

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

RENEE BLASZKOWSKI, *et al.*,
individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

MARS, INCORPORATED, *et al.*,
Defendants.

**DEFENDANTS' MOTION TO COMPEL THE DEPOSITIONS OF PLAINTIFFS
AND INCORPORATED MEMORANDUM OF LAW**

Defendants¹ hereby move pursuant to Rules 30 and 37 of the Federal Rules of Civil Procedure to compel the depositions of all Plaintiffs named in this action on the dates, at the locations and under the terms identified in Exhibit A hereto, and state:

FACTUAL AND PROCEDURAL BACKGROUND

1. In its April 8, 2008 Order on Motion to Dismiss, this Court ordered that “[c]lass and merits discovery shall commence.” [D.E. 346.]

2. On April 16, 2008, counsel for Natura Pet Products Inc., Kristen Caverly, acting on behalf of all Defendants with respect to coordination of Plaintiffs’ depositions, sent a letter to

¹ This Motion is made on behalf of all Defendants, with the exception of Defendant Kroger Co. of Ohio. Defendants moving here are: Mars, Incorporated; Mars Petcare US, Inc.; The Iams Co.; Hill’s Pet Nutrition, Inc.; Del Monte Foods, Co.; Nestlé Purina PetCare Co.; Nutro Products, Inc.; Natura Pet Products, Inc.; Menu Foods, Inc.; Menu Foods Income Fund; Publix Supermarkets, Inc.; New Albertsons, Inc.; Albertsons LLC; PETCO Animal Supplies Stores, Inc.; Pet Supermarket, Inc.; Pet Supplies Plus/USA, Inc.; PetSmart, Inc.; Target Corp.; and Wal-Mart Stores, Inc. (collectively, “Defendants”).

Plaintiffs' counsel, Catherine MacIvor, proposing dates, order and times of depositions of each of the 33 named plaintiffs in this action on successive days in Miami, Florida, beginning the week of May 12, 2008. (4/16/08 Letter from K. Caverly to C. MacIvor, attached as Exhibit C.)

3. In her letter, Ms. Caverly invited Plaintiffs' counsel to offer "some other proposal regarding location, order and dates," indicating that Defendants "are open to considering any reasonable means to complete these in the short time available but we need to move quickly in order to have the depositions completed by July 31" so as to "be ready to respond to your anticipated class certification motion." (*Id.*)

4. The following day, on April 17, 2008, a paralegal with Ms. MacIvor's firm advised Ms. Caverly that Ms. MacIvor was unavailable, but that a conference call would be set on her return to the office Monday, April 21, to discuss the deposition schedule proposed in Defendants' April 16 letter. (Declaration of Kristen E. Caverly, dated July 20, 2008, at ¶ 3, attached as Exhibit B.)

5. On April 21, 2008, Ms. MacIvor failed to schedule the conference call or otherwise respond to Defendants' April 16 letter, and also failed to acknowledge Ms. Caverly's April 16 email confirming her availability for a telephone conference at Ms. MacIvor's convenience. (*Id.* at ¶ 4.)

6. Plaintiffs' counsel finally conferred with Defendants' counsel, Kristen Caverly and Philip Sechler, on Wednesday, April 23, 2008, at which time Plaintiffs' counsel stated that she was unavailable for various periods between then and July, so the depositions could not begin as promptly as Defendants wanted them to begin. In response to Defendants' inquiry regarding whether other lawyers from her office could defend the depositions so that they could proceed without delay, Ms. MacIvor stated that each of her clients required her to personally

defend their respective depositions and, thus, no deposition could be scheduled during periods of Ms. MacIvor's unavailability. Ms. MacIvor also stated that it would be burdensome for many of her clients to travel to Miami for their depositions. Mr. Sechler and Ms. Caverly indicated Defendants would consider taking some depositions outside of Miami if the depositions could be in major cities and in blocks of time. Plaintiffs' counsel did not offer an alternative schedule but promised to do so. (Ex. B at ¶ 5.)

