



**PRELIMINARY STATEMENT**

1. This case challenges Defendants' practice of sending facsimiles without proper notice as required pursuant to the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).
2. The TCPA prohibits a person or entity from faxing or having an agent fax advertisements without sufficient notice to allow that person to opt-out of receiving future facsimiles. (“faxes”). The TCPA provides a private right of action and provides statutory damages of \$500 per violation.
3. On behalf of itself and all others similarly situated, Plaintiffs bring this case as a class action asserting claims against Defendants under the TCPA.
4. Plaintiffs seek an award of statutory damages for each violation of the TCPA.

**JURISDICTION AND VENUE**

5. This court has personal jurisdiction over Defendants because Defendants have transacted business and committed tortious acts related to the matters complained of herein within this state and otherwise have sufficient minimum contacts with the State of Missouri and this Court has subject matter jurisdiction.
6. This court has personal jurisdiction because some of the acts complained of arose here and some of the class members reside in or have their principal place of business in Missouri.

**PARTIES**

7. Plaintiff, RADHA GEISMANN M.D., P.C., is a Missouri professional company with its principal place of business in Missouri.

8. Plaintiff, JOHN H. LARY JR., M.D., is an Alabama resident with his principal place of business in Huntsville, Alabama.
9. On information and belief, Defendant, REXALL, INC., is a Florida corporation with its principal place of business in Ronkonkoma, New York. Rexall, Inc. is a subsidiary of Rexall Sundown, Inc.
10. On information and belief, Defendant, CORPORATE MAILINGS, INC. d/b/a CCG Marketing Solutions (“CCG”), is a New Jersey corporation with its principal place of business in New Jersey.

### **FACTS**

11. On or about March 5, 2013, Defendants transmitted by telephone facsimile machine unsolicited faxes to Plaintiffs, RADHA GEISMANN M.D., P.C. and JOHN H. LARY JR., M.D. A true and correct copy of the facsimile is attached hereto as Exhibit A.
12. On information and belief, Defendants received some or all of the revenues from the sale of the products, goods and services advertised on Exhibit A, and Defendants profited and benefited from the sale of the products, goods and services advertised on Exhibit A.
13. Plaintiffs have not invited or given permission to Defendants to send the faxes.
14. The facsimiles are material advertising the commercial availability or quality of any property, goods, or services.
15. The transmission of the advertisements by facsimile to Plaintiffs and the other class members did not contain a proper notice that states that the recipient may make a request to the sender of the facsimiles not to send any future facsimiles to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request

meeting the requirements under paragraph 47 C.F.R. 64.1200 (a)(3)(v) of this section is unlawful.

16. The transmission of the advertisements via fax to Plaintiffs did not contain a notice that complied with the provisions of 47 U.S.C. § 227(b)(1)(C) and/or 47 C.F.R. 64.1200(a)(3).
17. On information and belief, Defendants sent advertisements via facsimile to Plaintiffs and more than 39 other recipients without the appropriate notice requirements discussed above.
18. Defendants knew or should have known that: (a) the facsimiles were advertisements; and (b) Defendants did not display a proper opt out notice on the advertisements sent via facsimile.

**TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227**

19. In accordance with Missouri Rule Mo. S. Ct. Rule 52.08 Plaintiffs bring this action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the following class of persons:

All persons or entities who were the holders of telephone numbers on or about March 5, 2013 that were sent a facsimile message stating: “Osteo Bi-Flex Sample Offer” “Dear Partner Physician, We are excited to invite you to join the Osteo Bi-Flex Physician Sampling Program. Registration only takes a few minutes and is free!” “Please visit our exclusive physician’s only site at [www.osteobiflex.com/physiciansampling](http://www.osteobiflex.com/physiciansampling) to register to receive samples of Osteo Bi-Flex to share with your patients.”

Excluded from the Class are Rexall Sundown, Inc., Rexall Sundown 3001, LLC, Rexall, Inc., NBTY, Inc. United States Nutrition, Inc. and Corporate Mailings, Inc. d/b/a CCG Marketing Solutions, subsidiaries and affiliates of Rexall Sundown, Inc., Rexall Sundown 3001, LLC, Rexall, Inc., NBTY, Inc. United States Nutrition, Inc. and Corporate Mailings, Inc. d/b/a CCG Marketing Solutions, as well as the officers, directors, agents, servants or employees of Rexall Sundown, Inc., Rexall Sundown

3001, LLC, Rexall, Inc., NBTY, Inc. United States Nutrition, Inc. and Corporate Mailings, Inc. d/b/a CCG Marketing Solutions and the immediate family members of such persons, and the members of the Missouri judiciary.

20. A class action is warranted because:

(a) On information and belief, the class includes forty or more persons and is so numerous that joinder of all members is impracticable.

(b) There are questions of fact or law common to the class predominating over questions affecting only individual class members, including without limitation:

(i) Whether Defendants sent unsolicited fax advertisements;

(ii) Whether Defendants' facsimiles advertised the commercial availability or quality of property, goods, or services;

(iii) The manner and method Defendants used to compile or obtain the list of fax numbers to which it sent the faxes;

(iv) Whether Defendants violated the provisions of 47 USC § 227;

(v) Whether Plaintiffs and the other class members are entitled to statutory damages;

(vi) Whether the Court should award trebled damages; and

(vii) Whether Defendants' advertisements displayed a proper opt out notice as required by 47 C.F.R. 64.1200.

