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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ETF MANAGERS GROUP LLC,	:	Document Filed Electronically
	:	
Plaintiff,	:	
v.	:	Civil Action No.
	:	
ADVISORSHARES INVESTMENTS, LLC,	:	
and FORESIDE FUND SERVICES, LLC	:	JURY TRIAL DEMANDED
	:	
Defendants.	:	
	:	
	:	X

COMPLAINT AND DEMAND FOR TRIAL BY JURY

Plaintiff ETF Managers Group LLC (“ETFMSG” or “Plaintiff”), by and through its undersigned counsel, hereby complains of defendants AdvisorShares Investments, LLC (“AdvisorShares”) and Foreside Fund Services, LLC (“Foreside”) (collectively, “Defendants”), and alleges as follows, upon knowledge with respect to itself and its own acts, and upon information and belief as to all other matters:

PARTIES

1. Plaintiff ETF Managers Group LLC is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 30 Maple Street, Suite 2, Summit, New Jersey 07901.

2. Upon information and belief, defendant AdvisorShares Investments, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with a principal place of business at 4800 Montgomery Lane, Suite 150, Bethesda, Maryland 20814.

3. Upon information and belief, defendant Foreside Fund Services, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with a place of business at 899 Cassatt Road, Suite 110, Berwyn, Pennsylvania 19312.

JURISDICTION

4. ETFMG seeks pecuniary and injunctive relief from the various acts of Defendants arising under the Trademark and Unfair Competition Laws of the United States, 15 U.S.C. §§ 1051 *et seq.*, under the laws of the State of New Jersey, and under state common law. Defendants' illegal acts have infringed on USPTO awarded trademarks, irreparably harmed the goodwill, reputation, and brand equity of ETFMG and specifically its cannabis investment brand fund - the ETFMG Alternative Harvest ETF - hereinafter "MJ", and have caused MJ and as such ETFMG significant damage.

5. This Court has original jurisdiction over this dispute pursuant to 15 U.S.C. §§ 1116(a) and 1121, 28 U.S.C. § 1331, and 28 U.S.C. §§ 1338(a) and (b), as this action arises under the Trademark Laws of the United States.

6. The Court has supplemental jurisdiction over the state common-law claims under 28 U.S.C. § 1367.

7. Upon information and belief, Defendants purport to be and are actively engaged in promoting, advertising, marketing, or offering its services and/or doing business within this judicial district.

8. Upon information and belief, this Court has, and at all relevant times has had, personal jurisdiction over Defendants pursuant to the law of the State of New Jersey and Rule 4 of the Federal Rules of Civil Procedure.

9. The claims alleged in this complaint arise in the State of New Jersey and elsewhere.

10. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (c), as a substantial part of the events giving rise to the claims of this complaint ostensibly occurred in this judicial district, and Defendants are deemed to reside in this judicial.

BACKGROUND

Plaintiff's Trademark Rights

11. ETFMG was founded in 2014 by Sam Masucci with a vision of developing innovative thematic exchange-traded funds (“ETFs”) that provide investors unique exposure to new markets.

12. Exchange-traded funds are investment funds traded on stock exchanges, much like stocks. An ETF holds assets such as stocks, commodities, or bonds, and are designed to track the performance of specified indexes, industry sectors, or various managed strategies.

13. Today, the ETFMG fund lineup provides access to a diverse collection of global themes and is comprised of 75% first to market products that have been uniquely developed into investment brands.

14. First to market products are designed to give direct access to up and coming, long-term, outsized growth opportunities in new market segments within indexed strategies built to evolve in parallel with the respective industries. ETFMG’s investable product brands, specifically MJ, are seen as the educator and thought leader tied to their respective themes

because they have been first to market. They also are a source of information for investors and generally the financial industry beyond the actual product(s).

15. One of ETFMG's most successful funds, the MJ fund tracks the Prime Alternative Harvest Index, designed to measure the performance of companies within the global cannabis ecosystem benefitting from medicinal and recreational cannabis legalization initiatives across the world.

16. MJ was the first U.S. listed investable product allowing investors direct access to the cannabis industry when it launched, and it is to date the world's largest ETF to target the global cannabis industry (inclusive of international stock exchanges with listed cannabis products).

17. The MJ fund does not, however, invest in any U.S. or foreign company whose business activities are illegal under any applicable federal or state law.