7. On April 25, 2008, the Court entered an Amended Order Setting Trial and Pretrial Schedule [D.E. 355] ("Scheduling Order"). The Scheduling Order, which was based upon the parties' Joint Agreed Scheduling Report With Agreed Proposed Dates for Amended Scheduling Order, requires Plaintiffs to file their class certification motion on or before November 15, 2008.

8. On April 28, Defendants served notices of deposition directed to each of the named Plaintiffs for depositions beginning May 12, 2008 in Miami, Florida. (Copies of deposition notices are attached as Composite Exhibit D.) The email transmitting the notices made clear, however, that Defendants "have set them in Miami as we suggested, but we are open to working with you on the dates and locations as we discussed on Wednesday [April 23]." (4/28/08 Email from K. Caverly to C. MacIvor, attached as Exhibit E.)

9. On May 1, 2008, Plaintiffs' counsel notified Defendants that she had "extensive conflicts" with the noticed deposition dates and complained that notices were served "without first waiting for me to check with the Plaintiffs as to their availability and travel issues," (5/1/08 Email from C. MacIvor to K. Caverly, attached as Exhibit F) — despite the fact that Defendants had proposed dates almost two weeks earlier. A week later, Plaintiffs' counsel still had not provided an alternate deposition proposal but, on May 7, 2008, in a telephone conference concerning document production, Ms. MacIvor promised to do so promptly. (Ex. B at ¶ 7.)

10. On May 12, 2008, the date for the first of the noticed depositions, Plaintiffs' counsel had not produced the noticed deponent, filed a motion for protective order objecting to the deposition, or proposed an alternative deposition schedule.

11. Ms. Caverly wrote to Ms. MacIvor on May 12, 2008, pressing for a response to Defendants' depositions schedule and stating "the footnote in your letter regarding the document productions to the effect that you would not even be available to begin depositions until mid-July was very discouraging. If we wait until mid-July to begin the depositions, there is little chance that we will finish even Plaintiffs' depositions before the end of August and that would mean taking a deposition every day for six weeks, which is hardly favorable to anyone's schedule, particularly since you wish to take the depositions in various locations around the country rather than in Miami as defendants suggested. With the number of plaintiffs you have, the travel which will be required for each group of depositions, and the short time defendants have to prepare to defend your class certification motion, it is very important that we get these depositions on everyone's calendars soon." (5/12/08 Email from K. Caverly to C. MacIvor, attached as Exhibit G.)

12. On May 14, Ms. MacIvor finally provided a deposition schedule — one which stood in stark contrast with the schedule of dates and locations proposed by Defendants.

Plaintiffs' proposed that:

- Plaintiffs' depositions would not commence until August 4, 2008 and would end on October 10 – less than a month before the class certification deadline.
- Depositions would proceed in various locations throughout the country, including New York, Las Vegas, Washington, D.C., St. Louis, and Minneapolis, to relieve plaintiffs of the burden of traveling a great distance from their homes.

(5/14/08 Letter from C. MacIvor to K. Caverly, attached as Exhibit H.)

13. Despite the fact that Defendants believed that they could compel the depositions to take place in Miami and on the schedule that they originally proposed, in a sincere effort to reach consensus and confirm a deposition schedule without further delay, Defendants agreed to Plaintiff's proposed schedule with some minor adjustments for particular plaintiffs, but asking Plaintiffs' counsel to "please bear in mind that many of the defendants feel they are making an enormous concession in not requiring each plaintiff to travel to Miami to be deposed, as the rules provide and as noticed. In addition, since the depositions were noticed to commence in May and run through to July, it is a considerable further concession to allow the deposition not to begin until August to accommodate your schedule." (5/22/08 Email from K. Caverly to C. MacIvor, attached as Exhibit I (outlining terms of Defendants' agreement to Plaintiffs' proposed deposition schedule).)

