

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.**

SECURITIES AND EXCHANGE COMMISSION,)
)
Plaintiff,)
)
v.)
)
RICHARD M. KIRSCH and)
ADAM TERRIS,)
)
Defendants.)
_____)

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff Securities and Exchange Commission alleges as follows:

INTRODUCTION

1. This case involves insider trading by Defendants Richard M. Kirsch and Adam Terris. Kirsch and Terris were, respectively, the former Director of Information Systems and the former Director of Call Center and Pharmaceutical Operations of PetMed Express, Inc. (“PetMed” or the “Company”). In their respective senior roles at the Company and as members of PetMed’s management committee, Kirsch and Terris had access to material nonpublic information concerning PetMed’s quarterly earnings, business operations, and financial performance.

2. From December 29, 2014 through January 18, 2018 (the “Relevant Period”), Kirsch purchased and sold common stock and call options in advance of seven market-moving PetMed earnings announcements while in possession of material nonpublic information concerning the Company’s quarterly and year-end financial results. Through these trades, Kirsch realized profits and avoided losses of \$164,966.

3. In addition to trading for his own financial gain, in March 2017, Kirsch purchased call options using money Terris provided for that purpose. At that time, both Kirsch and Terris were

in possession of material nonpublic information concerning PetMed's fiscal 2017 fourth quarter and year-end financial performance. Kirsch sold the PetMed call options days after the Company issued its May 8, 2017 earnings announcement for its fiscal 2017 fourth quarter and year-end. While the realized profits were initially deposited into Kirsch's brokerage account, Kirsch subsequently gave Terris all of the realized profits of \$727,400.

4. By engaging in the conduct alleged in this Complaint, Kirsch and Terris violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5(a) and (c) thereunder, 17 C.F.R. § 240.10b-5(a) and (c). Unless enjoined, Kirsch and Terris are reasonably likely to continue to violate the federal securities laws. The Commission also seeks civil money penalties and officer-and-director bars against both Defendants.

JURISDICTION AND VENUE

5. The Commission brings this action pursuant to Sections 21(d) and 21A of the Exchange Act, 15 U.S.C. § 78u(d) and 78u-1. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e), 21A, and 27 of the Exchange Act, 15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa.

6. This Court has personal jurisdiction over Kirsch and Terris and venue is proper in the Southern District of Florida. PetMed is headquartered in the Southern District of Florida and Kirsch and Terris reside in this District and committed the acts alleged in the Complaint in this District.

7. In connection with the conduct alleged in this Complaint, Kirsch and Terris, directly and indirectly, singly or in concert with others, made use of the means or instrumentalities of interstate commerce, the means or instruments of transportation or communication in interstate commerce, and of the mails.

DEFENDANTS

8. **Kirsch**, age 47, is a resident of Davie, Florida. From February 2001 through July 2018, Kirsch was an employee of PetMed. Most recently, until he left the Company on July 31, 2018, Kirsch served as PetMed's Director of Information Systems and was a member of its management committee.

9. **Terris**, age 54, is also a resident of Davie, Florida. Most recently, until he left the Company on November 14, 2019, Terris served as PetMed's Director of Call Center and Pharmaceutical Operations and was a member of its management committee.

RELATED ENTITY

10. **PetMed**, a Florida corporation headquartered in Delray Beach, Florida, is an online pet pharmacy that sells medications and other health products for dogs and cats. PetMed's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the NASDAQ under the ticker "PETS."

FACTUAL ALLEGATIONS

I. Kirsch's And Terris's Access To Material Nonpublic Information

11. As members of PetMed's management committee, Kirsch and Terris had access to material nonpublic information concerning the Company's quarterly earnings, business operations, and financial performance. The management committee generally met on a weekly basis to discuss, among other things, financial data and metrics PetMed used to assess its financial condition and business operations. PetMed's CEO and CFO typically led the weekly meetings.

