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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MED VETS INC. and BAY MEDICAL SOLUTIONS INC.,

Plaintiffs,

v.

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

Defendants.

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

OPPOSITION OF PLAINTIFFS, MED VETS, INC. AND BAY MEDICAL SOLUTIONS, INC., TO MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 3, 2018
Time: 9:00 a.m.
Place: Courtroom 7 – 19th Floor
San Francisco Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102
Judge: Hon. Maxine M. Chesney

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ISSUES TO BE DECIDED

1. Whether the definition of the relevant market described in the Complaint (at ¶¶ 29-30 and elsewhere) is facially unsustainable;

2. Whether the allegations set forth in the Complaint (at ¶¶ 44-45 and elsewhere) adequately show that plaintiffs qualify as parties with standing to litigate in this court and that plaintiffs suffered "antitrust injury;"

3. Whether the claims brought require plaintiffs to allege "market power in a relevant market."

PRELIMINARY STATEMENT

In late 2016, all the loyal retail customers that had purchased Merial's Frontline Plus at wholesale from plaintiff Bay Medical Solutions, Inc. ("Bay Medical") for the better part of a decade, suddenly and without explanation stopped doing so. *Why*? The answer, plaintiffs allege, is because all of Bay Medical's contracts with those retailers had been lost to the joint venture between defendants, VIP Petcare Holdings, Inc. ("VIP") and PetIQ, Inc. ("PetIQ"), "which had the ability to exclude rival distributors by exploiting VIP's supply of Frontline Plus at deeply discounted prices unavailable to other distributors" (Doc # 1, Complaint, ¶ 34) ("Compl."). Those customers did not abandon Bay Medical because it was "unable or unwilling to compete in such a highly competitive industry," as defendants argue (Doc. # 25, Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint, at 2) ("Defds. Mem."). Rather, Bay Medical's customers abandoned it and moved their contracts and orders to the VIP-PetIQ joint venture solely because discriminatory and anticompetitive arrangements between VIP, PetIQ, and Merial enabled the joint venture to undercut all other wholesalers and capture the distribution of practically all the Frontline Plus sold by non-veterinary retailers (Compl. ¶ 44).

As the manufacturer, Merial did not have to offer defendants' joint venture a discriminatory price so they could undercut Bay Medical and the other secondary wholesalers in order to seize control of the wholesale market for its product. Merial lawfully could have appointed VIP, PetIQ, or some other wholesaler, as its authorized distributor (Compl. ¶ 34). But among the reasons it did not do so was that such a move would have required Merial to either openly violate its own restrictive

"veterinarian only" distribution policies or abrogate them (Compl. ¶ 23). By distributing its retailer-bound products through PetIQ's joint venture with VIP, the largest single provider of veterinary care in the country (Compl. ¶ 9), Merial could have its cake and eat it too, by claiming that sales to the joint venture, although destined for the shelves of PetIQ's many retailer customers, nonetheless complied with its own "veterinarian only" restrictions, because VIP operates veterinary clinics (Compl. ¶¶ 24-25).

Having successfully foreclosed and excluded Bay Medical and other wholesalers of Frontline Plus from doing business with the largest of the nation's pet medication retailers, defendants then made their joint venture relationship permanent. On January 8, 2018 it was announced that PetIQ would acquire VIP (Compl. ⁋ 14). The transaction was consummated on January 17, 2018. *Id.* The second question raised by this litigation, therefore, is whether similarly anticompetitive arrangements between the merged entity and Merial, Elanco, and other manufacturers of *prescription* pet parasiticides, of which plaintiff Med Vets, Inc. ("Med Vets") is a wholesaler, are likely to substantially lessen competition or tend to create a monopoly in the wholesale market for those products as they did in the wholesale market for Frontline Plus, the leading "restricted" OTC pet parasiticide. *See* Section 7 of the Clayton Act, 15 U.S.C. § 18 ("Section 7").