14. Defendants conditioned their acceptance of Plaintiffs' proposal upon, among other things, Plaintiffs' agreement to provide by June 19, 2008 both a list of purchase locations for all pet food identified in the list filed May 21 and contact information for treating veterinarians, to produce documents related to a specific plaintiff at least 30 days before his or her scheduled deposition, and execution of a formal writing memorializing the parties' agreement. Defendants asked Plaintiffs' counsel to confirm her agreement with these conditions on or before May 27, before her three-week period of unavailability beginning May 28, 2008. (*Id.*)

15. The following day, at the May 23 discovery hearing, counsel for The Iams Co. informed the Court that Defendants had been attempting to confer and agree with Ms. MacIvor as to Plaintiffs' depositions and expected the depositions to begin in early August. Ms. MacIvor then told the Court that "I have already [sic] with this deposition schedule. They're not being

hoodwinked in any way.” (5/23/08 Hearing Transcript, at 43_, attached as Exhibit J.) This statement to this Court, coupled with Ms. MacIvor’s May 14 letter and verbal communications with Ms. Caverly, gave Defendants some confidence that depositions would proceed on the schedule Plaintiffs’ counsel proposed, beginning August 4.

16. Plaintiffs’ counsel subsequently confirmed in a June 4, 2008 email to Ms. Caverly that “we can agree to almost all of the terms with a few exceptions.” (6/4/08 Email from C. MacIvor to K. Caverly, attached as Exhibit K.) In that communication, Ms. MacIvor noted further changes to the deposition schedules and locations, requested an extension of time through June 23 in which to provide pet food purchase locations, and requested clarification of minor logistical issues. (*Id.*) Defendants were prepared to accept these revisions.

17. On June 9, 2008, Ms. Caverly and Ms. MacIvor exchanged various emails about the details of the deposition schedule in preparation for Ms. Caverly presenting a formal stipulation later that week. (6/9/08 Emails between C. MacIvor and K. Caverly, attached as Composite Exhibit L.)

18. Defendants prepared a stipulated agreement, reflecting months of negotiations amongst themselves and between opposing counsel, which was presented to Plaintiffs’ counsel on June 13, 2008. (6/13/08 Email from K. Caverly to C. MacIvor and attached Stipulation Scheduling Plaintiffs’ Deposition and Conditions Thereto, attached as Exhibits M and N, respectively.) Defendants asked Plaintiffs’ counsel to respond to the proposed stipulation by June 18, 2008. (Ex. M.)

19. Plaintiffs’ counsel failed to provide any response to the proposed stipulation by June 18, 2008. On June 20, 2008, in the course of negotiating an additional extension to Plaintiffs’ discovery responses requested by Plaintiffs’ counsel, Juli Ann Lund, counsel for the

Mars Defendants,² inquired as to the status of Ms. MacIvor's review of the deposition stipulation; Ms. MacIvor responded that she had not yet reviewed the stipulation. (6/20/08 Emails between J. Lund and C. MacIvor, attached as Exhibit O.) Ms. MacIvor requested that Ms. Lund forward a copy of the stipulation and indicated that she would do her best "to revert by Monday." (*Id.*) Ms. Lund provided an additional copy of the stipulation that same afternoon. (6/20/08 Email from J. Lund to C. MacIvor, attached as Exhibit P.)

20. Plaintiffs' counsel did not respond to Ms. Lund, or any other counsel for Defendants, on the following Monday, June 23, 2008. Ms. Lund contacted Ms. MacIvor on the afternoon of June 23, 2008, to inquire again about the status of Ms. MacIvor's review of the stipulation (6/23/08 Email from J. Lund to C. MacIvor, attached as Exhibit Q), but received no response.

21. Having received no response to the June 13 stipulation, on June 27, 2008, Ms. Caverly sent via email and facsimile a letter to Ms. MacIvor inquiring about the status of the stipulation. (6/27/08 Email from K. Caverly to C. MacIvor with attached letter and response from C. MacIvor, attached as Exhibit R.) Ms. MacIvor acknowledged the email on June 27 but said she could not open the attachment remotely and asked that the letter be sent to Mr. Keegan, Plaintiffs' counsel from California that had recently been brought into the case. (*Id.*)

22. On June 30, 2008, Ms. Caverly sent a facsimile to Mr. Keegan which included her June 27, 2008 letter to Ms. MacIvor and a copy of the June 13 deposition stipulation. (Exhibit S.) Mr. Keegan did not respond to this letter.