12. At the meetings, an Excel spreadsheet would be projected on a screen containing various charts, graphs, and spreadsheets. It was generated from PetMed's proprietary software system that tracks and compiles all financial data from PetMed's other systems into one central

location. The management committee used this information to analyze the financial condition and operations of PetMed on a weekly basis.

13. PetMed's CEO and CFO would review these metrics, along with other financial data, with members of the management committee to understand how PetMed was performing and to ascertain what actions, if any, the Company needed to implement to improve its financial performance. As a result, during the Relevant Period Kirsch and Terris had a detailed understanding of PetMed's financial condition and performance. None of the information presented and discussed at the weekly management committee meetings was made public prior to PetMed issuing its quarterly earnings announcements and related filings with the Commission.

14. Kirsch was also responsible for overseeing and maintaining the proprietary system. His duties included, among other things, updating software and running tests on the system and generating reports and data for PetMed personnel and its outside auditors. He was routinely required to run reports and pull data for PetMed's management, accountants and auditors in connection with monthly, quarterly, and annual financial results and announcements.

15. Terris supervised customer services representatives who received calls from PetMed customers. He also oversaw pharmacists who, among other things, communicated with veterinarian offices to verify prescriptions and related medical data. In these roles, Terris had access to PetMed databases that provided sales, revenues, new orders, re-orders, and related product information.

II. Kirsch And Terris Were Aware Of PetMed's Prohibitions Against Insider Trading

16. During the Relevant Period, PetMed's Insider Trading Policy prohibited trading in PetMed securities while an employee was in possession of material nonpublic information about

the Company. The Insider Trading Policy listed common examples of such information, including unannounced results of operations and projections of future earnings or losses.

17. PetMed's Insider Trading Policy further prohibited any employee from trading in the Company's securities during certain blackout periods surrounding quarterly earnings announcements, and completely forbade any employee from buying or selling call or put options in PetMed securities at any time.

18. In connection with the Insider Trading Policy, PetMed's General Counsel would send all employees, including Kirsch and Terris, an email each quarter setting forth that quarter's blackout period in "which there may be no trading of the Company's stock in any manner."

19. Furthermore, each year, PetMed employees were required to sign a memorandum that, among other things, reiterated the Insider Trading Policy. Each year during the Relevant Period, Kirsch and Terris signed this memo acknowledging their responsibility to read and abide by the Insider Trading Policy.

III. Kirsch Traded In PetMed Securities On The Basis Of Material Nonpublic Information

20. During the Relevant Period, Kirsch purchased thousands of shares of PetMed common stock and call option contracts ahead of seven PetMed market-moving quarterly earnings announcements for his financial benefit.

21. Kirsch routinely purchased PetMed securities during quarterly blackout periods the Company imposed. Moreover, Kirsch purchased and sold PetMed call options in direct contravention of the Insider Trading Policy.

22. Kirsch utilized different trading strategies depending on whether an earnings announcement would have a positive or negative impact on PetMed's stock price. For example, Kirsch purchased shares of PetMed common stock prior to positive earnings announcements.

Once the positive earnings announcement was released, Kirsch would sell the shares, realizing a profit. Conversely, Kirsch purchased PetMed call option contracts and then sold his entire position prior to a negative earnings announcement, thereby avoiding losses. With respect to one other negative earnings announcement, Kirsch engaged in short-selling shares of PetMed common stock and then covered his short position after the announcement was released, thereby realizing profits.

23. Kirsch traded in PetMed securities prior to the Company issuing its quarterly earnings announcements based on material nonpublic information that he obtained as PetMed's Director of Information Systems and as a member of the management committee. In total, during the Relevant Period, Kirsch traded ahead of seven PetMed earnings announcements and made profits and avoided losses of \$164,996.

