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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MED VETS INC. and BAY MEDICAL SOLUTIONS INC.,

Plaintiffs,

v.

VIP PETCARE HOLDINGS, INC., successor in interest to COMMUNITY VETERINARY CLINICS, LLC d/b/a VIP Petcare and PETIQ, INC.,

Defendants.

Case No. 3:18-cv-02054-MMC

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LIMITED EXPEDITED DISCOVERY (CONTAINING PLAINTIFFS' FIRST AMENDED COMPLAINT), AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Courtroom: 7-19
Hearing date: Nov. 2nd, 2018
Time: 9 a.m.
Judge: Hon. Maxine M. Chesney

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on November 2nd, 2018, at 9 a.m./p.m., or as soon thereafter as the matter may be heard, in Courtroom 7 – 19th Floor of the above-titled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs Med Vets, Inc. and Bay Medical Solutions, Inc. will and hereby do move the Court for an Order granting their Motion for Limited Expedited Discovery (Containing Plaintiffs' First Amended Complaint).

As discussed in the accompanying Memorandum, good cause exists to allow plaintiffs to conduct the limited discovery sought on an expedited basis. Granting an extension of time to file the First Amended Complaint will allow plaintiffs to present a more fulsome pleading based on that expedited discovery without prejudicing their ability to proceed with this case. Plaintiffs therefore request that the Court (1) order defendants to respond to the proposed single document request within 30 days of entry of an order granting the instant motion; (2) enter plaintiffs' proposed Protective Order in the form attached to the Declaration of Jonathan L. Rubin as Exhibit F; and (3) grant plaintiffs an additional 30 days thereafter to file the Second amended complaint.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the supporting Declarations of Jonathan L. Rubin and Jeffrey Powers filed concurrently herewith and all exhibits attached thereto, the Proposed Order, the pleadings and papers on file, and upon such oral argument as may be heard on this Motion.

Dated: October 3, 2018

*/s/ Jonathan Rubin*_____

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Counsel for Plaintiffs, MED VETS, INC. and BAY MEDICAL SOLUTIONS, INC.

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I. BACKGROUND

On August 3, 2018, the Court dismissed plaintiffs' Med Vets, Inc. and Bay Medical Solutions, Inc.'s Complaint (Dkt. No. 1) ("Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Complaint alleges that the merger of defendants PetIQ and VIP Petcare is unlawful because, although largely a vertical merger, the combination of a pet medication distributor (PetIQ) and a large chain of veterinary clinics (VIP) that dispenses and sells pet medications is likely to cause anticompetitive effects in certain pet medication distribution markets. Those anticompetitive effects would injure plaintiffs, purchasers of these medications, eliminate horizontal competition, and tend to create a monopoly in a relevant market, all in violation of Section 7 of the Clayton Act.[1] Two other antitrust claims were also alleged.[2]

A. The Court's Rulings on Defendants' Motion to Dismiss

At the August 3, 2018 hearing on defendants' motion to dismiss, the Court made the following rulings:

1. Granted defendants' unopposed request for judicial notice of the FTC Staff Report, *Competition in the Pet Medications Industry: Prescription Portability and Distribution Practices*, May 2015, Exhibit 1 to defendants' judicial notice request (Dkt. No. 26-2) ("2015 FTC Report"); Declaration of Jonathan L. Rubin ("Rubin Decl.") ¶ 8, Ex. H (Tr. 2:21-3:14);

2. Denied defendants' request for judicial notice to be taken of PetIQ's press release dated January 8, 2018 (Dkt. No. 26-3), Rubin Decl. ¶ 8, Ex. H (Tr. 3:23-3:17);

3. Dismissed plaintiffs' Complaint, granting leave to file a First Amended Complaint ("FAC") on or before October 5, 2018, *id*. (Tr. 47:13-14; Tr. 48:21-24);

4. Denied plaintiffs' *ore tenus* request for expedited discovery limited to a copy of defendants' Notification and Report Forms submitted to the DOJ/FTC Pre-Merger Notification Office

[1] 15 U.S.C. § 18, "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[2] Count II alleged second-line price discrimination in violation of the Clayton Act, § 2(f) and Count III alleged attempted monopolization in violation of the Sherman Act, § 2.