Plaintiffs allege that precisely such a likelihood for anticompetitive conduct exists and has, in part, already come to pass, in the form of exclusive distribution agreements between defendants and manufacturers (Compl. ¶¶ 5, 25, 33, 37) and higher wholesale prices to retailers (Compl. ¶ 2, 43, 45). Plaintiffs, therefore, challenge the acquisition of VIP by PetIQ as a violation of Section 7 in Count I of the Complaint (Compl. ¶¶ 47-48).

The complaint alleges that the effect of the PetIQ-VIP acquisition "may be substantially to lessen competition or tend to create a monopoly" in two relevant markets (Compl. ⁋⁋ 2, 16, 43, 47). The relevant markets are defined as: i) the wholesale market for prescription pet parasiticides for distribution to non-veterinary retailers, and ii) the wholesale market for restricted OTC pet parasiticides (principally, Frontline Plus) for distribution to non-veterinary retailers. These markets correspond to the "secondary distribution system" for prescription and restricted OTC pet parasiticides, respectively, and are described informally in the FTC Staff Report, "Competition in the

Pet Medications Industry, Prescription Portability and Distribution Practices," released in May 2015 (Doc. # 26-2, "FTC Report").

Plaintiffs further allege that prior to the acquisition defendants jointly engaged in unlawful second-line price discrimination, giving rise to the claim in Count II that defendants have violated Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f) (Compl. ¶¶ 49-54).

In Count III, plaintiffs also claim that defendants have and are attempting to monopolize the relevant markets, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (Compl. ¶¶ 55-56).

Defendants' Memorandum in Support of their Motion to Dismiss improperly invites the Court to resolve factual issues, evaluate the data supporting the definitions of the relevant markets, and determine that the PetIQ/VIP merger creates efficiencies that outweigh the alleged anticompetitive effects. These determinations go far beyond whether the allegations in the Complaint satisfy the notice pleading requirements of Fed.R.Civ.P. 8(a)(2), which is the issue before the Court on a Rule 12(b)(6) motion.

Defendants also urge the Court to introduce substantive elements into each of plaintiffs' claims that are not recognized in antitrust law. For example, a plaintiff must neither allege nor prove "market power in a relevant market" to succeed on *any* of the three claims alleged in the Complaint, yet defendants insist that the Complaint must be dismissed in its entirety because it fails to do so (Defds. Mem. at 1, 3, 9, 12, 13).

Finally, defendants' summary of the discussion in the FTC Report in the opening pages of their supporting Memorandum regarding the competitive role of the secondary wholesale markets, which is largely accurate, reaches an erroneous conclusion. Neither the FTC Report nor the fact of price competition between veterinarians and retailers suggest the existence of "one market comprised of all channels" (Defds. Mem. at 5) or that the various channels and different levels of distribution "are part of the same market" (Defds. Mem at 11). The price-constraining effect of *retail* sales of pharmaceutical pet parasiticides on *veterinary* sales of the same products does not occur in the relevant markets alleged in this case. This case concerns *wholesale* markets, in which intermediate sales are made to retailers, not *retail* markets, in which final sales are made to consumers.

Defendants clearly recognize that "[n]on-veterinarian retailers *rely* on secondary distributors 'who typically purchase excess product from veterinarians.'" (Defds. Mem. at 4, quoting FTC Report, at 20) (emphasis supplied). The loss of competition alleged in this case occurs in these wholesale markets and no degree of competition between veterinarian and non-veterinarian *retailers* can alleviate that competitive injury. Stated another way, there is no number of competing retail outlets sufficient to constrain an upstream distributor in control of a "bottleneck" or "gateway" in the chain of distribution.

Defendants engage in other activities in the pet medication sector, but the focus in this litigation is on the conduct and position of defendants as secondary wholesalers that supply inventory to retailers and the anticompetitive effects that have occurred or are threatened in the two defined wholesale markets. Moreover, defendants' argument invites the Court to determine complex matters of fact on a motion to dismiss, based on matters far outside the four corners of the complaint and before any discovery.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARD

Defendants urge the Court to impose a heightened pleading standard not recognized in federal practice or antitrust jurisprudence ("antitrust claims require a 'higher degree of particularity in the pleadings'") (Defds. Mem. at 8, quoting *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 265 (1983)). Defendants cite *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 U.S. Dist. LEXIS 103662 (N.D. Cal. Oct. 22, 2009), quoting *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291 (S.D. Cal. 2009). Both cases quote the "higher degree of particularity" standard, a standard that may apply to pleadings in Cartwright Act cases brought in California courts, but does not accurately describe federal pleading standards.