IV. Terris Gave Money To Kirsch To Purchase PetMed Call Options

24. In early March 2017, Terris gave Kirsch two bank checks totaling \$135,250. Between March 2 and 8, 2017, Kirsch purchased 850 PetMed call option contracts in his brokerage account on Terris' behalf. Terris asked Kirsch to purchase these call options for him because Terris did not have an options trading agreement with his broker-dealer. At this time, Kirsch and Terris had access to material nonpublic information concerning PetMed's fiscal 2017 fourth quarter and year-end financial performance.

25. On May 8, 2017, PetMed issued its fiscal 2017 fourth quarter and year-end financial results prior to the market opening. This earnings announcement caused the price of PetMed common stock to increase by 25.43% from the previous day's closing price, from \$24.22 per share to \$30.38 per share.

26. On May 10 and 11, 2017, Kirsch sold all 850 PetMed call option contracts and realized profits of \$727,400. On May 11, 2017, Kirsch gave Terris bank checks that included all of the profits.

CLAIM FOR RELIEF

Violations of Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) Thereunder

27. The Commission repeats and realleges Paragraphs 1 through 26 of this Complaint as if fully set forth herein.

28. Kirsch and Terris knew or were severely reckless in not knowing that the information they possessed concerning PetMed's quarterly and annual earnings during the Relevant Period was material nonpublic information. They also knew or were severely reckless in not knowing that they owed a fiduciary or other duty of trust and confidence to PetMed and its shareholders to keep the information confidential.

29. Kirsch breached his duty of trust and confidence by trading in PetMed securities during the Relevant Period on the basis of material nonpublic information concerning the Company's business operations, financial condition, and performance.

30. Terris similarly breached this duty by knowingly providing money to Kirsch to purchase call options in March 2017 on the basis of material nonpublic information concerning the Company's fiscal 2017 fourth quarter and year-end financial performance.

31. By virtue of the foregoing, Kirsch and Terris, in connection with the purchase or sale of securities, by the use of any means or instrumentalities of interstate commerce, or of the mails, or a facility of a national securities exchange, directly or indirectly employed devices, schemes, or artifices to defraud and/or engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon any person.

32. By engaging in the foregoing conduct, Kirsch and Terris violated, and unless enjoined, are reasonably likely to continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5(a) and (c) thereunder, 17 C.F.R. § 240.10b-5(a) and (c).

RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that the Court find that Kirsch and Terris committed the violations alleged, and:

A.

Permanent Injunctive Relief

Issue Permanent Injunctions enjoining Kirsch and Terris, and their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with any of them, from violating Section 10(b) the Exchange Act, 15 U.S.C. § 78j(b), and Rules 10b-5(a) and (c) thereunder, 17 C.F.R. § 240.10b-5(a) and (c).

B.

Civil Money Penalties

Issue an Order directing Kirsch and Terris each to pay a civil money penalty pursuant to Section 21A of the Exchange Act, 15 U.S.C. § 78u-1.

C.

Officer and Director Bars

Issue an Order, pursuant to Section 21(d)(2) of the Exchange Act, 15 U.S.C. § 78u(d)(2), prohibiting Kirsch and Terris from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. § 78l, or that is required to file reports pursuant to Section 15(d) of the Exchange Act, 15 U.S.C. § 78o(d).

D.

Retention of Jurisdiction

The Commission respectfully requests that the Court retain jurisdiction over this action in order to implement and carry out the terms of all orders and decrees that it may enter, or to entertain any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court.

E.

Further Relief

Grant such other and further relief as this Court may determine to be just and necessary.

Dated: September 10, 2020

Respectfully submitted,

By: Robert K. Levenson
Senior Trial Counsel
Florida Bar No. 0089771
Direct Dial: (305) 982-6341
Email: levensonr@sec.gov

Jordan A. Cortez
Senior Counsel
Special Bar No. A5502524
Direct Dial: (305) 982-6355
Email: cortezjo@sec.gov

**ATTORNEYS FOR PLAINTIFF
SECURITIES AND EXCHANGE COMMISSION**
801 Brickell Avenue, Suite 1950
Miami, Florida 33131
Telephone: (305) 982-6300