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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 RETINA ASSOCIATES MEDICAL)
GROUP, INC., individually and on)
12 behalf of all others similarly situated,)
13 Plaintiff,)
14 v.)
15 KEELER INSTRUMENTS, INC.,)
16 Defendant.)
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CLASS ACTION
JUNK-FAX COMPLAINT
JURY TRIAL DEMANDED

18 Plaintiff Retina Associates Medical Group, Inc., brings this class action
19 under Rule 23 of the Federal Rules of Civil Procedure against Defendant Keeler
20 Instruments, Inc., for its violations of the Telephone Consumer Protection Act, 47
21 U.S.C. § 227 (TCPA), and the regulations promulgated thereunder.

22 **JURISDICTION AND VENUE**

23 1. This Court has federal question subject matter jurisdiction pursuant
24 to 28 U.S.C. § 1331 and 47 U.S.C. § 227.

25 2. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2),
26 because a substantial part of the events or omissions giving rise to the claims in
27 this case occurred in this District.

1 **PARTIES**

2 9. Plaintiff Retina Associates Medical Group, Inc., is a citizen of the
3 state of California, with its principal place of business in Orange County,
4 California.

5 10. Defendant Keeler Instruments, Inc., is a Delaware corporation with
6 its principal place of business in Malvern, Pennsylvania.

7 11. Defendant, directly or else through other persons acting on its behalf,
8 conspired to, agreed to, contributed to, assisted with, or otherwise caused the
9 wrongful acts and omissions, including the dissemination of the junk faxes
10 addressed in this Complaint.

11 **THE FAX**

12 12. On or about July 18, 2018, Defendant, or someone acting on its
13 behalf, used a telephone facsimile machine, computer, or other device to send to
14 Plaintiff's telephone facsimile machine at (714) 633-7470 an unsolicited
15 advertisement, a true and accurate copy of which is attached as **Exhibit A** (Fax).

16 13. Plaintiff received the Fax through Plaintiff's facsimile machine.

17 14. The Fax, which includes pricing for 3mL eye drops, constitutes
18 material advertising the quality or commercial availability of goods.

19 15. On information and belief, Defendant has sent other facsimile
20 transmissions of material advertising the quality or commercial availability of
21 goods to Plaintiff and to at least 40 other persons as part of a plan to broadcast fax
22 advertisements, of which the Fax is an example, or, alternatively, the Fax was sent
23 on Defendant's behalf.

24 16. The Fax is not a customized document specific to Plaintiff.

25 17. On information and belief, Defendant approved, authorized and
26 participated in the scheme to broadcast fax advertisements by (a) directing a list
27 to be purchased or assembled, (b) directing and supervising employees or third
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1 parties to send the faxes, (c) creating and approving the fax form to be sent, and
2 (d) determining the number and frequency of the facsimile transmissions.

3 18. Defendant had a high degree of involvement in, actual notice of, or
4 ratified the unlawful fax broadcasting activity and failed to take steps to prevent
5 such facsimile transmissions.

6 19. Defendant created, made, or ratified the sending of the Fax and other
7 similar or identical facsimile advertisements to Plaintiff and other members of the
8 “Class” as defined below.

9 20. The Fax to Plaintiff and, on information and belief, the similar
10 facsimile advertisements sent by Defendant, lacked a proper notice informing the
11 recipient of the ability and means to avoid future unsolicited advertisements.

12 21. Under the TCPA and 47 C.F.R. § 64.1200(a)(4)(iii), the opt-out
13 notice for unsolicited faxed advertisements must meet the following criteria:

- 14 (A) The notice is clear and conspicuous and on the first page of the
15 advertisement;
- 16 (B) The notice states that the recipient may make a request to the
17 sender of the advertisement not to send any future advertisements
18 to a telephone facsimile machine or machines and that failure to
19 comply, within 30 days, with such a request meeting the
20 requirements under paragraph (a)(4)(v) of this section is
21 unlawful;
- 22 (C) The notice sets forth the requirements for an opt-out request
23 under paragraph (a)(4)(v) of this section
- 24 (D) The notice includes—
- 25 (1) A domestic contact telephone number and facsimile
26 machine number for the recipient to transmit such a
27 request to the sender; and
- 28 (2) If neither the required telephone number nor facsimile
machine number is a toll-free number, a separate cost-free
mechanism including a Web site address or e-mail
address, for a recipient to transmit a request pursuant to
such notice to the sender of the advertisement. A local
telephone number also shall constitute a cost-free
mechanism so long as recipients are local and will not
incur any long distance or other separate charges for calls
made to such number; and

1 (E) The telephone and facsimile numbers and cost-free mechanism
2 identified in the notice must permit an individual or business to
make an opt-out request 24 hours a day, 7 days a week.

