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and PETIQ, INC.

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 NOTICE OF MOTION, MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 1, 2019
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

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on March 1, 2019 at 9:00 AM, or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Maxine M. Chesney, Courtroom 7 - 19th Floor, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants VIP Petcare Holdings, Inc., Community Veterinary Clinics, LLC, d/b/a VIP Petcare ("VIPH"), and PetIQ, Inc. ("PetIQ") will, and hereby do, move for an order dismissing Plaintiffs' First Amended Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

PetIQ and VIPH seek dismissal with prejudice of all claims against them.

This Motion is based on this Notice of Motion and Motion, accompanying Memorandum of Points and Authorities, the pleadings on file in this action, and upon such other matters as may be properly presented to the Court at the time of hearing.

Dated: January 15, 2019

WINSTON & STRAWN LLP

By: */s/ David E. Dahlquist*

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PRELIMINARY STATEMENT

Plaintiffs' latest complaint (the "Amended Complaint") is in fact their fourth attempt to plead plausible claims capable of surviving Rule 12. This latest attempt adds little to no factual substance, including any facts to address this Court's questions and concerns regarding Plaintiffs' alleged relevant market. Instead, the Amended Complaint merely confuses the allegations further, and because any additional attempt to plead their claims would be futile, the Amended Complaint should be dismissed with prejudice.

This Court dismissed the original Complaint in August 2018 based on the insufficient factual allegations, particularly regarding the relevant market definition and market share, and commented that "there are so many different layers that really don't have much flesh on them at the moment." MTD Hr. Tr. 22:1-2. Complaining of the unavailability of facts that could support their claims, Plaintiffs requested 60 days to amend their pleading, telling the Court "if we can't do it in 60 days, we can't do it." MTD Hg. Tr. 47:18-19. Plaintiffs failed to amend their pleading within the requested 60 days but instead asked for expedited discovery (while attaching to their moving papers two different proposed amended complaints). Subsequently, and two weeks after the Court's denial of Plaintiffs' motion seeking expedited discovery, Plaintiffs filed the Amended Complaint, which still fails to muster the "flesh" necessary to turn their conclusory allegations into viable claims.

In particular, Plaintiffs were on notice that they needed to do more than make "overarching statements about the market . . . not really supported by facts." MTD Hg. Tr. 38:9-10. But the Amended Complaint is similarly "devoid of facts" (MTD Hg. Tr. 38:8) regarding the arbitrary inclusions and exclusions of industry players to reach the relevant market Plaintiffs allege. And Plaintiffs' new allegations only further complicate their market definition—with no factual substantiation—by limiting the market to "unmeasured" sales, *i.e.* sales to retailers who do not provide data regarding their sales to pet owners to third party measurement firms. This limitation to "unmeasured" sales creates an artificial barrier in the relevant market definition that further highlights how Plaintiffs' alleged market randomly includes and excludes industry players and products and is therefore implausible.

Also, in another failed effort to address this Court's valid concerns that the original

complaint was improperly pleaded, Plaintiffs added two new percentages to the Amended Complaint that they claim represent PetIQ's post-Acquisition share of the relevant market alleged. However, neither of these percentages are interpreted correctly. Referring to a PetIQ presentation at a Jefferies 2018 Consumer Conference, the Amended Complaint alleges that "the combined entity claimed to control over 90% of the wholesale unmeasured pet wellness and medication products." (FAC ¶ 3.)[1] However, the 90% figure to which Plaintiffs refer in fact notes that PetIQ receives 90% of its *supply* from animal health suppliers, but it says nothing of the portion of the market this represents. Further, Plaintiffs allege that PetIQ represents a "95% Share of Rx in Retail" (FAC ¶ 33), but the relevant market alleged is not limited to prescription, making this figure inapposite to any allegation of market power.

Plaintiffs' repeated failures to sufficiently plead a complaint (and own admission that "if we can't do it in 60 days, we can't do it") demonstrate that further amendment is futile and warrant dismissal of the Amended Complaint with prejudice.

STATEMENT OF ISSUES

1. Whether Plaintiffs' Amended Complaint should be dismissed with prejudice because they (again) failed to allege a proper relevant market or market power.

2. Whether Plaintiffs' Amended Complaint should be dismissed with prejudice because they failed to allege antitrust injury.

3. Whether Plaintiffs' Amended Complaint should be dismissed with prejudice because they failed to allege cognizable claims for Clayton Act Section 7 or Sherman Act Section 2.

RELEVANT FACTUAL ALLEGATIONS

I. PET MEDICATIONS INDUSTRY BACKGROUND

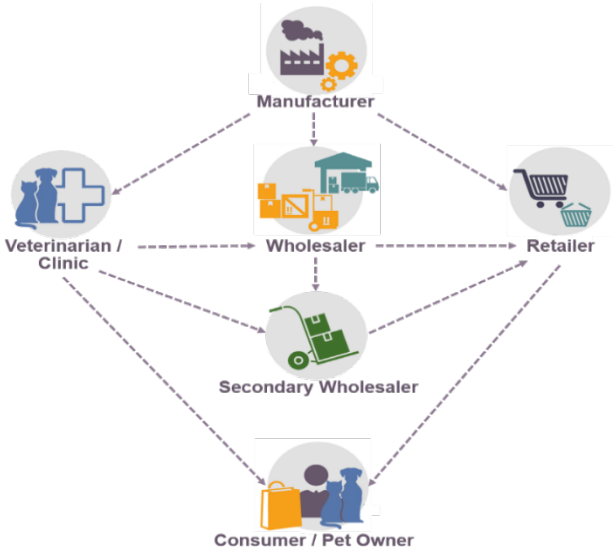
As this Court has previously heard,[2] pet owners have historically purchased pet medication products through their veterinarians, in part due to manufacturer policies restricting sales of their pet

[1] *See also* Exhibit 1, PetIQ Jefferies 2018 Consumer Conference PowerPoint Presentation, p.12 (hereinafter "Jefferies Presentation"). PetIQ files contemporaneously with the Motion to Dismiss Plaintiffs' Complaint a Request for Judicial Notice regarding the FTC Report. Any exhibit referred to herein may be found attached to the Declaration of David E. Dahlquist filed contemporaneously.

