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Saturday, December 06, 2003

The Honorable Denis R. Hurley
United States District Court
100 Federal Plaza
Central Islip, New York 11722-4438

Re: Robert Novak v. John Benn, et als.
Case Number: CV 02-2978 (DRH)(WDW)
Case Number: CV 01-3566 (DRH) (WDW)
Our File Number: 02-119

Dear Judge Hurley:

REVISED REQUEST FOR PRE-MOTION CONFERENCE

On behalf of entity "PetsForum Group, Inc." in the above styled lawsuit, I would like to formally request a pre-motion conference with respect to these intended Rule 12 motions.

1) 12(b)(5) Motion to Dismiss for Insufficiency of Service

Plaintiff has not properly served corporate entity "PetsForum Group, Inc." in these proceedings. As previous submissions before the Court indicate, Plaintiff Novak has altered the Return of Service filed in this case. See Docket #72. At the time of service there was no clear indication that this summons and complaint was being served on the corporate entity "PetsForum Group, Inc." Furthermore, the summons and complaint did not contain the necessary summons formally issued by the Federal Clerk. See FRCP 4(a). Instead, Plaintiff Novak copied and used a single general summons which failed to "be directed to defendant" PetsForum Group, Inc.

This motion would be based upon the provisions of FRCP Rules 4(a), 4(h)(1) and 12(b)(5). *Schaeffer v. Village of Ossining*, 58 F.3d 48 (2nd Cir. 1995); *Melkaz Int'l Inc. v. Flavor Innovations, Inc.*, 167 F.R.D. 634 (E.D.N.Y. 1996).

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

This motion would be based upon facts indicating that the PetsForum Group, Inc. is not located within the judicial district of the E.D.N.Y. nor does it have sufficient contacts with the State of New York to be subject to the New York long-arm statute.

This motion would be based upon the provisions of FRCP 12(b)(2) and the provisions of 3029a) of the New York long arm statute. This Court has previously dismissed several named defendants for lack of personal jurisdiction.

3. Rule 12(b)(7) Motion to Dismiss for Failure to Join Corporate Entities as Parties Under Rule 19

This motion would be based upon matters dealing with the web site "Petswarehouse.com" which is the underlying Internet location involved in this lawsuit. There are numerous corporate entities which have the same or greater interest with respect to nearly all of Plaintiff's claims in his Amended Complaint. None of them have been named as plaintiffs. These other entities, including Pet Net, Inc., Petswarehouse.com, Inc., and Pets Warehouse, Inc. are the real parties in interest with respect to several of the causes of action in this lawsuit. This motion would seek either dismissal of the Amended Complaint for failure to name these corporate entities or alternatively their join in this action.

This motion would be based upon the provisions of FRCP Rule 12(b)(7) and Rule 19. *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999); *Int'l Paper Co. v. Denkmann Associates*, 116 F.3d 134 (5th Cir. 1997).

4. Rule 12(b)(7) Motion to Dismiss for Failure to Join Bankruptcy Trustee as Party Under Rule 19

This motion would challenge the right of the named Plaintiff to pursue any legal claim with respect to his claimed common-law trademark rights to "Pets Warehouse." In Plaintiff's Amended Complaint he claims to have rights to the common-law trademark "Pets Warehouse" dating back to 1974. On August 25, 1993, Plaintiff filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York. In his bankruptcy petition Plaintiff Novak, in response to the disclosure section dealing with "Patents, copyrights and other intellectual property,," indicated that he had "None." Further, Plaintiff Novak failed to list as an asset any rights to the common-law trademark "Pets Warehouse." Also, Plaintiff Novak failed to claim as exempt any rights to the common-law trademark "Pets Warehouse." The Bankruptcy Trustee never abandoned any interest of the bankruptcy estate to this now-claimed asset.

Absent any action to pursue claims by the Trustee, Plaintiff has no specific rights to any cause of action on this abandoned asset.

This motion would be based upon the provisions of FRCP Rule 12(b)(7). *U.S. Inslaw, Inc.*, 932 F.2d 1467 (C.A.D.C. 1991); *In re: Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.C. 1993).

5. Rule 12(e) Motion for More Definite Statement

This motion would seek clarification of which of the numerous factual allegations and specific causes of action are applicable to named defendant PetsForum Group, Inc.

Plaintiff's original complaint named seven (7) defendants. Plaintiff has filed an Amended Complaint adding eight (8) new defendants. In Plaintiff's Amended Complaint there are sixty-four (64) occurrences of the term "Defendants" without delineating which of the current named fifteen (15) defendants are involved. Further, in view of the Court's recent ruling dismissing numerous defendants it is even more unclear which of the allegations in Plaintiff's Amended Complaint are specifically applicable to any cause of action against defendant PetsForum Group, Inc."

There are nine (9) occurrences of the term "Defendant's" (singular possessive) without any delineation of which of the named defendants are involved.

There are eight (8) occurrences of the term "Defendants" (plural possessive) without delineation of which of the named defendants are involved.

This motion would be based upon the provisions of FRCP Rule 12(e). *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996); *Eiseneach v. Miller-Dwan Med. Ctr.*, 162 F.R.D. 346 (D. Minn. 1995).

Based upon the foregoing matters, I would like to request a pre-motion conference on behalf of PetsForum Group, Inc. Due to the distances involved I would request that such conference be held telephonically. I can be reached at 256-386-7685.

A copy of this letter requesting a pre-motion conference on behalf of PetsForum Group, Inc. has been mailed to the pro se Plaintiff Robert Novak along with the other named defendants.

Thank you for your time and consideration.

Cordially,

John R. Benn
Attorney of Record for PetsForum Group, Inc.

JRB/gdd

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned attorney, do hereby certify that I mailed U.S. Mail, postage prepaid, or mailed by email a copy of the foregoing to:

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Date: _____

John R. Benn