("PNO") prior to the consummation of the subject merger, as required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act" or "HSR"), which are not publicly available, exempt from the Freedom of Information Act, and for which no other source is available;[3]

5. Acknowledged that retailers that are also plaintiffs' customers are the ultimate "consumers" threatened by defendants' alleged antitrust violations, *id*. (Tr. 48:25- 49);

6. Affirmed that competitors may bring claims under Section 7 of the Clayton Act while rejecting defendants' argument that, because plaintiffs "are essentially competitors, that [such competitors] can't bring a claim and show antitrust injury …," *id.* (Tr. 49:9-11);

7. Determined that where a joint venture was made "permanent" by a subsequent merger or acquisition between the parties, a plaintiff may bring an action against the merger or acquisition under Section 7 and did not have to demonstrate past damages, *id*. (Tr. 50:11-17) (The Court: "I'm not sure that one couldn't say that solidifying something that was less formal into -- and anti-competitive would give rise to a separate claim itself. In other words, before it was kind of an informal arrangement. Now you've made it a matter of, you know –" Mr. Rubin: "Ownership;"); and

8. Set a Case Management Conference for January 25, 2019, *id*. (Tr. 52:16-19).

The Court articulated several reasons it believed the Complaint failed to fulfill the pleading requirements of Rule 8(a) and should be dismissed.[4] It remarked that the "complaint is pretty much devoid of facts. It has a lot of overarching statements about the market, but they are not really supported by facts." Rubin Decl. ¶ 8, Ex. H (Tr. 38: 8-10). Because plaintiffs did not "have any percentages [in the] complaint" its allegations "are without … factual support." *Id*. (Tr. 7:18-25). The Court surmised

[3] The Court did not merely deny plaintiffs' oral request for defendants' HSR filings, but also appeared to express the view that it lacked the authority to do so, even if it wanted to. (The Court: "…they are saying no. Okay? They are not going to give it to you. Okay. And I at the moment can't make them do it." Rubin Decl. ¶ 8, Ex. H (Tr. 45:6-8)). The Court, of course, has the inherent authority to order defendants to produce their HSR filings without regard to whether a Rule 26 conference has occurred. See the authorities cited in Section I.C., *infra*.

[4] Federal Rules of Civil Procedure Rule 8(a) states: "Claim for Relief. A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."

that "[t]here's got to be zillions of [competitors to Frontline Plus] out there" (*id*. (Tr. 8:1-2)) and faulted plaintiffs for alleging they were forced out of the market. *Id*. (Tr. 14:15-18) ("I don't think you can just say something dominates, something is negligible, we were forced out of the market. I think you're going to need to put some facts on it.") It also questioned "where your clients fit in the secondary distribution market" and whether they were significant and could impact the market. *Id*. (Tr. 21:22-25). Regarding plaintiffs' allegation of "dangerous probability of achieving monopoly power … we don't have any percentages … so I have no idea whether it's in any []danger or not." *Id*. (Tr. 51:21-23). The Court implored plaintiffs to "come up with some figures … [and] some harder facts." *Id*. (Tr. 45:16-17).

The Court's "primary concern" was the product market definition and market shares attributable to each market participant. *Id*. (Tr. 4:10-14). The Court explained that, without a "legally viable market, a plausible market in the language of the cases, you can't really go anywhere with the case." *Id*.

B. <u>The Standards Governing Expedited Discovery</u>

In this District, "expedited discovery" "refer[s] to discovery that occurs before the parties' Rule 26(f) conference." *Opperman v. Path, Inc*., Order on Joint Letter Brief Regarding Pls.' Request to Open Discovery at 1, Case No. 13-cv-00453-JST, Dkt. No. 400 (N.D. Cal., Aug. 28, 2014) (*citing Apple Inc. v. Samsung Elecs. Co*., 768 F.Supp.2d 1040, 1044 (N.D. Cal. May 18, 2011), *Anzco Biotech Inc. v. Qiagen, N.V.*, No. 12-cv-2599-BEN (DHB), 2013 U.S. Dist. LEXIS 90812 (S.D. Cal. Jun. 26, 2013)). The judicial standards applicable to requests for expedited discovery stem from *Semitool, Inc. v. Tokyo Electron America, Inc*., 208 F.R.D. 273 (N.D. Cal. 2002). The plaintiff in *Semitool* was "not in a position to advance any additional [infringement] claims without access to the accused device and documents pertaining thereto." *Id.* at *274. As with the request in this case for the defendants' HSR filings, the plaintiff's request for technical documents and an inspection was refused. The court looked to *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612 (D. Ariz. 2001), which noted the ""scant authority on the standards governing the availability of expedited discovery before the Rule 26(f) scheduling conference in civil cases." *Id.* at 613-614; *see also Semitool*, 208 F.R.D. at 275. This District then adopted a "good cause" standard for granting discovery in advance of the Rule 26(f) conference. *Id.* "Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool*, 208 F.R.D. at

