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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 TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE OF PRESS RELEASE

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

I. INTRODUCTION

Defendants, VIP Petcare Holdings, Inc. and PetIQ, Inc., have requested the Court to take judicial notice of two documents (Dkt. No. 26) ("Defds. Request"). The first document is an FTC May 2015 Staff Report entitled, "Competition in the Pet Medication Industry: Prescription Portability and Distribution Practices" (Dkt. No. 26-1). The FTC Report is referred to several times in the Complaint. Plaintiffs, Med Vets Inc. and Bay Medical Solutions Inc., have no objection and join in the request to the Court to take judicial notice of the FTC Report.

Defendants also request the Court to take judicial notice of PetIQ's January 8, 2018 press release announcing the transaction that is the subject of this case (Dkt. No. 26-2). The press release is not referred to in the Complaint and sets forth facts subject to reasonable dispute. Accordingly, plaintiffs oppose defendants' request for judicial notice of the press release.

II. ARGUMENT

Federal Rule of Evidence 201(b) provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The statements in defendants' press release are neither, so the document should not be considered a suitable candidate for judicial notice.

Whether to take judicial notice of a document, however, is within the sound discretion of the Court. *Qingdao Tang-Buy Int'l Imp. & Exp. v. Preferred Secured Agents*, No. 15-cv-00624, 2015 U.S. Dist. LEXIS 163100, at *6 (N.D. Cal. 2015) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)). The general rule, however, is that "a court may not consider materials beyond the pleadings in ruling on a motion to dismiss." *O'Sullivan v. Longview Fibre*, 993 F. Supp. 743, 745 (N.D. Cal. 1997) (Chesney, J.) (citing *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)); *see also In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714, 2013 U.S. Dist. LEXIS 116245, at *30 (N.D. Cal. 2013) (citing *Lee*, 250 F.3d at 689-90); *Retrophin v. Questcor Pharms.*, 41 F. Supp. 3d 906, 911 (C.D. Cal. 2014) (denying judicial notice where documents were not mentioned in the complaint and the facts for which judicial notice was requested could be reasonably disputed) (citing

United States v. Corinthian Colleges, 655 F.3d 984, 998 (9th Cir. 2011)).

Courts may also take judicial notice of (1) material necessarily relied upon in the complaint or (2) matters of public record, *Drouin v. Contra Cost Cnty.*, No. 15-cv-03694, 2017 U.S. Dist. LEXIS 50750, at *7-8 (N.D. Cal. 2017). Defendants' press release is neither.[1]

A document has been "necessarily relied upon" under the doctrine of incorporation by reference only if (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document. *Retrophin*, 41 F. Supp. 3d at 911 (citation omitted); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). None of these conditions are met.

Plaintiffs' Complaint does not refer to the press release.[2] Moreover, the press release is not central to and does not form the basis for Plaintiffs' claims. The Request may be denied on that basis alone. *See Retrophin*, 41 F. Supp. 3d at 912 (denying judicial notice of two press releases where the complaint did not mention them and they were not central to plaintiff's claims); *see also In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1091 (N.D. Cal. 2007) (denying judicial notice of press releases not referenced in the complaint and only tangentially related to plaintiff's allegations).

More importantly, judicial notice is not appropriate where the contents of the document may be subject to reasonable dispute. *Retrophin*, 41 F. Supp. 3d at 911; *In re Apple iPhone Antitrust Litig.*, 2013 U.S. Dist. LEXIS 116245, at *31-32. A press release is inherently a self-serving and promotional document; it is not a "source whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Defendants concede that at most, the Court may consider the press release "for its existence and contents," but not "for the truth of any matters contained therein." Defds.' Request at 3; *Stewart v.*

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[1] Because a document is publicly available, it is not necessarily a "matter of public record." *See, e.g., Belodoff v. Netlist, Inc.*, 2008 U.S. Dist. LEXIS 45289, *11 (C.D. Cal. 2008) (noting that a document that is publicly available is not necessarily a matter of public records appropriate for judicial notice).

[2] Defendants' Request implies that Plaintiff's Complaint references the Press Release in ¶ 35, *see* Request at 4. However, ¶ 35 refers to a March 2018 press release in which PetIQ announced the appointment of Susan Sholtis, a former Merial executive who was Head of North America Commercial Operations, as a member of PetIQ's Board of Directors. The Complaint does not refer to the January 8 press release.

Gogo, No. 12-5164, 2013 U.S. Dist. LEXIS 51895, at *7-8 (N.D. Cal. 2013) (quoting *In re Am. Apparel S'holder Litig.*, No. 10-06352, 2013 U.S. Dist. LEXIS 6977, at *39 (C.D. Cal. 2013)). But Defendants do not (and cannot) offer any reason for the Court to take judicial notice of the mere existence of the press release without regard for its contents. It is likely that defendants will seek to use the document to make arguments about the effects of the merger on competition and other disputed matters in this case. *See* Defds. Motion at 6 (citing statement in press release about the merger's purported effects on "affordability" and "convenience" for consumers). The Court should not attempt to resolve "core disputed factual matter[s] in the case" at the pleading stage based on a press release. *Diversified Capital Invs. v. Sprint Comms.*, 2016 U.S. Dist. LEXIS 68757, at *13 (N.D. Cal. 2016).[3]

III. CONCLUSION

Based on the foregoing arguments and authorities, plaintiffs respectfully request that defendants' request for judicial notice of their January 8, 2018 press release be denied.

[3] Defendants also do not dispute that "documents that are judicially noticed should not be accepted as true when they contradict a plaintiff's allegations." Defds. Request at 2 (citing *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67 (9th Cir. 1956)). Yet they later argue that "this Court should consider the Press Release to the extent it contradicts allegations of the Complaint." Defds. Request at 4. This is an unsupportable position.

Dated: June 15, 2018

/s/ Jonathan Rubin

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