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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' COMPLAINT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: July 13, 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

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on July 13, 2018 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' 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: June 1, 2018

WINSTON & STRAWN LLP

By: */s/ David E. Dahlquist*

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PRELIMINARY STATEMENT

Plaintiffs' Complaint is an attempt by two disgruntled market competitors to belatedly challenge a transaction in the highly competitive pet medicine industry – a transaction that will produce more competition, greater availability of products and services, as well as lower prices to end customers. Pursuant to Federal Rule of Civil Procedure 12(b)(6), PetIQ and VIPH hereby move to dismiss with prejudice Plaintiffs' Complaint (the "Complaint") (Dkt. 1). The Complaint falls short on numerous fatal grounds, including failure to allege a proper relevant market or market power, lack of standing under Article III and lack of antitrust injury, and inadequately pled claims under Clayton Act Section 7, Clayton Act Section 2(f) and Sherman Act Section 2.

On January 17, 2018, nearly three months before the Plaintiffs' Complaint was filed, PetIQ, LLC[1] acquired Community Veterinary Clinics, LLC d/b/a/ VIP Petcare ("VIP Petcare") (the "Acquisition"). The vertical acquisition has allowed PetIQ to expand into parts of pet health and wellness industry in which it did not previously operate—principally veterinary services. Prior to the Acquisition, PetIQ was, among other things, a wholesale distributor of prescription and over the counter pet medications to retailers and consumers. PetIQ's entire business was focused on providing consumers convenient access and affordable choices of veterinarian-quality pet health and wellness products through leading national retailers. VIP Petcare, by contrast, operated thousands of veterinary clinics across the country and supplied pet medications from its veterinary clinics to consumers, as well as to wholesale distributors such as PetIQ. Consolidation of a wholesale distributor and veterinarian clinic/wholesale supplier has created efficiencies in the distribution chain and provided consumers with purchasing alternatives that were not previously available.

[1] Plaintiffs have named PetIQ, Inc. as opposed to PetIQ, LLC, the actual 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) ("To survive a [Rule 12] motion on an alter ego theory a plaintiff must make a prima facie showing that both (1) there is a unity of interest and ownership between the corporations such that their separate personalities do not actually exist, and (2) treating the corporations as separate entities would result in injustice.") (citations omitted).

Historically, there have been multiple potential distribution chains for pet medications to travel from manufacturer to the ultimate consumer or pet owner – (1) manufacturer to veterinary clinics to consumer, (2) manufacturer direct to retailers for sale to the end consumer, (3) manufacturer to wholesaler to retailers for sale to consumer, and (4) manufacturer to veterinary clinics to wholesaler to retailer for sale to end consumer. (*See* Image A below.)

Image A: Pet Medication Industry

While historically most consumers have purchased pet medications at veterinary clinics, pet medications are becoming increasingly available at non-veterinarian retailers. By consolidating two participants in the veterinarian clinic and wholesaler positions, the Acquisition provides an opportunity to bridge the gap between different distribution chains and create efficiencies in distribution for the benefit of the industry at large.

Plaintiffs admit they are wholesale or secondary wholesale distributors themselves and thus competitors to PetIQ (albeit small and localized competitors). Both Plaintiffs and Defendants operate in a highly competitive market that demands a high level of service, product availability, nationwide distribution, and competitive pricing. Plaintiffs appear to be unable or unwilling to compete in such a highly competitive industry and have therefore elected to file this misguided complaint rather than attempt to succeed through their own business performance. Due to the lack of sufficient allegations as to each and every claim asserted, the Complaint should be dismissed with prejudice.

STATEMENT OF ISSUES

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

2. Whether Plaintiffs' Complaint should be dismissed with prejudice because they failed to allege standing under both Article III as well as the higher burden of antitrust injury.

3. Whether Plaintiffs' Complaint should be dismissed with prejudice because they failed to allege cognizable claims for Clayton Act Section 7, Clayton Act Section 2(f) or Sherman Act Section 2, including the failure to plead a proper relevant market (all claims) and the failure to allege a contemporaneous transaction as required for Clayton Act Section 2(f).

RELEVANT FACTUAL ALLEGATIONS

Pet medications in the United States have traditionally been purchased directly from veterinarian clinics. In recent years, the sources from which pet medications can be purchased has expanded to encompass non-veterinarian retailers, either by pet medication manufacturers selling directly to non-veterinarian retailers or through wholesale pet medication distribution. The Federal Trade Commission ("FTC") has recognized that the multiple potential sources for pet medications impact each other's pricing and provide enhanced competition for the industry. PetIQ and VIP Petcare operate in the pet medications industry as a wholesale distributor and a veterinarian clinic/distributor, respectively, and the acquisition challenged by the Complaint provides opportunities to expand the scope of the companies' business and create distribution efficiencies that will benefit their customers and the industry at large.

I. PET MEDICATIONS HAVE HISTORICALLY BEEN PURCHASED DIRECTLY FROM VETERINARIANS

Historically, pet owners in the United States purchase pet medications directly from veterinarian clinics. (Declaration of David E. Dahlquist, Exhibit 1, Federal Trade Commission Staff Report, "Competition in the Pet Medications Industry: Prescription Portability and Distribution Practices" (May 2015), p.3 (the "FTC Report").[2] *See also* FTC Report, p.11 ("Historically, nearly

