



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

May 3, 2023

Jason M. Hille
Foley & Lardner LLP

Re: PetMed Express, Inc. (the "Company")
Incoming letter dated May 2, 2023

Dear Jason M. Hille:

This letter is in regard to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by James McRitchie (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Your letter indicates that the Proponent has withdrawn the Proposal and that the Company therefore withdraws its March 30, 2023 request for a no-action letter from the Division. Because the matter is now moot, we will have no further comment.

Copies of all of the correspondence related to this matter will be made available on our website at <https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: James McRitchie



ATTORNEYS AT LAW
777 EAST WISCONSIN AVENUE
MILWAUKEE, WI 53202-5306
414 271.2400 TEL
414 297.4900 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
414.319.7336
jhille@foley.com

March 30, 2023

VIA EMAIL (shareholderproposals@sec.gov)

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: PetMed Express, Inc. – Omission of Stockholder Proposal by James
McRitchie Pursuant to Rule 14a-8

Ladies & Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are writing on behalf of our client, PetMed Express, Inc., a Florida corporation (the "Company"), to request that the staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with the Company's view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (the "Proposal" and "Supporting Statement," respectively) submitted by James McRitchie (the "Proponent") from the proxy materials to be distributed by the Company in connection with its 2023 annual meeting of stockholders (the "2023 Proxy Materials"). We request confirmation that the Staff will not recommend to the Commission that enforcement action be taken if the Company omits the Proposal from the 2023 Proxy Materials for the reasons discussed below.

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB No. 14D"), we are emailing this letter and its attachments to the Staff at shareholderproposals@sec.gov. In accordance with Rule 14a-8(j), we are simultaneously emailing a copy of this letter and its attachments to the Proponent as notice of the Company's intent to omit the Proposal from the 2023 Proxy Materials.

Rule 14a-8(k) and Section E of SLB No. 14D provide that a shareholder proponent is required to send to the company a copy of any correspondence that the proponent elects to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent elects to submit correspondence to the Commission or the Staff relating to the Proposal, then a copy of that correspondence should concurrently be furnished to the Company.

The Company currently intends to file its definitive 2023 Proxy Materials with the Commission on or about June 20, 2023. Accordingly, as contemplated by Rule 14a-8(j), we have filed this letter with the Commission no later than 80 calendar days before the Company intends to file its definitive 2023 Proxy Materials with the Commission.

AUSTIN
BOSTON
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DENVER

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HOUSTON
JACKSONVILLE
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MIAMI
MILWAUKEE
NEW YORK
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SACRAMENTO
SALT LAKE CITY
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SILICON VALLEY

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TAMPA
WASHINGTON, D.C.
BRUSSELS
TOKYO

Office of Chief Counsel
March 30, 2023
Page 2

I. The Proposal.

The Proposal submitted to the Company by the Proponent relates to director elections and states in relevant part as follows:

Resolved

James McRitchie and other shareholders request that directors of PetMed Express Inc. (“Company”) take the steps necessary to amend its bylaws to include the following language:

Shareholder approval is required for any advance notice bylaw amendments that:

- 1. require the nomination of candidates more than 120 days before the annual meeting,*
- 2. impose new disclosure requirements for director nominees not required by law, including disclosures related to past and future plans, or*
- 3. require nominating shareholders to disclose limited partners or business associates, except to the extent such investors own more than 5% of the Company’s shares.*

II. Bases for Exclusion.

We hereby respectfully request that the Staff concur in the Company’s view that the Company may exclude the Proposal from the 2023 Proxy Materials pursuant to Rules 14a-8 under the Exchange Act because (A) the Proposal, if implemented, would cause the Company to violate Florida law in violation of Rule 14a-8(i)(2), (B) the Proposal is materially misleading and impermissibly vague and indefinite in violation of Rule 14a-8(i)(3) and (C) the Company lacks the power of authority to implement the proposal, pursuant to Rule 14a-8(i)(6).

III. Background.

On January 23, 2023, the Company received the Proposal accompanied by a cover letter from the Proponent dated January 23, 2023. Copies of the Proposal and the cover letter are attached hereto as **Exhibit A**. Subsequent correspondence with the Proponent, including a letter dated January 27, 2023 verifying the Proponent’s ownership of Company stock, is attached hereto as **Exhibit B**.

Office of Chief Counsel
March 30, 2023
Page 3

IV. Analysis.

A. The Company Can Exclude the Proposal Under Rule 14a-8(i)(2) Because The Proposal, if Implemented, Would Cause the Company to Violate State and Federal Law.

Rule 14a-8(i)(2) allows the exclusion of a proposal if implementation of such proposal would “cause the company to violate any state, federal, or foreign law to which it is subject.” *See, The Goldman Sachs Group, Inc.* (Feb. 1, 2016); *Kimberly-Clark Corp.* (Dec. 18, 2009). For the reasons set forth below, the Company believes that the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Florida state and federal law.

The Staff has previously concurred in the exclusion of stockholder proposals where in the opinion of counsel the proposal would, if implemented, be inconsistent with the company’s certificate of incorporation, violating state law. For example, in *Advanced Photonix, Inc.* (May 15, 2014), Advanced Photonix received a proposal calling for the adoption of a proxy access bylaw that could only be amended by a vote of its stockholders. In connection with its no-action request to the Staff, Advanced Photonix obtained the opinion of Delaware counsel, whose legal opinion asserted that the company’s certificate of incorporation did “not limit in any respect the [b]oard’s power to amend the By-Laws, and therefore, the [c]ertificate mandate[d] that any part of the By-Laws [could] be amended by the [b]oard.” The Staff granted no-action relief under Rule 14a-8(i)(2), noting that in the opinion of Delaware counsel, the “implementation of the proposal would cause [the company] to violate state law because the proposed bylaw would conflict with [the company’s] certificate of incorporation.”

