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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

DEFENDANTS VIP PETCARE HOLDINGS, INC. AND PETIQ, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LIMITED EXPEDITED DISCOVERY

Date: November 16, 2018
Time: 9:00 AM
Place: Courtroom 7 - 19th Floor
San Francisco Courthouse
450 Golden Gate Avenue,
San Francisco, CA 94102

Judge: Hon. Maxine M. Chesney

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Defendants VIP Petcare Holdings, Inc. ("VIPH") and PetIQ, Inc. ("PetIQ") (collectively, "Defendants") respectfully submit this memorandum in opposition to Plaintiffs' Motion for Limited Expedited Discovery (Containing Plaintiffs' First Amended Complaint).

INTRODUCTION

On August 3, 2018, this Court dismissed Plaintiffs' complaint in this action for failure to plead a plausible claim. Plaintiffs requested sixty days to amend, telling this Court that "if we can't do it in 60 days, then we can't do it." MTD Hg. Tr. 47:18-19. The Court explained with specificity at the hearing the deficiencies of Plaintiffs' complaint, including:

Flawed Product Market

- "Plus, you haven't -- you've made it a one-product market. For all your pleading, it's Front Line Plus. Again, even though you define the market more broadly. Plus, ordinarily your products are supposed to be interchangeable. You've got heartworm. That's not, you know, interchangeable with flea and tick stuff." MTD Hg. Tr. 16:19-24.
- "And these two markets, at least at the moment, don't seem to add up to what would be a plausible market because there are other channels. There are other products. There are -- I don't know. It's just there are so any other things here that seem to be ignored, I guess is the best way to put it." MTD Hg. Tr. 38:6-20.

Failure to Allege Market Power

- "[W]e don't have any percentages here in this complaint that really go to the argument that's being made by what the defendant characterizes as conclusory allegations. And I think in the main they are without the factual support." MTD Hg. Tr. 7:18-21.
- "In and of[] itself exclusivity is not an antitrust violation. So you have to show, again, that ultimately the retailers are getting -- charging more or will get charged more because they don't have, for example, anywhere else to go to get competing product." MTD Hg. Tr. 36:18-22.
- "And, in fact, that one 'dangerous probability of achieving monopoly power,' which we don't have any percentages of, so I have no idea whether it's in any []danger or not." MTD Hg. Tr. 51:20-23.

Lack of Factual Allegations

- "Well, then maybe [you] can't file a claim. You know, you can't, like, say we think they are doing something wrong, so we'll just say they are and then we'll try and discover it later." MTD Hg. Tr. 20:6-9.
- "And once again, that's all very nice as closing argument, but not as the facts. And that's why I say that this 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. And so someone looks at it and says: Yeah, fine. And what-have-you got to show that? So I think that you do need to come up with some." MTD Hg. Tr. 38:6-20.

At the hearing, Plaintiffs urged the Court to order production of Defendants' Hart-Scott-Rodino ("HSR") filing – the confidential and non-public form and related documents submitted to the Federal Trade Commission ("FTC") to obtain regulatory approval to close the transaction at issue in this case. MTD Hg. Tr. 39:7-21. Defendants opposed Plaintiffs' request and the Court rejected it, noting that Plaintiffs were essentially saying "if we could do discovery, we could figure out if we have a case." MTD Hg. Tr. 43:1-2. But, under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Plaintiffs cannot rely on a facially deficient complaint to get discovery.

On October 3, 2018, two days before their court-ordered deadline to amend their complaint, Plaintiffs filed this motion for expedited discovery, making the exact same discovery request this Court already denied during the August 3 hearing. Plaintiffs have again failed to establish they have good cause to seek expedited discovery where they have—now twice—failed to plead a viable complaint, and have not made any showing that the HSR filing would even allow them to do so. Plaintiffs' motion should be denied.

ARGUMENT

I. THIS COURT ALREADY HEARD AND DENIED PLAINTIFFS' REQUEST FOR PRODUCTION OF THE HSR FILE

Plaintiffs concede they requested the same discovery they now seek in this renewed discovery motion at the August 3, 2018 hearing.[1] Mot. pp. 6:22-7:3. Plaintiffs' motion raises no new facts or circumstances that would warrant a different result 60 days later. As this Court told Plaintiffs and under the plausibility standard set forth by *Twombly*, federal courts no longer use notice pleading through which early discovery would be permissible to determine "what the case is about." MTD Hg. Tr. 43:4-11. Given the "unusually high cost" and "extensive scope" of discovery, particularly in antitrust cases, the Supreme Court has held that courts "must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (citation omitted). In the early stages of a case, therefore, motions to dismiss a complaint enable defendants to challenge the sufficiency of implausible allegations "at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558. Plaintiffs lost a motion to dismiss under *Twombly*, but, now attempt to circumvent the gravamen of that seminal case's holding by seeking expedited discovery. The Court rightly refused to subject Defendants to the costs and burden of discovery until Plaintiffs plead a complaint that has "some facts on it," and should do so again. MTD Hg. Tr. 14:17-18.

