

I.
SUMMARY OF PETITION

1. Texas Health & Safety Code § 431.116 requires Defendants to file the average manufacturer price (AMP) for their drugs with the Texas Health & Human Services Commission (HHSC).

2. Defendants have failed to make these statutorily-mandated filings.

3. Defendants' failure to report AMPs to HHSC has helped thwart HHSC's attempt to control the costs of the State's Medicaid program.

4. In light of Defendants' violations of Texas law, Plaintiff respectfully requests that a permanent injunction be issued requiring the drug manufacturers to file their AMPs with HHSC.

II.
DISCOVERY CONTROL PLAN

5. Discovery is intended to be conducted under level 3 of the discovery control plan provided by Rule 190.3 of the Texas Rules of Civil Procedure.

III.
PARTIES

6. Plaintiff is the State of Texas. Under the Texas Constitution, "[t]he Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, . . . and perform such other duties as may be required by law." TEX. CONST. art. IV § 22 (amended 1999).

7. Texas Health & Safety Code § 431.116 grants the Attorney General authority to take legal action to enforce its terms.

8. Under the Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE ANN. ch. 36, the Attorney General may institute an action for an appropriate order to restrain a person from committing or continuing to commit an unlawful act if the Attorney General has reason to believe that the person is committing, has committed, or is about to commit the act. TEX. HUM. RES. CODE ANN. § 36.051 (a) (Vernon 2001).

9.1 Defendant, American Pharmaceutical Partners, Inc., a foreign corporation, organized and existing under the laws of the State of Delaware, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home office address is **American Pharmaceutical Partners, Inc., 1501 E. Woodfield Dr., Ste. 300E, Schaumburg, IL 60173.**

9.2 Defendant, Clay-Parks Labs, Inc., a foreign corporation, organized and existing under the laws of the State of Delaware, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home office address is **Clay-Parks Labs, Inc., 1700 Bathgate Ave., Bronx, NY 10457.**

9.3 Defendant, E. Fougera & Co., a division of Altana, Inc., a foreign corporation, organized and existing under the laws of the State of New Jersey, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm

Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home office address is **E. Fougera & Co., c/o Altana Inc., 60 Baylis Rd., Melville, NY 11747-0103.**

9.4 Defendant, ESP Pharma, Inc., a foreign corporation, organized and existing under the laws of the State of Delaware, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home office address is **ESP Pharma, Inc., 2035 Lincoln Highway, Ste. 2150, Edison, NJ 08817.**

9.5 Defendant, Healthpoint, Ltd., is a Texas limited partnership, whose principal place of business is Tarrant County, Texas, and may be served with process by serving its registered agent for service, **Mark A. Mitchell, 318 McCullough, San Antonio, TX 78215.**

9.6 Defendant, Hercon Laboratories Corporation, a foreign corporation, organized and existing under the laws of the State of Delaware, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home office address is **Hercon Laboratories Corporation, Aberdeen Road, Emigsville, PA 17318.**

9.7 Defendant, LifeCycle Ventures, a subsidiary of PDI, Inc., a foreign corporation, organized and existing under the laws of the State of Delaware, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home

office address is **LifeCycle Ventures, c/o PDI, Inc., 10 Mountainview Rd., Upper Saddle River, NJ 07458.**

9.8 Defendant, Person & Covey, Inc., a foreign corporation, organized and existing under the laws of the State of California, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home address is **Person & Covey, Inc., 616 Allen Avenue, Glendale, CA 91201.**

9.9 Defendant, Pharmaceutical Associates, Inc., a foreign corporation, organized and existing under the laws of the State of Florida, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home address is **Pharmaceutical Associates, Inc., 5220 S. Manhattan Ave., Tampa, FL 33611-3420.**

9.10 Defendant, Pharmascience Laboratories, Inc., a foreign corporation, organized and existing under the laws of the State of New York, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home address is **Pharmascience Laboratories, Inc., 295 Firetower Road, Tonawanda, NY 14150-2312.**