Other examples of the Staff concurring in the exclusion of a shareholder proposal, the implementation of which, in the opinion of counsel, would cause a company to violate the respective state law to which it is subject include *Elevance Health, Inc.* (Mar. 21, 2022) (concurring with exclusion under Rule 14a-8(i)(2) of a shareholder proposal requesting that the board of directors take the necessary steps to permit written consent by shareholders entitled to cast the minimum number of votes necessary to authorize the action at a meeting where Indiana law prohibited action by less than unanimous written consent for corporations with a class of voting shares registered under Section 12 of the Exchange Act); *CVS Caremark Corp.* (Mar. 9, 2010, recon. denied Mar. 17, 2010) (concurring with exclusion under Rule 14a-8(i)(2) of a proposal seeking a bylaw amendment that would require the board chair to be an independent director and could only be amended by stockholders, because such a bylaw would conflict with the company’s certificate of incorporation, which gave the board authority to amend the bylaws); *Ball Corp.* (Jan. 25, 2010) (concurring with the exclusion of a stockholder proposal requesting that the company take the necessary steps to declassify its board of directors where such declassification would violate state law); *Vail Resorts, Inc.* (Sep. 16, 2011) (concurring in exclusion of stockholder proposal to amend the bylaws to “make distributions to stockholders a higher priority than debt repayment or asset acquisition” under Rule 14a-8(i)(2) because the proposal would cause the company to violate state law); *Citigroup Inc.* (Feb. 18, 2009) (concurring with exclusion of stockholder proposal to amend the by-laws to establish a board committee on U.S. economic security under Rule 14a-8(i)(2) because the proposal would cause the company to violate state law); *AT&T, Inc.* (Feb. 19, 2008) (concurring with the exclusion under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) of proposals requesting that the company take the necessary steps to amend the company’s

Office of Chief Counsel
March 30, 2023
Page 4

governing documents to permit stockholders to act by written consent and that the board adopt cumulative voting because the proposals would cause the company to violate state law); *The Boeing Co.* (Feb. 19, 2008) (similar proposal seeking unilateral board action eliminating restrictions on stockholder actions by written consent violates Delaware law); *Monsanto Co.* (Nov. 7, 2008, recon. denied, Dec. 18, 2008) (concurring with exclusion of stockholder proposal to amend the by-laws to require directors to take an oath of allegiance to the U.S. Constitution under Rule 14a-8(i)(2) because the proposal would cause the company to violate state law); and *General Motors Corp.* (Apr. 19, 2007) (proposed by-law amendment requiring each company director to oversee, evaluate and advise certain functional company groups violates Section 141(a) of the DGCL, which provides that all directors have the same oversight duties unless otherwise provided in the company's certificate of incorporation).

As explained further in a legal opinion provided by Foley & Lardner, LLP regarding Florida law (the "Florida Law Opinion"), attached hereto as **Exhibit C**, the implementation of the Proposal would cause the company to violate Section 607.1020(1) of the Florida Business Corporation Act (the "FBCA"). Under Section 607.1020(1) of the FBCA, a board of directors of a Florida corporation is permitted to amend or repeal the corporation's bylaws unless an exception applies under the statute.¹ While Section 607.1020(1) provides two possible exceptions to a board's authority to amend or repeal a corporation's bylaws, as the Florida Law Opinion sets out, neither exception is applicable in this case. Specifically, the exception provided in Paragraph (b) of Section 607.1020(1) requires that the shareholders, rather than the board of directors, adopt an amendment to a corporation's bylaws that "expressly provide that the board of directors may not amend, repeal, adopt, or reinstate the bylaws generally or that particular bylaw provision." The Proposal asks the board of directors of the Company (the "Board"), and not the shareholders, to adopt an amendment to the Company's bylaws (the "Bylaws") requiring shareholders to approve certain further amendments relating to the advance notice issues in the Proposal, thereby restricting the Board's own ability to amend provisions of the Bylaws of which the Board itself has adopted. Such a restriction would be in direct contravention of Section 607.1020(1)(b) of the FBCA.

Furthermore, the third prong ("Prong 3") of the proposed Bylaw amendment language, if implemented, may cause the Company to violate future applicable state or federal law. Prong 3 seeks shareholder approval for any advance notice Bylaw amendments that "require nominating shareholders to disclose limited partners or business associates, except to the extent such investors own more than 5% of Company's shares." The language in Prong 3 that requires shareholders to "disclose limited partners or business associates" does not impose any limit on the information about the applicable limited partners or business associates that nominating shareholders are asked to provide to the Company. In case of a change in law or new regulation that requires the Company to request additional disclosure from director nominees or disclosure of limited partners or business associates of nominating shareholders (even if they own less than 5% of the Company's shares), to avoid violating such law or regulation, the Company must be able to adopt amendments to its Bylaws to implement

¹ FBCA §607.1020 "(1) A corporation's board of directors may amend or repeal the corporation's bylaws unless: . . . (b) Except as provided in s. 607.0206(5), the shareholders, in amending, repealing, or adopting the bylaws generally or a particular bylaw provision, expressly provide that the board of directors may not amend, repeal, adopt, or reinstate the bylaws generally or that particular bylaw provision."

Office of Chief Counsel

March 30, 2023

Page 5

these laws or regulations. Were such amendments to be subject to a shareholder vote, as the Proposal demands, shareholders would effectively be voting on whether the Company chooses to follow or violate the law. The Company cannot risk breaking the law or afford to wait for a shareholder vote in order to implement a new law or regulation of this kind.

Accordingly, and consistent with published positions of the Staff, the Company respectfully submits that the Proposal can be excluded from its 2023 Proxy Materials pursuant to Rule 14a-8(i)(2).