[2] Available at https://www.ftc.gov/system/files/documents/reports/competition-pet-medications-industry-prescription-portability-distribution-practices/150526-pet-meds-report.pdf. (*See* Compl. ¶¶ 3, 27, 28, 38.) Since the FTC Report was originally relied on and incorporated by Plaintiffs, PetIQ has similarly cited and referenced statements from the same FTC Report. PetIQ files contemporaneously with the Motion to Dismiss Plaintiffs' Complaint a Request for Judicial

all major manufacturers of pet medications distributed their products only to licensed veterinarians or to authorized distributors that sold only to veterinarians.").) Today, most consumers continue to purchase prescription pet medications directly from veterinarians, and "consumer surveys indicate that veterinarians remain the most trusted source for pet medications." (FTC Report, p.11.) However, non-veterinarian sources to purchase pet medications have continued to rise in recent years. (FTC Report, p.12.) In 2014, one estimate indicated that 58 percent of pet medications were purchased directly from veterinarians, "with brick-and-mortar retailers accounting for 28 percent and Internet/mail order retailers accounting for 13 percent." (FTC Report, p.13. *See also* Compl. ¶ 3 ("Today, nearly 40% of all pet medications are purchased at pharmacies, 'big-box' stores, pet specialty stores, on-line merchants, and other non-veterinary retail outlets.").)

Despite these statistics of multiple sources from which to purchase pet medications, "[n]early all major manufacturers of pet medications appear to maintain formal policies that restrict sales of pet medications to veterinarians or veterinary distributors. Some stakeholders report that despite these stated policies, large retail pharmacies and stores have been able to purchase pet medications directly from the manufacturers, although no manufacturers have confirmed that they engage in this practice." (FTC Report, p.20. *See also* FTC Report, p.4 ("Coinciding with the increased presence of non-veterinary retailers, as well as increased consumer demand for pet medications, some manufacturers have departed from the traditional distribution model and now supply both veterinarians and non-veterinarian retailers. In addition to this seemingly authorized expansion of distribution, a secondary distribution system (or 'gray market') for pet medications also has emerged, supplied by products that are diverted from the traditional veterinary distribution channel.").) The principal exception among pet medication manufacturers is Bayer Animal Health, which since 2010 has distributed many of its pet medications directly to retailers. (Compl. ¶¶ 18-19.) Non-veterinarian retailers rely on secondary distributors "who typically purchase excess product from veterinarians." (FTC Report, p.20.)

While the precise empirical effects of multiple sources from which to purchase pet medications is unclear, "numerous retailer stakeholders claim that the availability of pet medications

Notice regarding the FTC Report, among other documents.

from non-veterinary retail outlets offers the potential for consumer cost savings, greater convenience, and improved service." (FTC Report, p.25.) One potential reason for this cost savings is that large retailers are able to secure volume discounts due to their size, as compared to small veterinary clinics. (FTC Report, p.26.) This increased competition from non-veterinarian retailers has pushed veterinarian clinics to lower their own prices to remain competitive. (FTC Report, p.26.) In fact, many veterinarians have acknowledged that "pricing for pet medications is very competitive with non-veterinary retailer pricing," and "it appears that competition from non-veterinary retail outlets may already have resulted in lower prices charged by veterinarians, at least for some consumers and some product categories." (FTC Report, p.27. *See also* Compl. ¶ 3 ("By making a large volume of prescription and high-value [over the counter] pet medications available to consumers for significantly lower prices than are available through veterinarians, secondary distribution has become an essential driver of competition.").)

The FTC concluded that "[s]econdary distribution systems are often viewed as procompetitive, and responsive to consumer demand. In the pet medications industry, the secondary distribution system facilitates increased competition between veterinarians and other retailers, resulting in additional purchasing options and potentially lower prices for consumers, particularly for [over the counter] flea and tick products." (FTC Report, p.90; Compl. ¶ 3.) The FTC further acknowledged that competitive pricing in one distribution channel, retailers for example, could affect the pricing in another distribution channel, thereby creating one market comprised of all channels. (FTC Report, p.4.) And further, the FTC commented that consumers already benefitted from price competition between veterinarians and non-veterinarian retailers, and "continued growth of retailer distribution could increase competition and lead to lower prices for pet medications in both veterinary and retail channels." (FTC Report, p.28.)

II. PETIQ, INC. AND VIP PETCARE HOLDINGS, INC.

PetIQ, Inc. is a publicly traded company. Its indirectly held subsidiary, PetIQ, LLC, is engaged in numerous lines of business relating to pet health and wellness, one of which is the wholesale distribution of prescription and over the counter pet medications. (Compl. ¶ 10.) PetIQ also manufactures and distributes generic pet medications as well as pet treats and other health and

wellness products. *Id.* Prior to the Acquisition, PetIQ did not distribute pet medications to veterinarians, rather, its customers were mass retailers, including pet specialty stores. *Id.* VIP Petcare, by contrast, operates a chain of thousands veterinary clinics around the country, often as clinics inside of retailers such as Pet Supplies Plus and Tractor Supply Co. (Compl. ¶ 9.) VIP Petcare also operates as a wholesale distributor, selling pet medications to other third party wholesalers for sale to non-veterinarian retailers. (Compl. ¶ 14.) VIP Petcare's customers are pet owners and wholesale distributors. Thus, while PetIQ and VIP Petcare engaged in the same industry (pet medications) prior to the Acquisition, they did so in different ways – one (PetIQ) as a manufacturer and wholesale distributor of pet medications and other products directly to retailers, and the other (VIP Petcare) as veterinarian clinics and wholesale distributor of pet medications to other wholesale distributors.

In 2017, PetIQ and VIP Petcare entered into a supply and distribution agreement (Compl. ¶¶ 31-36) whereby they would create efficiencies between their two businesses. Between VIP Petcare's veterinary clinics and PetIQ's wholesale distribution business, they were able to arrange a distribution chain that involved PetIQ managing the excess sales of pet medications from VIP Petcare's veterinary clinics. *Id.* The efficiencies created by this arrangement allowed PetIQ and VIP Petcare to offer favorable rates and distribution to manufacturers and continue to offer competitive pricing to its customers. (Compl. ¶ 34.)

