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NO. GN 202514

TEXAS STATE BOARD OF  
PHARMACY and STATE BOARD  
OF VETERINARY MEDICAL  
EXAMINERS

IN THE DISTRICT COURT

VS.

TRAVIS COUNTY, TEXAS

PETMED EXPRESS, INC and  
SAVEMAX, INC.

201 JUDICIAL DISTRICT COURTPLAINTIFFS' ORIGINAL PETITION FOR INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Texas State Board of Pharmacy and the State Board of Veterinary Medical Examiners, Plaintiffs, complaining of PetMed Express, Inc., and Savemax, Inc., Defendants, and file this Plaintiffs' Original Petition for Injunctive Relief, and in support thereof would respectfully show the Court as follows:

I.

Discovery Control Plan

1.1 In accordance with Rule 190.1, Tex. R. Civ. Proc., because this is a suit for injunctive relief, discovery is intended to be conducted under Level 2.

II.

Plaintiff

2.1 Plaintiff, the Texas State Board of Pharmacy, is a State Board headquartered in Austin, Travis County, Texas, and created by the Texas Pharmacy Act, Tex. Occ. Code

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DISTRICT COURT  
TRAVIS COUNTY, TEXAS

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State Board of Veterinary  
Medical Examiners

§551.001 et seq.

2.2 Plaintiff, the State Board of Veterinary Medical Examiners, is a State Board headquartered in Austin, Travis County, Texas, and created by the Veterinary Licensing Act, Tex. Occ. Code §801.001 et seq.

### III.

#### Service of Process

3.1 The Defendant, PetMed Express, Inc. ("PetMed"), is a corporation organized and existing under the laws of the State of Florida, with its principal place of business at 1441 SW 29th Avenue, Pompano Beach, Florida 33069, and does business in the State of Texas as the holder of a Texas Class E Non-Resident Pharmacy license. Service of process on PetMed Express, Inc., as a Class E Non-Resident Pharmacy, may be had on Marc A. Puleo, M.D., Chief Executive Officer of PetMed Express, Inc., at 2727 N. Atlantic Blvd., Fort Lauderdale, FL 33308, by certified mail, return receipt requested; and upon the Pharmacist-in-Charge, Gordon Gyor, at 1441 SW 29th Avenue, Pompano Beach, Florida 33069, by certified mail, return receipt requested.

3.2 The Defendant, Savemax, Inc. ("Savemax"), is a corporation organized and existing under the laws of the State of Florida, with its principal place of business at 1441 SW 29th Avenue, Pompano Beach, Florida 33069, and does business in the State of Texas as a holder of a Texas Class E Non-Resident Pharmacy license. Service of Process on Savemax, Inc., as a Class E Non-Resident Pharmacy, may be had on William Wüizler,

President of Savemax, Inc., at 1509 West View Drive, Miami, FL 33140, by certified mail, return receipt requested; and upon the Pharmacist-in-Charge, Gary G. Koesten, at 1441 SW 29th Street, Pompano Beach, Florida 33069, by certified mail, return receipt requested.

#### IV.

##### Venue

4.1 Venue for a suit for injunctive relief is proper in Travis County, Texas, as provided by the Texas Pharmacy Act, Tex. Occ. Code §566.051(b) and/or the Veterinary Licensing Act, Tex. Occ. Code §801.502(b)(3)(A) or (B).

#### V.

##### Statutory and Constitutional Authority

5.1 A stated purpose of the Texas Pharmacy Act, Tex. Occ. Code §551.002, is to promote, preserve, and protect the public health, safety, and welfare through effectively controlling and regulating the practice of pharmacy. The Texas State Board of Pharmacy is charged with the duty of administering and enforcing the Act. See Texas Pharmacy Act, Tex. Occ. Code §554.001, et. seq.

5.2 A stated purpose of the Veterinary Licensing Act, Tex. Occ. Code §801.151, is to establish and maintain a high standard of integrity, skills, and practice in the profession of veterinary medicine and to protect the public. The State Board of Veterinary Medical Examiners is charged with the duty of administering and enforcing the Act. *Id.*

5.3 The Attorney General of Texas is authorized by the Texas Pharmacy Act, Tex.

Occ. Code §554.001(d) to institute this suit to restrain Defendants from violations of this Act, and by the Texas Pharmacy Act, Tex. Occ. Code §566.102 to collect a civil penalty for violations of the Act.

