaneers contract with FaxQom to  
22 send faxes in May of 2010?  
23 **A Yes, I believe so.**  
24 Q According to the first page on Exhibit 8,  
25 there was a request for a check in the amount of

1 Q Okay.  
2 **MR. KELLY:** Let's look at -- let's mark  
3 this as the next number (indicating).  
4 \* \* \*  
5 (Whereupon, the document referred  
6 to was marked for identification  
7 as Plaintiffs' Exhibit No. 8.)  
8 \* \* \*  
9 **BY MR. KELLY:**  
10 Q Now, I show you what's been marked as  
11 Exhibit 8. This is the only copy I have. Take a  
12 look at that.  
13 **A May 18, 2010.**  
14 **MR. POSTMAN:** While he's looking at that,  
15 we're going to fight whether you have the right to  
16 keep the depo open. You've used the exhibits that  
17 I gave you yesterday. Just so that it's clear,  
18 Counsel, it's going to be my position -- and it cost  
19 you \$112, Ross; I'll pay the \$112 -- but you can't  
20 argue that you can keep it open based on that.  
21 **MR. KELLY:** You're not keeping the  
22 deposition open because we had to pay \$112. We're  
23 going to keep the deposition open because we didn't  
24 have adequate time to review the documents.  
25 **MR. POSTMAN:** Well, I think the use of

1 \$14,766.92. Do you see that?  
2 **A I do.**  
3 Q And if you look at Exhibit 6, in the bank  
4 records --  
5 **A 14,766.92.**  
6 Q Do you see a check in the amount of  
7 \$14,766.92?  
8 **A I do. I'm just trying to focus on our**  
9 **check, which the writing's very small, but, yes, it**  
10 **appears correct.**  
11 Q All right. Did the Buccaneers contract or  
12 pay FaxQom \$14,766.92 for faxes to be sent in May of  
13 2010?  
14 **A I believe so. I would just like to confirm**  
15 **with my own records and copies of the check. I'm**  
16 **not sure if I have a copy of the check here.**  
17 **(Whereupon, a discussion was held off**  
18 **the record.)**  
19 **THE WITNESS:** I'll answer the question as  
20 "yes." I just usually like to confirm, you know,  
21 my own copy of the check. But, yes, that looks like  
22 a Buccaneers check in the same amount of what we  
23 contracted with them for.  
24 **BY MR. KELLY:**  
25 Q And the content of the images that were to

1 be sent, are they identified in Exhibit 8?  
2 **A Show me what you have, and I'll just -- I**  
3 **don't have a copy of that.**

4 **MR. POSTMAN:** That you do. That's in  
5 there. I'm not saying that --

6 **THE WITNESS:** Well, this isn't the exhibit  
7 he's referring to (indicating). So I just want to  
8 make sure we're talking about the same thing.

9 **MR. POSTMAN:** Oh.

10 **THE WITNESS:** So you're talking about this  
11 page (indicating) --

12 **BY MR. KELLY:**

13 Q Yes.

14 **A -- which we're both looking at the same**  
15 **thing. So, yes, this appears to be the content.**

16 **BY MR. KELLY:**

17 Q And then there's also another one that  
18 says, "Group Tickets On Sale Now." Was that a  
19 different type of document that was faxed?

20 **A "Attached is an order form, cover sheet,**  
21 **and both attachments." So it looks like, yes,**  
22 **those were the -- it looks like those were page 2 of**  
23 **something that went out with page 1, the cover being**  
24 **the same for both.**

25 Q And Exhibit 8 also contains the Fax

1 **"FaxQom agrees to indemnify and**  
2 **hold Tampa Bay Buccaneers or any of its**  
3 **affiliates, agents, or employees harmless**  
4 **from any claims, complaints, or FCC**  
5 **violations as a result of this campaign**  
6 **and hereby confirms that all numbers have**  
7 **been collected lawfully and with cause."**

8 **If you'd give me just a second -- "yes," to**  
9 **answer your question -- I just want to point an**  
10 **e-mail out where Steve Simms -- I think where you're**  
11 **going is that their indemnification wasn't included**  
12 **in this, and it may have been. I'd have to double**  
13 **check. But I have an e-mail from Steve Simms**  
14 **confirming that the indemnification that he provided**  
15 **us before was still in effect.**

16 Q Okay.

17 **A Let me see if I can find that.**

18 **I do have that e-mail. I'm not sure**  
19 **exactly if it was included in this stack or not,**  
20 **Bates stamp 73. It says:**

21 **"Steve, with our existing contract**  
22 **still in effect, with regard to the**  
23 **language in the indemnification and**  
24 **conditions set forth in Exhibit A, please**  
25 **send the attached beginning tomorrow."**

1 Broadcast Order Form. Is this your writing on  
2 there?

3 **A It is.**

4 Q All right.

5 **A It looks like we've moved over to the new**  
6 **building, you had asked me earlier. I see a new**  
7 **address, 10250 Constellation. So it looks like by**  
8 **May of 2010 is when we must have moved in the new**  
9 **building.**

10 Q All right. Does the Fax Broadcast Order  
11 Form identify the dates, area codes, quantities to  
12 which the faxes were sent in May of 2010?

13 **MR. POSTMAN:** Object to the form.  
14 You can answer.

15 **THE WITNESS:** It appears so.

16 **BY MR. KELLY:**

17 Q And is that your signature in the lower  
18 right-hand corner?

19 **A Yes, it is.**

20 Q There's an indemnification language on the  
21 next page. This one's a little bit different than  
22 the others that we've looked at. Is this language  
23 that was created by the Buccaneers?

24 **A Well, it looks like I -- it looks like my**  
25 **handwriting, and it reads:**

1 **So this was, I guess, our new dialogue**  
2 **regarding the 2010 campaign.**

3 Q Why use different language for the 2010  
4 broadcast, as opposed to the July and August 2009  
5 broadcast?

6 **A You know, I -- the -- I would want to go**  
7 **through my records and e-mail just to confirm that**  
8 **the original indemnification wasn't included with**  
9 **this, to be honest, and then I may have just written**  
10 **in addition to that form. You know, I don't recall.**  
11 **I mean, I really -- I don't want to -- I don't**  
12 **recall. I just want to -- I want to confirm that**  
13 **the indemnification wasn't sent with that, and it**  
14 **very well may have been.**

15 Q Okay. For all the broadcasts the  
16 Buccaneers wrote checks and sent them to FaxQom;  
17 correct?

18 **A I believe that's accurate.**

19 Q And I think I read in the e-mails that you  
20 were asking whether or not FaxQom accepts American  
21 Express; correct?

22 **A We had a particular schedule, and even with**  
23 **the existing relationship we had with -- in FaxQom,**  
24 **referring to the 2010 campaign, they always required**  
25 **payment up front, which I believe he told me he**

1 **didn't accept American Express but would accept**  
2 **credit cards. I only have an American Express**  
3 **company card. So that's required.**

4 Q Is that card associated with the  
5 Buccaneers?

6 A **It is. It's a company card, correct.**

7 Q All right. Did the fact that he wouldn't  
8 accept American Express raise any red flags to you  
9 in the form of payment?

10 A **No. I have my favorite Italian restaurant**  
11 **down the street from where I live. They only accept**  
12 **cash. They've been in business for 35 years so --**  
13 **it doesn't cease to amaze me, but I'm -- yes, in**  
14 **this day and age, I'm surprised that, you know,**  
15 **everyone doesn't accept every type of payment.**

16 Q Okay. Do you have an understanding that,  
17 if you use a credit card and you're not happy with  
18 the service or goods performed, you can always  
19 dispute the charge?

20 A **Do I -- I'm sorry. The first part of your**  
21 **question?**

22 Q Do you have an understanding that if you  
23 had charged something and dispute the service or  
24 good that's been purchased that you possibly can get  
25 a refund?

1 A **I was in charge of the campaign. This**  
2 **was -- you know, this was -- this was my campaign,**  
3 **so I believe -- just going off of memory, in 2009 --**  
4 **I think there was one complaint. And I think the**  
5 **practice would be whoever received the complaint in**  
6 **Tampa -- because I believe that's, you know, where**  
7 **the complaint went through because of the number on**  
8 **the fax -- they would then contact me.**

9 **So whether it would be a Manny or, you**  
10 **know, be a Jason Layton or a Ben Milsom or someone**  
11 **would advise me that, "Hey, you know, we got a**  
12 **call. This person, you know, has a complaint or**  
13 **didn't want to receive the fax."**

14 Q At all times did the Buccaneers -- or  
15 strike that.

16 At all times you were working for the  
17 Buccaneers; correct?

18 A **At all times --**

19 Q Yes, in 2009, 2010.

20 A **Correct.**

21 Q And you represented yourself as being an  
22 employee of the Buccaneers in dealing with FaxQom;  
23 is that right?

24 A **Of course.**

25 Q At any time in 2009 and 2010, were you

1 A **I guess it would depend on the card. It's**  
2 **not an understanding that I have, but I don't know**  
3 **the rules and regulations of our company card. I**  
4 **think American Express kind of has a reputation**  
5 **for that, but it's nor here or there. I just**  
6 **happened -- American Express was the only company**  
7 **cards I had so...**

8 Q Why did you not insist on FaxQom using  
9 the American Express card, as opposed to drafting a  
10 Buccaneers check?

11 **MR. POSTMAN:** Object to the form.

12 **THE WITNESS:** I don't recall. I'd have to  
13 go back and look. It's possible that our policy at  
14 the time was to pay by check, as opposed to credit  
15 card, but it's a moot point because he didn't accept  
16 the credit card anyhow. So...

17 **BY MR. KELLY:**

18 Q All right. So we have looked at a  
19 broadcast that took place in July of 2009, August of  
20 2009, and then May of 2010; correct?

21 A **Correct.**

22 **MR. POSTMAN:** Form.

23 **BY MR. KELLY:**

24 Q Are you also aware of recipients who had  
25 complained of receiving the faxes?

1 aware of FaxQom acting outside of the scope of their  
2 authority in the work that they performed for the  
3 Buccaneers?

4 A **Not that I was aware of, no.**

5 Q Did you ever have any problems with the  
6 way in which they sent the faxes as contracted in  
7 2009-2010?

8 A **Any issues as far as --**

9 Q Any issues that the faxes didn't go  
10 through, that they didn't send the proper quantity?

11 **MR. POSTMAN:** Object to the form.

12 You can answer.

13 **THE WITNESS:** Not that I'm aware of.

14 **BY MR. KELLY:**

15 Q Okay. I mean, in other words, a break  
16 between August of 2009 and May of 2010 would be,  
17 like, an eight-month break; is that right?

18 A **Correct.**

19 Q You could have chosen another fax  
20 broadcaster to send faxes; correct?

21 A **Yes, I suppose we could have.**

22 Q Did you consider using another fax  
23 broadcaster in 2010?

24 A **I don't recall.**

25 Q Do you recall ever speaking to any fax

1 broadcasters regarding sending faxes in 2010?  
2 **A Other than FaxQom?**  
3 **Q Other than FaxQom.**  
4 **A I don't recall. It's possible. Just**  
5 **sitting down and proposing different sales**  
6 **strategies is really kind of an annual thing,**  
7 **you know, in and around the time we begin to sell**  
8 **tickets. So, you know, with that, it's possible we**  
9 **have reached out to other companies, specifically**  
10 **other fax companies. I don't recall.**  
11 **Q Is there a reason why the Season Ticket**  
12 **Order Forms were sent in May of 2010, as opposed to**  
13 **another month?**  
14 **A I don't recall. May seems a little early.**  
15 **Just going -- you know, it's in and around when**  
16 **schedules come out. It's in and around when the**  
17 **draft is. So I think it's in and around the time**  
18 **when, you know, initial interest for the upcoming**  
19 **season really begins. That, I guess, would be my**  
20 **guess, but I don't --**  
21 **MR. POSTMAN: Don't guess.**  
22 **BY MR. KELLY:**  
23 **Q The schedules come out mid-April usually**  
24 **every year; right?**  
25 **A I believe so; correct.**

1 **cost -- you know, I carried a certain, you know,**  
2 **marketing budget and, you know, it was a small cost,**  
3 **I think, compared to some other things that we were**  
4 **doing. And just because it didn't work in 2009**  
5 **didn't necessarily mean it couldn't or wouldn't work**  
6 **in 2010.**  
7 **And, you know, with 2010 it was a new year.**  
8 **I think it was the second year for Ricky Morris. So**  
9 **I think there was some more excitement about a new**  
10 **season, you know, as opposed to maybe the year**  
11 **before. Maybe, you know, some...**  
12 **Q Is it your testimony that the 2009**  
13 **broadcast didn't increase sales, or you just don't**  
14 **know?**  
15 **MR. POSTMAN: Object to the form.**  
16 **THE WITNESS: "I don't know" I think would**  
17 **be the fair answer, but I don't recall -- I really**  
18 **don't recall having any discussions or any**  
19 **revelations that this was -- you know, that this was**  
20 **something that was -- you know, that was working**  
21 **or...**  
22 **BY MR. KELLY:**  
23 **Q Do you know whether or not the Buccaneers**  
24 **can identify whether or not a person purchased**  
25 **season tickets or individual tickets from receiving**

1 **Q So by the time May rolls around, the**  
2 **Buccaneers would know who they're playing and where**  
3 **they're playing; correct?**  
4 **A Correct.**  
5 **Q Did the Buccaneers benefit from the sending**  
6 **of the faxes?**  
7 **A Benefit --**  
8 **Q Financially.**  
9 **A As far as sales?**  
10 **Q As far as sales, yes.**  
11 **A Not that I'm aware of.**  
12 **Q Who at the Buccaneers would have the best**  
13 **information as to how many people responded to the**  
14 **faxes?**  
15 **A It would either be probably Ben Milsom or**  
16 **Jason Layton because they oversaw, you know, that**  
17 **department.**  
18 **Q Okay. Did you have any knowledge or were**  
19 **you provided any information as to whether or not**  
20 **the faxes increased sales?**  
21 **A I wasn't provided anything. I don't recall**  
22 **there being any sales or specific increases as a**  
23 **result of, you know, this campaign.**  
24 **Q Then why go ahead and do it again in 2010?**  
25 **A You know, I think -- I think, given the**

1 a fax?  
2 **A I'm sorry. Will you ask the question**  
3 **again.**  
4 **Q Yes. The question is: Can the Buccaneers**  
5 **identify those individuals who responded to the fax**  
6 **and actually purchased season tickets or individual**  
7 **ticket sales?**  
8 **A You know, I'm not sure. You know, I think**  
9 **in this day and age, even if you were to send a fax**  
10 **to people, sometimes they'll respond, you know, via**  
11 **e-mail or -- so I don't -- I don't know if there's a**  
12 **way -- what are you saying, a way for us to kind of**  
13 **track it or understand or --**  
14 **Q Well, yes. A lot of times, if you're**  
15 **selling a product, somebody calls in, and one of the**  
16 **first questions is, "Well, how did you" --**  
17 **A "How did you hear about it?"**  
18 **Q "How did you hear about me?"**  
19 **A I don't know -- you know, I don't know**  
20 **that we had any internal processes in place where --**  
21 **you know, where we checked a box when people were**  
22 **calling in.**  
23 **As you can imagine, we get a lot of calls,**  
24 **you know, from a lot of people, and our sales is**  
25 **really kind of a year-round business. So to the**

1 extent people identified that they were calling  
2 because they received, you know, a certain  
3 advertisement, I couldn't tell you.

4 Q Who would be the person at the Buccaneers  
5 that was in charge of sales in 2009 and 2010?

6 A Well, as we discussed, Jason Layton, I  
7 think, was the -- you gave me his title before --  
8 the vice president of Sales or the senior director  
9 of Sales I think was his title, and then Ben Milsom  
10 was the director of Ticketing I believe was his  
11 title at that time.

12 Q You had said that you are aware of one  
13 person complaining from faxes sent in 2009. Do you  
14 recall what that person's name was?

15 A I'm not sure if I was ever given a name for  
16 this person. Give me -- I can go through my notes.  
17 I know I had it listed here.

18 Okay. So it looks like -- okay, 2009, I  
19 have an e-mail. This is Bates stamp 56 to Steve at  
20 FaxQom, where I state that:

21 "We received a call from a guy who  
22 says he's on the National Do Not Call list  
23 and received numerous faxes. He said he  
24 has lawsuits against marketing companies  
25 for using his info illegally and is going

1 into the fax broadcasting; correct?

2 A I believe that was correct.

3 Q And you had received an e-mail or at  
4 least a call from a guy threatening to contact the  
5 State Attorney's Office regarding the sending of  
6 unsolicited faxes. Do you see that?

7 A I do.

8 Q And you took that seriously; correct?

9 A Yes. I, you know, immediately -- I  
10 immediately sent it over to Steve. You know, the  
11 language was -- the opt-out language was on the  
12 bottom of the pages that we sent out, actually  
13 prompting anyone to contact FaxQom directly. But,  
14 as you can imagine, it looks like they've contacted  
15 us instead.

16 Q Well, the issue with respect to sending the  
17 fax to Mr. Paschke wasn't the opt-out language. It  
18 was the fact that he never opted into any list;  
19 correct?

20 MR. POSTMAN: Form.

21 THE WITNESS: Well, that's what he stated.  
22 That's what he stated so --

23 BY MR. KELLY:

24 Q And did that cause --

25 MR. POSTMAN: Wait.

1 to contact the State Attorney's Office  
2 today regarding this issue.

3 "He would like the call-back with the  
4 name of the marketing company we use. How  
5 do you recommend we respond to people like  
6 this?

7 "His information is as follows:"

8 So I have his name, a telephone number, and  
9 a fax number, which was given to me from Tampa, Mike  
10 Paschke.

11 Q P-a-s-c-h-k-e?

12 A Correct.

13 Q And have you ever spoken to him?

14 A I never spoke with him.

15 Q Is that the person that Steve Simms spoke  
16 to?

17 A It appears so. So I -- there's a break in  
18 the correspondence between my e-mail to Steve and it  
19 looks like his e-mail -- well, his e-mail back to me  
20 says, "I already spoke to the guy." So maybe he  
21 just took the liberty at that point to call.  
22 He stated that the person has been opted out  
23 permanently. If I get any of these in the future,  
24 just to forward to him, and that was it.

25 Q So July 15, 2009, that's the second day

1 Done or not done?

2 THE WITNESS: I think I'm done.

3 MR. POSTMAN: Okay.

4 THE WITNESS: I never spoke with him, so  
5 the reality is this was forwarded to me. I don't  
6 know if it was in an e-mail or by a conversation. I  
7 don't have an e-mail string so it must have been by  
8 conversation, I assume through Ben or Jason. They  
9 said this individual called and said he was unhappy.  
10 So it looks like I'm just kind of repeating what was  
11 told to me via e-mail to Steve Simms.

