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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 REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date: August 3, 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Cases

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiffs' Opposition to VIP Petcare Holdings, Inc. and PetIQ, Inc.'s Motion to Dismiss (the "Opposition") confirms that the Complaint is an attempt by two disgruntled competitors to accomplish through litigation what they have failed to achieve through competition. Plaintiffs' Opposition claims that "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 competing. (Opp. at 13.) While Plaintiffs' alleged injuries are the result of real world competition (and not the result of Defendants' acquisition or related conduct), Plaintiffs' claims lack antitrust standing because their alleged injuries are personal injuries incurred by two minor secondary wholesalers, and not a harm to competition in the pet medicine industry as a whole. Plaintiff Bay Medical's failure to offer customers "favorable enough prices" (whatever that term might mean) and Plaintiff Med Vet's continued operations under a vague unidentified "threat," demonstrate that Plaintiffs can and/or do continue to operate in the competitive industry, and as a result, they do not have valid antitrust claims that should be permitted to proceed any further.

Plaintiffs complain that PetIQ's January 17, 2018 acquisition of Community Veterinary Clinics, LLC d/b/a VIP Petcare (the "Acquisition") is anticompetitive without sufficient allegations to support such a claim. They claim that "[i]n 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." (Opp. at 1.) However, Plaintiffs have failed to allege **facts** in the Complaint to make these claims plausible, and neither their minimal allegations regarding Defendants' conduct nor their allegations of injury, which, as alleged, are more plausibly linked to competition than to any conduct by Defendants, are sufficient to state an antitrust claim. Further, the Opposition relies on very minimal or no authority to contradict the Motion to Dismiss and asks the Court to disregard well-settled law because such principles are fatal to the Complaint. And finally, Plaintiffs attempt to cure certain deficiencies in their allegations by introducing new allegations in the Opposition that were omitted from the Complaint. Any such new "allegations" should be disregarded by this Court, because

anything outside of the Complaint (or incorporated within) should be disregarded when evaluating the Motion to Dismiss.

Plaintiffs have failed to sufficiently plead that they have standing to bring any of their claims before this Court, and they have likewise failed to sufficiently plead the specifics of the claims themselves. Nothing in the Opposition cures these fatal deficiencies. For all of these reasons, the Motion to Dismiss should be granted and the Complaint should be dismissed with prejudice.

ARGUMENT

I. ANTITRUST CLAIMS REQUIRE A HEIGHTENED PLEADING STANDARD

Plaintiffs spend a significant amount of time in the Opposition arguing that a heightened pleading standard does not apply, but fail to provide any authority from *this* Circuit to support their argument. Plaintiffs incorrectly suggest that PetIQ and VIP rely on California state law to support the heightened standard, while admitting that the cited cases note the similarity between the heightened standard for federal antitrust cases and the standard for the Cartwright Act. In *Lorenzo*, the court applied *Twombly* in noting that "[t]he allegations in the complaint 'may not evade [antitrust] requirements by merely alleging a bare legal conclusion.'" *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1298 (S.D. Cal. 2009) (quoting *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987)). In *Facebook*, this court noted in granting a motion to dismiss that "antitrust claims require a 'higher degree of particularity in the pleadings.'" *Facebook, Inc. v. Power Ventures, Inc.*, No. 08-cv-5780 JF (RS), 2009 WL 3429568, at *2 (N.D. Cal. Oct. 22, 2009) (quoting *Lorenzo*, 603 F. Supp. at 1298-99). Even *Twombly* cautions about the implications of allowing an insufficiently pled antitrust case to continue, considering the ramifications:

> Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007); *see also Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) ("This is because discovery in antitrust cases frequently causes

substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case.").[1]

Nor do PetIQ and VIP try to invoke Rule 9 pleading standards as Plaintiffs apparently suggest. Simply put, the Complaint must allege "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)). A complaint cannot survive on "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*).

