

NO. _____

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| STATE OF TEXAS | § | IN THE DISTRICT COURT OF |
| Plaintiff, | § | |
| | § | |
| V. | § | HARRIS COUNTY, TEXAS |
| | § | |
| ASAP MEDS, INC., DBA, MEDS-STAT | § | |
| and DUBIN MEDICAL INC. | § | |
| Defendant | § | _____ JUDICIAL DISTRICT |

**PLAINTIFF’S ORIGINAL VERIFIED PETITION AND APPLICATION FOR
TEMPORARY INJUNCTION AND PERMANENT INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the STATE OF TEXAS, Plaintiff, acting by and through Attorney General of Texas GREG ABBOTT (referred to herein as the “Attorney General”), on behalf of the State of Texas and on behalf of the interest of the general public of the State of Texas, and complains of ASAP MEDS, INC., DBA MEDS-STAT and DUBIN MEDICAL INC. The Attorney General would respectfully show the Court as follows:

I. DISCOVERY

1. Discovery shall be conducted under LEVEL 2 of Rule 190.3, of the Texas Rules of Civil Procedure.

II. JURISDICTION

2. This action is brought pursuant to the statutory authority of TEX. BUS. & COM. CODE ANN. §17.47(a), permitting the Consumer Protection Division of the Attorney General’s office to bring an action to restrain, by temporary restraining order, temporary injunction, or permanent injunction, the use of any method, act or practice declared to be unlawful by TEX. BUS. & COM. CODE ANN. §17.46, where such proceedings are in the public interest. The Attorney General files this suit

against Defendants on the grounds that:

a.) Defendants have engaged in false, misleading and deceptive acts and practices in the course of trade and commerce as defined herein and as declared unlawful pursuant to the Texas Deceptive Trade Practices--Consumer Protection Act, TEX. BUS. & COM. CODE § 17.41 et seq.;

3. This suit is brought against Defendants for injunctive relief, actual damages, restitution, civil fines and penalties, costs, and attorney's fees as a result of the violations of the DTPA.

III. DEFENDANTS

4. ASAP MEDS, INC. dba MEDS-STAT is a Florida corporation doing business in Texas and who may be served with process by serving its registered agent A.E. Raney at 5100 N. Federal Hwy, #204, Ft. Lauderdale, Florida 33308.

4a. DUBIN MEDICAL, INC. is a California corporation doing business in Texas and who may be served by serving its registered agent Gilbert Carpenter at 1153 Wilbur Avenue, San Diego, CA 92109.

IV. VENUE

5. Venue is proper in Harris County, Texas, pursuant to § 17.56 of the DTPA, because Harris County is the county in which the Defendants or an authorized agent of the Defendants solicited certain transactions made the subject of this action. TEX. BUS. & COM. CODE ANN. § 17.56. Venue is also proper in Harris County, Texas, pursuant to § 15.002 (a)(1) of the TEX. CIV. PRAC. & REM. CODE, because Harris County is the county in which all or a substantial part of the events or omissions giving rise to the claim occurred. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1).

V. PUBLIC INTEREST

6. Because Plaintiff State of Texas has reason to believe that Defendants have engaged in, and

will continue to engage in the unlawful practices set forth below, Plaintiff State of Texas has reason to believe Defendants have caused and will cause immediate, irreparable injury, loss and damage to the State of Texas, and will also cause adverse effects to legitimate business enterprises which lawfully conduct trade and commerce in this State. Therefore, the Consumer Protection Division of the Office of the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

VI. TRADE AND COMMERCE

7. Defendants have, at all times described below, engaged in conduct constituting “trade” and “commerce,” as those terms are defined in §17.45(6) of the DTPA.

VII. ACTS OF AGENTS

8. Whenever in this petition it is alleged that a Defendant did any act, it is meant that:

A. The Defendant performed or participated in the act, or

B. The Defendant’s officers, agents, trustees or employees performed or participated in the act on behalf of and under the authority of the Defendant.

VIII. NOTICE BEFORE SUIT NOT GIVEN

9. Pursuant to §17.47(a) of the Deceptive Trade Practices Act, contact has not been made with the Defendants herein to inform them of the unlawful conduct alleged herein, pursuant to the exceptions set forth in DTPA §17.47, and because there was not sufficient time to provide such notice prior to filing suit.

IX. SPECIFIC FACTUAL ALLEGATIONS

10. Defendants are engaged in the sale and distribution of pharmaceutical products and drugs. More specifically, Defendants market and sell the flu vaccine (“Fluzone”/“Fluvirin”) which is in

short supply in the United States and Texas. Because of the limited supply of flu vaccine, its use has been restricted for those who need it the most: elderly persons, children and care-givers. Defendants have brazenly taken advantage of this national crisis by marketing and selling this vital vaccine at exorbitant and outrageous prices. A typical 10 dose vial of the flu vaccine normally sells for approximately \$65-80. (Exhibit "4"). Defendants have been selling 10 dose vials for between \$396 and \$950 each. (See Exhibits "1-3" attached hereto). These markups of as much as 1150% over the normal price are unconscionable and illegal. Some health care providers are not able to afford such prices, leaving their patients without any supply of flu vaccine at all. (Exhibit "4"). Elderly persons and children will bear the brunt of these illegal and unconscionable practices.