3 22. The Fax and, on information and belief, Defendant's similar
4 facsimile advertisements lacked an opt-out notice containing a facsimile machine
5 number, thereby violating 47 U.S.C. § 227(b)(2)(D)(iv)(I) and 47 C.F.R. §
6 64.1200(a)(4)(iii)(D)(I).

7 23. The Fax and, on information and belief, Defendant's similar
8 facsimile advertisements lacked a stating that the recipient may make a request to
9 the sender of the advertisement not to send any future advertisements to a
10 telephone facsimile machine or machines and that failure to comply, within 30
11 days, with such a request meeting the requirements for a proper opt-out request is
12 unlawful, thereby violating 47 U.S.C. § 227(b)(2)(D)(ii) and 47 C.F.R. §
13 64.1200(a)(4)(iii)(B)..

14 24. On information and belief, Defendant faxed the same or other
15 substantially similar facsimile advertisements to the members of the Class in
16 California and throughout the United States without first obtaining the recipients'
17 prior express invitation or permission.

18 25. Defendant violated the TCPA by transmitting the Fax to Plaintiff and
19 to the Class members without obtaining their prior express invitation or
20 permission and by not displaying the proper opt-out notice required by 47 C.F.R.
21 § 64.1200(a)(4).

22 26. Defendant knew or should have known that (a) facsimile
23 advertisements, including the Fax, were advertisements, (b) Plaintiff and the other
24 Class members had not given their express invitation or permission to receive
25 facsimile advertisements, (c) no established business relationship existed with
26 Plaintiff and the other Class members, and (d) Defendant's facsimile
27 advertisements did not display a proper opt-out notice.

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1 27. Pleading in the alternative to the allegations that Defendant
2 knowingly violated the TCPA, Plaintiff alleges that Defendant did not intend to
3 send transmissions of facsimile advertisements, including the Fax, to any person
4 where such transmission was not authorized by law or by the recipient, and to the
5 extent that any transmissions of facsimile advertisement was sent to any person
6 and such transmission was not authorized by law or by the recipient, such
7 transmission was made based on Defendant's own understanding of the law or on
8 the representations of others on which Defendant reasonably relied.

9 28. The transmissions of facsimile advertisements, including the Fax, to
10 Plaintiff and the Class caused concrete and personalized injury, including
11 unwanted use and destruction of their property, e.g., toner or ink and paper, caused
12 undesired wear on hardware, interfered with the recipients' exclusive use of their
13 property, cost them time, occupied their fax machines for the period of time
14 required for the electronic transmission of the data, and interfered with their
15 business or personal communications and privacy interests.

16 **CLASS ACTION ALLEGATIONS**

17 29. Plaintiff brings this class action on behalf of the following class of
18 persons, hereafter, the "Class":

19 All persons in the United States who on or after four years prior to the
20 filing of this action, (1) were sent by or on behalf of Defendant a
21 telephone facsimile message of material advertising the commercial
22 availability or quality of any goods, (2) with respect to whom
23 Defendant cannot provide evidence of prior express invitation or
24 permission for the sending of such fax or (3) with whom Defendant did
25 not have an established business relationship, and (4) the fax identified
26 in subpart (1) of this definition (a) did not display a clear and
27 conspicuous opt-out notice on the first page stating that the recipient
28 may make a request to the sender of the advertisement not to send any
future advertisements to a telephone facsimile machine or machines
and that failure to comply, within 30 days, with such a request meeting
the requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful or (b)
lacked a facsimile number for sending the opt-out request.

1 30. Excluded from the Class are Defendant, its employees, agents, and
2 members of the judiciary.

3 31. This case is appropriate as a class action because:

4 a. Numerosity. On information and belief, based in part on review of
5 the sophisticated Fax and online research, the Class includes at least 40
6 persons and is so numerous that joinder of all members is impracticable.