[2] Defendants limit their discussion of the industry here to avoid repeating details with which the Court has already become familiar.

medications to veterinarians. (FAC ¶¶ 27-30.) However, recently and increasingly, these consumers have been able to purchase the exact same products (1) from non-veterinarian retailers[3] who obtain the products from a secondary wholesaler who purchased excess product from veterinarians, (2) from manufacturers that either do not have veterinarian-only sales policies (Bayer) or that make spot sales or leak product to retailers, (Exhibit 2, Federal Trade Commission Staff Report, "Competition in the Pet Medications Industry: Prescription Portability and Distribution Practices" (May 2015), pp.4, 79-80 (the "FTC Report"))[4], or (3) from manufacturer-authorized wholesalers, who sometimes ignore the veterinarian-only sales policies and may also purchase excess product from veterinarians. (FTC Report, p.11-12; FAC ¶¶ 28, 30.) A diagram of the participants and flow of goods in the pet medication industry is below.

Image A: Pet Medication Industry



The "unconventional" distribution system (FAC ¶ 5) and the resulting number of players that has subsequently emerged, provide retailers with a broad source of veterinary wellness and medication products that Plaintiffs allege were traditionally limited to veterinarian clinics. (FAC ¶ 31.) This distribution system, known as "diversion" or the "secondary distribution system," resulted in increased competition from retailers that pushed veterinarian clinics to maintain lower prices in order to remain competitive. (FTC Report, pp.20, 26.) The FTC has concluded that

[3] Unless otherwise noted, "retailers" refers to non-veterinarian retailers.
[4] Available at https://www.ftc.gov/system/files/documents/reports/competition-pet-medications-industry-prescription-portability-distribution-practices/150526-pet-meds-report.pdf.

"increased competition between veterinarians and other retailers result[s] in additional purchasing options and potentially lower prices for consumers, particularly for [over the counter] flea and tick products." (FTC Report, p.90.) Further, the FTC commented that consumers already benefit from price competition between veterinarians and non-veterinarian retailers, and "continued growth of retail distribution could increase competition and lead to lower prices for pet medications in both veterinary and retail channels." (FTC Report, p.28.)

Plaintiffs further allege, citing a PetIQ earnings call transcript, that pet medications in the distribution system are "unmeasured." Exhibit 3, *PetIQ's CEO McCord Christensen on Q1 2018 Results – Earnings Call Transcript*, p.9 (hereinafter "PetIQ Earnings Call Transcript").[5] This allegation is belied, in the next paragraph of the same earnings call transcript upon which Plaintiffs rely, by the reference to Nielsen data on "flea and tick category" product sales. Plaintiffs thus allege a flawed relevant market definition by use of the term "unmeasured," a term that at the same time includes and excludes retailers that sell the same pet medications, based on the arbitrary distinction of which products may or may not be "measured" by a third-party firm.

II. THE PARTIES

PetIQ[6] acts as a wholesale distributor of prescription and over the counter pet medications, in addition to manufacturing and distributing generic pet medications as well as pet treats and other pet wellness products. (FAC ¶ 18.) PetIQ distributes such products to both measured and unmeasured retailers, such as "Walmart, Target, Kroger, Albertsons, Publix, Meijer, Costco, Sam's Club, BJ's Wholesale Club, PetSmart, Petco, Phillips Pet Food and Supplies, Animal Supply Co., Amazon.com, Chewy.com, Walmart.com, Jet.com, PetSmart.com, PetCo.com, and others." *Id.* VIP Petcare, by contrast, operates a chain of thousands of veterinary clinics around the country, through which they offer veterinarian services and sell pet medications directly to pet owners. (FAC ¶ 17.) VIP Petcare

[5] Available at https://seekingalpha.com/article/4174496-petiqs-petiq-ceo-mccord-christensen-q1-2018-results-earnings-call-transcript?part=single.

[6] Plaintiffs have named PetIQ, Inc. as opposed to PetIQ, LLC, the party that acquired VIP Petcare. PetIQ, LLC is a wholly owned subsidiary of PetIQ Holdings, LLC. PetIQ, Inc. is the managing member of PetIQ Holdings, LLC. Because PetIQ, Inc. did not acquire VIP Petcare, PetIQ, Inc. is an improper party to this litigation. For purposes of this Motion, "PetIQ" will refer to PetIQ, LLC, the acquirer of VIP Petcare. *See Glass Egg Digital Media v. Gameloft, Inc.*, 2018 WL 500243, at *3-4 (N.D. Cal. Jan. 22, 2018) (Chesney, J.) (wholly conclusory allegations of a parent company's control of a subsidiary are insufficient to establish alter ego at the Rule 12 stage); *see also Corcoran v. CVS Health Corporation*, 169 F. Supp. 3d 970 (N.D. Cal. 2016).

also operates as a wholesale distributor, selling pet medications to other third party wholesalers for sale to non-veterinarian retailers. (*Id.*) Plaintiffs allege that VIP is a horizontal competitor (FAC ¶ 11) but then inconsistently allege that VIP does not sell pet medications directly to retailers (FAC ¶ 17, 22). PetIQ announced its acquisition of VIP Petcare on January 8, 2018, and the acquisition was consummated on January 17, 2018. (FAC ¶ 22.)