The Court was clear that its "primary concern [was] the definition of the market because without . . . a legally viable market, a plausible market in the language of the cases, you can't really go anywhere with the case." MTD Hg. Tr. 4:10-14. Applying the *Twombly* plausibility standard, the Court stated quite plainly that the complaint was "pretty much devoid of facts. It has a lot of overarching statements about the market, but they are not really supported by facts. . . . And these two markets, at least at the moment, don't seem to add up to what would be a plausible market . . ." MTD Hg. Tr. 38:8-17. The Court further noted that there appeared to be missing products, channels,

[1] While postured as a motion for expedited discovery, this motion would be more properly characterized as a motion for reconsideration of Plaintiffs' prior request, but they do not meet or even discuss the standards for a motion for reconsideration. Civil L.R. 7-9; *see also Johnson v. United Continental Holdings, Inc.*, 2013 WL 2252030 (N.D. Cal. May 22, 2013) (Chesney, J.).

and players from the alleged market. MTD Hg. Tr. 7:24-8:2; 38:15-20. The Court even highlighted for the parties the recent *Hicks v. PGA Tour, Inc.* decision, in which the Ninth Circuit made clear that Plaintiffs must plead a plausible market in their complaint or risk dismissal. 897 F.3d 1109, 1120-21 (9th Cir. 2018). That case affirmed that a market "must encompass …all economic substitutes" to be "facially sustainable" at the Rule 12(b)(6) stage.

However, Plaintiffs made no material changes to their flawed market in the proposed amended complaint attached as an exhibit to their motion for expedited discovery, (*Compare* Dkt. 1, ¶ 29 *with* Dkt. 33-12, ¶ 32.), despite the Court's explicit description of relevant facts that are within Plaintiffs' possession, *e.g.* the identity of substitutes for Frontline Plus. The Court told Plaintiffs the complaint had "very broad markets and you leave out people. Then you focus on Frontline Plus. That's one flea product." MTD Hg. Tr. 7:24-8:1. The Court further noted that the complaint lacked allegations about "leaking" product to the secondary distribution chain, (MTD Hg. Tr. 13:25-14:18), a description of Plaintiffs' competitors, (MTD Hg. Tr. 38:15-17), or an explanation of Plaintiffs' supply chain, (MTD Hg. Tr. 24:19-25:25). These facts are available to Plaintiffs and yet they fail to plead them. And, critically and fatally to Plaintiffs in their current posture, the expedited discovery Plaintiffs now seek does not go to the issues the Court identified with the relevant market (while other available facts the Court requested might). The Court properly denied Plaintiffs' request for the HSR filing at the motion to dismiss hearing, and should reject their renewed motion as well.

II. PLAINTIFFS FAIL TO DEMONSTRATE GOOD CAUSE FOR EXPEDITING THE REQUESTED DISCOVERY

Plaintiffs' motion does not establish the good cause necessary in the Ninth Circuit to warrant expediting discovery prior to the Rule 26(f) conference.[2] In this case, "the need for expedited discovery, in consideration of the administration of justice, [does not] outweigh[] the prejudice to the responding party." *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 274, 276 (N.D. Cal. 2002). Rather, the factors courts commonly consider: "(1) whether a preliminary injunction is

[2] Under Federal Rule of Civil Procedure 26(d), "a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except …when authorized by these rules, by stipulation, or by court order." Fed. R. Civ. Pro. 26(d)(1).

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," weigh heavily against granting Plaintiffs' request for discovery. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 768 F. Supp. 2d 1040, 1044 (N.D. Cal. 2011) (internal quotation marks and citation omitted). Plaintiffs have not shown a single factor favors granting their motion and do not come close to meeting their burden on the ultimate question of good cause, as under the circumstances here, production of the HSR file would not serve the administration of justice.