5.4 The Attorney General of Texas is authorized by the Veterinary Licensing Act, Tex. Occ. Code §801.502 to institute this suit to restrain the Defendants from violations of this Act and by the Veterinary Licensing Act, Tex. Occ. Code §801.503 to collect a civil penalty for violations of the Act.

5.5 The Attorney General is also authorized by Article IV, §22 of the Texas Constitution to "take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power ... not authorized by law."

## VI.

### Defendants' Internet Business

6.1 PetMed and its affiliate, Savemax, operate pet pharmacies and deliver prescription and non-prescription medications intended for pets directly to consumers, including consumers in the State of Texas.

6.2 Since July 8, 1997, PetMed has been licensed as a Class E - Non-Resident pharmacy by the Texas State Board of Pharmacy.

6.3 Since August 14, 2001, Savemax, has been licensed as a Class E - Non-Resident Pharmacy by the Texas State Board of Pharmacy.

6.4 PetMed advertises, promotes, sells, offers to sell and/or attempts to sell

prescription medications for pets, including heartworm medications such as Interceptor and Heartgard, and flea/tick medications such as Sentinel and Revolution.

6.5 PetMed advertises and sells its products and services through television and various other media, including a toll free number and a website at "www.1888petmeds.com" on a portion of the Internet known as the "World Wide Web" or simply "the Web." PetMed's website can be found by Texas consumers with internet access by simply typing its web address. Texas consumers can also access PetMed's website by utilizing a "search engine," which is a computer program that assists Internet users in locating websites by searching for terms or phrases (e.g. "Interceptor" or "heartworm") and displaying website addresses for websites containing those terms or phrases.

6.6 Through PetMed's website, Texas citizens can actually place orders for prescription medications advertised, promoted, sold, and offered for sale by PetMed and pay for those orders by credit card. Texas consumers can also obtain refills of prescription medications previously purchased from PetMed.

6.7 Consumers who access the website located at www.1888petmeds.com can decide what prescription medication they wish to order, can chose for themselves among various dosages and amounts of pills, and can see how much PetMed charges for each. Consumers select these items for placement in their virtual "shopping cart," and when ready to "check out," they provide information about their pets. They also enter they own personal credit card information to pay for the price of the medication itself and shipping charges.

Consumers immediately receive confirmation of the order, both through the website, and via e-mail sent to them by PetMed.

6.8 Consumers may, but do not have to, provide their veterinarian's contact information. Consumers who provide information regarding their pet's veterinarian are asked to indicate whether they will agree to PetMed's "staff" veterinarian issuing the prescription if their pet's veterinarian refuses to do so.

6.9 In the event that the consumer's veterinarian refuses to authorize the prescription, or the consumer does not specify a veterinarian to call, then the following will occur:

(a) the order will be provided to PetMed's "staff" veterinarian, who, in exchange for a fee, writes the prescription which is then filled and shipped by PetMed, or its affiliate Savemax; or

(b) the order will be filled and shipped by PetMed, or its affiliate Savemax, with the name of the consumer's veterinarian on the prescription drug label, without the consent or knowledge of the consumer's veterinarian.

6.10 If the order is filled by PetMed's "staff" veterinarian, at no time either before, during or after the sale does the "staff" veterinarian issuing the prescription actually speak with the consumer, see the consumer's pet, conduct a physical or any other type of examination of the consumer's pet, or perform any laboratory tests on the consumer's pet.

6.11 At no time does PetMed attempt to confirm by any means the information

provided by the consumer on the online form pertaining to the pet. At no time does the "staff" veterinarian provide follow-up care to the pets of consumers who have been prescribed medications in the above fashion prior to authorizing refills or prior to refilling any prescriptions.

From time to time, PetMed and Savemax ship prescription medications to Texas consumers that have the bar code removed from the drug package. The bar code contains information about the drug's source of manufacture, quality, and characteristics. Removal of the bar code results in a mislabeled product in violation of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§321 and 331, and deceives Texas consumers as to the source, origin or sponsorship of the drugs sold in the State of Texas in violation of the Texas Food, Drug and Cosmetic Act, Texas Health & Safety Code §§4231.003, 431.021(1)(1), and 431.112(b).