Plaintiffs describe themselves as "diverters," or secondary wholesale distributors, that operate through common ownership. Med Vets Inc. distributes "unmeasured veterinary pharmaceutical products to non-veterinary retailers" (FAC ¶ 15), whereas Bay Medical Solutions Inc. distributes "unmeasured over-the-counter ('OTC') pet medications to non-veterinarian retailers" (FAC ¶ 16). Both Plaintiffs are headquartered at the same address in Ft. Myers, Florida. (FAC ¶¶ 15, 16.) Plaintiffs allege that, as a result of the challenged Acquisition, Bay Medical "has been foreclosed" from its retail customers and Med Vets "is being foreclosed from supplying the market" (FAC ¶ 14). However, the Amended Complaint does not include allegations regarding Plaintiffs' customer pool, sales pre- and post-Acquisition, or why and how they have been "foreclosed" from their retailer customers.

III. THE COMPLAINT

The Amended Complaint alleges that the relevant market is "the wholesale distribution to non-veterinary retailers of unmeasured veterinary wellness and medication products. The market, therefore, is defined by type of customer: non-veterinarian retailer." (FAC ¶ 24.) This is a revision from Plaintiffs' original complaint, which defined the relevant market as "wholesale markets for prescription and restricted pet parasiticides for distribution to non-veterinary retailers." (Compl. ¶ 29.) Despite the revision, the relevant market offers puzzling and vague parameters which fail to meet the necessary plausible market standard.

The most puzzling and self-defeating change is the limitation of the new relevant market definition to "unmeasured products." Plaintiffs allege that "[m]easured products are those that are traced by retail measurement services such as The Nielsen Company" whereas "[u]nmeasured products are available in retail stores such as Petco, PetSmart, Wal-Mart or Sam's Club, but sales of these products are not tracked by firms such as Nielsen." (FAC ¶ 2.) However, Petco, PetSmart,

Wal-Mart and Sam's Club are in fact *measured* accounts, as are Target and a long list of supermarkets and regional pet stores; whereas Chewy, Inc., Costco, Amazon, and a host of other retailers are *unmeasured*. And Nielsen measures flea and tick medication sales for retailers that report to Nielsen (Earnings Call Transcript, p.9), which Plaintiffs allege are the cornerstone of their business. (*See, e.g.*, FAC ¶ 16.) They further allege "most or all" of the products included in their relevant market are unmeasured and "the principal channel through which unmeasured preventative pet medications reach retailers is through veterinarian practices that choose to resell pet medications to the wholesale market rather than directly to the public." (FAC ¶¶ 2, 3.) They also allege that "these products [animal health medications] are supposed to be sold only by veterinary clinics and pharmacies and not through non-veterinary retail stores. They are therefore not tracked by Nielsen or other retail measurement firms and are thus 'unmeasured.'" (FAC ¶ 4.)

Plaintiffs repeatedly refer to unmeasured products throughout the Amended Complaint, but they never square this allegation with the PetIQ Earnings Call Transcript upon which the Amended Complaint relies, which states that it is in fact retail accounts that are measured or unmeasured, not products. (FAC ¶ 34 (quoting PetIQ Earnings Call Transcript, p.9 ("[W]e've got an extremely diversified business that has significant customer diversification between measured and unmeasured accounts. This is the first time I've ever communicated that our measured accounts to report through Nielsen in Q1 was 36% of our business, which means unmeasured accounts were 64%. Unmeasured accounts are doing extremely well and made up for any disappointment we would have had in the measured accounts. Nielsen data had flea and tick category in total negative 18% through the end of Q1.").) In addition, the Amended Complaint does not specify how "measurement" is determined by Nielsen, what firms other than Nielsen exist and measure product sales, or who decides whether a particular sale will be measured. Further, the Amended Complaint glosses over the fact that the measured/unmeasured distinction refers to sales to pet owners, who Plaintiffs expressly exclude from the relevant market alleged. (FAC ¶ 24.)

In addition to the newly added "unmeasured" allegations, the Amended Complaint asserts that the relevant market is defined by the customer (the non-veterinarian retailer) and cites to the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines to allege

that markets can be defined by the customers targeted by the alleged conduct. (FAC ¶ 24.) The Amended Complaint does not, however, add any allegations as to how or why the non-veterinarian retailer – as opposed to the ultimate pet-owner or some other market participant – is the appropriate customer to measure the market. Further, while Plaintiffs allege that "the secondary distribution system is the only mechanism through which retailers can obtain unmeasured veterinary wellness and medication products" (*Id.*), the Amended Complaint allegations actually state that Bayer, a major manufacturer including of flea and tick products, sells directly to retailers. (FAC ¶ 28.). And the FTC Report, upon which Plaintiffs rely, states that **manufacturers and their authorized distributors also make sales to retailers**. (FTC Report, pp.4, 79-80.) Nonetheless, the Amended Complaint alleges that manufacturer sales directly to retailers are excluded. And because the Amended Complaint blurs the line between wholesalers and secondary wholesalers, it is unclear whether wholesale distributors are included in the market or if the market is comprised solely secondary distributors like Plaintiffs. (*See* Image B below.)