18. The MJ fund hit \$1 billion in assets invested after just 14 months of trading, had a "high water" assets invested mark of \$1.38 billion in May of 2019 and to date is at \$778 million. MJ was the only Cannabis ETF in the US for 14 months under which time brand development, brand equity, and non-industry standard investments were made by ETFMG to support building the MJ brand.

19. Investors in the MJ fund comprise a much more diverse group than for most ETFs. This is demonstrated by its average investment account size of \$2,100 across approximately 587,000 individual investors. In the ETF industry, this is an unusually large number of non-institutional entities, or "retail investors" meaning non-financial professionals that have invested in MJ. This uniqueness can be attributed in part to the MJ brand penetration

that has been achieved by ETFMG's investment in education, marketing, and events that are unique when compared to what is "standard" in the ETF industry.

20. ETFMG's products are available to all investors through several different outlets including direct stock purchases through online brokerages on the New York Stock Exchange, through financial advisers, and any number of online or application based commission free stock trading platforms. There is substantial public demand for products, events, and materials bearing the MJ brand marks as evidenced by the very significant sales. As a result, the MJ Marks represent a highly valuable goodwill and commercial property for ETFMG.

21. ETFMG has advertised its products bearing the MJ Marks as synonymous with cannabis investing through, *inter alia*, conference sponsorships, thought leadership speaking engagements, educational content and partnerships, branded giveaways, hotel lobby and elevator marketing, email campaigns, and ETFMG's own website (www.etfmg.com/MJ). Examples of these advertising and marketing items are attached as Exhibit A.

22. ETFMG and MJ are featured as the exclusive training sponsor of a world top-ranked Ultimate Fighting Championship heavyweight fighter, most recently visible on a national and global scale at UFC "Fight Night" ultimate fighting event on July 20, 2019 at the AT&T Center arena in San Antonio, Texas. This included prominent MJ branding on promotional event posters, fighters' training apparel, fighter's media and social media content, and with ring-side VIP attendees wearing ETFMG and MJ branded shirts that were aired in the national TV coverage. Examples of these promotional activities are attached as Exhibit B.

23. ETFMG distributes quarterly commentaries for the respective ETF brands as a unique educational branded material item – a unique offering in its industry. These documents feature prominent use of the MJ Marks.

24. ETFMG and MJ have also enjoyed substantial unsolicited/unpaid publicity for its product brands with the MJ brand being the most covered in mass media. The MJ brand has enjoyed over 2,200 media mentions since MJ's launch, over 25 broadcast television interviews featuring MJ and ETFMG branded experts educating on cannabis investing, and two featured articles in The New York Times.

25. Due to its great success, the unique brand equity, activations, and brand development executed and funded by ETFMG to support the development of the MJ brand, the MJ designation has become an internationally recognized brand synonymous with investing in cannabis and known as the only active U.S. Cannabis investment product giving full cannabis sector exposure.

26. ETFMG is the owner of all right, title, and interest in and to, *inter alia*, the following trademarks and United States trademark registrations (collectively the "MJ Marks"):

Reg. No.	Trademark	Registered	First Used	Services
5,841,343	MJ	Aug. 20, 2019	Feb. 09, 2018	Exchange-traded fund investment and brokerage services; management of an exchange-traded fund that tracks a select group of securities
5,855,339		Sep. 10, 2019	Feb. 09, 2018	Providing exchange-traded fund services in the nature of exchange-traded funds brokerage and investment; Management of exchange-traded funds that track select groups of securities; etc.

27. Copies of the foregoing registration certificates for the MJ Marks are attached hereto as Exhibits C and D.

28. The registrations for the MJ Marks are in full force and effect.

29. ETFMG has also filed trademark applications for the MJ Marks in various foreign jurisdictions, and has already received trademark registrations in the United Kingdom and Australia for its MJ Marks.

30. The MJ Marks are distinctive, have become well known to the trade and members of the investing public through their use in interstate commerce, and have established substantial goodwill such that the public associates and identifies products, materials, and messages bearing such trademarks as coming from a single source. Thus, even independent of ETFMG's federal trademark registrations, ETFMG possesses extensive common-law trademark rights in the above marks.

Defendants' Wrongful Conduct

31. Upon information and belief, defendant AdvisorShares has made plans to and intends to launch its own ETF that is intended to directly compete with MJ with a Cannabis focused investment theme.