A. Plaintiffs Have Not Requested and Cannot Obtain a Preliminary Injunction

First, there is no request for a preliminary injunction pending. While Plaintiffs assert that the expedited discovery requested would help them evaluate whether to move for a preliminary injunction in the future, (Mot. p.16), they cite no merger-challenge case where a court granted a request for expedited discovery without a pending preliminary injunction and, in any event, they know full-well such a motion would be, at best, a long-shot here, where they have twice failed to plead a viable complaint.

Every one of the cases Plaintiffs claim show that expedited discovery is allowed "to facilitate a merger challenge," (Mot. p. 11), [3] involved a preliminary injunction,[4] and, in half of these cases, the FTC, the federal agency charged with approving or challenging mergers and acquisitions, (*see* 15

[3] In addition to the merger cases, Plaintiffs list four categories of cases in which, they argue, expedited discovery is "customarily" permitted. But, the categories are easily distinguishable from this case, and Plaintiffs make no attempt to explain how this varied collection of cases is analogous to the circumstances here. First, "Doe" internet cases "in which expedited discovery is necessary to identify the defendants" (Mot. p. 10) are distinguishable here. In those cases, expedited discovery has been deemed necessary to determine who plaintiffs should be suing in their complaint. Second, patent or copyright infringement cases often involve ongoing, continuous harm to the party whose intellectual property is allegedly infringed. Third, expedited discovery is sometimes permissible to "resolve issues of service of process, venue, or personal jurisdiction" (Mot. p. 11). Fourth, Plaintiffs cite cases involving concerns of funds being moved outside the jurisdiction of the court, which present an imminent threat that does not exist in the instant case. Quite simply, none of these circumstances exist here and these citations do nothing to advance Plaintiffs' motion.

[4] One of the six cases cited for this proposition does not actually involve a merger, but, in any event, relates to a pending preliminary injunction. *See U.S. Healthcare v. Healthsource*, Civil No. 91-113-D, 1992 U.S. Dist. LEXIS 5826 (D.N.H. 1992).

U.S.C. § 18a) and declined to challenge the transaction here, brought the action.[5] Further, all but one of the merger-challenge cases involved a pre-consummation preliminary injunction.[6] In the lone exception,[7] *Tasty Baking Co. v. Ralston Purina, Inc.*, the plaintiffs filed a motion for a preliminary injunction with an adequately pled complaint just one month after the transaction closed. 653 F. Supp. 1250 (E.D. Pa. 1987). Additionally, *Tasty* is also distinguishable because it was pre-*Twombly* and not subject to today's pleading standard to reach discovery.

Instead, to argue that a plaintiff's mere consideration of a preliminary injunction alters the analysis, Plaintiffs focus on distinguishable cases in other contexts involving (1) potential destruction of assets prior to recovery through the litigation and (2) alleged ongoing trademark infringement. *See Tungsten Heavy Powder & Parts, Inc. v. Khem Precision, Machining, LLC*, No. 17-cv-1882-JAH(WVG), 2017 U.S. Dist. LEXIS 188371 (S.D. Cal. Nov. 14 2017); *Apple Inc. v. Samsung Elecs. Co.*, 2011 WL 1938154 (N.D. Cal. May 18, 2011).

In *Tungsten*, plaintiff sought expedited discovery while considering whether to file a preliminary injunction, arguing that defendant, who had already received and used plaintiff's product in manufacturing finished products, was also "actively taking steps to dispose of assets to frustrate recovery" in the litigation. 2017 U.S. Dist. LEXIS 188371, at *1-*2. The court determined that "what sets this case apart is the purported threat that Khem will take steps to thwart [p]laintiff's effort to collect money it is owed." *Id.* at *5. The court specifically noted that "[n]ot every case involves such circumstances." *Id.* This case does not.

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[5] *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 334 (3d Cir. 2016); *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 873 (D.C.C. 2008); *FTC v. Staples*, 970 F. Supp. 1066, 1070 (D.D.C. 1997).

[6] *See 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); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 334 (3d Cir. 2016); *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 873 (D.C.C. 2008); *FTC v. Staples*, 970 F. Supp. 1066, 1070 (D.D.C. 1997).

[7] In one other case, *FTC v. Whole Foods Mkt., Inc.*, the ultimate resolution of the preliminary injunction motion, although not the expedited discovery, occurred post-merger. The FTC in that case sought a preliminary injunction before the merger, and the district court allowed expedited discovery, but eventually denied the motion for preliminary injunction. 548 F.3d 1028, 1033 (D.C.C 2008). On appeal, as part of the D.C. Circuit's reversal, it held that the completion of transaction did not moot the preliminary injunction motion.