Image B: Relevant Market Alleged

Plaintiffs make two claims based on their allegations. First, they allege that the Acquisition violates Clayton Act Section 7 because the Acquisition "may . . . substantially . . . lessen competition or tend to create a monopoly in a line of commerce." (FAC ¶ 2.) Second, they allege that the Acquisition violates Sherman Act Section 2 because Defendants have "succeeded in monopolizing the wholesale distribution to non-veterinary retailers of unmeasured veterinary wellness and

medication products . . . or attempting to do so." (FAC ¶ 13.) However, after four attempts to plead a complaint, the 15-page Amended Complaint is built on conclusory statements and allegations amounting to acknowledgement of PetIQ and VIP Petcare's lawful business acumen, and Plaintiffs have not and cannot sufficiently plead that the Acquisition violates either Clayton Act Section 7 or Sherman Act Section 2 as alleged.

ARGUMENT

IV. APPLICABLE STANDARD

To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). The Court accepts all allegations of material fact as true and construes them in the light most favorable to the plaintiff. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002). However, factual allegations couched as legal conclusions need not be accepted as true. *Twombly*, 550 U.S. at 555-56. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*); *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (discussing *Iqbal*). Further, and in recognition of the high costs of discovery in antitrust cases, this court has looked for "higher degree of particularity in the pleadings" in these cases. *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 WL 3429568, at *2 (N.D. Cal. Oct. 22, 2009) (internal quotation marks omitted). Plaintiffs have failed to meet the standard required by this Court.

V. ALL CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS AGAIN FAIL TO ALLEGE MARKET POWER IN A RELEVANT MARKET

The Amended Complaint must fail just as the original complaint did because it does not allege a plausible relevant market as is necessary for all Plaintiffs' claims. *See, e.g., United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (Clayton Act Section 7); *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 492 (9th Cir. 1977) (Sherman Act Section 2). Without a properly pleaded relevant market, the Amended Complaint

cannot adequately allege market power, a deficiency that is also fatal to the claims. *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 972-73 (9th Cir. 2008); *Digital Sun v. The Toro Co.*, 2011 WL 1044502, at *3 (N.D. Cal. Mar. 22, 2011). But further, the Amended Complaint's allegations regarding market power mischaracterize the facts presented and are insufficient to plausibly plead market power. As such, Plaintiffs' claims must fail.

A. Plaintiffs Again Fail to Properly Allege a Relevant Market

Plaintiffs' fourth attempt at a complaint again "has a lot of overarching statements about the market, but they are not really supported by facts." MTD Hg. Tr. 38:8-10. The Amended Complaint's allegations regarding the relevant market are vague and contradictory, the same reasons their complaint was previously dismissed, and the amended allegations create additional issues, which further hopelessly confuse reality. *See Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120-21 (9th Cir. 2018). Moreover, the Amended Complaint does not satisfy any test this Court may apply because it fails to provide sufficient facts for the court to evaluate its plausibility. The Ninth Circuit generally applies an interchangeability test to determine if a relevant market is properly pleaded.[7] Under the interchangeability test, the market must be defined so that all products within it are reasonably interchangeable such that if the price of one product increases, a consumer could reasonably purchase an alternative product to serve the same function. *See e.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992) (relevant product market determined by choices available to consumers and is comprised of those products having reasonable interchangeability); *Colonial Medical Group, Inc. v. Catholic Health Care West*, 444 Fed. App'x. 937, at *1 (9th Cir. 2011) (per curiam mem.). Because of these fatal flaws, the Amended Complaint must fail.

1. Plaintiffs Fail to Plead Sufficient Facts Regarding Relevant Market

The relevant market alleged in the Amended Complaint is "the wholesale distribution to non-veterinary retailers of unmeasured veterinary wellness and medication products." (FAC ¶ 24.)

[7] However, even under the SSNIP test, Plaintiffs' relevant market must fail. Under the SSNIP test, the market should be defined by whether a hypothetical monopolist could profitably impose a "small but significant nontransitory increase in price" in the proposed market. *See, e.g., Saint Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015) ("If enough consumers would respond to a SSNIP by purchasing the product from outside the proposed geographic market, making the SSNIP unprofitable, the proposed market definition is too narrow.").

Other than the additional limitation to "unmeasured" products and an attempt to redefine the market with the "product" alleged as distribution services,[8] the Amended Complaint's relevant market is essentially the same as was alleged in the original complaint without any additional factual matter to sustain it. Namely, because the relevant market is both vague and contradictory as to which industry players are included or excluded and fails to adequately allege facts explaining the arbitrary inclusions or exclusions, the relevant market definition is too amorphous to withstand *Twombly* requirements. The Amended Complaint's relevant market suffers from the following fatal errors, just as the original complaint did:

Image B: Relevant Market Alleged

First, *without alleging facts*, Plaintiffs stop the market short of pet owners/consumers, alleging instead that retailers are the "customers" for purposes of defining the relevant market. (FAC ¶¶ 12, 24, 37.) Plaintiffs support this allegation, not with any facts regarding the market, but with a citation to a DOJ merger guideline standing only for the proposition that a market can be defined by the type of customer. (FAC ¶ 24.) However, even assuming they are correct that the market can be defined by the retail customer here, the Amended Complaint contains no facts to