When Texas consumers order such mislabeled drugs from Defendants, they are sometimes provided with foreign medicines which are different from FDA approved drugs in a number of ways, including:

- \* the foreign medicines are differently formulated;
- \* the foreign medicines are denominated according to the metric system whereas the FDA approved medicines are not;
- \* the foreign medicines are labeled for different minimum ages and weights for pets;
- \* the foreign medicines do not indicate that they must be prescribed by

a veterinarian;

- \* the foreign medicines do not have valid poison control numbers and provide no information on how a consumer can contact the manufacturer with any questions;
- \* the foreign medicines give different dosing directions than the FDA approved medicines;
- \* the foreign medicines are missing many statements required by the FDA.

6.13 The confusion created by Defendants' sale of foreign medicines in the State of Texas puts pets and pet owners in danger because of the material differences between foreign medicines and FDA approved medicines.

6.14 From time to time, PetMed may engage its affiliate, Savemax, to fill or refill any prescription and ship the same to the consumer.

## VII.

### The Texas Veterinary Licensing Act

7.1 The Texas Veterinary Licensing Act, Tex. Occ. Code §801.402(13) makes it unlawful for a person to order a prescription drug or controlled substance for the treatment of an animal without first establishing a veterinarian-client-patient relationship. A "veterinary-client-patient relationship" is defined at §801.351 of the Act as:

- (a) A veterinarian-client-patient relationship exists if the veterinarian:
- (1) assumes responsibility for medical judgments regarding the health of an animal and a client, who is the owner or other caretaker of the animal, agrees to follow the veterinarian's instructions;

(2) possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition; and

(3) is readily available to provide, or has provided, follow-up medical care in the event of an adverse reaction to, or a failure of, the regimen of therapy provided by the veterinarian;

(b) A veterinarian possesses sufficient knowledge of the animal for purposes of Subsection (a)(2) if the veterinarian has recently seen, or is personally acquainted with, the keeping and care of the animal by:

(1) examining the animal; or

(2) making medically appropriate and timely visits to the premises on which the animal is kept.

7.2 Under the Veterinary Licensing Act, §801.251, a person may not practice, or offer or attempt to practice, veterinary medicine unless the person holds a license issued under the Act. The "practice of veterinary medicine" is defined at §801.002 of the Act as:

the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique;  
the representation of an ability and willingness to perform an act listed in Paragraph (A);  
the use of a title, a word, or letters to induce the belief that a person is legally authorized and qualified to perform an act listed in Paragraph (A); or  
the receipt of compensation for performing an act listed in Paragraph (A).

## VIII.

### Exceptions to Veterinary Licensing Act's Requirements

8.1 Plaintiffs would show the Court that the Defendants are not within any of the categories or entities set forth in the Veterinary Licensing Act who are excepted from the

requirements of the Act.

## IX.

### Defendants' Violations of the Veterinary Licensing Act

9.1 Defendants have violated §801.402(13) of the Act by the "staff" veterinarian, and other persons, ordering a prescription drug for the treatment of an animal without first establishing a veterinarian-client-patient relationship as alleged in paragraphs 6.9, 6.10, and 6.11 above.

Defendants have violated §801.251 of the Act by the "staff" veterinarian, and others, practicing veterinary medicine without a license issued by the State Board of Veterinary Medical Examiners by ordering a prescription drug for an animal as alleged in paragraphs 6.9, 6.10, and 6.11 above.

## X.

### The Texas Pharmacy Act

The Texas Pharmacy Act §554.002(5)(A) provides that the Texas State Board of Pharmacy shall enforce the provisions of the Act relating to the conduct of a pharmacy operating in this state.

The Texas Pharmacy Act §554.005 provides that the Texas State Board of Pharmacy shall regulate the delivery or distribution of a prescription drug in an appropriately labeled container.

The Texas Pharmacy Act §554.055 empowers the Texas State Board of

Pharmacy to adopt rules regarding the sale and delivery of drugs by use of electronic media, including the Internet.

The Texas Pharmacy Act §565.002 sets forth the grounds for discipline of a licensed pharmacy if the pharmacy has:

- \* violated any provision of the Act or Board Rules.
- \* sold without legal authorization a prescription drug or device.
- \* allowed an employee who is not a pharmacist to practice pharmacy.
- \* sold an adulterated or misbranded prescription or nonprescription drug.
- \* engaged in fraud, deceit, or misrepresentation as defined by Board Rule in operating a pharmacy.

## XI.

### Exceptions to the Texas Pharmacy Act

11.1 Plaintiffs would show the Court that the Defendants are not within any of the categories or entities set forth in the Texas Pharmacy Act who are excepted from the requirements of the Act.