32. Upon information and belief, defendant AdvisorShares' competitive ETF will have the ticker symbol MJUS.

33. Upon information and belief, defendant Foreside is the distributor of AdvisorShares' funds, including MJUS.

34. As the distributor, Foreside is the face to financial regulatory groups (FINRA, SEC). Foreside's responsibilities include the regulatory and compliance review and approval of AdvisorShares' funds sales and marketing materials inclusive of the website, fund messaging, advertising, educational materials, and all related public facing, retail, and/or financial-professional (individuals and institution(s)) facing messaging and education.

35. Defendants advertise their pure U.S. cannabis ETF product making prominent trademark use of the term MJUS.

36. Defendants' use of the term MJUS constitutes use in commerce pursuant to the Lanham Act.

37. Defendants' advertising uses a box device that highlights the "MJ" portion to the mark as follows:



38. The font used in Defendants' logo advertising MJUS is identical to the rare font that was uniquely selected by ETFMG for its own website advertising as seen below:



39. Upon information and belief, Defendants' MJUS logo was copied from Plaintiff's logo.

40. Defendants make further trademark use of MJUS as seen in the below advertising found on its website:



Get a Copy of the Preliminary Prospectus

First Name Last Name

Email

Phone

I am an FP or Individual Investor *

Financial Professional

Individual Investor

Submit

41. On August 23, 2019 counsel for ETFMG sent a cease and desist letter to defendant AdvisorShares concerning AdvisorShares planned use of the MJUS mark.

42. On September 9, 2019, counsel for defendant AdvisorShares sent a responsive letter to counsel for ETFMG, in which it refused to cease use of the MJUS mark.

43. Defendants' acts of infringement and unfair competition complained of herein have been deliberate, willful, intentional, and in bad faith, with full knowledge and conscious disregard of ETFMG's rights. In view of the egregious nature of Defendants' actions, this is an exceptional case within the meaning of Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a).

FIRST CLAIM
Trademark Infringement in Violation of 15 U.S.C. § 1114(1)

44. ETFMG reasserts the preceding allegations in paragraphs 1-43 as if fully set forth herein.

45. Defendants' distributing, advertising, offering for sale, selling, or other use of the MJ Marks has caused and is likely to continue to cause confusion, to cause mistake, or to deceive, in violation of Section 32(1) of the Lanham Act (15 U.S.C. § 1114(1)).

46. Upon information and belief, the aforesaid acts of Defendants were committed willfully, knowingly, maliciously, and in conscious disregard of their legal obligations to ETFMG.

47. ETFMG has no adequate remedy at law. Defendants' conduct has caused, and if not enjoined, will continue to cause immediate and irreparable damage to the MJ brand and as such ETFMG's trademark rights, business, reputation, and goodwill in a manner that cannot be adequately calculated or compensated in money damages alone.

SECOND CLAIM
False Designation Of Origin And Unfair
Competition In Violation Of 15 U.S.C. § 1125(a)

48. ETFMG reasserts the preceding allegations in paragraphs 1-43 as if fully set forth herein.

49. Defendants' distributing, advertising, offering for sale, selling, or other use of the MJ Marks or any products bearing the MJ Marks constitutes false designations of origin, which have caused and are likely to continue to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of the Defendants with ETFMG, or as to the origin, sponsorship, or approval of the Defendants' products by ETFMG, in violation of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)).

50. The aforesaid acts of Defendants were committed willfully, knowingly, maliciously, and in conscious disregard of their legal obligations to ETFMG.

51. ETFMG has no adequate remedy at law. Defendants' conduct has caused, and if not enjoined, will continue to cause immediate and irreparable damage to the MJ brand and as such ETFMG's trademark rights, business, reputation, and goodwill in a manner that cannot be adequately calculated or compensated in money damages alone.

THIRD CLAIM
Common Law Trademark Infringement & Unfair Competition

52. ETFMG reasserts the preceding allegations in paragraphs 1-43 as if fully set forth herein.

53. By virtue of extensive and substantially exclusive use of the MJ Marks, ETFMG is the owner of such distinctive trademarks at common law.

54. Defendants' unauthorized use of imitations of ETFMG's common-law trademarks has caused and is likely to continue to cause confusion and mistake in the minds of the trade and

investing public as to the source of Defendants' products and to cause the investing public to believe that such products are products of ETFMG or tied directly to the more broadly-known MJ brand when, in fact, they are not.

