

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: NOVEMBER 2, 2004 DEPT. 60

REPORTER A: NOT REPORTED

CSR#

PRESENT HON. WILLIAM C. PATE

F I L E D

JUDGE

Clerk of the Superior Court

CLERK: CRYSTAL LUNT

NOV - 2 2004

BAILIFF:

REPORTER'S ADDRESS: P.O. BOX 120128
By: C. LUNT, Deputy

SAN DIEGO, CA 92112-4104

GIC830293 ROBERT F. STONEBREAKER, DVM, an individual and
AVID IDENTIFICATION SYSTEMS, INC., a California
corporation, et al.,

Plaintiffs

vs.

MEDICAL MANAGEMENT INTERNATIONAL, INC.,
dba BANFIELD THE PET HOSPITAL, a Delaware corporation,

Defendants

**EX-PARTE MINUTE ORDER, NOTICE OF RULING ON
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiffs' Motion for Preliminary Injunction came on regularly for hearing on October 7, 2004 at 10: 30 a.m. in Department 60. The Court heard argument by counsel and took the matter under submission.

The Court's ruling is as follows:

Plaintiffs' motion for a preliminary injunction is hereby GRANTED in part.

Preliminarily, the Court notes that it did not rely upon any of the evidence submitted by Plaintiffs via reply.

Plaintiff has met its burden to show all elements necessary to support issuance of a preliminary injunction in this case as follows: (1) there is a reasonable probability of success on the merits; (2) there is a risk of great or irreparable harm; (3) legal remedies are inadequate; and (4) the balancing of the equities weighs in favor of granting the preliminary injunction.

Plaintiffs have shown the probability of success on the merits as people are "likely to be deceived." Plaintiffs have also shown the risk of great, irreparable harm for which legal remedies are inadequate, specifically the increased potential for pets to be euthanized while their owners believe them to be safe. The balancing of the equities favors granting of a preliminary injunction enjoining Defendant from further promoting and/or selling its RecoveryChip.

Defendant claims that it has temporarily suspended shipments of its RecoveryChip products, has notified all Banfield hospitals to suspend sales, and "has no plans to resume chipping." [Defendant's Memorandum of Points and Authorities, 1:15.] However, "[t]he mere fact that a defendant refrains from unlawful conduct during the pendency of a lawsuit does not necessarily preclude the trial court from issuing injunctive relief." [*Aguilar v. Avis* (1999) 21 Cal.4th 121,133.] Furthermore, the Court must exercise its discretion "in favor of the party most likely to be injured. If denial of an injunction would result in great harm to the plaintiffs, and the defendants would suffer little harm if it were

granted, then it is an abuse of discretion to fail to grant the preliminary injunction.” [*Robbins v. Superior Court* (County of Sacramento) (1985) 38 Cal.3d 199,205.] As there is no evidence before the Court that Defendants would be injured by the issuance of the requested preliminary injunction enjoining future sales and promotion of the RecoveryChip, the equities favor the grant of a preliminary injunction.

Defendant is hereby enjoined from resuming the sale and promotion of the RecoveryChip, or other 134.2 kHz electronic identification tags absent accurately disclosing, in writing, that such tags cannot be read by the vast majority of scanners in U.S. shelters and other animal control facilities. If Defendant decides to resume its sale and promotion activities relative to the identification tags, its written promotional materials and advertisements shall be presented to the Court for its review to ensure compliance with this order at least fifteen (15) days prior to their distribution. Although Defendant is not enjoined from promotional activities concerning truly universal scanners, if any such promotional materials refer to Defendant’s RecoveryChip, or other 134.2 kHz tags manufactured and/or sold by Defendant, the promotional materials shall be presented to the Court for its review as stated.

“It is well established the judiciary possesses broad discretion in deciding the type of equitable relief to fit a case’s particular circumstances. [*Ojavan Investors, Inc. v. California Coastal Commission* (1997) 54 Cal.App.4th 373, 394.] Although mandatory preliminary injunctions are “not readily granted” [*Bennett v. Lew* (1984) 151 Cal.App.3d 1177, 1186], Plaintiff has presented evidence of the increased safety risks facing pets implanted with the RecoveryChip, such as was unfortunately experienced by Lisa Massey’s pet, if their owners are not on notice of the realistic effectiveness of Defendant’s lost pet recovery system. The circumstances are “extraordinary” and the potential for serious, irreparable harm warrants the issuance of a mandatory preliminary injunction to inform potentially affected pet owners. [*Id.*] However, the Court finds that Plaintiff’s proposed order is not sufficiently narrow to merely serve to maintain the status quo pending the outcome of this litigation.

The Court hereby orders Defendant to notify all purchasers of its RecoveryChip, or any other 134.2 kHz electronic identification tags it has sold as well as all veterinarians to whom it has recommended these products, in a written correspondence to be approved by the Court, that only certain, specifically listed, shelters equipped with the ISO scanners that can read Defendant’s 134.2 kHz chips, and the fact that the listed shelters are equipped with the ISO scanner does not guarantee that the shelters will actually use those scanners on lost pets and that the majority of shelters presently use a scanner that will not detect or read Defendant’s implanted chip. Defendant is hereby ordered to submit its proposed correspondence to the Court and serve opposing party with a copy on or before November 8, 2004. Plaintiff is to provide any written objection thereto, not to exceed two pages, on or before November 10, 2004.

In lieu of an undertaking, Plaintiffs may execute a bond with corporate surety, or with two or more personal sureties [CCP, §§995.210(b), 995.310] in the amount of \$5,000.00 within 30 days.

It is so ordered.

November 2, 2004

WILLIAM C. PATE

WILLIAM C. PATE,
Judge of the Superior Court