Roughly six months later, on January 8, 2018, PetIQ announced that it would be acquiring VIP Petcare, to be consummated on January 17, 2018. (Compl. ¶ 14.) PetIQ noted that they had been "focused on providing pet owners convenient access and affordable choices to a broad portfolio of pet health and wellness products across its network of retailers, and with this acquisition, we will now be able to provide the same convenience and affordability with veterinarian care." (Declaration of David E. Dahlquist, Exhibit 2, Press Release, "PetIQ, Inc. Enters Into Definitive Agreement to Acquire VIP Petcare" (January 8, 2018) (the "Press Release").)[3] This acquisition added to PetIQ a

[3] Available at http://ir.petiq.com/phoenix.zhtml?c=254371&p=irol-newsArticle&ID=2325282. PetIQ files contemporaneously with the Motion to Dismiss Plaintiffs' Complaint a Request for Judicial Notice regarding the Press Release, among other documents.

business in which it had not previously operated, namely veterinary clinics as well as the opportunity to expand its reach and provide efficiencies to its customers. (Compl. ¶ 14.)

III. THE COMPLAINT

Plaintiffs bring this Complaint to challenge PetIQ's January 17, 2018 acquisition of VIP Petcare. Plaintiffs are two pet medication distributors—competitors of post-Acquisition PetIQ/VIP Petcare—that are related in some unexplained fashion (Compl. ¶ 8) – Med Vets Inc. ("Med Vets") is a "licensed wholesale distributor of veterinary pharmaceutical products" (Compl. ¶ 7), and Bay Medical Solutions Inc. ("Bay Medical") "under common ownership with Med Vets, is a wholesale distributor of [over the counter] pet medications, principally Frontline Plus" (Compl. ¶ 8). Both Plaintiffs are headquartered at the same address in Ft. Myers, Florida. (Compl. ¶¶ 7-8.) Plaintiffs allege that they conduct business in the secondary wholesale market of pet medications.

Plaintiffs allege what appears to be two relevant markets – "the wholesale *markets* for prescription *and* restricted pet parasiticides for distribution to non-veterinary retailers (the secondary distribution system for prescription and restricted [over the counter] pet parasiticides, respectively)." (Compl. ¶ 29 (emphasis added).) As noted, Med Vets is a prescription distributor (Compl. ¶¶ 7, 44), and Bay Medical is a restricted over the counter distributor (Compl. ¶¶ 8, 44). But the complaint also generally references the *singular* "wholesale market" in an apparent conflation of the markets alleged. (Compl. ¶¶ 2, 37, 38.)

Plaintiffs' allegations can be summarized in two points. *First*, they allege the Acquisition violates Clayton Act Section 7 because the Acquisition "substantially may harm competition in the relevant market, leading to higher prices for retailers and consumers." (Compl. ¶ 2.) *Second*, they allege that VIP Petcare engaged in past conduct amounting to price discrimination and that the Acquisition will provide further opportunity for this alleged conduct. (Compl. ¶¶ 32, 28, 43.) While the Complaint specifically references VIP Petcare in some places, other paragraphs reference "defendants" without making clear what is meant by this term and whether any PetIQ-specific conduct is implicated. Further, VIP Petcare and PetIQ operated in different sales channels prior to the Acquisition, with VIP Petcare operating as a veterinary clinic and supplier **to wholesale distributors** (Compl. ¶¶ 9, 14) and PetIQ operating as a wholesale distributor **to mass retailers**

(Compl. ¶ 10). And *finally*, Plaintiffs allege as to price discrimination that "Defendants engaged in two or more transactions of goods at significantly lower actual net prices than were functionally and reasonably contemporaneously available to plaintiff." (Compl. ¶ 50.) But nowhere in the Complaint is there mention of a specific sale to Plaintiffs from which a comparison of price could be drawn – and in fact, Plaintiffs allegations of exclusive access suggest that no sale to Plaintiffs happened at all.

Nearly three months after the announcement of the Acquisition, Plaintiffs filed this Complaint seeking both monetary damages and seeking an order requiring PetIQ to divest the already-consummated acquisition. And the roughly fifteen-page complaint, built on conclusory statements and allegations amounting to acknowledgement of PetIQ and VIP Petcare's business acumen, Plaintiffs have not and cannot sufficiently plead that the Acquisition nor any past conduct is in contravention of the antitrust laws 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*).

This court has noted that "antitrust claims require a 'higher degree of particularity in the pleadings.'" *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 WL 3429568, at *2 (N.D. Cal. Oct. 22, 2009) (quoting *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1298-99 (S.D. Cal. 2009)). Plaintiffs have failed to meet the standard required by this Court.

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

Before even reaching the standing and cognizable claim issues the Complaint presents, the claims must fail because the Complaint does not properly allege a relevant market, which is necessary for the Clayton Act and Sherman Act violations they allege. And because Plaintiffs have not properly plead a relevant market, they cannot establish market power for that market, which is also fatal to their Clayton Act and Sherman Act claims. But even if Plaintiffs had pled a properly defined relevant market, they have not sufficiently pled market power as to both PetIQ and VIP Petcare. On these bases, the Complaint must fail.

