

**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

EXHIBIT G



Federal Communications Commission
Consumer & Governmental Affairs Bureau
Washington, D.C. 20554

CGB

March 20, 2014

Ross Good
3701 Algonquin Rd
760
Rolling Meadows, IL

FOIA No. 2014-253

Dear Mr. Good:

This letter responds to your recent Freedom of Information Act (FOIA) request received by the Federal Communications Commission (FCC or Commission) and assigned to the Consumer & Governmental Affairs (CGB) and Enforcement (EB) Bureaus. Your request seeks copies of all documentation, including complaints that mention any of the following telephone numbers: 1) 800-745-3000; 2) 866-247-0920; 3) 877-272-7614; 4) 877-649-2827; 5) 888-703-9205; and the website or business entity "buccaneers" or buccaneers.com.

My staff conducted a search of the databases containing informal complaints. According to the Commission's Records Control Schedule for Informal Complaints ("Records Control Schedule"), the Commission is not required to maintain informal complaints and related correspondence for more than three years after the case is closed. *See NI-173-07-1, FCC Disposition Authority*. Therefore, all complaint records prior to January 1, 2011, have been purged pursuant to the Records Control Schedule. My staff found approximately thirty-nine responsive documents. Copies of the complaints are enclosed. EB found no additional documents.

All personal identifying information has been redacted based on Exemption 6 of FOIA, which permits agencies not to disclose files that would clearly invade personal privacy.¹ Some FCC employee names have also been redacted based on Exemption 2 of FOIA, which permits agencies not to disclose internal personnel rules and practices.²

The FCC receives many complaints and comments that do not involve violations of the Communications Act or any FCC rule or order. Thus, a complaint or comment does not necessarily indicate any wrongdoing by any individuals or entities named in the complaint or comment.

FOIA and FCC rules require the FCC to charge requesters for time spent searching for and reviewing responsive documents, and for copying them.³ Based on your

¹ 5 U.S.C. § 552 (b)(6); *see also* 47 C.F.R. § 0.457(f).

² 5 U.S.C. § 552(b)(2); *see also* 47 C.F.R. § 0.457(b).

³ 5 U.S.C. § 552(a)(4)(A)(i); 47 C.F.R. § 0.470.

classification as a "commercial" requester, the FCC charges you the full cost of searching for, reviewing and duplicating the records you seek.⁴ The total charge for processing your FOIA request is \$278.14. The search and review was conducted by a GS-14 employee for four (4) hours at an hourly rate of \$68.56. The fee for duplication of documents being furnished to you is \$3.90 (39 pages x \$0.10 per page).⁵ The Financial Operations Division, Office of Managing Director, Federal Communications Commission, will send you a bill for this amount soon. Interest will be assessed on the fee owed if it is not paid within 30 days of the date of the bill.⁶

If you think this response denies your FOIA request, you may file an application for review of this decision with the FCC's Office of the General Counsel within 30 days.⁷ Both the application and envelope containing it must be marked "Review of Freedom of Information Action" and the application should refer to FOIA Control Nos. 2014-253.

Sincerely



Nancy Stevenson
Deputy Chief
Consumer Policy Division
Consumer & Governmental Affairs Bureau

Enclosures

⁴ 47 C.F.R. § 0.470(a)(1).

⁵ 47 C.F.R. § 0.465 (c)(2).

⁶ 47 C.F.R. § 0.468.

⁷ 47 C.F.R. § 0.461(j).

877-649-2827

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00403204-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	Trusted Home Care, Inc., DBA Home Instead Senior Care-Jeannah Haber		
Address	3800 S. Tamiami Trl., Ste. 314		
City/State/Zip Code	Sarasota	FL	34239
Complaint Information			
Company	Group Tickets		
Comments	Sport Event Tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00403425-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bb</i>		
Address			
City/State/Zip Code	TAVARES	FL	32778
Complaint Information			
Company	TAMPA BAY BUCCANEERS		
Comments	GROUP SEATING TICKETS WWW.BUCCANEERS.COM		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00404336-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[Redacted] <i>bb</i>		
Address	[Redacted]		
City/State/Zip Code	Tampa	FL	33602
Complaint Information			
Company	tampa bay buccaneers	Tampa Bay Buccaneers	
Comments	football game tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00404438-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	Reese's Plants-Philip Reese		
Address	161 Marshall Street		
City/State/Zip Code	Safety Harbor	FL	34695
Complaint Information			
Company	Tampa Bay Buccaneers		
Comments	Football tickets www.buccaneers.com		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00407061-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	Paralegal Services-Henry Lavado		
Address	5422 Fulmar Drive		
City/State/Zip Code	Tampa	FL	33625
Complaint Information			
Company	Buccaneers		
Comments	Buccaneers Group Tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00417559-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] <i>bl</i>		
Address	[REDACTED]		
City/State/Zip Code	Tampa	FL	33610
Complaint Information			
Company	Tampa Bay Buccaneers		
Comments	Group Tickets Claimed that they hired Faxqom who claimed I opted in. That his totally false.		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00490084-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	ALBERT A HAAB CPA-FRANK OWEN, ESQ		
Address	900 S FEDERAL HWY STE C		
City/State/Zip Code	HOLLWOOD	FL	33020
Complaint Information			
Company	GROUP TICKETS	TAMPA BAY BUCCANEERS	
Comments	BUCCANEERS GROUP TICKETS ONE BUCCANEER PLACE TAMPA FL 33607 WWW.BUCCANEERS.COM ** NO OPT-OUT NOTICE WHATSOEVER		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00557783-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bl</i>		
Address	[REDACTED]		
City/State/Zip Code	TAVARES	FL	32778
Complaint Information			
Company	BUCCANEERS SALES DEPARTMENT	TAMPA BAY BUCCANEERS	
Comments	TAMPA BAY BUCCANEER GROUP TICKETS WWW.BUCCANEERS.COM		

866-247-0920

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00569276-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] bb		
Address	[REDACTED]		
City/State/Zip Code	San Francisco	CA	94127
Complaint Information			
Company	Financial Services West		
Comments	home loan analysis & modification scam		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00572397-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bb</i>		
Address	[REDACTED]		
City/State/Zip Code	doral	FL	33178
Complaint Information			
Company	dept of us mortgage holders		
Comments	loan audit/loan modification did not fax back removal request as many have reported that once removal request is sent i will receive more junk faxes in retaliation. please advise.		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00573422-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] b4		
Address	[REDACTED]		
City/State/Zip Code	Somerville	MA	02144
Complaint Information			
Company	Dept of U.S Mortgage Holders		
Comments	Mortgage refinancing		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00575390-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] <i>bl</i>		
Address	851		
City/State/Zip Code	Yuba City	CA	95992
Complaint Information			
Company	Financial Services West		
Comments	They sent 12 black pages with no cover or ID info.		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00582689-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] 06		
Address	[REDACTED]		
City/State/Zip Code	The Woodlands	TX	77382
Complaint Information			
Company	www.golakeconroe.com		
Comments	[REDACTED]		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00586103-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bk</i>		
Address	[REDACTED]		
City/State/Zip Code	Venice	CA	90291
Complaint Information			
Company	Dept of U.S. Mortgage Holders		
Comments	Steve Simms - when he faxed back to me, that's the name at the top (I faxed a remove request to him, I got back "HEY FUCK OFF ASSHOLE" back from him). I sent a removal request by fax to the number listed for "fax back for more info" and I got my fax sent back to me with "HEY FUCK OFF ASSHOLE" as the "to"		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00591178-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	Barkley Court Reporters-Chelsea Miller		
Address	1875 Century Park East		
City/State/Zip Code	Los Angeles	CA	90067
Complaint Information			
Company	Dept. of U.S. Mortgage Holders	Dept. of U.S. Mortgage Holders / State	
Comments			

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00593800-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] b2		
Address	[REDACTED]		
City/State/Zip Code	Irvine	CA	92603
Complaint Information			
Company	Dept. of US Mortgage Holders		
Comments	Did not work. Average 1 fax per week.		

888-703-9205

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00403204-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	Trusted Home Care, Inc., DBA Home Instead Senior Care-Jeannah Haber		
Address	3800 S. Tamiami Trl., Ste. 314		
City/State/Zip Code	Sarasota	FL	34239
Complaint Information			
Company	Group Tickets		
Comments	Sport Event Tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00404336-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bl</i>		
Address			
City/State/Zip Code	Tampa	FL	33602
Complaint Information			
Company	tampa bay buccaneers	Tampa Bay Buccaneers	
Comments	football game tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00407061-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	Paralegal Services-Henry Lavado		
Address	5422 Fulmar Drive		
City/State/Zip Code	Tampa	FL	33625
Complaint Information			
Company	Buccaneers		
Comments	Buccaneers Group Tickets		

877-272-7614

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00403204-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information:			
Complainant Details	Trusted Home Care, Inc., DBA Home Instead Senior Care-Jeannah Haber		
Address	3800 S. Tamiami Trl., Ste. 314		
City/State/Zip Code	Sarasota	FL	34239
Complaint Information:			
Company	Group Tickets		
Comments	Sport Event Tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00404336-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bb</i>		
Address	[REDACTED]		
City/State/Zip Code	Tampa	FL	33602
Complaint Information			
Company	tampa bay buccaneers	Tampa Bay Buccaneers	
Comments	football game tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00407061-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	Paralegal Services-Henry Lavado		
Address	5422 Fulmar Drive		
City/State/Zip Code	Tampa	FL	33625
Complaint Information			
Company	Buccaneers		
Comments	Buccaneers Group Tickets		

buccaneers

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00403425-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] bb		
Address	[REDACTED]		
City/State/Zip Code	TAVARES	FL	32778
Complaint Information			
Company	TAMPA BAY BUCCANEERS		
Comments	GROUP SEATING TICKETS WWW.BUCCANEERS.COM		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00404438-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	Reese's Plants-Philip Reese		
Address	161 Marshall Street		
City/State/Zip Code	Safety Harbor	FL	34695
Complaint Information			
Company	Tampa Bay Buccaneers		
Comments	Football tickets www.buccaneers.com		

Form Type	1088G - Call or Message to Wireless Device (Cell Phone or Pager) Complaint		
Complaint Number	09-T00406284-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] <i>bk</i>		
Address	[REDACTED]		
City/State/Zip Code	Clearwater	FL	33759
Complaint Information			
Company	http://m.buccaneers.com		
Comments	Season Tickets for the Tampa Bucs Football team.		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00423438-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	Paralegal Services-Henry Lavado		
Address	5422 Fulmar Drive		
City/State/Zip Code	Tampa	FL	33625
Complaint Information			
Company	Buccaneers		
Comments	Individual Game Tickets BUCCANEERS.COM		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00426294-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] <i>bk</i>		
Address			
City/State/Zip Code	Keystone Heights	FL	32656
Complaint Information			
Company	Buccaneers.com		
Comments	<p>GAME TICKETS FOR THE BUCCANEERS WITH GAME LOCATIONS, DATES, AND TIMES THIS COMPLAINT ABOUT A JUNK FAX ALSO INVOLVES THE ISSUE OF A JUNK FAX BEING SENT TO AN UNLISTED NUMBER AS WELL AS THE NUMBER BEING ON TWO (2) DO NOT CALL LISTS : NATIONAL AND FLORIDA.</p> <p>MY HOME PHONE IS UNLISTED. IT IS ON THE NATIONAL DO NOT CALL LIST. IT IS ON THE FLORIDA DO NOT CALL LIST.</p> <p>EVEN THOUGH THE SOLICITATION CAME INTO MY FAX, IT CAME INTO MY UNLISTED PHONE NUMBER.</p> <p>NOTE: THE SECTION BELOW TITLES "DO NOT FAX REQUEST" DOES NOT APPLY IN MY CASE SINCE MY NUMBER IS UNLISTED AND ON THE DO NOT CALL LISTS.</p>		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00433568-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bl</i>		
Address	[REDACTED]		
City/State/Zip Code	Tampa	FL	33602
Complaint Information			
Company	buccaneers	tampa bay	buccaneers
Comments	football game tickets www.buccaneers.com		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00490084-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	ALBERT A HAAB CPA-FRANK OWEN, ESQ		
Address	900 S FEDERAL HWY STE C		
City/State/Zip Code	HOLLWOOD	FL	33020
Complaint Information			
Company	GROUP TICKETS	TAMPA BAY BUCCANEERS	
Comments	BUCCANEERS GROUP TICKETS ONE BUCCANEER PLACE TAMPA FL 33607 WWW.BUCCANEERS.COM ** NO OPT-OUT NOTICE WHATSOEVER		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00557783-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED]		
Address	[REDACTED] <i>bl</i>		
City/State/Zip Code	TAVARES	FL	32778
Complaint Information			
Company	BUCCANEERS SALES DEPARTMENT	TAMPA BAY BUCCANEERS	
Comments	TAMPA BAY BUCCANEER GROUP TICKETS WWW.BUCCANEERS.COM		

800-745-3000

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00426294-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] b6		
Address	[REDACTED]		
City/State/Zip Code	Keystone Heights	FL	32656
Complaint Information			
Company	Buccaneers.com		
Comments	<p>GAME TICKETS FOR THE BUCCANEERS WITH GAME LOCATIONS, DATES, AND TIMES THIS COMPLAINT ABOUT A JUNK FAX ALSO INVOLVES THE ISSUE OF A JUNK FAX BEING SENT TO AN UNLISTED NUMBER AS WELL AS THE NUMBER BEING ON TWO (2) DO NOT CALL LISTS : NATIONAL AND FLORIDA.</p> <p>MY HOME PHONE IS UNLISTED. IT IS ON THE NATIONAL DO NOT CALL LIST. IT IS ON THE FLORIDA DO NOT CALL LIST.</p> <p>EVEN THOUGH THE SOLICITATION CAME INTO MY FAX, IT CAME INTO MY UNLISTED PHONE NUMBER.</p> <p>NOTE: THE SECTION BELOW TITLES "DO NOT FAX REQUEST" DOES NOT APPLY IN MY CASE SINCE MY NUMBER IS UNLISTED AND ON THE DO NOT CALL LISTS.</p>		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00433568-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[Redacted] <i>bl</i>		
Address	[Redacted]		
City/State/Zip Code	Tampa	FL	33602
Complaint Information			
Company	buccaneers	tampa bay buccaneers	
Comments	football game tickets www.buccaneers.com		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00403425-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] 26		
Address			
City/State/Zip Code	TAVARES	FL	32778
Complaint Information			
Company	TAMPA BAY BUCCANEERS		
Comments	GROUP SEATING TICKETS WWW.BUCCANEERS.COM		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00404336-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] bb		
Address			
City/State/Zip Code	Tampa	FL	33602
Complaint Information			
Company	tampa bay buccaneers	Tampa Bay Buccaneers	
Comments	football game tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00404438-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	Reese's Plants-Philip Reese		
Address	161 Marshall Street		
City/State/Zip Code	Safety Harbor	FL	34695
Complaint Information			
Company	Tampa Bay Buccaneers		
Comments	Football tickets www.buccaneers.com		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00407061-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	Paralegal Services-Henry Lavado		
Address	5422 Fulmar Drive		
City/State/Zip Code	Tampa	FL	33625
Complaint Information			
Company	Buccaneers		
Comments	Buccaneers Group Tickets		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	09-T00417559-1	Complaint Source	Web
Category		Attachments	No
Complainant Information			
Complainant Details	[REDACTED] <i>bb</i>		
Address			
City/State/Zip Code	Tampa	FL	33610
Complaint Information			
Company	Tampa Bay Buccaneers		
Comments	Group Tickets Claimed that they hired Faxqom who claimed I opted in. That his totally false.		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00490084-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	ALBERT A. HAAB CPA-FRANK OWEN, ESQ		
Address	900 S FEDERAL HWY STE C		
City/State/Zip Code	HOLLYWOOD	FL	33020
Complaint Information			
Company	GROUP TICKETS	TAMPA BAY BUCCANEERS	
Comments	BUCCANEERS GROUP TICKETS ONE BUCCANEER PLACE TAMPA FL 33607 WWW.BUCCANEERS.COM ** NO OPT-OUT NOTICE WHATSOEVER		