B. The Company Can Exclude the Proposal Because The Proposal is Materially Misleading and Impermissibly Vague and Indefinite, in Violation of Rule 14a-8(i)(3).

Rule 14a-8(i)(3) permits a company to exclude all or portions of a shareholder proposal or its supporting statement “[i]f the proposal or supporting statement is contrary to any of the Commission’s proxy rules, including [Rule] 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials.” As illustrated below, the Proposal contains various statements that inaccurately reflect the Bylaws and its amendment provisions. As a result, if the Proposal were to be included in the 2023 Proxy Materials, it would inevitably materially mislead shareholders as to what the Bylaws state with respect to shareholder director nominations and the current mechanisms for amending the Bylaws, in violation of Rule 14a-9.

The Staff has recognized that companies can exclude shareholder proposals that are “so vague and indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.” Staff Legal Bulletin No. 14B (Sept. 15, 2004). Historically, the Staff has consistently applied this standard. See, e.g., *Walt Disney Co.* (Jan. 19, 2022) (concurring with the exclusion of a proposal which fails to define key terms under Rule 14a-8(i)(3)); *Apple Inc.* (Dec. 22, 2021) (concurring with the exclusion of a proposal requesting amendment to the certificate of incorporation and bylaws when the nature of the proposed changes were “impermissibly vague”); *Cisco Systems, Inc.* (Oct. 7, 2016) (concurring with the exclusion of a proposal under Rule 14a-8(i)(3) as “vague and indefinite”); *SunEdison, Inc.* (Mar. 6, 2014) (concurring with the exclusion of a proposal under Rule 14a-8(i)(3) as “vague and indefinite,” in particular because “the proposal does not sufficiently explain when the requested bylaw would apply”); *General Motors Corp.* (Mar. 26, 2009) (concurring with the exclusion of a proposal requesting elimination of “all incentives for the CEOs and the Board of Directors”); *Alaska Air Group Inc.* (Apr. 11, 2007) (concurring with the exclusion of a proposal vaguely requesting that the company amends its governing instruments to “assert, affirm and define the right of the owners of the company to set standards of corporate governance”); and *Fuqua Industries, Inc.* (Mar. 12, 1991) (concurring with the exclusion of a proposal because the company and its stockholders might interpret the proposal differently such that “any action ultimately taken by the company upon implementation could be significantly different from the actions envisioned by shareholders voting on the proposal”).

As described in further detail below, the Proposal is vague and indefinite on several fronts, and if the Proposal were to be included in the 2023 Proxy Materials, (i) shareholders would be unable to make an informed vote on the Proposal, (ii) the Company would be unable to determine with any

Office of Chief Counsel

March 30, 2023

Page 6

reasonable certainty exactly what actions or measures the proposal would require in the event it was approved, and (iii) there would be a high risk that the action ultimately taken by the Company upon implementation of the Proposal, if approved, would be significantly different from the actions envisioned by the stockholders when voting on the Proposal.

The lead-in to the Proposal, which applies to all three proposed Bylaw amendments, does not explain what the Proponent means by requiring “shareholder approval” for certain kinds of Bylaw amendments. “Shareholder approval” could mean anything between requiring that a certain percentage of the Company’s common stock shareholders approve a matter to requiring approval by 100% of the Company’s shareholders. If the Proponent means the former, it is not clear anywhere in the Proposal or the supporting statement what percentage approval the Proponent intends to require. If the Proponent meant the latter, then the Proposal is effectively a prohibition on the Company’s ability to implement any of the advance notice Bylaw amendments as it would be almost impossible to obtain 100% of shareholder votes. This would be especially problematic if the Company needed to enact a Bylaw amendment because applicable law required it to do so or the Company has legitimate business concerns that necessitate an amendment. The term “shareholder approval” is a key term and an essential component of the Proposal, but it is so vague and indefinite as to make the Proposal difficult to interpret. The Staff has historically concurred in the exclusion of shareholder proposals that fail to define key terms. See, e.g., *Moody’s Corp.* (Feb. 10, 2014) (concurring in the exclusion of a proposal where the term “ESG risk assessments” was not defined); *The Boeing Co.* (Mar. 2, 2011) (concurring in the exclusion of a proposal that failed to “sufficiently explain the meaning of ‘executive pay rights’”); and *NSTAR* (Jan. 5, 2007) (concurring in the exclusion of a proposal where the terms “record keeping” and “financial records” were not defined). Since the term “shareholder approval” is not defined, and it is a key term that applies to all three prongs of the Proposal which could have easily been defined, the Proposal should be similarly considered too vague and indefinite, in violation of Rule 14a-8(i)(3).

The second prong of the proposed amendment (“Prong 2”) would require shareholder approval for any amendment to the Company’s advance notice bylaw(s) that, among other things, “impose new disclosure requirements for director nominees, including disclosures related to *past and future plans*. . .” (emphasis added). The phrase “past and future plans” is vague and subject to numerous interpretations. If the amendment were adopted, this language and its uncertain scope would be included in the Bylaws, further heightening the importance of this phrase. There is no clarification elsewhere in the Proposal or in the Supporting Statement describing the meaning of this phrase. “Past plans” in the context of director nominations could mean a directors’ plans with respect to the Company’s business operations, Company securities, personal plans, realized plans, unrealized plans or any other number of interpretations. Similarly, “future plans” could mean plans with respect to the Company, the directors’ careers, plans with respect to other directorships they hold, plans for other directorship they might pursue and personal plans, among other possibilities. Without further clarification, it impossible to determine what disclosures the Proponent intended to address. As a result, it would be impossible for shareholders voting on the Proposal to ascertain with reasonable certainty the meaning of the language they would be voting on and the scope of the amendment to the Bylaws. As indicated above, if a request is so inherently vague and indefinite that shareholders voting on it would be unable to ascertain with reasonable certainty the policies that the Company should implement to enact the Proposal, the request can be considered misleading under Rule 14a-9.