A. Plaintiffs Fail to Properly Allege a Relevant Market

Plaintiffs' Complaint must fail because they do not properly allege a relevant market – a properly pled relevant market is necessary for all three claims Plaintiffs assert. *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 593 (1957) ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act."); *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008) ("In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'").[4]

Plaintiffs allege that the relevant market is "the wholesale markets for prescription and restricted pet parasiticides for distribution to non-veterinary retailers (the secondary distribution system for prescription and restricted [over the counter] pet parasiticides, respectively)." (Compl. ¶ 29.) However, this relevant market as alleged is fatally flawed because it does not apply and comport with the interchangeability test as applied by the Supreme Court and Ninth Circuit. The market must be defined in such a manner 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, and Plaintiffs have made no effort to explain the contours of the

[4] *E. I. DuPont de Nemours & Co.*, 353 U.S. at 593 ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act [Section 7].") (citations omitted); *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 492 (9th Cir. 1977) ("The offense of monopoly under [Section] 2 of the Sherman Act has 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.") (citation omitted); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971) ("CTS's threshold problem in proving a prima facie case for any of its [Clayton Section 2(a) and Sherman Section 2] claims was proof of a well-defined relevant market . . . .").

market by interchangeability. *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.); *Verducci v. Sonoma Valley Hosp. Dist.*, 87 F.3d 1325, 1996 WL 338339, at *3 (9th Cir. 1996) (unpublished mem. opinion) ("A product market incudes the pool of goods and services that are reasonably interchangeable for one another . . . such that a monopolist in that market would profit by raising prices.").

Plaintiffs' relevant market definition conflicts with their own allegations, and they provide no justification for why the relevant markets should be defined as they allege. For example, Plaintiffs' own allegations say that the price from purchases at retailers through the secondary distribution system affect the pricing for direct-from-veterinarian purchases, and yet their relevant market conflicts with this point. (Compl. ¶ 3 ("By making a large volume of prescription and high-value [over the counter] pet medications available to consumers for significantly lower prices than are available through veterinarians, secondary distribution has become an essential driver of competition."). *See also* FTC Report, p.90 ("Secondary distribution systems are often viewed as procompetitive, and responsive to consumer demand. In the pet medications industry, the secondary distribution system facilitates increased competition between veterinarians and other retailers, resulting in additional purchasing options and potentially lower prices for consumers, particularly for [over the counter] flea and tick products.").) Instead, their alleged relevant markets (1) *exclude* the same exact products purchased from veterinary clinics (Compl. ¶¶ 1, 17) and (2) *exclude* products sold directly to retailers (Compl. ¶ 29). Both exclusions are contrary to the reality of consumer purchases of prescription and over the counter pet medications. (*See* Image B below.)

Image B: Relevant Markets Alleged

First, Plaintiffs' relevant markets definition is fatally flawed because they exclude products sold and purchased from veterinary clinics without explanation. (Compl. ¶ 29.) The exclusion of products sold to consumers directly from veterinary clinics fails the interchangeability test. A consumer is likely to seek alternative sources for pet medication, and if it is more cost effective to purchase directly from a veterinary clinic instead of from a retailer, a consumer is likely to utilize that alternative source. Further, the FTC Report examination of the effect of retail pricing and availability on veterinary clinic pricing necessarily indicates ***that they are a part of the same market***, and thus Plaintiffs' relevant market allegation again is flawed. (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.").)

Second, the relevant markets fail because they *exclude* products sold directly to retailers. (Compl. ¶ 29.) Considering the interchangeability test, a consumer is likely to seek an alternate source for pet medication, including interchanging between veterinary clinics or retailers depending on factors such as price. A consumer does not care, and likely does not know, whether the products it seeks were provided to a retailer directly by the manufacturer, by a wholesaler, or through a secondary wholesaler. Plaintiffs' distinction is incurably flawed. As the FTC noted in its Report, increasing availability of pet medications at retailers is putting competitive pressure on veterinary

clinics to decrease their prices. (FTC Report, p.4.) Despite the FTC's findings and Plaintiffs' repeated citation to the FTC Report, they provide no explanation for this limitation to their relevant market.

Therefore, Plaintiffs have failed to allege properly both the types of products included in the relevant markets and the sources for those products. As a result, the relevant markets as defined in the Complaint thus fail to be properly alleged. Because a properly pled relevant market is necessary for Clayton Act and Sherman Act claims, the Complaint must fail.

B. Plaintiffs Fail to Allege Market Power

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); *see also Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063-65 (9th Cir. 2001).

Even if Plaintiffs had alleged a relevant market properly, they have failed to allege that the Acquisition "creates or enhances 'market power'" in the relevant market. *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)). Generally, market power can be demonstrated through market shares and concentration levels. Here, Plaintiffs allege little to no facts beyond conclusory statements to demonstrate market power. With respect to VIP alone, Plaintiffs include a single allegation as to market share, but they provide only an unsupported "estimate" of share in a market that conflicts with the markets they have alleged. (Compl. ¶ 37 ("Plaintiffs estimate that in 2017, VIP distributed over 27% of the *prescription* pet parasiticides sold by *non-veterinary retailers*, compared to about 25% of retailer-sold medications that were sourced from all other U.S. *veterinarian-wholesalers* combined.") (emphasis added).) The relevant markets alleged contain both prescription *and over the counter* pet parasiticides to non-veterinary retailers

(Compl. ¶ 29), while their market share allegation includes only *prescription* pet parasiticides to non-veterinary and veterinary wholesalers. And it does not appear that the Complaint alleges any particular market share for PetIQ in any relevant market. Instead, Plaintiffs rely upon conclusory statements of market power (Compl. ¶¶ 2, 4-5, 32-34), which are insufficient and do not "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. Moreover, Plaintiffs offer no facts to plausibly allege that the Acquisition will "create or enhance" market power. *Oracle*, 331 F. Supp. 2d at 1110. Instead, they again rely on conclusory statements that fail to allege how the Acquisition will diminish competition because of increased market power. (Compl. ¶¶ 5, 16, 37.) 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.) In comparison, the Press Release indicates that PetIQ and VIP Petcare expected the post-Acquisition business to generate approximately $450 million to $500 million in 2018 net sales. (Press Release.) Even assuming (albeit incorrectly) that all of the sales listed in the Press Release relate to pet medications, $450-500 *million* is far from representing market power in a $10.2 *billion* market.