276; *see also Interserve, Inc. v. Fusion Garage PTE, Ltd*, No. C 09-05812 JW (PV), 2010 U.S. Dist. LEXIS 6395 (N.D. Cal. Jan. 7, 2010) ("In the Ninth Circuit, courts use the 'good cause' standard to determine whether discovery should be allowed to proceed prior to a Rule 26(f) conference") (*quoting Wangson Biotechnology Group, Inc. v. Tan Tan Trading Co., Inc.*, No. C 08-04212 SBA, 2008 U.S. Dist. LEXIS 79691 (N.D. Cal. Sep. 11, 2008)).[5]

It is beyond question that "[a] court may authorize early discovery before the Rule 26(f) conference for the parties' and witnesses' convenience and in the interest of justice." *Strike 3 Holdings, LLC v. Doe*, No. 18-cv-04988-LB, 2018 U.S. Dist. LEXIS 163531, at *3 (N.D. Cal. Sept. 24, 2018). The Court's authority to order expedited discovery "falls under the Court's general discretion to engage in case management." *Invitrogen Corp. v. President & Fellows of Harvard College, No. 07-cv-0878-JLS (POR)*, 2007 U.S. Dist. LEXIS 74282, at *5-6 (S.D. Cal., Oct. 2, 2007)(*citing Semitool*, 208 F.R.D. at 273; *Yokohama Tire Corp.*, 202 F.R.D. at 614). Indeed, Rule 26(d) specifically contemplates the authority of the Court to enter an order that alters that Rule's default procedures: "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, *or by a court order*." Fed. R. Civ. Proc. 26(d) (emphasis supplied). "In fashioning discovery orders under Rule 26(d), the district courts wield broad discretion, as they do when managing any aspect of discovery." *UMG Recordings, Inc. v. Doe*, No. C 08-1193 SBA, 2008 U.S. Dist. LEXIS 79087, at *9 (N.D. Cal., Sept. 2, 2008) (citing cases). The interests of justice here require plaintiffs' expedited discovery request to be granted.

[5] In some cases, some courts in the Ninth Circuit consider the following factors to determine whether good cause justifies expedited discovery: (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made. *See Tungsten Heavy Powder & Parts, Inc. v. Khem Precision Machining, LLC*, No. 17-cv-1882-JAH (WVG), 2017 U.S. Dist. LEXIS 188371, *3 (S.D. Cal. Nov. 14, 2017) (*quoting Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009); *Apple*, 768 F. Supp. 2d at 1044). *See also Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846-LHK, 2011 U.S. Dist. LEXIS 53233, *3-4 (N.D. Cal. May 18, 2011). As discussed below, those factors have all been met here.

II. ARGUMENT

A. The Need for and Relevance of the Requested Expedited Discovery is Not at Issue

The circumstances of the present case render limited expedited discovery judicially efficient and would serve the ends of justice for the following reasons:

- Six months after the merger, investment analyst Jefferies described defendants as monopolists in at least two separate markets;
- The 2015 FTC Report describes a competitively dysfunctional industry;[6]
- Large retailers, such as PetSmart, 1-800PetMeds, Costco, and others, suddenly and simultaneously changed their buying policies after the merger;
- The industry is overly secretive and opaque;
- Many veterinarians oppose portable prescriptions so that prescription pet medications must be purchased from the veterinarian; and,
- The competitive effects of the subject acquisition will be analyzed by plaintiffs' antitrust and economic experts in a private cause of action, a process intended to supplement and support the FTC and Department of Justice Antitrust Division in enforcing the nation's antitrust laws.