Office of Chief Counsel

March 30, 2023

Page 7

Accordingly, and consistent with published positions of the Staff, the Company respectfully submits that the Proposal can be excluded from its 2023 Proxy Materials pursuant to Rule 14a-8(i)(3).

C. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(6) Because the Company Lacks the Power of Authority to Implement the Proposal.

Pursuant to Rule 14a-8(i)(6), a company may exclude a proposal “if the company would lack the power or authority to implement the proposal.” The Staff has excluded proposals that, if implemented, would cause the company to violate state law in reliance on Rule 14a-8(i)(2) and 14a-8(i)(6).² As discussed above in Section IV(A), the implementation of the Proposal would cause the Company to violate Section 607.1020(1) of the FBCA. Thus, for the same reasons the Proposal can be excluded under Rule 14a-8(i)(2) as a violation of Florida law, it may also be excluded under Rule 14a-8(i)(6) as beyond the Company’s power to implement.

Accordingly, and consistent with published positions of the Staff, the Company respectfully submits that the Proposal can be excluded from its 2023 Proxy Materials pursuant to Rule 14a-8(i)(6).

V. Conclusion.

For the reasons stated above, the Company believes it may exclude the Proposal from its 2023 Proxy Materials. The Company requests the Staff’s concurrence in the Company’s view or, alternatively, confirmation that the Staff will not recommend any enforcement action to the Commission if the Company excludes the Proposal from its 2023 Proxy Materials.

If you have any questions or need additional information, please feel free to contact me at (414) 319-7336. In accordance with Staff Legal Bulletin No. 14F (Oct. 18, 2011), please send your response to this letter by email to jhille@foley.com.

² See, *Citigroup Inc.* (Feb. 18, 2009) (concurring with exclusion under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) of a proposal urging the adoption of a policy that would breach the company’s current compensation agreements by requiring senior executives to retain shares acquired as compensation for two years following the termination of their employment unless the proposal were revised to state that it would apply only to compensation awards made in the future); *NVR, Inc.* (Feb. 17, 2009) (same); *Bank of America Corp.* (Feb. 26, 2008, recon. denied Mar. 3, 2008) (concurring with exclusion under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) of a proposal urging the board to disclose certain information regarding the company’s relationships with compensation consultants, including information subject to binding confidentiality agreements); *AT&T Corp.* (Feb 19, 2008) (concurring with the exclusion under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) of proposals requesting that the company amend the company’s governing documents to permit stockholders to act by written consent and that the board adopt cumulative voting because the proposals would cause the company to violate state law); *The Boeing Co.* (Feb. 19, 2008) (concurring with the exclusion under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) of a proposal requesting that the company amend the company’s governing documents to permit stockholders to act by written consent because the proposal would cause the company to violate state law).



FOLEY & LARDNER LLP

Office of Chief Counsel

March 30, 2023

Page 8

I would appreciate if the Staff also would send a copy of any response to Wendy Zalai, Controller and Corporate Secretary, PetMed Express, Inc. at wzalai@petmeds.com and Roxanne K. Beilly, Legal Counsel to PetMed Express, Inc. at rbeilly@gmail.com.

Very truly yours,

/s/ Jason M. Hille

Jason M. Hille

Enclosures

cc: Wendy Zalai, Controller and Corporate Secretary, PetMed Express, Inc.
Roxanne K. Beilly, Legal Counsel to PetMed Express, Inc.
James McRitchie
John Chevedden

EXHIBIT A

PROPOSAL

Corporate Governance

CorpGov.net: improving accountability through democratic corporate governance since 1995

PetMed Express
420 South Congress Avenue
Delray Beach, FL 33445
Attention: Wendy Zalai or current Corporate Secretary, wzalai@petmeds.com
cc: Alison Berges, ABerges@1800petmeds.com
Bruce S. Rosenbloom, CFO, BRosenbloom@1800petmeds.com

Dear Corporate Secretary:

I am submitting the attached shareholder proposal, which I support, for a vote at the next annual shareholder meeting requesting Fair Elections, as specified. I intend and pledge to continue to hold the requisite amount of securities required under SEC rules until after the date of that meeting.

My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication. I am available to meet with the Company's representative via phone or Zoom on February 10, at 11:00am or 11:30am Pacific or at another day or time that is mutually convenient.

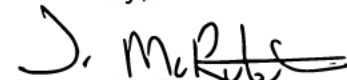
□

This letter confirms that I am delegating John Chevedden to act as my agent regarding including presentation at the forthcoming shareholder meeting but not regarding submission, negotiation, or modification, which require my approval. Please include Mr. Chevedden in future communications regarding my rule 14a-8 proposal [REDACTED]

Avoid the time and expense of filing a deficiency letter to verify ownership by simply acknowledging receipt of my proposal promptly by email to [REDACTED]. I will then request the required letter from my broker and submit it to you.

Per the most recent SEC SLB 14L <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>, Section F, Staff "encourages both companies and shareholder proponents to acknowledge receipt of emails when requested." I am requesting acknowledgment of receipt.

Sincerely,


James McRitchie

January 23, 2022

Date



Proposal [4*] – Fair Elections

Resolved

James McRitchie and other shareholders request that directors of PetMed Express Inc. (“Company”) take the steps necessary to amend its bylaws to include the following language:

Shareholder approval is required for any advance notice bylaw amendments that:

1. require the nomination of candidates more than 120 days before the annual meeting,
2. impose new disclosure requirements for director nominees not required by law, including disclosures related to past and future plans, or
3. require nominating shareholders to disclose limited partners or business associates, except to the extent such investors own more than 5% of the Company’s shares.