23. By July, Plaintiffs' counsel still had not signed the stipulation or said that it was in any way unacceptable. With the first deposition scheduled to begin a month later and no

² The Mars Defendants include Mars, Incorporated; Mars Petcare US, Inc.; and Nutro Products, Inc.

response from Plaintiffs' counsel on the proposed stipulation, Defendants advised Plaintiffs' counsel on July 1, 2008 that, if she failed to respond regarding the dates and locations contained in the stipulation sent June 13 by the close of business on July 2, 2008, Defendants would move for entry of an order compelling Plaintiffs to appear for the taking of their depositions beginning August 4, 2008 in Miami. (7/1/08 Email from K. Caverly to C. MacIvor, attached as Exhibit T.)

24. Ms. MacIvor responded on July 1, 2008 confirming that the stipulation was acceptable if two changes were made – the city where plaintiff Linda Brown was to be deposed and the date (now June 30) on which plaintiffs were to provide discovery responses. Ms. MacIvor said that she would be available on July 2 in the afternoon to discuss the matter. (7/1/08 Email from C. MacIvor to K. Caverly, attached as Exhibit U.)

25. On July 2, 2008, Philip Sechler and Kristen Caverly called Ms. MacIvor at her office and on her cell phone. She did not answer at either number, so defense counsel left a message and sent a follow-up email attaching the stipulation that accepted Ms. MacIvor's proposed revisions. Mr. Keegan was copied on that email. (Ex. B at ¶ 22; 7/2/08 Email from K. Caverly to C. MacIvor with attachment, attached as Exhibit V.)

26. On July 3, 2008, Ms. MacIvor responded to the July 2 phone message with an email saying that she was available then to speak about the stipulation. As Mr. Sechler was out of the office that day, Ms. Caverly called Ms. MacIvor. Ms. MacIvor again confirmed on the phone that the stipulation was acceptable and said that she would sign it when she returned to the office after the 4th of July weekend. (Ex. B at ¶ 23.) However, Ms. MacIvor never sent defendants a signed copy of the agreement.

27. On July 9, 2008, Ms. Caverly sent an email to Mr. Baker, who also represents the Plaintiffs, asking about the status of the stipulation and Plaintiffs' deposition dates. (7/9/08 Email from K. Caverly to J. Baker, attached as Exhibit W.)

28. By July 15, 2007, it became clear that further negotiations with Plaintiffs regarding the scheduling of Plaintiffs' depositions would be futile. At a meet and confer by telephone conference with Patrick Keegan, Jason Baker and Catherine MacIvor on July 15, 2008, Mr. Keegan stated that he would not be producing any of the Plaintiffs for deposition about their claims against the Defendants on the schedule beginning August 4.³

29. On July 17, 2008, Mr. Keegan sent a letter to defense counsel proposing that no depositions of Plaintiffs would go forward on the schedule the parties spent months negotiating. Citing his intended motion for a stay, Mr. Keegan offered only that the six plaintiffs with claims against Natura could be deposed as scheduled on the proposed stipulation, but only by defendant Natura and only about the Natura products those plaintiffs claim to have purchased. (7/17/08 Letter from P. Keegan to P. Sechler, attached as Exhibit X.)

MEMORANDUM OF LAW

Defendants are entitled to entry of an order compelling Plaintiffs to appear for the taking of their depositions in this case beginning on August 4, 2008 on the dates, times and locations specified in the Stipulation Scheduling Plaintiffs Depositions (Ex. A). Rule 37 of the Federal Rules of Civil Procedure authorizes a party to move for an order compelling disclosure or discovery after in good faith conferring with the parties who have failed to provide discovery and

³ Mr. Keegan indicated that depositions could proceed as to the 6 plaintiffs who purchased products from Defendant Natura Pet Products, Inc., but only with respect to their claims against Natura and only as to questions about the Natura products they purchased.

otherwise making an effort to obtain necessary discovery without court action. *See* Fed. R. Civ. P. 37.