## XII.

### Defendants' Violations of the Texas Pharmacy Act

Defendants have violated §§565.002 of the Act by placing the name of the Texas consumer's veterinarian on the prescription drug label, without the knowledge or consent of the consumer's veterinarian as alleged in paragraphs 6.9, 6.10, and 6.11 above.

12.2 Defendants have violated §§565.002 of the Act by engaging in fraud, deceit, and misrepresentation by selling drugs to Texas consumers that have the bar code removed

as alleged in paragraphs 6.12 and 6.13 above.

12.3 Defendants have violated §§565.002 of the Act by selling prescription drugs to Texas Consumers without a prescription as alleged in paragraphs 6.9, 6.10, and 6.11 above.

12.4 Defendants have violated §§565.002 of the Act by selling misbranded prescription drugs to Texas consumers as alleged in paragraphs 6.12 and 6.13 above.

### XIII.

#### The Texas Health & Safety Code

13.1 The Texas Health & Safety Code §483.042(a) states that a person commits an offense if the person delivers or offers to deliver a dangerous drug without a valid prescription.

31.2 The Texas Health & Safety Code §483.021(a) states that a pharmacist may not dispense a dangerous drug if the pharmacist knows or should have known that the prescription was issued without a valid patient-practitioner relationship.

### XIV.

#### Exceptions to the Texas Health & Safety Code

14.1 Plaintiffs would show the Court that the Defendants are not within any of the categories or entities set forth in the Texas Health & Safety Code who are excepted from the proscriptions of the Act.

### XV.

### Defendants' Violations of the Texas Health & Safety Code

Defendants have violated §483.042 by delivering dangerous drugs, with the name of the Texas consumer's veterinarian on the prescription drug label, without the consent or knowledge of the consumer's veterinarian as alleged in paragraph 6.9(b) above. A violation of this section is a state jail felony.

15.2 The Defendants have aided and abetted in the violation of §483.021(a) by dispensing dangerous drugs, to Texas consumers, when their pharmacists knew, or should have known, that the prescriptions were issued without a valid patient-practitioner relationship as alleged in paragraphs 6.1 through 6.12 above. A violation of this section is a Class B misdemeanor.

## XVI.

### Effect of Internet Activity

The Texas Occupations Code, §105.001(b), states that "The fact that an activity occurs through the use of the Internet does not affect a licensing authority's power to regulate an activity or person that would otherwise be regulated by statute."

## XVII.

### Serious Violations Are Continuing

17.1 The above named violations have been committed by the Defendants in the past and at the present time continue to be serious violations.

The violations are so serious that the Texas Veterinary Licensing Act §801.504

makes a violation of the Act a Class A misdemeanor punishable with confinement up to 1 year in jail and a fine of up to \$4,000. Moreover, in addition to injunctive relief under §801.502, a civil penalty of \$1,000 against a person not licensed may be assessed under §801.503 for each day of violation.

17.2 The violations are so serious that the Texas Pharmacy Act §566.151 makes the violation of the Act a Class A misdemeanor punishable with confinement up to 1 year in jail and a fine of up to \$4,000. Moreover, in addition to injunctive relief under §566.051, a civil penalty of up to \$1,000 may be assessed under §566.101 for each day the violation continues.

The violations are so serious that the Texas Health & Safety Code §483.042 makes the unlawful delivery, or offer to deliver, a dangerous drug a state jail felony punishable with confinement of not more than 2 years in jail and a fine not to exceed \$10,000.

17.4 The violations are so serious that the Texas Health & Safety Code §483.021(a) makes the dispensing of dangerous drugs, when the pharmacist knew, or should have known, that the prescriptions were issued without a valid patient-practitioner relationship a Class B misdemeanor punishable with a fine of up to \$2,000 and 180 days in jail.

## XVIII.

### Affidavit In Support of Injunctive Relief

18.1 In support of Plaintiffs' verified petition for injunctive relief, the Affidavit of Michael J. Miller, Investigator for the State Board of Veterinary Medical Examiners, is attached as Exhibit "A", and sets forth certain facts regarding the Defendants' violations of

the Texas Veterinary Licensing Act, the Texas Pharmacy Act, and the Texas Health & Safety Code.