Because of these circumstances, this case falls squarely into the category of cases in which expedited discovery is customarily permitted:

- "Doe" internet cases, in which expedited discovery is necessary to identify the defendants, *e.g.*, *Strike 3 Holdings*, Dist. LEXIS 163531 at *3 (collecting cases);
- Patent or Copyright infringement cases, *e.g.*, *UMG Recordings, Inc*, 2008 U.S. Dist. LEXIS 79087 at *11 ("[I]n considering 'the administration of justice,' early discovery avoids ongoing, continuous harm to the infringed party and there is no other way to advance the litigation.");

[6] During the August 3, 2018 oral argument, plaintiffs' counsel stated: "The key thing, your Honor, is that the FTC, as they put it, has realized that the policies of selling only -- or at least stating that you're selling only through veterinarians are restrictive and anti-competitive. And the secondary market, which is how -- which is where veterinary product goes through a secondary distributor to retailers is a pro-competitive force that's necessary." Rubin Decl. ¶ 8, Ex. H (Tr. 15:24- 16:5)

- To resolve issues of service of process, venue, or personal jurisdiction, *e.g.*, *Invitrogen Corp.*, 2007 U.S. Dist. LEXIS 74282 at *7;
- To impose a constructive trust on funds that may be moved outside the jurisdiction of the court, *e.g.*, *Interserve, Inc.*, 2010 U.S. Dist. Lexis 6395 at *3; and
- To facilitate a merger challenge based on non-public information, *e.g.*, *Payment Logistics Ltd., v. Lighthouse Network, LLC*, No. 18-cv-0786-L-AGS, 2018 U.S. Dist. LEXIS 138338, at *5-10 (S.D. Cal. Aug. 14, 2018) (ordering expedited discovery of defendants' documents of the kind ordinarily submitted with HSR filings in reportable transactions). *See also FTC v. Staples*, 970 F. Supp. 1066, 1070 (D.D.C. 1997) (expedited discovery permitted); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 334 (3d Cir. 2016) (same); *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 873 (2008) (same); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1254 (E.D. Pa. 1987) (same); *U.S. Healthcare v. Healthsource*, Civil No. 91-113-D, 1992 U.S. Dist. LEXIS 5826, at *2 (D.N.H. 1992) (same).

In these circumstances, courts have found that the information requested is so central to the litigation, and the burden to the respondent so minimal, that the benefits of expedited discovery greatly outweigh any prejudice or burden claimed by defendants. They also establish the more important principle that critical and readily available non-privileged information in the possession of defendants that is essential for the progress of well-founded litigation and the administration of justice cannot and should not be secreted or hidden from a *bone fide* plaintiff, like the Ace in a game of 3-card monte.

It is unquestionable that the HSR filings requested by plaintiffs contain the information the Court believes to be essential for a more fulsome pleading. The requested information has already been collected by defendants, reviewed by their attorneys for privilege, prepared for production, and produced to the competition authorities. Therefore, providing it to plaintiffs' counsel entails no burden.

With respect to the content, the HSR Notification and Report Form, among other things, requires each defendant to identify their competitors, identify the product markets in which they operate, provide an estimate of market concentration, and explain the competitive effects of the merger the defendants anticipated. *See* Rubin Decl. ¶ 3-4, Exs B-C. This is precisely the information the Court is seeking and

the information plaintiffs seek to analyze.

The allegations of the Complaint reflect the experiences of plaintiffs, its rivals, and its former customers redolent of anticompetitive effects. Now, with newly publicized information claiming that defendants have attained 90% and 95% market shares of certain distribution markets (*see* Rubin Decl. ¶ 2), the circumstances augers strongly in favor of granting plaintiffs' motion for defendants' HSR filings.

B. The Factual Details the Court Requires are Not Available to Plaintiffs

Conventional antitrust cases tend to involve horizontal arrangements among competitors that may unlawfully acquire or maintain market power, whether through unlawful conspiracy or collusion, as proscribed by Section 1 of the Sherman Act, 15 U.S.C. § 1, or through monopolization, as proscribed by Section 2 of the Sherman Act, 15 U.S.C. § 2. The pleadings usually allege:

- The definition of the market, which must be large enough to include all sellers (or buyers) of products or services that consumers (or sellers) consider to be reasonable economic substitutes;
- The size—in dollars or volume—of the defined market;
- The number and nature of participants in the defined market; and,
- The market share of each participant in the defined market.

