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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' REPLY IN SUPPORT OF MOTION FOR LIMITED EXPEDITED DISCOVERY

Courtroom: 7-19
Hearing Date: November 16, 2018
Time: 9:00 a.m.
Judge: Hon. Maxine M. Chesney

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I. INTRODUCTION

Plaintiffs are seeking limited expedited discovery to obtain defendants' previously assembled business records submitted to the Federal Trade Commission in accordance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act" or "HSR"). The Court found plaintiffs did not allege facts in the Complaint regarding defendants' market shares, other market participants identities and market shares, and facts regarding the substitutability of pet medications, despite pleading product markets based on distribution services rather than pet medications. *See* Motion for Limited Expedited Discovery (Containing Plaintiffs' First Amended Complaint) ("Motion") at 6-8. Although much of this information is not necessary to plead a plausible vertical merger challenge or attempted monopolization claim, plaintiffs endeavored to locate this information within the allotted 60 days given to amend. *Id.* Their efforts yielded marginal results. Yet, all of the information the Court desires sits neatly in a file within defendants' records that could be turned over to plaintiffs quickly.

Defendants resist expedited discovery and argue the five factors traditionally considered to obtain such an order have not been met. They are wrong. A preliminary injunction does not need to be filed (or even contemplated) and plaintiffs do not need to be suffering irreparable harm. The single document request is narrowly tailored to seek only documents currently within their possession, custody or control that have already been reviewed by attorneys and converted to production-ready files and therefore, imposes no burden. Any confidentiality concerns can be easily remedied, for example by entering the protective order proposed by plaintiffs. Ordering discovery a few months ahead of the Court's scheduled Case Management Conference (and therefore the start of traditional discovery) is not too soon. Defendants boldly assume that plaintiffs' amended pleading will be dismissed and are wrong to do so. And plaintiffs' purpose for seeking the HSR documents – to satisfy this Court's elevated pleading standard – presents a strong reason for ordering discovery.

Defendants' opposition arguments are based in large part on their and the Court's misconstruction of plaintiffs' alleged product market. *See* Defendants' Opposition to Plaintiffs' Motion for Limited Expedited Discovery ("Op.") at 3-4; Dkt. No. 38-10 (Tr. 8:1-2)). Plaintiffs do not allege a product market based on Frontline Plus or any other single pet medication. Rather, the First Amended Complaint advances a product market based on distribution services for pet medication of any kind.

Defendants' merger has placed them in a dominant position (90% - 95% by some accounts) of the distribution services for pet medication product market, allowing them to exclude competitors such as plaintiffs, and raise prices or otherwise exert market power. These allegations plausibly describe the sort of incipient harm to be prevented by merger enforcement under Section 7 of the Clayton Act, 15 U.S.C. § 18, and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiffs, therefore, believe this case to be one of great public importance. They also satisfy the pleading standards enunciated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("*Twombly*") and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ("*Iqbal*"). Out of an abundance of caution, plaintiffs submit a restated amended complaint to clarify the distribution services for pet medication product market alleged in light of defendants' opposition. *See* Exhibit 1 hereto.[1] But, because this Court is seeking more, expedited discovery is necessary to present a fulsome pleading with the description of market participants, market shares, substitutability of distribution services, and percentages otherwise unavailable to plaintiffs.

II. ARGUMENT

The interests of justice and conservation of court and party resources weigh in favor of granting plaintiffs' expedited discovery request. *Semitool v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276-77 (N.D. Cal. 2002). Requiring defendants to respond to a single document request now that seeks information previously produced to federal antitrust authorities and contains product market details required by the Court (though unnecessary for a plausible antitrust theory) is appropriate and imposes no burden. But, denying plaintiffs the ability to provide the Court with the information it seeks unfairly prejudices their ability to proceed with this litigation. Although the Restated FAC alleges a plausible Clayton Act Section 7 claim based on plaintiffs' allegations of a distribution services product market, the Court is holding plaintiffs to a summary judgment standard without "put[ting] in declarations." Dkt.