7 b. Commonality. Questions of fact or law common to the Class
8 predominate over questions affecting only individual Class members, e.g.:

- 9 i. Whether Defendant engaged in a pattern of sending unsolicited
10 fax advertisements;
- 11 ii. Whether the Fax, and other faxes transmitted by or on behalf of
12 Defendant, contains material advertising the commercial
13 availability of any goods;
- 14 iii. Whether the Fax, and other faxes transmitted by or on behalf of
15 Defendant, contains material advertising the quality of goods;
- 16 iv. The manner and method Defendant used to compile or obtain
17 the list of fax numbers to which Defendant sent the Fax and
18 other unsolicited faxed advertisements;
- 19 v. Whether Defendant faxed advertisements without first
20 obtaining the recipients' prior express invitation or permission;
- 21 vi. Whether Defendant violated 47 U.S.C. § 227;
- 22 vii. Whether Defendant willfully or knowingly violated 47 U.S.C. §
23 227;
- 24 viii. Whether Defendant violated 47 C.F.R. § 64.1200;
- 25 ix. Whether the Fax, and the other fax advertisements sent by or on
26 behalf of Defendant, displayed the proper opt-out notice
27 required by 47 C.F.R. § 64.1200(a)(4);
- 28 x. Whether the Court should award statutory damages per TCPA
violation per fax;
- xi. Whether the Court should award treble damages per TCPA
violation per fax; and
- xii. Whether the Court should enjoin Defendant from sending
TCPA-violating facsimile advertisements in the future.

1 c. Typicality. Plaintiff’s claim is typical of the other Class members’
2 claims, because, on information and belief, the Fax was substantially the
3 same as the faxes sent by or on behalf of Defendant to the Class, and
4 Plaintiff is making the same claim and seeking the same relief for itself and
5 all Class members based on the same statute and regulation.

6 d. Adequacy. Plaintiff will fairly and adequately protect the interests
7 of the other Class members. Plaintiff’s counsel is experienced in TCPA
8 class actions, having litigated many such cases, and having been appointed
9 class counsel in multiple cases. Neither Plaintiff nor its counsel has
10 interests adverse or in conflict with the Class members.

11 e. Superiority. A class action is the superior method for adjudicating
12 this controversy fairly and efficiently. The interest of each individual Class
13 member in controlling the prosecution of separate claims is small and
14 individual actions are not economically feasible.

15 32. The TCPA prohibits the “use of any telephone facsimile machine,
16 computer or other device to send an unsolicited advertisement to a telephone
17 facsimile machine.” 47 U.S.C. § 227(b)(1).

18 33. The TCPA defines “unsolicited advertisement,” as “any material
19 advertising the commercial availability or quality of any property, goods, or
20 services which is transmitted to any person without that person’s express
21 invitation or permission.” 47 U.S.C. § 227(a)(4).

22 34. The TCPA provides:
23 Private right of action. A person may, if otherwise permitted by the
24 laws or rules of court of a state, bring in an appropriate court of that
state:

25 (A) An action based on a violation of this subsection or the
26 regulations prescribed under this subsection to enjoin such
violation,

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1 (B) An action to recover for actual monetary loss from such a
2 violation, or to receive \$500 in damages for each such violation,
3 whichever is greater, or

3 (C) Both such actions.

4 47 U.S.C. § 227(b)(3)(A)-(C).

5 35. The TCPA also provides that the Court, in its discretion, may treble
6 the statutory damages if a defendant “willfully or knowingly” violated Section
7 227(b) or the regulations prescribed thereunder.

8 36. Defendant’s actions caused concrete and particularized harm to
9 Plaintiff and the Class, as

- 10 a. receiving Defendant’s faxed advertisements caused the recipients to
11 lose paper and toner consumed in printing Defendant’s faxes;
12 b. Defendant’s actions interfered with the recipients’ use of the
13 recipients’ fax machines and telephone lines;
14 c. Defendant’s faxes cost the recipients time, which was wasted time
15 receiving, reviewing, and routing the unlawful faxes, and such time
16 otherwise would have been spent on business activities; and
17 d. Defendant’s faxes unlawfully interrupted the recipients’ privacy
18 interests in being left alone and intruded upon their seclusion.

