

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FEDERAL TRADE COMMISSION	§	
	§	
v.	§	CASE NO. 4:15-CV-829
	§	Judge Mazzant
LIBERTY SUPPLY CO., also d/b/a Omni	§	
Services; ET. AL.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff Federal Trade Commission’s Motion to Strike Defendants’ Jury Demand (Dkt. #82), Plaintiff Federal Trade Commission’s Motion to Strike Defendants’ Affirmative Defenses (Dkt. #108), and Plaintiff Federal Trade Commission’s Motion to Strike Defendant Norma Hart’s Affirmative Defenses (Dkt. #121). After reviewing the relevant pleadings, the Court finds that the FTC’s motion to strike the jury demand should be granted, the FTC’s motion to strike Defendants’ affirmative defenses should be granted in part and denied in part, and the FTC’s motion to strike Defendant Norma Hart’s affirmative defenses should be granted in part and denied in part.

BACKGROUND

On December 4, 2015, the Federal Trade Commission (the “FTC”) filed the present case to stop Defendants’ deceptive sales of non-durable business supplies to churches, schools, and small businesses nationwide (Dkt. #1). On December 4, 2015, the Court entered an *ex parte* temporary restraining order (the “TRO”), and set the preliminary injunction hearing for December 17, 2015 (Dkt. #12). The Court conducted its preliminary injunction hearing, and entered its preliminary injunction on December 30, 2015 (Dkt. #36).

On February 19, 2016, Defendants John B. Hart (“John Hart”), Liberty Supply Company (“Liberty Supply”), Mia L. McCrary (“McCrary”), and Nor-Jay Enterprises (“Nor-Jay”)

(collectively, the “Liberty Supply Defendants”) filed their answer to the complaint, in which they asserted their right to a jury trial (Dkt. #73).

On February 23, 2016, the FTC filed an amended complaint, in which it added Norma Hart and Texas 110 as defendants (Dkt. #76). The FTC’s amended complaint stated that it sought to obtain “permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants’ acts or practices....” (Dkt. #76 at p. 2). On May 2, 2016, Texas 110 filed its answer to the amended complaint (Dkt. #103). On May 6, 2016, the Liberty Supply Defendants filed their answer to the amended complaint, in which they requested that the matter be tried before a jury, and asserted seven other affirmative defenses (Dkt. #104). On May 27, 2016, Norma Hart filed her answer to the amended complaint, in which she requested that the matter be tried before a jury, and asserted six additional affirmative defenses (Dkt. #109).

On February 25, 2016, the Liberty Supply Defendants filed their demand for a jury trial (Dkt. #80). On March 3, 2016, the FTC filed its Motion to Strike Defendants’ Jury Demand (Dkt. #82). On March 21, 2016, the Liberty Defendants filed their response (Dkt. #84). On March 24, 2016, the FTC filed its reply (Dkt. #87).

On May 26, 2016, the FTC filed its Motion to Strike the Defendants’ Affirmative Defenses (Dkt. #108). On June 13, 2016, the Liberty Supply Defendants filed their response (Dkt. #115). On June 23, 2016, the FTC filed its reply (Dkt. #123). On July 5, 2016, the Liberty Supply Defendants filed their sur-reply (Dkt. #139).

On June 20, 2016, the FTC filed its Motion to Strike Defendant Norma Hart’s Affirmative Defenses (Dkt. #121). On July 5, 2016, Norma Hart filed her response (Dkt. #141).

ANALYSIS

Motion to Strike Jury Demand (Dkt. #82):

The FTC asks the Court to strike Defendants' Jury Demand (Dkt. #82).¹ Defendants assert that the jury demand should not be stricken as the motion is premature (*See* Dkt. #84). Defendants' deadline for amended pleadings passed on July 15, 2016. As Defendants, including Norma Hart, have included their right for a jury trial within their answer, and have not filed any additional pleadings, the Court finds that the motion is ripe, and will address the parties' arguments.

The Seventh Amendment guarantees a litigant's right to a trial by jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. The scope of this right is analyzed under a two-prong inquiry. First, the Court must determine whether the cause of action is analogous to a suit at law or a suit in equity in eighteenth century England. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708 (1999); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323 (1994). The Court must also examine whether the relief sought is "legal or equitable in nature." *Id.* The second step carries more weight than the first. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). In order to be entitled to a jury trial under the Seventh Amendment, the relief sought by the plaintiff must be characterized as legal. *Tull v. United States*, 481 U.S. 412, 425 (1987).