12 BY MR. KELLY:

13 Q All right. And he actually threatened a  
14 lawsuit against the Buccaneers on July 15, 2009;  
15 correct

16 A It looks like -- yes, it looks like that's  
17 what I put in writing to Steve so --

18 Q At that time did you call up Steve and  
19 say, "Don't send out any more faxes" on July 16 or  
20 July 17?

21 A No, based on Steve's response, that he  
22 spoke to the guy. Everything seems fine. And that  
23 he would scrub that number -- he used the word  
24 "scrub" -- or remove the number from his database.

25 It didn't seem one out of 307,000 supposed

1 faxes that went out was -- you know, hardly, you  
2 know, an inconsistency with, you know, what was  
3 represented. You know, it's possible -- and I don't  
4 know if this was something that Steve explained to  
5 me at the time -- that sometimes people opt out  
6 of things. They don't remember opting out.  
7 Sometimes -- you know, I assume there could be a  
8 miscalculation of the number in the software that's  
9 being used. You know, these kind of things.

10 So one out of, again, 307,000, or whatever  
11 the number was, didn't really cause any alarms.

12 Q Have you seen the FTC complaints against  
13 the Buccaneers, people complaining to the FTC that  
14 they were receiving --

15 A Federal Trade Commission?

16 Q Yes, Federal Trade Commission.

17 A No, I don't believe I've seen any of those.

18 Q Are you aware of --

19 A What were they complaining?

20 Q Unsolicited faxes.

21 Were you provided with any of the  
22 complaints from the people that complained to the  
23 FTC?

24 A I'm sorry. Did I receive --

25 Q Did you have any understanding in 2009-2010

1 recall any letters from the FTC to the Buccaneers?

2 A I don't recall. You know, again, it was  
3 five years ago. As diligent as -- you know, as I've  
4 been keeping documents of everything, I'd be  
5 surprised if I had -- or had received anything.

6 Q Did the Florida Attorney General send a  
7 letter to the Buccaneers regarding the sending of  
8 faxes?

9 A I remember a reference of a letter being  
10 received by the Florida Attorney General. I can't  
11 confirm or deny if we received it as -- let me just  
12 go through. I'll look at the e-mail that I sent,  
13 and I just kind of have to go off of what I -- you  
14 know, what I said.

15 Q I have it here. It's the June 16, 2010  
16 e-mail.

17 A Perfect.

18 Q It says, "Hi, Steve."

19 A Yes.

20 Q "After receiving the letter from the  
21 Attorney General regarding our faxing,  
22 we do not feel comfortable moving forward  
23 with more faxes."

24 Do you have a copy of the letter from the  
25 Attorney General?

1 that people were complaining to the FTC about  
2 Buccaneer faxes?

3 A Not to my knowledge, no.

4 Q And me bringing up the FTC violations here  
5 today is the first time you've heard of that?

6 A Yes.

7 Q Are you aware of whether the FTC sent a  
8 letter to the Buccaneers telling them to stop  
9 sending the faxes?

10 A Well, let me -- there was an e-mail -- it  
11 was at the very end of the campaign, and maybe this  
12 is what you're referring to --

13 MR. KELLY: It's not.

14 THE WITNESS: -- so I might look for a  
15 track on it.

16 MR. POSTMAN: Let him find it.

17 MR. KELLY: It's not so --

18 MR. POSTMAN: Well, you've got to let him  
19 look. You can't --

20 MR. KELLY: Well, I know. I'm just going  
21 to represent to him that that deals with the Florida  
22 Attorney General.

23 THE WITNESS: I think you're correct.

24 BY MR. KELLY:

25 Q So my question to you is the FTC. Do you

1 A I don't. You know, I have a copy of the  
2 e-mail. I don't know if I referenced -- I don't  
3 know if I meant to put "the" letter or "a" letter.

4 I said, "After receiving the letter." It  
5 insinuates that there's just some sort of a letter  
6 or something. I probably meant to put "a" letter,  
7 not that that's here or there but --

8 Q Well, I don't understand the distinction.  
9 I guess my question is --

10 A Well, I say "the" as if it was something  
11 that was discussed or talked about, as opposed to  
12 "a" letter. Nonetheless, I don't have a copy of  
13 the letter. I thought, though -- I'm -- it's just  
14 kind of confusing --

15 MR. POSTMAN: It looks like you did a  
16 pretty good job of going through those e-mails last  
17 night.

18 MR. KELLY: No. I wish we had more time to  
19 go through the e-mails. We'd be better prepared for  
20 this deposition.

21 THE WITNESS: Do you have June 9? It's --  
22 yes, you just referred to it a second ago. That the  
23 paragraph at the bottom, the "cease and desist" --  
24 just so I'm clear, and then I can answer your  
25 question, that's not the FTC?

1 BY MR. KELLY:

2 Q No.

3 A Okay. So, then, I don't have a copy of a  
4 letter from the FTC. Maybe in that e-mail I was  
5 referring to this (indicating). Maybe I got FTC or  
6 the Florida statute or -- oh, I'm sorry. The e-mail  
7 says, "Attorney General." The e-mail doesn't say  
8 "FTC" so -- your question was did I get a letter  
9 from the "FTC"?

10 Q Well, I think we're past that, and I think  
11 you said you don't recall receiving anything from  
12 the FTC. My question now is:

13 According to your e-mail, you've stated  
14 that you've got a letter from the Attorney General.  
15 My question is do you have a copy of the letter from  
16 the Attorney General?

17 A I think what I was referring to was, to go  
18 back to this e-mail on June 9 -- it says:

19 "Steve, we received a letter today  
20 with the attached paragraph summarized  
21 below."

22 I don't know if somebody cut that out and  
23 attached it to a letter saying, "Don't fax me" or --  
24 I have no idea. He says:

25 "Can you please explain to me, just

1 That looks to be -- and that's -- you're kind of  
2 jogging a five-year-old memory here -- that seems to  
3 be the case, correct.

4 Well, it looks like it's the June 9,  
5 2010 letter. Actually, it looks like there's an  
6 attachment. It's 19 kilobytes. That's awfully  
7 small. That could be that little snippet --

8 Q Yes. Okay.

9 A -- likely, and I'd be happy to print out  
10 the attachment on the e-mail when I get back to the  
11 office just to confirm that it is this.

12 Q Okay. And I'll ask that, and I'll also ask  
13 to see if you do have the letter that's referenced  
14 in the June 9, 2010 e-mail.

15 MR. POSTMAN: So we'll cooperate. Do you  
16 have an FTC letter? Because we don't have an FTC  
17 letter.

18 MR. KELLY: We have, like, a dozen  
19 complaints to the FTC.

20 MR. POSTMAN: I have seen those. You've  
21 produced those. But that's not what you asked him.

22 Do you have a letter from the FTC to the  
23 Bucs? Because we don't have that.

24 MR. KELLY: Okay.

25 MR. POSTMAN: Do you have a letter that was

1 so I understand what this means and what  
2 these specific reference chapters of the  
3 Florida statutes mean. I would like to  
4 hold off on sending anything else out  
5 until I understand this first."

6 So that was really my -- to answer your  
7 previous question, my first sense of any type of  
8 alarm.

9 So when I send the e-mail out June 16 --  
10 and I don't know what the Bates stamp was -- and I  
11 say, "After receiving the letter from the Attorney  
12 General," I think what I was referring to is after  
13 we -- I never received anything directly -- after we  
14 received this letter, which referenced the Attorney  
15 General, "we don't feel comfortable moving forward  
16 anymore." I think that was the intent of what I  
17 meant because I never received a letter from the  
18 Attorney General.

19 So that's a very long-winded answer to your  
20 question.

21 Q So it's your testimony that the Buccaneers  
22 never received a letter from the Attorney General?

23 A No, not that I recall. And in looking at  
24 the fax now, it looks like we received a letter with  
25 a clippet that referenced the Attorney General.

1 sent?

2 MR. KELLY: I don't have a letter that was  
3 sent to the Bucs, but --

4 MR. POSTMAN: Okay. Because your question  
5 suggests that you might. But I'm happy to cooperate  
6 with you in that regard. So when you go back to the  
7 office, just send me an e-mail --

8 THE WITNESS: I'll just forward this exact  
9 e-mail to you. And I assume -- again, back to  
10 MCmail, it just shows the attachment here, and that  
11 is the actual attachment of the 19 kilobytes.

12 MR. POSTMAN: Send it to Dave, and then  
13 Dave will send it to me.

14 THE WITNESS: But there's also --

15 THE REPORTER: I didn't hear you.

16 MR. POSTMAN: I'm just telling him to send  
17 it to David or to me, and I'll send it over.

18 But I'm also yawning, though. So I  
19 apologize.

20 MR. KELLY: But I'm also requesting the  
21 letter that's referenced, not only the attachment to  
22 the June 9 e-mail.

23 MR. POSTMAN: I think -- maybe I  
24 misunderstood, but I think what he said is that is  
25 what he understood the letter to be.

1 But having said that, if we have something  
2 else I think would be responsive to a Discovery  
3 request, then we'll produce it.  
4 **MR. KELLY:** Okay.  
5 **MR. POSTMAN:** So if you have the letter --  
6 **THE WITNESS:** I don't -- it's -- I go back.  
7 I don't think there was a letter. I think I just  
8 probably could have worded my e-mail to Steve better  
9 saying, "After I received the letter we talked  
10 about the other day, which referenced the Attorney  
11 General, we don't feel comfortable moving forward."  
12 Because I don't have any copy of any other  
13 kind of letter or knowledge of receiving anything  
14 from them directly so...  
15 **MR. KELLY:** Okay.  
16 **MR. POSTMAN:** So about ten or 15 minutes,  
17 we'll take this afternoon break.  
18 So I tell you as a courtesy so you can...  
19 **BY MR. KELLY:**  
20 Q Are you aware of a lawsuit that was filed  
21 against the Tampa Bay Buccaneers on August 29, 2009?  
22  
23 A **I have been made aware of the lawsuit.**  
24 **MR. POSTMAN:** So you can't talk about what  
25 I've told you.

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1 **THE WITNESS:** Okay.  
2 **MR. POSTMAN:** Or what David has told you or  
3 what any lawyer has told you.  
4 **THE WITNESS:** Okay.  
5 **MR. POSTMAN:** So --  
6 **BY MR. KELLY:**  
7 Q When is the first time you knew that there  
8 was a lawsuit filed against the Tampa Bay Buccaneers  
9 regarding unsolicited faxes?  
10 A **I don't recall. I believe it was just**  
11 **recently, though.**  
12 Q "Recently," that would be sometime in 2014?  
13 A **Again, I think probably since -- maybe**  
14 **a little earlier than that. I don't recall. I just**  
15 **remember hearing something about it. If it was --**  
16 **if it was kind of through all this Discovery process**  
17 **or what it was.**  
18 Q But you did not have notice of the lawsuit  
19 that was filed in August of 2009 in 2009, 2010, or  
20 2011; correct?  
21 A **I don't believe so in 2009 or 2010. When**  
22 **exactly I was made aware, I don't know. I wasn't**  
23 **involved or questioned with anything or asked to**  
24 **produce anything at that time, I don't believe. So**  
25 **I can't recall exactly when I was made aware.**

1 Q All right. But the best information that  
2 you have was you were made aware of the lawsuit  
3 against the Buccaneers that was filed in August of  
4 2009 just recently; correct?  
5 **MR. POSTMAN:** Object to the form.  
6 **THE WITNESS:** I don't know how recent.  
7 When you say, "recent," we're talking about between  
8 2009 and 2014. So the second half of "recent," I  
9 would say yes. The first half of "recent," I would  
10 say probably no. But, again, I don't recall exactly  
11 when I was made aware of it.  
12 **BY MR. KELLY:**  
13 Q Well, who made you aware of the lawsuit  
14 that was filed in August of 2009?  
15 A **I really don't recall. I don't recall. It**  
16 **wasn't anything that's come to my knowledge in -- I**  
17 **don't believe in preparing, you know, for today**  
18 **or anything, but I don't recall. I really don't**  
19 **recall.**  
20 Q Can you give me your best estimate of the  
21 year in which you were first informed of the case  
22 against the Buccaneers in August of 2009.  
23 **MR. POSTMAN:** Form.  
24 **THE WITNESS:** Again, I don't recall. If  
25 I were to kind of draw a map, starting with -- you

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1 know, with this case or -- at some point I think  
2 there was some dialogue. I don't remember who it  
3 was with, if was Steve Johnston or David Cohen or  
4 Jason Layton or somebody. I really -- I don't  
5 recall.  
6 But within the -- call it the "five-year  
7 period," I'd say probably somewhere in that second  
8 half. So with that, we could probably eliminate  
9 certain people. I really don't recall. I can't  
10 help you out here. I don't remember.  
11 **BY MR. KELLY:**  
12 Q Your best estimate as to what year you were  
13 first notified of the lawsuit that was filed in  
14 August of 2009, you had said it's probably the  
15 second half of the five-year time period. So would  
16 it be somewhere in 2011? 2012?  
17 **MR. POSTMAN:** Form.  
18 **THE WITNESS:** Likely. It could also likely  
19 be 2013. I just don't remember being made aware --  
20 rather than saying what I do remember, what I don't  
21 remember is having any knowledge in 2009 and 2010.  
22 When that knowledge was gained or acquired, I  
23 really -- I don't recall. I really don't recall.  
24 **BY MR. KELLY:**  
25 Q Okay. And you don't recall who first

1 notified you of the lawsuit that was filed in August  
2 of 2009?  
3 **MR. POSTMAN:** Form.  
4 **THE WITNESS:** Again, I don't recall, but  
5 when it was -- when it was discussed, I think it was  
6 more of a "did you know?" or "this had happened" or  
7 "this is resolved" or whatever it was, but I really  
8 don't recall.  
9 **BY MR. KELLY:**  
10 Q Did you understand that --  
11 A **It was more in a passing, as opposed to,**  
12 **"Okay. We need you to deal with this kind of**  
13 **situation," if that makes sense.**  
14 Q Have you ever read the Complaint that was  
15 filed in August of 2009 against the Buccaneers?  
16 A **I don't believe I have.**  
17 Q Do you know where that case was filed?  
18 **MR. POSTMAN:** The only way you would be  
19 able to answer that question if you do is if you  
20 learned from somebody that's not a lawyer that  
21 represents the Buccaneers. You haven't read the  
22 Complaint, and you were told. So if you learned  
23 from someone and you can recall.  
24 **THE WITNESS:** I don't know. I don't  
25 recall -- I guess my recollection is -- my

1 (At the hour of 2:29 p.m., the  
2 deposition of MATTHEW KAISER was resumed  
3 at the same place, the same persons being  
4 present.)  
5  
6 **THE VIDEOGRAPHER:** Back on the record. The  
7 time is 2:29 p.m.  
8 **MR. POSTMAN:** I was just going to say that  
9 could be another fight in and of itself, but if it's  
10 not going to be an issue, we won't deal with it.  
11 \* \* \*  
12 **EXAMINATION**  
13 (Resumed)  
14 **BY MR. KELLY:**  
15 Q All right. We were talking about  
16 complaints made to the Buccaneers for the sending of  
17 the faxes. We were talking about an August 2009  
18 case that was filed against the Buccaneers. Do you  
19 recall that?  
20 **MR. POSTMAN:** Object.  
21 **THE WITNESS:** I recall discussing it, yes.  
22 **BY MR. KELLY:**  
23 Q Okay. And we also talked about another  
24 complaint that Mike Paschke made in reference to the  
25 Attorney General. Do you recall that?

1 recollection is the case we're discussing today was  
2 initially -- if this is what we're talking about,  
3 and this is the recollection I have of what was  
4 initially filed, I think, in Tampa, before being  
5 filed with the Federal Court. If -- are we  
6 referring to the same case?  
7 **BY MR. KELLY:**  
8 Q Yes. The plaintiff in the case is CIN-Q --  
9 A **Right.**  
10 Q -- which was filed in State Court in August  
11 of 2009.  
12 A **Okay. So I just wanted to confirm that**  
13 **that's what you were referring to.**  
14 Q That's what I'm referring to.  
15 A **Okay.**  
16 **MR. POSTMAN:** So why don't we take our  
17 break.  
18 **MR. KELLY:** Okay.  
19 **THE VIDEOGRAPHER:** The time is 1:47 p.m.  
20 We're off the record.  
21  
22 (At the hour of 1:47 p.m., a  
23 luncheon recess was taken.)  
24 ///  
25 ///

1 A **I don't think Paschke was in reference to**  
2 **the Attorney General. I think Paschke was just the**  
3 **first complaint or notification we had.**  
4 Q Well, I'm looking at the e-mail. It's,  
5 again, that July 15, 2009 e-mail, where it says,  
6 "and is going to contact State Attorney Office today  
7 regarding this issue."  
8 A **I don't know if that came from Mike**  
9 **Paschke. We talked about two things. We talked**  
10 **about this, the letter, and then we talked about**  
11 **Mike Paschke. Mike Paschke was just one out of**  
12 **the -- one person out of the first round of faxes.**  
13 **I think this is with regard to the 2010, if I'm not**  
14 **mistaken.**  
15 Q No. This is in regard to 2009, that he was  
16 going to complain to the State Attorney Office.  
17 That's what the e-mail says.  
18 A **Okay. Okay. I remember. I thought we**  
19 **were kind of merging the two things.**  
20 Q Well, that letter or notification from the  
21 Attorney General isn't necessarily related to Mike  
22 Paschke; correct?  
23 A **I guess, yes, that's the point that I was**  
24 **trying to make is I thought you were trying to put**  
25 **the two together, and I was just clarifying that, to**

1 my knowledge, it wasn't.  
 2 Q All right.  
 3 A I think it was just a snippet. A snippet.  
 4 Q I'll represent to you that the Complaint  
 5 that was filed in August of 2009, that the  
 6 Buccaneers were served with it September 7, 2009.  
 7 Do you know of any reason why you weren't  
 8 notified in 2009 about the lawsuit?  
 9 A I'm not sure. I'm not sure, no.  
 10 Good question.  
 11 Q Have you ever learned why you weren't  
 12 notified of the August 2009 lawsuit?  
 13 MR. POSTMAN: Object to the form.  
 14 THE WITNESS: No. I could assume that  
 15 perhaps at the time maybe it didn't require anything  
 16 directly of me, any of my direct involvement at that  
 17 time would be the assumption I would make.  
 18 BY MR. KELLY:  
 19 Q Were you aware --  
 20 MR. POSTMAN: Wait. Hold on. Are you  
 21 done?  
 22 THE WITNESS: Yes.  
 23 MR. POSTMAN: Okay.  
 24 BY MR. KELLY:  
 25 Q Were you aware that the August 2009 lawsuit

1 signing a Verification?  
 2 A I kind of vaguely recall. I don't recall  
 3 signing anything. It's not to say that I didn't. I  
 4 just specifically don't remember signing a specific  
 5 document with regard to a specific lawsuit.  
 6 But you said that was 2011?  
 7 Q 2011.  
 8 A That was probably the time that I was kind  
 9 of first made aware of it, then.  
 10 Q All right. And just so I'm clear, in May  
 11 or June of 2010, you were unaware of any lawsuit  
 12 brought against the Buccaneers for the sending of  
 13 faxes?  
 14 MR. POSTMAN: Object to the form.  
 15 THE WITNESS: Again, I don't remember the  
 16 specific date in which I was made aware of it. My  
 17 guess would be the second half of the last five  
 18 years. Clearly, if you're saying I signed something  
 19 on January of 2011, then I would say that that would  
 20 certainly be a date -- the earliest date that I can  
 21 confirm that I'm aware of it, or was aware of it.  
 22 BY MR. KELLY:  
 23 Q I didn't say "January 2011." I think I  
 24 just said "2011." I can get you the date, though.  
 25 A Okay.