The record here clearly demonstrates Defendants' diligence in pursuing a workable and fair deposition schedule as well as their willingness to negotiate in good faith and to compromise in the interests of obtaining essential discovery and adhering to this Court's Scheduling Order. *See generally Allianz Global Risks U.S. Insurance Co. v. Singlesource Roofing Corp.*, No. 2:05-cv-603-FtM-29SPC, 2006 WL 5112608, * 1 (M.D. Fla. Nov. 14, 2006) (granting motion to compel deposition dates necessitated by counsel's repeated failure to schedule depositions). Without the Plaintiffs' depositions in this matter, Defendants will lack the discovery necessary to adequately prepare their opposition to class certification and otherwise defend against Plaintiffs' claims.

By contrast, Plaintiffs' counsel has repeatedly been unavailable or unresponsive and has been disingenuous in dealings with Defendants' counsel. Further, by repudiating their agreement to a negotiated deposition schedule less than three weeks before depositions were due to commence, Plaintiffs have significantly increased the burden on the resources of the Defendants and this Court and thwarted the discovery process. Plaintiffs' counsel should not be allowed to renounce the stipulated schedule after leading Defendants to believe that Plaintiffs would honor the deposition schedule that they had together worked out to comport with the dates, times and locations requested by Plaintiffs.

Further, this motion is timely, as required by Local Rule 7.1(H)(1) of the United States District Court for the Southern District of Florida, having been filed within five court days of Plaintiffs' refusal to proceed with a deposition schedule negotiated in good faith over a period of three months.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court enter an order compelling Plaintiffs to submit to the taking of their depositions pursuant to the dates, times and locations proposed on Exhibit A hereto and grant such other relief as the Court may deem proper, including reasonable attorneys' fees and expenses attendant to bringing this motion.

LOCAL RULE 7.1(A) (3) CERTIFICATION

Pursuant to Rule 7.1(A)(3) of the Local Rules of the United States District Court for the Southern District of Florida, counsel for Defendants conferred in good faith with counsel for Plaintiffs, including Patrick Keegan, Jason Baker and Catherine MacIvor by telephone conference on July 15, 2008, but were unable to resolve the issues raised in this motion.

Respectfully submitted,

/s/ Omar Ortega

Omar Ortega

DORTA AND ORTEGA, P.A.

Douglas Entrance

800 S. Douglas Road, Suite 149

Coral Gables, FL 33134

Telephone: (305) 461-5454

Facsimile: (305) 461-5226

E-mail: oortega@dortaandortega.com

Dane H. Butswinkas

E-mail: dbutswinkas@wc.com

Philip A. Sechler

E-mail: psechler@wc.com

Thomas G. Hentoff

E-mail: thentoff@wc.com

Patrick J. Houlihan

E-mail: phoulihan@wc.com

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W.

Washington, D.C. 200005

*Attorneys for Defendants Mars, Incorporated,
Mars Petcare U.S., Inc. and Nutro Products,
Inc.*

/s/ John B.T. Murray, Jr.

John B.T. Murray, Jr.

E-mail: jbmurray@ssd.com

Barbara Bolton Litten

E-mail: blitten@ssd.com

SQUIRE, SANDERS & DEMPSEY L.L.P.

1900 Phillips Point West

777 South Flagler Drive

West Palm Beach, FL 33401-6198

Telephone: (561) 650-7200

Facsimile: (561) 655-1509

*Attorneys for Defendants PETCO Animal
Supplies Stores, Inc., PetSmart, Inc., Wal-
Mart, Inc., Target Corporation*

/s/ Rolando Andres Diaz

Rolando Andres Diaz

E-Mail: rd@kubickdraper.com

Peter S. Baumberger

E-mail: psb@kubickdraper.com

KUBICKI DRAPER

25 W. Flagler Street

Penthouse

Miami, FL 33130-1712

Telephone: (305) 982-6708

Facsimile: (305) 374-7846

Attorneys for Defendant Pet Supermarket, Inc.

/s/ Hugh J. Turner, Jr.

Hugh J. Turner, Jr.