Unlike traditional antitrust cases, much of that information is unavailable to plaintiffs at the present time. Plaintiffs defined the relevant product markets in the Complaint with factual detail describing the contours of those markets. Dkt. No. 1, ¶¶ 29-30. However, the Court requires more, including percentages, market shares and other additional information largely unavailable absent discovery. Specifically, two principal obstacles preclude plaintiffs from meeting the Court's expectations.

First, the product markets impacted and monopolized in this case (the wholesale distribution markets for various categories of pet medications) are notoriously opaque and secretive. Reliable market data identifying market participants, market shares, and evidence of how retailers substitute among various products are not published and are not otherwise publicly available. *See* Declaration of Jeffrey Powers ("Powers Decl.") ¶ 2. Such information is closely guarded and remains undisclosed except to a

small group of market participants, including defendants.

After investigation of more than nine months prior to filing the Complaint, since the August 3, 2018 hearing plaintiffs have consulted numerous additional sources about the distribution of pet medications in an attempt to marshal the additional facts sought by the Court for a successful amended pleading. Rubin Decl. ¶ 11-13. Counsel interviewed or consulted several potential witnesses, industry insiders, and experts, but the results have been disappointing. Market participants are either unwilling to discuss the industry or provide plaintiffs with information that is biased or of questionable reliability. *Id*.

This lack of participation is unsurprising in an industry rife with misrepresentation and infested with the kind of anticompetitive arrangements described in the 2015 FTC Report and alleged in the Complaint. *See, e.g.*, Dkt. No. 1 at ¶ 24 ("An article in 2010 in the veterinary industry publication VIN News Service suggested that Merial knowingly misrepresented its distribution policies … A Merial executive also reportedly asserted that the antitrust laws were limiting the company's ability to 'aggressively enforce' its policy, because retail sales are not illegal and because Frontline is the market leader, putting them under 'particular scrutiny to avoid breaking laws against restraint of trade, anti-competitive behavior.'").

Other difficulties also prevent the collection of reliable market metrics, including the fact that economic substitutability of various of pet medication products is strongly dictated by veterinarian recommendations, and many veterinarians are reluctant to issue portable prescriptions. *See* Dkt. No. 1, ¶¶ 26-28. These factors influence end-user (and thus retailer) preferences and substitutability, the principal determinants of market definition.

In many industries, including the pet medication industry, commercial research reports are available for purchase that describe the industry's organization and present metrics related to market participants. Indeed, plaintiffs have expended over $9,000 on such reports in an attempt to obtain essential metrics and other information to satisfy the Court. *See* Powers Decl. ¶ 2. Unfortunately, those reports failed to provide sufficiently informative facts relevant to the antitrust analysis of the industry.

The second obstacle facing a successful re-plead of the Complaint is the level of industry metrics the Court believes to be required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft*

v. Iqbal, 556 U.S. 662 (2009) for a plausible antitrust claim in a largely vertical transaction. Nonetheless, plaintiffs' independent investigation has yielded documents confirming defendants' post-merger market power. According to material made available at a Jefferies 2018 Consumer Conference convened on June 19-20, 2018 in Nantucket, MA, the merged entity now distributes a "95% Share of Rx in Retail" and 90% of "direct purchasing from animal health suppliers" for delivery to retailers to be sold to. Rubin Decl. ¶ 2, Ex. A. By any measure, 90% and 95% market shares constitute monopolies, precisely the reason HSR are filed and pre-merger review conducted.

But, as the Court is aware, the FTC allowed the merger-review time period to expire. The FTC's decision making was influenced by their understanding of the organization of the industry, much of which is informed by the material submitted to the PNO by defendants in their HSR forms.[7] In other words, what the Court characterized as defendants' "secret(s)."[8]

Thus, unambiguous, dispositive evidence of the antitrust claims alleged in the Complaint has already been collected, packaged, and sent by each defendant to the PNO.[9] The limited expedited discovery requested contains sufficient information for the Court to decide the central issue at this stage of the case, *i.e.*, that the PetIQ/VIP merger violates Section 7 of the Clayton Act. The Court has the discretion to allow plaintiffs to obtain this information based on the good cause demonstrated herein.