1 was a class action complaint?  
 2 A I don't -- one way or the other, I don't  
 3 remember learning if it was class action versus not  
 4 class action or what it was.  
 5 Again, I just kind of remember some  
 6 discussion about it -- again, if it was with Steve  
 7 Johnston or Jason Layton or -- I use the phrase "in  
 8 passing" at some point, not remembering exactly when  
 9 I was made aware of it, learning that there was a  
 10 suit. So I don't recall whether or not it was, you  
 11 know, a class action versus a non.  
 12 Q In the State Court case, the August --  
 13 let's call it the August 2009 lawsuit. Okay?  
 14 A Okay.  
 15 Q That's the State Court case which CIN-Q  
 16 brought. You answered --  
 17 A Is that what this has kind of morphed into,  
 18 just so I'm understanding --  
 19 Q Yes. This is a different lawsuit. It also  
 20 has CIN-Q, but it's filed in Federal Court.  
 21 A Okay.  
 22 Q You know, the specifics don't really matter  
 23 for the purposes of these questions.  
 24 But in the State Court case you had signed  
 25 Answers to Interrogatories in 2011. Do you remember

1 Q But I guess my question is, when you were  
 2 contracted with FaxQom in May-June of 2010, were you  
 3 aware of any pending lawsuits?  
 4 MR. POSTMAN: This is literally eight times  
 5 you've asked the exact same question. Object to the  
 6 form of the question.  
 7 THE WITNESS: I'm happy to answer it the  
 8 same way.  
 9 BY MR. KELLY:  
 10 Q Okay.  
 11 A I really -- at that point I don't recall  
 12 that I was aware of anything.  
 13 Q All right. Did you ever speak to Steve  
 14 Simms about the lawsuit?  
 15 A About the suit that you're referring to?  
 16 Q Yes.  
 17 A My answer would be, "no," for a couple of  
 18 different reasons: One, not knowing when I was  
 19 made aware of it. I think Steve Simms' and I's  
 20 conversation ended towards late 2010.  
 21 Two, it wouldn't be my nature to discuss  
 22 anything legal within our company with a third  
 23 party, even if it was a result of that third party.  
 24 That would be something I would have our attorneys  
 25 do if there was something to discuss. I wouldn't

1 even bring up that there was a suit or something to  
2 somebody.

3 Q Are you aware of Manny Alvare ever speaking  
4 to Steve Simms?

5 MR. POSTMAN: So the only way you could  
6 answer that is predicated upon conversations you  
7 had with Manny Alvare. So at this point I'm going  
8 to instruct you not to answer it, unless you  
9 verbally -- unless you saw it -- well, even if you  
10 saw it, if you remember.

11 MR. KELLY: No, because if somebody from  
12 the Buccaneers told him that Manny Alvare spoke to  
13 Steve Simms --

14 MR. POSTMAN: But that would all be covered  
15 by privilege so --

16 MR. KELLY: No, it wouldn't be.

17 THE WITNESS: I -- well, I mean, listen.  
18 It's up to you. I think Manny had requested Steve  
19 Simms' contact information or vice versa. I don't  
20 recall. It's in a document.

21 BY MR. KELLY:

22 Q Yes. I --

23 MR. POSTMAN: Here's the thing. Any  
24 conversations you have with Manny are privileged.

25 THE WITNESS: Right.

1 that question.

2 Let's mark this (indicating).

3 \* \* \*

4 (Whereupon, the document referred  
5 to was marked for identification  
6 as Plaintiffs' Exhibit No. 9.)

7 \* \* \*

8 THE REPORTER: Exhibit 9.

9 BY MR. KELLY:

10 Q I'm showing you what has been marked as  
11 Exhibit 9. It's an e-mail dated August 11, 2009,  
12 where you wrote to FaxQom with the phone number  
13 (813) 554-1353. Do you see that?

14 A I do.

15 Q And the preceding e-mail is an e-mail from  
16 FaxQom to you requesting Manny's phone number. Do  
17 you see that?

18 A I do.

19 Q Do you know what triggered these two  
20 e-mails?

21 A I don't recall. This was what I was  
22 referring to a second ago.

23 MR. POSTMAN: But, in all fairness --

24 THE WITNESS: I'm sorry

25 MR. POSTMAN: -- if you know of it because

1 MR. POSTMAN: And the law is -- just so --  
2 and I'll tell you in front of him that, if you start  
3 talking about it, then you waive privilege.

4 THE WITNESS: Gotcha.

5 MR. POSTMAN: And no disrespect to Ryan  
6 or Ross, but they very well may say that even an  
7 inadvertent disclosure could be a waiver of a  
8 broader privilege that you and the Buccaneers have  
9 a right to. He can suggest anything as your  
10 non-lawyer about what it may or may not be.

11 As your lawyer, to the extent he's asking  
12 about any conversations with Manny, I'm going to  
13 instruct you not to answer.

14 BY MR. KELLY:

15 Q And I'm not asking you about any  
16 conversations that you had with Manny. My question  
17 to you is do you have an understanding that Manny  
18 spoke to Steve Simms?

19 MR. POSTMAN: And if the only understanding  
20 that you have is predicated upon conversations or  
21 communications you had with Manny and/or another  
22 lawyer I'm going to instruct you not to answer.

23 THE WITNESS: I guess at the advice of my  
24 lawyer, I don't want to answer the question, then.

25 MR. KELLY: All right. So I'll certify

1 of conversations with Steve, that's not privileged.  
2 If you know of it from conversations with Manny, it  
3 is privileged, so in all fairness.

4 THE WITNESS: Okay. Then I was confused on  
5 the last question. This is what I was referring to.

6 I don't remember specifically. I think  
7 Manny may have reached out to Steve, and then Steve  
8 was looking to return his call. I don't remember.

9 BY MR. KELLY:

10 Q Was the topic regarding indemnification, or  
11 was it regarding a complaint that was made against  
12 the Buccaneers?

13 MR. POSTMAN: Again, only if you know from  
14 Steve.

15 THE WITNESS: I honestly couldn't tell you.  
16 I don't remember. I remember this. My recollection  
17 five years ago, I don't remember exactly why he  
18 needed to call Manny back or if Manny had reached  
19 out to him or what the conversation was.

20 BY MR. KELLY:

21 Q Did Steve tell you what they spoke about?

22 A Not to my knowledge, unless there's an  
23 e-mail or something where Steve responds or says,  
24 "I talked to Manny," or whatever it was. I don't  
25 recall.

1 Q Did Manny require a signed Indemnity  
2 Agreement every time a broadcast occurred?  
3 MR. POSTMAN: So I'm going to instruct you  
4 not to answer that question on the grounds of the  
5 attorney-client privilege.  
6 THE WITNESS: So at the advice of my  
7 attorney I decline to answer the question.  
8 MR. KELLY: I'll certify the question.  
9 MR. POSTMAN: So what does that mean when  
10 you certify the question? Because it's obviously an  
11 Illinois thing. If I'm instructing him not to  
12 answer, in all fairness to you, the record will  
13 reflect -- and I could be wrong, although I think  
14 I'm right -- that you can bring it to the Judge.  
15 But I -- just since you've done it, what does that  
16 mean?  
17 MR. KELLY: That just means that question  
18 is marked on the transcript as a question that the  
19 witness --  
20 MR. POSTMAN: So you put it in a separate  
21 area?  
22 THE REPORTER: I just put "Question  
23 Instructed Not to Answer," and then I index it.  
24 MR. POSTMAN: Oh, you index it somewhere.  
25 THE REPORTER: Yes.

1 THE WITNESS: So per the advice of my  
2 attorney I decline to answer the question.  
3 MR. KELLY: Certify the question.  
4 Q Had you ever spoken to Manny regarding any  
5 issues relating to FaxQom?  
6 MR. POSTMAN: So I'm going to object and  
7 instruct you not to answer the question predicated  
8 upon the attorney-client privilege.  
9 MR. KELLY: I'm not asking about the  
10 conversations. I'm asking about whether or not  
11 there were any discussions.  
12 MR. POSTMAN: And that's what I'm trying to  
13 work with you on this. I think that any -- whether  
14 he speaks to a lawyer -- so let's assume I commit a  
15 crime last night, and I call a lawyer. I think the  
16 fact that I have a communication with the counsel in  
17 and of itself is privileged.  
18 So I guess if you're asking a  
19 "Yes"-and-"No" question, I probably don't have a  
20 problem because it doesn't disclose the contents of  
21 the question. And if you agree that it's not a  
22 waiver of any attorney-client privilege, I'll agree  
23 to allow him to answer it. But if you're not  
24 willing to do that, then I think I have to instruct  
25 him not to answer.

1 MR. POSTMAN: Okay. So you can find it.  
2 MR. KELLY: It has some legal significance  
3 in other states.  
4 MR. POSTMAN: Okay.  
5 MR. KELLY: I'm not sure if it has any in  
6 Federal Court.  
7 Q Have you ever spoken to Manny regarding the  
8 requirement to have indemnification?  
9 MR. POSTMAN: I'm going to object and  
10 instruct the witness not to answer predicated upon  
11 the attorney-client privilege.  
12 THE WITNESS: Per the advice of my attorney  
13 I decline to answer the question.  
14 MR. KELLY: Certify the question.  
15 Q Did you rely on any representations Manny  
16 made to you regarding contracting with FaxQom to  
17 send faxes?  
18 MR. POSTMAN: Well, there's probably a way  
19 you can ask that question, although that's not the  
20 way because that would reflect conversations you  
21 had with Manny. But I think you can ask about his  
22 actions after speaking with Manny. But the way  
23 that question is asked, I'm going to instruct you  
24 not to answer predicated upon the attorney-client  
25 privilege.

1 MR. KELLY: Okay. I'm not agreeing to that  
2 at all so...  
3 MR. POSTMAN: Okay. So any conversations  
4 that you had with Manny about any subject matters  
5 related to this case and whether or not those  
6 conversations took place are privileged, at least  
7 under Florida law they are, and I'm going to  
8 instruct you not to answer.  
9 THE WITNESS: Okay.  
10 BY MR. KELLY:  
11 Q But my question to you is have you had any  
12 contact with Manny relating -- or any communications  
13 with Manny relating to any issues related to FaxQom?  
14 MR. POSTMAN: And I think that's exactly  
15 the same question that you just said, and again my  
16 instruction to you would be the exact same, based  
17 upon the attorney-client privilege and the benefit  
18 that both you and the Buccaneers have, I'm going to  
19 instruct you not to answer.  
20 THE WITNESS: So as per the suggestion of  
21 my attorney I decline to answer the question.  
22 MR. KELLY: All right. Certify the  
23 question.  
24 Q Was Manny general counsel for the  
25 Buccaneers in 2009-2010?

1 **A I hesitate. I don't know if it was all of**  
2 **2009-2010, but during that period, yes, he was.**

3 **Q** If there was a legal question that needed  
4 to be addressed, would you go to Manny for that  
5 issue?

6 **A It really depends on the issue.**

7 **Q** Had you contacted any private attorneys  
8 regarding any FaxQom matters in 2009 and 2010?

9 **MR. POSTMAN:** So I would have to ask him  
10 to see if I -- I need to ask him a question about  
11 that before I let him answer it because it could  
12 predicate on the privilege, and that's the reason  
13 why I want to take a break. Otherwise, I'm going to  
14 instruct him not to answer. I'm happy to go  
15 outside and see if he does.

16 **MR. KELLY:** That's fine.

17 **THE VIDEOGRAPHER:** Off the record?

18 **MR. COHEN:** What time?

19 **THE VIDEOGRAPHER:** The time is 2:43 p.m.  
20 We are off the record.

21 (Mr. Cohen, Mr. Postman, and the deponent  
22 left the room at 2:43 p.m. and returned  
23 at 2:45 p.m.)

24 **THE WITNESS:** I forgot the question. Could  
25 I have it read back?

1 instruct you not to answer predicated upon the  
2 attorney-client privilege.

3 **THE WITNESS:** At the suggestion of my  
4 attorney I decline to answer the question.

5 **MR. KELLY:** Certify the question.

6 **Q** What communications did you have with Ed  
7 Glazer regarding the sending of faxes?

8 **A The initial sending of faxes or --**

9 **Q** Yes. Faxes were sent in July and August of  
10 2009 and then May and June of 2010; correct?

11 **A Correct.**

12 **Q** So when was the first time you spoke to Ed  
13 Glazer regarding the legality of sending out faxes?

14 **A Regarding the legality?**

15 **Q** Regarding the legality.

16 **A I don't know that we had specific questions**

17 **or conversations regarding the legality. I can**  
18 **answer the first time I spoke with him about it,**  
19 **you know, was probably in that sales meeting,**  
20 **somewhere between January of 2009, in my first**  
21 **correspondence with FaxQom, and September of 2009,**  
22 **in which case I had proposed a number of different**  
23 **ideas for sales. The legality, I don't remember**  
24 **specific questions or conversations regarding that.**

25 **Q** At all times was Ed Glazer made aware of

1 **MR. KELLY:** We have to go back on the  
2 record first.

3 **THE VIDEOGRAPHER:** Back on the record. The  
4 time is 2:45 p.m.

5 (Record read as follows:

6 "Q Had you contacted any private  
7 attorneys regarding any FaxQom matters in  
8 2009 and 2010?")

9 **THE WITNESS:** Not that I recall.

10 **BY MR. KELLY:**

11 **Q** Did you ever speak to Ed Glazer regarding  
12 the legality of sending faxes?

13 **MR. POSTMAN:** You can answer that.

14 **THE WITNESS:** Yes. Yes, I'm confident at  
15 some point. I don't recall specifically, but I'm  
16 confident we had a conversation at some point.

17 **BY MR. KELLY:**

18 **Q** All right. Did you continue to contract  
19 with FaxQom on the advice of Manny?

20 **MR. POSTMAN:** I'm sorry. What was the  
21 question?

22 (Record read as follows:

23 "Q Did you continue to contract  
24 with FaxQom on the advice of Manny?")

25 **MR. POSTMAN:** I'm going to object and

1 the work that you were doing with FaxQom?

2 **A No, I wouldn't say at all times. He was**  
3 **aware that I was going to move forward with --**  
4 **you know, with FaxQom, that I was working with**  
5 **FaxQom. But to that extent he wasn't aware of all**  
6 **communications and conversations, no.**

7 **Q** Were you authorized by the Buccaneers to  
8 contract with FaxQom?

9 **A I'm -- yes, you know, as the director of**  
10 **New Business Development, I'm authorized to make**  
11 **those decisions.**

12 **Q** Do you have a certain budget that you can  
13 freely spend?

14 **A There's not a set amount, but I have the**  
15 **authority to request from our Accounting Department**  
16 **certain amounts to be paid to certain vendors, yes.**

17 **Q** I think we have three checks. I'm not sure  
18 if these are -- do you think there's only three  
19 checks that were written or possibly a fourth?

20 **A You know, honestly, it would depend on the**  
21 **number of campaigns that we went through. So we**  
22 **talked. We said there were two in 2009. We have**  
23 **those two checks. And then there was the 2010**  
24 **campaign, and we have that check. So if there**  
25 **were only the three occasions, then that would be**

1 accurate.

2 Q So if you just add them up, one was --

3 A Three "broadcasts" call them or  
4 "campaigns."

5 Q -- roughly 15,000, the other one was  
6 roughly 8,000, and the other one was 15,000. So  
7 that's about \$38,000 or so. Is that within your  
8 authority to expend for marketing?

9 A Yes.

10 Q And the Buccaneers used 1 Touch for text  
11 messages; is that right?

12 A It was a mobile marketing campaign that we  
13 did.

14 Q Do you know how much was spent with  
15 1 Touch?

16 A I don't recall. And you said, "text  
17 messages." There were -- I would have to go by my  
18 memory. 1 Touch was kind of in the mobile world.  
19 So their campaign was a little different. It wasn't  
20 necessarily text messages, but I would have to go  
21 back and look exactly what we did with them. But  
22 did I -- I'm not sure of your initial question.

23 Q The question was how much was spent with  
24 1 Touch.

25 A I don't recall. I could figure it out, but

1 counsel of the marketing efforts that you did with  
2 faxing?

3 MR. POSTMAN: So that is a specific  
4 conversation, and I am going to object and  
5 instruct you not to answer predicated upon the  
6 attorney-client client.

7 THE WITNESS: So per the suggestion of my  
8 attorney I decline to answer the question.

9 MR. KELLY: Certify the question.

10 MR. POSTMAN: Just so that I can  
11 understand, why do you think that's not privileged?  
12 If Manny is the general counsel, don't you believe  
13 that any conversations that my client has with his  
14 general counsel and the sum and substance of what  
15 those conversations are fall within the purview of  
16 the attorney-client privilege --

17 MR. KELLY: Not --

18 MR. POSTMAN: -- particularly given the  
19 fact that you've not agreed to waive that any  
20 single conversation is not a waiver of the entire  
21 privilege?

22 MR. KELLY: You can make that argument,  
23 Barry.

24 MR. POSTMAN: Well, just so --

25 MR. KELLY: I don't have to explain my

1 I don't recall.

2 Q Just a rough estimate is all --

3 A No. I'd have to look at the contract and  
4 stuff with them to figure it out, which I don't have  
5 with me, but I don't recall.

6 Q Would it be around the same amount as the  
7 faxing?

8 MR. POSTMAN: Object to the form.

9 THE WITNESS: Again, I don't recall. If  
10 you asked me the same question about FaxQom, the  
11 only reason I would have an estimate because all  
12 these documents are in front of me and, you know,  
13 have been. So, with 1 Touch, I really don't recall.

14 BY MR. KELLY:

15 Q In order to do marketing does the general  
16 counsel for the Buccaneers need to sign off on the  
17 marketing?

18 MR. POSTMAN: I think you can answer that.  
19 It's a pattern or practice question, as opposed to a  
20 specific conversation.

21 THE WITNESS: The answer would be no, but  
22 that doesn't necessarily preclude them from being  
23 involved.

24 BY MR. KELLY:

25 Q Did you notify the Buccaneers' general

1 position --

2 MR. POSTMAN: No, you don't --

3 MR. KELLY: -- at a deposition so --

4 MR. POSTMAN: You don't but, in all  
5 fairness, I will point out to the Court that I tried  
6 to work it out at the deposition, and you didn't  
7 want to talk about it. So you're right, you don't  
8 have a responsibility to try to work it out. No one  
9 is pointing a gun to your head to try to talk to me  
10 about it, but I wanted you to at least have the  
11 benefit of trying to convince me that I'm wrong, but  
12 we're happy to keep plowing along.

