

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION**

**JOHN GARLAND, individually, and  
on behalf of all others similarly situated,**

**Plaintiff,**

**Case No. 1:09-cv-1067**

**v.**

**CLASS ACTION**

**WAL-MART STORES, INC.,  
BANK OF AMERICA NATIONAL  
TRUST AND SAVINGS ASSOCIATION,**

**JURY DEMANDED**

**Defendants.**

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**REPORT AND RECOMMENDATION  
ON DEFENDANT WAL-MART'S MOTION TO STRIKE**

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Plaintiff filed this action seeking damages under the Electronic Fund Transfer Act (“EFTA”). In the Amended Class Action Complaint, Plaintiff alleges that the ATM located at Defendant Wal-Mart’s Jackson, Tennessee Store No. 335 did not have a fee notice posted on the machine when Plaintiff withdrew cash from it, and seeks statutory damages pursuant to 15 U.S.C. §1693m. In addition, Plaintiff’s prayer for relief seeks disgorgement of all revenue obtained by Defendants from electronic fund transfers obtained in violation of law and a permanent injunction (Amended Class Action Complaint, Doc. 6). Defendant Wal-Mart has moved to strike the portions of the prayer for relief seeking disgorgement and injunctive relief, on the grounds that Plaintiff only claims relief under the EFTA but disgorgement and injunctive relief are not remedies available under the EFTA.

Federal Rule of Civil Procedure 12(f) allows the court to strike, either on motion of a party or on its own initiative, “any redundant, immaterial, impertinent or scandalous matter” in a pleading. Wright & Miller, Fed. Prac. & Proc. Civ. 3d §1382. Motions to strike are generally disfavored, and the resolution of such motions is reserved to the sound discretion of the trial court. Wausau Benefits v. Progressive Ins. Co., 270 F. Supp. 2d 980 (S.D. Ohio 2003); see also Watkins & Son Pet Supplies v. Iams Co., 107 F.Supp.2d 883 (S.D. Ohio 1999) (application of Rule 12(f) within discretion of the trial judge).

In this case, Defendant Wal-Mart has not alleged the specific grounds for striking this material pursuant to Rule 12(f); that is, it has not stated whether it believes the material is redundant, immaterial, impertinent or scandalous. Nevertheless, based on the pleadings, it appears to the Magistrate Judge that the material is being objected to as impertinent or immaterial.

Material is said to be impertinent, for purposes of Rule 12(f), if it consists of statements that do not pertain, and are not necessary, to the issues in question. “[T]here is considerable overlap between the concepts of ‘impertinent’ and ‘immaterial’ matter.” Wright & Miller, Fed. Prac. & Proc. Civ. 3d §1382. Motions to strike on the grounds that the material is impertinent or immaterial will usually be denied unless the matter to be stricken has no possible relation to the controversy and may cause significant prejudice to one of the parties. Id., quoting Pessin v. Keeneland Ass’n., 45 F.R.D. 10, 13 (E.D. Ky. 1968).

Defendant Wal-Mart cites Labarre v. Memphis Light, Gas & Water Division in support of its contention that portions of the prayer for relief should be stricken because they are not contemplated by the statute. Labarre, 2006 WL 485086 at \*1 (W.D. Tenn. 2006). In that case, the court granted the movant's motion to strike a punitive damages claim against the government under Rule 12(f) because punitive damages were not recoverable under the statute. The statute at issue in Labarre specifically exempted governments and government agencies from punitive damage claims.

While the EFTA does not specifically direct that the remedies at issue are not recoverable, as Defendant Wal-Mart points out the EFTA does not include disgorgement and injunctive relief as remedies in its list of available remedies. This Circuit recognizes the canon of construction *expressio unius est exclusio alterius*, meaning "the expression of one thing implies the exclusion of another thing." See, e.g., United States v. Booth, 551 F.3d 535, 540 (6th Cir. Tenn. 2009). Because these remedies are not listed in the EFTA, and Plaintiff only claims relief under the EFTA, the Magistrate Judge is of the opinion that these portions of the prayer for relief have no relation to the controversy. See Timmons v. Wal-Mart Stores, 33 F. Supp. 2d 577, 578 (W.D. Ky. 1999) (observing that when a statute lists available remedies, *expressio unius* dictates that the legislation bars other avenues of redress). Further, allowing Plaintiff to seek these remedies would undoubtedly prejudice Defendant-Wal-Mart, as they are not contemplated by the statute.

Accordingly, because the Magistrate Judge finds that the remedies of disgorgement and injunctive relief that Plaintiff seeks are immaterial and impertinent under Rule 12(f), he recommends that Defendant Wal-Mart's Motion to Strike be GRANTED.

**s/ Edward G. Bryant**  
EDWARD G. BRYANT  
United States Magistrate Judge

**September 1, 2009**  
Date