Under the first-prong of the test, the FTC's claims are equitable in nature. The FTC has brought the present action under Sections 13(b) and 19 of the FTC Act, and sought only equitable relief in the form of injunctive and ancillary equitable monetary relief (Dkt. #76 at pp. 14-15). Federal courts, including a district court within the Eastern District of Texas, "have

¹ Defendants have each included within their answers, an affirmative defense for the right to trial by jury. Therefore, the Court's analysis regarding the FTC's motion to strike the jury demand will also apply to Defendants' affirmative defenses.

unanimously held that the Seventh Amendment does not provide a right to a trial by jury in actions brought under Section 13(b).” *FTC v. Think All Publ’g L.L.C.*, 564 F. Supp. 2d at 663, 665 (E.D. Tex. 2008); see *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006); *FTC v. Seismic Entm’t Prods., Inc.*, 441 F. Supp. 2d 349, 353 (D.N.H. 2006); *FTC v. Bronson Partners, L.L.C.*, No. 3:04cv1866, 2006 WL 197357, at *4 (D.Conn. Jan. 25, 2006); *FTC v. Ne. Telecomm., Ltd.*, No. 96-6081-CV, 1997 WL 599357, at *3 (S.D. Fla. June 23, 1997); *FTC v. Hang-Ups Art Enters., Inc.*, No. CV 95-0027, 1995 WL 914179, at *1-2 (C.D. Cal. Sept. 27, 1995); *FTC v. Febre*, No. 94 CV 3625, 1994 WL 702711, at *1-2 (N.D. Ill. Dec. 15, 1994); *FTC v. Abbott Labs.*, No. 92-1364, 1992 WL 427476, at *1 (D.D.C. Dec. 7, 1992).

This finding is consistent with the view of the authority of district courts in Section 13(b) cases given by the Fifth Circuit and other Circuit Courts of Appeals. *Think All Publ’g L.L.C.*, 564 F. Supp. 2d at 665; see *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982); *Verity*, 443 F.3d at 66, n. 5-9. For instance, in *Southwest Sunsites*, the Fifth Circuit made clear that in Section 13(b) cases, the district courts may use “the full range of equitable remedies traditionally available.” *Sw. Sunsites, Inc.*, 665 F.2d at 718. The Fifth Circuit and numerous other courts have held that actions under § 13(b) of the FTC Act are equitable in nature, even when seeking ancillary monetary relief. See *Sw. Sunsites, Inc.*, 665 F.2d at 718; see also *FTC v. Febre*, 128 F.3d 530, 534-36 (7th Cir. 1997) (holding “ancillary equitable relief” under 13(b) includes “the power to order repayment of money for consumer redress as restitution” and affirming \$16 million in disgorgement); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) (awarding refund of \$100 to 5,000 consumers as equitable consumer redress under 13(b)); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989) (holding section 13(b)’s authority to

grant injunctions includes authority to grant equitable monetary relief, “such as rescission and restitution.”).

Likewise, courts have found that there is no right to a jury trial in cases brought under Section 19 of the FTC Act to enforce rule violations when those cases are seeking equitable relief, as in the present case. *See FTC v. Mazzoni & Son, Inc.*, No. 06-15766, 2007 WL 3413086, at *3 (E.D. Mich. Aug. 14, 2007); *FTC v. Commonwealth Mktg. Grp., Inc.*, 72 F. Supp. 2d 530, 543-45 (W.D. Pa. 1999); *FTC v. AMREP Corp.*, 705 F. Supp. 119, 126 (S.D.N.Y. 1988).

The Court must now turn to the second prong of the analysis, whether the relief sought is “legal or equitable in nature.” *City of Monterey*, 526 U.S. at 708. The Court finds that the remedies that the FTC seeks in the present action are traditional equitable remedies. In the present case, the FTC seeks a permanent injunction, restitution, rescission of contracts, and disgorgement, which have all been held to be equitable remedies, as they serve to reinstate the parties to their positions prior to the challenged conduct. *See Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990); *Tull*, 481 U.S. at 423-24; *Think All Publ’g, L.L.C.*, 564 F. Supp. 2d at 665; *FTC v. H.N. Singer*, 668 F.2d 1107, 1110-12 (9th Cir. 1982) (restitution and rescission are appropriate equitable remedies under Sections 13(b) and 19). Additionally, restitution of money is an equitable remedy. “Merely because [a] case involves a claim for restitution of money does not detract from its equitable nature.” *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423-24 (9th Cir. 1994); *see Think All Publ’g, L.L.C.*, 564 F. Supp. 2d at 665. As the FTC’s action contains only equitable relief and ancillary monetary relief, the Court finds that its motion to strike the jury demand should be granted.

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