13 BY MR. KELLY:

14 Q Have you ever spoken to any Buccaneer  
15 employees about the lawsuit that was filed in August  
16 of 2009 or 2010?

17 MR. POSTMAN: Aside from counsel?

18 MR. KELLY: Aside from counsel.

19 THE WITNESS: Your question is specific  
20 about discussing it in 2009 and 2010, and I had  
21 established that the earliest I can confirm that I  
22 was aware was 2011.

23 So, no. I guess the answer to your  
24 question would be "no."

25 ///

1 **BY MR. KELLY:**

2 Q Do the Buccaneers take complaints that have  
3 lawsuits seriously?

4 **A Absolutely.**

5 Q And can you think of any reason why you  
6 weren't notified of the lawsuit?

7 **MR. POSTMAN:** Object to the form. He's  
8 already testified he was notified of it.

9 **MR. KELLY:** Well, and he also testified the  
10 earliest he can think of is 2011.

11 **THE WITNESS:** Well, that's the earliest I  
12 can confirm.

13 **BY MR. KELLY:**

14 Q So the question is why do you think  
15 you weren't notified of a class action lawsuit in  
16 2009-2010?

17 **A I --**

18 **MR. POSTMAN:** Object to the form. I'm  
19 sorry. Continue.

20 **THE WITNESS:** I would go back to what  
21 I said before is that if -- if -- if -- if -- if  
22 the Buccaneers were notified in 2009, the only  
23 assumption I can make of why I wasn't informed until  
24 2011, or whenever the date was, was that perhaps it  
25 didn't require my involvement. We have a general

1 **BY MR. KELLY:**

2 Q Well, why would it cause you serious  
3 concern had you been notified of the 2009 lawsuit in  
4 2009?

5 **MR. POSTMAN:** You're misrepresenting  
6 what he's saying. I'm sure you're doing it  
7 unintentionally because you wouldn't do that, but  
8 object to the form.

9 You can answer.

10 **THE WITNESS:** The question was why would it  
11 cause me concern?

12 **BY MR. KELLY:**

13 Q Right.

14 **MR. POSTMAN:** Form.

15 **THE WITNESS:** Because I had taken so many  
16 steps. I had done so much due diligence to make  
17 sure that the faxes that were being sent out by  
18 FaxQom were legal. And I had required in writing  
19 that everyone who was to receive a fax had opted  
20 in and that all the best practices were being used,  
21 and that FaxQom was operating lawfully and under the  
22 guidelines of the TCPA. So to receive notice that  
23 someone was bringing a suit would have been an eye  
24 opener, yes.

25 ///

1 counsel for a reason, to address certain issues,  
2 just like I'm the director of New Business  
3 Development. You know, I'm here to conduct new  
4 business.

5 So just because I was involved in one  
6 project prior and there's something related to that  
7 project that comes to fruition a number of years  
8 later doesn't necessarily require my immediate  
9 attention or, you know, hence, my involvement.

10 **BY MR. KELLY:**

11 Q Had you been notified of the lawsuit in  
12 2009, would you question your contracting with  
13 FaxQom in 2010?

14 **MR. POSTMAN:** Form again.

15 **THE WITNESS:** If the lawsuit in 2009 was  
16 specific and absolutely related to the FaxQom, I  
17 think that would have given us some concern, yes.  
18 So, you know, I can't say with any confidence that I  
19 would have proceeded in 2010, having known in 2009  
20 that there was a valid issue.

21 When I say, "valid issue," not to be  
22 confused with one person out of 300,000 that said,  
23 "I didn't want to receive a fax." We take both  
24 seriously, but, you know, one clearly screams, you  
25 know, "serious" and -- you know, so...

1 **BY MR. KELLY:**

2 Q Okay.

3 **A Just as -- if I may continue -- just as it  
4 was an eye opener when we received this letter with  
5 this snippet from -- a paraphrase from the Attorney  
6 General, which is why at that point I immediately  
7 ceased operations with FaxQom.**

8 Q Aside from counsel for the Buccaneers,  
9 did you ever ask anyone why you weren't promptly  
10 notified of the lawsuit in 2009?

11 **MR. POSTMAN:** Object to the form.

12 **THE WITNESS:** Well, I never specifically  
13 asked counsel why I wasn't notified.

14 **BY MR. KELLY:**

15 Q Well, I said aside from -- well, I'm not  
16 suggesting --

17 **A You said, "aside." That's assuming that I  
18 did so --**

19 Q Yes, I was trying to ask a question that  
20 wouldn't invade the attorney-client privilege.

21 **A Gotcha. You're saying outside.**

22 Q Outside.

23 **A Gotcha. So outside of counsel, did I  
24 discuss the lawsuit with anyone within the  
25 Buccaneers?**

1 Q Well, specifically, the question why you  
2 weren't notified promptly in 2009 about the lawsuit.  
3 **MR. POSTMAN:** Form.  
4 **THE WITNESS:** No, I don't believe I  
5 discussed that. It's -- I'm more interested in  
6 moving forward with things, you know, as opposed to  
7 asking questions why -- you know, why I may not have  
8 been involved with something.  
9 **BY MR. KELLY:**  
10 Q Had you been notified of the lawsuit in  
11 2009, would you have gone ahead and contracted with  
12 FaxQom in 2010?  
13 **MR. POSTMAN:** Object to the form.  
14 **THE WITNESS:** Absolutely not, no.  
15 **BY MR. KELLY:**  
16 Q Do you feel as if the Buccaneers did not --  
17 or do you know why the Buccaneers didn't provide you  
18 with notice of the 2009 lawsuit in 2009?  
19 **A Well, again, I can only speculate that at**  
20 **the time it didn't require any immediate or direct**  
21 **action from me and that our general counsel was**  
22 **working on it. So for whatever reason that I wasn't**  
23 **made aware, you know, at that point, I could only**  
24 **speculate. I'm not sure.**  
25 Q Why would you have not contracted with

1 **BY MR. KELLY:**  
2 Q And why not?  
3 **A You know, I would just be speculating but,**  
4 **you know, it would depend on when he was made aware**  
5 **of it. If -- you know, if we had our regularly**  
6 **scheduled meetings -- I go out of town during the**  
7 **summer, and he takes vacations in the summer. So**  
8 **it just would really kind of depend -- I wouldn't**  
9 **necessarily expect him to say something to me,**  
10 **especially if it was being handled by the proper**  
11 **people within our organization to address it, if**  
12 **it didn't require any action from me. So, not**  
13 **necessarily, I guess is the answer.**  
14 Q Had you received any preservation letters  
15 from anyone at the Buccaneers to preserve all  
16 e-mails and other evidence from the 2009 lawsuit?  
17 **MR. POSTMAN:** I mean, I've got to ask him a  
18 privileged question with regard to that before he  
19 answers it.  
20 **MR. KELLY:** Off the record.  
21 **THE VIDEOGRAPHER:** The time is 3:00 o'clock  
22 p.m. We are off the record.  
23 (Mr. Cohen, Mr. Postman, and the deponent  
24 left the room at 3:00 p.m. and returned  
25 at 3:03 p.m.)

1 FaxQom in 2010 had you received notice of the  
2 lawsuit in 2009?  
3 **MR. POSTMAN:** Object to the form.  
4 **THE WITNESS:** Well, for the same reasons  
5 that I required that FaxQom put in writing that what  
6 they were doing was lawful and followed the proper  
7 guidelines that we've discussed.  
8 So to receive a lawsuit, the most serious  
9 offense, more serious than, you know, just an  
10 individual complaint, again, would be a red flag to  
11 me and -- just as it was when we received the letter  
12 from the person threatening the lawsuit, which is  
13 when I ceased -- or had FaxQom cease operations with  
14 the faxes or cease, I guess, the broadcast, I should  
15 say.  
16 Q To your knowledge, did Ed Glazer know of  
17 the lawsuit in 2009?  
18 **MR. POSTMAN:** Object to the form.  
19 **THE WITNESS:** I couldn't confirm that or  
20 deny that.  
21 **BY MR. KELLY:**  
22 Q If he had notice of the lawsuit in 2009,  
23 would you expect him to tell you about it?  
24 **MR. POSTMAN:** Object to the form.  
25 **THE WITNESS:** Not necessarily.

1 **MR. POSTMAN:** Can you read back the  
2 question for me.  
3 (Record read as follows:  
4 "Q Had you received any preservation  
5 letters from anyone at the Buccaneers to  
6 preserve all e-mails and other evidence  
7 from the 2009 lawsuit?")  
8 **MR. POSTMAN:** Wait. Hold on.  
9 **MR. KELLY:** Well, hold on.  
10 **THE VIDEOGRAPHER:** Are we on the record?  
11 **MR. POSTMAN:** No, we're off the record.  
12 (Whereupon, a discussion was held off  
13 the record.)  
14 **THE VIDEOGRAPHER:** Ready to go on?  
15 **MR. POSTMAN:** Yes.  
16 **THE VIDEOGRAPHER:** Back on the record. The  
17 time is 3:03 p.m.  
18 **MR. POSTMAN:** Okay. I'm going to --  
19 unfortunately -- and I'll be happy to explain this  
20 to you -- there was a time period where there was a  
21 letter that came through, but he got it through  
22 counsel, so he can't answer it. I'm telling you so  
23 you understand why he can't answer it.  
24 **MR. KELLY:** Well, that's not --  
25 **MR. POSTMAN:** I'm just telling you. So the

1 answer is, I'm going to object and instruct him not  
2 to answer. I wanted to give you the courtesy of  
3 learning from me why I'm doing it, because it would  
4 have come through counsel.

5 Now, if you want to ask if he got it from  
6 other sources, that's fine, but -- so the answer is  
7 he's not -- I'm going to object and instruct you not  
8 to answer, predicated upon what I now understand to  
9 be a communication you had with your lawyer.

10 **MR. KELLY:** All right. I'll certify the  
11 question.

12 **Q** When did you receive the preservation  
13 letter?

14 **MR. POSTMAN:** You can answer that.  
15 I think -- well --

16 **MR. KELLY:** Well, he did --

17 **MR. POSTMAN:** No, he didn't see the letter.

18 **MR. KELLY:** Well, you just said he did.

19 **MR. POSTMAN:** No. I said he learned about  
20 it is what I said, actually.

21 **MR. KELLY:** Is there a preservation letter  
22 or not?

23 **MR. POSTMAN:** I actually -- I don't know  
24 if --

25 **THE WITNESS:** What is a "preservation

1 to preserve evidence?"

2 **MR. KELLY:** No, that's not my question.

3 **Q** My question is when did you receive the  
4 preservation letter from the attorneys for the  
5 Buccaneers?

6 **MR. POSTMAN:** I don't --

7 **MR. KELLY:** You represented that he  
8 received one.

9 **MR. POSTMAN:** No. I think what I  
10 represented is he was told to preserve evidence.  
11 Maybe you misunderstood me. Maybe I said it wrong.  
12 Maybe I don't understand.

13 **THE WITNESS:** I could add some  
14 clarification I think would clear this up.

15 I don't remember or recall ever receiving  
16 specifically a preservation letter. To your point,  
17 I -- I guess that's it. I don't know if that clears  
18 it up or -- sorry. I'm not trying to --

19 **BY MR. KELLY:**

20 **Q** Do you know what a "preservation letter"  
21 is?

22 **A** No, I don't.

23 **Q** It's a letter that states a lawsuit's been  
24 filed and not to destroy evidence. Do you recall  
25 ever receiving a letter like that?

1 letter"?

2 **MR. POSTMAN:** So let me try to work this  
3 out with you, and you can fight with me if you want.

4 At some point he had a conversation with  
5 his counsel about the pending lawsuit. I'm guessing  
6 it's 2011, predicated upon what he's already told  
7 us, but I don't know. And during that time there  
8 was an issue about getting the documents together,  
9 which he ultimately did. I think that's what he  
10 thinks you're asking him.

11 That all came from a conversation that he  
12 had with general counsel at the time. All of that  
13 is privileged, so that it's clear. The way you've  
14 asked the question, he can't answer it because it's  
15 seeking conversations he had with his lawyer.

16 **MR. KELLY:** That's not true.

17 **MR. POSTMAN:** I'm not trying to hide  
18 something.

19 **MR. KELLY:** Well, that's not what I'm  
20 asking. All I'm asking is when did you receive the  
21 preservation letter.

22 **MR. POSTMAN:** So I'm going to -- so why  
23 don't you ask him, "did you get a" -- "did you  
24 get" -- have you physically seen a letter from a  
25 lawyer not represented by the Buccaneers asking you

1 **A** I don't recall. I may have. I don't  
2 recall.

3 **Q** All right.

4 **MR. POSTMAN:** Now, it's just getting cranky  
5 towards the end of the day. We're just going to  
6 fight over everything.

7 **BY MR. KELLY:**

8 **Q** All right. So we've talked about the Mike  
9 Paschke complaint that was July 15, 2009; correct?

10 **A** If the 15th was the date, correct.

11 **Q** Okay. And then there was a lawsuit that  
12 was filed in August of 2009; correct?

13 **MR. POSTMAN:** Object to the form.

14 **THE WITNESS:** Correct.

15 **BY MR. KELLY:**

16 **Q** I'll represent to you it's August 2009.

17 **A** Okay.

18 **Q** Any other complaints that you were made  
19 aware of in 2009 or in 2010, other than the Attorney  
20 General in June or July of 2010?

21 **A** You know, I'd have to go through and scour.  
22 I'm happy to do it and see if there was another  
23 number or two. The Mike Paschke -- I remember  
24 talking to Steve Simms that he talked to the guy.  
25 He was a nice guy. Took the number out.

1 I'd have to go through my e-mails. I  
2 remember at some point there was a number, too, that  
3 I sent to Steve Simms, asking him to be sure those  
4 were not included in our latest broadcast, you know,  
5 because of the Complaint that we had.

6 So if there was another number, I'd have to  
7 go through to confirm it. Or if you know the  
8 number, you could save me the time to --

9 Q Well, we can look at the e-mails. But my  
10 question to you is do you have any recollection  
11 outside of the e-mails.

12 A Outside of the Mike Paschke and you said  
13 the person with the Florida --

14 Q Yes, whatever's not in the e-mails.

15 A Yes. I think I sent, on recollection,  
16 Steve in 2010, before doing what I would call kind  
17 of a second round of broadcast, a couple of fax  
18 numbers. Whether the number's two or three, I  
19 really don't recall.

20 Q Do you know who the complaining people were  
21 for those two or three?

22 A I didn't speak to them directly so I  
23 wouldn't know. You asked me earlier about the name  
24 associated with Mike Paschke's telephone number, and  
25 I wasn't aware until I just re-looked it. There was

1 A Not directly, no.

2 Q Why not?

3 A From the person --

4 Q From the complainant.

5 A From the complainant? No. Not many  
6 people are aware of my office location or, you know,  
7 my direct responsibility, you know, with the  
8 organization so...

9 Q Did you ever ask the Buccaneer employees to  
10 forward all complaints to you so you can handle it  
11 directly?

12 A I may have. I'll even say I believe so  
13 because I was the one working with FaxQom directly,  
14 and I would have wanted to be sure that they  
15 scrubbed those numbers or removed those numbers  
16 from certainly anything else we were doing, but  
17 as a courtesy to have them remove the numbers from  
18 anything else they did for any other clients because  
19 clearly those people made it clear they didn't want  
20 to receive a fax.

21 Q There was "opt-out" language at the bottom  
22 of the faxes; correct?

23 A Correct.

24 Q And the "opt-out" language didn't identify  
25 Buccaneers' contact; correct?

1 a name and telephone number associated with it.

2 So, no. I think I was just given fax  
3 numbers from somebody in the Tampa office.

4 Q All right. So you don't recall ever  
5 talking to anybody complaining of receiving any fax?

6 A I didn't do it --

7 MR. POSTMAN: Aside from counsel.

8 BY MR. KELLY:

9 Q Are you aware of anyone else at the  
10 Buccaneers, aside from counsel, that had spoken to  
11 anyone that complained of faxing?

12 MR. POSTMAN: Form.

13 THE WITNESS: I'd have to go through. If  
14 perhaps Ben received a phone call -- I believe he  
15 did because I think he sent me one of the telephone  
16 numbers. You said except for counsel so...

17 BY MR. KELLY:

18 Q Are you aware of any letters from anyone  
19 claiming a violation of the TCPA that came either by  
20 Fed-Ex or by mail to the Buccaneers?

21 A I don't recall. I would never receive  
22 those, nothing with regard to the TCPA that I can  
23 recall.

24 Q Would you expect those complaint letters  
25 claiming a violation of the TCPA to be sent to you?

1 A Correct, to my knowledge, but I've got a  
2 copy right here. It was language that Steve Simms  
3 sent to me and I used verbatim at the bottom. I  
4 assumed it was all in an effort to continue to  
5 comply with the TCPA and the DMA guidelines.

6 Q So the toll free number "(877) 272-7614,"  
7 that's --

8 A Which one are you looking at here?

9 Q I just pulled one out randomly.

10 A Yes, I've got one here.

11 Q All right. So that would be a number that  
12 would be owned and maintained by FaxQom; correct?

13 A I assume so, correct.

14 Q And then "Removaltech@FaxQom.com," that's a  
15 FaxQom address?

16 A I would assume so.

17 Q Did you have any access to those recipients  
18 that wanted to be removed off the fax list?

19 A To have access -- I'm not sure if I  
20 understand.

21 Q Did you have access to those people that  
22 were complaining about the Tampa Bay Buccaneers'  
23 faxes in calling that toll free number or in  
24 e-mailing that e-mail address?

