

STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

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KRIST OIL COMPANY and  
ROBERT LOTTO,

Plaintiffs,

v.

Case No. 16CV117

BEN BRANCEL, Secretary,  
Wisconsin Department of  
Agriculture, Trade and Consumer  
Protection,

Defendant,

and

WISCONSIN PETROLEUM MARKETERS  
AND CONVIENCE STORE ASSOCIATION,

Intervenor-Defendant.

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**SECRETARY BRANCEL'S BRIEF IN OPPOSITION TO  
PLAINTIFFS' REQUEST FOR A JURY TRIAL**

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This is an equitable action seeking only declaratory and injunctive relief, and not an action at law seeking money damages. “It is well settled that the right to a jury trial does not extend to equitable actions.” *Norwest Bank Wis. Eau Claire, N.A. v. Plourde*, 185 Wis. 2d 377, 386, 518 N.W.2d 265 (Ct. App. 1994). As a result, the Court should deny the plaintiffs’ request for a jury trial.

**FACTS**

The plaintiffs, Krist Oil Company and Robert Lotto, “challenge[] the constitutionality of Wis. Stat. § 100.30, Wisconsin’s Unfair Sales Act,” referred to as the Minimum Markup Law. (Compl. ¶ 1.) The plaintiffs sued defendant Ben

Brancel, Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection, “in his official capacity.” (Compl. ¶ 11.)

In the prayer for relief, the plaintiffs seek “a declaratory judgment that the Minimum Markup Law violates the due process guarantee set forth in Article I, section I of the Wisconsin Constitution” and “the equal protection guarantee set forth in article I, section I of the Wisconsin Constitution.” (Compl. 16, ¶¶ A–B.) In addition, the plaintiffs seek “an order permanently enjoining Defendants from enforcing the provisions of the Minimum Markup Law.” (Compl. 16. ¶ B [sic].)<sup>1</sup> Lastly, the plaintiffs seek costs and fees allowed by law and any “other and further relief as the Court deems appropriate.” (Compl. 16 ¶¶ C–D.) The plaintiffs do not seek money damages.

## ARGUMENT

### **I. The plaintiffs have no right to a jury trial.**

Article I, section 5 of the Wisconsin Constitution provides that “[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.” This provision has long been construed as providing the right to a jury only if the case involves an action at law that existed when the Wisconsin Constitution was adopted in 1848. *Harrigan v. Gilchrist*, 121 Wis. 127, 281–82, 99 N.W. 909 (1904); *Harvot v. Solo Cup Co.*, 2009 WI 85, ¶ 62, 320 Wis. 2d 1, 768 N.W.2d 176. The plaintiffs have

no right to a jury trial because they have not brought a “case[] at law” under article 1, section 5.

In contrast, “[w]hen equitable relief is requested, there is no constitutional right to a jury trial.” *In re Marriage of Zabel v. Zabel*, 210 Wis. 2d 336, 345, 565 N.W.2d 240 (Ct. App. 1997).<sup>2</sup> The Wisconsin Supreme Court has clearly held that “[h]istorically, injunctive proceedings have been deemed actions in equity, and must still be regarded as such for the purpose of determining the scope of sec. 5, art. I.” *Upper Lakes Shipping Ltd. v. Seafarers’ Int’l Union of Canada*, 23 Wis. 2d 494, 503, 128 N.W.2d 73 (1964). That plaintiffs in equitable actions have no right to a jury trial is a black-letter rule of law consistently applied by the Wisconsin courts. *E.g.*, *Bender v. Town of Kronenwetter*, 2002 WI App 284, ¶ 18, 258 Wis. 2d 321, 654 N.W.2d 57 (Ct. App. 2002) (plaintiffs were “seeking equitable relief and are therefore not entitled to a jury trial”); *Little v. Roundy’s, Inc.*, 152 Wis. 2d 715, 722, 449 N.W.2d 78 (Ct. App. 1989) (“Equitable claims are properly determined by the trial court.”); *Schramek v. Bohren*, 145 Wis. 2d 695, 708, 429 N.W.2d 501 (Ct. App. 1988) (“because the TRO and injunction as provided for in sec. 813.12, Stats., are equitable in nature, there is no right to a jury trial under art. I, sec. 5 of the Wisconsin Constitution”). Article I, section 5,

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<sup>1</sup> The complaint’s prayer for relief mistakenly contains two separate paragraph B’s.

<sup>2</sup> In this respect, Wisconsin law is in accord with the federal right to a jury trial in the Seventh Amendment. *United States v. Louisiana*, 339 U.S. 699, 706 (1950); *Kramer v. Banc of Am. Sec. LLC*, 355 F.3d 961, 966 (7th Cir. 2004).

does not provide a right to a jury trial in equitable actions because parties in an equitable action have never had a right to a jury trial.