II. PLAINTIFFS FAILED TO IDENTIFY MARKET POWER IN A RELEVANT MARKET AS REQUIRED TO SUSTAIN THEIR CLAIMS

The Opposition confirms that Plaintiffs have insufficiently pled both relevant market and market power, both of which are required for the claims they assert. Plaintiffs conflate Defendants' relevant market and market power arguments to gloss over the fact that they have properly alleged neither. To reiterate, (1) Plaintiffs have failed to sufficiently plead a relevant market, which is required for all of their claims,[2] (2) Plaintiffs' failure to sufficiently plead a relevant market also means that they cannot plead market power (because relevant market is necessary for market power), and thus their claims must fail on this basis as well,[3] and (3) even if Plaintiffs had sufficiently pled a relevant market, they still have not sufficiently pled any facts related to PetIQ or VIP market share or market power (pre-Acquisition or post-Acquisition), and on all of these bases, their claims must fail.[4]

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[1] The concern for expensive and harmful discovery is especially concerning here where Plaintiffs' counsel has already, without any permission or notice to the Court or Defendants, issued improper document hold and preservation notices to multiple third parties including Defendants' vendors – but not to Defendants themselves. Such an improper and premature effort at third party discovery is evidence that Plaintiffs are preparing to embark on an expensive and expansive fishing expedition if their claims are permitted to proceed.

[2] *E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (Clayton Act Section 7; *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 492 (9th Cir. 1977) (Sherman Act Section 7); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971) (Clayton Act Section 2).

[3] *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 972-73 (9th Cir. 2008); *Digital Sun v. The Toro Co.*, No. 10-cv-4567-LHK, 2011 WL 1044502, at *3 (N.D. Cal. Mar. 22, 2011).

[4] *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)).

In addition, Plaintiffs improperly attempt to allege additional facts in the Opposition that are not supported by the allegations of the Complaint. Any such additionally alleged facts should be disregarded by the Court, because anything beyond the Complaint itself should not be considered in evaluating a motion to dismiss. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

A. Plaintiffs Fail to Properly Allege Relevant Market

Plaintiffs attempt to rely on boilerplate arguments and plain recitations of relevant market standards to disguise the fact that they have insufficiently pled their relevant markets. Mechanic restatements of the SSNIP or interchangeability tests do not overcome that the Complaint's relevant market allegations are both contradictory and insufficient to survive at the Motion to Dismiss stage. Even applying the standard Plaintiffs support, the relevant market as alleged is "facially unsustainable" or "suffers a fatal legal defect" (Opp. at 6 (quoting *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008))), and on this basis alone the complaint should be dismissed.

By merely reiterating that their alleged market consists of only certain wholesale sales, Plaintiffs fail to address the deficiency Defendants identify in the Motion to Dismiss. Plaintiffs admit that Defendants' summary of the wholesale market "is largely accurate," but then fail to explain why their alleged markets can properly exclude multiple sales channels, multiple participants, and numerous competitors that all compete to provide the same relevant products into the marketplace. (Opp. at 3.) While Plaintiffs are not required to "prove" their relevant market in the Complaint, Plaintiffs must allege **facts** explaining why their proposed relevant market is so limited and excludes vast pieces of the industry. Here, Plaintiffs' Complaint fails to provide any such facts. For example, Plaintiffs fail to highlight any alleged facts from their Complaint that justify why it would be appropriate to exclude veterinary clinics from their relevant market definition, notwithstanding that their Opposition attempts to rely on allegations with no support in the Complaint that should be completely disregarded. (*See, e.g.*, Opp. at 8, with no Complaint citation ("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.").) (*See* Image B below.)

Image B: Relevant Markets Alleged

Plaintiffs also invoke the FTC Report throughout the Opposition but fail to respond to the portions of the FTC Report highlighted in the Motion that specifically contradict the relevant markets as alleged. (*See* Motion at 10-12, FTC Report, pp.4, 90.)[5] Defendants have highlighted a number of portions of the FTC Report that, when incorporated by reference as now agreed by Plaintiffs, contradict Plaintiffs' own relevant market allegations. Plaintiffs ask the Court to consider the portions of the FTC Report that appear to support their positions, but then ask the Court to disregard the rest. And the simple truth is that the FTC Report notes that the prices non-veterinarian retailers charge affect the prices that veterinarians charge, and customers will buy medications from either. (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.").) Thus Plaintiffs' relevant market definition is fatally flawed for its exclusion of direct-to-veterinary clinic sales.