Form Type	1088A - Junk Fax Complaint		
Complaint Number	10-T00557783-1	Complaint Source	Web
Category		Attachments	Yes
Complainant Information			
Complainant Details	[REDACTED] <i>bl</i>		
Address	6588 FREEPORT DRIVE		
City/State/Zip Code	TAVARES	FL	32778
Complaint Information			
Company	BUCCANEERS SALES DEPARTMENT	TAMPA BAY BUCCANEERS	
Comments	TAMPA BAY BUCCANEER GROUP TICKETS WWW.BUCCANEERS.COM		

EXHIBIT H



NETWORK

Law enforcement's source for consumer complaints

[PRINT](#)

Do Not Call Complaints

Record # 1 / Do Not Call Complaints

Reference Number: 26672295

Complaint Date: 6/8/2010

Complaint Source: National Do Not Call Registry

Transaction Date: 6/8/2010

Existing Business Relationship?: No

Requested entity to stop calling?: No

Comments: this was a unsolicited fax

First Name: (b)(6)

Address 1: [Redacted]

City: Ocala

ZIP: (b)(6)

Company Name: Buccaneers

Country Code:

Is Phone in Registry?: Yes

Product Service Code: National Do Not Call Registry

Complaint Channel: Internet

Transaction Time: 11:00:00 AM

Pre-recorded message?: Yes

Consumer

Last Name: (b)(6)

Address 2:

State/Prov: Florida

Phone Number: (b)(6)

Subject

State:

Phone Number: (877) 6492827

Record # 2 / Do Not Call Complaints

Reference Number: 26589209
Complaint Date: 6/1/2010
Complaint Source: National Do Not Call Registry
Transaction Date: 6/1/2010
Existing Business Relationship?: No
Requested entity to stop calling?: Yes

Is Phone in Registry?: Yes
Product Service Code: National Do Not Call Registry
Complaint Channel: Internet
Transaction Time: 11:00:00 AM
Pre-recorded message?: No

Comments: I contacted Amy Weber on 5/27/2010 when faxes were first sent from their office to our two fax numbers -(the other number being (b)(6)). She stated she obtained our numbers from a purchased list. I advised her there was a law against sending unsolicited faxes and she needed to verify with the "do not call registry" before faxing. I asked her on that day to remove both numbers from their "fax" list. No one in this office requested the solicitations. Today I called their "opt-out" number to have both numubers removed from their list because faxes were received again today to both fax numbers. I felt I had given her "fair opportunity" to take action to remove the numbers. I also contacted her via phone and left a voice message to contact me and that I was filing a **complaint.**

First Name: (b)(6)
Address 1: [Redacted]
City: Bradenton
ZIP: (b)(6)

Consumer Last Name: (b)(6)
Address 2:
State/Prov: Florida
Phone Number: (b)(6)

Company Name: Tampa Bay Buccaneers
Country Code:

Subject State:
Phone Number: (877) 6492827

Record # 3 / Do Not Call Complaints

Reference Number: 26588459	Is Phone in Registry?: Yes
Complaint Date: 6/1/2010	Product Service Code: National Do Not Call Registry
Complaint Source: National Do Not Call Registry	Complaint Channel: Internet
Transaction Date: 5/27/2010	Transaction Time: 11:00:00 AM
Existing Business Relationship?: No	Pre-recorded message?: No
Requested entity to stop calling?: Yes	

Comments: Contacted Amy Weber at 877-649-2827. Informed her we were on the 'do not call registry'. I asked where she obtained our fax number..she said they purchased it. I advised her that in future she needs to check the registry before sending faxes when they purchase lists. I requested she personally take care of this issue to remove our fax number. On June 01, I received another same fax to same fax number and called the 866 247 0920 number to have our number "opted out". I trusted she would have been diligent enough to take of this when I first contacted her on 5-27-2010. I was fair enough to give her an opportunity to have our number removed, but apparently she did not since I received it again today 6-01-2010. I left a voice message today to inform her that I was reporting these unwanted faxes today.

First Name: (b)(6)
Address 1: [Redacted]
City: Bradenton
ZIP: (b)(6)

Consumer
Last Name: (b)(6)
Address 2:
State/Prov: Florida
Phone Number: (b)(6)

Company Name: Tampa Bay Buccaneers
Country Code:

Subject
State:
Phone Number: (877) 6492827

Record # 4 / Do Not Call Complaints

Reference Number: 26587613
Complaint Date: 6/1/2010
Complaint Source: National Do Not Call Registry
Transaction Date: 5/27/2010
Existing Business Relationship?: No
Requested entity to stop calling?: Yes
Comments: This was a fax

First Name:
Address 1:
City:
ZIP:

Company Name: Tampa Bay Buccaneers
Country Code:

Is Phone in Registry?: Yes
Product Service Code: National Do Not Call Registry
Complaint Channel: Internet
Transaction Time: 11:00:00 AM
Pre-recorded message?: Yes

Consumer
Last Name: Not Provided
Address 2:
State/Prov: Florida
Phone Number: (b)(6)
Subject
State:
Phone Number: (877) 6492827

Record # 5 / Do Not Call Complaints

Reference Number: 26587600
Complaint Date: 6/1/2010
Complaint Source: National Do Not Call Registry
Transaction Date: 5/28/2010
Existing Business Relationship?: No
Requested entity to stop calling?: Yes
Comments: Received by fax

First Name:
Address 1:
City:
ZIP:

Company Name: Tampa Bay Buccaneers
Country Code:

Is Phone in Registry?: Yes
Product Service Code: National Do Not Call Registry
Complaint Channel: Internet
Transaction Time: 10:00:00 AM
Pre-recorded message?: Yes

Consumer
Last Name: Not Provided
Address 2:
State/Prov: Florida
Phone Number: (b)(6)
Subject
State:

Phone Number: (877) 6492827

Record # 6 / Do Not Call Complaints

Reference Number: 26585820

Complaint Date: 6/1/2010

Complaint Source: National Do Not Call Registry

Transaction Date: 5/26/2010

Existing Business Relationship?: No

Requested entity to stop calling?: No

Comments:

First Name: (b)(6)

Address 1: (b)(6)

City: Bushnell

ZIP: (b)(6)

Company Name: Tampa Bay Buccaneers

Country Code:

Is Phone in Registry?: Yes

Product Service Code: National Do Not Call Registry

Complaint Channel: Internet

Transaction Time: 12:00:00 PM

Pre-recorded message?: No

Consumer

Last Name: (b)(6)

Address 2:

State/Prov: Florida

Phone Number: (b)(6)

Subject

State:

Phone Number: (877) 6492827

Record # 7 / Do Not Call Complaints

Reference Number: 26571830	Is Phone in Registry?: Yes
Complaint Date: 5/28/2010	Product Service Code: National Do Not Call Registry
Complaint Source: National Do Not Call Registry	Complaint Channel: Internet
Transaction Date: 5/28/2010	Transaction Time: 11:00:00 AM
Existing Business Relationship?: No	Pre-recorded message?: Don't Know or choose not to answer
Requested entity to stop calling?: Yes	

Comments: Unwanted Fax about group ticket sales. Called number (866-247-0920) to be removed. Hope it works as I'm very unhappy about wasting ink and paper.

First Name: (b)(6)
Address 1: [Redacted]
City: Sarasota
ZIP: (b)(6)

Consumer
Last Name: (b)(6)
Address 2:
State/Prov: Florida
Phone Number: (b)(6)

Company Name: Tampa Bay Buccaneers
Country Code:

Subject
State:
Phone Number: (877) 6492827

Record # 8 / Do Not Call Complaints

Reference Number: 26561395

Complaint Date: 5/27/2010

Complaint Source: National Do Not Call Registry

Transaction Date: 5/27/2010

Existing Business Relationship?: No

Requested entity to stop calling?: No

Comments: Unwanted Fax on group ticket sales. Did not reply to remove number (866-247-0920) as that only indicates a working Fax.

Is Phone in Registry?: Yes

Product Service Code: National Do Not Call Registry

Complaint Channel: Internet

Transaction Time: 11:00:00 AM

Pre-recorded message?: No

First Name: (b)(6)
Address 1: [Redacted]
City: Sarasota
ZIP: (b)(6)

Consumer Last Name: (b)(6)
Address 2:
State/Prov: Florida
Phone Number: (b)(6)

Company Name: Tampa Bay Buccaneers

Subject State:

Country Code:

Phone Number: (877) 6492827

Record # 9 / Do Not Call Complaints

Reference Number: 26574692
Complaint Date: 5/27/2010
Complaint Source: National Do Not Call Registry
Transaction Date: 5/26/2010
Existing Business Relationship?: No
Requested entity to stop calling?: Yes
Comments:

First Name:
Address 1:
City:
ZIP:

Company Name: Buccaneers
Country Code:

Is Phone in Registry?: Yes
Product Service Code: National Do Not Call Registry
Complaint Channel: IVR
Transaction Time: 12:00:00 AM
Pre-recorded message?: No

Consumer
Last Name:
Address 2:
State/Prov: Florida
Phone Number: (b)(6)
Subject
State:
Phone Number: (877) 6492827

Record # 10 / Do Not Call Complaints

Reference Number: 26540004	Is Phone in Registry?: Yes
Complaint Date: 5/25/2010	Product Service Code: National Do Not Call Registry
Complaint Source: National Do Not Call Registry	Complaint Channel: Internet
Transaction Date: 5/24/2010	Transaction Time: 10:00:00 AM
Existing Business Relationship?: No	Pre-recorded message?: No
Requested entity to stop calling?: Yes	

Comments: This company is continuously sending 2 page, full ink waste, faxes to my fax number. I have reported them in the past and they continue to abuse my do not call status. Please take harsh actions against this company that is responsible. This is NOT a first time call.

First Name: (b)(6)	Consumer Last Name: (b)(6)
Address 1: (b)(6)	Address 2:
City: Tampa	State/Prov: Florida
ZIP: (b)(6)	Phone Number: (b)(6)
Company Name: www.buccaneers.com	Subject State:
Country Code:	Phone Number: (877) 6492827

Record # 11 / Do Not Call Complaints

Reference Number: 23433470
Complaint Date: 7/17/2009
Complaint Source: National Do Not Call Registry
Transaction Date: 7/16/2009
Existing Business Relationship?: No
Requested entity to stop calling?: No
Comments:

First Name:
Address 1:
City:
ZIP:

Company Name: Tampa Bay Buccaneers
Country Code:

Is Phone in Registry?: Yes
Product Service Code: National Do Not Call Registry
Complaint Channel: IVR
Transaction Time: 12:00:00 AM
Pre-recorded message?: No

Consumer
Last Name:
Address 2:
State/Prov: Florida
Phone Number: (b)(6)
Subject
State:
Phone Number: (877) 6492827

Record # 12 / Do Not Call Complaints

Reference Number: 23429794

Complaint Date: 7/16/2009

Complaint Source: National Do Not Call Registry

Transaction Date: 7/16/2009

Existing Business Relationship?: No

Requested entity to stop calling?: Yes

Comments:

First Name: (b)(6)
Address 1: [Redacted]
City: Sarasota
ZIP: (b)(6)

Company Name: Tampa Bay Buccaneers Group Seating Department

Country Code:

Is Phone in Registry?: Yes

Product Service Code: National Do Not Call Registry

Complaint Channel: IVR

Transaction Time: 12:00:00 AM

Pre-recorded message?: No

Consumer

Last Name: (b)(6)
Address 2:
State/Prov: Florida
Phone Number: (b)(6)

Subject

State:

Phone Number: (877) 6492827

Record # 13 / Do Not Call Complaints

Reference Number: 23405570
Complaint Date: 7/16/2009
Complaint Source: National Do Not Call Registry
Transaction Date: 7/16/2009
Existing Business Relationship?: No
Requested entity to stop calling?: Yes
Comments:

First Name:
Address 1:
City:
ZIP:

Company Name: Tampa Bay Buccaneers
Country Code:

Is Phone in Registry?: Yes
Product Service Code: National Do Not Call Registry
Complaint Channel: Internet
Transaction Time: 10:00:00 AM
Pre-recorded message?: No

Consumer
Last Name: Not Provided
Address 2:
State/Prov: Florida
Phone Number: (b)(6)
Subject
State:
Phone Number: (877) 6492827

Record # 14 / Do Not Call Complaints

Reference Number: 23402840

Complaint Date: 7/16/2009

Complaint Source: National Do Not Call Registry

Transaction Date: 7/16/2009

Existing Business Relationship?: No

Requested entity to stop calling?: No

Comments: They left faxes on my fax machine

First Name: (b)(6)
Address 1: [Redacted]
City: Ocala
ZIP: (b)(6)

Company Name: Tampa Bay Buccaneers

Country Code:

Is Phone in Registry?: Yes

Product Service Code: National Do Not Call Registry

Complaint Channel: Internet

Transaction Time: 11:00:00 AM

Pre-recorded message?: No

Consumer

Last Name: (b)(6)
Address 2:
State/Prov: Florida
Phone Number: (b)(6)

Subject

State:

Phone Number: (877) 6492827

Record # 15 / Do Not Call Complaints

Reference Number: 23401151	Is Phone in Registry?: Yes
Complaint Date: 7/16/2009	Product Service Code: National Do Not Call Registry
Complaint Source: National Do Not Call Registry	Complaint Channel: Internet
Transaction Date: 7/16/2009	Transaction Time: 10:00:00 AM
Existing Business Relationship?: No	Pre-recorded message?: No
Requested entity to stop calling?: No	

Comments: There is a fax machine hooked up to this phone line and I am constantly receiving unsolicited faxes despite the number being registered on the do not call list. I no longer call to be removed from lists because it seems to cause me to receive more faxes. This is the first fax from this company. The fax I received has a number to call to remove my number from their list - 877-272-7614. There is also an email address - Removaltech@FaxQom.com.