Supporting Statement

Under SEC Rule 14a-19, the universal proxy card must include all director nominees presented by management and shareholders for election.¹ Although the Rule implies each side’s nominees must be grouped together and clearly identified as such, in a fair and impartial manner, most rules for director elections are set in company bylaws.

For Rule 14a-19 to be implemented equitably, boards must not undertake bylaw amendments that deter legitimate efforts by shareholders to submit nominees. The bylaw amendments set forth in the proposed resolution would presumptively deter legitimate use of Rule 14a-19 by deterring legitimate efforts by shareholders to seek board representation through a proxy contest.

The power to amend bylaws is shared by directors and shareholders. Although directors have the power to adopt bylaw amendments, shareholders have the power to check that authority by repealing board-adopted bylaws. Directors should not amend the bylaws in ways that inequitably restrict shareholders’ right to nominate directors. This

¹ <https://www.ecfr.gov/current/title-17/chapter-II/part-240/section-240.14a-19>

resolution simply asks the board to commit not to amend the bylaws to deter legitimate efforts to seek board representation, without submitting such amendments to shareholders. We urge the Board not to further amend its advance notice bylaws until shareholders have at least voted on this proposal.

Bloomberg's Matt Levine speculates bylaws might require disclosure submissions "on paper woven from unicorns' manes,"² with requirements waived for the board's nominees. While Mr. Levine depicts humorous and exaggerated possibilities, some companies are adopting amendments clearly designed to discourage fair elections.

Directors of Masimo recently adopted bylaw amendments that could deter legitimate efforts by shareholders to seek board representation through a proxy contest. Masimo's advance notice bylaws "resemble the 'nuclear option' and offers a case study in how rational governance devices can become unduly weaponized, writes Lawrence Cunningham.³ The Delaware Chancery Court has at least ruled Masimo cannot compel Politan to reveal its backers.⁴ However, directors of other companies are considering similar bylaws.

To ensure shareholders can vote on any proposal that would impose inequitable restrictions, we urge a vote FOR Fair Elections.

**To Enhance Shareholder Rights and Value, Vote FOR
Fair Elections – Proposal [4*]**

[This line and any below are *not* for publication]
Number 4* to be assigned by Company

The graphic above is intended to be published with the rule 14a-8 proposal. The graphic would be the same size as the largest management graphic (and/or accompanying bold or highlighted management text with a graphic, box or shading) or any highlighted management executive summary used in conjunction with a management proposal or any other rule 14a-8 shareholder proposal in the 2023 proxy.

The proponent is willing to discuss the mutual elimination of both shareholder graphic and management graphic in the proxy in regard to specific proposals.

Reference: SEC Staff Legal Bulletin No. 14I (CF)[16] Companies should not minimize or otherwise diminish the appearance of a shareholder's graphic. For example, if the company includes its own graphics in its proxy statement, it should give similar prominence to a shareholder's graphics. If a company's proxy statement appears in

² <https://www.bloomberg.com/opinion/articles/2022-10-27/credit-suisse-gives-first-boston-gets-a-second-chance?sref=a7KHiWzs>

³ <https://corpgov.law.harvard.edu/2022/10/23/the-hottest-front-in-the-takeover-battles-advance-notice-bylaws/>

⁴ <https://www.reuters.com/legal/transactional/delaware-judge-rejects-early-unmasking-activist-fund-investors-proxy-bylaw-fight-2022-12-22/>

black and white, however, the shareholder proposal and accompanying graphics may also appear in black and white.

Notes: This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including (emphasis added):

Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also Sun Microsystems, Inc. (July 21, 2005)

The stock supporting this proposal will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email to [REDACTED].

EXHIBIT B

CORRESPONDENCE

From: [Christine Chambers](#)
To: rbeilly@gmail.com
Subject: Fwd: (PETS) Fair Elections proposal
Date: Tuesday, January 24, 2023 4:37:55 PM
Attachments: [PETS-FE submission.pdf](#)

Per our conversation

----- Forwarded message -----

From: **Wendy Zalai** <wzalai@petmeds.com>
Date: Mon, Jan 23, 2023 at 2:29 PM
Subject: Fwd: (PETS) Fair Elections proposal
To: Christine Chambers <cchambers@petmeds.com>

Shareholder proposal. Another first for me. Other than the receipt of his email not sure what else I can acknowledge.

Wendy Zalai
Controller / Corporate Secretary
PetMed Express, Inc. d/b/a 1-800-PetMeds
420 S Congress Ave. #100
Delray Beach, FL 33445
Phone: [561-526-4444](tel:561-526-4444) ext.8130
WZALAI@1800PETMEDS.COM

image001.png



----- Forwarded message -----

From: **James McRitchie** <[REDACTED]>
Date: Mon, Jan 23, 2023 at 2:09 PM
Subject: (PETS) Fair Elections proposal
To: Wendy Zalai <wzalai@petmeds.com>
Cc: <ABerges@1800petmeds.com>, <BRosenbloom@1800petmeds.com>, John Chevedden <[REDACTED]>

Thanks for your quick response Ms. Zalai. Please find and acknowledge the attached shareholder proposal on Fair Elections. I look forward to negotiating good governance changes with you on advance notice bylaws.

Best wishes, — Jim

James McRitchie
Shareholder Advocate
Corporate Governance
[REDACTED]

[REDACTED]

On Jan 23, 2023, at 10:40 AM, Wendy Zalai <wzalai@petmeds.com> wrote:

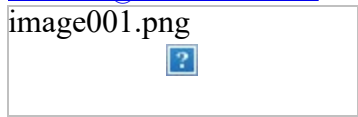
Good afternoon Mr. Mcritchie

This email is in response to your request for my email address. Any questions and suggestions can be sent to my email address below.

Thank you and have a wonderful day.

