

COPY

JUDGE RAKOFF

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

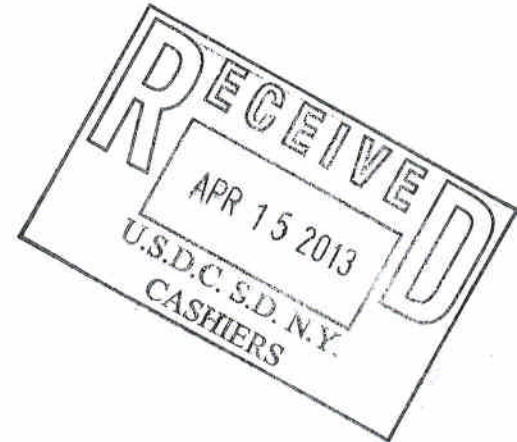
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BAYER HEALTHCARE LLC,

Plaintiff,

vs.

SERGEANT'S PET CARE PRODUCTS, INC.

Defendant.
----- X



13-cv-_____
ECF CASE

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Bayer HealthCare LLC ("Bayer"), by its attorneys, Debevoise & Plimpton LLP, for its complaint, alleges as follows:

NATURE OF THE ACTION AND RELIEF SOUGHT

1. This is a civil action for false advertising and unfair competition under federal and state law against Sergeant's Pet Care Products, Inc. ("Sergeant's"), which competes directly against Bayer's Animal Health Division in the sale of flea and tick preventives. Sergeant's has launched a national advertising campaign which deceives consumers and retailers into believing that Sergeant's Sentry[®] Fiproguard[®] Max

(“Fiproguard”) and Pronyl OTC[®] Max (“Pronyl”) products offer superior protection against fleas and ticks on dogs compared to competing products, including Bayer’s K9 Advantix[®] II (“K9 Advantix”) and Advantage[®] II for dogs (“Advantage”) products.

2. These advertisements lure consumers and retailers into thinking – incorrectly—that Sergeant’s products (a) are more effective or kill faster than Bayer’s products, (b) kill or repel 100% of fleas and ticks immediately, (c) cause fleas or ticks to start dying within minutes, (d) can kill 99% of all fleas and ticks within 4 hours and maintain that efficacy for a full month, (e) kill or repel fleas and ticks before they even come into contact with the pet, (f) prevent more fleas from biting pets than Bayer’s products, (g) continue to prevent more fleas from biting pets than Bayer’s products for an entire month, and (h) prevent fleas from biting humans.

3. For example, one commercial for Fiproguard goes so far as to claim that Fiproguard not only “prevents more fleas from biting than Frontline[®] Plus and K9 Advantix[®] II,” but to show fleas being unable to even come into contact with treated dogs.

4. Sergeant’s advertising claims are false and unsubstantiated. Fiproguard, Pronyl, K9 Advantix, and Advantage are all effective products, and there is no evidence that Fiproguard or Pronyl is any more effective than K9 Advantix and Advantage. Furthermore, no product on the market, including Sergeant’s products, kills a significant number of fleas or ticks immediately after application or prevents fleas and ticks from even coming into contact with dogs, as Sergeant’s advertisements literally claim through

their visuals. With the exception of a single illegible – and legally ineffective – disclaimer stating that “independent studies” support a small part of the claim that Fiproguard prevents more fleas from biting and taking a blood meal than K9 Advantix and Frontline[®] Plus (“Frontline”) (another competitor’s product), Sergeant’s does not even attempt to substantiate the myriad false claims in its advertisements. And even that study, on information and belief, fails to substantiate the claims in the commercial.

5. Sergeant’s conduct is causing serious and irreparable harm to Bayer and constitutes false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), unfair competition in violation of the New York State common law, violation of the New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §§ 349 and 350, and violation of the comparable unfair competition and deceptive acts and practices laws of the other states in which the advertising is disseminated.

6. If Sergeant’s conduct is not immediately enjoined, Bayer will suffer irreparable harm in the marketplace. Bayer has invested substantial resources into developing its products and bringing them to consumers through sales to veterinarians and pet specialty retailers. Sergeant’s false advertising threatens not only that enormous investment, but also to undermine consumer perception of Bayer’s products. Because these pet medicines are being sold outside of the veterinary channel, consumers may not have the benefit of veterinarian recommendations when they see the advertisement or make their purchasing decisions and must therefore rely heavily on brand reputation. Sergeant’s false advertising, if left unchecked, will irreparably damage Bayer’s

reputation. This harm is particularly serious now as Bayer enters the critical flea and tick season. Because the flea and tick season does not last the entire year in much of the United States, Bayer only has a small window of opportunity during the height of the season to effectively market its products. Its marketing efforts should not be hampered by Sergeant's false and misleading advertising.

THE PARTIES

7. Bayer HealthCare LLC is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business at 511 Benedict Avenue, Tarrytown, New York 10591. Bayer owns rights in the United States to a number of parasite treatments, including the flea product Advantage and the flea and tick product K9 Advantix. Bayer distributes these brands in New York and throughout the United States. Bayer sells its products to veterinarians and pet specialty retail stores.