The cited cases are not to the contrary. *Lorenzo* was a case involving a pendant state claim under the Cartwright Act, in which the court simply remarked that "California courts similarly demand a 'high degree of particularity in the pleading of Cartwright Act violations.'" *Lorenzo*, 603 F. Supp. 2d at 1299. In *Facebook*, this Court was confronted with a "narrative untethered to any specific claim" followed by a recitation of a legal standard and "a general 'reference [to] all allegations of all prior paragraphs ….'" *Facebook*, 2009 U.S. Dist. LEXIS 103662 at *5. In that instance, the Court bolstered

its decision to require greater detail in the plaintiff's complaint by quoting the same observation about pleading Cartwright Act claims in state court that appeared in *Lorenzo*. The cited authority, therefore, applies only to pleading a Cartwright Act claim under California law.

Even though the *Lorenzo* and *Facebook* courts use the word "similarly" to mean "similar to federal pleading standard," the cases provide scant support for defendants' position that the "high degree of particularity" standard is the "standard required by this Court" (Defds. Mem. at 8). The Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), made clear that it did not require "heightened fact pleading of specifics [to satisfy Rule 8(a)(2)], but only enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 547. Matters, claims, and defenses that must be pleaded with heightened specificity beyond the notice pleading called for by Rule 8(a)(2), such as fraud, mistake, conditions of mind, *etc*., are itemized in Rule 9 of the Federal Rules of Civil Procedure. In the absence of allegations involving one or more of those enumerated matters, federal courts have declined to impose a heightened pleading standard, requiring only the "short and plain statement of the claim showing that the pleader is entitled to relief" described in Rule 8(a)(2). *See, e.g., In re Packaged Seafood Prods. Antitrust Litig*., 242 F.Supp.3d 1033, 1074 (S.D. Cal., 2017) (claim under Illinois's Consumer Fraud and Deceptive Business Practices Act is "simply based on antitrust violations such that Rule 9(b) does not apply"); *see also In re Disposable Contact Lens Antitrust*, 215 F.Supp.3d 1272, 1288 (M.D. Fla. 2016) (acknowledging that *Twombly* "declined to apply a heightened pleading standard to antitrust cases, instead holding that the facts alleged are subject to Rule 8(a)'s general requirement of a 'short and plain statement' of facts supporting a plausible claim"); *Felder's Collision Parts v. All Star Adver. Agency*, 777 F.3d 756, 760 (5th Cir. 2015) ("there is no heightened pleading standard in antitrust cases"), cert. denied, 133 S. Ct. 39, 193 L. Ed. 2d 26 (U.S. 2015); *In re Riddell Concussion Reduction Litig.*, 77 F. Supp. 3d 422, 433 n.11 (D.N.J. 2015) ("Because neither fraud nor mistake is an element of unfair conduct under Illinois' Consumer Fraud Act, a cause of action for unfair practices under the Consumer Fraud Act need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b)"); and *Concord Assocs. v. Entm't Props. Trust*, 817 F.3d 46, 52 (2d Cir. 2016) ("there is no heightened pleading standard in antitrust cases, and the facts alleged are subject to Federal Rule of Civil

Procedure 8(a)'s general requirement of a 'short plain statement' of facts supporting a plausible claim").

Accordingly, the Court should reject defendants' argument that plaintiffs are required to plead federal antitrust claims with a "high degree of particularity." The Complaint gives the defendants "fair notice of what the … claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555, and that is all the federal pleading standards require. *See also Erickson v. Pardus*, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests,'" quoting *Twombly*).