[1] Exhibit 1 contains the Restated [Proposed] First Amended Complaint for Violations of the Sherman and Clayton Acts Seeking Permanent Injunction and Damages ("Restated FAC"). Exhibit 2 appended to this brief contains a redlined comparison of the Restated FAC and First Amended Complaint filed with plaintiffs' Motion (Dkt. No. 38-12), identifying the clarifications made for the Court's convenience. Counsel for plaintiffs conferred with counsel for defendants the day before this Reply was filed and emailed both Exhibits to counsel for defendants. At that time, plaintiffs also waived any objection to the filing of a Sur-reply by defendants at any time, should they deem it necessary.

No. 38-10 (Tr. 15:3-6). The information gleaned from defendants' HSR documents will allow plaintiffs to meet the Court's pleading standard.

A. Plaintiffs Have Demonstrated Good Cause for Expedited Discovery

As plaintiffs noted, courts within the Ninth Circuit "generally use the 'good cause' standard to determine whether to permit discovery prior to a Rule 26(f) conference." *Apple v. Samsung*, No. 11-cv-01846-LHK, 2011 U.S. Dist. LEXIS 53233, *3-4 (N.D. Cal. May 18, 2011). *See also* Motion at 8-9. Good cause is found where, as here, the "'need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.'" *Apple*, 2011 U.S. Dist. LEXIS 53233 at *4 (*quoting Semitool*, 208 F.R.D. 273, 276 (N.D. Cal. 2002)). The five factors defendants raise (Op. at 4-5) are "commonly considered" but not dispositive: (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. *Apple*, 2011 U.S. Dist. LEXIS 53233 at *4 (*quoting Am. LegalNet, Inc. v. Davis*, 673 F.Supp.2d 1063, 1067 (C.D. Cal. 2009)). Good cause is "frequently found" in cases involving unfair competition. *Interserve, Inc. v. Fusion Garage PTE, Ltd.*, No. C 09-05812 JW (PVT), 2010 U.S. Dist. LEXIS 6395, *4-5 (N.D. Cal. Jan. 7, 2010). Nonetheless, each of the five factors has been met here. *See* Motion at 16-17.

1. No Preliminary Injunction Need Be Pending

A preliminary injunction is not required for the Court to allow expedited discovery. *See Semitool*, 208 F.R.D at 276-77 (allowing expedited discovery with no preliminary injunction pending). *See also Tugnsten Heavy Poweder & Parts v. Khem Precision Machining*, 17-cv-1882-JAH(WVG), 2017 U.S. Dist. LEXIS 188371, *3-4 (S.D. Cal. Nov. 14, 2017) (allowing expedited discovery, in part, "to determine whether injunctive relief is necessary"); *Bona Fide Conglomerate, Inc. v. SourceAmerica*, No. 14cv0751-GPC-DHB, 2014 U.S. Dist. LEXIS 189051, at *5 (S.D. Cal. Nov. 7, 2014) (expedited discovery granted with no preliminary injunction filed); *Apple*, 2011 U.S. Dist. LEXIS 53233, *5 ([w]hile Apple has not yet filed a motion for preliminary injunction, courts have found that expedited discovery may be justified to allow a plaintiff to determine whether to seek an early injunction"); *Interserve*, 2010 U.S. Dist. LEXIS 6395, *7 ("[e]xpedited discovery will allow plaintiff to determine

whether to seek an early injunction"). Rather, courts in this district are to consider whether expedited discovery promotes the interests of justice and orderly case management. *Semitool*, 208 F.R.D. at 276. The Northern District has recognized that amending a complaint presents a "stronger" case for issuing discovery. *See San Francisco Tech. v. Kraco Enters. LLC*, No. 5:11-cv-00355 EJD, 2011 U.S. Dist. LEXIS 59933, *8-9 (N.D. Cal. June 6, 2011) (the plaintiffs' position in opposing a discovery stay is "far stronger" because the "discovery sought by [the plaintiff] would certainly allow for a more detailed complaint as required by the Federal Circuit, and would assist in expedited [the] case"). *See also* Motion at 12-15.