In *Apple*, the court granted limited expedited discovery related to product samples and packaging materials for the Samsung Galaxy devices so Apple could "prevent alleged infringement of its intellectual property and to forestall allegedly irreparable harm." *Apple Inc.*, 2011 WL 1938154, at *5. Again, the harm Apple alleged was imminent and potentially irreparable to their intellectual property rights.

But the circumstances in the instant case, where PetIQ's acquisition of VIP Petcare was consummated over nine months ago in January 2018, do not present the same imminent concerns. There is no looming deadline, ongoing intellectual property infringement, or potential destruction of recoverable property at issue here. As such, there is no imminent threat or concern, which is made even clearer by the fact that this litigation has been pending for over six months and Plaintiffs have not sought preliminary injunctive relief.

Their asserted interest in pursuing it now is an illusory and transparent attempt to manufacture any changed circumstance, and grasp onto any precedent in support of their bold request that this Court essentially exempt them from the requirements of Rule 12. The Court should reject this effort to leverage the suggestion of a preliminary injunction to obtain discovery, including because the record before the Court shows that Plaintiffs have no hope of obtaining a preliminary injunction here. Among other reasons, Plaintiffs, having twice failed to allege sufficient facts or a relevant market, could not show the likelihood of success on the merits necessary to justify a preliminary injunction. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). In sum, merely raising the specter of a preliminary injunction motion does not satisfy this factor or help Plaintiffs establish good cause.

B. Any Discovery Is Inappropriate At This Stage Because Plaintiffs Ignore a Wealth of Publicly Available Information

As the Court noted previously, "all manner of publications" exist that Plaintiffs could consult for an amended complaint. MTD Hg. Tr. 40:8-10, 46:8-15. The Court also noted that Defendants had to have collected the information contained in the HSR filing from somewhere, and Plaintiffs could do the same. MTD Hg. Tr. 46:9-13. Despite this guidance, Plaintiffs disregard or dismiss information that is available to them. And, while they argue the discovery they seek is "highly

targeted," (Mot. at 15), any request is improperly broad where Plaintiffs have ignored sources in the public domain, including over the Court's express instructions to consider them.

First, the FTC Report[8] that has been judicially noticed in this case is rife with details and statistics about the pet medication industry that Plaintiffs could use to amend their complaint, and yet the proposed amended complaint submitted as Exhibit J to the Motion only cites the FTC Report in two paragraphs.[9] More importantly though, the FTC report relies on dozens of public sources regarding the pet medication industry that Plaintiffs could investigate to obtain facts for the case they are trying to bring. Plaintiffs have done nothing to show this Court they have exhausted this available information before asking for what they believe is a shortcut to pleading their claim.

Nor did Plaintiffs avail themselves of the information and statistics *about their own business* as the Court suggested. *See* MTD Hg. Tr. 19-:25-20:1 ("Plus, your client knows, for example, what they have gotten over the years from various sources."). Or add information about substitutes to Frontline Plus as a flea product, which the Court specifically requested, (MTD Hg. Tr. 36:23-37:2), and which, at the hearing, Plaintiffs' counsel admitted exist and are, in fact, replacing Frontline Plus as the "blockbuster" drug, (MTD Hg. Tr. 37:14-20) ("Now, I'm not saying that there are not other spot-on flea and tick. There is another little factual thing going on here that's part of the dynamic, which is that the spot-on are kind of going out of fashion now and the manufacturers are moving that market over to … chewable [products]. … That's the new blockbuster drug….").

Plaintiffs argue the sources they consulted did not provide them with "sufficiently informative facts." But, as to the two industry reports mentioned, (Mot. p. 13), they do not explain why those two reports were insufficient nor what the reports included (even if it is contradictory to their allegations),[10] or argue that no other industry reports are available. Plaintiffs also indicate that they conducted interviews of industry participants but say they did not find the contents of those

[8] Federal Trade Commission Staff Report, "Competition in the Pet Medications Industry: Prescription Portability and Distribution Practices" (May 2015).

[9] Plaintiffs may limit their citations to the FTC Report, because, as Defendants noted in their Motion to Dismiss, it does not support their claims. Dkt. 25, Motion to Dismiss, p. 10-12.

[10] Ironically, Plaintiffs grossly mischaracterize the only statistics they appear to use from the reports, coming from the Jefferies Consumer Conference presentation, which do not even relate to the markets alleged.

interviews trustworthy. Again, they provide no detail regarding what information they did derive from those interviews, however, and it is unclear whether the interviews were "untrustworthy" for any reason more than that the interviewees did not provide commentary that supports Plaintiffs' allegations.