II. THE COMPLAINT ADEQUATELY ALLEGES THE RELEVANT MARKETS

Painting with an overly-broad brush, defendants lead off their arguments by incorrectly and indiscriminately urging that "a plaintiff must allege that the defendant has market power within a 'relevant market'" (Defds. Mem. at 9, quoting *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008). Doing a two-step, defendants first argue that the "the relevant market as alleged [in Paragraph 29 of the Complaint] is fatally flawed because it does not apply and comport with the interchangeability test as applied by the Supreme Court and Ninth Circuit" (Defds. Mem. at 9) (citing cases). Second, because a "[f]ailure to properly allege the relevant market is fatal to a market power allegation," plaintiffs have not adequately alleged market power (Defds. Mem. at 12). Neither prong of defendants' argument has merit.

A. The Alleged Market Definitions Are Not "Facially Unsustainable"

The proper definition of the relevant market in an antitrust case is a question of fact that cannot be determined on a motion to dismiss unless "the complaint's 'relevant market' definition is facially unsustainable" or "suffers a fatal legal defect." *Newcal*, 513 F.3d at 1045; *see also SumoText Corp. v. Zoove, Inc.*, No. 16-cv-01370-BLF, 2017 U.S. Dist. LEXIS 98625, *26 (N.D. Cal., June 26, 2017) ("Where the complaint's definition of relevant market is facially unsustainable, the antitrust claim may be dismissed"); *High Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) (market definition involves a factual inquiry into commercial realities). The market definitions alleged in the Complaint are not "facially unsustainable" and suffer from no "fatal legal defect."

The Complaint defines two relevant markets in this case, i) the wholesale market for prescription pet parasiticides, and ii) the wholesale market for restricted OTC pet parasiticides, for distribution to non-veterinary retailers (Compl. ¶ 29). The Complaint alleges that "[o]ther pet products, such as those distributed directly to retailers, are not sufficiently substitutable to discipline at least a small but significant and non-transitory increase in the wholesale price of prescription and restricted pet parasiticides in the market, and very few retailers would substantially reduce their purchases of such medications in the event of such a price increase" (Compl. ¶ 29).

These allegations implement what is widely known as the hypothetical monopolist test, which posits whether a hypothetical monopolist could profitably impose a "small but significant nontransitory increase in price" ("SSNIP") in the proposed market. If buyers in the market will turn to substitutes outside the market so that the hypothetical monopolist's price increase is not profitable, the market definition must be expanded to include those substitutes. If the hypothetical monopolist can profitably increase prices, a relevant market is properly defined. The Ninth Circuit has recognized this as a "common method" for determining the relevant 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") (citing Dep't. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, § 4 (2010)).

The Ninth Circuit has repeatedly recognized that the purpose of defining a relevant market is to identify "the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.1995) quoting *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc*., 875 F.2d 1369, 1374 (9th Cir. 1989); *see also Newcal* at 1045 (same). By accomplishing precisely this, the relevant markets defined in the Complaint do indeed "apply and comport with the interchangeability test as applied by the Supreme Court and Ninth Circuit." For example, the Complaint identifies the "key wholesalers" in the secondary distribution system for prescription pet parasiticides to nonveterinary retailers as defendant, VIP, Lambert Vet Supply, Rainbow Vet Supply, Pet Vet Supplies, Southeastern Veterinary Exports (a captive distributor to retailer 1-800-Petmeds), and plaintiff, Med Vets (Compl. ¶ 37). Retailers seeking to stock

their shelves with prescription pet parasiticides for sale to the public have few if any other choices. As long as pharmaceutical pet medication manufacturers continue to refuse to sell to non-veterinary retailers through a direct distribution channel and choose instead to maintain the charade of selling their products only to veterinarians, these few wholesalers are the only sellers with the "actual or potential ability to deprive each other of significant levels of business." *Rebel Oil Co.*, 51 F.3d at 1434. A similar group of sellers used to participate in the wholesale market for restricted OTC pet parasiticides (principally Frontline Plus) along with plaintiff Bay Medical, but since the VIP-PetIQ joint venture (now PetIQ) captured virtually all of the trade in that market, those wholesalers have exited the market (Compl. ¶¶ 34, 38).