25 MR. POSTMAN: Form.

1 **THE WITNESS:** I just want to make sure  
2 that I understand. Do I have access to the  
3 people? Because in the case of Mike Paschke  
4 (pronunciation) --  
5 **BY MR. KELLY:**  
6 Q Paschke (pronunciation).  
7 A Sorry, Paschke (pronunciation).  
8 In the case of Mike Paschke, the fax number  
9 and his name was accompanied by a telephone number.  
10 So I had access to his telephone number. But are  
11 you asking -- you're asking about the removal of  
12 FaxQom? Did I have access to that?  
13 Q Yes. I think my question is were you  
14 made aware of or did you have access to those  
15 individuals that were complaining about receiving  
16 the Buccaneers' faxes?  
17 **MR. POSTMAN:** Form.  
18 **THE WITNESS:** I believe, other than Mike,  
19 I was just giving the fax numbers that needed to be  
20 removed.  
21 **BY MR. KELLY:**  
22 Q Well, how were you obtaining those fax  
23 numbers?  
24 A It would have been -- whatever fax numbers  
25 that I forwarded to Steve Simms I believe would have

1 A I don't remember any specific instructions  
2 that I gave to the Sales Department. I think  
3 the Sales Department, in general, has, you know,  
4 procedures in place for people that call that have a  
5 complaint. You know, I think we try to hire some  
6 smart people, some good people, you know, people  
7 with a sense of ownership. And if someone's calling  
8 your business that you work for or represent with an  
9 issue, I'm confident that the people we've had  
10 working or have working would take that seriously  
11 and pass it along to the person in charge of their  
12 department.  
13 Q So for the Sales Department who would  
14 complaints be forwarded to?  
15 A Tickets specifically, Ben Milsom, and I  
16 think at the time he reported to Jason Layton, but I  
17 could be mistaken on that. But it was Jason that  
18 was kind of overseeing the entire Sales Department,  
19 but Ben more on the kind of individual ticket level.  
20 Q Now, you said that Jason or Ben may have  
21 forwarded you people complaining about receiving the  
22 faxes. I didn't see any of those e-mails in the  
23 production. Do you know if you have any of those  
24 e-mails?  
25 A The -- and it may have been done over a

1 come from either Ben Milsom or perhaps counsel,  
2 maybe even Jason Layton. So that, again, in an  
3 effort -- if we were to continue the broadcast or as  
4 a courtesy to FaxQom, advise them that clearly these  
5 people don't recall removing their numbers or  
6 deciding that at some point they didn't want to be  
7 on their list any longer.  
8 Q The Sales Department would receive the  
9 phone calls for people who were interested, as well  
10 as people that were complaining; correct?  
11 **MR. POSTMAN:** Form.  
12 **THE WITNESS:** Not necessarily. I think  
13 it's safe to assume that, in most cases, people  
14 would just call probably the largest telephone  
15 number on what they received.  
16 But, again, in this day and age, people  
17 have a complaint, it's likely they could have just  
18 gone online and called the main line, asked for the  
19 person in charge of sales or asked for the general  
20 counsel. We get people that call and ask to speak  
21 with Coach. So, you know.  
22 **BY MR. KELLY:**  
23 Q Well, what were the instructions for the  
24 Sales Department for those people who didn't want to  
25 receive any more faxes?

1 conversation. Perhaps they called me and said,  
2 "Hey, you know, we got a call from this person" and,  
3 you know, "they've respectfully requested to be  
4 removed" or something; so I may have written the  
5 number down.  
6 But there is an e-mail, I believe, that I  
7 sent to Steve Simms before -- it was either after --  
8 just after a campaign or just before starting a new  
9 campaign -- I think there are a couple of different  
10 e-mails, actually, confirming or reminding him that,  
11 hey, these are the two or three out of the, again,  
12 600,000 at that time, or whatever, that -- you know,  
13 I guess, orders that, you know, that he had  
14 supposedly to put together to make sure that they  
15 weren't included again in anything else we did and  
16 certainly anything else that he did.  
17 I can probably find that e-mail for you,  
18 too.  
19 (Whereupon, a discussion was held off  
20 the record.)  
21 **BY MR. KELLY:**  
22 Q Okay. Yes, I've got the e-mail.  
23 A You've got it?  
24 Q I don't know if it's the e-mail that you --  
25 A What date do you have on there?

1 Q It's September 1, 2009.  
2 A **September 1, 2009. Okay.**  
3 **MR. KELLY:** Let's mark this as the next  
4 number (indicating).  
5 \* \* \*  
6 (Whereupon, the document referred  
7 to was marked for identification  
8 as Plaintiffs' Exhibit No. 10.)  
9 \* \* \*  
10 **THE REPORTER:** Exhibit 10.  
11 (Whereupon, a discussion was held off  
12 the record.)  
13 **MR. GOOD:** I don't have an explanation for  
14 this one.  
15 **MR. POSTMAN:** I don't see it.  
16 **MR. KELLY:** Well, it's Bates numbered 95.  
17 It's just -- I think this portion was redacted  
18 (indicating).  
19 **THE WITNESS:** I have the e-mail here.  
20 **MR. POSTMAN:** Explain to him why that  
21 comes now in terms of you putting it off yesterday.  
22 Explain that to him. He needs to understand that,  
23 the bottom of it.  
24 **THE WITNESS:** What is the question?  
25 ///

1 A **"Need to get this number taken out of the  
2 blast ASAP..."**  
3 **MR. POSTMAN:** The reason why it's not  
4 redacted is because, in all fairness to you, it  
5 was forwarded to a third party. So I can't claim  
6 privilege if it was forwarded to a third party.  
7 **BY MR. KELLY:**  
8 Q All right. So the e-mail says:  
9 "Need to get this number taken  
10 out of the blast ASAP...727-892-9925."  
11 Do you see that?  
12 A **I do.**  
13 **MR. POSTMAN:** He's talking about he  
14 forwarded it to a third party. That's why it is not  
15 privileged.  
16 **MR. KELLY:** That's fine.  
17 **THE WITNESS:** I do see that.  
18 **BY MR. KELLY:**  
19 Q Okay.  
20 A **And that number again was?**  
21 Q 727-892-9925.  
22 A **Okay.**  
23 Q And then you forwarded that number to  
24 FaxQom the same day; correct?  
25 A **September 1st and September 1st; correct.**

1 **BY MR. KELLY:**  
2 Q So the question is --  
3 A **Why the e-mail we gave them from  
4 yesterday --**  
5 **MR. POSTMAN:** Yes.  
6 **THE WITNESS:** The logo mark lives on our  
7 server. So we just had a new logo a month ago. So  
8 I could forward an e-mail that was sent as early as  
9 I'd ever had -- anyone at the Buccaneers could send  
10 an e-mail from as early as they ever had in one of  
11 these, and it would show up as the new logo that  
12 lives on a server somewhere.  
13 **MR. POSTMAN:** That's what it was.  
14 **MR. GOOD:** That's not what we're talking  
15 about.  
16 **MR. KELLY:** Yes, I don't understand. I  
17 think this portion (indicating) of it was redacted  
18 for some reason. It's not a big deal. We've got it  
19 now so...  
20 Q Take a look at Exhibit 10. There's an  
21 e-mail from Manny to you dated September 1, 2009.  
22 **MR. POSTMAN:** That's probably why it's  
23 redacted.  
24 **BY MR. KELLY:**  
25 Q Do you see that?

1 Q Do you know who the owner of that number  
2 was?  
3 A **I don't. Again, I think only in the case  
4 of Mike -- I'm sorry, it's been a long day.**  
5 Q Paschke.  
6 A **Paschke. I think only in the case of Mike  
7 Paschke was I given a name or anything more than  
8 just the fax number.**  
9 **MR. KELLY:** All right. Let's mark this.  
10 (Whereupon, the document referred  
11 to was marked for identification  
12 as Plaintiffs' Exhibit No. 11.)  
13 **BY MR. KELLY:**  
14 Q All right. I'm showing you what's been  
15 marked as Exhibit 11.  
16 A **Okay.**  
17 Q The number that's on Exhibit 10 is  
18 "727-892-9925." Do you see that?  
19 A **I do.**  
20 Q And then on Exhibit 11, the Law Offices  
21 of Phyllis J. Towzey is that same fax number,  
22 727-892-9925.  
23 **MR. POSTMAN:** Do you have a signed copy of  
24 this?  
25 **MR. KELLY:** Well, considering I got the

1 e-mail last night --  
2 **MR. POSTMAN:** Oh, this is from us?  
3 **MR. KELLY:** No, it's not from you.  
4 **MR. POSTMAN:** Oh. But considering we just  
5 got the information off of Exhibit 10 last night, we  
6 were able to retrieve this letter, which should have  
7 been produced by the Buccaneers a long time ago.  
8 **MR. POSTMAN:** Well, that's assuming it was  
9 received. I see an unsigned copy. I have no proof  
10 that it was actually sent in or received. Can you  
11 get a signed copy?  
12 **BY MR. KELLY:**  
13 Q All right. Take a look at Exhibit 11.  
14 It's a letter from an attorney to Brian Ford from  
15 the Tampa Bay Buccaneers. Do you see that?  
16 **A I do.**  
17 Q All right. Who is Brian Ford?  
18 **A Again, he's our C.O.O.**  
19 Q Have you ever seen this letter before?  
20 **A I have not.**  
21 Q Would you characterize this as a letter --  
22 **A Not that I recall, I should say.**  
23 Q Take a moment and just review it. It says:  
24 "On July 14, 2009, and again on  
25 August 17, 2009, Tampa Football Corporation

1 Q Had you known about the Exhibit 11 would  
2 you have gone ahead and contracted with FaxQom in  
3 May and June of 2010?  
4 **A Perhaps. I don't know. You know, this**  
5 **is the first time I've seen this letter, but this**  
6 **person claims to have received a fax unlawfully.**  
7 **Perhaps this individual doesn't remember having**  
8 **opted into the FaxQom language.**  
9 **And after I clearly forwarded to Steve**  
10 **Simms that that number should be removed from**  
11 **anything further that we did, it wouldn't seem like**  
12 **it would, you know, continue to be an issue.**  
13 **So, you know, I can't say definitively**  
14 **"Yes" or "No." Just that I really don't have enough**  
15 **facts.**  
16 Q Have you spoken to anyone at the  
17 Buccaneers, outside the Buccaneers' counsel,  
18 regarding Exhibit 11?  
19 **A No, not that I recall.**  
20 Q Would you expect Exhibit 11 to be a concern  
21 for you in deciding whether or not to use FaxQom  
22 again?  
23 **MR. POSTMAN:** Object to the form.  
24 Is it your testimony that you have -- not  
25 your testimony -- you have this and didn't produce

1 on behalf of the Tampa Bay Buccaneers sent  
2 a facsimile to my facsimile machine that  
3 is connected to the telephone number  
4 727-892-9925..."  
5 Do you see that?  
6 **A I do.**  
7 Q And the letter goes on to state the statute  
8 and that there's a claim that the Buccaneers sent at  
9 least two unsolicited faxes; correct?  
10 **MR. POSTMAN:** Objection to the form.  
11 **THE WITNESS:** Well, you say, "unsolicited."  
12 I -- I -- I --  
13 **BY MR. KELLY:**  
14 Q Or just faxes.  
15 **A Faxes?**  
16 Q Okay. Were you notified by Brian Ford that  
17 there was a claim for violating the TCPA that was  
18 sent to the Buccaneers on August 20, 2009?  
19 **A Well, I'm not sure if -- I don't recall**  
20 **being notified directly by Brian Ford. What appears**  
21 **to have happened is that he gave this letter to our**  
22 **general counsel, who then advised me to have this**  
23 **number removed from anything further that we did.**  
24 **I think by August 20th, the 2009 broadcast was**  
25 **completed.**

1 it to us, out of curiosity?  
2 **MR. KELLY:** Barry, we got it this morning.  
3 **MR. GOOD:** You didn't give us the fax  
4 number until last night.  
5 **MR. KELLY:** Yes. So --  
6 **MR. POSTMAN:** This is a letter -- listen,  
7 this is a letter that you had.  
8 **MR. GOOD:** Since this morning.  
9 **MR. KELLY:** Yes.  
10 **MR. POSTMAN:** You've had this letter since  
11 this morning?  
12 **MR. GOOD:** I can give you the exact time,  
13 but you redacted this fax number.  
14 **MR. KELLY:** And I'm surprised this wasn't  
15 produced by you guys.  
16 **MR. POSTMAN:** We don't have it. I've never  
17 seen it.  
18 **MR. KELLY:** All right. Sure.  
19 Q All right. Are you aware of any other  
20 demand letters made by recipients of faxes similar  
21 to Exhibit 11?  
22 **MR. POSTMAN:** Form.  
23 **THE WITNESS:** I'm sorry. I didn't  
24 understand the question. Am I aware of what other  
25 type of letters?

1 **BY MR. KELLY:**  
2 Q Any other demand letters.  
3 **A Demand?**  
4 Q Demand. This letter is demanding payment.  
5 Are you aware of --  
6 **A Oh, I'm sorry. I didn't finish it.**  
7 Q Okay.  
8 **A So, "...liable to pay to me...currently...  
9 a total 3,000" -- I'm -- not to my knowledge am I  
10 aware of any other letters at all that are demanding  
11 payment. The only other letter that I was aware of  
12 that I was advised that was received was the one  
13 with the Attorney General snippet enclosed.**  
14 Q Do you specifically know what Brian Ford  
15 did with Exhibit 11?  
16 **MR. POSTMAN:** Object to the form.  
17 **THE WITNESS:** I can't confirm, but if this  
18 letter was received on August 20th and -- where's  
19 Exhibit 10?  
20 **BY MR. KELLY:**  
21 Q Right here (indicating).  
22 **A And then I received from Manny Alvare  
23 on September 1st that I should remove the number,  
24 I would assume -- maybe I shouldn't make  
25 assumptions -- but I would assume that it went from**

1 that they no longer wanted to receive faxes; or,  
2 to take it a step further, it's possible that this  
3 number got somehow in the system on accident.  
4 **MR. KELLY:** Change the tape.  
5 You can finish your answer.  
6 **MR. POSTMAN:** Are you finished?  
7 **THE VIDEOGRAPHER:** The time is --  
8 **THE WITNESS:** Oh, I would just --  
9 **MR. KELLY:** Hold on. We've got to change  
10 the tape, and then you can finish your answer.  
11 **THE WITNESS:** Okay.  
12 **THE VIDEOGRAPHER:** The time is 3:27 p.m.  
13 (Whereupon, a recess was taken from  
14 3:27 p.m. to 3:37 p.m.)  
15 **THE VIDEOGRAPHER:** Back on the record. The  
16 time is 3:37 p.m. This is the beginning of Tape 4.  
17 **MR. POSTMAN:** Would you read back the last  
18 question and answer, ma'am.  
19 (Record read as follows:  
20 "Q Had you seen Exhibit 11  
21 would that cause you concern and not  
22 contract with FaxQom in May and June  
23 of 2010?")  
24 **THE REPORTER:** Objection. "Form."  
25 ///

1 **Brian Ford's desk to our general counsel, who then  
2 advised me to make sure that the number was removed  
3 from anything else that we were doing.**  
4 Q All right. The letter goes on to state on  
5 the second page:  
6 "In that case, Hooters hired a fax  
7 service that sent six unsolicited junk  
8 faxes to each of 1,321 fax numbers. In  
9 April 2001, the court ordered Hooters to  
10 pay treble damages of \$11,889,000."  
11 Do you see that?  
12 **A I do.**  
13 Q All right. Had you seen Exhibit 11, would  
14 that cause you concern and not contract with FaxQom  
15 in May and June of 2010?  
16 **MR. POSTMAN:** Form.  
17 **THE WITNESS:** Well, you know, again, not  
18 necessarily because this is -- of the number of  
19 faxes that we understood went out, I believe this is  
20 based on the date and everything we've discussed --  
21 the second such complaint that we would have  
22 received. So, no, not necessarily.  
23 I think it's likely out of 300,000 fax  
24 broadcasts that may have gone out that one or two  
25 people don't remember signing up and/or deciding

1 (Record read further as follows:  
2 "A Well, you know, again, not  
3 necessarily because this is -- of the  
4 number of faxes that we understood went  
5 out, I believe this is based on the date  
6 and everything we've discussed -- the  
7 second such complaint that we would have  
8 received. So, no, not necessarily.  
9 "I think it's likely out of 300,000  
10 fax broadcasts that may have gone out  
11 that one or two people don't remember  
12 signing up and/or deciding that they no  
13 longer wanted to receive faxes; or,  
14 to take it a step further, it's possible  
15 that this number got somehow in the system  
16 on accident.")  
17 **THE WITNESS:** I'm finished with that.  
18 **MR. POSTMAN:** You are finished?  
19 **THE WITNESS:** Yes.  
20 **BY MR. KELLY:**  
21 Q Okay. The fax number that's on Exhibit 11,  
22 727-892-9925, that number eventually made it to you;  
23 correct?  
24 **A It's the same number.**  
25 Q Okay. Do you know why the demand letter

1 was not sent to you?  
2 **MR. POSTMAN:** Object to the form.  
3 **THE WITNESS:** No. I could speculate again  
4 that it looks like it was sent to Brian Ford. My  
5 assumption would be that Ford gave it to our general  
6 counsel, who then advised me that this number  
7 needs to be removed ASAP as indicated in his e-mail  
8 on September 1st.  
9 "Need to get this number taken  
10 out of the blast ASAP."  
11 My immediate forward to Steve Simms:  
12 "You need to remove this number from  
13 your broadcast. Definitely remove it from  
14 anything else we might do in the future."  
15 **BY MR. KELLY:**  
16 Q Do you know if Brian Ford responded to  
17 Exhibit 11?  
18 **A I can't speak on behalf of Brian Ford. I'm**  
19 **not sure. I couldn't say.**  
20 Q Do you know if Manny responded to  
21 Exhibit 11?  
22 **MR. POSTMAN:** So you would only know -- do  
23 you know?  
24 **THE WITNESS:** Not to my knowledge.  
25 **MR. POSTMAN:** Okay.