If, in the Court's phrase, plaintiffs "may not be able to plead a case," it will be only because plaintiffs cannot discover the "secrets" of the industry known by defendants. Rubin Decl. ¶ 8, Ex. H (Tr. 39:24-40:7) ("We've got all the essential facts regarding the market, regarding market shares, regarding competition. … And for [defendants] to say, well, we've got this file, but you can't have it, good luck pleading your case, we just think that's wrong.") Ex. H (Tr. 41:10-17).

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[7] That the FTC allowed the waiting period to expire does not inoculate the subject merger from challenge under the antitrust laws. Mergers have been challenged by both the federal government and in private litigation as anticompetitive after initially being allowed to close. *See, e.g.*, Complaint, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 3:16-cv-00545-REP (E.D. Va. June 29, 2016) (private action challenging merger in door-skin industry that the DOJ had cleared); Complaint, *United States v. Parker-Hannifin Corp. and Clarcor, Inc*, No. 1:17-cv-01354-UNA, (D. Del. Sept. 26, 2017) (merger challenge brought by DOJ after initially clearing the proposed transaction).

[8] The Court: "And I understand, you know, that you say, gee, they are not going to give us their secret, this, that and the other." Tr. 40:6-7.

[9] Filings are made either via paper copies or DVD. *See* Rubin Decl, ¶ 3, Ex. B at 1 (HSR Instructions) at 1.

It is also immaterial that the requested expedited discovery will be utilized to prepare an amended pleading. *S. F. Tech. v. Kraco Enters LLC*, No. 5:11-cv-00355 EJD, 2011 U.S. Dist. LEXIS 59933 at *8 (N.D. Cal. Jun. 6, 2011) (Plaintiffs "could utilize the discovery responses to prepare an amended pleading."); *see also, e.g.*, *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046 (9th Cir. 2008) ("The district court dismissed appellants' original complaint with leave to amend for, *inter alia*, failure to allege specific facts of … conspiracy. The district court then allowed appellants to conduct discovery to they would have the facts they needed to plead an antitrust violation in their amended complaint."); *Hardie v. NCAA*, No. 13-cv-346- W (DHB), 2013 U.S. Dist. LEXIS 49714, at *7 (S.D. Cal. April 5, 2013) (granting expedited discovery while motion to dismiss was pending).

C. Plaintiffs' Expedited Discovery Request Is Highly Targeted and Defendants Would Bear No Burden in Complying

The expedited discovery sought is highly targeted. The "Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions," FTC Form C4 (rev. 02/04/2018), provides instructions for the proper submission of the "Notification and Report Form," required for certain transactions including the defendants' merger.[10] Rubin Decl. ¶ 3, Ex. B. Defendants were required to produce documents (i) assessing respective market shares, competition, competitors, product markets, and potential for sales growth or expansion into product or geographic markets; (ii) analyzing the pros and cons of the acquisition; and (iii) discussing the rationale for the transaction, among other documents.[11] *See* Rubin Decl. ¶ 4, Ex. C. Therefore, many, if not all, of the Court's product market questions can and will be answered by the requested discovery. Plaintiffs requested defendants to provide this material, but defendants declined.[12]

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[10] Instructions and forms are specified in a set of Rules located at 16 C.F.R. § 801-803. Section 803.1(a) of the Rules requires the filing of the Notification and Report Form for certain transactions. The various tests of whether transactions are large enough to be reportable are generally updated in February of each year. There is no issue in this case whether the PetIQ/VIP merger was reportable, it was, and thus each party was required to file a Notification and Report Form.

[11] The HSR Act requires entities in a merger to file "documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d). See Rubin Decl., ¶ 4, Ex. C.

[12] Plaintiffs requested defendants' HSR forms on May 15, 2018. On June 1, 2018, PetIQ informed plaintiffs that it "is not willing to produce their HSR filing in advance of the formal deadlines established

Because all of the requested information and forms have been already collected, reviewed by attorneys, and prepared for production, defendants will bear no burden in complying with the requested order. The filings should be easy to locate within defendants' files (particularly since the transaction closed merely nine months ago and plaintiffs requested these exact documents four months ago). For these reasons, Plaintiffs' need for the requested discovery, to put this case at issue and prevent further irreparable harm to market competition, far outweighs any claimed burden associated with producing documents. Thus, there is no "logistical inconvenience" caused to the responding parties. *Semitool*, 208 F.R.D. at 276-77. By contrast, in the absence of such an order, plaintiffs' case and the potential to maintain competitive pet medication distribution markets are likely to wither on the vine.