Defendants complain that the defined relevant markets "exclude" sales to retailers by manufacturers and other "wholesalers." The reason is these channels are rarely if ever available to retailers as a source of restricted OTC or prescription pet parasiticide products. Defendants concede as much through their endorsement of the FTC Report, their admission that manufacturers attempt to maintain veterinarian-only sales policies, and their acknowledgement that retailers must rely on secondary wholesalers for their inventory (Defds. Mem. at 4). In any event, such an inquiry is factual in nature. *Newcal*, 513 F.3d at 1045 ("the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial").

Nonetheless, defendants complain that plaintiffs "have made no effort to explain the contours of the market by interchangeability" (Defds. Mem. at 9-10). But, as a sister court has pointed out, "[l]ack of interchangeability and lack of substitutability are essentially conclusions to be drawn from the preferences of consumers and the characteristics of the goods at issue." *Rock River Communs., Inc. v. Universal Music Group, Inc.*, 2008 U.S. Dist. LEXIS 126968 *8, n.5 (C.D. Cal. August 25, 2008). Here, the "consumers" in the market are retailers that must purchase from secondary wholesalers such as plaintiffs and defendants. As in *Rock River*, the Complaint in this case pleads sufficient facts about the choices and preferences of the retailers and the characteristics of the market to permit the Court to "reasonably infer" that the secondary wholesale markets for prescription and restricted OTC pet parasiticides "constitute [ ] separate and distinct product market[s]." *Id. See also In re eBay Seller*

Antitrust Litig., 2010 WL 760433, at *6-*9 (N.D. Cal. Mar. 4, 2010), aff'd 433 Fed. Appx. 504, 2011 WL 1749206 (9th Cir. May 9, 2011) (whether "online auctions market" was an economically distinct submarket within broader category of online marketplaces was triable issue of fact). And here, as in *Rock River*, defendants "essentially ask[ ] the Court to weigh the facts of the case and determine that [the defined markets] are not unique enough to form the basis of a separate product market[,] … an issue of fact to be based on evidence, not an issue for a motion to dismiss." *Rock River*, 2008 U.S. Dist. LEXIS 126968 at *8.

B. Market Power in a Relevant Market is Not an Element of Any Claim

For several independent reasons, market power is not an element of any of the claims pleaded in the Complaint.

First, as a matter substantive law, as to Count I, it is well established that Section 7 of the Clayton Act does not require "certain" harm, but instead permits courts to use predictive judgment to "arrest anticompetitive tendencies in their 'incipiency.'" *United States v. Penn-Olin Chem. Co*., 378 U.S. 158, 171 (1964) quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (internal quotation marks omitted). It would defeat the purpose of the statute and vitiate the incipiency standard to require a plaintiff to establish that a defendant *already possessed* market power in a defined market before a challenge to a transaction that threatens competitive injury may be brought. Plaintiffs are only required to show that the proposed merger is likely to "substantially lessen competition" in the relevant markets. As to Count II, plaintiffs know of no authority, and defendants have not cited any, that holds that a price discrimination claim must contain an allegation that the defendant possesses market power in the relevant market. As to Count III, the law is clear that defendants "may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." *Spectrum Sports, Inc v. Quillan*, 506 U.S. 447, 459 (1993). Again, to require plaintiffs to allege that defendants had *already* attained market power in the defined market would simply eliminate cases of attempted monopolization under Section 2 and re-define the "dangerous probability" element.

Second, as a matter of antitrust economics, it is illogical for defendants on the one hand to characterize the challenged acquisition as "vertical" (Defds. Mem. at 1, 2, 7) and at the same time insist

that plaintiffs must address the anticompetitive effects of the transaction "through market shares and concentration levels" (Defds. Mem. at 12). As one court recently observed, in the analysis of the anticompetitive effects of a vertical merger "the 'familiar' horizontal merger playbook is of little use." *United States v. AT&T Inc. and Time Warner, Inc*., No. 17-2511 (RJL), *55 (D.D.C., June 12, 2018). Vertical transactions involve "firms that do not operate in the same market" and thus "produce[s] no immediate change in the level of concentration in any relevant market." Dep't. of Justice and Fed. Trade Comm'n, Non-Horizontal Merger Guidelines, § 4.0 (June 17, 1984). Accordingly, adopting a requirement that plaintiffs establish anticompetitive effects through such changes in market shares and concentration levels in a defined market would render it all but logically impossible for any plaintiff to challenge a non-horizontal merger, no matter how pernicious its threatened effects or injurious to competition or the competitive process. That is not a result this Court should endorse.