Further, Plaintiffs' reliance on *Rock River* is inapposite. *Rock River* involved allegations that

[5] Defendants did not author the FTC Report, and do therefore do not "concede" or adopt the statements in the report as Plaintiffs suggest. Rather, by now incorporating the FTC Report (*see* Dkt. 30, Plaintiffs' Opposition to Request for Judicial Notice, p.1), Plaintiffs have exposed the conflicts with their own allegations.

a music record company violated Section 2 of the Sherman Act by sending cease-and-desist letters threatening copyright infringement actions to the plaintiffs' musical remix distributors, as well as alleged violations of Section 7 of the Clayton Act for reducing competition in the reggae music recordings market. *Rock River Communs., Inc. v. Universal Music Group, Inc.*, 2008 WL 11338096, at *1 (C.D. Cal. August 25, 2008). The Central District found that there was a sufficient relevant market definition to survive a motion to dismiss because the definition hinged on the "determination of the substitutability of other types of music," which the court concluded was an issue of fact to be determined at a later stage. *Id*. at *3. However, the determination about whether reggae music is unique enough to be a separate product market is completely distinguishable from the relevant markets alleged by Plaintiffs – here, the Court is not presented with issues of personal musical taste but more simply, identical products sold through different distribution channels. Therefore, Plaintiffs' reliance on *Rock River* should not affect this Court's determination.

Plaintiffs would have the Court believe that they have sufficiently plead relevant market because they have recited in their pleadings the standard required for a relevant market. But the facts alleged in the Complaint are contradictory at best. The relevant markets as alleged do not sufficiently pass either the SSNIP or interchangeability tests because they have failed to properly allege the types of products included in the relevant markets and the sources for these products. And because relevant market is necessary for Clayton Act and Sherman Act claims, the Complaint must fail.

B. Plaintiffs Fail to Properly Allege Market Power as Required for All of Their Claims

Plaintiffs have also failed to properly allege market power for two reasons, and nothing in the Opposition overcomes these two fatal flaws. While failure to adequately plead a relevant market makes an attempt to plead market power futile, *see, e.g., Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 972-73 (9th Cir. 2008), Plaintiffs' claims independently fail because they do not allege sufficient facts to establish market power, in the relevant market they allege or in any other. *United States v. Oracle*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) (citing *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 464 (1992) and *Rebel Oil Co., Inc. v. Atlantic Richfield*

Co., 51 F.3d 1421, 1434 (9th Cir. 1995)).

In addition, Plaintiffs incorrectly argue that they do not need to allege market power for the claims they attempt to assert in the Complaint. Their policy arguments against market power notwithstanding, market power is a necessary element of their Clayton Act and Sherman Act claims. *See, e.g.*, *Mulaney v. UAL Corp.*, No. 3:10-cv-02858-RS, 2010 WL 3790296, at *7 (N.D. Cal. Sept. 27, 2004) (Regarding Clayton Act Section 7, "[m]arket share is just a way of estimating market power, which is the ultimate consideration.") (quoting *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986)); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (requiring market power for a Sherman Act Section 2 and Clayton Act Section 2 claims and requiring a relevant market and dominant market share to establish market power); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006) (holding no Clayton Act Section 2(f) secondary-line price discrimination and noting that "there is no evidence that any favored purchaser possesses market power").[6] *See also Stubhub, Inc. v. Golden State Warriors, LLC*, No. 15-cv-1436-MMC, 2015 WL 6755594, at *3 (N.D. Cal. Nov. 5, 2015) (Chesney, J.) ("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.'") (quoting *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008), cert. denied, 557 U.S. 903 (2009)).