Consumer

First Name:	Last Name: Not Provided
Address 1:	Address 2:
City:	State/Prov: Florida
ZIP:	Phone Number: (b)(6)

Subject

Company Name: Tampa Bay Buccaneers Group Seating Department	State:
Country Code:	Phone Number: (877) 6492827

Provided by the Federal Trade Commission

Record # 2 / Do Not Call Complaints

Reference Number: 23406442
Complaint Date: 7/16/2009
Complaint Source: National Do Not Call Registry
Transaction Date: 7/16/2009
Existing Business Relationship?: No
Requested entity to stop calling?: Yes

Is Phone in Registry?: Yes
Product Service Code: National Do Not Call Registry
Complaint Channel: Internet
Transaction Time: 10:00:00 AM
Pre-recorded message?: Yes

Comments: The above number is a company that solicits for the Tampa Bay Buccaneers. They sent me a fax (unsolicited) . Their phone # is 813-870-2700. I was told to ask for Ben Milson but he wasn't there at the moment. Another # for them is 877-649-2827.

First Name: (b)(6)
Address 1: [Redacted]
City: Ocala
ZIP: (b)(6)

Consumer Last Name: (b)(6)
Address 2:
State/Prov: Florida
Phone Number: (b)(6)

Company Name: Tampa Bay Buccaneers
Country Code:

Subject State:
Phone Number: (877) 2727614

Provided by the Federal Trade Commission

EXHIBIT I

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 representative 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. _____ /

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs, CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC. (“Plaintiffs”), brings this action on behalf of themselves and all others similarly situated, through their attorneys, and except as to those allegations pertaining to Plaintiffs or their attorneys, which allegations are based upon personal knowledge, allege the following upon information and belief against Defendants, BUCCANEERS LIMITED PARTNERSHIP and JOHN DOES 1-10 (“Defendants”).

PRELIMINARY STATEMENT

1. This case challenges Defendants’ practice of sending unsolicited facsimiles.
2. The federal Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005, 47 USC § 227 (“JFPA” or the “Act”), and the regulations promulgated under the Act, prohibits a person or entity from faxing or having an agent fax advertisements without the recipient’s prior express invitation or permission. The JFPA provides



a private right of action and provides statutory damages of \$500 per violation. Upon information and belief, Defendants have sent facsimile transmissions of unsolicited advertisements to Plaintiffs and the Class in violation of the JFPA, including, but not limited to, the facsimile transmission of an unsolicited advertisements on July 15, 2009 and August 19, 2009 (“the Faxes”), true and correct copy of which are attached hereto as **Exhibits A and B**, and made a part hereof. The Faxes promote the services and goods of Defendants. Plaintiffs are informed and believe, and upon such information and belief avers, that Defendants have sent, and continue to send, unsolicited advertisements via facsimile transmission in violation of the JFPA.

3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient’s valuable time that would have been spent on something else. A junk fax interrupts the recipient’s privacy. Unsolicited faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipients’ fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message.

4. On behalf of themselves and all others similarly situated, Plaintiffs bring this case as a class action asserting claims against Defendants under the JFPA and common law conversion.

5. Plaintiffs are informed and believe, and upon such information and belief avers, that this action is based upon a common nucleus of operative fact because the facsimile transmissions at issue were and are being done in the same or similar manner. This action is based on the same legal theory, namely liability under the JFPA. This action seeks relief expressly authorized by the JFPA: (i) injunctive relief enjoining Defendants, their employees, agents, representatives, contractors, affiliates, and all persons and entities acting in concert with

them, from sending unsolicited advertisements in violation of the JFPA; and (ii) an award of statutory damages in the minimum amount of \$500 for each violation of the JFPA, and to have such damages trebled, as provided by § 227(b)(3) of the Act.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. § 227.

7. Venue is proper in this District because Defendants committed a statutory tort within this district and a significant portion of the events took place here.

PARTIES

8. Plaintiff, CIN-Q AUTOMOBILES, INC., is a Florida corporation with its main office and principal place of business located Alachua County, Florida.

9. Plaintiff, MEDICAL & CHIROPRACTIC CLINIC, INC., is a Florida corporation with its principal place of business in Hillsborough County, Florida.

10. On information and belief, Defendant, BUCCANEERS LIMITED PARTNERSHIP (“BUCCANEERS”), is a Delaware corporation with its principal place of business in Tampa, Florida.

11. John Does 1-10 will be identified through Discovery but are currently unknown.

FACTUAL ALLEGATIONS

12. Defendants own and operate a professional football team in Tampa, Florida, which plays some of its scheduled games each season at Raymond James Stadium in Tampa, Florida.

13. The Buccaneers’ 2009 professional football season commenced on August 27, 2009, with a home preseason game against the Miami Dolphins at Raymond James Stadium.

14. On or about July 15, 2009, Defendants transmitted by telephone facsimile machine an unsolicited fax to Plaintiff, MEDICAL & CHIROPRACTIC CLINIC, INC., for the purpose of offering for sale group game tickets to the Tampa Bay Buccaneers' home football games starting with the September 13, 2009, game against Dallas. A copy of the facsimile is attached hereto as **Exhibit A**.

15. On or about August 19, 2009, Defendants transmitted by telephone facsimile machine an unsolicited fax to Plaintiff, CIN-Q AUTOMOBILES, INC., for the purpose of offering for sale individual game tickets to the Tampa Bay Buccaneers' home football games starting with the August 27, 2009, game against the Dolphins. A copy of the facsimile is attached hereto as **Exhibit B**.

16. Defendants created or made Exhibits A and B which Defendants knew or should have known are goods or products which Defendants intended to and did in fact distribute to Plaintiff and the other members of the class.

17. Exhibits A and B were sent at Defendants' request and on Defendants' behalf by a broadcast fax service known as FaxQom for the purpose of assisting and facilitating Defendants' efforts to sell tickets for the Tampa Bay Buccaneers' football games to be played at its home stadium. FaxQom had a contract with Defendants to provide such broadcast fax services on behalf of Defendants, and such services included offering for sale Tampa Bay Buccaneers' home game tickets.

18. The faxes prompted the recipients to order game tickets by using the Tampa Bay Buccaneers' website of "Buccaneers.com" or calling a toll free number for Ticketmaster (Ex. A) or the Buccaneers (Ex. B).

19. The faxes identified the source as FaxQom and indicated that the recipient could request removal of its fax number from the database used to send the fax by contacting Removaltech@FaxQom.com. A printout of portions of the webpage for FaxQom advertises the furnishing of Worldwide IP Fax Broadcast Services and that FaxQom will provide broadcast services for its customers. A true copy of the portions of the webpage is attached as **Exhibit C**.

20. Exhibits A and B are part of Defendants' work or operations to market Defendants' goods or services which were performed by Defendants and on behalf of Defendants. Therefore, Exhibits A and B constitute material furnished in connection with Defendants' work or operations.

21. Plaintiffs had not invited or given permission to Defendants to send the faxes.

22. On information and belief, Defendants faxed the same and similar unsolicited facsimiles to Plaintiffs and more than 100,000 other recipients without first receiving the recipients' express permission or invitation.

23. There is no reasonable means for Plaintiffs (or any other class member) to avoid receiving unauthorized faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

24. Defendants' facsimiles did not display a proper opt-out notice as required by 47 C.F.R. § 64.1200.

CLASS ALLEGATIONS

25. In accordance with F. R. Civ. P. 23(b)(1), (b)(2) and (b)(3), Plaintiffs brings this class action pursuant to the JFPA, on behalf of the following class of persons:

All persons from July 1, 2009, to present who were 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.

Excluded from the Class are the Defendants, their employees, agents and members of the Judiciary. Plaintiffs reserve the right to amend the class definition upon completion of class certification discovery.

26. Class Size (F. R. Civ. P. 23(a)(1)): Plaintiffs are informed and believes, and upon such information and belief avers, that the number of persons and entities of the Plaintiff Class is numerous and joinder of all members is impracticable. Plaintiffs are informed and believe, and upon such information and belief avers, that the number of class members is at least forty (40).

27. Commonality (F. R. Civ. P. 23 (a) (2)): Common questions of law and fact apply to the claims of all class members. Common material questions of fact and law include, but are not limited to, the following:

- a) Whether the Defendants sent unsolicited fax advertisements;
- b) Whether the Defendants' faxes advertised the commercial availability of property, goods, or services;
- c) The manner and method the Defendants used to compile or obtain the list of fax numbers to which they sent Exhibit A and other unsolicited faxed advertisements;
- d) Whether the Defendants faxed advertisements without first obtaining the recipient's prior permission or invitation;
- e) Whether the Defendants sent the faxed advertisements knowingly;
- f) Whether the Defendants violated the provisions of 47 U.S.C. § 227 and the regulations promulgated thereunder;
- g) Whether the faxes contain an "opt-out notice" that complies with the requirements of § (b)(1)(C)(iii) of the Act, and the regulations promulgated thereunder, and the effect of the failure to comply with such requirements;

h) Whether the Defendants should be enjoined from faxing advertisements in the future;

i) Whether the Plaintiffs and the other members of the class are entitled to statutory damages; and

j) Whether the Court should award treble damages.

28. Typicality (F. R. Civ. P. 23 (a) (3)): The Plaintiffs' claims are typical of the claims of all class members. The Plaintiffs received faxes sent by or on behalf of the Defendants advertising Defendants' goods and services during the Class Period. The Plaintiffs are making the same claims and seeking the same relief for themselves and all class members based upon the same federal statute. The Defendants have acted the same or in a similar manner with respect to the Plaintiffs and all the class members.

29. Fair and Adequate Representation (F. R. Civ. P. 23 (a) (4)): The Plaintiffs will fairly and adequately represent and protect the interests of the class. It is interested in this matter, has no conflicts and has retained experienced class counsel to represent the class.

30. Need for Consistent Standards and Practical Effect of Adjudication (F. R. Civ. P. 23 (b) (1)): Class certification is appropriate because the prosecution of individual actions by class members would: (a) create the risk of inconsistent adjudications that could establish incompatible standards of conduct for the Defendants, and/or (b) as a practical matter, adjudication of the Plaintiffs' claims will be dispositive of the interests of class members who are not parties.

31. Common Conduct (F. R. Civ. P. 23 (b) (2)): Class certification is also appropriate because the Defendants have acted and refused to act in the same or similar manner

with respect to all class members thereby making injunctive and declaratory relief appropriate. The Plaintiffs demand such relief as authorized by 47 U.S.C. §227.

32. Predominance and Superiority (F. R. Civ. P. 23 (b) (3)): Common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other methods for the fair and efficient adjudication of the controversy because:

a) Proof of the claims of the Plaintiffs will also prove the claims of the class without the need for separate or individualized proceedings;

b) Evidence regarding defenses or any exceptions to liability that the Defendants may assert and prove will come from the Defendants' records and will not require individualized or separate inquiries or proceedings;

c) The Defendants have acted and are continuing to act pursuant to common policies or practices in the same or similar manner with respect to all class members;

d) The amount likely to be recovered by individual class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one proceeding based upon common proofs; and

e) This case is inherently manageable as a class action in that:

(i) The Defendants identified persons or entities to receive the fax transmissions and it is believed that the Defendants' computer and business records will enable the Plaintiffs to readily identify class members and establish liability and damages;

(ii) Liability and damages can be established for the Plaintiffs and the class with the same common proofs;

(iii) Statutory damages are provided for in the statute and are the same for all class members and can be calculated in the same or a similar manner;

(iv) A class action will result in an orderly and expeditious administration of claims and it will foster economics of time, effort and expense;

(v) A class action will contribute to uniformity of decisions concerning the Defendants' practices; and

(vi) As a practical matter, the claims of the class are likely to go unaddressed absent class certification.

COUNT I

Claim for Relief for Violation of the JFPA, 47 U.S.C. § 227 *et seq.*

33. Plaintiffs and the Plaintiff Class reassert and incorporate herein by reference the averments set for in paragraphs 1 through 32 above.

34. The JFPA makes it unlawful for any person to “use any telephone facsimile machine, computer or other device to send, to a telephone facsimile machine, an unsolicited advertisement ...” 47 U.S.C. § 227(b)(1)(C).

35. The JFPA defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227 (a) (5).

36. **Opt-Out Notice Requirements.** The JFPA strengthened the prohibitions against the sending of unsolicited advertisements by requiring, in §(b)(1)(C)(iii) of the Act, that senders

of faxed advertisements place a clear and conspicuous notice on the first page of the transmission that contains the following among other things (hereinafter collectively the “Opt-Out Notice Requirements”):

1. a statement that the recipient is legally entitled to opt-out of receiving future faxed advertisements – knowing that he or she has the legal right to request an opt-out gives impetus for recipients to make such a request, if desired;
2. a statement that the sender must honor a recipient’s opt-out request within 30 days and the sender’s failure to do so is unlawful – thereby encouraging recipients to opt-out, if they did not want future faxes, by advising them that their opt-out requests will have legal “teeth”;
3. a statement advising the recipient that he or she may opt-out with respect to all of his or her facsimile telephone numbers and not just the ones that receive a faxed advertisement from the sender – thereby instructing a recipient on how to make a valid opt-out request for all of his or her fax machines;

The requirement of (1) above is incorporated from § (b)(D)(ii) of the Act. The requirement of (2) above is incorporated from § (b)(D)(ii) of the Act and the rules and regulations of the Federal Communications Commission (the “FCC”) in ¶31 of its 2006 Report and Order (*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Junk Prevention Act of 2005*, 21 F.C.C.R. 3787, 2006 WL 901720, which rules and regulations took effect on August 1, 2006). The requirements of (3) above are contained in § (b)(2)(E) of the Act and incorporated into the Opt-Out Notice Requirements via § (b)(2)(D)(ii). Compliance with the Opt-Out Notice Requirements is neither difficult nor costly. The Opt-Out Notice Requirements are important consumer protections bestowed by Congress upon the

owners of fax machines giving them the right, and means, to stop unwanted faxed advertisements.

37. **2006 FCC Report and Order.** The JFPA, in § (b)(2) of the Act, directed the FCC to implement regulations regarding the JFPA, including the JFPA's Opt-Out Notice Requirements and the FCC did so in its 2006 Report and Order, which in addition provides among other things:

A. The definition of, and the requirements for, an established business relationship for purposes of the first of the three prongs of an exemption to liability under § (b)(1)(C)(i) of the Act and provides that the lack of an "established business relationship" precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶8-12 and 17-20);

B. The required means by which a recipient's facsimile telephone number must be obtained for purposes of the second of the three prongs of the exemption under § (b)(1)(C)(ii) of the Act and provides that the failure to comply with these requirements precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶13-16);

C. The things that must be done in order to comply with the Opt-Out Notice Requirements for the purposes of the third of the three prongs of the exemption under § (b)(1)(C)(iii) of the Act and provides that the failure to comply with these requirements precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶24-34);

D. The failure of a sender to comply with the Opt-Out Notice Requirements precludes the sender from claiming that a recipient gave "prior express permission or

invitation” to receive the sender’s fax (*See* Report and Order ¶48);

As a result thereof, a sender of a faxed advertisement who fails to comply with the Opt-Out Notice Requirements has, by definition, transmitted an unsolicited advertisement under the JFPA. This is because such a sender can neither claim that the recipients of the faxed advertisement gave “prior express permission or invitation” to receive the fax nor can the sender claim the exemption from liability contained in § (b)(C)(1) of the Act.