Here, the plaintiffs are seeking an injunction against enforcement of the Minimum Markup Law. (Compl. 16. ¶ B [sic].) An injunction is an equitable remedy and thus not an action at law for which a jury trial is guaranteed by Wis. Const. art. I, § 5. *Upper Lakes Shipping*, 23 Wis. 2d at 503. Instead of trial to a jury, “[i]n all equitable actions, the case must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence.” *Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.*, 128 Wis. 2d 279, 288, 381 N.W.2d 601 (Ct. App. 1985) (quoting *Stahl v. Gotzenberger*, 45 Wis. 121, 123 (1878)). Because this action is clearly one for equitable remedies, the Court should deny the plaintiffs’ request for a jury trial.

## **II. The declaratory judgment statute does not grant a right to a jury trial.**

The plaintiffs do not have a right to a jury trial based on Wisconsin’s declaratory judgment statute. The pertinent statutory section provides:

When a proceeding under this section involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Wis. Stat. § 806.04(9). This statute provides that when a declaratory judgment is sought in an equitable action, in which facts would be found by the court, then

the court would also find the facts in a declaratory judgment action. *See* Wisconsin Civil Procedure Before Trial (2d ed. 2002) § 7.85 (*citing Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 504 (1959)). If a declaratory judgment is sought in an action at law, in which facts would be determined by a jury under article I, section 5, then a jury would also find the facts in the declaratory judgment action. *Id.* Put another way, the black-letter rule of law is that there is a right to a jury trial only “if the issues of fact arising would have been triable by a jury as of right in an action which might have been substituted for the declaratory judgment action by either party.” 13 A.L.R.2d 777 (Originally published in 1950).

The declaratory judgment statute does not provide for a jury trial in this case because the plaintiffs are seeking a declaration that a statute is unconstitutional, not a declaratory judgment in an action at law in which a jury would ordinarily act as fact-finder, such as a tort or breach of contract action. Instead, the plaintiffs’ equitable action “must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence.” *Spensley Feeds*, 128 Wis. 2d at 288. As a result, a trial to the court is “the same manner as issues of fact are tried and determined in other civil actions” in this court. Wis. Stat. § 806.04(9). Ordering a jury trial in this case would contravene the declaratory judgment statute.

Based on correspondence with the plaintiffs, they may erroneously rely on *American Motorists Ins. Co. v. R & S Meats, Inc.*, 190 Wis. 2d 196, 200, 526 N.W.2d 791 (Ct. App. 1994), as supporting their right to a jury trial. This case provides no support for the plaintiffs because it was a declaratory judgment on a claim at law—specifically a breach of contract action for insurance coverage. *Id.* As a result, the jury would have acted as factfinder had the case not been brought as a declaratory judgment. *Bender*, 258 Wis. 2d 321, ¶ 18 (“Claims for fraud and breach of contract are indeed actions at law, which carry a right to a jury trial.”). It was entirely proper, therefore, for a jury to decide the facts in *American Motorists*. Thus, *American Motorists* merely shows the general rule that parties have a right to a jury trial when the declaratory judgment action is a substitute for an action at law, like breach of contract action, in which there would be a right to a jury trial.

*American Motorists* also provides no support for the right to a jury trial when a plaintiff seeks a declaration that a state statute is unconstitutional and an injunction against enforcement of the statute. This type of case is clearly equitable in nature and therefore carries no right to a jury trial. *E.g.*, *Benz v. Kremer*, 142 Wis. 1, 4, 125 N.W. 99 (1910) (“in a proper case courts of equity will enjoin enforcement of an unconstitutional law”). There simply is no authority in Wisconsin law authorizing a jury trial in an action seeking to enjoin a state law because article I, section 5, does not provide for a jury trial right in this type of case.

The defendant further expects the plaintiffs to rely on inapposite federal cases in which juries were used where plaintiffs sought damages from state officials, such as *Reid v. Rolling Fork Public Utility Dist.*, 979 F.2d 1084 (5th Cir. 1992). This decision is easily distinguishable. A jury were appropriate in this case because suits under 42 U.S.C. § 1983 seeking damages against state officials are actions at law, and thus carry a right to a jury trial under the Seventh Amendment. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999).<sup>3</sup> There is no right to a jury trial in an action seeking to enjoin a state law because such an action is equitable in nature.

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<sup>3</sup> The defendant was not able to find a Wisconsin case addressing this issue under article I, section 5, of the Wisconsin Constitution. Because the plaintiffs are not seeking damages, the question is immaterial to this case.

## CONCLUSION

For the foregoing reasons, the Court should deny the plaintiffs' request for a jury trial.

Dated this 2nd day of June, 2017.

Respectfully submitted,

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