## XIX.

### Strict Liability - No Bond Required by State

Because there is strict liability in the enforcement of public health and welfare statutes, the Plaintiffs' need not show imminent harm and irreparable injury as a condition to the granting of injunctive relief. In addition, the State is not required to post bond as a condition for the issuance of the Writ of Injunction. Tex. Civ. Prac. & Rem. Code §6.001(b)(1).

## XX.

### Civil Penalties

The Texas Veterinary Licensing Act §801.503 provides that any unlicensed person who is shown to have violated the Act is liable to the State for a civil penalty in an amount of \$1,000 per day for each day a violation has occurred. The State Board of Veterinary Medical Examiners requests that the Court award a civil penalty, as permitted by the statute, against Defendants, jointly and severally, for each day that a violation of the Texas Veterinary Licensing Act has occurred.

20.2 The Texas Pharmacy Act §566.101 provides that a person who is shown to have violated the Act is liable to the State for a civil penalty in an amount not to exceed \$1,000 per day for each day a violation has occurred. The Texas State Board of Pharmacy

requests that the Court award a civil penalty, as permitted by the statute, against Defendants, jointly and severally, for each day that a violation of the Texas Pharmacy Act has occurred.

## XXI.

### Injunctive Relief

21.1 Plaintiffs request that a Writ of Temporary Injunction, and thereafter, a Writ of Permanent Injunction, be issued against the Defendants, restraining and enjoining them, individually and collectively, and anyone in concert with them from engaging in the unlawful conduct as alleged in paragraphs 6 through 18 above; and

21.2 A mandatory injunction requiring Defendants to inform Texas customers who contact them by telephone that their service is unavailable to Texas residents, and to clearly and conspicuously post a notice on any television advertisement or web site through which they sell prescription medications, including, but not limited to "www.1888petmeds.com", advising customers that their services are unavailable to Texas residents.

## XXII.

### Attorneys' Fees and Costs

22.1 Plaintiffs seek to recover their attorneys' fees and costs incurred in obtaining injunctive relief. The Texas Occupations Code §101.252 provides for recovery of reasonable expenses in obtaining an injunction including court costs, reasonable attorney's fees, reasonable investigative costs, witness fees and deposition expenses.

## XXIII

Prayer

23.1 WHEREFORE PREMISES CONSIDERED, Plaintiffs pray:

- (a) that the Defendants be cited to appear and answer;
- (b) that Defendants show cause why the writ of temporary injunction, and thereafter, the writ of permanent injunction should not be issued;
- (c) that the Defendants be enjoined from engaging in the unlawful conduct as alleged herein;
- (d) that a mandatory injunction be issued requiring Defendants to inform Texas customers who contact them by telephone that their service is unavailable to Texas residents and to modify their television advertisements and web pages as alleged herein;
- (e) that civil penalties be assessed as alleged herein;
- (f) that Plaintiffs recover their reasonable attorney's fees and costs;  
and
- (g) Plaintiffs pray for general relief

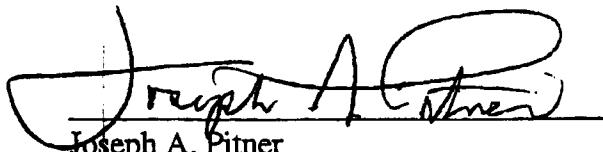
Respectfully submitted,

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VERIFICATION

STATE OF TEXAS §

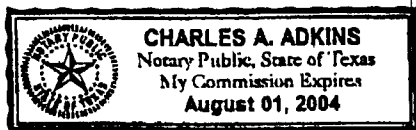
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BEFORE ME, the undersigned authority, on this day personally appeared Lee Mathews, General Counsel for the State Board of Veterinary Medical Examiners, and known to me to be the person whose name is subscribed hereunder, who after being by me duly sworn, upon his oath stated to me that he is authorized by the State Board of Veterinary Medical Examiners to make this verification; that he is of sound mind, over the age of eighteen years, has never been convicted of a felony or other crime involving moral turpitude, and is otherwise fully competent to make this verification; that he is either personally acquainted with the facts contained in the foregoing Plaintiffs' Original Petition for Injunctive Relief, or has been advised of the facts stated therein by other persons regularly in the employ of the State Board of Veterinary Medical Examiners from various sources of information, including records and files kept by the State Board of Veterinary Medical Examiners in the regular course of its business, and that said facts are true and correct.

  
Lee Mathews, Affiant

SUBSCRIBED AND SWORN TO before me, this 25<sup>th</sup> day of JULY 2002



  
Notary Public  
State of Texas