19 37. Defendant intended to cause damage to Plaintiff and the Class, to
20 violate their privacy, to interfere with the recipients’ fax machines, or to consume
21 the recipients’ valuable time with Defendant’s advertisements; therefore, treble
22 damages are warranted under 47 U.S.C. § 227(b)(3).

23 38. Defendant knew or should have known that (a) Plaintiff and the other
24 Class members had not given express invitation or permission for Defendant or
25 anyone else to fax advertisements about Defendant’s goods, (b) the Fax and the
26 other facsimile advertisements were advertisements, (c) Defendant did not have
27 an established business relationship with Plaintiff and the other Class members,

1 and (d) the Fax and the other facsimile advertisements did not display the proper
2 opt-out notice.

3 39. Defendant violated the TCPA by transmitting the Fax to Plaintiff and
4 substantially similar facsimile advertisements to the other Class members without
5 obtaining their prior express invitation or permission and by not displaying the
6 proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4)(iii).

7 WHEREFORE, Plaintiff, for itself and all others similarly situated,
8 demands judgment against Defendant as follows:

- 9 a. certify this action as a class action and appoint Plaintiff as Class
10 representative;
- 11 b. appoint the undersigned counsel as Class counsel;
- 12 c. award damages of \$500 per TCPA violation per facsimile pursuant
13 to 47 U.S.C. § 227(a)(3)(B);
- 14 d. award treble damages up to \$1,500 per TCPA violation per facsimile
15 pursuant to 47 U.S.C. § 227(a)(3);
- 16 e. enjoin Defendant and its contractors, agents, and employees from
17 continuing to send TCPA-violating facsimiles pursuant to 47 U.S.C.
18 § 227(a)(3)(A);
- 19 f. award class counsel reasonable attorneys' fees and all expenses of
20 this action and require Defendant to pay the costs and expenses of
21 class notice and claim administration;
- 22 g. award Plaintiff an incentive award based upon its time expended on
23 behalf of the Class and other relevant factors;
- 24 h. award Plaintiff prejudgment interest and costs; and
- 25 i. grant Plaintiff all other relief deemed just and proper.
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DOCUMENT PRESERVATION DEMAND

Plaintiff demands that Defendant take affirmative steps to preserve all records, lists, electronic databases, or other itemization of telephone or fax numbers associated with the Defendant and the communication or transmittal of advertisements as alleged herein.

DATED: August 3, 2018

EDWARDS POTTINGER LLC

/s/ Seth M. Lehrman

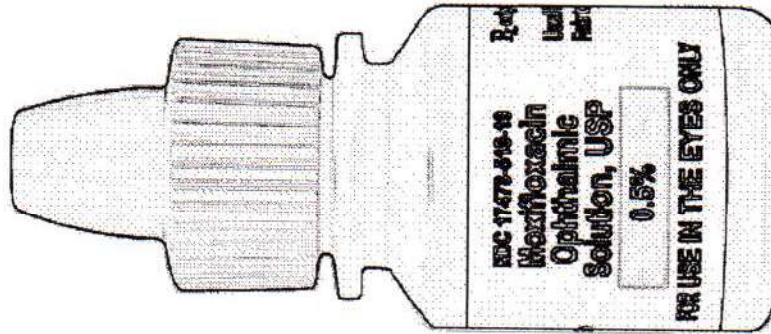
Seth M. Lehrman
Attorney for Plaintiff RETINA ASSOCIATES
MEDICAL GROUP, INC.

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Exhibit A

ITEM OF THE WEEK

From 7/16/2018 to 7/20/2018



**Moxifloxacin 0.5%, 3mL drops
(Vigamox Generic)**

Item Number: AX17015

NDC: 17478051919

List Price – \$29.95

Sale Price – \$27.95

12+ Price – \$25.95

24+ Price – \$23.95

If you wish to no longer receive these faxes, you can opt out by calling 800.523.5620 or by e-mailing keeler@keelerusa.com

Keeler Instruments, Inc • 3222 Phoenixville Pike - Bldg. #50 • Malvern, PA 19355
Tel No: 1-610-353-4350 • Toll Free: 1-800-523-5620 • Fax: 1-610-353-7814

Keeler

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Lawsuit Claims Keeler Instruments Sent Unlawful Junk Faxes](#)
