

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

ROBERT NOVAK, \*  
Plaintiff, \*  
vs. \* CASE NO.: CV-02-2978(DRH)(WDW)  
JOHN BENN, et als., \*  
Defendants. \*

DEFENDANT JOHN BENN'S OMNIBUS RULE 12(b), 12(e)  
AND RULE 19 MOTION TO DISMISS

Comes now Defendant John Benn and requests the Court to dismiss this action. In support of said Motion, Defendant John Benn would show as follows:

**Rule 12(e) Motion For More Definite Statement**

COMES NOW Defendant John Benn in the above referenced matter and pursuant to Rule 12(e) requests that the Court enter an Order requiring Plaintiff to state the legal basis on which he is claiming any action against this Defendant, and further requiring said Plaintiff to plead the specific relief for which he seeks. Said Motion is based upon this Defendant's contention that the current Amended Complaint is so vague or ambiguous that Defendant cannot ascertain the legal basis for Plaintiff's claim, nor can Defendant identify which of the twelve (12) counts are applicable to this Defendant. Further, Plaintiff has not delineated the specific remedy which he seeks (i.e., amount and which remedy against this Defendant). In further support of said Motion, Defendant would state as follows:

1. Plaintiff's original complaint named seven (7) defendants.
2. Plaintiff has offered to the Court an "Amended Complaint" which attempts to add eight (8) new defendants.
3. That in paragraphs 40, 45, 47, 48, 50, 51, 52, 54, 55, 56, 58, 59, 61, 62, 64, 66, 68, 71, 72, 79, 83, 84, 86, 87, 90, 98, 107, 108, 110, 112, 113, 116, 124, 125, 126, 128,

136, 137, 138, 139, 159, 160, 173, 177, 178, 179, 180, 186, 18, 190, 192, 193, 194, 197, 198, 203, 225, 239, 240, 247, 250, 256, 258, and 262 Plaintiff refers to "Defendants" without delineating which of the fifteen (15) currently named defendants are involved.

4. That in paragraph 98, 101, 106, 114, 141, 176, 204, 229, and 241 Plaintiff refers to "Defendant's" (singular possessive) without delineating which of the fifteen (15) currently named defendants are involved.

5. That in paragraphs 49, 88, 132, 133, 142, 143, 200, and 259 Plaintiff refers to "Defendants" (plural possessive) without delineating which of the fifteen (15) currently named defendants are involved.

WHEREFORE, Defendant John Benn prays that the Court will order Plaintiff to file a more definite statement of his claims and the remedy being sought, and further to require Plaintiff to separately state which named defendants are involved with respect to the aforementioned paragraphs.

**Rule 12(b)(7) Motion To Dismiss For Failure To Join Parties Under Rule 19**

COMES NOW Defendant John Benn, pursuant to Rule 12(b)(7), and moves the Court to dismiss this action for failure to join a party under Rule 19. In support of said Motion, Defendant John Benn would show as follows:

6. That Plaintiff's complaint largely involves matters dealing with web site "PetsWarehouse.com" and allegations involving comments posted about this web site.

7. That a number of different corporate entities have been involved with the operation of web site "PetsWarehouse.com" during the relevant time frame noted in Plaintiff's complaint.

8. That these corporate entities are the real parties in interest with respect to the material allegations of Plaintiff's complaint including Pet Net, Inc.; Petswarehouse.com, Inc., and Pets Warehouse, Inc., and Pets Warehouse, New York, Inc.

Wherefore, Defendant John Benn moves, pursuant to Rule 12(b)(7) and Rule 19, to add the appropriate corporate entities as real parties in interest or otherwise to enter an Order dismissing this case due to the proper corporate entities not being parties plaintiff in this action.

**12(b)(7) Motion To Dismiss For Failure To Join The Bankruptcy Trustee As A Party**

**Under Rule 19**

COMES NOW Defendant John Benn, pursuant to Rule 12(b)(7), and moves the Court to dismiss this action for failure to join the bankruptcy trustee as a party under Rule 19. In support of said Motion, Defendant John Benn would show as follows:

9. That Plaintiff in his allegations contends in the "Nature of the Action" section that he "is bringing this action to protect his rights in the trademark 'Pets Warehouse' and its use in the Internet business Petswarehouse.com..."

