

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**ERVIN & SMITH ADVERTISING AND  
PUBLIC RELATIONS, INC.,** )  
)

**Plaintiff,** )

**v.** )

**WILLIAM ERVIN, THOMAS ERVIN,  
LYNNETTE ROXBURGH, DAVID  
ZEMUNSKI, and BTM, INC.,** )  
)

**Defendants.** )  
)

**8:08CV459**

**ORDER**

The parties report that they disagree on whether a trial by jury is available in this case. Plaintiff states it does not intend to demand a jury trial. Defendants William Ervin, Thomas Ervin and BTM, Inc. moved to dismiss the complaint (the motion is still pending) and have not yet answered or filed any jury demand. Defendants Roxburgh and Zemunski filed answers, but did not demand a jury trial at that time.

Paragraph VIII.C.3. of the planning report, filed December 22, 2008 (Doc. 27 at p. 29/31), advises: "The Defendants hereby demand a jury trial on all issues. Plaintiff objects to Defendants' jury demand as out of time."

Under Fed. R. Civ. P. 38(b), on any issue triable of right by a jury, a party may demand a jury trial by:

- (1) serving the other parties with a written demand — which may be included in a pleading — no later than 10 days after the last pleading directed to the issue is served; and
- (2) filing the demand in accordance with Rule 5(d).

Assuming, without deciding, that the defendants' jury demand was untimely, the court finds that the defendants should be granted relief under Fed. R. Civ. P. 39(b). Rule 39(b)

provides: "Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded."

Construing the statement<sup>1</sup> "[t]he Defendants hereby demand a jury trial on all issues," as a motion for jury trial, and pursuant to Fed. R. Civ. P. 39(b),

**IT IS ORDERED** that the defendants' request for jury trial is granted, and this case will be designated on the docket as a jury action as to all the issues so triable.

**DATED December 23, 2008.**

**BY THE COURT:**

**s/ F.A. Gossett  
United States Magistrate Judge**

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<sup>1</sup>The preferred practice would be to follow the procedure set out in Fed. R. Civ. P. 38 and NECivR 38.1.