[8] The only support Plaintiffs provide are two inapposite FTC cases, both of which specify that because there was low cross-elasticity of demand between the separate distribution channels, they could be seen as not interchangeable and thus different markets, and Plaintiffs make no such allegations here. *See Fed. Trade Comm'n. v. Staples, Inc. and Office Depot, Inc.*, 970 F. Supp. 1066, 1078, 1780 (D.D.C. 1997) (there was "low cross-elasticity of demand between the consumable office supplies sold by superstores and those sold by other sellers," so superstores could be considered a separate relevant product market); *Fed. Trade Comm'n. v. Sysco Corp. and U.S. Foods, Inc.*, 113 F. Supp.3d 1, 27 (D.D.C. 2015) (a "product" comprising a market "need not be a discrete good for sale," and broadline food distribution qualified as a relevant market based on the *Brown Shoe* substitutability indicia) (quotations omitted).

explain why the retailer, instead of the end user pet owner, is the appropriate customer around which the market should be defined in this case. In fact, the only factual matter before the Court on this point, contained in the FTC Report, which Plaintiffs again incorporate by reference into the Amended Complaint, concludes that veterinary pricing is responsive to retailer pricing. (FTC Report, p.4 ("Furthermore, some veterinarians appear to have already responded to price competition from other retail distribution channels by lowering their prices for certain pet medications.").) The price sensitivity between retailers and veterinarian retailers suggests that the pet owner should be included in the market, because their actions (their purchases) affect the pricing at their pet medication sources. As such the exclusion of pet owners is not supported by the allegations of the Amended Complaint.

Second, *without alleging facts*, the Amended Complaint excludes veterinary clinics who participate in the secondary distribution system from the relevant market alleged. But this exclusion is contradicted by other allegations, and Plaintiffs now allege that VIP is a horizontal competitor (FAC ¶ 11), which would indicate that VIP is a part of the relevant market alleged. Extending this to its logical conclusion, veterinary clinics that also operate as distributors should be included in the relevant market alleged. Further, any veterinary clinic that chooses to operate as a distributor in the future may enter the relevant market alleged. It is implausible that only some veterinarian clinics would be a part of the market while others are excluded, and such a market definition is entirely unwieldy. Moreover, the price sensitivity between retailers and veterinarian clinics (*see supra*, FTC Report, p.4) indicates substitutability and requires that these sales are part of the same market.

Third, *without alleging facts*, the Amended Complaint attempts to blur the line between wholesalers and secondary wholesalers and fails to properly allege whether both types are included in the relevant market. The relevant market allegation notes that "wholesale distribution" generally is part of the market, but the allegation then states that "the secondary distribution system is the only mechanism through which retailers can obtain unmeasured veterinary wellness and medication products," which suggests that only secondary wholesalers are included in the relevant market as alleged. (FAC ¶ 24.) This contradiction appears throughout the Amended Complaint, further confusing whether wholesalers are included in the relevant market.

Fourth, *without alleging facts*, the Amended Complaint excludes manufacturer sales directly to retailers. In fact, their own allegations expressly acknowledge that at least one manufacturer sells directly to retailers. (FAC ¶ 30.) And the Amended Complaint offers no facts to explain the exclusion of sales by manufacturers of the pet wellness and medication products to the very retailers around whom Plaintiffs argue the market should be defined. It is illogical that one source of pet medications be included (via secondary wholesale distribution) while another be excluded (direct from manufacturer). Rather, a retailer-customer is likely to view these two sources as interchangeable, thus mandating the manufacturer sales inclusion in the market definition. *See Brown Shoe*, 370 U.S. at 325.

Given that a relevant market is necessary for the claims Plaintiffs bring, these defects are fatal to the Amended Complaint. Further, this Court highlighted repeatedly for Plaintiffs the deficiencies in their relevant market definition. MTD Hg. Tr. 7:24-8:1, 24:19-25:25, 38:8-17. This is now the fourth time Plaintiffs have proposed amendments to their complaint, and the continued flaws make clear that they will be unable to plead a plausible relevant market and the Amended Complaint should be dismissed with prejudice.

2. Plaintiffs' Limitation of the Market to "Unmeasured" Products Renders It Implausible

Plaintiffs further confuse their relevant market definition by restricting it to "unmeasured" pet wellness and medication products. Plaintiffs allege that "unmeasured" refers to "products" the sales of which "are not tracked by firms such as Nielsen." (FAC ¶ 2.) As described above, the allegations distort the term "unmeasured," making it seem as though sales of certain products (in this case, pet wellness and medication products) are never tracked. This is untrue and fundamentally misappropriates Plaintiffs' source of these terms, the PetIQ Earnings Call Transcript, which discusses unmeasured *accounts* and Nielsen sales data for flea and tick products. (PetIQ Earnings Call Transcript, p.9.) As a result, the Amended Complaint alleges that only *some* retailers are included in the relevant market, while others are arbitrarily excluded.