55. Defendants are improperly trading upon the reputation and goodwill of the MJ brand and as such ETFMG and are impairing the distinctiveness of ETFMG's valuable rights in and to such trademarks.

56. The aforesaid acts of Defendants constitute unfair competition and unfair business practices contrary to the common law of the State of New Jersey.

57. The aforesaid acts of Defendants have been continuous and deliberate, and were committed willfully, knowingly, maliciously, in bad faith, and in conscious disregard of ETFMG's rights.

58. ETFMG has no adequate remedy at law. Defendants' conduct has caused, and if not enjoined, will continue to cause immediate and irreparable damage to the MJ brand and as such ETFMG's trademark rights, business, reputation, and goodwill in a manner that cannot be adequately calculated or compensated in money damages alone.

FOURTH CLAIM
Unfair Competition Under N.J.S.A. § 56:4-1

59. ETFMG reasserts the preceding allegations in paragraphs 1-43 as if fully set forth herein.

60. Despite the public recognition of the MJ Marks, Defendants traded on the goodwill associated with such trademarks.

61. Defendants have appropriated for their own use a name, brand, trademark, reputation, or goodwill of ETFMG in whose products Defendants deal, in violation of N.J.S.A. § 56:4-1.

62. ETFMG has no adequate remedy at law. Defendants' conduct has caused, and if not enjoined, will continue to cause immediate and irreparable damage to ETFMG's trademark rights, business, reputation, and goodwill in a manner that cannot be adequately calculated or compensated in money damages alone.

PRAYER FOR RELIEF

WHEREFORE, the Court should enter judgment in ETFMG's favor, including the following:

A. A preliminary and permanent injunction enjoining Defendants and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of them, from:

a. Using, reproducing, advertising, or promoting the MJUS trademark, or any designation confusingly similar therewith, in connection with the offer or sale of any goods or services, the use of any domain name, the rendering of any service, or any commercial activity;

b. Using, reproducing, advertising, or promoting any trademark, URL, or copyright that is confusingly similar to, or a colorable imitation of, the MJ Marks;

c. Injuring the commercial reputation, renown, and goodwill of the established MJ brand and the MJ Marks;

d. Using or reproducing any word, term, name, symbol, or device, or any combination thereof, which confuses or falsely represents or misleads, is calculated to confuse, falsely represent or mislead, or which has the effect of confusing, falsely presenting, or misleading, that the activities of Defendants or another are in some way connected with MJ, the MJ brand or marks, ETFMG, or are sponsored, approved, or licensed by ETFMG;

e. Using any false representation or description of ETFMG or of its products, services, or activities, which would damage or injure ETFMG, or give Defendant an unfair competitive advantage in the marketplace; and

f. Otherwise unfairly competing with the MJ brand and ETFMG;

B. An order barring Defendants from applying to register, registering, or maintaining any URL that contains the MJ Marks or confusingly similar marks or combinations;

C. An accounting to determine Defendants' profits in connection with sales of products and services identified by the MJUS trademark, or use by Defendants of any mark, or designation likely to be confused with the foregoing, and an award to ETFMG of such profits;

D. An award of compensatory damages arising out of Defendants' infringing acts, trebled as provided by 15 U.S.C. § 1117(b);

E. A monetary award to ETFMG in the amount of the actual damages sustained by it resulting from Defendants' false description, false representation, false advertising, product disparagement, unfair competition, deceptive trade practices, and other unlawful acts, in an amount to be determined at trial;

F. An award of exemplary and/or punitive damages arising out of Defendants' violations;

G. An award by the Court to Plaintiff of its reasonable attorneys' fees and the costs of this action;

H. Prejudgment and postjudgment interest on the above monetary awards; and

I. Such other and further relief as this Court deems equitable and just.

DEMAND FOR TRIAL BY JURY

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff hereby demands a trial by a jury on all issues so triable.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,
KRUMHOLZ & MENTLIK, LLP
Attorneys for Plaintiff ETF Managers Group LLC

Dated: November 1, 2019

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CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

The undersigned hereby certifies, pursuant to Local Civil Rule 11.2, that with respect to the matter in controversy herein, neither Plaintiff nor Plaintiff's attorney is aware of any other action pending in any court, or of any pending arbitration or administrative proceeding, to which this matter is subject.

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Dated: November 1, 2019

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