10. That Plaintiff in Paragraph 91 of his Amended Complaint contends "[s]ince 1974, Robert Novak has been using the Mark 'Pets Warehouse' to identify itself in connection with goods and services it offers to pet hobbyists. The Plaintiff is the exclusive owner of all rights, title, and interest in the 'Pets Warehouse' Mark."

11. That on or about August 25, 1993 Plaintiff Novak filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York.

12. A copy of Plaintiff Novak's bankruptcy petition is attached as **Exhibit 1** to this Motion.

13. In his bankruptcy petition Plaintiff Novak in response to the disclosure section dealing with "Patents, copyrights and other intellectual property" indicated he had "None".

14. In his bankruptcy petition Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse".

15. In his bankruptcy petition Plaintiff Novak failed to claim as exempt property any rights to the trademark "Pets Warehouse."

16. That on or about March 23, 1994, the assigned Bankruptcy Trustee reported that this was a "no assets" case.

17. A copy of this report is attached as **Exhibit 2** to this Motion.

18. That Plaintiff Novak failed to disclosure to the Bankruptcy Trustee any claim to rights to the trademark "Pets Warehouse."

19. That on or about December 4, 1995, Plaintiff Novak filed Amended Schedules to his bankruptcy.

20. A copy of these amended schedules are attached as **Exhibit 3** to this Motion.

21. In his amended schedules Plaintiff Novak in response to the disclosure section dealing with "Patents, copyrights and other intellectual property" indicated he had "None".

22. In his amended schedules Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse".

23. In his amended schedules Plaintiff Novak failed to claim as exempt property any rights to the trademark "Pets Warehouse."

24. That on or about January 1, 1996, Plaintiff Novak filed to convert his bankruptcy case from Chapter 7 to Chapter 11.

25. That on or about January 30, 1996, Plaintiff Novak filed amended schedules to his bankruptcy petition.

26. A copy of these amended schedules are attached as **Exhibit 4** to this Motion.

27. In his amended schedules Plaintiff Novak in response to the disclosure section dealing with "Patents, copyrights and other intellectual property" indicated he had "None".

28. In his amended schedules Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse".

29. In his amended schedules Plaintiff Novak failed to claim as exempt property any rights to the trademark "Pets Warehouse."

30. That on or about May 23, 1996, Plaintiff Novak filed amended schedules to his bankruptcy petition.

31. A copy of these amended schedules are attached as **Exhibit 5** to this Motion.

32. In his amended schedules Plaintiff Novak, in response to the disclosure section dealing with "Patents, copyrights and other intellectual property", indicated he had "None".

33. In his amended schedules Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse".

34. In his amended schedules Plaintiff Novak failed to claim as exempt property any rights to the trademark "Pets Warehouse."

35. That the Bankruptcy Court has previously held that Plaintiff Novak failed to disclose in his bankruptcy petitions and schedules his interest in a sailboat and further that such property was part of the bankruptcy estate.

36. That the Bankruptcy Trustee has not abandoned any interest in the Mark "Pets Warehouse" or otherwise authorized the filing of the present lawsuit.

37. A copy of the docket for Plaintiff's bankruptcy case is attached as **Exhibit 6**.

38. That on or about February 27, 2001, Plaintiff filed for formal trademark registration the mark "Pets Warehouse."

39. That Plaintiff in his formal trademark filing claimed that the mark was first used on December 4, 1974.

Wherefore, Defendant John Benn moves, pursuant to Rule 19, to add the appropriate Bankruptcy Trustee as a real party in interest or otherwise to enter an Order dismissing this case due to abandonment of this property as a result of Plaintiff's wrongful actions in his bankruptcy petition.