Worse for Plaintiffs, because retailers themselves determine whether or not to share sales data with Nielsen, Plaintiffs allege a relevant market that includes or excludes sales based solely on

whether *retailers choose* to have their sales to pet owners[9] tracked by third party measurement firms. Plaintiffs incorrectly use this terminology, because it is not *products* that may be measured or unmeasured; rather it is *accounts*—the retailers themselves determine whether or not to share sales data with measurement firms such as Nielsen. (PetIQ Earnings Call Transcript, p.9.) Plaintiffs thus allege a relevant market that *includes* Costco but *excludes* Wal-Mart. This makes no sense. And it certainly does not meet any legal standard for market definition, particularly because the Amended Complaint not only offers no facts to support this market definition, it obscures how the market is being defined with its misuse of terminology. In sum, it is simply illogical that the relevant market should include only *some* flea and tick medication sales at only *some* retailers (a distinction only made by whether a particular retailer chooses to share its sales data with a measurement firm like Nielsen), and such artificially created parameters to the relevant market establish its implausibility.[10]

3. Plaintiffs' Relevant Market Includes Even More Products That Are Not Interchangeable

Finally, the Amended Complaint alleges that the market is comprised of distribution of "unmeasured veterinary wellness and medication products." (FAC ¶ 24.) The Amended Complaint provides no definition for "unmeasured veterinary wellness and medication products," but it does define "unmeasured pet medications" as parasiticides, vaccines, antibiotics, and analgesics. (FAC ¶ 26.) It further defines parasiticides as including "preventative medications against conditions such as fleas, ticks, and heartworm." *Id.* This product list is far broader than the products alleged in the original complaint, which included only prescription and restricted pet parasiticides. (*See* Compl. ¶ 29.) The new broader product list, and the distribution thereof, fail the interchangeability test. A retailer interested in stocking its shelves with flea and tick medication such as Frontline is not going to purchase heartworm medication if the price of Frontline increases, let alone a vaccine, antibiotic,

[9] Plaintiffs' reliance on measured/unmeasured sales to consumers as a determining factor of which retailers are included in the market is further evidence of the illogic of using retail customers, rather than pet owners as the relevant customer in Plaintiffs' proposed market. *See supra*.

[10] Plaintiffs' decision to exclude measured retailers may be an effort to absolve themselves of the need to plead market power for the relevant market they have alleged since they fail to provide any such share numbers. Even if it did, they have not pleaded any facts to support their conclusory allegations that Defendants have market power in the alleged market, including facts about their sales, customers, or why the transaction they are challenging foreclosed them from any customer.

or analgesic.[11] As such, the relevant market fails to plead with specificity either products or distribution of products, and the Amended Complaint must fail.

B. Plaintiffs Again Fail to Allege Market Power as Their Claims Require

Even if Plaintiffs had alleged a relevant market properly, the Amended Complaint again fails to allege that the Acquisition "creates or enhances 'market power'" in the relevant market.[12] *United States v. Oracle*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) (citing *Eastman Kodak Co.*, 504 U.S. at 464 and *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)). The Amended Complaint's market power allegations fail in two ways. First, the Amended Complaint offers two allegations of Defendants' market share that Plaintiffs incorrectly argue relate to the relevant market. Second, with the exception of these two incorrectly used percentages, Plaintiffs rely upon conclusory allegations regarding "control" or "power" without pleading the specificity that *Twombly* and its ilk require.

The Amended Complaint offers only two percentages that Plaintiffs purport represent PetIQ's market share after the acquisition of VIP. However, neither of these percentages are correctly characterized or related to Plaintiffs' current proposed market. Plaintiffs allege, citing a Jefferies Consumer Conference presentation from June 2018, that "PetIQ now claims to distribute a '95% Share of [prescription] in Retail.'" (FAC ¶ 33.) However, because the Amended Complaint's relevant market is both broader and narrower than pet prescriptions sold at retailers since it includes all products (e.g. prescription and non-prescription) but only at some retailers (e.g. measured but not unmeasured), this percentage is meaningless. Further, Plaintiffs offer no facts to give context to how much of their relevant market prescription medications represent. As such, this 95% figure does nothing to help them meet their burden to plead market power.

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[11] Moreover, this definition fails the less commonly used SSNIP test, because the SSNIP test begins with "the smallest possible group of competing products" before broadening the proposed market by slowly adding substitutable products until a hypothetical monopolist could profitably impose a small but significant nontransitory increase in price. *United States v. Oracle Corp.*, 331 F. Spp. 2d 1098, 11 (N.D. Cal. 2004). Instead, the Amended Complaint begins with the distribution of an overbroad product list that makes the application of the SSNIP test impossible.

[12] Because Plaintiffs have failed to properly allege a relevant market, their allegations as to market power also fail. Failure to properly allege the relevant market is fatal to a market power allegation. *See, e.g.*, *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 972-73 (9th Cir. 2008) (affirming grant of motion to dismiss where complaint failed to plead any facts relating to "the amount of power or control" in the relevant market); *Digital Sun v. The Toro Co.*, 2011 WL 1044502, at *3 (N.D. Cal. Mar. 22, 2011) (dismissing complaint where plaintiff failed to allege defendant's share of the relevant market and failed to plead sufficient facts supporting an inference of market power).

Plaintiffs also allege, again citing the Jefferies Presentation, that "defendant PetIQ now claims to distribute . . . 90% of 'direct purchasing from animal health suppliers' for delivery to retailers." (FAC ¶ 33.) This incorrectly quotes the Jefferies Presentation. Instead, the presentation notes that PetIQ receives 90% *of its supply* from animal health suppliers. (Jefferies Presentation, p.12.) It does not estimate PetIQ's share of distribution to retailers.

In fact, the Jefferies Presentation upon which Plaintiffs rely suggests that PetIQ, even post-Acquisition, maintains too small a percentage of the industry to possess market power. The Jefferies Presentation indicates that as of June 2018, PetIQ projected a $450-500 million business for 2018. (Jefferies Presentation, p.16.) In comparison, according to the FTC Report, "U.S. retail sales of companion animal pet medications are expected to grow to $10.2 billion by 2018." (FTC Report, p.9.) Even assuming (albeit incorrectly) that all of PetIQ's $450-$500 million net revenue derives from pet medication sales, that number is far too small to represent market power in a $10.2 *billion* market.