AKERMAN SENTERFITT

350 E. Las Olas Boulevard

Suite 1600

Fort Lauderdale, FL 33301-2229

Telephone: (954) 463-2700

Facsimile: (954) 463-2224

E-mail: hugh.turner@akerman.com

Attorneys for Defendant Publix Super Markets, Inc

/s/ Alexander Shaknes

Alexander Shaknes

E-mail: Alex.Shaknes@dlapiper.com

DLA PIPER US LLP

1251 Avenue of the Americas

New York, New York 10020

Lonnie L. Simpson

E-mail: Lonnie.simpson@dlapiper.com

S. Douglas Knox

E-mail: Douglas.knox@dlapiper.com

DLA PIPER US LLP

100 North Tampa

Suite 2200

Tampa, FL 33602-5809

*Attorneys for Defendants Menu Foods, Inc.
and Menu Foods Income Fund*

/s/ Benjamine Reid

Benjamine Reid

E-mail: breid@carltonfields.com

Olga M. Vieira

E-mail: ovieira@carltonfields.com

Ana M. Craig

E-mail: acraig@carltonfields.com

CARLTON FIELDS, P.A.

100 S.E. Second Street, Suite 4000

Bank of America Tower at International Place
Miami, FL 33131-9101

Telephone: (305) 530-0050

Facsimile: (305) 530-0055

John J. Kuster

E-mail: jkuster@sidley.com

James D. Arden

E-mail: jarden@sidley.com

SIDLEY AUSTIN LLP

787 Seventh Avenue

New York, NY 10019

Telephone: (212) 839-5300

Facsimile: (212) 839-5599

Kara L. McCall

SIDLEY AUSTIN LLP

One South Dearborn

Chicago, Illinois 60603

Telephone: (312) 853-2666

E-mail: kmccall@Sidley.com

*Attorneys for Defendant Hill's Pet Nutrition,
Inc.*

/s/ Sherril M. Colombo

Sherril M. Colombo

COZEN O'CONNOR

Wachovia Center, Suite 4410

200 South Biscayne Boulevard

Miami, FL 33131

Telephone: (305) 704-5945

Facsimile: (305) 704-5955

E-mail: scolombo@cozen.com

John F. Mullen

E-mail: jmullen@cozen.com

Julie Negovan

E-mail: jnegovan@cozen.com

COZEN O'CONNOR

1900 Market Street

Philadelphia, PA 19103

Telephone: (215) 665-2000

Facsimile: (215) 665-2013

Richard Fama

E-mail: rfama@cozen.com

John J. McDonough

E-mail: jmcdonough@cozen.com

COZEN O'CONNOR

45 Broadway

New York, New York 10006

Telephone: (212) 509-9400

Facsimile: (212) 509-9492

Attorneys for Defendant Del Monte Foods, Co.

/s/ Carol A. Licko

Carol A. Licko

HOGAN & HARTSON L.L.P.

Mellon Financial Center

1111 Brickell Avenue, Suite 1900

Miami, FL 33131

Telephone: (305) 459-6500

Facsimile: (305) 459-6550

E-mail: calicko@hhlaw.com

Robert C. Troyer

HOGAN & HARTSON L.L.P.

1200 17th Street

One Tabor Center, Suite 1500

Denver, Colorado 80202

Telephone: (303) 899-7300

Facsimile: (303) 899-7333

E-mail: retroyer@hhlaw.com

Craig A. Hoover

E-mail: cahoover@hhlaw.com

Miranda L. Berge

E-mail: mlberge@hhlaw.com

HOGAN & HARTSON L.L.P.

555 13TH Street, NW

Washington, D.C. 20004

Telephone: (202) 637-5600

Facsimile: (202) 637-5910

*Attorneys for Defendant Nestlé Purina Petcare
Co.*

/s/ Kristen E. Caverly

Kristen E. Caverly

E-mail: kcaverly@hcesq.com

Tony F. Farmani

E-mail: tfarmani@hcesq.com

HENDERSON & CAVERLY LLP

P.O. Box 9144

16236 San Dieguito Road, Suite 4-13

Rancho Santa Fe, California 92067-9144

Jeffrey S. York

E-mail: jyork@mcguirewoods.com

Michael M. Giel

E-mail: mgiel@mcguirewoods.com

McGUIRE WOODS LLP

50 N. Laura Street, Suite 3300

Jacksonville, FL 32202

Telephone: (904) 798-2680

Facsimile: (904) 360-6330

*Attorneys for Defendant Natura Pet Products,
Inc.*

/s/ Alan G. Greer

Alan G. Greer

RICHMAN GREER, P.A.