38. **The Faxes.** Defendants sent the July 15, 2009 and August 19, 2009 Faxes via facsimile transmission from telephone facsimile machines, computers, or other devices to the telephone facsimile machines of Plaintiffs and members of the Plaintiff Class. The Faxes constituted an advertisement under the Act. Defendants failed to comply with the Opt-Out Requirements in connection with the Faxes. The Faxes were transmitted to persons or entities without their prior express permission or invitation and/or Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements. By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder by sending the Faxes via facsimile transmission to Plaintiffs and members of the Class.

39. **Defendants’ Other Violations.** Plaintiffs are informed and believes, and upon such information and belief avers, that during the period preceding four years of the filing of this Complaint and repeatedly thereafter, Defendants have sent via facsimile transmission from telephone facsimile machines, computers, or other devices to telephone facsimile machines of members of the Plaintiff Class faxes that constitute advertisements under the JFPA that were transmitted to persons or entities without their prior express permission or invitation (and/or that Defendants are precluded from asserting any prior express permission or invitation because of

the failure to comply with the Opt-Out Notice Requirements in connection with such transmissions). By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder. Plaintiffs are informed and believe, and upon such information and belief avers, that Defendants are continuing to send unsolicited advertisements via facsimile transmission in violation of the JFPA and the regulations promulgated thereunder, and absent intervention by this Court, will do so in the future.

40. The TCPA/JFPA provides a private right of action to bring this action on behalf of Plaintiffs and the Plaintiff Class to redress Defendants' violations of the Act, and provides for statutory damages. 47 U.S.C. § 227(b)(3). The Act also provides that injunctive relief is appropriate. *Id.*

41. The JFPA is a strict liability statute, so the Defendants are liable to the Plaintiffs and the other class members even if their actions were only negligent.

42. The Defendants knew or should have known that (a) the Plaintiffs and the other class members had not given express invitation or permission for the Defendants or anybody else to fax advertisements about the Defendants' goods or services; (b) Defendants transmitted an advertisement; and (c) the Faxes did not contain the required Opt-Out Notice.

43. The Defendants' actions caused damages to the Plaintiffs and the other class members. Receiving the Defendants' junk faxes caused the recipients to lose paper and toner consumed in the printing of the Defendants' faxes. Moreover, the Defendants' fax used the Plaintiffs' fax machine. The Defendants' fax cost the Plaintiffs time, as the Plaintiffs and their employees wasted their time receiving, reviewing and routing the Defendants' unauthorized fax. That time otherwise would have been spent on the Plaintiffs' business activities. The Defendants' fax unlawfully interrupted the Plaintiffs' and other class members' privacy interests

in being left alone. Finally, the injury and property damage sustained by Plaintiffs and the other class members from the sending of Defendants' advertisements occurred outside of Defendants' premises.

WHEREFORE, Plaintiffs, CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC., individually and on behalf of all others similarly situated, demand judgment in their favor and against Defendants, BUCCANEERS LIMITED PARTNERSHIP and JOHN DOES 1-10, jointly and severally, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint the Plaintiffs as the representatives of the class and appoint the Plaintiffs' counsel as counsel for the class;

B. That the Court award actual monetary loss from such violations or the sum of \$500 for each violation, whichever is greater;

C. That Court enjoin the Defendants from additional violations; and

D. That the Court award pre-judgment interest, costs and such further relief as the Court may deem just and proper.

COUNT II
Conversion

44. Plaintiffs incorporate paragraphs 1, 3, and 8 through 23 as though fully set forth herein.

45. In accordance with Florida Statute §365.1657, Plaintiffs bring Count II for conversion under the common law for the following class of persons:

All persons who on or after four years prior to the filing of this action, were sent telephone facsimile messages on behalf of the Defendants.

46. By sending Plaintiffs and the other class members unsolicited faxes, Defendants improperly and unlawfully converted their fax machines, toner and paper to its own use.

Defendants also converted Plaintiffs' employees' time to Defendants' own use.

47. Immediately prior to the sending of the unsolicited faxes, Plaintiffs and the other class members owned an unqualified and immediate right to possession of their fax machines, paper, toner and employee time.

48. By sending the unsolicited faxes, Defendants permanently misappropriated the class members' fax machines, toner, paper and employee time to Defendants' own use. Such misappropriation was wrongful and without authorization.

49. Defendants knew or should have known that its misappropriation of paper, toner and employee time was wrongful and without authorization.

50. Plaintiffs and the other class members were deprived of the use of the fax machines, paper, toner and employee time, which could no longer be used for any other purpose. Plaintiffs and each class member thereby suffered damages as a result of their receipt of unsolicited faxes from Defendants.

51. Each of Defendants' unsolicited faxes effectively stole Plaintiffs' employees' time because multiple persons employed by Plaintiffs were involved in receiving, routing and reviewing Defendants' illegal faxes. Defendants knew or should have known employees' time is valuable to Plaintiffs.

52. Defendants' actions caused damages to Plaintiffs and the other members of the class because their receipt of Defendants' unsolicited fax caused them to lose paper and toner as a result. Defendants' actions prevented Plaintiffs' fax machines from being used for Plaintiffs' business purposes during the time Defendants were using Plaintiffs' fax machines for

Defendants' illegal purpose. Defendants' actions also cost Plaintiffs employee time, as Plaintiffs' employees used their time receiving, routing and reviewing Defendants' illegal faxes, and that time otherwise would have been spent on Plaintiffs' business activities.

WHEREFORE, Plaintiffs, CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC., individually and on behalf of all others similarly situated, demands judgment in their favor and against Defendants, BUCCANEERS LIMITED PARTNERSHIP and JOHN DOES 1-10, jointly and severally, as follows:

- A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint the Plaintiffs as the representatives of the class and appoint the Plaintiffs' counsel as counsel for the class;
- B. That the Court award appropriate damages
- C. That the Court award costs of suit; and
- D. That the Court award such further relief as the Court may deem just and proper.

Respectfully submitted,

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

By: s/ Michael C. Addison
Michael C. Addison – Florida Bar No. 145579
ADDISON & HOWARD, P.A.
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Rolling Meadows, IL 60008
Tel: (847) 368-1500
Fax: (847) 368-1501

CERTIFICATE OF SERVICE

I hereby certify that on _____, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF which will send notification of such filing to all counsel of record and I hereby certify that the foregoing document was served by U.S. mail on the person listed below.

s/ _____

Defendant:

Buccaneers Limited Partnership
c/o David Cohen, as General Counsel
One Buccaneer Place
Tampa, FL 33607

07/15/2009 12:25 PM

Buccaneers

-> 1813237379E

TAMPA BAY BUCCANEERS

FAX COVER



ONE BUCCANEER PLACE TAMPA, FL 33607

TEL: (813) 870-2700

BUCCANEERS.COM



DATE: 7/15/09 # 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

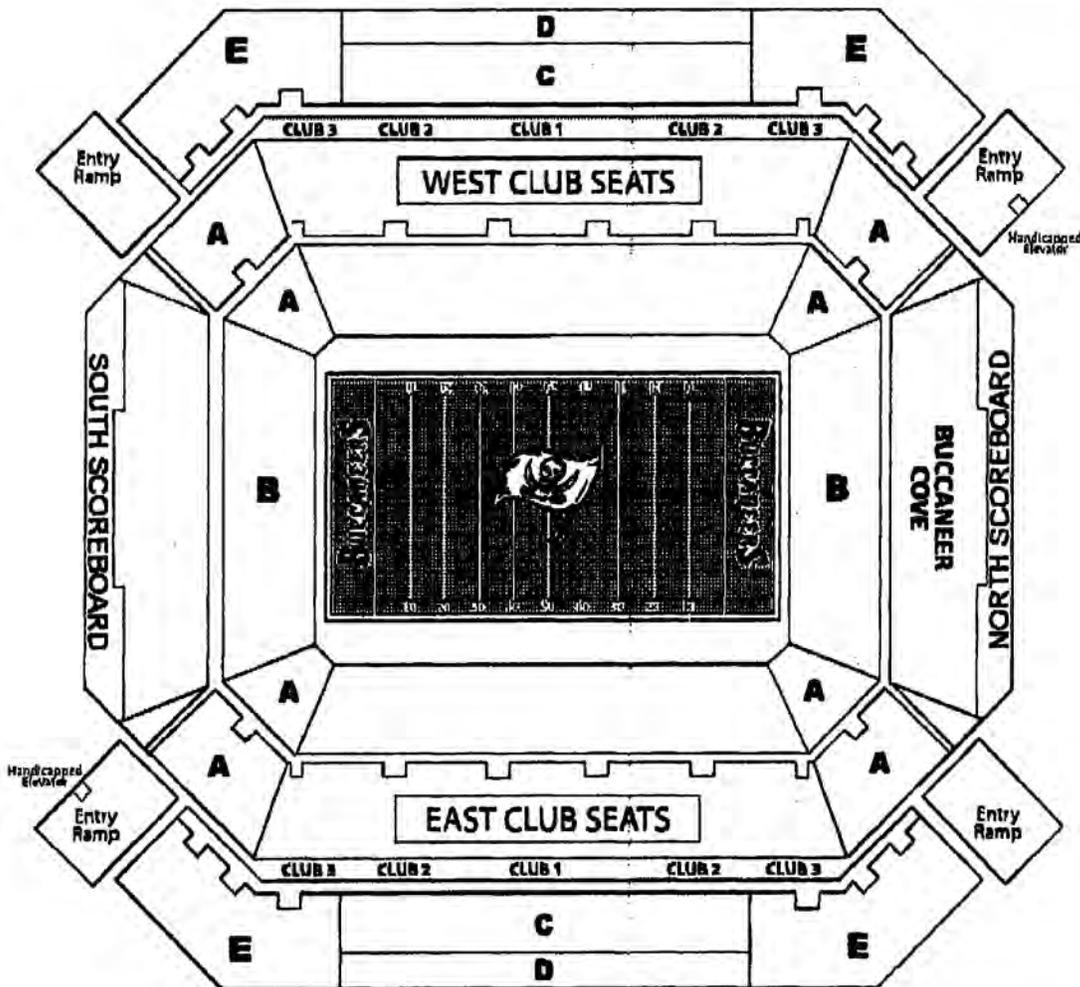




GROUP TICKETS ON SALE NOW!

877-649-BUCS (2827)

SECTION	A	B	C	D	E
GROUP PER GAME PRICE	\$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					
DALLAS September 13 1:00pm	N.Y. GIANTS September 27 1:00pm	CAROLINA October 18 1:00pm	GREEN BAY November 8 1:00pm		
NEW ORLEANS November 22 1:00pm	N.Y. JETS December 13 1:00pm	ATLANTA January 3 1:00pm			



Call 877-649-BUCS (2827) or visit 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

To: 13523779774

Fr:

11:23 08/19/09 PG 001



INDIVIDUAL GAME TICKETS ON SALE NOW!

	MIAMI	August 27	8:00pm
	HOUSTON	September 4	7:00pm
	DALLAS	September 13	1:00pm
	N.Y. GIANTS	September 27	1:00pm
	CAROLINA	October 18	1:00pm
	GREEN BAY	November 8	1:00pm
	NEW ORLEANS	November 22	1:00pm
	N.Y. JETS	December 13	1:00pm
	ATLANTA	January 3	1:00pm

All game dates and times are subject to NFL flexible scheduling.

TO PURCHASE TICKETS CALL 800-745-3000 OR VISIT BUCCANEERS.COM

To immediately and permanently remove your fax number from our opt-in compiled database, please call 888-703-9205. Removaltech@FaxCom.com



FaxQom.Com

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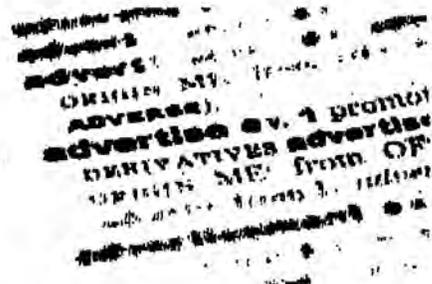
[WebFax](#)

[Broadcast Reports](#)

[Contact](#)



Welcome to the world of fax communications !



Faxqom can disseminate tens of thousands of faxes in just a few minutes using the largest integrated IP fax broadcast system. Whatever the industry----Retail----Wholesale---- Manufacturing----Banking----Medical----Communications----Travel.....you name it , we can handle it ! Faxqom can disseminate information FASTER and more Economically and Conveniently than any other means.

Get there first ! By improving your communications to large groups.....By reducing your cost of distributing information.....By allowing you to control delivery of sensitive information.....By giving you the capabilities of target marketing by fax / s.i.c codes and geographic areas.....By allowing you to bulk fax, or in another words, reaching every single fax number in a geographic area.

Worldwide IP Fax Broadcast Services

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Thank you for visiting FaxQom. FaxQom has a solid reputation and has been providing quality service worldwide for over 18 years. We specialize in Worldwide IP Fax Broadcast Services. Count on FaxQom for your broadcast advertising needs.

Applications for Faxqom Services

A financial corporation provides clients with daily updates on markets and developments.

A public relations firm distributes 2,000 press releases overnight to announce the launch of a new product.

A trade organization sends announcements to its 5,000 members.

A publisher distributes a weekly newsletter to 10,000 subscribers around the country.

An insurance agent wants to send an insurance update to every fax number in the 713, 815, 904, 212 area codes.

FaxQom.Com

Page 3 of 4

Insurance agents need **RED HOT LEADS** to generate new business, FaxQom supplies agents with new leads daily.

A mortgage brokers and loan officers broadcast to certain area codes around the country for new business.

Stock brokers use FaxQom daily for distributing stock updates to potential investors around the U.S.

Travel agencies use FaxQom daily to broadcast travel and vacation specials throughout the country.

Broadcast Rates

Targeted fax broadcasting by city, state, area code...3.0 cents per page

Minimum order \$300

Targeted fax broadcasting by SIC code.....8 cents per page

Minimum order \$400

Submission of own databases.....2.5 cents per page

Quantity price breaks are available, ask for details.

Payment Options

Mastercard, Visa, Wire transfer, Bank draft

FaxQom New York, NY

FaxQom Atlantic Boston, Ma

FaxQom Pacific Seattle, Wa

Ph 508-500-4806

Ph 617-874-2147

sales@faxqom.com

FaxQom.Com

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Worldwide IP Fax Broadcast Services

EXHIBIT J

UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:13-cv-1592-17 AEP

CIN-Q AUTOMOBILES, INC., and
MEDICAL & CHIROPRACTIC CLINIC,
INC., Florida corporations, individually and
as the representative of a class of
similarly-situated persons,

Plaintiffs,

v.

BUCCANEERS LIMITED PARTNERSHIP
and JOHN DOES 1-10,

Defendants.