Defendants seem to concede that a preliminary injunction does not need to be pending but contend that plaintiffs instead need to be suffering irreparable harm to obtain discovery at this time. Op. at 5-7. Not so. The Northern District rejected the "rigid" test stemming from *Notaro v. Koch*, 95 F.R.D. 405 (S.D.N.Y. 1982) [2] – in which a showing of irreparable harm would be necessary – for the "more flexible good cause standard" at this stage. *Semitool*, 208 F.R.D. at 274-276. The district court in *Semitool* explained:

> The *Notaro* factors would not accommodate expedited discovery in circumstances even where such discovery would facilitate case management and expedite the case with little or no burden on the defendant simply because the plaintiff would not suffer "irreparable injury." Such a result is inconsistent not only with Rule 26(d), which requires the Court to consider, *inter alia*, "the interests of justice," but also the overarching mandate of Rule 1 which requires that the Rules "shall be construed and administered to secure that just, speedy and inexpensive determination of every action."

Semitool, 208 F.R.D. at 276. *See also* Motion at 8-9. Indeed, the *Semitool* plaintiff admitted that it would not be irreparably harmed but was allowed expedited discovery because, as here, it "would ultimately conserve party and court resources and expedite the litigation." *Id*. at 276.

[2] *Notaro* required the plaintiffs to "'satisfy a standard akin to a preliminary injunctive relief: [1] irreparable harm; [2] some probability of success on the merits; [3] some connection between expedited discovery and avoidance of irreparable injury; and [4] some evidence that the injury will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.'" *Semitool*, 208 F.R.D. at 275 (*quoting Notaro*, 95 F.R.D. at 405).

Nonetheless, plaintiffs indicated their intent to seek preliminary injunctive relief. *See* Restated FAC Section XIII ¶ B; Dkt. No. 38-12, Section XIII ¶ B. They have also alleged the irreparable harm defendants' merger is inflicting. Restated FAC ¶¶34-39; Dkt. No. 38-12 ¶34-39.

Likewise, defendants' claim that plaintiffs may not be able to obtain a preliminary injunction because most merger challenges occur pre-consummation is inapposite. Op. at 6. Defendants ignore the plethora of cases where mergers are challenged *post-consummation* by both the federal antitrust authorities and private actors. *See, e.g., United States v. Parker-Hannifin Corp.*, No. 17-1354-JEJ, 2018 U.S. Dist. LEXIS 88695 (D. Del. Apr. 30, 2018); *Payment Logistics Ltd. v. Lighthouse Network, LLC*, No. 18-cv-0786-L-AGS, 2018 U.S. Dist. LEXIS 138338, at *1 (S.D. Cal. Aug. 14, 2018); *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, Civil Action No. 3:16cv545, 2018 U.S. Dist. LEXIS 173704, at *6-7 (E.D. Va. Oct. 5, 2018); *In the Matter of Otto Bock HealthCare North America, Inc.*, FTC Dkt. No. 9378 (filed Dec. 20, 2017); *In the Matter of ProMedica Health System, Inc.*, FTC Dkt. No. 9346 (filed Jan. 6, 2011) (*available at https://www.ftc.gov/sites/default/files/documents/cases/2011/01/110106promedicacmpt.pdf* (last visited Oct. 24, 2018); *United States v. Transdigm Grp. Inc.*, No. 1:17-cv-02735-ABJ (D.D.C. 2009) (*available at* https://www.justice.gov/atr/case-document/file/1020256/download (last visited Oct. 24, 2018)). *See also* Motion at n.7. Indeed, the *Steves & Sons* district court recently ordered divestiture of the defendants' assets upon a jury finding their merger to be illegal *six years* after it had closed. Plaintiffs are not asking for such a severe remedy. They are simply asking for defendants to produce documents previously compiled for antitrust review.

2. Discovery Request is Narrowly Drawn and Imposes No Burden

The single document request is also narrowly tailored and seeks information that is "fair game" during the course of traditional discovery. *Tungsten*, 2017 U.S. Dist. LEXIS 188371, *4-5 (because the requested discovery was "limited" to a single deposition and information related to disposing assets, and ordinarily discoverable supported good cause for issuing expedited discovery). The HSR documents have already been reviewed for attorney-client and other privilege, and no other privilege attaches simply because the documents were produced to the federal government. *See* Motion at 15-16.