8. On information and belief, Sergeant's Pet Care Products, Inc. is a corporation organized and existing under the laws of the State of Michigan with its principal place of business at 2637 South 158th Plaza, Omaha, Nebraska 68130. Sergeant's distributes its flea and tick products, including Fiproguard and Pronyl, in New York and throughout the United States. Sergeant's sells its products to pet specialty retailers, grocery stores, and other mass retailers.

JURISDICTION AND VENUE

9. This Court has original jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332 and 1338 and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). The amount in controversy is in excess of \$75,000 exclusive of interest and costs.

10. This Court has personal jurisdiction over Sergeant's by virtue of its transacting and doing business in this district and pursuant to N.Y. Civ. Prac. L & R. § 302(a). On information and belief, Sergeant's has transacted and done business in the State of New York and in this District and has disseminated its false advertising in the State of New York and in this District.

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to this action occurred in this District, including the distribution of Sergeant's false advertising in this District.

FLEA AND TICK PRODUCTS

12. Companion pets, especially those that go outdoors, are often victims of flea or tick infestations. Fleas and ticks are parasites that feed on the blood of an animal, often causing severe discomfort, itching, and even pain to pets. Fleas and ticks also may be vectors of dangerous diseases that can harm the pet and, in some cases, even humans. For example, Lyme disease is spread through tick bites. Infestations are difficult to eradicate, as these parasites are highly prolific.

13. One of the most effective ways to prevent flea and tick infestations is by applying topical parasiticides on a monthly basis. These parasiticides are typically applied topically to the back of the pet and then spread across the animal's skin to control any parasites that come into contact with it.

14. Some topical parasiticides also repel fleas and ticks in addition to killing them. These products prevent the parasites from attaching to the skin, causing them to fall off the pet. All known flea and tick topical parasiticides require the flea or tick to at least come into contact with the product on the pet—there is no product that prevents the parasite from coming into contact with the pet in the first instance.

15. Bayer manufactures and distributes in the United States two flea products for dogs: K9 Advantix and Advantage. K9 Advantix contains as active ingredients imidacloprid, permethrin and pyriproxyfen. K9 Advantix kills, among other pests, all life stages of fleas and adult ticks. It also repels fleas and ticks. Advantage contains as active ingredients imidacloprid and pyriproxyfen. Advantage kills, among other pests, all stages of the flea life cycle.

16. K9 Advantix and Advantage are both highly effective products against fleas. K9 Advantix kills 100% of fleas within 24 hours of application and maintains a high level of efficacy for an entire month. By the end of the month, K9 Advantix still kills 90-100% of all fleas within 24 hours of infestation. While Bayer is not aware of any studies measuring K9 Advantix's efficacy prior to two hours following treatment, K9 Advantix kills at least 28-84% of fleas within 2 hours of application.

17. Advantage is also highly effective at killing fleas. Advantage kills 100% of fleas within 24 hours of application, and like K9 Advantix, Advantage is highly efficacious for the entire month. Even at the end of the month, Advantage still kills up to 100% of fleas within 24 hours of infestation. Bayer is also unaware of any studies measuring Advantage's efficacy prior to two hours following treatment, but Advantage will kill up to 28% of fleas within 2 hours of application.

18. K9 Advantix is highly effective at killing and repelling ticks as well. At the beginning of the month, depending on the species of tick, K9 Advantix kills 29-100% of ticks within 48 hours. At the end of the month, K9 Advantix continues to kill ticks, in many instances over 90% within 48 hours.

19. Sergeant's manufactures and sells a flea and tick product for dogs that contains both fipronil (the active ingredient in Merial's Frontline[®] products) and cyphenothrin ("Sergeant's Combo Product"). This product is sold under multiple brand names: Sentry[®] Fiproguard[®] Max for Dogs to pet specialty retailers and Sergeant's[®] Pronyl OTC[®] Max to grocery and mass retail stores. This product kills adult fleas and ticks and is labeled for 30-day use.

20. Both imidacloprid and fipronil have demonstrated excellent efficacy against fleas. Imidacloprid-based products generally kill fleas as quickly and as effectively as fipronil-based products.

21. The other active ingredient in Sergeant's Combo Product, cyphenothrin, is in the same category of pesticides as permethrin, which Bayer includes in K9 Advantix. Both are neurotoxins in the pyrethroid family of chemicals and have very similar activity against fleas and ticks. There is no significant difference in the efficacy of K9 Advantix and Advantage compared to the efficacy of Fiproguard or Pronyl in killing fleas or (in the case of K9 Advantix) ticks.

22. Neither Sergeant's nor Bayer's products prevent fleas or ticks from coming into contact with the pet in the first place. As with all topicals, fleas and ticks must actually come into contact with the treated animal and be exposed to the active ingredients before the products take effect.

23. Fiproguard and Pronyl are applied topically to the pet's back. Like all flea and tick products that are applied topically, Fiproguard and Pronyl do not kill a significant number of fleas immediately after application. Instead, the product must first spread across the dog's skin, which itself takes time. Thus, within an hour of application, Fiproguard and Pronyl only manage to kill 0-9% of fleas on dogs, and only 2-11% of ticks on dogs. Even four hours after application, Fiproguard and Pronyl do not reach 100% efficacy against fleas or ticks on dogs. Ex. 1, EPA Efficacy Review (Dec. 6, 2010).

24. Neither Sergeant's nor Bayer's products are indicated for use on humans or for reducing flea bites on humans.