That is not to say that the challenged transaction will not eventually result in increased concentration and the accretion of market power by the defendants in the relevant markets. It will, but not as a result of the immediate combination of the two transacting parties. The alleged anticompetitive effects cannot be evaluated in the first instance by easy reference to the immediate increase in market concentration but require instead a fact-specific inquiry into the likely outcome of defendants' post-acquisition position relative to the other participants in the market, and the prospects that the new position will enable defendants to engage in anticompetitive conduct that allows them to acquire market power in the future.

Finally, the legal authorities relied upon by defendants for the imposition of a requirement to plead "market power in a relevant market" are all inapposite to this case. For example, in *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963 (9th Cir. 2008), the court was presented with a tying claim in which the plaintiff had failed to allege that the defendant possessed market power in the relevant tying market, an essential element of that claim. In *Digital Sun v. The Toro Co.*, 2011 U.S. Dist. LEXIS 30222 (N.D. Cal. Mar. 22, 2011) the plaintiff brought a claim for attempted monopolization without alleging that the defendant is in danger of possessing power in the relevant market. And in *Tanaka v. Univ. of S. Cal*., 252 F.3d 1059 (9th Cir. 2001), the plaintiff attempted to bring a claim under Section 1

of the Sherman Act, but "simply ha[d] no antitrust cause of action." *Id.* at 1065. It is unclear how the *Tanaka* case is relevant to the market power issue at all.

Plaintiffs are not required to allege market power in a relevant market to state any of its claims and, therefore, the absence of such an allegation does not provide grounds for dismissal of plaintiffs' Complaint.

III. PLAINTIFFS ADEQUATELY DEMONSTRATE ARTICLE III STANDING

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "To qualify as a party with standing to litigate, a plaintiff must show injury in the form of 'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual and imminent,' and which is also 'fairly traceable to the challenged action' and 'redressable by a favorable ruling.'" *Mehr v. Féderation Internationale de Football Ass'n*, 115 F.Supp.3d 1035, 1055 (N.D. Cal., 2015) quoting *Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, —— U.S. —— , 135 S.Ct. 2652, 2663 (2015). "A plaintiff seeking injunctive relief satisfies the requirement of redressability by alleging facts showing that he/she is 'realistically threatened by a repetition of the violation.'" *Mehr*, 115 Supp.3d at 1057 quoting *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006).

Paragraph 44 of the Complaint alleges that i) an injury-in-fact was suffered by Bay Medical and ii) Med Vets is under imminent threat of future injury. The Complaint alleges that Bay Medical has been excluded from the market and that Med Vets is threatened with exclusion. Moreover, defendants' transaction *and* their antecedent joint conduct are alleged as the causes of plaintiffs' past and threatened loss. Such injury and threatened injury represents the kind of "invasion of a legally protected interest" that customarily confers Article III standing upon litigants involved in business disputes.

Knowing this, defendants seize on the narrow issue of whether plaintiffs' past and threatened injuries are "fairly traceable to the challenged action." Defendants first assert that "the conduct of numerous players in the pet medication industry" and various "barriers to competition" are the real cause of plaintiffs' injuries. Defendants argue that plaintiffs "allege no facts to explain why any 'injury' … is not the result of these barriers that have nothing to do with PetIQ or VIP Petcare's conduct."

In other circumstances, a plaintiff alleging a business injury might have an obligation to explain why factors other than the defendants' conduct did not cause plaintiffs' alleged injuries. However, this case involves no such circumstances. The factors defendants point to are features of the market that have existed for at least a decade before the PetIQ/VIP joint venture and transaction. No other event is offered by defendants to explain plaintiffs' dramatic change of fortunes. The only significant change of circumstances was the defendants' aggressive and unlawful initiative beginning in late 2016 to wrest control of the secondary distribution system for pet parasiticides. Prior to that, plaintiffs had no difficulty in obtaining and retaining their customers. Plaintiffs do not explain why other factors did not cause their past or threatened injuries because there are no other factors to explain.