X. VIOLATIONS OF THE DTPA

11. Defendants, in the course and conduct of trade and commerce, have directly and indirectly engaged in false, misleading and deceptive acts and practices declared to be unlawful by the DTPA, to wit:

- A. Engaging in false, misleading or deceptive acts or practices in the course of trade or commerce, in violation of DTPA § 17.46(a).
- B. Engaging in unconscionable actions and course of actions in violation of the DTPA;
- C. Advertising goods with the intent not to sell them as advertised, in violation of DTPA § 17.46(b)(9);
- D. Failing to disclose material information intending to induce a consumer into a transaction to which they would not have entered had the information been disclosed, in violation of 17.46(b)(24);
- E. Engaging in illegal price gouging of necessities which is unconscionable and

violative of the DTPA;

11.1. Defendants have, by means of the unlawful acts and practices described in this petition, obtained money or other property from identifiable persons to whom such money or property should be restored.

XI. CONSPIRACY TO DEFRAUD

12. Defendants, in concert with their agents and employees, agreed to willfully and fraudulently obtain funds from consumers by engaging in the course of conduct complained of herein, which course of conduct Defendants knew had the tendency and capacity to deceive.

XII. DISGORGEMENT

13. Defendants' assets are subject to the equitable remedy of disgorgement, which is the forced relinquishment of all benefits that would be unjust for Defendants to retain, including all ill-gotten gains and benefits or profits that result from Defendants' conduct. Defendants should be ordered to disgorge all monies fraudulently taken from individuals and businesses together with all of the proceeds, profits, income, interest and accessions thereto. Such disgorgement should be for the benefit of victimized consumers and the State of Texas.

XIII. REQUEST TO CONDUCT DISCOVERY PRIOR TO TEMPORARY INJUNCTION HEARING

14. Plaintiff requests leave of this Court to conduct telephonic, oral, written and other depositions of witnesses and parties prior to any scheduled Temporary Injunction Hearing and prior to Defendant's answer date. There are a number of victims and other witnesses who may need to be deposed prior to any scheduled injunction hearing. Any depositions, telephonic or otherwise, would be conducted with reasonable, shortened notice to defendant and its attorneys,

if known.

XIV. TRIAL BY JURY

15. Plaintiff herein requests a jury trial and tenders the jury fee to the Harris County District Clerk's office pursuant to TEX. R. CIV. P. 216 and TEX. GOV'T CODE ANN. §51.604.

XV. APPLICATION FOR TEMPORARY INJUNCTION AND PERMANENT INJUNCTION

16. Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated and will continue to violate the law as alleged in this Petition. Unless immediately restrained by this Honorable court, Defendants will continue to violate the laws of the STATE OF TEXAS and cause immediate, irreparable injury, loss and damage to the State of Texas and to the general public. Therefore Plaintiff requests a Temporary Injunction and Permanent Injunction as indicated below.

XVI. PRAYER

17. WHEREFORE, Plaintiff prays that Defendants be cited according to law to appear and answer herein; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, Defendants' successors, assigns, officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants, from engaging in the following acts or practices:

A. Transferring, concealing, destroying, or removing from the jurisdiction of this Court any books, records, documents, invoices or other written materials relating to the business of Defendants currently or hereafter in Defendants' possession, custody or control except in response

to further orders or subpoenas in this cause;

B. Selling, marketing, advertising or distributing the flu vaccine (Fluzone/Fluvirin) for any exorbitant or excessive price;

C. Selling, marketing, advertising, or distributing any of the flu vaccine (Fluzone/Fluvirin) for any price exceeding the sum of \$90 per 5ML (or 10 dose) vial.

D. Taking advantage of the limited supply of flu vaccine in any way by marketing, selling or distributing the vaccine for any excessive or exorbitant price;

17.1. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court will:

A. Adjudge against Defendants civil penalties in favor of Plaintiff STATE OF TEXAS in an amount up to \$250,000 as allowed by law under the DTPA, specifically, §17.47(c)(2) of the Texas Business and Commerce Code, due to Defendants committing acts and practices which were calculated to acquire or deprive money or other property from consumers who were 65 years of age or older when the act or practice occurred;

B. Adjudge against Defendants civil penalties in favor of Plaintiff, STATE OF TEXAS, in an amount up to \$20,000 per violation, allowed by law under the DTPA, specifically, § 17.47(c)(1) of the Texas Business and Commerce Code;

C. Order Defendants to restore all money or other property taken from identifiable persons by means of unlawful acts or practices, or, in the alternative, award judgment for damages in an amount within the jurisdictional limits of this court to compensate for such losses;

D. Order equitable rescission of contracts between Defendants and Health care providers whereby such providers receive most or all of the money back that they paid to Defendants;

E. Order Defendants to pay Plaintiff STATE OF TEXAS attorney fees and costs of court

pursuant to TEX. GOV'T. CODE §402.006(c);

F. Order the disgorgement of all sums taken from Health care provider/consumers by means of deceptive trade practices, together with all proceeds, interest, income, profits and accessions thereto;

G. Grant leave to the Plaintiff to conduct telephonic, oral and other depositions prior to the Defendants' answer date and any Temporary Injunction hearing; and

H. Grant all other relief to which the Plaintiff State of Texas may show itself entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
STATE OF TEXAS

VERIFICATION

STATE OF TEXAS §

§

COUNTY OF HARRIS §

Before me, the undersigned Notary Public, on this day personally appeared Cathryn Haynes, who, after being duly sworn, stated under oath that she is an investigator for this action, that she has read the above petition, and that every statement contained in the petition is true and correct and within the personal knowledge of affiant and those persons providing information to affiant.

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME, on the ___th day of October, 2004, to certify which witness my hand and official seal.

NOTARY PUBLIC
State of Texas