Miami Center – Suite 1000

201 South Biscayne Boulevard

Miami, FL 33131

Telephone: (305) 373-4000

Facsimile: (305) 373-4099

E-mail: agreer@richmangreer.com

D. Jeffrey Ireland

E-mail: djireland@ficlaw.com

Brian D. Wright

E-mail: Bwright@ficlaw.com

Laura A. Sanom

E-mail: lsanom@ficlaw.com

FARUKI IRELAND & COX P.L.L.

500 Courthouse Plaza, S.W.

10 North Ludlow Street

Dayton, Ohio 45402

Attorneys for Defendant The Iams Co.

/s/ Ralph G. Patino

Ralph G. Patino

E-mail: rpatino@patinolaw.com

Carlos B. Salup

E-mail: csalup@patinolaw.com

PATINO & ASSOCIATES, P.A.

225 Alcazar Avenue

Coral Gables, FL 33134

Telephone: (305) 443-6163

Facsimile: (305) 443-5635

*Attorneys for Defendants Pet Supplies “Plus”
and Pet Supplies Plus/USA, Inc.*

/s/ W. Randolph Teslik

W. Randolph Teslik, P.C.

E-mail: rteslik@akingump.com

Andrew Dober

E-mail: adober@akingump.com

**AKIN GUMP STRAUSS HAUER & FELD
LLP**

1333 New Hampshire Avenue, NW

Washington, D.C. 20036

Telephone: (202) 887-4000

Facsimile: (202) 887-4288

Craig P. Kalil

E-mail: ckalil@aballi.com

Joshua D. Poyer

E-mail: jpyer@abaili.com

**ABALLI, MILNE, KALIL & ESCAGEDO,
P.A.**

2250 Sun Trust International Center

One Southeast Third Avenue

Miami, FL 33131

Telephone: (305) 373-6600

Facsimile: (305) 373-7929

*Attorneys for Defendants New Albertson's Inc.
and Albertson's LLC*

Dated: July 21, 2008

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Omar Ortega

Omar Ortega

SERVICE LIST

<p>Catherine J. MacIvor Email: cmacivor@mflegal.com Jeffrey Eric Foreman Email: jforeman@mflegal.com Jeffrey Bradford Maltzman Email: jmaltzman@mflegal.com Darren W. Friedman Email: dfriedman@mflegal.com Bjorg Eikeland Email: beikeland@mflegal.com MALTZMAN FOREMAN PA One Biscayne Tower 2 South Biscayne Boulevard, Suite 2300 Miami, FL 33131-1803 Telephone: (305) 358-6555 Facsimile: (305) 374-9077</p> <p>Patrick N. Keegan Email: pkeegan@keeganbaker.com Jason E. Baker Email: jbaker@keeganbaker.com Edgar R. Nield Email: enield@keeganbaker.com KEEGAN & BAKER, LLP 4370 Jolla Village Dr., Suite 640 San Diego, CA 92122 Telephone: (858) 552-6750 Facsimile: (858) 552-6749</p> <p><i>Attorneys for Plaintiffs</i></p>	<p>John B.T. Murray, Jr. Email: jbmurray@ssd.com Barbara Bolton Litten E-mail: blitten@ssd.com SQUIRE, SANDERS & DEMPSEY L.L.P. 1900 Phillips Point West 777 South Flagler Drive West Palm Beach, FL 33401-6198 Telephone: (561) 650-7200 Facsimile: (561) 655-1509</p> <p><i>Attorneys for Defendants PETCO Animal Supplies Stores, Inc., PetSmart, Inc., Wal-Mart Stores, Inc., Target Corporation</i></p>
<p>Rolando Andres Diaz Email: rd@kubickdraper.com Maria Kayanan Email: mek@kubickdraper.com KUBICKI DRAPER 25 W. Flagler Street Penthouse Miami, FL 33130-1712 Telephone: (305) 982-6708 Facsimile: (305) 374-7846</p> <p><i>Attorneys for Defendant Pet Supermarket, Inc.</i></p>	<p>Amy W. Schulman Alexander Shaknes Email: Alex.Shaknes@dlapiper.com DLA PIPER US LLP 1251 Avenue of the Americas New York, New York 10020</p> <p><i>Attorneys for Defendants Menu Foods, Inc. and Menu Foods Income Fund</i></p>

