

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| FEDERAL TRADE COMMISSION, |) | |
| |) | |
| Plaintiff, |) | Case No. 07 C 4541 |
| |) | |
| v. |) | Judge David H. Coar |
| |) | |
| SILI NEUTRACEUTICALS, LLC, and |) | Magistrate Judge Morton Denlow |
| |) | |
| BRIAN MCDAID, individually and doing business as KAYCON LTD, |) | |
| |) | |
| Defendants. |) | |
| |) | |

FTC’S MOTION TO STRIKE JURY DEMAND

Plaintiff Federal Trade Commission (“FTC”), by undersigned counsel, moves the Court, pursuant to Fed. R. Civ. P. 12(f) and Fed. R. Civ. P. 39(a)(2), to strike the jury demand contained in Defendants’ Answer.¹ In support of its motion, the FTC states:

Introduction and Background

1. On August 13, 2007, the FTC filed a Complaint for Injunctive and Other Equitable Relief in this matter against Defendants Sili Neutraceuticals, LLC and Brian McDaid for deceptively marketing and selling dietary supplements on Internet Web sites utilizing illegal “spam” email messages. (See Cmplt., Att. B.) The FTC brought the action pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and under Section 7(a) of the Controlling the Assault of Non-Solicited Pornography and

¹ On November 6, 2007, FTC counsel sent a letter to Defendants’ counsel requesting that Defendants withdraw their jury demand. (See 11/6/07 letter, Att. A.) Defendants have refused to do so. Therefore, the FTC has filed this motion.

Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7706(a). (See Cmpl., Att. B at ¶ 1.) The FTC’s Complaint solely seeks equitable relief, including “a permanent injunction to prevent future violations of the FTC Act and the CAN-SPAM Act by defendants” and “such relief as the Court finds necessary to redress injury to consumers resulting from Defendants’ violations of the FTC Act and CAN-SPAM Act, including, but not limited to, rescission or reformation of contracts, restitution, the refunds of monies paid, and the disgorgement of ill-gotten monies.” (*Id.* at p. 18; *see also* ¶ 61 (reciting the Court’s power to grant equitable relief).)

2. On August 13, 2007, the Court granted the FTC’s *ex parte* motion for a temporary restraining order against Defendants, enjoining further misrepresentations and ordering that Defendants’ assets be preserved. (See Docket #11.) The parties subsequently agreed to a Stipulated Preliminary Injunction Order With Asset Freeze and Other Equitable Relief, which the Court signed on August 27, 2004. (See Docket #23.) On October 29, 2007, Defendants filed their Answer which, among other things, demands a jury trial. (See Docket #24.)

Legal Standard

3. The right to a jury trial for purposes of the Seventh Amendment turns upon whether the relief sought is equitable or legal. *See Tull v. United States*, 481 U.S. 412, 417 (1987). The Supreme Court has found that “[s]uits at common law,” the phrase used in the Seventh Amendment, “refers to suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.” *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (internal citations omitted; emphasis in original).

4. Pursuant to Fed. R. Civ. P. 39(a)(2), the Court may negate a jury demand if it finds “that a right of trial by jury of some or all of th[e] issues does not exist under the Constitution or statutes of the United States.” Moreover, pursuant to Fed. R. Civ. P. 12(f), the Court may order stricken from any pleading “any redundant, immaterial, impertinent, or scandalous matter.”²

Defendants’ Jury Demand Should be Stricken

5. The FTC seeks relief for Defendants’ FTC Act and CAN-SPAM violations pursuant to Section 13(b) of the FTC Act. Section 13(b) authorizes the FTC to file suits in federal court where it has reason to believe that any person, partnership or corporation is violating “any provision of law enforced by the [FTC].” *See* 15 U.S.C. § 53(b).³ Section 13(b) “authorizes the court to provide equitable relief.” *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997). *See also FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (“[I]n a proceeding under section 13(b), the statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers.”).