Defendants do not dispute that their HSR filings may be produced at some point in the litigation, nor do they challenge the scope of the document request.

Rather, defendants protest discovery by arguing that plaintiffs "disregard or dismiss information that is available to them." Op. at 7. *See also* Dkt. No. 38-10 (Tr. 44:1-22). They fail to point out a single source of publicly available information that provides their market shares, the market shares of their direct competitors, and end-user preference and substitutability, the market metrics this Court is demanding of plaintiffs. *See* Motion at 12-15. Their failure to do so is unsurprising given the difficulties plaintiffs have previously explained in obtaining such information and the industry's historically clandestine nature. *Id*.

In contrast, information disclosing defendants' market shares, the identity of other market participants and potentially their market shares, and defendants' view of the product market(s) in which they operate is within defendants' possession, custody and control and in a manner ready for production. It is relatively easy to locate given that their HSR filing was made approximately nine months ago, and this case has been pending since March 2018. Their claim of undue burden on confidentiality grounds (Op. at 10) is easily resolved by entering plaintiffs' proposed Protective Order. *See* Dkt. No. 38-8. Thus, defendants' "logistical inconvenience[s] may be overcome" and this factor also weighs in favor of allowing plaintiffs to obtain expedited discovery. *Interserve*, 2010 U.S. Dist. LEXIS 6395, *6-7.

3. Meeting the Court's Heightened Pleading Standard is Proper Justification

The requested discovery is to provide a "measure of clarity to the parties early in the proceeding and facilitating effective case management." *Apple*, 2011 U.S. Dist. LEXIS 53233, at *8. This is a proper justification for seeking limited expedited discovery.[3] *Id*. *See also Bona Fide Conglomerate*, 2014 U.S. Dist. LEXIS 189051, at *6, *supra*; Motion at 10-15.

[3] Contrary to defendants' opposition, plaintiffs' motion should not be framed as a motion for reconsideration. The Court indicated that it did not believe it had the authority to grant plaintiffs' *ore tenus* request during the August 3, 2018 hearing. *See* Motion at 6-7 & n.3; Dkt. No. 38-10 (Tr. 45:6-8). This formal motion for expedited discovery in conjunction with the Court's inherent authority under Federal Rules of Civil Procedure Rule 1 provides the Court with that authority.

Defendants do not contest that their HSR file is relevant to the core issues of this case. They argue instead that their documents should not be produced to allow plaintiffs to plead a plausible complaint. Op. at 9-10. They contort the purpose for seeking the HSR documents in the first place.

As plaintiffs explained, the FAC reflects their experiences as well as the experiences of other market participants. Motion at 10-12. *See also* Section III.B., *infra*. It details reports describing defendants as monopolists. *Id*. It describes the incipient anticompetitive harm resulting from defendants' transaction. *Id*. But, the Court believes that more is necessary under *Twombly* and *Iqbal*. Precise market shares, identities of defendants' competitors and other market participants, corroboration of plaintiffs' advanced product markets. *Id*. This level of information is unavailable to outsiders such as plaintiffs but accumulated and capable of production with no burden on defendants.

4. The Request is Not Extraordinarily Premature

Finally, plaintiffs' discovery request is not extraordinarily premature given the January 2019 Case Management Conference date, allowing traditional discovery to begin earlier that month. *See Tungsten*, 2017 U.S. Dist. LEXIS 188371 (finding discovery request not too early since "discovery in the normal course will commence in the next few months); *Interserve*, 2010 U.S. Dist. LEXIS 6395, *5, 6-7 (granting expedited discovery several weeks in advance of traditional discovery); *Bona Fide Conglomerate*, 2014 U.S. Dist. LEXIS 189051, at *6-7 (granting expedited discovery approximately two months in advance of traditional discovery). Defendants argue this factor weighs against discovery because they will "likely [] seek dismissal of Plaintiffs' Amended Complaint when it is filed." Op. at 10. Defendants assume their next motion will be successful, which is unlikely given the FAC's plausible allegations that will be bolstered by their own documents. *See* Section III.B., *infra*. In any event, expedited discovery is allowed even with dispositive motions pending. *See Hardie v. NCAA*, No. 13-cv-346-W (DHB), 2013 U.S. Dist. LEXIS 49714, *7 (S.D. Cal. Apr. 5, 2013) (granting expedited discovery while motion to dismiss was pending).