Given that Plaintiffs fail to adequately allege a relevant market and fail to identify specific market shares for PetIQ and VIP that correspond to an adequately alleged relevant market, they cannot identify market power for purposes of evaluating the alleged effect on competition. *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096 (9th Cir. 1999) ("Monopolization claims can only be evaluated with reference to properly defined geographic and product markets."). Without a properly alleged relevant market, any analysis as to market share, market power, and effect on competition is fruitless, and on this basis Plaintiffs' claims must be dismissed.

VI. PLAINTIFFS' CLAIMS MUST FAIL BECAUSE THEY LACK ARTICLE III STANDING

Plaintiffs' Complaint must also be dismissed in its entirety because Plaintiffs have failed to allege facts to support Article III standing. The pet medication industry is highly competitive, and any "injury" Plaintiffs allege is a result of the competitive nature of the industry and not any conduct alleged related to PetIQ or VIP Petcare. Article III standing requires allegations that they have "suffered an injury which bears a causal connection to the alleged antitrust violation." *Lucas*

Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232 (9th Cir. 1998) (quoting *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997)). Article III standing "is a jurisdictional prerequisite to the consideration of any federal claim," which requires "proof of injury-in-fact, causation and redressability." *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008).

Dismissal is warranted when a complaint fails to allege that the plaintiff was injured by the defendants' alleged unlawful conduct. *See, e.g.*, *Korea Kumho Petrochemical v. Flexsys America LP*, No. C07-01057 MJJ, 2008 WL 686834, *5-6 (N.D. Cal. 2008) (dismissing liability theory without leave to amend for failure to plead facts sufficient to show that plaintiff "suffered a cognizable injury proximately caused by" defendant's conduct). Here, Plaintiffs have failed to allege facts sufficient to establish that the alleged injury is the result of PetIQ or VIP Petcare's conduct.

Instead, Plaintiffs make varied allegations about the conduct of numerous players in the pet medication industry and about barriers to competition. For example, the Complaint is rife with allegations regarding manufacturer policies that prohibit sales of pet medications at non-veterinarian retailers. (*See, e.g.*, Compl. ¶¶ 2, 18, 25, 42.) Further, Plaintiffs allege that the practice of portable prescriptions, whereby a consumer obtains a portable prescription from a veterinarian before being able to purchase certain pet medications at a non-veterinarian retailer, causes significant issues due to veterinarian clinic's alleged reticence at providing portable prescriptions. (Compl. ¶¶ 26-28.) Both the manufacturer policies and portable prescription difficulties could cause significant difficulties for a distributor in the industry, and Plaintiffs allege no facts to explain why any "injury" Plaintiffs purportedly suffered is not the result of these barriers that have nothing to do with PetIQ or VIP Petcare's conduct. Thus, Plaintiffs should not be permitted to blame a competitor for what is in fact the result of a highly competitive industry in which Plaintiffs choose to participate.

Further, Plaintiffs concede by their own allegations that the "injury" Plaintiffs purport to have suffered cannot be causally linked to any of PetIQ or VIP Petcare's alleged conduct, and in particular cannot be causally linked to the Acquisition. Plaintiffs allege that "*[p]rior to the Transaction [i.e. Acquisition]*, VIP received from Merial and other manufacturers discriminatory

pricing, permitting VIP to achieve a majority share of the distribution of Merial's Frontline Plus and other manufacturer-limited [over the counter] medications customarily supplied to retailers through the secondary distribution system" and further state that "*by 2017*, all of Bay Medical's contacts with [retailers such as PetSmart, Petco, and 1-800-PetMeds] had been lost" to VIP Petcare or PetIQ. (Compl. ¶¶ 5, 34 (emphasis added).) Any decrease in business that Plaintiffs allegedly suffered "prior to" or "by 2017" cannot be linked to the Acquisition, which by Plaintiffs' own allegations was not consummated until January 17, 2018. (Compl. ¶ 14.)

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

Only after Plaintiffs have established Article III standing does the court look to "the more demanding standard for *antitrust* standing" under Clayton Act Sections 4 and 16. *Lucas Automotive Engineering, Inc.*, 140 F.3d at 1232 (citation omitted). As the Supreme Court so seminally noted decades ago, antitrust laws were passed for "the protection of *competition*, not *competitors*." *Brown Shoe v. United States*, 370 U.S. 294, 325 (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). Plaintiffs have failed to properly allege antitrust standing for damages or injunctive relief under Clayton Act Sections 4 and 16, respectively, because they have failed to allege an antitrust injury. An antitrust plaintiff can only successfully pursue an antitrust action by showing antitrust injury, meaning "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977). The failure to establish antitrust standing is fatal to Plaintiffs' allegations, and on that basis the 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 allege that they have antitrust standing because "Bay Medical[] has been excluded from the wholesale market for the distribution of restricted [over the counter] pet parasiticides to non-veterinarian retailers [and] . . . Med Vets is threatened with exclusion from the wholesale market for the distribution of prescription pet parasiticides to non-veterinarian retailers and has no adequate remedy at law." (Compl. ¶ 44.) Conclusory statements of causality notwithstanding, Plaintiffs have failed to allege that any alleged antitrust injury is linked to PetIQ's allegedly wrongful conduct because Plaintiffs admit they are competitors to PetIQ. (*See, e.g.*, Compl. ¶¶ 7-10, 34, 37.) As a result, any alleged injury is to their own personal business interests and not to competition in the pet medication industry. *See Brown Shoe*, 370 U.S. at 324.