6. Because Section 13(b) of the FTC only provides for equitable relief, “[c]ourts in this district have consistently held that there is no right to a jury trial in cases brought pursuant to Section 13(b).” *FTC v. International Research & Dev. Corp. of Nevada*, No. 04 C 6901 (Aug.

² Rule 12(f) requires that any motion to strike be filed within 20 days of the pleading containing the improper material. Rule 39(a)(2) does not have a similar time restriction on filing motions to strike, but the FTC has filed this motion within the time constraints of Rule 12(f) in the interest of caution.

³ The FTC alleges violations of Sections 5(a) and 12 of the FTC Act (*see* Cmplt., Att. B at ¶¶ 32-43), and violations of the CAN-SPAM Act (*see id.* ¶¶ 44-49). These are laws enforced by the FTC.

17, 2005) (Hibbler, J.). *See also* *FTC v. World Media Brokers, Inc.*, No. 02 C 6985 (N.D. Ill. June 26, 2003) (St. Eve, J.) (“[I]t is clear that there is no right to trial by jury in actions brought pursuant to section 13(b) of the FTC Act.”); *FTC v. Febre*, No. 94 C 3625, 1994 WL 702711, at *1-2 (N.D. Ill. Dec. 14, 1994) (Manning, J.).⁴ Indeed, every court to consider this issue has similarly held that the equitable nature of the FTC’s claims under Section 13(b) of the FTC Act makes the right to a jury trial unavailable in such cases. *See, e.g.,* *FTC v. Mazzone & Son, Inc.*, 2007 WL 2413086, at *3 (E.D. Mich. Aug. 14, 2007); *FTC v. Bronson Partners, LLC*, 2006 WL 197357, at *4 (D. Conn. Jan. 25, 2006); *FTC v. Commonwealth Marketing Group, Inc.*, 72 F. Supp. 2d 530, 544-45 (W.D. Pa. 1999); *FTC v. North East Telecommunications, Ltd.*, 1997 WL 599357, at *1 (S.D. Fla. June 23, 1997); *FTC v. Hang-Ups Art Enterprises, Inc.*, 1995 WL 914179, at *1 (C.D. Cal. Sept. 27, 1995); *FTC v. Abbott Labs.*, 1992 WL 427476, at *1 (D.D.C. Dec. 7, 1992); *FTC v. Kitco of Nevada*, 612 F. Supp. 1280, 1280-81 (D. Minn. 1985).⁵

⁴ Copies of these cases and all other cases published only in electronic databases are attached to this motion as Attachment C.

⁵ In addition to being authorized to seek relief pursuant to Section 13(b), the FTC also has authority to seek relief for Defendants’ CAN-SPAM violations pursuant to Section 19 of the FTC Act, 15 U.S.C. 57b. *See* 15 U.S.C. 7706 (violation of CAN-SPAM treated as “unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B))”). Like Section 13(b), Section 19 of the FTC Act only provides for equitable relief. *See* U.S.C. 57b(b). As such, courts have similarly held that there is no right to a jury trial in matters seeking relief pursuant to Section 19 of the FTC Act. *See, e.g.,* *Commonwealth Marketing Group*, 72 F. Supp. 2d at 544-45 (“[D]efendants are not entitled to a jury trial on plaintiff’s claims brought under Section 13 and Section 19 of the FTC Act.”); *FTC v. AMREP Corp.*, 705 F. Supp. 119, 126 (S.D.N.Y. 1988) (“the cause of action created by Section 19 does not fall within the right of a trial guaranteed by the Seventh Amendment”).

WHEREFORE, in the absence of either a constitutional or statutory right to a jury trial, the FTC respectfully requests that the Court strike Defendants' jury demand pursuant to Fed. R. Civ. P. 12(f) and Fed. R. Civ. P. 39(a)(2).

Respectfully Submitted,

William Blumenthal
General Counsel

/s/ Steven Wernikoff
Steven M. Wernikoff
Marissa J. Reich
Attorneys for Plaintiff
Federal Trade Commission
55 West Monroe Street, Suite 1825
Chicago, Illinois 60603
(312) 960-5634 [Telephone]
(312) 960-5600 [Facsimile]