B. The FAC Satisfies Twombly and Iqbal

Finally, Plaintiffs' Restated FAC alleges plausible Section 7 and attempted monopolization claims to withstand Rule 12 scrutiny as articulated in *Twombly* and *Iqbal*, even without the requested discovery. That legal framework explains that plaintiffs' burden is to allege factual matter that raises

"a right to relief above the speculative level" (*Twombly*, 550 U.S. 544, 555 (2007)) and "state[s] a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement," and all reasonable inferences are to be drawn in plaintiffs' favor. *Iqbal*, 556 U.S. 662, 678 (2009). *See also In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1192-93 (N.D. Cal. 2015); *Toranto v, Jaffurs*, 297 F. Supp. 3d 1073, 1083-84 (S.D. Cal. 2018). "Material allegations, even if doubtful in fact, are assumed to be true." *Clean Conversion Techs., Inc. v. CleanTech Biofuels, Inc.*, No. 12-cv-239-L(JMW), 2012 U.S. Dist. LEXIS 117279, *6-7 (S.D. Cal. Aug. 20, 2012) (*citing Twombly*, 550 U.S. at 555). *See also In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d at 1192.

"There is no requirement that [the] elements of an antitrust claim be pled with specificity." *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). An antitrust complaint therefore survives Rule 12 scrutiny, "unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Id*. (emphasis added). "And since the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial." *Id*.

The Restated FAC alleges that plaintiffs are secondary distributors for pet medications. Ex. A at ¶¶2, 32. *See also* Dkt. No. 38-12 ¶¶2, 32. Pre-merger, they competed to supply retailers in the distribution services for pet medications market. Ex. A at ¶20; Dkt. No. 38-12 ¶20. Because consumers do not substitute veterinarian-sold products (supplied through the secondary distribution services product market) with conventionally distributed pet products available at retailers (supplied through different distribution channels), the secondary distribution services for pet medication market is a distinct product market defined by widely-accepted and supported economic theory. Ex. A at ¶¶4, 32; Dkt. No. 38-12 ¶¶ 4, 32. Defendants' vertical combination has provided them with approximately 90% to 95% of the secondary distribution market. Ex. A at ¶19; Dkt. No. 38-12 ¶19. They are using this dominant market position to exclude other secondary distributors such as plaintiff from the market. Ex. A at ¶¶7, 20, 28, 34-39; Dkt. No. 38-12 ¶¶7, 20, 28, 34-39. Retailers can no longer allocate purchases among secondary distributors to obtain lower prices. *Id*. Competition is suffering. *Id*.

These allegations plausibly describe how defendants' acquisition may substantially lessen competition and that it creates dangerous probability of their successfully monopolizing the relevant secondary distribution services markets. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1021 (9th Cir. 2016). *See also St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys. Ltd.*, 778 F.3d 775, 785 (9th Cir. 2015). Plaintiffs have never alleged a product market based on Frontline Plus or any other specific medication. *See* Dkt. No. 1 at ¶29. This Court's ruling dismissing the Complaint is reflective of defendants' interpretation of the product market rather than what was pled. *See* Dkt. No. 38-10 (Tr. 8:1-2, discussing plaintiffs' product market in the context of Frontline Plus). Defendants' opposition here reiterates that flawed interpretation (*see* Op. at 3-4), thereby necessitating plaintiffs' Restated FAC. And, contrary to defendants' opposition, plaintiffs are not using discovery to cure a facially deficient complaint. Op. at 2. Rather, the discovery requested is to meet this Court's "summary judgment"-style pleading standard. *See* Motion at 12-15.

III. CONCLUSION

Based on the foregoing, plaintiffs respectfully request that the Court grant the limited expedited discovery request and order defendants to produce their HSR materials within 30 days of this order.

Dated: October 26, 2018

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