**DEFENDANT BUCCANEERS LIMITED PARTNERSHIP'S AMENDED ANSWER,
AFFIRMATIVE DEFENSES, AND DEMAND FOR JURY TRIAL TO PLAINTIFF'S
SECOND AMENDED CLASS ACTION COMPLAINT**

Defendant, Buccaneers Limited Partnership (hereinafter "BLP") , by and through its undersigned counsel hereby files its Amended Answer, Affirmative Defenses, and Demand for Jury Trial to Plaintiff's Second Amended Class Action Complaint, and states as follows:

PRELIMINARY STATEMENT

1. BLP admits that this case challenges the alleged practice that BLP sent unsolicited facsimiles but BLP denies the same.
2. Denied.
3. Denied.
4. Denied.
5. Denied.

JURISDICTION AND VENUE

6. Admit.
7. BLP admits that venue is proper but denies that BLP committed a statutory tort.

PARTIES

8. Without knowledge, therefore denied.
9. Without knowledge, therefore denied.
10. Denied.
11. Without knowledge, therefore denied.

FACTUAL ALLEGATIONS

12. Admit.
13. Denied.
14. Denied.
15. Denied.
16. Denied.
17. Denied.
18. Denied.
19. Denied.
20. Denied.
21. Without knowledge, therefore denied.
22. Denied.
23. Denied.
24. Denied.

CLASS ALLEGATIONS

25. Denied.

26. Denied.

27. Denied.

(a) Denied.

(b) Denied.

(c) Denied.

(d) Denied.

(e) Denied.

(f) Denied.

(g) Denied.

(h) Denied.

(i) Denied.

(j) Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

(a) Denied.

(b) Denied.

(c) Denied.

(d) Denied.

- (e) Denied.
- (i) Denied.
- (ii) Denied.
- (iii) Denied.
- (iv) Denied.
- (v) Denied.
- (vi) Denied.

COUNT I

Claim for Relief for Violation of the JFPA, 47 U.S.C. §227 et seq.

33. BLP reasserts and realleges all responses to paragraphs 1 through 32 as if fully set forth herein.

34. The allegations set forth in Paragraph 34 are legal conclusions that do not call for a response, and accordingly, are denied.

35. The allegations set forth in Paragraph 35 are legal conclusions that do not call for a response, and accordingly, are denied.

36. The allegations set forth in Paragraph 36 are legal conclusions that do not call for a response, and accordingly, are denied.

1. The allegations set forth in Paragraph 36(1) are legal conclusions that do not call for a response, and accordingly, are denied.

2. The allegations set forth in Paragraph 36(2) are legal conclusions that do not call for a response, and accordingly, are denied.

3. The allegations set forth in Paragraph 36(3) are legal conclusions that do not call for a response, and accordingly, are denied.

37. The allegations set forth in Paragraph 37 are legal conclusions that do not call for a response, and accordingly, are denied.

A. The allegations set forth in Paragraph 37(A) are legal conclusions that do not call for a response, and accordingly, are denied.

B. The allegations set forth in Paragraph 37(B) are legal conclusions that do not call for a response, and accordingly, are denied.

C. The allegations set forth in Paragraph 37(C) are legal conclusions that do not call for a response, and accordingly, are denied.

D. The allegations set forth in Paragraph 37(D) are legal conclusions that do not call for a response, and accordingly, are denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

COUNT II
Conversion

44. BLP reasserts and realleges all responses to paragraphs 1, 3 and 8 through 23 as if fully set forth herein.

45. Denied.

46. Denied.

47. Denied.

- 48. Denied.
- 49. Denied.
- 50. Denied.
- 51. Denied.
- 52. Denied.

AFFIRMATIVE DEFENSES

1. BLP affirmatively states that the Plaintiffs had a duty to take reasonable steps to mitigate and/or avoid their alleged damages and failed to do so by failing to opt-out of receiving facsimiles. Furthermore, Medical & Chiropractic Clinic, Inc., failed to follow the directive by the Court to file a motion for default judgment in Medical & Chiropractic Clinic, Inc. v. Michael Wayne Clement, Steve Simms, Wayne Clement and Carl Simms d/b/a Faxqom.com, Case No. 8:12-cv-607-T-26TGW in the United States District Court Middle District of Florida Tampa Division. Additionally, Cin-Q failed to mitigate its damages by not collecting on the judgment in Cin-Q Automobiles, Inc. v. Michael Wayne Clement, doing business as FaxQom.com, Case No. 8:11-cv-01502-JSM-AEP in the United States District Court Middle District of Florida Tampa Division, and to the extent that it has done so, it is not entitled to a recovery from BLP.

2. BLP affirmatively states that any alleged unlawful facsimiles were sent by FaxQom and were sent beyond the scope of authority given to FaxQom by BLP. Therefore, any alleged violations of the Telephone Consumer Protection Act were by FaxQom and BLP is not liable for the same.

3. BLP affirmatively states that Plaintiffs' claims are barred as BLP is not vicariously liable for the actions of FaxQom and/or any individuals or entities whom FaxQom hired to send facsimiles.

4. BLP affirmatively states that Plaintiffs failed to plead that BLP was vicariously liable for the actions of FaxQom and/or any individuals or entities whom FaxQom hired to send facsimiles.

5. BLP affirmatively states that Plaintiffs' claims are barred as the Plaintiffs do not have standing to bring such claims as they cannot established they received faxes from BLP.

6. BLP affirmatively states that BLP is entitled to a set off for the benefits the Plaintiffs have received from a collateral source. Specifically, BLP is entitled to a set off for the benefits received by Cin-Q from FaxQom/Michael Wayne Clement to satisfy a judgment in Cin-Q Automobiles, Inc. v. Michael Wayne Clement, doing business as FaxQom.com, Case No. 8:11-cv-01502-JSM-AEP in the United States District Court Middle District of Florida Tampa Division.

7. BLP affirmatively states that Plaintiffs' class allegations are barred as the legislative intent of the Telephone Consumer Protection Act is for the consumer to appear without an attorney in a small claims court. *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*, 421 N.J.Super. 268, 273 (N.J. Super. App. Div. 2011); *Local Baking Products, Inc. v. Westfield Rental-Mart, Inc.*, Case No. L-4701-09, 2013 WL 709257, at *2 (N.J. Super. App. Div. 2013).

8. BLP affirmatively states that Cin-Q's claims are barred as Cin-Q has already been compensated for alleged violations of the Telephone Consumer Protection Act for receipt of the same fax at issue in this case in Cin-Q Automobiles, Inc. v. Michael Wayne Clement, doing business as FaxQom.com, Case No. 8:11-cv-01502-JSM-AEP in the United States District Court Middle District of Florida Tampa Division.

9. BLP affirmatively states that the Plaintiffs failed to allege demand or futility of demand for the return of the Plaintiffs' and other Class members' fax machines, toner, paper, and employee time. *Ginsburg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 49 (Fla. 3d DCA 1994).

10. BLP affirmatively states that the Plaintiffs do not own, or possess rights to the other Class Members' fax machines, toner, paper and employee time that is the subject of the claim for Conversion in the Second Amended Class Action Complaint. *Page v. Matthews*, 386 So. 2d 815 (Fla. 5th DCA 1980).

11. BLP affirmatively states that Plaintiffs' claims are barred pursuant to 47 U.S.C. §227(b)(1)(C)(i), because Plaintiff and potential class members had an established business relationship with BLP.

12. BLP affirmatively states that Plaintiffs' claims are barred pursuant to 47 U.S.C. §227(b)(1)(C)(ii)(II), because Plaintiff and potential class members invited faxes by advertising or displaying their fax numbers publicly on business cards, advertisements, on the internet, etc.

13. The incident giving rise to this cause of action and the Plaintiffs' damages was the sole and proximate result or partially contributed thereto from the negligence or other conduct of persons other than BLP and over whom BLP exercised no control, and with whom BLP has no legal relationship. Pursuant to Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), any damages awarded to the Plaintiffs are subject to apportionment by the jury of the total fault of all participants in the subject incident. The apportionment of fault statute applies to all named parties, any settling defendants or parties, and any other person or entity that is discovered to have been negligent which operated as a legal cause of any injury or damage to the Plaintiffs, including, but not limited to, FaxQom, Westfax, Inc. a/k/a 127 High Street d/b/a 123 High Street, Rocket Messaging, Datalink USA Enterprises, Inc. a/k/a Coast to Coast Marketing a/k/a DMI

Marketing a/k/a Datalink, Datamark Inc., JCFDATA, Inc. Clear Choice Sales, and Concord III, L.L.C., d/b/a Concord Technologies.

14. BLP affirmatively states that Plaintiffs' claims are barred because Plaintiffs failed to join an indispensable party. Specifically, Craig Cinque, on behalf of Plaintiff Cin-Q, testified during his deposition that Cin-Q does not own the facsimile number that received the facsimile for which it is suing BLP. This Court cannot accord complete relief among the existing parties in this required party's absence, and thus, the owner of this facsimile number is a required party to this action.

15. BLP specifically reserves the right to amend the Affirmative Defenses pled above and to assert additional Affirmative Defenses that become known to them during the course of discovery.

WHEREFORE, BLP requests all relief to which it is entitled, and any other relief the Court deems just and proper.

DEMAND FOR JURY TRIAL

BLP hereby demands trial by jury to all issues by right so triable.

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel of parties who are not authorized to receive electronically Notices of Electronic Filing.

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EXHIBIT K

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

CIN-Q AUTOMOBILES, INC. and MEDICAL &)	
CHIROPRACTIC CLINIC, INC., Florida)	
corporations, individually and as the representative)	
of a class of similarly-situated persons,)	
)	Civil Action No.:
Plaintiff,)	
)	8:13-CV-01592-17 EAK-AEP
v.)	
)	
BUCCANEERS LIMITED PARTNERSHIP and)	<u>Dispositive Motion Pursuant to LR</u>
JOHN DOES 1-10,)	<u>3.01(h)</u>
)	
Defendants.)	

**PLAINTIFFS' MOTION AND MEMORANDUM OF LAW
IN SUPPORT OF SUMMARY JUDGMENT**

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Glenn L. Hara (pro hac vice pending)
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Fax: (813) 228-6000

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Table of Points and Authorities v

Statement of Uncontested Facts..... 1

A. BLP decides to advertise by fax, designs the fax advertisement, and hires FaxQom to send the faxes. 1

B. BLP tells FaxQom to send fax advertisements to area codes 352, 941 813, and 727 on July14-16, 2009, including to Medical & Chiropractic on July 15, 2014. 4

C. BLP immediately begins receiving complaints about unsolicited faxes..... 5

D. BLP tracks the results of the first round of fax broadcasts, concludes it was effective in generating ticket sales, and sends more faxes. 5

E. BLP receives additional complaints about the fax campaign..... 5

F. BLP directs FaxQom to send fax advertisements to area codes 727, 813 352, and 941 on August 17-20 2009, including to Cin-Q on August 19, 2009. 6

G. Attorney Phyllis Towzey notifies BLP it is violating the TCPA. 7

H. Cin-Q serves BLP with a TCPA class-action lawsuit..... 7

I. Towzey corrects Alvare’s misunderstanding of TCPA “sender” liability..... 8

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 A. BLP is directly liable under agency law and tort law..... 17

 1. BLP authorized FaxQom to take actions that, if taken by BLP, would subject BLP to liability. 17

 2. BLP ratified FaxQom’s conduct. 19

 3. BLP was negligent in selecting, supervising, and controlling FaxQom. 21

 4. BLP delegated its statutory duty to Faxqom, which failed to perform. 21

 B. BLP is vicariously liable for FaxQom’s acts within the scope of its employment and with apparent authority. 23

- 1. FaxQom acted within the scope of its employment to send
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- 2. FaxQom acted with apparent authority..... 24
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The Court should hold Defendant Buccaneers Limited Partnership (“BLP”) directly liable under the Telephone Consumer Protection Act of 1991 (“TCPA”). The Court already held BLP is the “sender,” since its “goods or services” are advertised in the faxes sent to Plaintiffs (Doc. 41 at 4), and the FCC has ruled a sender is “ultimately liable,” 10 FCC Rcd 12391 ¶ 34, even if it relies on a fax broadcaster’s misrepresentations “about the legality” of the faxing, 21 FCC Rcd 3787 ¶ 40. The remaining elements of a TCPA claim are undisputed, so summary judgment is appropriate. The Court should also find BLP sent faxes “willfully or knowingly,” warranting treble damages.

Even in the absence of “sender” liability, BLP is liable under the common law of agency and torts for the actions of its fax broadcaster, FaxQom. BLP kept faxing after it had actual notice of its TCPA violations, ratifying the acts of its agent, and it had complete control over the fax campaign, designing the faxes, choosing the area codes, specifying dates and times for broadcasts, monitoring the broadcasts, tracking ticket sales generated, and sending more faxes based on the results. BLP was negligent in hiring and supervising FaxQom. But FaxQom sent the faxes as directed, and BLP reaped the benefits. Now BLP is liable for the consequences.

Statement of Undisputed Facts¹

A. BLP decides to advertise by fax, designs the fax advertisement, and hires FaxQom to send the faxes.

BLP owns the Tampa Bay Buccaneers and sells tickets to its games. (Kaiser Dep. at 68). Matt Kaiser, BLP’s Director of New Business Development, testified as BLP’s Rule 30(b)(6) representative. (*Id.* at 13). In early 2009, Kaiser pitched an idea to his superiors to “generate some

¹ The following are attached in Plaintiffs’ Appendix of Exhibits: Ex. A, Deposition of Matthew Kaiser (“Kaiser Dep.”); Ex. B, BLP Resp. First Req. Admissions; Ex. C, Group Exhibit of Business Records Produced by BLP; Ex. D, Second Am. Compl.; Ex. E, Deposition of Craig Cinque (“Cinque Dep.”); Ex. F, Affidavit of Phyllis J. Towzey (“Towzey Aff.”); Ex. G, Deposition of Manuel Alvare (“Alvare Dep.”); Ex. H, Cin-Q State Court Complaint Against BLP; Ex. I, BLP Mot. Dismiss State Court Complaint; Ex. J, Declaration of Robert Biggerstaff (“Biggerstaff Decl.”); Ex. K, Deposition of Michele Zakrzewski (“M. Zakrzewski Dep.”); Ex. L, *In re GroupMe, Inc./Skype Communications*, Docket No. 02-278, FCC-14-33, 2014 WL 1266074 (Mar. 27, 2014).

ticket sales” by sending advertisements to fax numbers in and around Tampa Bay. (*Id.* 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 then authorized by BLP to hire a fax broadcaster to execute the advertising campaign. (BLP Resp. First Req. Admissions, No. 117).

Kaiser knew prior to hiring FaxQom there was a federal statute called the TCPA that imposed “liability associated with the unsolicited sending of faxes.” (Kaiser Dep. at 72, 121). BLP had a copy of a 2006 FCC order explaining that where “a fax broadcaster . . . makes representations about the legality of faxing,” leading to unsolicited faxes being sent, “the sender is liable,” while the fax broadcaster may also be “jointly and severally liable” in some circumstances. (BLP000890).

Kaiser conducted internet research on fax broadcasters and settled on a company called FaxQom. (Kaiser Dep. at 66). Kaiser does not remember whether FaxQom provided references, whether he checked the Better Business Bureau for complaints about FaxQom, or whether he asked if FaxQom “maintained liability insurance.” (*Id.* at 117–18). Kaiser did not research whether FaxQom was “a legal incorporated business,” and he was not “concern[ed]” with where FaxQom was physically located. (*Id.*) Kaiser did not ask how many employees FaxQom had. (*Id.* at 93).

