

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

_____)	
OTA FRANCHISE CORPORATION,)	
NEWPORT EXCHANGE HOLDINGS, INC.,)	
NEH SERVICES, INC., EYAL SHACHAR,)	
SAMUEL SEIDEN, AND DARREN KIMOTO,)	
)	Case No. 1:20-cv-802
Plaintiffs,)	
)	Judge: Charles R. Norgle
v.)	
)	
FEDERAL TRADE COMMISSION,)	
)	
Defendant.)	
_____)	

**MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
OR, IN THE ALTERNATIVE, FAILURE TO STATE A CLAIM**

Defendant Federal Trade Commission moves this Court to dismiss the plaintiffs’ complaint for lack of subject matter jurisdiction or, in the alternative, failure to state a claim. As set forth in the accompanying Memorandum of Law, the complaint should be dismissed for the following reasons:

1. Plaintiffs filed this suit as an attempt to preempt the FTC’s enforcement lawsuit, but there is no subject matter jurisdiction or, alternatively, plaintiffs fail to state a claim. The only possible source of a cause of action for plaintiffs against the FTC is the Administrative Procedure Act, but they fail both of the APA’s requirements for judicial review: (1) there is no final agency action to challenge, since the FTC’s filing of a complaint merely *initiates* proceedings; and (2) plaintiffs have an adequate remedy elsewhere, since they can defend against the FTC’s enforcement suit in the Central District of California. The Supreme Court’s decision in *FTC v. Standard Oil*, 449 U.S. 232 (1980), and the Seventh Circuit’s decisions in *General*

Finance v. FTC, 700 F.2d 366 (7th Cir. 1983), and *Bunrock v. SEC*, 347 F.3d 995 (7th Cir. 2003), dismissed similar unlawful attempts to turn “prosecutor into defendant,” and this Court should do the same here.

2. The case also should be dismissed because plaintiffs’ claims are not ripe for judicial consideration. They ask this Court to declare that their activities do not violate the FTC Act or the Consumer Review Fairness Act (CRFA), but that requires resolving fact-bound questions unfit for review in a separate declaratory suit. Moreover, plaintiffs cannot identify any hardship that would result from litigating their positions in the California enforcement case rather than here.

3. Alternatively, this Court should decline to exercise its discretionary jurisdiction to hear declaratory judgment cases. Allowing this case to proceed would only confuse matters and result in unnecessary, duplicative litigation. Moreover, plaintiffs filed this suit to avoid litigating in the FTC’s chosen venue, where Ninth Circuit law applies. The case thus is a prime example of the “procedural fencing” that abuses the Declaratory Judgment Act. Plaintiffs can raise all of their arguments in the California enforcement case, and this case should be dismissed.

March 30, 2020

/s/ Mariel Goetz
Mariel Goetz
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2763
mgoetz@ftc.gov

CERTIFICATE OF SERVICE

I certify that on March 30, 2020, I caused a copy of the foregoing to be electronically served on counsel of record for all parties via the Court's CM/ECF system.

March 30, 2020

/s/ Mariel Goetz
Mariel Goetz
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2763
mgoetz@ftc.gov