9.11 Defendant, Savage Laboratories, a division of Altana, Inc., a foreign corporation, organized and existing under the laws of the State of New York, is authorized to do business in Texas, and does not maintain a regular place of business or a designated agent for service of

process in Texas. Defendant has sufficient contacts with Texas that, under the Texas Long-Arm Statute, it can be served with process by serving the Texas Secretary of State. Defendant's home address is **Savage Laboratories, c/o Altana, Inc., 60 Baylis Road, Melville, NY 11747.**

9.12 Defendant Somerset Pharmaceuticals Inc, a foreign corporation, organized and existing under the laws of the state of Delaware, is authorized to do business in Texas, and does not maintain a regular place of business or designated agent for service of process in Texas. Defendant has sufficient contacts with Texas, that, under the Texas long-arm statute, it can be served with process by serving the Texas Secretary of State. Defendant's home office address is **Somerset Pharmaceuticals Inc., 2202 N. West Shore Blvd., Suite 450, Tampa, FL 33607.**

IV. JURISDICTION

10.1. The court has jurisdiction over Defendant Healthpoint, Ltd. because it is a Texas resident.

10.2 The court has jurisdiction over the remaining Defendants because each of these Defendants is a nonresident that has done business in and that has continuing contacts with Texas and is amenable to service by a Texas court. The court has jurisdiction over the controversy pursuant to the Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE ANN. ch. 36 (Vernon 2001 & Supp. 2004).

V. VENUE

11. Venue of this action is proper in a district court of Travis County under the Medicaid Fraud Prevention Act, which provides that an action for injunctive relief under the Act shall be brought in a district court of Travis County or of a county in which any part of the

unlawful act occurred, is occurring, or is about to occur, TEX. HUM. RES. CODE ANN. § 36.051 (b) (Vernon 2001).

VI.
CAUSE OF ACTION

Defendants' Failure to Comply With Texas Health & Safety Code Section 431.116

12. The average manufacturer price (AMP) for a drug is the average price paid to the manufacturer for the drug in the United States by wholesalers for drugs distributed to retail pharmacies, after customary prompt pay discounts are deducted.

13. In September 2001, the Texas legislature amended the Health and Safety Code and created the Interagency Council on Pharmaceuticals Bulk Purchasing (Council). Also in September 2001, the Texas Legislature amended the Health and Safety Code by adding Section 431.116. Tex. H.B. 915, 77th Leg., R.S., 2001 Tex. Gen. Laws 2184–86 (effective September 1, 2001). Among other things, Section 431.116 required manufacturers of drugs sold in this state to file the AMPs for their drugs with the Texas Department of Health (TDH) which, in turn, was required to provide the AMPs to the Council.

14. HHSC's Vendor Drug Program (VDP) provides access to prescription drugs for persons who are eligible for benefits under the state's Medicaid, Children With Special Health Care Needs, Kidney Health Care, and Children's Health Insurance programs. VDP makes payments on behalf of those persons directly to participating pharmacies. The amount that VDP pays a participating pharmacy equals either the usual and customary price the pharmacy charges the general public or its best estimate of the pharmacy's actual acquisition cost plus a dispensing fee, whichever is less. VDP estimates the pharmacy's acquisition cost for a drug based on pricing information reported to it by the drug's manufacturer.

15. Access to AMPs allows VDP to calculate more accurately participating pharmacies' actual acquisition costs. For this reason, before HHSC and TDH were consolidated, VDP sought access to the AMPs that were filed with TDH pursuant to Section 431.116. However, an opinion by the Attorney General's office concluded, among other things, that TDH could not share AMPs with the VDP. *See* Tex. Att'y Gen. Op. No. GA-0019 (2003).

16. In response to the Attorney General's opinion, the Texas legislature passed House Bill 2292, which amended Section 431.116. Tex. H.B. 2292, 78th Leg., R.S., 2003 Tex. Gen. Laws 611–728 (effective Sept. 1, 2003). The amendment to Section 431.116 provided that TDH could share AMPs with VDP. The amendment further specified that any AMPs disclosed under Section 431.116 are confidential, and provided for penalties for their unauthorized disclosure. *Id.* at § 431.116(I). A copy of the current text of Section 431.116 is attached as Exhibit “A” to this petition.