Kaiser thought consumers could “opt-in” under the TCPA if they “[a]greed to receive faxes” from the fax broadcaster. (*Id.* at 72, 84). So he wanted to send to people who “had agreed to receive from FaxQom.” (*Id.* at 97). On June 24, 2009, Kaiser told FaxQom that “[a]fter reading some literature” about the TCPA, he was “concerned” and asked, “[c]an you please tell me if 100% of the numbers you gather have opted in, to receive your faxes?” (BLP000011). Kaiser asked if FaxQom would “indemnify us from any complaints or potential financial recourse as it relates to the fines imposed for spam mail?” (*Id.*) FaxQom stated it had millions of fax numbers, that “100% of our data is ‘opt-in,’” and that it was “no problem” to indemnify BLP. (BLP000013). Kaiser “trusted”

FaxQom. (Kaiser Dep. at 96). Kaiser does not remember if FaxQom explained how it supposedly obtained permission from millions of people (*id.* at 91), other than “legal techniques” (*id.* at 144).

On June 26, 2009, Kaiser sent FaxQom a draft advertisement created by BLP, listing “group ticket” prices. (BLP000022). FaxQom responded, “[c]opy looks great . . . [w]hat day would you like to launch?” (BLP000025). FaxQom recommended BLP add the following language, which BLP “squeeze[d]” in 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@FaxQom.com.” (BLP000029). The language does not provide a fax number for opt-out requests or state that a sender’s failure to comply within 30 days is unlawful. (*Id.*)

On July 9, 2009, BLP and FaxQom executed a “Fax Indemnity Agreement.” (BLP000068). The first page states FaxQom “agrees to indemnify defend, and hold harmless” BLP from legal issues that “arise from fax broadcasting through FaxQom.” (BLP000068). Kaiser drafted an addendum to give BLP greater “comfort.” (Kaiser Dep. at 108). It states (1) FaxQom will “stop the campaign and refund all monies” at BLP’s request, (2) FaxQom “indemnifies the Tampa Bay Buccaneers from any and all complaints or litigation that may arise as a result of this campaign,” (3) FaxQom will report “successfully delivered faxes” and charge BLP only for successful 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 associated with facimile [sic] marketing.” (BLP000069). BLP’s in-house General Counsel, Manuel Alvare, reviewed and approved the agreement. (BLP00136).

The agreement does not specify how FaxQom would mechanically transmit the fax advertisements over phone lines or prohibit FaxQom from using third parties to do so. (BLP000068–69). Kaiser proceeded to place orders for thousands of fax advertisements. (Kaiser Dep. at 107–08). Kaiser did not feel it was “necessary” to do anything else to verify the legality of

the fax campaign. (*Id.* at 131). Kaiser never asked FaxQom for a list of the fax numbers or contact information for any of the intended targets to verify they had “opted in.” (*Id.* at 132).

B. BLP tells FaxQom to send fax advertisements to area codes 352, 941, 813, and 727 on July 14–16, 2009, including to Medical & Chiropractic on July 15, 2009.

On July 9, 2009, BLP directed FaxQom to send advertisements for Buccaneers tickets to fax numbers in selected area codes 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 specified that fax broadcasts begin at 9:15 a.m. (*Id.*) BLP insisted on controlling the specific time of day faxes were sent because BLP had “a sales department that needs to be available when people receive these” and “[i]f they go out late, our sales people will leave for the day.” (BLP000093). 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 a cover page stating, “attached is the information on group seating.” (*Id.*) The fax contains the “remove” language BLP added at the bottom. (*Id.*) Kaiser instructed FaxQom the fax was “for tomorrow only,” and he would “send you the ones for Wednesday and Thursday after this one goes out.” (*Id.*) BLP told FaxQom it had no authority to modify the content of the faxes, except at BLP’s direction. (Kaiser Dep. at 273). Kaiser told FaxQom to add his fax number to the list so he could monitor the broadcast in real time. (*Id.* at 48).

On July 14, 2009, at 11:18 a.m., Kaiser had not yet received the advertisement on his fax machine, so he sent FaxQom an email asking whether it put his fax number “on the list” as he instructed. (BLP000043). FaxQom stated it did, and Kaiser sent FaxQom “the Wednesday and Thursday faxes (marked as 7/15 and 7/16).” (BLP000044).

On July 15, 2009, Plaintiff Medical & Chiropractic received a Buccaneers advertisement on its fax machine in area code 813, according to schedule. (M. Zakrzewski Dep. at 9–10, 121; Second Am. Compl., Ex. A). The fax is identical to the “7/15” fax Kaiser sent to FaxQom. (Second Am.

Compl, Ex. A; BLP000045–46). Medical & Chiropractic had no business relationship with BLP and never gave BLP permission to send it fax advertisements. (M. Zakrzewski Dep. at 207, 222).

C. BLP immediately begins receiving complaints about unsolicited faxes.

On July 15, 2009, BLP received a phone call from 813 area code resident Mike Paschke, complaining that he “received numerous faxes,” that he had filed “law suits” against marketing companies before, that he was “going to contact [the] State Attorney office,” and that he “would like a call back with the name of the marketing company [BLP] used.” (BLP000053). Ben Milsom, BLP’s Director of Sales, asked Kaiser, “[a]ny response to this?” (*Id.*)

Kaiser forwarded Milsom’s email to Ed Glazer, the chairman and owner of BLP (Kaiser Dep. at 22), asking, “[w]ould you like me to call this guy back and give him the information?” (BLP000052). Glazer told Kaiser, “email me our signed indemnification” and do not “worry about” calling Paschke. (BLP000052). Kaiser told Milsom for future complaints about unsolicited faxes, “just tell them that the opt out info is located” on page two. (*Id.*) Kaiser told Glazer Paschke’s fax number would not be “on our next go around,” and that “[a]ll is well.” (BLP000058).

D. BLP tracks the results of the first round of fax broadcasts, concludes it was effective in generating ticket sales, and sends more faxes.

On July 20, 2009, eleven days into the campaign, Milsom reported to his colleagues: “So far we have generated \$12,643 in Group Sales revenue from the Group Fax Blasts.” (BLP00676).

Kaiser responded, “Great! The cost was \$15,336 (since we did 2-page faxes). One more sale and we’re about there.” (*Id.*)

E. BLP receives additional complaints about the fax campaign.

On July 22, 2009, Nick Coblio, an 813 area code resident, called BLP to complain about the unsolicited Buccaneers fax and a text advertisement received on his cell phone. (BLP00677). At the time, BLP was saturating the market with hundreds of thousands of text and email advertisements, in addition to the faxes. (BLP00144–47). Milsom spoke to Coblio and reported to Kaiser that he

threatened to “file a complaint with the FCC.” (*Id.*) Kaiser responded, “just add both his fax and mobile to the list, so I can send this to the companies if we decide to go for round 2 (which we will likely do).” (*Id.*) Kaiser also referred to a “hospital” that “received all the faxes” and asked Milsom to add the Hospital’s number to the “remove” list as well. (*Id.*)

Kaiser brushed off the complaints about the fax and text campaigns, stating, “[i]f these people didn’t sign up for every free offer they see, then their names probably wouldn’t end up in 2 separately compiled [sic] marketing databases of ‘opted-in’ recipients. I wish there was a nice way to explain that to them.” (BLP00677). In BLP’s view, it was the consumers’ own fault they were receiving the faxes, not BLP’s. (*Id.*)

F. BLP directs FaxQom to send fax advertisements to area codes 727, 813, 352, and 941 on August 17–20, 2009, including to Cin-Q on August 19, 2009.

On August 13, 2009, BLP directed FaxQom to send an advertisement for “individual game tickets” to area codes 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 30, 2009. (BLP000087). BLP required broadcasts begin at 9:30 a.m. (*Id.*) Kaiser sent the new advertisement to FaxQom, but did not attach the Fax Indemnity Agreement or addendum. (BLP000090–91). BLP paid FaxQom \$7,668.40 for the second round of broadcasts. (BLP000087).

On August 17, 2009, Kaiser asked FaxQom, “Did the fax go out today? I have not received my copy?” (BLP000092). FaxQom responded, “[y]ou’ll get your copies . . . things are running slow as we are all 100% capacity today.” (BLP000093). Kaiser responded he was “less concerned with my copy than I am keeping the schedule for the faxes to be sent.” (BLP000093). He explained, “we have a sales department that needs to be available when people receive these” and stressed that “[w]e must keep schedule tomorrow and through the rest of the week.” (*Id.*)

On August 19, 2009, as scheduled, Plaintiff Cin-Q received the “individual game tickets” fax at its area code 352 fax number. (Cinque Dep. at 268; Second Am. Compl., Ex. B). Cin-Q had no

business relationship with BLP and never gave BLP permission to send it fax advertisements. (Cinque Dep. at 150).

G. Attorney Phyllis Towzey notifies BLP it is violating the TCPA.

On August 20, 2009, attorney Phyllis J. Towzey sent a letter to BLP's registered agent complaining of fax advertisements she received at her office on July 14, 2009, and August 17, 2009. (Towzey Aff. ¶¶ 1, 5, 6). Towzey had no business relationship with BLP and did not give BLP permission to send fax advertisements. (*Id.* ¶¶ 7, 8). Towzey warned BLP the TCPA prohibits fax advertisements without "prior express invitation or permission" and imposes \$500 damages per violation, which can be increased to \$1,500 for "willfully or knowingly" violating the statute, setting forth verbatim portions of the statute. (*Id.* ¶ 11; *id.*, Ex. A). Towzey offered to settle for \$1,000. (*Id.*, Ex. A at 1, 2). Towzey warned she planned to sue BLP in this Court. (*Id.*)

Shortly thereafter, Towzey received a phone call from Alvare, BLP's General Counsel, who stated he received the August 20 letter. (Towzey Aff. ¶ 15; Alvare Dep. at 44). Alvare told Towzey the faxes had been sent by FaxQom and that FaxQom was liable for any damages because it "sent" the fax, not BLP. (Towzey Aff. ¶¶ 16, 17; Alvare Dep. at 44–46).

H. Cin-Q serves BLP with a TCPA class-action lawsuit.

On August 28, 2009, Cin-Q filed a class-action lawsuit against BLP under the TCPA in Florida state court. (Ex. H). Cin-Q served the Complaint on BLP's registered agent September 7, 2009. (*Id.*) BLP hired outside counsel to defend the case. Counsel appeared in the case October 5, 2009, and filed a Motion to Dismiss. (Ex. I).

The Complaint alleged BLP sent the "individual game tickets" fax to Cin-Q on August 19, 2009 (attaching a copy), that BLP had not obtained permission, and that BLP was therefore liable for \$500 minimum damages. (Ex. F ¶¶ 12, 27). The Complaint alleged BLP sent the same or similar faxes to a class of "fifty or more persons." (*Id.* ¶ 17). It alleged "[t]he TCPA is a strict liability

statute,” making BLP liable “even if its actions were only negligent.” (*Id.* ¶ 30). And it alleged the class members had not given permission “for Defendant or anyone else to fax advertisements about Defendant’s goods or services” to them. (*Id.* ¶ 31).

I. Towzey corrects Alvare’s misunderstanding of TCPA “sender” liability.

On September 16, 2009, Towzey wrote a second letter to Alvare, stating it was irrelevant whether a “vendor actually sent the fax,” since “the fax was clearly sent on behalf of the Tampa Bay Buccaneers, and expressly solicits the purchase of tickets for Bucs games.” (Towzey Aff., Ex. C). Alvare called Towzey again, asking her not to file a lawsuit and assuring her he would make sure she did not receive any more unsolicited faxes from BLP and “see what he could do” to make FaxQom pay her damages. (*Id.* ¶ 22). Towzey has not received any compensation to date. (Towzey Aff. at ¶ 23). As a member of the putative class, Towzey will recover if Plaintiffs are successful.

J. BLP seeks indemnification from FaxQom.

On October 2, 2009, BLP’s outside counsel sent a letter to FaxQom at the address it provided Kaiser, demanding FaxQom “provide a legal defense” in this lawsuit and “indemnify BLP to the fullest extent of the law.” (BLP00789). The letter was returned as undeliverable. (BLP00794). On April 8, 2014, BLP filed a third-party complaint against FaxQom. (Doc. 120).

K. BLP tells FaxQom to execute a third round of fax broadcasts on May 24–26, 2010, including a fax to Plaintiff Medical & Chiropractic on May 24, 2010.

On May 18, 2010, BLP directed FaxQom to send a third round of faxes to area code 813 – May 24, 2014; area code 727 – May 25, 2014; and area codes 352 and 941 – May 26, 2014. (BLP000107). BLP specified that broadcasts begin at 9:45 a.m. (*Id.*) BLP did not attach the Fax Indemnity Agreement. (*Id.*) Instead, for the first time, Kaiser added handwritten language stating FaxQom will “indemnify and hold harmless Tampa Bay Buccaneers and any of its affiliates, agents, or employees harmless from any claims, complaints, or FCC violations as a result of this campaign and hereby confirms that all numbers have been collected lawfully and with cause.” (BLP000109).

BLP sent FaxQom the new fax advertisement it designed and directed FaxQom to add opt-out language “simply about the opt-out.” (BLP00307). On May 20, 2010, BLP sent a revised order form and stated payment for the broadcast would be delivered the next day, reminding FaxQom to “show me the proof of the opt out info you add.” (BLP00310). Kaiser directed FaxQom to “swap out” the second page of half of the faxes to each area code with a different page BLP had designed, and to “please acknowledge my indemnification note.” (BLP00310).

On May 24, 2010, Plaintiff Medical & Chiropractic received the new advertisement at its area code 813 fax number. (Biggerstaff Decl. ¶ 7). As with the fax it received on July 15, 2009, Medical & Chiropractic did not give BLP permission to send the fax. (M. Zakrzewski Dep. at 207, 222). From May 25–28, 2010, BLP made a series of interim modifications from the written broadcast order, varying the area codes (BLP00319) and content of the faxes (BLP00321–22; BLP00325–26). On June 1, 2010, Kaiser reminded FaxQom, “I never received a signed copy of the order form back from you” with the handwritten indemnification language. (BLP00328).

L. The Florida Attorney General serves a cease-and-desist letter on BLP.

On June 3, 2010, the Florida Attorney General sent BLP a letter stating it received complaints BLP had sent unsolicited fax advertisements and that it is “unlawful to transmit an unsolicited facsimile” under Florida law and “47 U.S. C. § 227(b)(1)(C) and the Junk Fax Protection Act of 2005 set forth a similar prohibition under federal law.” (BLP00758). The AG concluded that, “[b]ased upon the information received by this office, your company is in violation of either the state or federal laws (or both),” that violations “carry civil penalties of \$500.00 per transmission,” and that BLP was advised to stop immediately. (*Id.*)

On June 3, 2010, BLP was planning its next round of fax broadcasts, and Kaiser was still asking FaxQom for its “acceptance” of his handwritten language regarding indemnification of BLP “employees” (BLP00330), although thousands of faxes had already been sent since he proposed that

language two weeks earlier (BLP000109). Kaiser insisted he needed FaxQom's signature "before any more go out." (BLP00333). FaxQom did as it was told and stopped sending faxes. (BLP00336).