Further, as Defendants noted during the motion to dismiss hearing, PetIQ is a publicly traded company about which there is significant publicly available information. MTD Hg. Tr. 44:3-13. Plaintiffs could have researched that information, such as PetIQ's Form 10-K filings with the Securities and Exchange Commission, but they did not do so.

Thus, and despite Plaintiffs' assertions to the contrary, there is ample publicly available information, and no justification for any discovery where Plaintiffs have simply refiled a complaint without thoroughly investigating and pleading all facts available to them.

C. Plaintiffs' Request for Expedited Discovery to Rehabilitate their Flawed Complaint is Not a Proper Justification

With respect to the third factor, the purpose of their request, Plaintiffs seek the HSR filing as a workaround to their inability to plead a plausible complaint. Plaintiffs requested 60 days to amend their complaint and stated "if we can't do it in 60 days, then we can't do it." MTD Hg. Tr. 47:18-19. In a motion filed 58 days later, Plaintiffs ask for more, seeking expedited discovery to overcome their deficient pleadings.

Plaintiffs argue that the contents of the HSR filing will provide them the detail they need to plead a plausible complaint. This amounts to Plaintiffs asking the Court to compel Defendants to plead this case for them. Notwithstanding that the HSR filing will not support Plaintiffs' flawed theories in this case, the burden to plead a plausible complaint is on the Plaintiffs—not Defendants. A defendant should not be forced to produce information that might lead to years of time consuming and wasteful discovery before the plaintiff's complaint passes Rule 12 muster

As the Court noted, "What you're saying is that if we could do discovery, we could figure out if we have a case," (MTD Hg. Tr. 43:1-2), which is simply not allowed under Rule 12 and *Twombly*. *See supra* Section I. In fact, Plaintiffs do not even know whether the HSR filing will actually support their allegations (it will not) where, apparently, none of the publicly available information

has. As Plaintiffs acknowledged, the FTC reviewed the HSR filing before the acquisition was consummated and elected not to challenge the acquisition. MTD Hg. Tr. 40:23-40:6. Plaintiffs are not the government; they are not entitled to receive this information to make their own decision about this merger or whether to proceed in this case.

D. Compelling Any Discovery Before Plaintiffs Plead a Viable Complaint is Unduly Burdensome

As to the fourth factor, the production of the HSR filing presents significant burden to Defendants because, as Court has already said, Plaintiffs are "asking, in effect, for [Defendants'] work product" by requesting the HSR filing. MTD Hg. Tr. 46:7-8. It would unduly prejudice Defendants to be forced to produce their work product, particularly when, as the Court further noted, Defendants were able to collect the information necessary for the HSR filing and Plaintiffs are capable of collecting such information as well. MTD Hg. Tr. 46:9-13.

Further, these documents are required to be submitted to the FTC pursuant to their statutory authority to approve or challenge mergers or acquisitions pursuant to the provisions of the HSR Act, which requires that the information submitted pursuant to this process be kept confidential.[11] Plaintiffs have failed to make any showing that they are entitled to confidential information that the FTC reviewed and declined to pursue further.

E. Defendants May Never Be Required To Produce the Requested Discovery

Finally, regarding the fifth factor of how much acceleration of discovery is sought, Plaintiffs incorrectly suggest that the expedited discovery they seek is only a few weeks in advance of post-Rule 26(f) conference discovery. Plaintiffs' argument is a gross mischaracterization of their burden and Defendant's discovery obligations. Defendants successfully dismissed Plaintiffs' initial Complaint and are likely to seek dismissal of Plaintiffs' Amended Complaint when it is filed. If Plaintiffs cannot plausibly plead their complaint, the case will be properly dismissed, and no

[11] *See* 15 U.S.C. § 18a(h); 15 U.S.C. § 57b-2 ("Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.").

discovery will ever happen. As such, Plaintiffs are asking for something now that they may never be entitled to if they cannot survive the motion to dismiss stage.

CONCLUSION

This motion for expedited discovery appears to be nothing more than a smokescreen for Plaintiffs' inability to plead a plausible complaint. As Plaintiffs said themselves, "if we can't do it in 60 days, then we can't do it." MTD Hg. Tr. 47:18-19. Sixty days have now passed, and Plaintiffs have failed to plead a plausible complaint as this Court requested and as Supreme Court and Ninth Circuit precedent require. There is no indication that the requested materials would cure these fatal deficiencies, and no good cause to order their production. For all the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for expedited discovery.

Dated: October 18, 2018

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