Further, Plaintiffs have not established that any alleged antitrust injury "flows from that which makes defendants' acts unlawful." *Am. Ad Mgmt*, 190 F.3d at 1055 (quoting *Brunswick Corp.*, 429 U.S. at 489). Plaintiff Bay Medical has not been excluded from selling over the counter pet parasiticides. Rather, as Plaintiffs affirmatively allege, Bay Medical "lost" its contracts with certain retailers by 2017, *before* the PetIQ-VIP Petcare Acquisition. Thus, any alleged antitrust injury does not and cannot flow from the Acquisition because their alleged "injury" occurred well before the Acquisition was consummated. Further, Plaintiffs have failed to justify why barriers in the market such as manufacturer policies and issues with portable prescriptions are not the "cause" of their alleged injury. *See supra*.

Plaintiffs admit they are competitors seeking to operate in the same sales channels as pre-Acquisition PetIQ and post-Acquisition PetIQ/VIP Petcare. (Compl. ¶¶ 7-10, 34, 37.) This concession is fatal to Plaintiffs' ability to demonstrate antitrust injury. As a competing distributor, Plaintiffs benefit from any alleged "chilling of new entry" and allegedly resulting increased pricing

in the secondary distribution market. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (plaintiff has no antitrust standing to sue competitors who fixed prices when the plaintiff actually economically benefits from the higher prices); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 868 (9th Cir. 1991) ("As an existing competitor, Datagate would be benefitted from any chilling of new entry into the market."); *Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1242-43 (3d Cir. 1987) (no injury from competitor's acquisition because "elimination of a potential increase in output" would "inevitably aid" existing competitors) (citing *Matsushita*, 475 U.S. at 583). (*See also* Compl. ¶¶ 2, 45.)

Because Plaintiffs have failed to establish that they suffered any form of antitrust injury, they do not have antitrust standing to bring such a claim for damages. *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.

VIII. PLAINTIFFS FAIL TO ALLEGE COGNIZABLE CLAIMS UNDER CLAYTON ACT SECTION 7, SHERMAN ACT SECTION 2, AND CLAYTON ACT SECTION 2(F)

Notwithstanding the relevant market and standing issues that indicate the Court does not need to reach whether the claims have been properly pled, the Complaint must also be dismissed because Plaintiffs have failed to allege cognizable claims. Plaintiffs' Clayton Act Section 7 claim fails because the Complaint does not plausibly allege with specificity that the Acquisition risks the substantial lessening of competition nor that it tends to create monopoly. Plaintiffs' Sherman Act Section 2 claim likewise fails because the Complaint does not allege specific facts that PetIQ and VIP Petcare engaged in predatory conduct with the specific intent to monopolize and with a dangerous probability of success. The facts as alleged fall far short of this high bar. And finally, Plaintiffs' Clayton Act Section 2(f) claim must fail because Plaintiffs have not established seller liability under Section 2(a) (a prerequisite for a Section 2(f) claim) and have not properly pled that PetIQ or VIP Petcare knowingly induced or received discriminatory pricing.

A. Plaintiffs Fail to Allege a Substantial Lessening of Competition as Required by 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. Rather, under the Clayton Act a plaintiff must allege "that his loss flows from an anticompetitive aspect . . . of the defendant's behavior . . . . If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se." *Pool Water Prod.*, 258 F.3d at 1034 (citation omitted).

Here, Plaintiffs complain in conclusory manners that the Acquisition risks lessening competition or monopoly. (Compl. ¶¶ 16, 43.) But such statements do not reach the level of alleging 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). And more so, Plaintiffs have not sufficiently alleged that any injury "flows" from anticompetitive conduct.

B. Plaintiffs Fail to State a Claim for Monopolization Under Sherman Act Section 2

So too does Plaintiffs' monopolization claim 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).).

Plaintiffs have likewise failed to allege facts sufficient to support a claim that PetIQ has engaged in monopolization or attempted monopolization in violation of Section 2. Conclusory statements that the Acquisition "has the capacity to gain a monopoly share" (Compl. ¶ 37), or that there is a "dangerous probability that defendants will succeed in monopolizing" (Compl. ¶ 43), are not sufficient to allege that the alleged monopoly power is not due to "superior product, business acumen, or historic accident." *eBay*, 545 F. Supp. 2d at 1031. Sufficiently alleging predatory or anticompetitive conduct *with a specific intent to monopolize* requires more than allegations that monopolization may happen, particularly with (a) insufficient facts for that allegation and (b) insufficient allegations as to how that potential monopolization is due to any predatory and intentional behavior. Put simply, allegations of potential monopoly are insufficient without allegations of exclusionary conduct that "tends to impair the opportunities of rivals" and "either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985); *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004). Plaintiffs' claims of allegedly lost business are simply insufficient.

C. Plaintiffs Fail to Allege the Requisite Elements of a Buyer Liability Claim Under Clayton Act Section 2(f)

Plaintiffs fail to satisfy their burden to plausibly allege a Clayton Act Section 2(f) for buyer liability for a seller's price discrimination as their allegations with respect to this claim are at best a boilerplate recitation of the elements offering no facts to support their allegations.

To meet their Rule 12 burden on a buyer liability claim, Plaintiffs must: (1) allege facts to support all the elements of a Section 2(a) *seller* liability claim; and (2) allege additional facts establishing that the buyer **knowingly** "induce[d] or receive[d] a discrimination in price" *and* knew that the seller would have little defense to a Section 2(a) claim. *See Gorlick Distribution Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1021 (9th Cir. 2013). Plaintiffs' Complaint does neither.