21. Plaintiffs will fairly and adequately protect the interests of the other class members.

Plaintiffs' counsel is experienced in handling class actions and claims involving unsolicited advertising faxes. Neither Plaintiffs nor Plaintiffs' counsel have any interests adverse or in conflict with the absent class members.

22. A class action is an appropriate method for adjudicating this controversy fairly and efficiently. The interest of each individual class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

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

24. The TCPA 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 express invitation or permission.” 47 U.S.C. § 227(a)(4).

25. The TCPA provides:

3. Private right of action. A person may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that state:

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

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

(C) Both such actions.

26. The Court, in its discretion, can treble the statutory damages if the violation was knowing. 47 U.S.C. § 227.

27. Defendants violated the 47 U.S.C. § 227 et seq. by sending advertising faxes to Plaintiffs and the other members of the class without displaying a proper opt out notice as required by 47 C.F.R. 64.1200.

28. The TCPA is a strict liability statute and Defendants are liable to Plaintiffs and the other class members even if its actions were only negligent.

29. Defendants knew or should have known that the facsimile advertisements Defendants sent did not display the proper opt out notice as required by 47 C.F.R. 64.1200.

WHEREFORE, Plaintiffs, RADHA GEISMANN M.D., P.C. and JOHN H. LARY JR., M.D., individually and on behalf of all others similarly situated, demand judgment in its favor and against Defendants, REXALL, INC., and CORPORATE MAILINGS, INC. d/b/a CCG MARKETING SOLUTIONS, 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 Plaintiffs as the representatives of the class, and appoint Plaintiffs' counsel as counsel for the class;
- B. That the Court award \$500.00 in damages for each violation of the TCPA;
- C. That the Court enter an injunction prohibiting Defendants from engaging in the statutory violations at issue in this action; and
- D. That the Court award costs and such further relief as the Court may deem just and proper, inclusive of all damages and fees.

RADHA GEISMANN M.D., P.C. and JOHN H. LARY JR., M.D., individually and as the representative of a class of similarly-situated persons

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# Osteo Bi-Flex



Osteo Bi-Flex Triple Strength<sup>1</sup> with Vitamin D helps:

- Revitalize Joints\*
- Promote Mobility\*
- Support Bone Strength\*

Dear Partner Physician,

We are excited to invite you to join the Osteo Bi-Flex Physician Sampling Program. Registration **only takes a few minutes** and is **free!**

**Please visit our exclusive physician's only site at [www.osteobiflex.com/physiciansampling](http://www.osteobiflex.com/physiciansampling) to register to receive samples of Osteo Bi-Flex<sup>®</sup> to share with your patients.**

*Or complete the following section and fax to 873-208-8183*

Name Dr. John Lary Jr

Name of Practice John H Lary Jr MD

Address 600 Saint Clair Ave SW Ste 5 Huntsville, AL 35801-5057

Phone Number 256-533-1510

Email\*\* \_\_\_\_\_

\*\*email address is required for program participation.

State License Number 6328

Professional Designation  MD  DO  NP  PA  Other

**Yes, please send me my free kit of Osteo BiFlex<sup>®</sup>!** 6379690

When your patients come to you with joint health concerns, recommend Osteo Bi-Flex<sup>®</sup> as an effective support for long term joint health.\*

We've made it easy for you with a kit to introduce your patients to the multiple benefits of the market leading joint care brand.<sup>1</sup>

The kit contains 20 free 7-day samples of our premier formula, Triple Strength<sup>4</sup> with Vitamin D. You'll also get a **specialty prepared booklet** describing the benefits of Osteo Bi-Flex<sup>®</sup> and each of the formulas available for retail sale. The booklet is a great in-office teaching tool to help educate your patients on how their joints work and why the nutritional supplement approach offered by Osteo Bi-Flex<sup>®</sup> is a great option to help them support the health of their joints.\*

Thank you for choosing Osteo Bi-Flex<sup>®</sup> and helping to make it the market leading Joint Care Brand!<sup>1</sup>

Sincerely,

The Osteo Bi-Flex<sup>®</sup> Team  
[Info@osteobiflex.com](mailto:Info@osteobiflex.com)

Proud sponsor of the  
**ARTHRITIS FOUNDATION**<sup>®</sup>  
Take Control. We Can Help.<sup>™</sup>  
[www.arthritis.org](http://www.arthritis.org)

\*\*By submitting your email address you agree to receive further communication from Osteo BiFlex<sup>®</sup> and agree to our Privacy Policy (<http://www.osteobiflex.com/privacy/>). You have the right to opt-out of receiving unsolicited advertisements by fax. You may contact us with your opt-out request, along with the fax number to which your request relates, by fax at 1-873-208-8183, or by submitting a request to [osteobiflex@corpcomm.com](mailto:osteobiflex@corpcomm.com). Opt-out requests will be honored within 30 days of receipt. Please be sure to indicate fax number to which your request relates and reason for opt-out.

**\*These statements have not been evaluated by the Food and Drug Administration. These products are not intended to diagnose, treat, cure or prevent any disease.**

<sup>1</sup>52 Week Nielsen ScanTrack data ending 1/26/13.

<sup>4</sup> Refers to level of key ingredients in each individual caplet.

## EXHIBIT A