Beyond these two misleading percentages, the Amended Complaint offers nothing but amorphous and conclusory allegations as to market power. Instead, Plaintiffs make bold assertions that the Acquisition allows PetIQ to "dominate the secondary distribution market and [force] other secondary distributors to exit." (FAC ¶ 11). They further allege that other distributors "are being foreclosed from the retail customer base and have been or may be forced to exit the market." (FAC ¶ 37). However, Plaintiffs provide no specific facts regarding this alleged dominance or foreclosure (including no facts how the Acquisition allegedly foreclosed Plaintiffs from customers). Instead, Plaintiffs attempt to rely solely on conclusory allegations of market power and misleading percentages. Because Plaintiffs cannot plead market power with specificity, they cannot sustain claims under Clayton Act Section 7 or Sherman Act Section 2, and their claims should be dismissed with prejudice.

VI. PLAINTIFFS' CLAIMS MUST FAIL BECAUSE THEY LACK ANTITRUST STANDING

As with the first complaint, Plaintiffs do not sufficiently allege injury to "*competition*, not *competitors*," as required for antitrust standing. *Brown Shoe v. United States*, 370 U.S. 294, 344

(1962). "Antitrust standing is distinct from Article III standing," and a "plaintiff who satisfies the constitutional requirement of injury in fact is not necessarily a proper party to bring a private antitrust action," because "[t]he antitrust laws do not provide a remedy to every party injured by unlawful economic conduct." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1054 n.3, 1055 (9th Cir. 1999). Here, Plaintiffs have failed to properly allege that they suffered any injury caused by the conduct the allege, much less any anticompetitive aspect of that conduct. *See Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977) (Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."). The failure to establish antitrust standing is fatal to Plaintiffs' allegations, and on that basis the Amended Complaint should be dismissed.

To demonstrate antitrust injury, a plaintiff must allege: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (citations omitted). "Courts vet a plaintiff's ability to establish antitrust injury at the pleading stage, because a plaintiff's ability to establish antitrust injury depends less on the plaintiff's proof than on its underlying theory of injury. . . ." *Korea Kumho*, 2008 WL 686834, at *3; *see also Pool Water Prod. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (affirming dismissal for lack of antitrust injury and noting that identifying antitrust injury is "[t]he most important limitation" to standing for antitrust claims).

Plaintiffs' allegations of harm are conclusory at best and fail to allege with specificity a harm to *competition*. The Amended Complaint is devoid of allegations of increased prices, customers lost, or unavailability of supply. Notably, while much of their latest complaint focuses on the "*unfettered access*" to product the Acquisition provides PetIQ, Plaintiffs never allege that they are unable to access any product at issue. (*See* FAC ¶ 11.) The only fact in the record on that point is Plaintiffs' counsel's judicial admission at the prior hearing that VIP represented only a small source of their supply prior to the Acquisition. MTD Hr. Tr. 32:18-21 ("Our client got some product from VIP, not by any means a large proportion of their product, in the past."). Plaintiffs do not allege, and have never alleged, that

they, or any other secondary distributor, has been, is, or will be unable to obtain supply of pet wellness products as a result of the Acquisition.

Plaintiffs' only allegation of injury is that they have been "foreclosed from customers." But, as this Court already highlighted to Plaintiffs this allegation is "pretty much devoid of facts." MTD Hg. Tr. 38:8. In particular, as the Court further noted, Plaintiffs failed (and still fail) to avail themselves of the information and statistics *about their own business*. MTD Hg. Tr. 19-:25-20:1 ("Plus, your client knows, for example, what they have gotten over the years from the various sources."). Plaintiffs do not allege from whom they have been foreclosed or how any loss of customers is related to the Acquisition, despite the Court's admonitions.[13]

As a result, Plaintiffs have failed to sufficiently allege a harm to competition that amounts to antitrust injury. Because Plaintiffs have failed to establish that they suffered any form of antitrust injury, they do not have antitrust standing, and their claims must be dismissed. *E.g.*, *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120 (9th Cir. 2008) ("The Supreme Court has interpreted [Section 4] narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits."); *American Ad Management*, 190 F.3d 1051.

VII. PLAINTIFFS FAIL TO ALLEGE COGNIZABLE CLAIMS UNDER CLAYTON ACT SECTION 7 OR SHERMAN ACT SECTION 2

The Amended Complaint's failures with respect to relevant market, market power, and antitrust injury discussed above are fatal to its claims. While this Court need not reach the issue, the Amended Complaint must also be dismissed because Plaintiffs fail to plead cognizable claims under Clayton Act Section 7 and Sherman Act Section 2. As the Amended Complaint demonstrates, Plaintiffs cannot meet their burden to establish that the Acquisition risks the "substantial lessening of competition" or that it has a "tendency to create monopoly," as required under Clayton Act Section

[13] The only allegation that sheds any light on why retailers would choose to purchase from PetIQ, instead of Plaintiffs, is in Paragraph 22, and suggests that PetIQ has been able to pass more "favorable terms" to retailers, "including not only product price, but also duration…, quantity, packaging, [and] bundled discounts." Rather than supporting Plaintiffs' claims, these facts would suggest procompetitive effects of the Acquisition are benefiting retailers and pet owners, negating conclusory allegations of *anticompetitive* harm to Plaintiffs or any harm to *competition* writ large. *Brunswick Corp.*, 429 U.S. at 489; *Brown Shoe*, 370 U.S. at 325.