1. Plaintiffs Failed to Allege Seller Liability Under Section 2(a)

Plaintiffs' claim under Section 2(f) fails at the outset because they have not adequately alleged the threshold requirement to adequately allege a seller price discrimination claim. The basic framework requires plaintiff to show that the seller discriminated in price between two buyers and that the effect of such discrimination "may be to injure, destroy, or prevent competition" to the advantage of the favored purchaser. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006) (citation omitted). However, *in addition*, because courts are "[m]indful of the purposes . . . of the antitrust laws generally" to encourage competitive behavior and allow economic actors to pursue the lowest available prices, the Robinson-Patman Act been interpreted to require that the underlying sales meet the following "technical" requirements to state a claim : There must be (1) two different sales; (2) one at a high price and one at a lower price; (3) to two different purchasers; (4) that are reasonably contemporaneous transactions; (5) of goods of like grade and quality, so as to not "ban all price differences charged to different purchasers." *Id.* at 176 (citations omitted). While Plaintiffs' boilerplate allegations without any supporting facts are inadequate on their face to survive a motion to dismiss, Plaintiffs' Complaint also suffers from three specific deficiencies with respect to these fundamental elements required to sustain their claim for price discrimination.

First, Plaintiffs' Complaint fails to identify *the seller* that might have liability under Section 2(a). With respect to the seller, in their allegations in Count II, Plaintiffs obfuscate, stating that "Defendants engaged in two or more transactions of goods," but omitting any information about the other party to the transaction. (Compl. ¶ 50.) The only other reference to purchases that could potentially underlie Plaintiffs' price discrimination claim mentions VIP (not Defendants) making purchases from Merial and Elanco. (*See* Compl. ¶ 30.) However, even this statement is insufficient because without an allegation of the identity of the seller (and the product for that matter), Defendants cannot determine the extent to which a defense to a price discrimination claim exists, and cannot be said to be fairly on notice as to the claim against them. *See Twombly*, 550 U.S. at 570.

Second, the Complaint fails to adequately allege which buyer might have derivative liability under Section 2(f). As mentioned, Count II asserts that *Defendants* received discriminatory pricing,

(Compl. ¶¶ 50, 54), but, elsewhere, the Complaint's allegations indicate only that, by virtue of the Acquisition, PetIQ has the "incentive and ability… to inflict … secondary-line price discrimination," not that PetIQ has consummated any such transaction. (Compl. ¶ 5.) Again, where, as here, the identity of the party to the transaction can directly impact the defenses that are available, Plaintiffs' ambiguous allegations are insufficient to meet their burden to plausibly state a claim.

Third, and perhaps most fundamentally problematic to their effort to establish a Section 2(a) claim, Plaintiffs' Complaint fails to allege a "disfavored purchase," a purchase from the same seller at a higher price than VIP paid. In fact, **nowhere** in the Complaint do Plaintiffs allege that they, or any other entity except VIP, made any purchase from any manufacturer. The closest allegation is notably worded to avoid making such a statement: "[B]etween 2012-2016, Bay Medical **had distributed** 10% of Merial's Frontline Plus to retailers." (Compl. ¶ 34 (emphasis added).) Plaintiffs attempt to gloss over this insufficiency with statements that the prices VIP received were "not available" to Plaintiffs or other distributors (*see, e.g.*, Compl. ¶¶ 32, 34, 50), but, even accepting that allegation as true at the Rule 12 stage, it is not enough to state a claim under Section 2(a). *See Sylling v. Westinghouse Corp.*, 5 F.3d 540, 1993 WL 339959, at * (9th Cir. 1993) (unpublished mem. opinion) (affirming dismissal of price discrimination claim at Rule 12 stage because plaintiff failed to "allege contemporaneous sales by the same seller at different prices"); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1191-92 (9th Cir. 1984) (A key requirement for a Robinson-Patman section 2(a) claim is a showing that there have been at least two completed, substantially contemporaneous sales by the same seller) (citations omitted). Without an allegation of an actual "disfavored" sale, Plaintiffs' price discrimination claim must fail. *See Volvo*, 546 U.S. at 177.

2. Plaintiffs Also Failed to Allege Buyer Liability Under Section 2(f)

Even if Plaintiffs' allegations of seller liability did pass muster, their Complaint must still meet the further requirements to demonstrate buyer liability, namely, that the favored buyer *knowingly induced or received* discriminatory pricing. This standard requires more than an allegation that a buyer had general knowledge that it was obtaining better prices than a rival. *Gorlick*, 723 F.3d at 1022. Instead, a plaintiff must allege that the buyer also knew that the seller "would have 'little likelihood of a defense' for offering that price." *Id.* (citation omitted).

Plaintiffs' efforts here to allege knowledge are a quintessential recitation of the elements. The Complaint merely parrots the wording of the statute in several places, but states no facts that would support their assertion. (*Compare* Compl. ¶¶ 32, 38 53 with 15 U.S.C. § 13(a).) As described above, Plaintiffs cannot possibly have adequately explained how PetIQ or VIP had knowledge that a rival made a purchase at a higher price because their Complaint does not even allege that a rival made any purchase.

Further, even if Plaintiff had not failed to satisfy nearly every element of a Section 2(a) claim, and had established that Defendants had knowledge they were receiving a better price than a rival, Plaintiffs fail in the final instance to state any facts to show that Defendants knew that the seller would have no affirmative defense. Plaintiffs' ***own allegations*** provide more basis to conclude that VIP would plausibly have believed that any lower pricing it received would be "[d]ue to the scale of its practice, [which caused it to receive] substantial manufacturer allotments of veterinary pharmaceuticals." (Compl. ¶ 32.) In making large volume sales, as the Complaint alleges VIP does, VIP would have obvious reason to presume that it could obtain better pricing than competitors due to potential manufacturer cost savings with volume sales. Thus, the allegations support, rather than undermine, the possibility that VIP would believe the seller would have a cost justification affirmative defense for any lower pricing it received, and are thus insufficient to state a claim for price discrimination under Section 2(f).