FaxQom sent its signature on June 7, 2010, and BLP authorized FaxQom to resume faxing.

(BLP00343). On June 9, 2010, FaxQom reported area code 352 "will complete tomorrow morning," and Kaiser told FaxQom to "finish 727 on Tuesday, Wednesday, and Thursday." (BLP00631).

On June 9, 2010, at 2:32 p.m., BLP's Senior Director of Sales and Advertising, Jason Layton, sent an email to Kaiser and others attaching the Florida AG's cease-and-desist letter, stating, "[w]e should probably stop sending the faxes based on the attached." (BLP00759). Kaiser responded that "for now" BLP would hold off, until he could "get a complete explanation of which statutes have been violated and exactly what that means." (BLP00759).

M. BLP stops faxing and consults an attorney for advice.

On June 9, 2010, BLP directed FaxQom to stop faxing. (BLP00350). On June 16, 2010, BLP told FaxQom that, "at least for now," it was not comfortable "moving forward with more faxes," although it might do so "after some further research" being conducted by its attorney. (BLP00356).

Argument

I. BLP is directly liable as the "sender" of unsolicited fax advertisements under the TCPA and FCC regulations.

The Court has already held BLP is the "sender" because the faxes advertise BLP's "goods or services." (Doc. 41 at 4). BLP claims it cannot be held liable because FaxQom misrepresented that the faxes were legal. As argued below, the FCC issued a final order on this precise issue in 2006, ruling the sender is ultimately liable for all unsolicited faxes, even if it is misled by a fax broadcaster. The TCPA is "essentially a strict liability statute," imposing liability even for "erroneous" faxes. *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 776 (11th Cir. 2011). The sender's intent is irrelevant, "except when awarding treble damages." *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 2013 WL 3654550, at *3 (W.D. Mich. July 12, 2013).

A. The sender is “ultimately liable” for all unsolicited faxes under the TCPA, even if it is misled by a fax broadcaster.

In 2006, the FCC addressed a common scenario in which “a fax broadcaster . . . provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules,” leading to unsolicited faxes being sent. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd 3787, 3808 ¶ 40 (Apr. 6, 2006) (“2006 Junk Fax Order”). The FCC ruled “the sender is liable for violations of the facsimile advertising rules” under this scenario, even if it was misled by the fax broadcaster. *Id.* ¶ 39. As for the fax broadcaster, the FCC ruled it “may be held jointly and severally liable”—along with the “sender”—if it has a “high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent” it. *Id.* ¶ 40. This final order reaffirmed the FCC’s longstanding rule that the “entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.” *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407–08, ¶¶ 34–35 (July 26, 1995).

To remove any confusion in future cases where a fax broadcaster misleads an advertiser, the FCC issued a regulation defining “sender” as the person or entity (1) “on whose behalf” the fax is sent or (2) “whose goods or services” are advertised. 47 C.F.R. § 64.1200(f)(10). The “whose goods or services” part of the definition cements the FCC’s ruling that a sender cannot escape TCPA liability by arguing faxes were not sent “on [its] behalf” on the basis that the fax broadcaster was authorized to send only legal faxes. 21 FCC Rcd 3787, 3808 ¶ 40

Since 2006, the courts have consistently relied on the FCC’s rulings and the definition of “sender” to reject arguments that advertisers are not liable if they are misled by fax broadcasters. In *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 2013 WL 3654550, at *3 (W.D. Mich. July 12, 2013), for example, the defendants asked the broadcaster “whether its practices were legal,” the

broadcaster “answered in the affirmative,” and the defendants “accepted the response as true.” The court granted the plaintiff summary judgment, observing the defendants may have been “victims of fraud or negligence (for not consulting a lawyer),” but they were nonetheless “senders” under § 64.1200(f)(10) and ultimately liable for the TCPA violations. *Id.* at *3 & n.2.

Likewise, in *Glen Ellyn Pharmacy v. Promius Pharma, LLC*, 2009 WL 2973046, at *2 (N.D. Ill. Sept. 11, 2009), the defendant had a written contract with the fax broadcaster stating it would “comply with all applicable laws and regulations in performing the Services, including, without limitation, the Federal Junk Fax Protection Act of 2005 (47 U.S.C. 227).” The defendant moved for summary judgment, arguing it could not be held liable given the scope of the scope of the broadcaster’s contractual authority. *Id.* at *3. The Court denied the motion, holding that the FCC’s rulings making the seller “ultimately liable” were binding. *Id.* at *4.

The definition of “sender” and the FCC’s rulings are unambiguous and conclusive. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (unambiguous statutes “must be ordinarily regarded as conclusive”); *Boeing Co. v. United States*, 258 F.3d 958, 967 (9th Cir. 2001) (“tenets of statutory construction apply with equal force to the interpretation of regulations”); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (regulation unambiguously defined “facility” as physical place, and court was bound to “follow the law as written”). Congress vested the judicial power to consider a challenge to final FCC orders “exclusively” in the federal courts of appeal under 28 U.S.C. § 2342, the “Hobbs Act.” *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 463 (11th Cir. 2012). Since BLP cannot challenge the FCC rules making a “sender” who is misled by a fax broadcaster ultimately liable in this Court, all that is left is to apply those rules.

B. BLP is the “sender” under both parts of the regulatory definition.

There are two ways a person may be the “sender” of an unsolicited fax: (1) as the person “on whose behalf” the fax is sent or (2) as the person whose “goods or services” are advertised. 47

C.F.R. § 64.1200(f)(10). The FCC interpreted the first part of the definition in the 2006 Junk Fax Order, ruling that “[i]n most instances,” the person or entity “on whose behalf” faxes are sent means “the entity whose product or service is advertised or promoted in the message.” 21 FCC Rcd at 3808 ¶ 39. The FCC’s interpretation of its own regulation is entitled to substantial deference. *Blessitt v. Ret. Plan For Employees of Dixie Engine Co.*, 848 F.2d 1164, 1168 (11th Cir. 1988). Because BLP admits its products or services are advertised in the faxes, BLP meets the first part of the definition.

The Court has already held BLP’s “goods or services are advertised or promoted in the unsolicited advertisement” (Doc. 41 at 4), and BLP admits this factor (BLP Resp. First Interrogs. No. 17). Therefore, BLP is the “sender,” even if the faxes were not sent “on [its] behalf.”

C. The remaining elements of a TCPA claim are undisputed, entitling Plaintiffs to summary judgment.

The elements of a TCPA fax claim are (1) the defendant is a “sender,” (2) the faxes are sent using “a telephone facsimile machine, computer, or other device,” (3) the faxes are advertisements, and (4) the faxes are either “unsolicited” or lack compliant opt-out language. *See Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013). BLP does not dispute the faxes were sent using “a telephone facsimile machine, computer, or other device” (Doc. 120 ¶ 29), or that the faxes are “advertisements” (Ex. B, No. 17). Plaintiffs testified they did not give permission to BLP to send faxes or have an established business relationship (“EBR”) with BLP. (M. Zakrzewski Dep. at 207, 222; Cinque Dep. at 150). BLP had no evidence of EBR or permission when it answered Plaintiff’s interrogatories (BLP Resp. First Interrogs. No. 6 (investigation “ongoing”)), and it has none now.

Even if BLP had some evidence of EBR or permission, the faxes do not contain compliant opt-out notice, meaning it cannot raise either defense. *See Turza*, 728 F.3d at 683 (fax advertisements without compliant opt-out language “violate the Act whether or not the recipients were among [the defendant’s] clients”); *Nack v. Walburg*, 715 F.3d 680, 685–86 (8th Cir. 2013) (same). Since BLP has no defenses, Plaintiffs are entitled to summary judgment. *See Breslow v. Wells Fargo Bank, N.A.*, 857 F.

Supp. 2d 1316, 1322 (S.D. Fla. 2012) (summary judgment for plaintiff on TCPA claim where defendant had no evidence of consent) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

D. The Court should find BLP “willfully or knowingly” violated the TCPA.

The Court may award treble damages up to \$1,500 per fax if it finds BLP “willfully or knowingly” violated the statute. 47 U.S.C. § 227(b)(3). Some courts hold “willful or knowing” requires specific intent, meaning the defendant knows it is violating the TCPA, but the majority follow a general-intent rule, where the defendant need only be aware of its conduct. *See Stewart v. Regent Asset Mgmt. Solutions*, 2011 WL 1766018, at *6 (N.D. Ga. May 4, 2011) (collecting cases, adopting general-intent interpretation, and awarding treble damages).

Under a general-intent approach, all BLP’s faxes were “willful and knowing.” BLP designed the faxes, hired a broadcaster, dictated the area codes, dates, and times of day, monitored the results, and sent more faxes based on ticket sales generated. Plaintiffs request \$1,500 for the three faxes sent to Plaintiffs on July 15, 2009, August 19, 2009, and May 24, 2010. Under the specific-intent approach, at the very least, the May 24, 2010 fax was willful and knowing. By that time BLP had been litigating the state-court class action for eight months. Under the specific-intent approach, Plaintiffs request \$500 for the two 2009 faxes and \$1,500 for the May 2010 fax.

II. There is no vicarious-liability requirement in a TCPA unsolicited-fax claim.

BLP will likely argue the FCC’s decision in *In re Dish Network, LLC*, 28 F.C.C.R. 6574, 2013 WL 1934349 (May 9, 2013), overruled its prior rulings that a sender who is misled by a fax broadcaster is ultimately liable for resulting unsolicited faxes, instead requiring the sender be “vicariously liable” under common-law agency principles. This argument fails for two reasons: (1) *Dish Network* did not overrule (or even mention) the FCC’s prior unsolicited-fax rulings and (2) even if *Dish Network* changed the FCC’s position, the new interpretation would apply only to conduct occurring *after* the 2013 ruling; it cannot apply retroactively to BLP’s faxes in 2009 and 2010.

A. *Dish Network* did not change the FCC’s unsolicited-fax rules.

In *Dish Network*, the FCC interpreted TCPA telemarketing provisions defining “seller” as the person “on whose behalf” a telephone call is “initiated.” *Id.* The calls were “initiated” by a third-party telemarketer, and there was no provision in the applicable rules defining “seller” as the person whose “goods or services” were marketed (as in the unsolicited-fax rules). So the plaintiffs needed a way to establish the calls were initiated “on [the defendants’] behalf,” and they sought to use common-law agency principles. The FCC agreed, allowing the plaintiffs to use agency law to hold the defendants liable for phone calls initiated “on [their] behalf” by third parties. *Id.* ¶ 48.

Dish Network does not mention the definition of fax “sender,” the FCC’s 1995 ruling stating the sender is “ultimately liable” for all violations, or the 2006 Junk Fax Order stating “the sender is liable” for all unsolicited faxes, even if it is misled by a fax broadcaster. *Id.* ¶¶ 1–50. It mentions one TCPA fax case in a footnote, where the court held a plaintiff may—not *must*—use agency principles to establish an unsolicited-fax violation where precluding the plaintiff from doing so would allow the defendant to make “an end-run around the TCPA’s prohibitions.” *Id.* ¶ 29, n.84. At best, *Dish Network* stands for the proposition that the FCC allows consumers to use common-law principles to enforce the TCPA, not that it allows advertisers to use common law to circumvent the TCPA.

If the FCC had meant to revise its unsolicited-fax rules in *Dish Network*, it would have said so. An agency may revise its interpretations (prospectively, as discussed below), but it must do so explicitly. The court in *Addison Automatics, Inc. v. RTC Group, Inc.*, 2013 WL 3771423, at *4 (N.D. Ill. July 16, 2013), recognized this point, holding that using *Dish Network* to import a vicarious-liability standard into unsolicited-fax cases would ignore “the rule promulgated by the FCC that defines ‘senders’ as the person or entity whose goods or services are advertised or promoted in the unsolicited advertisement.” *Id.* The court held the FCC’s 2006 rules are “binding on a district court under the Hobbs Act” and so, “even if the Court disagreed with the FCC’s definition of a sender, it

has no authority to disregard it.” *Id.* “In the absence of a repeal of 47 C.F.R. § 64.1200(f)(10) or a clear statement in a final FCC Order specifically modifying” it, the court held, “it must be applied to this case in its entirety and in accordance with its plain meaning.” *Id.* This Court should adopt *Addison Automatics* and reject BLP’s invitation to violate the Hobbs Act by imposing vicarious-liability principles in conflict with the FCC’s unambiguous fax-advertising rules.

B. Even if *Dish Network* changed the rules, that change would be prospective, not retrospective.

An agency may revise its positions, but those changes apply to prospective conduct only. *Wright v. Dir., Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1574 (11th Cir. 1990) (refusing to apply revised agency regulation retroactively to flood-loss claims that were “clearly ‘fixed’ at the time of the loss by the regulations then in effect”). A “clarification” may be applied retroactively, but the court must determine whether a ruling is a “clarification” or a “revision.” *McPhillips v. Gold Key Lease, Inc.*, 38 F. Supp. 2d 975, 980 (M.D. Ala. 1999). The test is whether the ruling is “consistent with prior interpretations and views expressed by the agency.” *Id.* at 980–81 (agency’s 1998 commentary did not apply to contract entered into in 1996 where it was inconsistent with prior commentary).

Here, the FCC ruled in 1995 and 2006 that the sender is *always* “ultimately liable,” while the fax broadcaster is sometimes also liable, if the plaintiff can prove a higher standard (“high degree of involvement”). In contrast, if BLP is correct about *Dish Network*, the new rule is that the sender is *sometimes* liable, if the plaintiff can prove a higher standard (vicarious liability). BLP’s reading of *Dish Network* is therefore “inconsistent” with the 2006 Junk Fax order, and it could apply only to faxing that took place after the effective date of the order, May 9, 2013. BLP’s faxes were sent in 2009 and 2010, and they are subject to the 2006 Junk Fax Order even if *Dish Network* changed the rules.

III. BLP is directly and vicariously liable under the common law of agency and torts.

Even if there were no binding FCC “sender” rulings on point, BLP would be liable for the unsolicited faxes sent to Plaintiffs under the common law of agency and torts. Federal courts look to

the Restatements of Law for guidance in these areas. *See, e.g., Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524 (2013). The Restatement (Third) of Agency § 7.03 summarizes the standards:

- (1) A principal is subject to direct liability to a third party harmed by an agent's conduct when
 - (a) as stated in § 7.04, the agent acts with actual authority or the principal ratifies the agent's conduct and
 - (i) the agent's conduct is tortious, or
 - (ii) the agent's conduct, if that of the principal, would subject the principal to tort liability; or
 - (b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent; or
 - (c) as stated in § 7.06, the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.
- (2) A principal is subject to vicarious liability to a third party harmed by an agent's conduct when
 - (a) as stated in § 7.07, the agent is an employee who commits a tort while acting within the scope of employment; or
 - (b) as stated in § 7.08, the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.