Wendy Zalai
Controller / Corporate Secretary
PetMed Express, Inc. d/b/a 1-800-PetMeds
420 S Congress Ave. #100

Delray Beach, FL 33445
Phone: [561-526-4444](tel:561-526-4444) ext.8130
WZALAI@PETMEDS.COM



From: rbeilly@gmail.com
To: [REDACTED] PII [REDACTED] PII
Cc: "[Wendy Zalai](#)"
Subject: PetMed Express, Inc.; shareholder proposal from James McRitchie
Date: Saturday, January 28, 2023 9:07:04 AM

Mr. McRitchie,

I am legal counsel to PetMed Express, Inc. ("PetMed"). On behalf of PetMed, I acknowledge receipt of your email to PetMed on January 23, 2023 attaching the Rule 14a-8 Proposal dated January 23, 2023 along with your cover letter dated January 23, 2022 (I am assuming the year '2022' in your cover letter was a typo, please confirm). We ask you to send the requisite broker letter to confirm proof of your ownership of PetMed's stock; such written proof should be clear and sufficiently evidence the requisite minimum ownership requirements set forth in Rule 14a-8.

Please note, again, that Allison Berges, a 'cc:' in your cover letter and email is no longer with PetMed having retired in February 2021. Please also note that Bruce Rosenbloom, also a 'cc:' in your cover letter and email, is no longer CFO of PetMed as of August 3, 2022. Please direct your communications in this matter to myself and Wendy Zalai, Corporate Secretary of PetMed.

Kindly acknowledge receipt of this email.

Thank you.

Roxanne

Roxanne K. Beilly
Roxanne K. Beilly, P.A.
907 S.E. 7th Street
Fort Lauderdale, Florida 33301
rbeilly@gmail.com
(954) 632-3181

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From: [REDACTED] PII
To: rbeilly@gmail.com
Cc: [REDACTED] PII; [Wendy Zalai](#)
Subject: Re: PetMed Express, Inc.; shareholder proposal from James McRitchie
Date: Monday, January 30, 2023 4:57:27 PM
Attachments: [PETS BL.pdf](#)
[Untitled attachment 02365.htm](#)

Roxanne

Sorry for the typo. Yes, date should have been 2023. Thanks for the update on staffing. Attached is a broker letter confirming the required ownership. I look forward to negotiating and a possible withdrawal. Best, — Jim

01/27/2023

James McRitchie

Re: Your TD Ameritrade Account

Dear James McRitchie,

Thank you for allowing me to assist you today. Pursuant to your request, this confirms that as of the date of this letter, James McRitchie has held since 04/29/2015 and continues to hold 125 common shares of PetMed Express Inc (PETS) in an account at TD Ameritrade. The DTC clearinghouse number for TD Ameritrade is 0188.

If we can be of any further assistance, please let us know. Just log in to your account and go to the Message Center to write us. You can also call Private Client Services at 800-400-4078. We're available 24 hours a day, seven days a week.

Sincerely,

A handwritten signature in black ink that reads 'Jennifer Hickman'.

Jennifer Hickman
Resource Specialist
TD Ameritrade

TD Ameritrade understands the importance of protecting your privacy. From time to time we need to send you notifications like this one to give you important information about your account. If you've opted out of receiving promotional marketing communications from us, containing news about new and valuable TD Ameritrade services, we will continue to honor your request.

Market volatility, volume, and system availability may delay account access and trade executions.

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TDA 1002212 11/21

From: rbeilly@gmail.com
To: [REDACTED] PII
Cc: [REDACTED] PII "[Wendy Zalai](#)"
Subject: RE: PetMed Express, Inc.; shareholder proposal from James McRitchie
Date: Monday, January 30, 2023 5:19:43 PM

Mr. McRitchie,

On behalf of PetMed Express, Inc. ("PetMed"), I acknowledge receipt of the "broker letter" from TD Ameritrade to you dated January 27, 2023 evidencing your ownership of PetMed stock.

I will get back to you regarding your offer of availability to meet with PetMed or myself via phone or Zoom on February 10, at 11:00am or 11:30am Pacific Time or at another day or time that is mutually convenient, to discuss your shareholder proposal dated 1-23-2023.

Thank you.
Roxanne

Roxanne K. Beilly
Roxanne K. Beilly, P.A.
907 S.E. 7th Street
Fort Lauderdale, Florida 33301
rbeilly@gmail.com
(954) 632-3181

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From: James McRitchie <[REDACTED]>
Sent: Monday, January 30, 2023 5:57 PM
To: rbeilly@gmail.com
Cc: John Chevedden <[REDACTED]>; Wendy Zalai <wzalai@petmeds.com>
Subject: Re: PetMed Express, Inc.; shareholder proposal from James McRitchie

Roxanne

Sorry for the typo. Yes, date should have been 2023. Thanks for the update on staffing. Attached is a broker letter confirming the required ownership. I look forward to negotiating and a possible withdrawal. Best, — Jim

From: rbeilly@gmail.com
To: [REDACTED] PII
Cc: [REDACTED] PII; "[Wendy Zalai](#)"
Subject: RE: PetMed Express, Inc.; shareholder proposal from James McRitchie
Date: Wednesday, February 8, 2023 5:59:43 PM

Mr. McRitchie,

I wanted to get back to you regarding your offer of availability to discuss your shareholder proposal dated January 23, 2023 with PetMed Express, Inc. ("PetMed") on Friday February 10, 2023 at 11:00am or 11:30am PT. PetMed has no need to discuss the shareholder proposal at this time. I will let you know if PetMed would like to discuss the shareholder proposal at a later date.

Thank you.

