

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 07-21221-CIV-ALTONAGA/TURNOFF

RENEE BLASZKOWSKI, AMY
HOLLUB, and PATRICIA DAVIS,
individually and on behalf of others
similarly situated,

Plaintiffs,

vs.

MARS, INC., et al.,

Defendants.

**DEFENDANTS', PET SUPPLIES "PLUS" AND PET SUPPLIES PLUS/USA, INC.,
MOTION TO DISMISS PLAINTIFFS' CORRECTED
AMENDED CLASS ACTION COMPLAINT**

COME NOW, Defendants, PET SUPPLIES "PLUS" (hereinafter "PLUS") and PET SUPPLIES PLUS/USA, INC. (hereinafter "USA")¹, specially appearing for the limited purpose of this Motion and without submitting to the jurisdiction or venue of this Court, pursuant to Federal Rule of Civil Procedure 12(b)(1), (2), (4), (5), and (6), by and through their undersigned counsel, hereby file the instant Motion to Dismiss the Plaintiffs' Corrected Amended Complaint and as grounds therefore state as follows:

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The Plaintiffs' have incorrectly stated USA's registered corporate name as it is PET SUPPLIES "PLUS"/USA, INC.

I. Introduction

As more fully described in Defendants' Omnibus Motion to Dismiss², the Plaintiffs' Corrected Amended Complaint ("Complaint") categorically splinters the pet food industry in the United States into: (1) Manufacturers; (2) Co-Packers; (3) Retailers; and, (4) Specialty Retailers. (D.E. 156 at ¶¶ 26- 51). To that end, the Plaintiffs have lumped PLUS and USA into their alleged "specialty retailers" group referenced throughout the Complaint. *Id.* at ¶ 51. Based on the bare allegations made in Plaintiffs' Complaint, dismissal of their claims against PLUS and USA is warranted.

II. The Plaintiffs' Complaint Is Facially Defective As It Fails To State Claims Against USA In Violation Of Federal Rules Of Civil Procedure 12(b)(6) & 8(a).

First, as a threshold matter, the Plaintiff's Complaint utterly fails to state a cause of action against USA pursuant to Federal Rules of Civil Procedure 12(b)(6) and 8(a).³ Specifically, USA is last identified in the Complaint in paragraph 51 - before any substantive allegations are asserted - wherein it states:

51. Defendant, Pet Supplies "Plus" ("Pet Supplies Plus"), is a Michigan corporation with its principal place of business in Michigan and **Pet Supplies Plus/USA Inc.** is a Michigan corporation with its principal place of business in Michigan. Pet Supplies⁴ is in the business of advertising, distributing, selling and making recommendations to consumers regarding dog and/or cat food. Pet

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Defendants' Omnibus Motion to Dismiss is adopted and incorporated by reference herein.

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For sake of brevity, all legal citations set forth in Defendants' Omnibus Motion pertaining to Fed.R.Civ.P. 12(b)(6) and 8(a) are incorporated and adopted herein.

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Plaintiffs fail to identify whether "Pet Supplies" as set forth therein pertains to USA or PET SUPPLIES "PLUS".

Supplies Plus markets, sells and makes recommendations to consumers regarding pet food at issue in Michigan and other states. Pet Supplies Plus adopts the marketing representations of the Defendant Manufacturers' by placing point of purchase marketing materials near the Defendant Manufacturers' pet food in its retail stores. Pet Supplies markets and advertises the Defendant Manufacturers' commercial pet food products with the intent to induce consumers to purchase these products.

(D.E. 156 at ¶ 51). [Emphasis Added.]

Thereafter, the Complaint **never again** refers to USA (the party listed in the caption and in paragraph 51) and, of course, is not identified as a party which allegedly committed any wrongdoing. As such, this Court should consider the Plaintiffs' failure to state a claim against USA, after its introduction in paragraph 51 of the Complaint, as an independent basis for dismissal. Specifically, the Plaintiffs have not alleged any facts against USA that would give rise to any discernable legal cause of action.

Notwithstanding the Plaintiffs blatant failure to state a claim against USA, their inclusion of USA into the remaining blanket allegations against "specialty retailers" also fails. Specifically, USA is in the business of granting franchises for the right to operate retail pet food and supply stores under the trade name: Pet Supplies "Plus". (Affidavit of Harvey Solway attached hereto and marked as Exhibit "A"). **To be clear, USA is not a retail seller of pet products nor does it operate any Pet Supplies "Plus" licensed franchisees. Id.** Instead, **all** Pet Supplies "Plus" stores operating in the United States are **independently owned** and registered through corporations within the state they are located in. Id. Therefore, *assuming arguendo* that this Court finds the Plaintiffs blanket allegations against "specialty retailers" in the Complaint to be legally sufficient, USA should be granted the relief requested herein as it does not fall within the definition of a "specialty retailer" as

advanced in the Complaint and because the Plaintiffs have clearly failed to state claims upon which relief can be granted against USA as a franchiser. To that end, it is axiomatic that since USA is only a franchiser and not a retail seller of pet products, any and all allegations in the Plaintiffs Complaint against USA (should the Court find any to be legally sufficient) fail as the Plaintiffs do not state a cause of action against it as a franchiser.