7, nor that there exists a "specific intent to monopolize" with a "dangerous probability of success" as Sherman Act Section 2 requires. As such, the Amended Complaint should be dismissed.

A. Clayton Act Section 7

Clayton Act Section 7 forbids acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. To state a claim, "a plaintiff must allege that the acquisition will create an appreciable danger of anticompetitive consequences." *Reyn's Pasta Bella, LLC v. Visa U.S.A.*, 259 F. Supp. 2d 992, 1003 (N.D. Cal. 2003), aff'd, 442 F.3d 741 (9th Cir. 2006). This is a high bar, and acquisitions that do not create a monopoly or lessen competition—even if they injure a competitor or are otherwise objectionable—do not violate the Clayton Act. *Id.*

Here, Plaintiffs complain in conclusory terms that the Acquisition risks "lessen[ing] competition or monopoly" and then allege that "the likely effect of the defendants' acquisition will be to lessen competition substantially in a line of interstate trade and commerce, *to-wit*: the wholesale distribution to non-veterinary retailers of unmeasured veterinary wellness and medication products. . . ." (FAC ¶¶ 41, 44.) However, such conclusory statements fail to plausibly allege that the Acquisition "had anti-competitive effects, or that anti-competitive acts made possible by the acquisition occurred." *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881, 887 (9th Cir. 1979). Indeed, despite the Court's suggestion that they include allegations regarding how the Acquisition has affected their own business (MTD Hg. Tr. 7:24-8:1, 24:19-25:25, 38:8-17), Plaintiffs offer no details regarding their own access to supply or sales to retailers. And while they assert that Plaintiff Bay Medical "has been foreclosed" from its retail customers and Plaintiff Med Vets "is being foreclosed from supplying the market" (FAC ¶ 14), the Amended Complaint fails to properly allege how these purported foreclosures could be linked to the Acquisition. As such, Plaintiffs' failure to properly allege how the Acquisition risks lessening competition justifies a dismissal of their Clayton Act Section 7 claim.

B. Sherman Act Section 2

So too do Plaintiffs' monopolization and attempted monopolization claims fail. For a Sherman Act Section 2 claim, "a plaintiff must prove (1) that the defendant engaged in predatory or

anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *see also In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027, 1031 (N.D. Cal. 2008) (To establish a claim, a plaintiff must properly allege two elements: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966)) (citations omitted).

Here, Plaintiffs rely on conclusory allegations that the Acquisition "has created a monopoly in the relevant market or created a dangerous probability that PetIQ will succeed in monopolizing the relevant market" (FAC ¶ 41) or that the Acquisition tends to "create a monopoly in the defined market" (FAC ¶ 13). But recitations of the Sherman Act Section 2 legal standard do not satisfy Plaintiffs' burden to plead plausible facts under *Twombly*. Rather, Plaintiffs must allege predatory or anticompetitive conduct *with a specific intent to monopolize*, and the failure to plead such facts is fatal to these claims. As such, Plaintiffs' monopolization and attempted monopolization claims must be dismissed.

VIII. PLAINTIFFS SPECIFICALLY LACK STANDING FOR INJUNCTIVE RELIEF UNDER CLAYTON ACT SECTION 16

Plaintiffs also specifically lack standing for Clayton Act Section 16 injunctive relief for a number of reasons. First, the Amended Complaint fails to allege a loss or injury in equity that is likely and not speculative. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008). Second, injunctive relief is only appropriate to prevent future violations. *See, e.g.*, *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952). Third, they have failed to show that an adequate remedy at law does not exist, and Plaintiffs in fact seek such a remedy in the form of monetary damages. *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1122 (N.D. Cal. 2011), *aff'd*, 554 F. App'x 598 (9th Cir. 2014). Fourth, the balance of equities does not favor injunctive relief because it would provide Plaintiffs with an unprecedented windfall. *See Orson, Inc. v. Miramax Film Corp.*, 836 F. Supp. 309, 314 (E.D. Pa. 1993). And fifth, specifically for divestiture, Plaintiffs have failed to establish the elements necessary for any form of permanent injunctive relief. *Sierra Forest*

Legacy v. Sherman, 646 F.3d 1161, 1184 (9th Cir. 2011). Because Plaintiffs have failed to meet the standards for permanent injunctive relief and provide no compelling reason as to why they should be excepted from such a standard, injunctive relief of any form should be denied.

IX. DISMISSAL WITH PREJUDICE IS APPROPRIATE

This is now the fourth time that Plaintiffs have attempted to cure the deficiencies of their allegations. Their "repeated failure[s] to cure deficiencies" warrant dismissal with prejudice because it is clear that the complaint "[can]not be saved by amendment." *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1062)). When this Court provided them with 60 days to amend their Complaint, Plaintiffs noted that "if we can't do it in 60 days, then we can't do it." MTD Hg. Tr. 47:18-19. More than four months passed between the Hearing on the Motion to Dismiss Plaintiffs' Original Complaint and the filing of the Amended Complaint. Plaintiffs have been given multiple opportunities and extended time to amend their allegations but have failed to state a viable claim. This Court should take them at their word that they "can't do it." As any further amendment would be futile, the Amended Complaint should be dismissed with prejudice.

CONCLUSION

For all the foregoing reasons, PetIQ and VIPH respectfully request that the Court dismiss the Amended Complaint with prejudice.

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