IX. 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.

A. Plaintiffs Fail to Allege Loss or Injury in Equity

First, injunctive relief of any kind is inappropriate here because plaintiffs have failed to allege that any injury they purport to have suffered is *likely and not speculative*. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008) (injunctive relief requires irreparable harm be likely rather than merely a possibility and speculative injuries are inadequate); *Backhaut v. Apple Inc.*, No. 14-CV-02285-LHK, 2015 WL 4776427, at *8-9 (N.D. Cal. Aug. 13, 2015) (finding injury

too speculative for injunction because plaintiffs failed to show any possibility of past conduct continuing into the future). Plaintiffs lack antitrust injury to support their injunctive relief claim. Further, injunctive relief is inherently prospective, because it is designed to prevent future violations rather than repair past wrongdoings. *See, e.g., United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952) (denying injunctive relief where the record disclosed no threat of resumption of anticompetitive conduct and noting that "[t]he sole function of an action for injunction is to forestall future violations. It is so unrelated to punishment or reparations for those past . . . that the calendar of years gone by might have been filled with transgressions"); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 3648478, at *12 (N.D. Cal. July 7, 2016) ("[t]he unlikelihood of future violations makes an injunction basically worthless, and probably impossible to obtain"), *appeal dismissed*, No. 16-16368, 2017 WL 3468376 (9th Cir. Mar. 2, 2017). Here, the Acquisition occurred nearly three months before the filing of the Complaint. Plaintiffs failed to seek an equitable injunction prior to the consummation of the Acquisition and cannot seek one now. Thus, Plaintiffs fail on this element for the same reasons they fail to properly plead antitrust injury. *See supra*.

B. Alternative Remedies Exist that Make Injunctive Relief Inappropriate

Even if Plaintiffs could establish that the injury they allege is likely and not merely speculative, injunctive relief would still be inappropriate because Plaintiffs have an adequate remedy at law. *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) (finding injunctive relief under the Clayton Act unwarranted because plaintiffs failed to show remedies available at law were inadequate). Assuming they could prove liability, Plaintiffs have and in fact seek such an adequate remedy at law for the conduct they challenge in the form of damages. Plaintiffs' decision to seek damages as a form of relief weighs heavily against injunctive relief being appropriate.

This is particularly true when considering that the balance of equities does not favor injunctive relief in this case because Plaintiffs would receive an unprecedented windfall. *See Orson, Inc. v. Miramax Film Corp.*, 836 F. Supp. 309, 314 (E.D. Pa. 1993) (rejecting preliminary injunction because the requested relief would "give plaintiff a windfall," and noting "plaintiff cannot try to gain

from the Court what it could not even gain through its own dealings with defendant"). As competitors in the industry, Plaintiffs stand to benefit significantly from the divestiture they seek. For Plaintiffs to have the ability to hamstring PetIQ's business activities on a permanent basis weighs heavily against injunctive relief, and Plaintiffs should not be permitted to use the courts to artificially increase their own market share rather than engaging in natural competition in the market.

C. Plaintiffs Fail to Establish They Are Entitled to Permanent Injunctive Relief in the Form of Divestiture

For an award of permanent injunctive relief the plaintiff must establish *all* of the following: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Here, Plaintiffs do not and cannot allege facts supporting any of these essential elements.

First, taking the first two elements together, Plaintiffs have failed to plead facts sufficient to establish that they will suffer irreparable injury that would not be compensable through remedies available at law. *See, e.g.*, *Katiki v. Taser Int'l, Inc.*, 2013 WL 163668, at *3 (N.D. Cal. Jan. 15, 2013) (dismissing claim for injunctive relief because plaintiff "only alleged a financial injury"); *Taleff*, 828 F. Supp. 2d at 1123 (dismissing private merger challenge where "[p]laintiffs ha[d] not demonstrated that the remedies available at law, such as monetary damages, would be inadequate."). Plaintiffs spend much of the Complaint focusing on alleged monetary harm (Compl. ¶¶ 5, 34, 37-38, 44-45), which is patently insufficient to satisfy Plaintiffs' burden for permanent injunctive relief such as divestiture. *See L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("[M]onetary injury is not normally considered irreparable."). In addition, any allegations beyond monetary harm lack the level of specificity required at this stage. *See Iqbal*, 556 U.S. at 678.

Second, taking the third and fourth elements together, Plaintiffs' own complaint and their decision to seek damages as well as injunctive relief demonstrates that the equities and balance of hardships weighs heavily in PetIQ's favor. The Acquisition has already been consummated, and

Plaintiffs have clearly indicated by their pleadings that they do not consider injunctive relief to be their only option. Moreover, Plaintiffs cannot establish that public interest would be served by injunctive relief, because there is a "strong interest in preserving free operation of the nation's markets and insuring that [the Court] does not unduly restrain free enterprise. . . . , where Plaintiffs have failed to demonstrate that there will be any real, palpable harm to Plaintiffs." *Ginsburg v. InBev SA/NV*, No. 4:08CV01375JCH, 2008 WL 4965859, at *6 (E.D. Mo. Nov. 18, 2008) (citation omitted).

Plaintiffs' request for the extreme remedy of divestiture should likewise be dismissed because private plaintiffs such as those in this case have a very high bar to establish that they have standing. *See California v. American Stores Co.*, 495 U.S. 271, 295-96 (1990) (in addition to establishing injunctive relief standing, a private plaintiff seeking divestiture must overcome equitable defenses such as laches and unclean hands). It would be unprecedented in this Circuit for a *private* plaintiff to obtain an order of divestiture, and this Court should not deviate from that near insurmountable threshold. *See International Tel. & Tel. Corp. v General Tel. & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975) (While "a few courts have indicated in dicta that divestiture is available in private actions . . . the prior judicial decisions on this issue do not furnish persuasive authority, . . . [and] Congress did not intend to permit private divestiture suits."). This specific request for divestiture is inappropriate and unwarranted under the circumstances and should be specifically addressed and dismissed.

CONCLUSION

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

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