II. The Plaintiffs' Complaint Fails To State A Claim Upon Which Relief Can Be Granted Against PLUS As It Is Nothing More Than A Trade Name.

Unlike the sole reference to USA, the Plaintiffs' Complaint does assert allegations against PLUS. (D.E. 156 at ¶¶ 51, 97, 166 and 167). However, the Plaintiffs' allegations can not, pursuant to Federal Rule of Civil Procedure 12 (b)(6)⁵, stand as pled as PLUS is nothing more than a trade name. (See Exhibit A.) Specifically, PLUS is not a corporate entity and is solely a trade name licensed for use by USA's franchisees. *Id.* Accordingly, this Court should dismiss PLUS as a party to this action by virtue of its non-existence and inability to afford relief to the Plaintiffs for any allegations advanced against it - which clearly a trade name could not have performed. This defect too is fatal and requires dismissal with prejudice.

IV. Pursuant To Federal Rule Of Civil Procedure 12(b)(2), This Court Should Dismiss The Plaintiffs' Complaint Against USA & PLUS With Prejudice As No Attempt Was Made In The Complaint To Assert Personal Jurisdiction Over Either USA or PLUS.

As described more fully above, the Plaintiffs made one material reference to USA in the entire Complaint and numerous allegations against PLUS - all of which are insufficient to overcome dismissal. However, the Plaintiffs' pleading is all fatally deficient in that it fails to make a prima

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Similarly, this Court is also without subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), over PLUS as it has no citizenship recognizable under the laws of any state. Moreover, the Plaintiffs process and service of process on a non-existent entity by definition is defective and subject to dismissal pursuant to Fed.R.Civ.P. 12(b)(4) and (5).

facie case for personal jurisdiction over either USA or PLUS.

While well-settled law in this jurisdiction imposes a burden on the Plaintiff to plead sufficient material facts to establish the basis for the exercise of personal jurisdiction over a non-resident, the Plaintiffs have not overcome their burden.⁶ Instead, a plain reading of paragraph 51 of the Complaint demonstrates that the Plaintiffs did not so much as make an attempt to carry the burden imposed by law. Specifically, the **only** material fact pled by the Plaintiffs concerning personal jurisdiction states, “**Pet Supplies Plus** markets, sells and makes recommendations to consumers regarding the commercial pet food at issue in its **retail stores in Michigan and other states.**” (D.E. 156 at ¶ 51). [Emphasis Added].

Importantly, the sole jurisdictional allegation pertains only to Defendant, PLUS. Accordingly, under similar analysis discussed in Section II, *supra*, the Plaintiffs have utterly failed to make any allegation (jurisdictional or otherwise) against USA. Therefore, USA should be dismissed as a party for lack of personal jurisdiction as a threshold issue. Here, as with their failure to state a claim upon which relief can be granted, the Plaintiffs fail to make a prima facie case for personal jurisdiction over USA and, thus, no further Florida long-arm statute (F.S. § 48.193) and/or Due Process inquiry is required by this Court. Simply stated, the Plaintiffs have remained silent as to personal jurisdiction over USA and under well settled law their silence warrants dismissal with prejudice.

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For the Court’s convenience, USA adopts and incorporates all legal authority cited in Defendant, The Kroger Co.’s Motion to Dismiss (D.E. 197) by reference herein with special emphasis on the case law authority cited in pages 2 - 6 therein.

Additionally, the Plaintiffs sole jurisdictional allegation, directed only at PLUS, also fails to meet the prima facie burden imposed by law. Specifically, the Plaintiffs do not plead a single material fact to establish a prima facie case as to how any of PLUS' alleged conduct and/or activity **in Michigan** supports personal jurisdiction **in Florida**. Here, without passing on the fact that PLUS is solely a trade name incapable of the conduct alleged, the Complaint is again fatally defective. Accordingly, this Court need not conduct further analysis under Florida's long-arm statute (F.S. § 48.193) and, thereafter, Due Process Clause of the Fourteenth (14th) Amendment as the Plaintiffs bare allegation render the Complaint subject to dismissal with prejudice.

V. Conclusion

Based on the foregoing, PLUS and USA respectfully move this Court to dismiss the Plaintiffs' Complaint against them with prejudice.

Dated: September 20, 2007
Miami, Florida

Respectfully submitted,

s/ Carlos B. Salup

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 20, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that this document is being served this day on to all counsels on the attached service list via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ Carlos B. Salup

SERVICE LIST

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