<p>Lonnie L. Simpson Email: Lonnie.simpson@dlapiper.com S. Douglas Knox Email: Douglas.knox@dlapiper.com DLA PIPER US LLP 101 East Kennedy Boulevard Suite 2000 Tampa, FL 33602-5149 Telephone: (813) 229-2111 Facsimile: (813) 229-1447</p> <p><i>Attorneys for Defendants Menu Foods, Inc. and Menu Foods Income Fund</i></p>	<p>Hugh J. Turner, Jr. Email: hugh.turner@akerman.com AKERMAN SENTERFITT 350 E. Las Olas Boulevard Suite 1600 Fort Lauderdale, FL 33301-2229 Telephone: (954) 463-2700 Facsimile: (954) 463-2224</p> <p><i>Attorneys for Defendant Publix Super Markets, Inc</i></p>
<p>Robin L. Hanger SQUIRE, SANDERS & DEMPSEY L.L.P. 200 S. Biscayne Boulevard 40th Floor Miami, FL 33131-2398 Telephone: (305) 577-7040 Facsimile: (305) 577-7001 Email: rlhanger@ssd.com</p> <p><i>Attorneys for Defendants PETCO Animal Supplies Stores, Inc.</i></p>	<p>Ralph G. Patino Email: rpatino@patinolaw.com Carlos B. Salup Email: csalup@patinolaw.com PATINO & ASSOCIATES, P.A. 225 Alcazar Avenue Coral Gables, FL 33134 Telephone: (305) 443-6163 Facsimile: (305) 443-5635</p> <p><i>Attorneys for Defendants Pet Supplies "Plus" and Pet Supplies Plus/USA, Inc.</i></p>
<p>C. Richard Fulmer, Jr. FULMER, LeROY, ALBEE, BAUMANN & GLASS, PLC 2866 East Oakland Park Boulevard Fort Lauderdale, FL 33306 Telephone: (954) 707-4430 Facsimile: (954) 707-4431 Email: rfulmer@Fulmer.LeRoy.com</p> <p><i>Attorneys for Defendant The Kroger Co. of Ohio</i></p>	<p>Craig P. Kalil Email: ckalil@aballi.com Joshua D. Poyer Email: jpoyer@abailli.com ABALLI, MILNE, KALIL & ESCAGEDO, P.A. 2250 Sun Trust International Center One Southeast Third Avenue Miami, FL 33131 Telephone: (305) 373-6600 Facsimile: (305) 373-7929</p> <p><i>Attorneys for Defendant New Albertson's Inc. and Albertson's LLC</i></p>

<p>W. Randolph Teslik, P.C. Email: rteslik@akingump.com Andrew Dober Email: adober@akingump.com AKIN GUMP STRAUSS HAUER & FELD LLP 1333 New Hampshire Avenue, NW Washington, D.C. 20036 Telephone: (202) 887-4000 Facsimile: (202) 887-4288</p> <p><i>Attorneys for Defendants New Albertson's Inc. and Albertson's LLC</i></p>	<p>James K. Reuss LANE ALTON & HORST, LLC Two Miranova Place Suite 500 Columbus, Ohio 43215 Telephone: (614) 233-4719 Email: JReuss@lanealton.com</p> <p><i>Attorneys for Defendant The Kroger Co. of Ohio</i></p>
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