D. The Evaluation of a Preliminary Injunction Would Be Facilitated by Expedited Discovery

The requested documents will also allow plaintiffs to evaluate the propriety and necessity of seeking preliminary injunctive relief. Each day a market is monopolized or each time a purchaser is over-charged, competition is injured, and the economy suffers. Although plaintiffs are evaluating filing a preliminary injunction, the *pendency* of such a motion is not required for the success of a motion for expedited discovery. *Tungsten Heavy Powder & Parts, Inc. v. Khem Precision, Machining, LLC,* No. 17-cv-1882-JAH(WVG), 2017 U.S. Dist. LEXIS 188371 at *2 (S.D. Cal. Nov. 14 2017) (expedited discovery granted when purpose is to "gather information necessary to decide whether to seek preliminary injunctive relief") ("*Tungsten*"). *See also Apple*, 2011 U.S. Dist. LEXIS 53233, *5-6 (granting expedited discovery and noting that "courts have found that expedited discovery may be justified to allow a plaintiff to determine whether to seek an early injunction"). Moreover, in *Tungsten*, as in this case, the defendants acknowledge that the requested discovery is fair game and will come forth during the course of discovery later in the case. *See* n.11, *supra*. "Given this acknowledgement, it is unclear how [defendants] will suffer *prejudice* if inevitable discovery is taken early." *Id.* at *5 (italics in original).

In sum, plaintiffs' request for expedited limited discovery is i) supported by good cause, ii)

by the rules in the ND of CA, or by order of Court." But, defendants were open to providing the HSR filings "at some later stage in the litigation." *See* Rubin Decl. ¶ 3, Ex. B.

highly targeted, iii) necessary, iv) without burden or prejudice to the respondents, iv) serves the public interest and supports the FTC, and, finally, v) is not excessively premature. A Case Management Conference has been set in this case for January 25, 2019. (Dkt. No. 34.) Plaintiffs may begin propounding discovery on January 4, 2019 under Rule 26(d). Granting this motion, therefore, would not be out of the ordinary. *See Tungsten*, 2017 U.S. Dist. LEXIS 188371 at *3-6 (explaining that courts commonly consider (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the request; and (5) how far in advance of the typical discovery process the request was made, and noting that those factors weighed in favor of granting the discovery request at issue). *See also, e.g.*, *Interserve,* 2010 U.S. Dist. LEXIS 6395, at *5 (granting expedited discovery six weeks prior to the Rule 26(f) conference) and *Semitool*, 208 F.R.D. at 276 (granting expedited discovery three weeks early).

III. FIRST AMENDED COMPLAINT

The First Amended Complaint is attached to the Declaration of Jonathan L. Rubin as Exhibit J. As discussed at length herein, the expedited discovery sought will allow plaintiffs to submit a more fulsome amended complaint because of the lack of available industry information. Accordingly, plaintiffs respectfully request that, if the motion for expedited limited discovery is granted, the FAC be deemed a nullity and plaintiffs be granted leave after a reasonable time after receipt of the requested HSR documents to file a Second Amended Complaint containing the additional infomation contained in the ordered production.

IV. CONCLUSION

Based on the foregoing, plaintiffs respectfully request the following relief:

A. That the Court exercise its judicial discretion to order defendants to respond to the proposed Request for Production (attached to the Rubin Decl. as Ex. G) within 30 days;

B. That the Court enter Plaintiffs' proposed Protective Order in the form attached to the Rubin Decl. as Ex. F;[13] and,

[13] Under Plaintiffs' proposed Protective Order, the HSR documents may be designated as Highly Confidential and shared only with outside counsel.

C. That, if the expedited discovery motion is granted, the Court set a deadline of 30 days from the date of plaintiffs' receipt of the requested expedited limited discovery in which to file a Second Amended Complaint should they choose to do so.

Dated: October 3, 2018

/s/ Jonathan Rubin

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