1 **it to their department director, and then from there**  
2 **that individual would likely decide if it needs to**  
3 **go further to general counsel, for example.**  
4 Q All right. Take a look at Exhibit 12.  
5 **A I haven't seen it yet.**  
6 Q It's dated December 16, 2009. So about a  
7 month later. This is a letter to Manny from the  
8 person complaining of receiving the faxes. She  
9 states:  
10 "I'm following up on our conversation  
11 several weeks ago regarding the unsolicited  
12 advertisements..."  
13 Do you see that?  
14 **A I do.**  
15 Q Do you know or have any knowledge as to  
16 what was spoken about between Manny and Ms. Towzey?  
17 **MR. POSTMAN:** So I'm going to tell you if  
18 you only -- think you don't -- just answer --  
19 **THE WITNESS:** The answer's "No."  
20 **MR. POSTMAN:** Okay. I was going to say, if  
21 the answer's "no," then I don't need to object. If  
22 you answer...  
23 **BY MR. KELLY:**  
24 Q Then the next paragraph or the third  
25 paragraph says:

1 **THE WITNESS:** I wasn't aware that  
2 Exhibit 11 existed until today.  
3 **MR. KELLY:** Let's mark this (indicating).  
4 \* \* \*  
5 (Whereupon, the document referred  
6 to was marked for identification  
7 as Plaintiffs' Exhibit No. 12.)  
8 \* \* \*  
9 **THE REPORTER:** Exhibit 12.  
10 **BY MR. KELLY:**  
11 Q All right. Was it the custom and practice  
12 for letters that -- or complaint letters to be  
13 forwarded to general counsel?  
14 **A It would depend on the subject and the**  
15 **severity. As far as the company's policy on that,**  
16 **I'd probably have to get a better description from**  
17 **our Human Resource office or our current general**  
18 **counsel with regard to what our policy is or what**  
19 **the policies were for the general counsel that were**  
20 **in place at that time.**  
21 **So I don't know if the policy has been**  
22 **consistent. I don't know if the policy has changed.**  
23 **I'm not sure exactly what the policy is, other than**  
24 **to say any complaint or issue that seems severe**  
25 **by -- at the confidence of any employee would take**

1 "As you know, I received a letter  
2 from a Steven Simms at FaxQom in which  
3 he vehemently denied that it was his  
4 company that sent the faxes. Mr. Simms  
5 declined to provide a mailing address or  
6 a physical address for FaxQom, and his  
7 company's website (www.faxquom.com.)  
8 likewise furnishes no contact information."  
9 Do you see that?  
10 **A I do.**  
11 Q Have you ever reviewed that letter from  
12 Steve Simms to Ms. Towzey?  
13 **A No. I wasn't even aware there was a**  
14 **conversation.**  
15 Q And I think I know the answer to this, but  
16 did you ever speak with Steven Simms regarding his  
17 letter to Ms. Towzey?  
18 **A No.**  
19 **MR. POSTMAN:** That's probably why Manny  
20 needed the phone number. I don't know.  
21 **BY MR. KELLY:**  
22 Q And you've never seen Exhibit 12; is that  
23 right?  
24 **A That's correct.**  
25 Q Had you seen Exhibit 12, would you have

1 contracted with FaxQom in May and June of 2010?  
2 **A Perhaps, I think, and perhaps not. I think**  
3 **it would have really depended on the conversations**  
4 **I had with Steve Simms, first and foremost. I**  
5 **would want to know why he declined providing any**  
6 **additional details, including his denial that it**  
7 **was his company that sent the faxes.**  
8 Q Anything else?  
9 **A No.**  
10 Q She says that:  
11 "The company's website furnishes  
12 no contact information."  
13 Is that your recollection of FaxQom.com?  
14 **MR. POSTMAN:** That's the wrong spelling.  
15 **THE WITNESS:** It's not because at some  
16 point I had gotten ahold of FaxQom. So between  
17 January of 2009, when it looks like our first  
18 conversation was, and September, it's possible they  
19 have changed the Website.  
20 But there was some sort of number, you  
21 know, in which, you know, I called FaxQom. I don't  
22 know if it was on their Website. I really -- I  
23 don't recall five years ago, and I cannot recall who  
24 contacted who first. I don't remember.  
25 **MR. KELLY:** You know what? Let me just

1 **A I'm sorry. You're waiting for me to --**  
2 Q Yes.  
3 **A Yes. Yes, it's the same telephone number.**  
4 Q All right. So this is a letter from  
5 Ms. Towzey to Steve Simms; correct?  
6 **A It appears to be.**  
7 Q She writes:  
8 "In 22 years of business litigation,  
9 I have learned to be skeptical of  
10 individuals who do not identify their  
11 position with a company and also who do  
12 not provide the business operating address  
13 of the company."  
14 Do you see that?  
15 **A I do.**  
16 Q "Your fax to me had no date, no  
17 business address of the company, and  
18 you did not provide your identification  
19 with the company. The website  
20 www.faxquom.com shows no business address.  
21 Are you empowered to act on behalf of  
22 FaxQom?"  
23 Do you see that?  
24 **A I do. Faxquom wouldn't have an address**  
25 **because that's not the correct site.**

1 take a short break, and I'm almost done. At least  
2 under the -- a good ending.  
3 **THE VIDEOGRAPHER:** The time is 3:46 p.m.  
4 We're off the record.  
5 (Whereupon, a recess was taken from  
6 3:46 p.m. to 3:53 p.m.)  
7 **MR. KELLY:** Let's mark this (indicating).  
8 \* \* \*  
9 (Whereupon, the document referred  
10 to was marked for identification  
11 as Plaintiffs' Exhibit No. 13.)  
12 \* \* \*  
13 **THE REPORTER:** Exhibit 13.  
14 **THE VIDEOGRAPHER:** Back on the record. The  
15 time is 3:53 p.m.  
16 **BY MR. KELLY:**  
17 Q All right. I'm going to show you what's  
18 been marked as Exhibit 13. This is a letter from  
19 Ms. Towzey to Steve Simms. There's a fax number  
20 here, "617-674-2147." Do you see that?  
21 **A I do.**  
22 Q And if you look at Exhibit 2, do you see  
23 the number "617-674-2147"?  
24 **A I do.**  
25 Q And that's the same number?

1 Q It's not the correct Website address?  
2 **A It doesn't -- yes. It has**  
3 **"f-a-x-q-u-o-m.com." So if she used that, she**  
4 **probably went to the wrong place.**  
5 Q All right. Have you ever seen Exhibit 13?  
6 **A I have not, no.**  
7 Q So Steve Simms never forwarded to you  
8 Exhibit 13?  
9 **A Whichever -- sorry.**  
10 **MR. POSTMAN:** You can answer.  
11 **THE WITNESS:** I -- no, I never -- never  
12 received anything from him on this.  
13 **BY MR. KELLY:**  
14 Q All right. There's a "cc" on this letter.  
15 Do you see that?  
16 **A At the bottom?**  
17 Q Yes.  
18 **A I do.**  
19 Q And the person who was cc'd is Manny  
20 Alvarez. Do you see that?  
21 **A Yes.**  
22 Q He's the general counsel for Tampa Bay; is  
23 that right?  
24 **A At the time, correct.**  
25 Q Did Manny ever forward to you Exhibit 13?

1 **MR. POSTMAN:** Well, I think you know -- I'm  
2 not going to object on that. I think he's told us  
3 the answer.

4 **THE WITNESS:** I don't recall receiving it,  
5 no.

6 **BY MR. KELLY:**

7 Q Had you received Exhibit 13 would you still  
8 have contracted with FaxQom in May and June of 2010?

9 **MR. POSTMAN:** Form.

10 You can answer.

11 **THE WITNESS:** Well, I think the answer  
12 would be the same is, had I received Exhibit 12,  
13 which is perhaps, perhaps not, the reason being  
14 this is the same letter from the same individual.  
15 So this letter wouldn't sway anything more than --  
16 this initial letter -- oh, I'm sorry. This  
17 letter -- Exhibit 13, I don't think would sway any  
18 more than Exhibit 12, than it would Exhibit 11,  
19 because it's all from the same one individual.

20 So to go back, I guess, to the answer  
21 I gave before is that, out of the volume of fax  
22 broadcasting that we contracted for, it's possible  
23 that somebody had opted out and for whatever the  
24 reason the number wasn't removed.

25 I don't want to make excuses for FaxQom and

1 **what he asked us to put at the bottom.**

2 Q And when you say, "he," you're referring to  
3 Steve Simms?

4 **A To Steve Simms, yes, correct.**

5 Q Did you do any research, or did you have an  
6 understanding of whether the opt-out language that  
7 Steve Simms suggested was legally compliant?

8 **A You know, I think the initial research I  
9 did in and around the TCPA and the DMA I felt was  
10 sufficient. I was relying on Steve, really, from  
11 the start to kind of guide us on exactly what was  
12 compliant and what wasn't. And prior to any faxes  
13 going out, that's exactly what he did. So he, I  
14 guess -- he really gave the final approval of what  
15 was sent out by adding that language.**

16 Q Are you aware that the TCPA provides  
17 that, even if a recipient gives permission or has a  
18 business relationship, the "opt-out" language isn't  
19 sufficient; that it's still a violation?

20 **MR. POSTMAN:** Object to the form.

21 **THE WITNESS:** I'm not aware specifically  
22 to that. I don't know how the TCPA's evolved or  
23 changed over the years either. But above and beyond  
24 that, I felt that everything else we had gotten in  
25 writing from FaxQom was sufficient.

1 their database and their maintenance of records, but  
2 perhaps someone wanted to be removed and it wasn't,  
3 or perhaps the computer made an error and, you know,  
4 it's sent to a number that -- you know, that wasn't  
5 opted in.

6 **BY MR. KELLY:**

7 Q Okay. The images that were sent out by  
8 FaxQom, those images were created by the Buccaneers;  
9 is that right?

10 **MR. POSTMAN:** Object to the form.

11 **THE WITNESS:** When you say, "images," are  
12 you talking about the fax broadcast?

13 **MR. POSTMAN:** Object to the form.

14 You can answer.

15 **THE WITNESS:** 95 percent of the content,  
16 yes.

17 **BY MR. KELLY:**

18 Q What about the other five percent?

19 **A The other five percent would be the  
20 "opt-out" language that we were advised to put at  
21 the bottom of the fax.**

22 Q So there was discussion in the e-mails  
23 regarding the language of the "opt-out" language?

24 **A I don't know if it was discussion. He sent  
25 it, and we used it verbatim or exactly -- exactly**

1 **BY MR. KELLY:**

2 Q Did you ever have any negotiation into the  
3 language of the "opt-out" language with Steve Simms?

4 **A "Negotiation's" a broad term. Going back,  
5 I think he told us exactly how he wanted the  
6 language at the bottom, and we followed. Just going  
7 off memory, we may have increased or decreased the  
8 font size to be more consistent with the rest of the  
9 message.**

10 **And I think, in 2010, he gave us some  
11 separate "opt-out" language to use at the bottom  
12 and then confirmed that we would be okay using the  
13 initial language from 2009 that seemed, at least to  
14 my knowledge, to have served us just fine.**

15 Q All right. But you didn't go to the FCC  
16 regulations or the statute to confirm or verify that  
17 the language at the bottom of the faxes were legally  
18 sufficient?

19 **A You know, I don't recall -- you know,  
20 from the day, I think, we began considering fax  
21 marketing, I know we did research and we paid a lot  
22 of attention to, really, the -- you know, the entire  
23 campaign and, really, what the message was and who  
24 we were using; again, just to reiterate, the  
25 indemnification that we received, the guarantees**

1 that everything was lawful.  
2 So I guess to answer your question, I may  
3 or may not have gone back to their Website just to  
4 confirm that what we already had seemed to be in  
5 line or, you know, with what their recommendations  
6 are.  
7 Q Did you feel as if Steve Simms had  
8 working knowledge of the TCPA statute and the FCC  
9 regulation?  
10 A I did, yes.  
11 Q And you believed that the language at the  
12 bottom of the faxes that he suggested established a  
13 working knowledge of the TCPA and FCC regulations?  
14 A I -- you know, I would have to say, "yes."  
15 Again, just to back up, I researched the TCPA, you  
16 know, for their recommendations and the DMA,  
17 and based on what I learned, he seemed to confirm,  
18 really, every step of the process.  
19 So with regard to the specific language  
20 at the bottom, he seemed to be the -- you know, the  
21 expert, having done this for 18 years. So I trusted  
22 him that that was sufficient.  
23 Q What are the different elements to have a  
24 legally compliant "opt-out" language?  
25 MR. POSTMAN: Form.

1 Q Well, it's the creator of the fax images.  
2 A Creator of the fax images. The images we  
3 sent out?  
4 Q Yes.  
5 A Or that FaxQom sent out, but the images  
6 that we put together?  
7 Q Yes. There was a designer that helped with  
8 the creating of the images; correct?  
9 A Our internal graphic artist.  
10 Q What was that person's name?  
11 A Darren Morgan, I believe.  
12 Q All right. You worked with Darren Morgan  
13 to create the content, and then Steve Simms put in  
14 the "opt-out" language on the faxes; correct?  
15 MR. POSTMAN: Form.  
16 THE WITNESS: Steve Simms gave us the  
17 language that needed to be put in there to make the  
18 fax compliant is my understanding.  
19 BY MR. KELLY:  
20 Q All right. Who would put the "opt-out"  
21 language at the bottom of the faxes? Would it be  
22 you, or would it be Darren Morgan?  
23 MR. POSTMAN: Form.  
24 THE WITNESS: I believe I asked Darren  
25 Morgan to do that and then sent it to Steve for his

1 THE WITNESS: The elements?  
2 BY MR. KELLY:  
3 Q The elements.  
4 A I'm not an attorney. I don't know  
5 specifically what is required. Based on my memory,  
6 to have some type of "opt-out" language I think was  
7 a necessity, but specifically what it needs to say,  
8 I don't recall.  
9 Q Did you ever speak to Ed Glazer regarding  
10 the requirement for "opt-out" language?  
11 A I don't recall. I'm in the office with  
12 him, so I may have at some point.  
13 Q To your knowledge, did Ed Glazer ever speak  
14 to Steve Simms?  
15 A Not to my knowledge, no.  
16 Q Did you ever speak to anyone other than  
17 Steve Simms at FaxQom?  
18 A Not to my knowledge, no. I don't recall,  
19 no.  
20 Q Do you know what Hudson is, H-u-d-s-o-n?  
21 It's the Medadata on the PDFs that were produced.  
22 A The -- what do -- it's the Medadata?  
23 Q Just the way the PDFs are created. It  
24 says, "Hudson," H-u-d-s-o-n?  
25 A Do you have a copy I can look at?

1 final approval.  
2 BY MR. KELLY:  
3 Q Are you aware of Steve Simms ever changing,  
4 modifying, or altering any of the content of any of  
5 the images that were sent out by fax?  
6 MR. POSTMAN: Form.  
7 THE WITNESS: Not that I'm aware of, nor  
8 would I have authorized him to do so without making  
9 me aware.  
10 MR. KELLY: Okay. That's it. I just know  
11 that there's a letter, according to Exhibit 12,  
12 that Steve Simms sent Manny Alvare. I request that  
13 letter.  
14 And I also have a few other documents that  
15 we first learned of that may be relevant to the  
16 litigation based upon the records that were produced  
17 last night.  
18 MR. POSTMAN: So, in all fairness, I will  
19 look to see if those exist. We've looked and don't  
20 have them. I can represent to you that I talked to  
21 my client and --  
22 THE WITNESS: See that one there  
23 (indicating)?  
24 You asked for the attachment to this  
25 (indicating).

1 **MR. POSTMAN:** So I'm going to mark this as  
2 an exhibit.  
3 **THE WITNESS:** Okay.  
4 **MR. POSTMAN:** That's why I need to take  
5 that. I'll remember this.  
6 **THE WITNESS:** Okay.  
7 **MR. POSTMAN:** We don't have them, but we'll  
8 double check and make sure and see what we have. So  
9 I can -- I don't know what else to say, aside from  
10 saying we'll look and see if we have it and, if we  
11 do, we'll give it to you.  
12 **MR. GOOD:** Just a suggestion. It says it  
13 was faxed to him. You might want to check that.  
14 **MR. POSTMAN:** Okay. So we're going to mark  
15 as Defendants' Exhibit A -- you guys are using  
16 numbers; we'll call this letters -- "A," the  
17 documents that were sent to you all last night that  
18 apparently you've done a pretty good job of going  
19 through. I just want the record to be clear that  
20 these are the documents, and there's no dispute  
21 about what the documents are. So I'll want these  
22 attached as Exhibit A. And, with that, I'm done.  
23 (Whereupon, the documents referred  
24 to were marked for identification  
25 as Defendants' Exhibit A.)

1 Exhibit A. Your attorney represented that these are  
2 all of the documents that have been produced. I  
3 know there was a supplemental production that --  
4 **MR. POSTMAN:** They don't include -- maybe I  
5 wasn't clear. Those aren't in this. These are the  
6 documents that were produced to you all last night  
7 from him.  
8 **MR. KELLY:** Okay. I actually have a couple  
9 of questions about those e-mails, but let me ask you  
10 this.  
11 Q The documents that are marked as Exhibit A,  
12 are these all of the e-mails that were retrieved by  
13 you?  
14 **A That's correct.**  
15 Q Okay. And you retrieved those for  
16 preparation -- for -- by the instruction of your  
17 attorneys; correct?  
18 **MR. POSTMAN:** Well, so you can't answer  
19 that question but --  
20 **MR. KELLY:** Let me ask a different  
21 question.  
22 **MR. POSTMAN:** Yes.  
23 **BY MR. KELLY:**  
24 Q The e-mails that are marked as Exhibit A  
25 were produced for this litigation; correct?

1 **MR. KELLY:** Well, okay. What are those  
2 documents?  
3 **MR. POSTMAN:** These are exactly what you  
4 got last night by e-mail. It's a full set of all of  
5 the documents.  
6 **MR. KELLY:** All right. Let's mark it as  
7 Exhibit A, and I'll just ask the witness what they  
8 are.  
9 **MR. POSTMAN:** I just represented to you  
10 what they are. He doesn't -- I mean, he may or may  
11 not know, but that's fine. I mean --  
12 **MR. COHEN:** Just introduce the Bates  
13 numbers.  
14 **MR. POSTMAN:** Yes. I literally just gave  
15 you a Bates number, a copy of all of them.  
16 **MR. KELLY:** There's no need to question --  
17 I mean --  
18 **MR. POSTMAN:** Whatever you want. My point  
19 to you is I wanted it on record that you had them  
20 and what it is that you had so there's no dispute as  
21 to what you had.  
22 **MR. KELLY:** Let me just ask a question --  
23 **MR. POSTMAN:** Sure.  
24 **BY MR. KELLY:**  
25 Q I'm going to show you what's been marked as

1 **A Yes. Yes, that would be -- yes, that would**  
2 **be correct.**  
3 Q You didn't change, modify, or alter any of  
4 the e-mails before production; correct?  
5 **A No.**  
6 **MR. POSTMAN:** The only thing is, it has his  
7 logo on the bottom. Okay?  
8 **THE WITNESS:** Yes. I guess we could --  
9 **MR. POSTMAN:** I don't know if you call that  
10 a modification -- I don't want him to slip up -- so  
11 you understand.  
12 **BY MR. KELLY:**  
13 Q And Exhibit A truly and accurately depicts  
14 the e-mails that were created in 2009 and 2010  
15 related to your activities relating to FaxQom?  
16 **A Yes. And I would take that a step further**  
17 **to say that this was 98 percent of the conversations**  
18 **I had with Steve Simms directly.**  
19 **MR. POSTMAN:** That's all of the requests.  
20 **MR. KELLY:** You don't have a separate set?  
21 **MR. POSTMAN:** No.  
22 **MR. KELLY:** Do you have a set of the Glazer  
23 e-mails that exist?  
24 **MR. POSTMAN:** I don't believe so.  
25 **MR. GOOD:** They're in a different place.