17. House Bill 2292 also reorganized and consolidated Texas's health and human services agencies. Tex. H.B. 2292, 78th Leg., R.S., 2003 Tex. Gen. Laws 611–728 (effective Sept. 1, 2003). The bill abolished TDH and transferred its powers, duties, functions, programs and activities to HHSC. However, House Bill 2292 also made clear that any statutory obligations previously owed to TDH were transferred to HHSC. *Id.* 635–36, 641. Thus, under House Bill 2292, Defendants' obligation under Section 431.116 to file their AMPs with TDH became an obligation to file their AMPs with HHSC.

18. On April 1, 2005, April 4, 2005, and April 5, 2005, the Attorney General sent letters by certified mail, postage prepaid, to 160 companies, including the Defendants. The letters informed the recipients that, because they were not filing AMPs with HHSC, they were in violation of Texas Health & Safety Code § 431.116. The letters further set deadlines for the

recipients to comply with the requirements of Section 431.116. Copies of the letters sent by the Attorney General to the Defendants and verifications of their receipt by the Defendants are attached hereto as Exhibit B and incorporated into this petition by reference.

19. Of the 160 companies which received letters from the Attorney General, the vast majority agreed to comply with the terms of Section 431.116. The Defendants are the only companies which did not respond to the Attorney General's notice letter.

20. Given Defendants' continuing failure to comply with the express statutory filing requirements set forth in Section 431.116, even after they received notice of these requirements, the Court should order Defendants to file their AMPs with HHSC.

VII.
REQUEST FOR PERMANENT INJUNCTION

21. Plaintiff incorporates by reference the allegations contained in each and every preceding paragraph of this petition.

22. Plaintiff asks the Court to enter a permanent injunction against each of the Defendants, ordering each Defendant to file the AMPs for its drugs with HHSC on a quarterly basis at the same time the information is reported to the U.S. Secretary of Health and Human Services.

23. Plaintiff asks the Court to set its request for Permanent Injunction for hearing for a full trial on the issues in Plaintiff's request for injunctive relief and, after the hearing, to issue a permanent injunction against each of the Defendants, granting the relief set out above and all other relief, both special and general, either at law or in equity to which Plaintiff may be justly entitled, including but not limited to fees, expenses, and costs reasonably incurred in obtaining permanent injunctive relief, including court costs, reasonable attorney's fees, witness fees, and deposition fees. TEX HUM. RES. CODE ANN. § 36.007 (Vernon 2001).

VIII.
PRAYER

24. For these reasons, Plaintiff asks that Defendants be cited to appear and answer and that Plaintiff have judgment against the Defendants for injunctive relief; for fees, expenses, and costs reasonably incurred in obtaining the injunctive relief; and for all other relief, both special and general, either at law or in equity to which Plaintiff may be justly entitled, as set forth more particularly above.

Plaintiff asks that this matter be set for a hearing as soon as possible.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

MARK TOBEY
Chief, Antitrust and Civil Medicaid Fraud Division

PATRICK J. O'CONNELL
Chief, Civil Medicaid Fraud Section

PATRICK J. O'CONNELL
TX Bar No. 15179900
BILL R. MOSS
TX Bar No. 14581800
WILLIAM J. SHIEBER
TX Bar No. 24012167
Assistant Attorneys General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-1710
(512) 320-0975 (Fax)

ATTORNEYS FOR PLAINTIFF

VERIFICATION

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

On this day, _____, appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath she said she read the foregoing Plaintiff's Original Petition for Permanent Injunction and the facts stated in it are within her personal knowledge and are true and correct.

SWORN TO and SUBSCRIBED before me by _____ on this ___ day of _____, 2005.

Notary Public in and for the State of Texas