Roxanne

Roxanne K. Beilly
Roxanne K. Beilly, P.A.
907 S.E. 7th Street
Fort Lauderdale, Florida 33301
rbeilly@gmail.com
(954) 632-3181

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From: rbeilly@gmail.com <rbeilly@gmail.com>
Sent: Monday, January 30, 2023 6:20 PM
To: 'James McRitchie' <[REDACTED]>
Cc: 'John Chevedden' <[REDACTED]>; 'Wendy Zalai' <wzalai@petmeds.com>
Subject: RE: PetMed Express, Inc.; shareholder proposal from James McRitchie

Mr. McRitchie,

On behalf of PetMed Express, Inc. ("PetMed"), I acknowledge receipt of the "broker letter" from TD Ameritrade to you dated January 27, 2023 evidencing your ownership of PetMed stock.

I will get back to you regarding your offer of availability to meet with PetMed or myself via phone or

Zoom on February 10, at 11:00am or 11:30am Pacific Time or at another day or time that is mutually convenient, to discuss your shareholder proposal dated 1-23-2023.

Thank you.

Roxanne

Roxanne K. Beilly

Roxanne K. Beilly, P.A.

907 S.E. 7th Street

Fort Lauderdale, Florida 33301

rbeilly@gmail.com

(954) 632-3181

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From: James McRitchie <[REDACTED]>

Sent: Monday, January 30, 2023 5:57 PM

To: rbeilly@gmail.com

Cc: John Chevedden <[REDACTED]>; Wendy Zalai <wzalai@petmeds.com>

Subject: Re: PetMed Express, Inc.; shareholder proposal from James McRitchie

Roxanne

Sorry for the typo. Yes, date should have been 2023. Thanks for the update on staffing. Attached is a broker letter confirming the required ownership. I look forward to negotiating and a possible withdrawal. Best, — Jim

From: [REDACTED] PII
To: rbeilly@gmail.com
Cc: [REDACTED] PII; [Wendy Zalai](#)
Subject: Re: PetMed Express, Inc.; shareholder proposal from James McRitchie
Date: Wednesday, February 8, 2023 7:45:30 PM
Attachments: [CorpGovFavicon.png](#)

Much appreciated. Let me know.

Shareholder Advocate
Corporate Governance



On Feb 8, 2023, at 3:59 PM, <rbeilly@gmail.com> <rbeilly@gmail.com> wrote:

Mr. McRitchie,

I wanted to get back to you regarding your offer of availability to discuss your shareholder proposal dated January 23, 2023 with PetMed Express, Inc. ("PetMed") on Friday February 10, 2023 at 11:00am or 11:30am PT. PetMed has no need to discuss the shareholder proposal at this time. I will let you know if PetMed would like to discuss the shareholder proposal at a later date.

Thank you.
Roxanne

Roxanne K. Beilly
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907 S.E. 7th Street
Fort Lauderdale, Florida 33301
rbeilly@gmail.com
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From: rbeilly@gmail.com <rbeilly@gmail.com>

Sent: Monday, January 30, 2023 6:20 PM

To: 'James McRitchie' <[REDACTED]>

Cc: 'John Chevedden' <[REDACTED]>; 'Wendy Zalai' <wzalai@petmeds.com>

Subject: RE: PetMed Express, Inc.; shareholder proposal from James McRitchie

Mr. McRitchie,

On behalf of PetMed Express, Inc. ("PetMed"), I acknowledge receipt of the "broker letter" from TD Ameritrade to you dated January 27, 2023 evidencing your ownership of PetMed stock.

I will get back to you regarding your offer of availability to meet with PetMed or myself via phone or Zoom on February 10, at 11:00am or 11:30am Pacific Time or at another day or time that is mutually convenient, to discuss your shareholder proposal dated 1-23-2023.

Thank you.
Roxanne

Roxanne K. Beilly
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From: James McRitchie <[REDACTED]>

Sent: Monday, January 30, 2023 5:57 PM

To: rbeilly@gmail.com

Cc: John Chevedden <[REDACTED]>; Wendy Zalai <wzalai@petmeds.com>

Subject: Re: PetMed Express, Inc.; shareholder proposal from James McRitchie

Roxanne

Sorry for the typo. Yes, date should have been 2023. Thanks for the update on staffing. Attached is a broker letter confirming the required ownership. I look forward to negotiating and a possible withdrawal. Best, — Jim

EXHIBIT C

FLORIDA LAW OPINION

March 30, 2023

PetMed Express, Inc.
420 South Congress Avenue
Delray Beach, FL 33445

Re: Stockholder Proposal Submitted by James McRitchie

Ladies and Gentlemen:

This letter confirms our opinion regarding a stockholder proposal (the "Proposal") submitted to the Board of Directors (the "Board") of PetMed Express, Inc., a Florida corporation (the "Company"), by James McRitchie (the "Proponent") for inclusion in the Company's proxy materials for its 2023 annual meeting of stockholders (the "Annual Meeting"). We are a global law firm that maintains five offices throughout the State of Florida and have acted as counsel to the Company in connection with the Proposal and other matters. The partner of this firm responsible for the preparation of this letter is Curt P. Creely, a member in good standing of the Florida bar since 1995.

For the reasons explained below, it is our opinion that the Proposal, if implemented, would cause the Company to violate Florida law.

I. Summary.

The Proposal asks the Board to amend the Second Amended and Restated Bylaws of the Company (the "Bylaws"). The Proposal reads as follows:

James McRitchie and other shareholders request that directors of PetMed Express Inc. ("Company") take the steps necessary to amend its bylaws to include the following language:

Shareholder approval is required for any advance notice bylaw amendments that:

- 1. require the nomination of candidates more than 120 days before the annual meeting,*
- 2. impose new disclosure requirements for director nominees not required by law, including disclosures related to past and future plans, or*

March 30, 2023

Page 2

3. *require nominating shareholders to disclose limited partners or business associates, except to the extent such investors own more than 5% of the Company's shares.*

We have been advised that the Company is considering excluding the Proposal from the Company's proxy statement for the Annual Meeting under, among other reasons, Rule 14a-8(i)(2) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) permits a company to exclude a stockholder proposal "[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." In this connection, you have requested our opinion as to whether, under Florida law, the implementation of the Proposal, if adopted by the Company's stockholders, would violate Florida law. For the reasons noted below, we believe the Proposal, if implemented, would violate the Florida Business Corporation Act ("FBCA").