Defendants further argue that their transaction could not have been the cause of plaintiffs' injury because Bay Medical is alleged to have been injured prior to the acquisition. As the Complaint makes clear, both the acquisition as well as the parties' antecedent conduct are alleged to be the causes of plaintiffs' past and threatened injuries (Compl. ¶ 44).

IV. THE COMPLAINT ADEQUATELY ALLEGES ANTITRUST INJURY

In addition to Article III standing, a complaint in an antitrust case must also allege sufficient facts to demonstrate that plaintiffs have "antitrust standing" to bring their action. A well-known formulation of the kind of injury that confers antitrust standing appears in *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977), which defines antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." "Antitrust injury does not arise ... until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (emphasis in original). Moreover, "[w]here the defendant's conduct harms the plaintiff without adversely affecting competition generally, there is no antitrust injury." *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).

Paragraph 45 of the Complaint alleges that defendants' transaction and antecedent conduct have had the effect of excluding plaintiffs and other secondary wholesalers and will have the effect of lowering output and raising prices in the wholesale markets for pet parasiticides. In addition, "retailers are threatened with a significant loss of wholesale purchasing options." Allegations of this kind that

claim injury from the exclusion of plaintiff and others from the market as the result of anticompetitive conduct or arrangements are sufficient to establish antitrust injury. *See, e.g., Funai Elec. Co. v. LSI Corp*., No. 16-cv-01210-BLF (N.D. Cal. March 27, 2017) (allegations that conduct threatens unlawfully to exclude rivals sufficient for "causal antitrust injury").

Defendants once again read the antitrust injury doctrine too broadly, arguing that 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*." (Defds. Mem. at 16) (emphasis supplied). Similarly, defendants argue that plaintiffs' "concession" that "they are competitors seeking to operate in the same sales channels as pre-Acquisition PetIQ and post-Acquisition PetIQ/VIP Petcare … is fatal to Plaintiffs' ability to demonstrate antitrust injury." *Id.*

Apparently, defendants interpret the antitrust injury doctrine to prohibit all antitrust suits by competitors against their rivals. Defendants' reasoning is based on the notion a plaintiff will inevitably benefit from the anticompetitive conduct of a rival, either because the rival's conduct will increase price or deter new entry (Defds. Mem. at 17). But this has not and has never been the meaning or purpose of the antitrust injury doctrine. The authorities cited by defendants stand for the proposition that claimants that "actually economically benefit[ ]" from the complained of anticompetitive conduct are not likely to have suffered an antitrust injury. *Id.* But defendants point to no conduct or economic effect that could possibly benefit plaintiffs. Bay Medical can no longer obtain supply at favorable enough prices and volumes to win customers and Med Vets operates with an ongoing threat of being similarly excluded from the market by arrangements between PetIQ and the manufacturers. The past and threatened injuries to plaintiffs are not economic benefits; they are "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Plaintiffs have adequately alleged antitrust injury.

V. THE COMPLAINT ALLEGES COGNIZABLE CLAIMS IN EACH OF THE THREE COUNTS

Defendants conclude their argument with a potpourri of attacks on the sufficiency of the allegations stating each of the three claims.

A. The Complaint Alleges a Violation of Section 7 of the Clayton Act

Defendants complain that the Complaint fails to allege that the challenged acquisition "had anti-competitive effects, or that anti-competitive effects made possible by the acquisition occurred." *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881, 887 (9th Cir. 1979). However, *Purex* was a case decided in 1979 involving an acquisition that had occurred in 1957. In the present case, the challenged acquisition is only a few months old. The very existence of this litigation, moreover, may be inhibiting the defendants' anticompetitive conduct and incentivizing them to "lay low" for the present. The goal of Section 7 is "primarily to arrest apprehended consequences of intercorporate relationships before those relationships (can) work their evil." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957). Plaintiffs should not, at this early post-acquisition stage, be required to allege that the transaction has already demonstrated an anticompetitive effect on the relevant markets.