1 **MR. KELLY:** Do you know if they're Bates  
2 stamped?  
3 **MR. POSTMAN:** They're all Bates stamped.  
4 **MR. KELLY:** I mean, since these are the  
5 30(B)(6), I want some testimony regarding those  
6 e-mails, where they came from. You can --  
7 **MR. POSTMAN:** I'll stipulate that they came  
8 from us and that they're authentic and they're true  
9 and accurate representations as it relates to those  
10 e-mails.  
11 **MR. KELLY:** And where did they come from?  
12 **MR. POSTMAN:** They came from Buccaneers'  
13 equipment, computers, et cetera.  
14 **MR. KELLY:** Okay. In Tampa?  
15 **MR. POSTMAN:** I don't know that, but I  
16 don't know if it makes a difference. I don't know  
17 if it came from Tampa or L.A. or wherever. But I'll  
18 stipulate -- if you give me the numbers -- or I'll  
19 represent to you that those are Buccaneers' e-mails,  
20 and I won't fight the admissibility of those  
21 documents.  
22 **MR. KELLY:** What's the Bates label on the  
23 supplemental production?  
24 **MR. POSTMAN:** I won't fight the  
25 admissibility of those documents, Exhibit A, as

1 office.  
2 **MR. KELLY:** Okay.  
3 **THE VIDEOGRAPHER:** Are we off the record?  
4 The time is 4:11 p.m. This is the end of  
5 the videotaped deposition of Matthew Kaiser, Volume  
6 I, dated March 25, 2014, and we are off the record.  
7 (Whereupon, a discussion was held off  
8 the record.)  
9 **THE REPORTER:** Mr. Kelly, do I send the  
10 original to you?  
11 **MR. KELLY:** Yes, we'll get the original.  
12 **THE REPORTER:** All right.  
13 (Whereupon, a discussion was held off  
14 the record.)  
15 **MR. POSTMAN:** I'm assuming that that depo  
16 was ordered. Did I miss it? So I'd like a copy of  
17 it.  
18 **MR. COHEN:** I got the video.  
19 **MR. POSTMAN:** I need like in the same  
20 manner and fashion that --  
21 **THE REPORTER:** Do you want an E-Tran as  
22 well?  
23 **MR. POSTMAN:** Yes.  
24 **THE REPORTER:** And do you want a condensed?  
25 **MR. POSTMAN:** Yes, yes. If they want it

1 well as the documents that were kept in the  
2 ordinary course of business that were produced as a  
3 supplement a couple weeks ago. Give me the Bates  
4 stamp numbers, and I'll confirm them.  
5 **MR. GOOD:** Give me one second.  
6 It's 136 to 187.  
7 **MR. KELLY:** All right. So the documents  
8 are Bates labeled BLP 136 --  
9 **MR. GOOD:** To 187.  
10 **MR. KELLY:** -- to 187. Those are e-mails,  
11 I believe, generally involved at Glazer.  
12 **MR. POSTMAN:** So whatever e-mails I gave  
13 you -- and I'll say this as an officer of the Court,  
14 as well as a professional; I just can't verify the  
15 numbers -- whatever e-mails I gave you two weeks  
16 ago, I will agree that they are e-mails from the  
17 Buccaneers that were kept in the ordinary course  
18 of business, and I'm not going to fight the  
19 admissibility of those documents.  
20 And I will also tell you, as an officer  
21 of the Court, that I won't fight Exhibit A either  
22 because they did come to us.  
23 **MR. KELLY:** Okay. That's it.  
24 **MR. POSTMAN:** Okay. We're done.  
25 He'll read and coordinate it through my

1 tomorrow -- I don't think they do -- but if they do,  
2 I'll want it tomorrow. If they want it regular,  
3 I'll take it regular. I just don't want it any  
4 different way that they don't get it, if that makes  
5 sense.  
6 **THE REPORTER:** Same day.  
7 Is two weeks all right? That's our normal  
8 turnaround.  
9 **MR. KELLY:** Yes, two weeks is fine.  
10 **THE REPORTER:** Thank you.  
11 (The deposition was concluded at  
12 4:13 p.m.)  
13 ---oOo---  
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1 STATE OF CALIFORNIA )  
2 ) ss.  
3 COUNTY OF LOS ANGELES )

4  
5

6 I, the witness herein, hereby certify under  
7 penalty of perjury under the laws of the State of  
8 California that the foregoing is true and correct.

9

10 Executed this \_\_\_\_\_ day of  
11 \_\_\_\_\_, 2014, at \_\_\_\_\_,  
12 California.

13  
14  
15 \_\_\_\_\_

16 MATTHEW KAISER

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1 STATE OF CALIFORNIA )  
2 COUNTY OF LOS ANGELES ) ss.  
3 )

4  
5

6 I, Sylvia Pollick, a Certified  
7 Shorthand Reporter, do hereby certify:

8 That prior to being examined, the  
9 witness named in the foregoing proceedings was by me  
10 duly sworn to testify to the truth, the whole truth,  
11 and nothing but the truth;

12 That said proceedings were taken before  
13 me at the time and place therein set forth and were  
14 taken down by me in shorthand and thereafter  
15 transcribed into typewriting under my direction and  
16 supervision;

17 I further certify that I am neither  
18 counsel for, nor related to, any party to said  
19 proceedings, nor in anywise interested in the  
20 outcome thereof.

21 In witness thereof, I have hereunto  
22 subscribed by me.

23

24 Dated: \_\_\_\_\_

25 Sylvia Pollick  
CSR #1826, RMR, CRR

**EXHIBIT C**

From: Matt Kaiser <mkaiser@firstalliedcorp.com>  
Subject: RE: Revised Ticket Fax Proof  
Date: June 26, 2009 12:16:37 PM PDT  
To: 'Morgan, Darren'  
▶ 1 Attachment, 50.0 KB



Great! Can you squeeze the following at the bottom using 9 point font:

To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. [Removaltech@FaxOom.com](mailto:Removaltech@FaxOom.com)

**Matt Kaiser**  
Acquisitions Manager  
**First Allied Corporation**  
9601 Wilshire Blvd., Suite 744  
Beverly Hills, CA 90210  
Tel: (310) 275-8944  
Fax: (310) 275-8995  
[www.firstalliedcorp.com](http://www.firstalliedcorp.com)

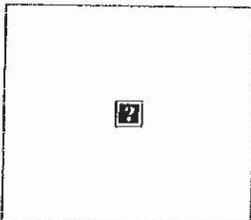
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**From:** Morgan, Darren [mailto:dmorgan@buccaneers.nfl.com]  
**Sent:** Friday, June 26, 2009 12:24 PM  
**To:** Matt Kaiser  
**Subject:** Revised Ticket Fax Proof

Matt:

Attached is the revised ticket fax sheet. Take a look and let me know your thoughts.

Darren



Darren Morgan  
*Creative Services Director*  
Tampa Bay Buccaneers  
One Buccaneer Place  
Tampa FL 33607  
(813) 554-1364  
(813) 387-6310 (fax)  
[www.buccaneers.com](http://www.buccaneers.com)



Buccaneers Limited Partnership

73525

OUR REF NUMBER	YOUR INVOICE NUMBER	INVOICE DATE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN	NET CHECK AMOUNT
117928	SeasonTix Faxes	7/9/2009	15336.80	15336.80	0.00	15336.80

ORIGINAL DOCUMENT PRINTED ON CHEMICAL REACTIVE PAPER WITH MICROPRINTED BORDER

**BB&T**  
63-9138/2631

**Buccaneers Limited Partnership**

73525

CHECK DATE	CONTROL NUMBER	AMOUNT
7/9/2009	073525	\$*****15336.80

**PAY** Fifteen Thousand Three Hundred Thirty-Six and 80/100 U/S Dollar

VOID AFTER 180 DAYS

*Charles J. [Signature]*

AUTHORIZED SIGNATURE

TO THE ORDER OF: FaxQom, 5500 University, Boston, MA 02134

DOCUMENT INCLUDES A HIDDEN WORD. DO NOT CASH IF THE WORD IS VISIBLE. DOCUMENT ALSO CONTAINS HEAT SENSITIVE INK. TOUCH HERE - RED IMAGE DISAPPEARS WITH HEAT.

⑈073525⑈ ⑆263191387⑆0141061704⑈

Buccaneers Limited Partnership

73525

Ref Nbr	Inv Nbr	Inv Date	Invoice Amount	Amount Paid	Disc Taken	Net Check Amt
117928	SeasonTix Faxes	7/9/2009	15336.80	15336.80	0.00	15336.80

Vendor: FAXQOM, Check Date: 7/9/2009, Check Number: 073525

From: Matt Kaiser <mkaiser@firstalliedcorp.com>

Subject: 1st Day Fax

Date: July 13, 2009 2:57:49 PM PDT

To: 'sales@faxqom.com'

▶ 1 Attachment, 296 KB



Steve,

Here is the fax sheet for tomorrow only. I will send you the ones for Wednesday and Thursday after this one goes out.

Please add the following to the list anytime a fax goes out.

(813) 872-0046

(813) 554-1351

(310) 275-8995

(866) 613-5112

(813) 387-6310

Please confirm your receipt of the attached. I look forward to the report for the 1<sup>st</sup> day.

If you have any questions or issues, please contact me on my mobile in the morning (310) 980-4068.

Thank you,

**Matt Kaiser**  
Acquisitions Manager

**First Allied Corporation**  
9601 Wilshire Blvd., Suite 744  
Beverly Hills, CA 90210  
Tel: (310) 275-8944  
Fax: (310) 275-8995  
www.firstalliedcorp.com



[FaxSheetgro....pdf \(296 KB\)](#)

TAMPA BAY  
**BUCCANEERS**

**FAX COVER**

F A C S I M I L E

ONE BUCCANEER PLACE TAMPA, FL 33607

TEL: (813) 870-2700

BUCCANEERS.COM



DATE: 7/14/09 # of Pages (including cover): 2

TO: Human Resources

FROM: Group Seating Department

SUBJECT: Buccaneers Group Tickets

ADDITIONAL COMMENTS:

Attached is the information on group seating. Tickets are available for groups of 20 or more people. When buying group seating, you save up to \$16 per ticket versus the individual game ticket cost. Group seating also gives you access to large blocks of seating that are not available any other way.

Many companies use group seating as a retreat and/or reward to build team unity.

If you have any questions, please don't hesitate to call us at (877) 649-BUCS (2827).

**2009 SCHEDULE**

**DALLAS**  
September 13 | 1:00pm

**AT BUFFALO**  
September 20 | 4:05pm

**N.Y. GIANTS**  
September 27 | 1:00pm

**AT WASHINGTON**  
October 4 | 1:00pm

**AT PHILADELPHIA**  
October 11 | 1:00pm

**CAROLINA**  
October 18 | 1:00pm

**NEW ENGLAND**  
October 25 | 1:00pm | LONDON

**GREEN BAY**  
November 8 | 1:00pm

**AT MIAMI**  
November 15 | 1:00pm

**NEW ORLEANS**  
November 22 | 1:00pm

**AT ATLANTA**  
November 29 | 1:00pm

**AT CAROLINA**  
December 6 | 1:00pm

**N.Y. JETS**  
December 13 | 1:00pm

**AT SEATTLE**  
December 20 | 4:15pm

**AT NEW ORLEANS**  
December 27 | 1:00pm

**ATLANTA**  
January 3 | 1:00pm

\*ALL TIMES EASTERN / SUBJECT TO CHANGE

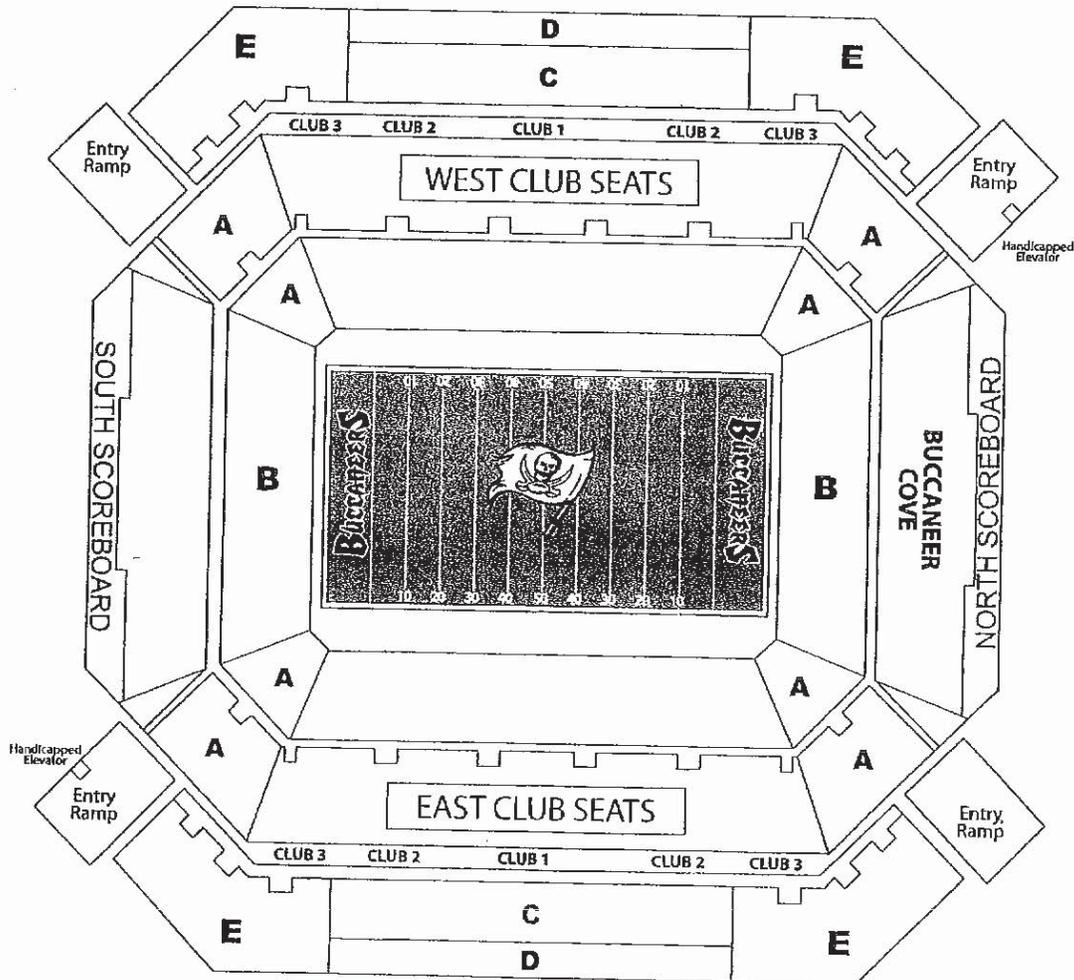
**2002 WORLD CHAMPIONS**



# GROUP TICKETS ON SALE NOW!

## 877-649-BUCS (2827)

SECTION	A	B	C	D	E
<b>GROUP PER GAME PRICE</b>	\$99.00	\$89.00	\$85.00	\$75.00	\$65.00
Group tickets are available in packages of 20 or more and reflect a discount of up to \$16 per ticket					
2009 SEASON					
<b>DALLAS</b> September 13   1:00pm	<b>N.Y. GIANTS</b> September 27   1:00pm	<b>CAROLINA</b> October 18   1:00pm	<b>GREEN BAY</b> November 8   1:00pm		
<b>NEW ORLEANS</b> November 22   1:00pm	<b>N.Y. JETS</b> December 13   1:00pm	<b>ATLANTA</b> January 3   1:00pm			



Call 877-649-BUCS (2827) or visit [www.buccaneers.com](http://www.buccaneers.com) today for seat locations

To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. Removaltech@FaxQom.com

**Exhibit A**

- FaxQom agrees to stop the campaign and refund all monies paid immediately at anytime with the written request from the Tampa Bay Buccaneers.
- FaxQom has acknowledged the Indemnity Form signed by Buccaneers Limited Partnership, which indemnifies the Tampa Bay Buccaneers from any and all complaints or litigation that may arise as a result of this campaign.
- The Tampa Bay Buccaneers will receive a detailed report showing the total number of successfully delivered faxes and will only be charged for each successful delivery of each. Such reports will be to the satisfaction of the Tampa Bay Buccaneers to the extent these reports can be generated by FaxQom.
- FaxQom agrees to send all faxes at the times and dates outlined in the Sales Agreement.
- FaxQom confirms that all faxes have been collected according to the best industry practices as outlined by the Direct Marketing Association (DMA).
- FaxQom will agree to and abide by all laws associated with facimile marketing.

**From:** Matt Kaiser <mkaiser@firstalliedcorp.com>  
**Subject:** RE: Fax  
**Date:** August 17, 2009 11:31:17 AM PDT  
**To:** 'sales@faxqom.com'



Steve,

I,m less concerned with my copy than I am keeping the schedule for the faxes to be sent. Please understand that we have a sales department that needs to be available when people receive these. If they go out too late, our sales people will leave for the day.

We must keep schedule tomorrow and through the rest of the week.

**Matt Kaiser**

**First Allied Corporation**  
9601 Wilshire Blvd., Suite 744  
Beverly Hills, CA 90210  
Tel: (310) 275-8944  
Fax: (310) 275-8995

---

**From:** sales@faxqom.com [mailto:sales@faxqom.com]  
**Sent:** Monday, August 17, 2009 11:40 AM  
**To:** Matt Kaiser  
**Subject:** Re: Fax

Good morning Matt.

Youll get your copies.....things are running slow as we are all 100% capacity today.....busy busy busy

hang in there brother.

Steve

**From:** Matt Kaiser <[mkaiser@firstalliedcorp.com](mailto:mkaiser@firstalliedcorp.com)>  
**Subject:** Mobile Marketing, Etc.  
**Date:** July 9, 2009 at 4:42:42 PM PDT  
**To:** Edward Glazer <[eglazer@mac.com](mailto:eglazer@mac.com)>

Ed,

I sent the agreements out today for the text, email and fax campaigns. They included the indemnifications approved by Manny and an Exhibit A that I put together allowing us to cancel anytime, giving us a credit for any unsuccessful deliveries, and verifying that the companies are using best industry approved practices according to the DMA. Payment has been arranged as well.

We're all set with the text and Jason is finalizing your changes with the fax sheets and HTML email.

Please let me know if there is anything else you need while I am here. I went to a Rays game and have a list of some ideas as well as a photo of all their advertisers. I have video of half the billboards in town as well as some comments for each.

We should be all set with the press conference as well. Jim Sorenson says 90% of our players have to wear Nike shoes and gloves, per their individual contracts, and shoes are made with colors for retail sale purposes. Tennessee wears all black shoes now, but he is looking into what else we can get and should have feedback next week. He's very responsive.

I'm here if you need me. We got a lot done the last few days!

Matt Kaiser  
Mobile: (310) 980-4068

From: Matt Kaiser <mkaiser@firstalliedcorp.com>  
Subject: Buccaneers Fax  
Date: May 20, 2010 2:24:19 PM PDT  
To: "sales@faxqom.com" <sales@faxqom.com>

3 Attachments 735 KB

Steve,

Attached is the revised order form starting on Monday. The check will be to you tomorrow.

Please show me the proof of the opt out info you add to the cover, and please keep it simple and only related to opting out. Also, please acknowledge my indemnification note.

We are still going to do a 50/50 split each day (so the cover page goes with all, but you will swap out the #2 page for half the numbers).

Call anytime with any questions.

[2010 Fax C...ocx \(120 KB\)](#)



**TAMPA BAY  
BUCCANEERS**

# GROUP TICKETS ON SALE NOW!

- Group tickets starting at **\$32** per seat for groups of 10 or more
- Savings up to **\$16** per ticket
- Fully catered tailgating packages also available

**GROUP TICKETS**

	Kansas City	Sat.	Aug. 21	7:30 PM
	Jacksonville	Sat.	Aug. 28	7:30 PM

BLP00310

From: **Matt Kaiser** [mkaiser@firstalliedcorp.com](mailto:mkaiser@firstalliedcorp.com)  
Subject: **RE: Fax Revenue**  
Date: **July 20, 2009 at 11:02 AM**  
To: 'Milsom, Ben'

Great! The cost was \$15,336 (since we did 2-page faxes). One more sale and we're about there.