BLP is liable under each of these standards.

- A. BLP is directly liable under agency law and tort law.**
 - 1. BLP authorized FaxQom to take actions that, if taken by BLP, would subject BLP to liability.**

BLP admits it authorized FaxQom to send fax advertisements. (BLP Resp. First Interrogs. No. 14). The Court has held BLP “authorized FaxQom to send the facsimile advertisements on its behalf” and “received the benefits of those faxes.” (Doc. 41 at 5–6). The Court need go no further. BLP hired FaxQom to send fax advertisements, and that is what FaxQom did.

In *Am. Copper*, 2013 WL 3654550, at *3, the fax broadcaster represented that “its practices were legal,” but the court still held the defendants liable under agency principles. *Id.* Even if they relied on the broadcaster's misrepresentations, the court held, the defendants “responded to [the

broadcaster's] advertisement, paid for VoIP lines, completed a questionnaire, and edited and approved a fax [they] knew would be sent to approximately 10,000 target fax numbers of businesses that had not solicited" the faxes. *Id.* It was irrelevant that the broadcaster lied and that the defendants were "unaware" of all the circumstances, the court held, since they had "significant" knowledge of the details of the broadcast and "control over whether to execute" the faxes. *Id.*

This case is much stronger than *American Copper*. In both cases, the broadcaster misrepresented the legality of the faxes, and the defendants remained blissfully "unaware of exactly how the numbers were generated." In this case, however, BLP did not merely "edit and approve" the fax content; it designed the faxes start to finish, with FaxQom relegated to making suggestions. And while the defendant in *American Copper* had "significant" knowledge of the details of the broadcast, BLP dictated every detail, even giving "interim instructions" to modify the written specifications regarding area codes, dates, times, and content. *See* Restatement (Third) Agency § 1.01, cmt. f(1). BLP did not merely have control over "*whether* to execute the fax," it controlled the *how* and *when* of the broadcasts, monitoring them in real time, chastising FaxQom if it did not receive its "sample" on time, and tracking the resulting ticket sales to see if it was getting its money's worth.

BLP's argument that it cannot be held liable because FaxQom promised not to break the law would overturn settled agency and tort law. Under Restatement (Second) of Agency § 212 (1958), "[i]f one intends a particular result to follow from his conduct and the result follows, it is immaterial that the particular way in which it is accomplished was unintended." This rule "results from the general rule, stated in the Restatement of Torts, that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result." *Id.* The Restatement (Second) of Torts § 877 states that "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability" if the person (1) "orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his

own,” (2) “conducts an activity with the aid of the other and is negligent in employing him,” or (3) “has a duty to provide protection” for third persons “and confides the performance of the duty” to another who “fail[s] to perform the duty.” All three conditions apply here.

First, BLP knew or should have known the faxing violated the TCPA. BLP was aware of the TCPA and the 2006 Junk Fax Order, but did not investigate how FaxQom supposedly obtained permission from millions of people. BLP failed investigate further by asking for contact information for some of these “opt-ins” to confirm they had consented. Second, BLP was negligent in employing FaxQom, failing to inquire about where FaxQom was located or how many people it employed to obtain permission from millions of people. BLP took FaxQom at its word, and doing so carries risks. Third, BLP had a statutory duty to obtain permission from Plaintiffs before sending the faxes, and it confided performance of that duty to FaxQom, who failed to perform. The Court need go no further to find BLP directly liable under agency and tort law.

2. BLP ratified FaxQom’s conduct.

A principal may ratify its agent’s acts, even if originally unauthorized, and such ratification relates back and supplies original authority. *Banyan Corp. v. Schucklat Realty, Inc.*, 611 So.2d 1281, 1282 (Fla. 2d DCA 1993). The test is whether the principal affirmatively accepts the benefits of the conduct while “fully informed” of the circumstances. *Id.* Here, BLP had actual notice its fax campaign violated the TCPA, but continued faxing anyway because it was generating ticket sales. BLP suspected it was unlawful from the start, which is why it insisted on an indemnification agreement from FaxQom and drafted an addendum to give it greater “comfort.” BLP was threatened with a lawsuit on the second day of faxing. (BLP000053). That alone should have caused BLP to reexamine the legality of the faxing, but when BLP’s owner learned of the threat, his only response was, “email me our signed indemnification”(BLP000052). Instead of consulting a lawyer, BLP told consumers to just “opt out” (*id.*), assuming “[a]ll is well,” and sending more faxes

(BLP000058). In the meantime, BLP tracked the benefits of the campaign, concluding it nearly made its money back within a week of faxing and sending thousands more faxes. (BLP000676).

When more complaints rolled in, including a threat of an FCC complaint on July 22, 2009 (BLP00144–47), BLP decided to remove the fax number from the list, but to “go for round 2” without pausing to ask why these supposed “opt-in” consumers were complaining. BLP also knew a “hospital” had complained about the faxes, but it merely instructed FaxQom to remove its number from the list rather than investigate why a hospital was receiving its faxes in the first place. BLP believed some consumers brought the faxes on themselves by “sign[ing] up for every free offer they see” (BLP000677), but it could not have held that belief with regard to a hospital.

Then came attorney Phyllis Towzey’s letter on August 20, 2009, explaining in detail that BLP was violating the TCPA. BLP’s General Counsel spoke with Towzey, and Towzey wrote a subsequent letter correcting General Counsel’s misapprehension that BLP could not be held liable under the TCPA because it had an indemnification agreement with FaxQom and because FaxQom “sent” the faxes. Towzey’s communications put BLP on notice (if it was not already) that it was violating the TCPA. *See* Restatement (Second) of Agency § 268 (“[N]otification given to an agent is notice to the principal” if given “to an agent authorized to receive it.”).

Cin-Q served BLP with a class-action TCPA complaint in 2009. BLP sent a letter to FaxQom asking it to provide cost of defense and indemnification, which was returned undeliverable, and BLP appeared and filed a motion to dismiss. BLP had actual notice of the risk, but it did not stop faxing. Instead, it sent more faxes through FaxQom, including another fax to Medical & Chiropractic in May 2010. In doing so, BLP ratified not only the May 2010 faxes, but *all* the faxes.

Fundamentally, BLP did not care whether its faxing was legal, as long as it had indemnification from FaxQom (e.g., BLP000052). BLP believed indemnification would relieve it of TCPA liability, but indemnification *presupposes* the risk of liability and insures against it. *Osorio v. State*

Farm Bank, F.S.B., 857 F. Supp. 2d 1312, 1315 (S.D. Fla. 2012) (“A contract for indemnity is an agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.”). It does not relieve the indemnitee of liability. *Id.* BLP may or may not recover its losses from FaxQom, but that does not excuse BLP’s underlying liability to Plaintiffs.

3. BLP was negligent in selecting, supervising, and controlling FaxQom.

Under the Restatement (Third) of Agency § 7.05 “[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.” Here, BLP negligently selected FaxQom. BLP asked nothing about the details of how FaxQom was able to obtain consent from millions of people, where it was located, how many people it employed, or its use of subcontractors. It was content to trust FaxQom’s representation that it obtained the numbers “legally,” and leave it at that.

BLP also negligently supervised and controlled FaxQom. BLP brushed consumer complaints aside, directing its personnel to take the consumers’ numbers off the list, but failing to consider why these “opt-in” consumers were complaining in the first place. Glazer, the owner, told Kaiser not to worry about calling a complainant back to explain what happened, and was interested only in the indemnification agreement. (BLP000052). Kaiser put the blame squarely on the consumers, stating, “[i]f these people didn’t sign up for every free offer they see, then their names probably wouldn’t end up in 2 separately compiled [sic] marketing databases of ‘opted-in’ recipients. I wish there was a nice way to explain that to them.” (BLP00677). BLP never considered whether it was to blame, always taking FaxQom’s word, and its willful blindness was negligent.

4. BLP delegated its statutory duty to FaxQom, which failed to perform.

Under the Restatement (Second) of Agency § 214, a person under a statutory duty to another who “confides the performance of such duty” to another is “subject to liability to such

others for harm caused to them by the failure of such agent to perform the duty.” These “non-delegable” duties are often imposed “by statute.” *Id.* cmt. e; *Royal Ins. Co. of Am. v. Whitaker Contracting Corp.*, 295 F.3d 1381, 1382–83 (11th Cir. 2002) (general contractor had non-delegable duty to maintain roadway under Alabama statute, and indemnification agreement with subcontractor was irrelevant, since party “may be indemnified for its nondelegable duty,” but “it nevertheless retains this duty”); *Brown v. CSX Transp., Inc.*, 363 F. Supp. 2d 1342, 1344 (M.D. Fla. 2005) (employer had non-delegable duty under federal statute was liable even if party delegated authority was negligent); *see also Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 909 (11th Cir. 2004) (cruise line had non-delegable duty under carrier-passenger relationship and was liable for crew-member assaults).

The FCC recently ruled that a text-message sender could not delegate away its TCPA duty to obtain prior consent in *In re GroupMe, Inc./Skype Communications*, CG Docket No. 02-278, FCC-14-33, 2014 WL 1266074, Declaratory Ruling (Mar. 27, 2014) (Ex. L). In *GroupMe*, the FCC held a text-based social network may send a text to a person who gives express consent, even if the consent is “conveyed to the text-based social network by an intermediary.” *Id.* ¶ 1. But the FCC also stated, “[t]o ensure that the TCPA’s consumer protection goals are not circumvented, we emphasize that social networks that rely on third-party representations regarding consent remain liable for TCPA violations when a consumer’s consent was not obtained.” *Id.* The FCC stressed its ruling was not a “get-out-of-jail-free card” because “a caller remains liable for TCPA violations when it relies upon the assertion of an intermediary that the consumer has given such prior express consent.” *Id.* ¶ 14.

GroupMe is right on point. Viewed in the light most favorable to BLP, it relied on an intermediary’s representation that it had obtained permission from Plaintiffs when it had not. Now BLP is liable, just like the text-based social network would be liable in *GroupMe* under the same circumstances. *GroupMe* is not an unsolicited-fax ruling, but neither is *Dish Network*. If BLP can use

non-fax FCC orders to import a new vicarious-liability standard, then it must take all comers. Under *GroupMe*, if an intermediary lies to a principal about obtaining consent, the principal is liable.

B. BLP is vicariously liable for FaxQom's acts within the scope of its employment and with apparent authority.

1. FaxQom acted within the scope of its employment to send Buccaneers fax advertisements.

Under Restatement (Third) of Agency § 7.07, “[a]n employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.” An “employee” is defined as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.” *Id.* An employee acts within the “scope of employment” when “performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control” but not when the act “occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.” *Id.*

Here, FaxQom is BLP’s “employee” under § 7.07. BLP had “the right to control” FaxQom entirely, even if it did not exercise that right responsibly. The contract BLP negotiated gave it total control over “the times and dates” faxes were sent and provided BLP could order FaxQom to “stop the campaign and refund all monies” immediately.² (BLP000069). BLP also designed all the content top to bottom (except the “remove” language).

FaxQom was hired to send the content dictated by BLP to the area codes dictated by BLP at the dates and time dictated by BLP. That is what it did. At any time, BLP could have demanded to see the fax list or contact information for consumers to verify they had given permission to receive BLP’s faxes. It could have asked why the consumers who complained were on the list in the first

² The Eleventh Circuit has interpreted “scope of authority” in the criminal context to mean “acts or omissions that [the defendant] has the power to prevent.” *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999). BLP had the “power to prevent” the violations at issue here at any time.

place. It never did. FaxQom did not send faxes in “an independent course” of its own purpose. It sent them to “serve the purpose” of BLP’s fax campaign, which is what it was paid to do.

The fact that BLP’s fax campaign violated the TCPA does not mean FaxQom was not authorized. “The fact that the employee performs the work carelessly does not take the employee’s conduct outside the scope of employment, nor does the fact that the employee otherwise makes a mistake in performing the work.” Restatement (Third) Of Agency § 7.07 cmt. c. “Likewise, conduct is not outside the scope of employment merely because an employee disregards the employer’s instructions.” *Id.*; *id.* § 7.03 (citing *SuccessFactors, Inc. v. Softscape, Inc.*, 544 F. Supp. 2d 975, 981 (N.D. Cal. 2008) (employee’s conduct not outside scope of employment merely because unauthorized)).

2. FaxQom acted with apparent authority.

Under Restatement (Third) Of Agency § 7.08, a principal is subject to “vicarious liability” for a tort committed by an agent acts with “apparent authority.” For example, in *Phillips Petroleum Co. v. Royster*, 256 So.2d 559, 561 (Fla. App. Ct. 1972), a gasoline company sued a service station owner to recover damages resulting from false credit-card sales made at the owner’s station. The owner argued the false sales were made by an agent operating the station under a written power of attorney authorizing the agent to perform only “lawful acts.” *Id.* at 559. Since the sales were not “lawful,” the owner argued, the agent was acting outside the scope of his authority. *Id.* at 560.

The Florida court rejected that argument, holding the fraud was “committed in connection with the apparent scope of said agent’s authority.” *Id.* The power of attorney authorized only “lawful acts,” but that did not “absolve [the owner] from claims of third parties” arising from acts within the agent’s “apparent scope of his authority.” *Id.* Although the owner did not “expressly empower” the agent to commit fraud, and it was “unfortunate” the owner had to pay for an agent’s torts, the court held the plaintiff was “equally without fault” and that “where one of two innocent parties must suffer a loss, that loss must be borne by the one whose acts enabled the loss to occur.” *Id.* at 561.

C. It is irrelevant whether FaxQom physically pressed the “send” button.

BLP may argue that, although it authorized FaxQom to send the faxes, it cannot be held liable because FaxQom used third parties to physically transmit the faxes over phone lines. First, this argument fails because an agent “has implied authority to delegate the performance of ministerial acts, not requiring the exercise of judgment and discretion, to a subagent,” and “express authority” is not required. *Empire Gas & Fuel Co. v. Allen*, 294 F. 617, 619 (5th Cir. 1923); Restatement (Third) Agency § 3.15, cmt. c (authority implied given “nature of the work”). Here, the use of phone lines (and whatever third parties necessary to reach those lines) is implied in the written agreement, which stated BLP was merely “broadcasting through FaxQom.” (BLP000068). Nowhere does the agreement state FaxQom must physically control every aspect of the technology or prohibit FaxQom from delegating necessary ministerial tasks to accomplish the results BLP directed. (*Id.*)

Second, this argument fails under tort law, independent of *any* agency relationship, since BLP “order[ed] or induce[ed]” the faxing, it negligently hired FaxQom, and FaxQom failed to perform BLP’s non-delegable duty of obtaining prior permission. *See* Restatement (Second) of Torts § 877. As in *Phillips*, 256 So.2d at 561, the resulting damages are “borne by the one whose acts enabled the loss to occur.”

Conclusion

For the foregoing reasons, the Court should enter summary judgment on liability for Plaintiffs on direct “sender” liability under the TCPA and, in the alternative, direct and vicarious liability under the common law of agency and torts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2014, 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.

/s/Ryan M. Kelly
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2014, 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 all counsel of record.

/s/Ryan M. Kelly
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