B. The Complaint Alleges a Violation of Section 2(f) of the Clayton Act

Defendants also complain that the allegations of the Complaint do not satisfy the "technical" requirements of a claim for price discrimination. As a result, defendants claim they "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." (Defds. Mem. at 20).

Defendants are seeking a level of specificity that is not required to place them on notice of the nature of the claim and that cannot be expected to be in the possession of a price discrimination plaintiff. It is clear from the Complaint that, at the least, VIP is alleged to have received discriminatory pricing on Frontline Plus from the product's manufacturer (Compl. ¶ 5, 34, 50), and to have "knowingly induced and received" such prices (Compl. ¶ 32). Plaintiffs have a good faith basis to make these allegations, including information received from a representative of VIP itself (Compl. ¶ 33). To require the plaintiffs to allege the specific details of the individual sales transaction(s) between VIP and Merial at discriminatory prices would place a claim for price discrimination outside the reach of plaintiffs and any other price discrimination claimant, because such detailed information is practically never available. No doubt, proof of the details of the offending transaction(s) and other technical requirements alluded to by defendants will be required to be met before plaintiffs can overcome a motion for summary judgment or prevail at trial. At this stage, however, plaintiffs have adequately alleged that VIP knowingly engaged

in the receipt of discriminatory prices that did not reflect any difference in costs or market conditions and that caused competitive injury in the relevant market (Compl. ¶¶ 50-53). That is all that is required.

C. The Complaint Alleges a Violation of Section 2 of the Sherman Act

Defendants complain that the allegations of the Complaint are not sufficient to allege that defendants' alleged monopoly power is "not due to 'superior product, business acumen, or historic accident'" (Defds. Mem. at 19) (citation omitted). Moreover, defendants argue that the Complaint fails to allege how "potential monopolization is due to any predatory and intentional behavior." *Id.*

As defendants concede and as the FTC Report makes clear, the secondary wholesale market is a creature of anticompetitive restraints imposed by manufacturers of pet pharmaceuticals intended to artificially inflate pet medications sold by veterinarians and limit the supply of those same medications to retailers. Cooperation between Merial, Elanco, and other manufacturers and PetIQ/VIP constitutes a threat to the continued flow of product at competitive prices to retailers through the secondary distribution system. Arrangements between manufacturers and defendants that raise the wholesale price of pet parasiticides, lower the quantity of product available to retailers, and eliminate retailers' customary wholesale sources of supply such as plaintiffs, as alleged in the Complaint, reflect an intentional effort by defendants, with the blessing of the manufacturers, to attempt to monopolize the relevant markets. These facts sufficiently state a claim for attempted monopolization.

VI. PLAINTIFFS HAVE STANDING TO SEEK AN INJUNCTION

Defendants argue that plaintiffs would have an adequate remedy at law in the absence of an injunction and have otherwise failed to sufficiently allege standing to seek an injunction.

Section 16 of the Clayton Act, 15, U.S.C. § 26, provides, in pertinent part, that "any person … shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws … under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." Under those principles, a claim for injunctive relief must be based on likely rather than merely speculative or possible injuries.

The present case is brought by two related plaintiffs, one of which has *already* lost its business as a consequence of the arrangements and relationships between VIP and PetIQ. The other plaintiff is

under the threat of a similar fate. The loss of one's business, and the ability to serve customers and make money, cannot be remediated in a suit for damages.

In arguing that plaintiffs lack standing to seek injunctive relief, defendants again seek from this Court an assessment of the evidence entitling plaintiffs to relief rather than an evaluation of whether the allegations of the Complaint are sufficient to state a claim. The cases cited by defendants denying injunctive relief for various reasons shed little light on whether the Complaint in this case adequately places defendants on notice of the nature of plaintiffs' claim. Defendants have failed to raise legitimate grounds to deny plaintiffs standing to seek injunctive relief at this early stage of the litigation.

CONCLUSION

Based on the foregoing points and authorities, plaintiffs respectfully request an order denying defendants' Motion to Dismiss Plaintiffs' Complaint.

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