**Rule 12(b)(6) Motion To Dismiss Based Upon Judicial Estoppel**

COMES NOW Defendant John Benn, pursuant to Rule 12(b)(6), and moves the Court to dismiss this action for failure to state a claim in that Plaintiff Novak is judicially estopped from making any claim concerning an alleged trademark in "Pets Warehouse" due to his failure to list or claim such intellectual property in a Chapter 7/Chapter 11 bankruptcy proceeding he filed. In support of said Motion, Defendant John Benn would show as follows:

40. That Plaintiff in Paragraph 91 of his Amended Complaint contends "[s]ince 1974, Robert Novak has been using the Mark 'Pets Warehouse' to identify itself in connection with goods and services it offers to pet hobbyists. The Plaintiff is the exclusive owner of all rights, title, and interest in the 'Pets Warehouse' Mark."

41. That on or about August 25, 1993 Plaintiff Novak filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York.

42. A copy of Plaintiff Novak's bankruptcy petition is attached in the Joint Evidentiary Submissions filed with this Motion.

43. In his bankruptcy petition Plaintiff Novak in response to the disclosure section dealing with "Patents, copyrights and other intellectual property" indicated he had "None."

44. In his bankruptcy petition Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse."

45. In his bankruptcy petition Plaintiff Novak failed to claim as exempt property any rights to the trademark "Pets Warehouse."

46. That on or about March 23, 1994 the assigned Bankruptcy Trustee reported that this was a "no assets" bankruptcy.

47. That on or about December 4, 1995, Plaintiff Novak filed Amended Schedules to his bankruptcy.

48. In the amended schedules Plaintiff Novak in response to the disclosure section dealing with "Patents, copyrights and other intellectual property" indicated he had "None."

49. In his amended schedules Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse."

50. In his amended schedules Plaintiff Novak failed to claim as exempt any rights to the trademark "Pets Warehouse."

51. That on or about January 1, 1996, Plaintiff Novak filed to convert his bankruptcy case from Chapter 7 to Chapter 11.

52. That on or about January 30, 1996, Plaintiff Novak filed amended schedules to his bankruptcy petition.

53. In his amended schedules Plaintiff Novak in response to the disclosure section dealing with "Patents, copyrights and other intellectual property" indicated he had "None."

54. In his amended schedules Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse."

55. In his amended schedules Plaintiff Novak failed to claim as exempt property any rights to the trademark "Pets Warehouse."

56. That on or about May 23, 1996, Plaintiff Novak filed amended schedules to his bankruptcy petition.

57. In his amended schedules Plaintiff Novak, in response to the disclosure section dealing with "Patents, copyrights and other intellectual property" indicated he had "None."

58. In his amended schedules Plaintiff Novak failed to list as an asset any rights to the trademark "Pets Warehouse."

59. In his amended schedules, Plaintiff Novak failed to claim as exempt any rights to the trademark "Pets Warehouse."

60. That the Bankruptcy Court has previously held that Plaintiff Novak failed to disclose in his bankruptcy petitions and schedules his interest in a sailboat.

61. That the Bankruptcy Trustee has not abandoned any interest in the Mark "Pets Warehouse" or otherwise authorized the filing of the present lawsuit.

62. That Plaintiff Novak is judicially estopped from now claiming an interest in the Mark "Pets Warehouse" and is judicially estopped from pursuing any claims in this lawsuit based upon said Mark.

Wherefore, Defendant John Benn moves, pursuant to Rule 12(b)(6) for an Order dismissing Plaintiff Novak's claims based upon the Mark "Pets Warehouse."

**Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction**

COMES NOW Defendant John Benn, pursuant to Rule 12(b)(7), and moves the Court to dismiss this action for lack of personal jurisdiction. In support of said Motion, Defendant John Benn would show as follows:

63. Defendant John Benn does not reside in the judicial district encompassed by the Eastern District of New York.

64. Under applicable provisions of New York statutes, Defendant John Benn does not have sufficient contacts with the State of New York to support personal jurisdiction before the United States District Court for the Eastern District of New York.

65. This motion is based upon the Affidavit of John Benn attached and incorporated herein.

This Motion is based upon the Joint Evidentiary Submissions separately filed in these proceedings and incorporated herein.

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Date

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John R. Benn, *Pro se*  
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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to or immediately after filing the foregoing with the Court, I mailed U.S. Mail, postage prepaid, or mailed by email a copy to:

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Date: \_\_\_\_\_

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John R. Benn