II. Analysis.

The Proposal asks the Board to amend the Bylaws in a manner that would require future bylaw amendments regarding certain advance notice bylaw issues (the "Advance Notice Bylaw Issues") to be approved by a vote of the Company's stockholders. The Proposal would create a category of bylaw provisions that would require stockholder approval and could not be amended by the Board. This Proposal, however, would cause the Bylaws to be inconsistent with Florida law.

If implemented, the Proposal would violate Section 607.1020(1) of the FBCA, which states:

"(1) A corporation's board of directors may amend or repeal the corporation's bylaws unless:

(a) The articles of incorporation or this chapter reserves the power exclusively to the shareholder in whole or in part; or

(b) Except as provided in s. 607.0206(5), the shareholders, in amending, repealing, or adopting the bylaws generally or a particular bylaw provision, expressly provide that the board of directors may not amend, repeal, adopt, or reinstate the bylaws generally or that particular bylaw provision."

Under Section 607.1020(1), the Board is expressly authorized and given the power to amend or repeal the Company's Bylaws unless an exception applies under the statute. The exception set forth in Paragraph (a) of Section 607.1020(1) does not apply because the Company's articles of incorporation do not reserve to the shareholders the exclusive power to amend or repeal bylaws, either in whole or in part. The other exception in the statute is Paragraph (b) of Section 607.1020(1), which provides an exception for bylaws adopted by the shareholders (and not by the Board) that expressly



FOLEY & LARDNER LLP

March 30, 2023

Page 3

prohibit the Board from amending, repealing, adopting, or reinstating the Bylaws, or any portion thereof and does not apply.

The Proposal, if implemented, requests that the Board adopt an amendment to the Bylaws that the FBCA does not permit. Section 607.1020(1) of the FBCA states that bylaws of Florida corporations are subject to amendment or repeal by the corporation's board of directors unless a shareholder-adopted bylaw expressly states that the board of directors does not have such authority. The Proposal asks the Board, and not the shareholders, to adopt an amendment to the Bylaws requiring shareholders to approve certain further amendments relating to the Advance Notice Bylaw Issues, thereby restricting the Board's own ability to amend provisions of the Bylaws of which the Board itself has adopted. However, such restriction would be in direct contravention of Section 607.1020(1)(b) of the FBCA.

III. Conclusion.

Based upon and subject to the foregoing, it is our opinion that because the Proposal would request that the Board take actions that would violate Section 607.1020(1) of the FBCA, the Proposal would violate Florida law if implemented by the Board. The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand you may furnish a copy of this opinion letter to the Securities and Exchange Commission and the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Foley & Lardner LLP

By: /s/ Curt P. Creely
Curt P. Creely, Partner

CPC:

May 2, 2023

VIA EMAIL (shareholderproposals@sec.gov)

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, D.C. 20549

Re: PetMed Express, Inc. – Omission of Stockholder Proposal by James
McRitchie Pursuant to Rule 14a-8

Ladies & Gentlemen:

We refer to our letter, dated March 30, 2023 (the “No-Action Request”), pursuant to which we requested, on behalf of our client PetMed Express, Inc., a Florida corporation (the “Company”), pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended, the Staff of the Division of Corporation Finance of the Securities Exchange Commission concur with our view that the Company may exclude the shareholder proposal (the “Proposal”) submitted by James McRitchie (the “Proponent”), from the proxy materials to be distributed by the Company in connection with its 2023 annual meeting of the shareholders.

Attached hereto as Exhibit A is an email correspondence, dated April 29, 2023, on behalf of the Proponent, withdrawing the Proposal (the “Withdrawal Email”). In reliance on the Withdrawal Email, we hereby withdraw the No-Action Request on behalf of the Company.

If you have any questions or need additional information, please feel free to contact me at (414) 319-7336 or jhille@foley.com.

Very truly yours,

/s/ Jason M. Hille

Jason M. Hille

Enclosures

cc: Wendy Zalai, Controller and Corporate Secretary, PetMed Express, Inc.
Roxanne K. Beilly, Legal Counsel to PetMed Express, Inc.
James McRitchie
John Chevedden

EXHIBIT A

CONFIRMATION OF WITHDRAWAL

Subject: Withdrawal of "Fair Elections" proposal

From: James McRitchie [REDACTED] PII

Sent: Saturday, April 29, 2023 12:37 PM

To: Wendy Zalai <wzalai@petmeds.com>

Cc: [REDACTED] PII Hille, Jason M. <JHille@foley.com>; SEC - Office of Chief Counsel <shareholderproposals@sec.gov>

Subject: Withdrawal of "Fair Elections" proposal

**** EXTERNAL EMAIL MESSAGE ****

Ms. Zalai

This is to withdraw my proposal on Fair Elections. I had hoped that PetMed Express would negotiate a withdrawal, as many other companies have done. I recognize the submitted proposal has several minor flaws, which a cooperating company could easily work with. However, rather than having SEC Staff waste valuable time on a decision, I am withdrawing and will resubmit a proposal on the same topic for next year using better language. I hope by that time you will recognize the importance of the issue and that we can reach an amicable agreement.

Best wishes, — Jim

James McRitchie
Shareholder Advocate
Corporate Governance
<http://www.corpgov.net>

[REDACTED] PII