**Matt Kaiser**  
Acquisitions Manager  
**First Allied Corporation**  
9601 Wilshire Blvd., Suite 744  
Beverly Hills, CA 90210  
Tel: (310) 275-8944  
Fax: (310) 275-8995  
[www.firstalliedcorp.com](http://www.firstalliedcorp.com)

---

**From:** Milsom, Ben [<mailto:bmilsom@buccaneers.nfl.com>]  
**Sent:** Monday, July 20, 2009 11:11 AM  
**To:** Layton, Jason; Matt Kaiser  
**Subject:** Fax Revenue

Jason/Matt:

So far we have generated \$12,643 in Group Sales revenue from the Group Fax Blasts.

Ben



Ben Milsom  
*Director of Sales*  
Tampa Bay Buccaneers  
One Buccaneer Place  
Tampa FL 33607  
813-554-1305  
[www.buccaneers.com](http://www.buccaneers.com)



**EXHIBIT D**



# FAX COVER

ONE BUCCANEER PLACE, TAMPA, FL 33607 TEL: (877) 649-2827 WWW.BUCCANEERS.COM

DATE:	<b>5/24/10</b>	# OF PAGES (INCLUDING COVER):	<b>2</b>	<b>2010 HOME SCHEDULE</b>
TO:	<b>Human Resources</b>			<b>KANSAS CITY</b> August 21   7:30pm
FROM:	<b>Group Sales Department</b>			<b>JACKSONVILLE</b> August 28   7:30pm
SUBJECT:	<b>Your Group Ticket Order</b>			<b>CLEVELAND</b> September 12   1:00pm
ADDITIONAL COMMENTS				<b>PITTSBURGH</b> September 26   1:00pm
<b>Enclosed is the information you requested.</b>				<b>NEW ORLEANS</b> October 17   1:00pm
				<b>ST. LOUIS</b> October 24   1:00pm
				<b>CAROLINA</b> November 14   1:00pm
				<b>ATLANTA</b> December 5   1:00pm
				<b>DETROIT</b> December 19   1:00pm
				<b>SEATTLE</b> December 26   1:00pm

If your office has decide to opt-out of further faxes please call 866-247-0920  
Thank you

**EXHIBIT E**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

CIN-Q AUTOMOBILES, INC., and  
MEDICAL & CHIROPRACTIC CLINIC,  
INC., Florida corporations, individually  
and as the representatives of a class of  
similarly-situated persons,

Plaintiffs,

v.

Case No. 8:13-cv-1592-17AEP

BUCCANEERS LIMITED  
PARTNERSHIP and JOHN DOES 1-10,

Defendants. \_\_\_\_\_/

**AFFIDAVIT OF PHYLLIS J. TOWZEY**

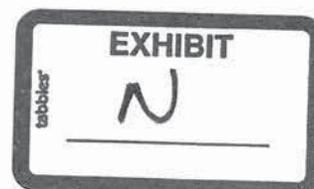
COUNTY OF PINELLAS )  
STATE OF FLORIDA )

1. I am over the age of 18, I have personal knowledge of the facts set forth in this affidavit and I am competent to testify with respect to the facts alleged herein. If called to testify in court, my testimony would be as follows:

2. I am the owner of the Law Offices of Phyllis J. Towzey, P.A., located at 475 Central Avenue, St. Petersburg, FL 336701.

3. I have been licensed to practice law in the State of Florida since 1987.

4. During July and August of 2009, my law firm maintained a facsimile machine for the sending and receiving of correspondence and court pleadings in connection with my law practice. The telephone number assigned to my law firm's



CinQ007071

Affidavit of Phyllis J. Towzey  
April 2, 2014

facsimile machine was (727) 892-9925, the service was registered in the name of my law firm and the billing for that service was paid for by my law firm. That telephone service was provided by Verizon.

5. On two separate occasions—July 14, 2009, and again on August 17, 2009—someone on behalf of the Buccaneers Limited Partnership, d/b/a the Tampa Bay Buccaneers (“Tampa Bay Buccaneers”), sent a facsimile (“the Fax”) to my law firm’s facsimile machine that is connected to the telephone number (727) 892-9925.

6. The Fax my law firm received was an advertisement attempting to sell football tickets.

7. Buccaneers Limited Partnership, d/b/a the Tampa Bay Buccaneers, had the Fax sent to my law firm’s facsimile machine without my prior express invitation or permission.

8. Buccaneers Limited Partnership, d/b/a the Tampa Bay Buccaneers, has never had an established business relationship my law firm.

9. I was tired of receiving unsolicited faxes that used up my firm’s ink cartridge, interrupted my day by forcing me to review unwanted and unasked for advertisements, and delayed our receipt of fax communications that *were* invited.

10. On August 20, 2009, I authored a letter (hereafter “August 20 Letter”) to Brian A. Ford, Registered Agent, Tampa Football Corporation, One Buccaneer Square, Tampa, FL 33615 and sent it to his attention *via* Federal Express. A true and correct copy of the August 20 Letter is attached as **Exhibit A**.

Affidavit of Phyllis J. Towzey  
April 2, 2014

11. In the August 20 Letter I warned Mr. Ford as follows:

“A federal law enacted in 1991, the Telephone Consumer Protection Act (“the Act”), provides as follows:

‘It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine’ 47 U.S.C. § 227(b)(1).

“The Act also provides that ‘[a] person or entity may . . . bring in an appropriate court . . . an action . . . to receive \$500 in damages for each such violation.’ If the court finds that the defendant ‘willfully or knowingly violated this subsection’ of the regulations, the court may triple the damage award. See 47 U.S.C. § 227(b)(3).”

12. I further advised Mr. Ford of the consequences of sending the unsolicited advertisement to me by using my firm’s facsimile machine in the following words:

“By sending the Fax to me, Tampa Bay Buccaneers violated 47 U.S.C. § 227(b)(1) and is now liable to pay damages to me of not less than \$500 for each of the two occurrences under 47 U.S.C. § 227(b)(3). I believe Tampa Bay Buccaneers willfully or knowingly violated the Act (which has been widely publicized), and is therefore liable to pay me \$1,500 for each of the two occurrences – a total of \$3,000.”

13. On behalf of my law firm in the August 20 Letter I proposed a settlement of the claim, but warned as follows:

“If this matter is not resolved by payment of \$1,000 by the deadline set forth above, it is my intention to file an action in federal court in the Middle District of Florida for violations of the Act, seeking treble damages (\$1,500 for each of the two occurrences), attorney’s fees and the costs of the action.”

14. I know my August 20 Letter was received by the Tampa Bay Buccaneers because I confirmed through Federal Express tracking that it had been received, and it was not returned to me.

Affidavit of Phyllis J. Towzey  
April 2, 2014

15. In addition, I received a telephone call from Manuel Alvare, who identified himself as the General Counsel for the Tampa Bay Buccaneers, and wished to discuss the subject matter of my letter. He told me that my letter to Mr. Ford had been forwarded to him for his attention, and that he was contacting me in response to that letter.

16. Mr. Alvare told me in that conversation that the Fax had been sent by an entity he identified as FaxQom and that he was looking into how that had occurred. He apologized to me for any inconvenience or annoyance I had suffered as a result of the unsolicited faxes sent to my office, and said he would take steps to ensure that it did not happen again.

17. When I raised the issue of monetary damages, Mr. Alvare told me he believed FaxQom was responsible for any damages because FaxQom had sent the Fax.

18. Following the receipt of my August 20 Letter by Mr. Alvare and our subsequent telephone conversation, I received a facsimile from an individual who identified himself as Steve Simms representing that he was associated with an entity known as FaxQom. Mr. Simms denied being involved in the sending of the Fax to my law firm's facsimile machine. I responded to the letter from Mr. Simms with my letter dated September 11, 2009 (hereafter "September 11 Letter"), which I had to send by facsimile because the letter from Mr. Simms did not include a physical address, nor was any business address mentioned anywhere on FaxQom's website. A true and correct copy of the September 11 Letter is attached as **Exhibit B**.

Affidavit of Phyllis J. Towzey  
April 2, 2014

19. I also sent a copy of the September 11 Letter by facsimile to Manuel A. Alvaré, III, Esq., Tampa Bay Buccaneers Headquarters, One Buccaneer Place, Tampa, Florida 33607, Phone: 813.870-2700, Fax: 813.554-1351.

20. On September 16, 2009, I wrote a letter (hereafter "September 16 Letter") to Mr. Alvare following up on my telephone conversation with him, as well as my August 20 Letter and my September 11 Letter to Mr. Simms. The September 16 Letter was again sent *via* Federal Express. A true and correct copy of the September 16 Letter is attached as **Exhibit C**.

21. In my September 16 Letter I informed Mr. Alvare of the following:

"As you know, I received a letter from a Steven Simms at FaxQuom in which he vehemently denied that it was his company that sent the faxes. Mr. Simms declined to provide a mailing address or a physical address for FaxQuom, and his company's website (www.faxquom.com) likewise furnishes no contact information."

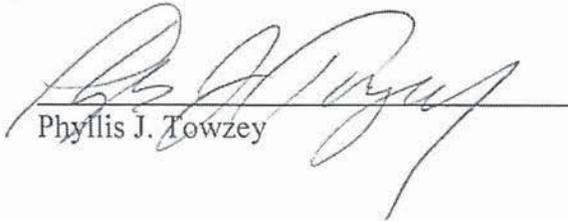
22. I received a telephone call from Mr. Alvare following his receipt my September 16 Letter requesting that I not follow through with my threat to file a lawsuit against the Tampa Bay Buccaneers. Mr. Alvare assured me that he would further investigate this matter with FaxQom, take all appropriate steps to ensure that I did not receive any further unsolicited faxes asking me to purchase Bucs tickets or anything else, and see what he could do to make FaxQom take responsibility for its actions if I agreed to refrain from filing that action.

Affidavit of Phyllis J. Towzey  
April 2, 2014

23. I have never received any compensation from the Buccaneers Limited Partnership, or anyone else on its behalf, for the two Fax transmissions to my law firm facsimile machine.

24. I have not had any involvement with the subject matter addressed in this Affidavit until the morning of Tuesday, March 25, 2014, when I received a telephone call from Attorney Michael Addison inquiring as to my possible complaint to the Tampa Bay Buccaneers about receiving facsimile advertisements for home games for the 2009 season.

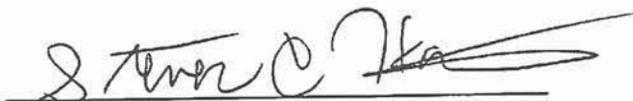
25. In response to Mr. Addison's request, I located the copies of my correspondence that had been saved and stored on my computer hard drive, and provided electronic copies of the three letters to him. Those letters are attached as Exhibits A, B and C to this Affidavit.

  
Phyllis J. Towzey

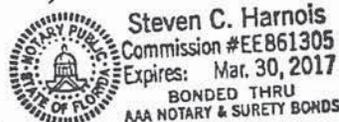
Affidavit of Phyllis J. Towzey  
April 2, 2014

STATE OF FLORIDA )  
COUNTY OF PINELLAS )

Sworn to and subscribed before me on April 10, 2014, by  
Phyllis J. Towzey, who is personally known to me or who produced her  
\_\_\_\_\_ as identification.



NOTARY PUBLIC, State of Florida  
Print, Type or Stamp Name of Notary  
(Seal)



ADDISON & HOWARD, P.A.  
400 N. Tampa St., Suite 1100  
Tampa, FL 33602-4714  
Tel: (813) 223-2000  
Fax: (813) 228-6000  
Attorneys for Plaintiffs

/s/ Michael C. Addison  
Michael C. Addison  
Florida Bar No. 0145579  
m@mcalaw.net

and

Ryan M. Kelly  
Florida Bar No. 90110  
ANDERSON + WANCA  
3701 Algonquin Road, Suite 760  
Rolling Meadows, IL 60008  
Tel: (847) 368-1500  
Fax: (847) 368-1501  
rkelly@andersonwanca.com

## **EXHIBIT A**

Law Offices  
PHYLLIS J. TOWZEY, P.A.  
Board Certified Labor & Employment Law

(727) 895-1200  
(727) 892-9925 (Fax)

phyllis@towzey.com  
www.towzey.com

475 Central Ave  
St. Petersburg, FL 33701

August 20, 2009

*Via Federal Express*

Brian A. Ford  
Registered Agent  
Tampa Football Corporation  
One Buccaneer Square  
Tampa, FL 33615

Re: Tampa Football Corporation, Violation of Telephone Consumer Protection Act

Dear Mr. Ford:

On July 14, 2009, and again on August 17, 2009, Tampa Football Corporation on behalf of the Tampa Bay Buccaneers ("Tampa Bay Buccaneers") sent a facsimile ("the Fax") to my facsimile machine that is connected to the telephone number 727-892-9925, which is registered in my name. A copy of the Fax is enclosed. The Fax is an advertisement attempting to sell me football tickets. Tampa Bay Buccaneers sent the Fax to me without my prior express invitation or permission. Tampa Bay Buccaneers and I have never had an established business relationship. Frankly, I am tired of receiving unsolicited faxes that use up my ink cartridge, interrupt my day, and delay my receipt of fax communications that *are* invited.

A federal law enacted in 1991, the Telephone Consumer Protection Act ("the Act"), provides as follows:

It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1).

The Act also provides that "[a] person or entity may . . . bring in an appropriate court . . . an action . . . to receive \$500 in damages for each such violation." If the court finds that the defendant "willfully or knowingly violated this subsection" of the regulations, the court may triple the damage award. See 47 U.S.C. § 227(b)(3).

By sending the Fax to me, Tampa Bay Buccaneers violated 47 U.S.C. § 227(b)(1) and is now liable to pay damages to me of not less than \$500 for each of the two occurrences under 47 U.S.C. § 227(b)(3). I believe Tampa Bay Buccaneers willfully or knowingly violated the Act (which has been widely publicized), and is therefore liable to pay me \$1,500 for each of the two occurrences – a total of \$3,000.

Brian A. Ford  
August 20, 2009  
Page 2 of 2

For information about the Act, see the federal regulations interpreting the Act, and also see the 2001 class action lawsuit, *Nicholson v. Hooters of Augusta, Inc.*, (Richmond County, Georgia, Superior Court case number 95-RCCV-616). In that case, Hooters hired a fax service that sent six unsolicited junk faxes to each of 1,321 fax numbers. In April of 2001, the court ordered Hooters to pay treble damages of \$11,889,000. In another case filed in 2002, Dallas Basketball Limited (the Dallas Mavericks) paid \$650,000 to settle a junk fax class action lawsuit.

To resolve this matter and avoid unnecessary litigation, I am willing to waive my right to seek damages totaling \$3,000 for the two occurrences and will agree not to file a 47 U.S.C. § 227(b)(1) lawsuit against Tampa Bay Buccaneers in exchange for payment of \$500 for each of the two occurrences (a total payment of \$1,000) on or before September 15, 2009.

If this matter is not resolved by payment of \$1,000 by the deadline set forth above, it is my intention to file an action in federal court in the Middle District of Florida for violations of the Act, seeking treble damages (\$1,500 for each of the two occurrences), attorney's fees and the costs of the action.

Demand is hereby made that Tampa Bay Buccaneers immediately cease and desist from sending any facsimiles to me in the future.

Thank you in advance for your attention to this matter.

Sincerely,

Phyllis J. Towzey

**EXHIBIT B**

Law Offices  
PHYLLIS J. TOWZEY, P.A.  
Board Certified Labor & Employment Law

(727) 895-1200  
(727) 892-9925 (Fax)

phyllis@towzey.com  
www.towzey.com

475 Central Ave  
St. Petersburg, FL 33701

September 11, 2009

Sent by Fax to number 617-674-2147

Steven Simms  
FaxQom

RE: Your fax to my phone fax number of 727 892 9925

Dear Mr. Simms:

In 22 years of business litigation, I have learned to be skeptical of individuals who do not identify their position with a company and also do who not provide the business operating address of the company. Your fax to me had no date, no business address of the company, and you did not provide your identification with the company. The website [www.faxquom.com](http://www.faxquom.com), shows no business address. Are you empowered to act on behalf of FaxQom?

Would you kindly provide me with your position with FaxQom? Is FaxQom a Florida Corporation? What is your business operating address? What is the name of your attorney?

Demand is hereby made pursuant to 47 U.S.C. § 227(b)(1). for FaxQom to remove my fax phone number – 727-892-9925—from all lists you maintain and from all lists you have sold, shared, or distributed to other companies in the past six months. Should my fax number be inundated by junk faxes in the near future I will consider your company responsible.

Sincerely,

Phyllis J. Towzey

Cc: by fax to  
Manuel A Alvaré, III, Esq.  
Tampa Bay Buccaneers Headquarters  
One Buccaneer Place  
Tampa, Florida 33607  
Phone: 813.870-2700  
Fax: 813.554-1351

**EXHIBIT C**

Law Offices  
PHYLLIS J. TOWZEY, P.A.  
Board Certified Labor & Employment Law

(727) 895-1200  
(727) 892-9925 (Fax)

phyllis@towzey.com  
www.towzey.com

475 Central Ave  
St. Petersburg, FL 33701

September 16, 2009

*Via Federal Express*

Manny Alvare, Esq.  
Tampa Bay Buccaneers Headquarters  
One Buccaneer Place  
Tampa, FL 33607

Re: Violation of Telephone Consumer Protection Act

Dear Mr. Alvare:

I'm following up on our conversation several weeks ago regarding the unsolicited advertisements for the Tampa Bay Buccaneers sent to my fax machine in violation of the federal Telephone Consumer Protection Act.

You advised me that fax advertisements for the Bucs are sent by an outside vendor, "FaxQuom," and told me you were looking into how this occurred.

As you know, I received a letter from a Steven Simms at FaxQuom in which he vehemently denied that it was his company that sent the faxes. Mr. Simms declined to provide a mailing address or a physical address for FaxQuom, and his company's website ([www.faxquom.com](http://www.faxquom.com)) likewise furnishes no contact information.

If I can provide any additional information that would assist you in obtaining indemnification from FaxQuom, please let me know. In the meantime, however, realize that it is irrelevant to me whether FaxQuom or another vendor actually sent the fax; the fax was clearly sent on behalf of the Tampa Bay Buccaneers, and expressly solicits the purchase of tickets for Bucs games. Accordingly, the law holds your company responsible for the actions of its agent.

Ironically, I learned of this law when one of my own clients, a small business located in Pinellas County, was sued by another party for sending unsolicited faxes advertising the company's services. After researching the matter, I determined that if a fax was indeed sent, there is simply no defense; my client was liable for treble damages and attorney's fees.

I have contacted you directly (rather than using the attorney who sued my own client) to provide an opportunity for you to resolve this matter by paying only the statutory amount of \$500 per violation, rather than treble damages of \$1,500 per occurrence, and attorney's fees.

Manny Alvare, Esq.  
September 16, 2009  
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If I receive payment of \$1,000 within the next ten (10) days, I will waive my right to seek damages totaling \$3,000 for the two occurrences and will agree not to file a 47 U.S.C. § 227(b)(1) lawsuit against Tampa Bay Buccaneers. If it is necessary for me to file suit, however, I will turn the matter over to the attorney who sued my client, and your company will then be liable for his attorney's fees as well.

Thank you in advance for your attention to this matter.

Sincerely,

Phyllis J. Towzey