Plaintiffs have failed to establish market power, and they have even failed to establish market share under the relevant market alleged. And if there are no allegations as to market share, the Court cannot make a determination as to whether the post-Acquisition entities will have sufficient market share and influence to substantially lessen competition. *See, e.g.*, *Rebel Oil*, 51 F.3d at 1437 ("[As part of the market power analysis], [m]easurement of market share is necessary to determine whether the defendant possesses sufficient leverage to influence marketwide output."). As such, even without requiring market power, the Complaint must fail because it does not sufficiently plead market share. Further, and importantly, Plaintiffs are of course not obligated to prove their case at

[6] A properly defined market with accompanying market power is *essential* in price discrimination claims because the Robinson-Patman Act is viewed in the context "of the antitrust laws generally," and because price discrimination alone is not forbidden – the law proscribes only price discrimination that "threatens to injure competition." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220-22 (1993).

the motion to dismiss stage. They are, however, obligated to plead sufficient facts to support the various elements of their claims, and their utter failure to plead facts as to market power (or even market share for the relevant markets alleged which would tend to suggest market power pre- and/or post-Acquisition) means that their claims must fail.

III. PLAINTIFFS FAILED TO PROPERLY ALLEGE ARTICLE III OR ANTITRUST STANDING

A. Plaintiffs Fail to Explain How the Complaint Sufficiently Pleads Article III Standing

While the Opposition recognizes the importance of Article III standing, the Opposition fails to do anything more than reassert the boilerplate and conclusory statements made in the Complaint. Further, Plaintiffs incorrectly suggest that causation is a "narrow issue" (Opp. at 11) while citing no authority for such a position. This is patently incorrect – causation is a key element for Article III standing, and Plaintiffs attempt to downplay its importance to disguise the fact that they have failed to establish how the "harm" they allege can be causally linked to any of the conduct they attribute to Defendants.

Plaintiffs inappropriately attempt to shift the burden to Defendants "to explain plaintiffs' dramatic change of fortune." (Opp. at 12.) However, the only burden on Defendants at the Motion to Dismiss stage is to show that the Complaint does not plausibly allege facts to show that any change in Plaintiffs' "fortune" was caused by Defendants' alleged conduct. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Further, Plaintiffs assert that this case does not involve "circumstances" as in some other cases that would obligate them to "explain why factors other than the defendants' conduct did not cause plaintiffs' alleged injuries" (Opp. at 12) but cite no authority for why this case does not involve such circumstances.

Further, the Opposition concedes that the injury they allege they suffered began far before the joint venture or the Acquisition. (Opp. at 12 ("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 transactions.").) Despite this, Plaintiffs only point to the wholly conclusory Antitrust Injury paragraph of the Complaint to support their allegations. (Opp. at 11, Compl. ¶ 44.) They offer no explanation as to why any alleged injury is the result of PetIQ or VIP's conduct and not the result of manufacturer

policies out of Defendants' control that may conflict with or even prohibit Plaintiffs' very business model in the first place. (Opp. at 8.)

B. Plaintiffs Fail to Explain How the Complaint Sufficiently Pleads Antitrust Standing

Plaintiffs have also failed to overcome the deficiencies of their antitrust injury allegations, because they continue to rely on conclusory arguments to establish antitrust injury and standing, such as those in the Antitrust Injury section of the Complaint. (Opp. at 12, Compl. ¶ 45.) And where they do argue anything with specificity it is either not supported by their Complaint (and thus should be disregarded as outside of the pleadings), contrary to law, or both.

Now accusing Defendants of reading the law too broadly (as opposed to reading causation too narrowly), Plaintiffs incorrectly suggest that Defendants' antitrust injury argument is hinged on a prohibition of "all antitrust suits by competitors against their rivals." (Opp. at 13.) This is a misreading, intentional or otherwise, of the Motion to Dismiss. First, and importantly, the purpose of antitrust laws is "the protection of *competition*, not *competitors*." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962). Second, and in pointing to this well-established principle, Defendants argued in the Motion to Dismiss that the Complaint fails to sufficiently allege that Plaintiffs would be harmed by any of the conduct the attribute to Defendants, and as Plaintiffs concede, antitrust standing cannot be established by plaintiffs that "actually economically benefit" from the alleged conduct. (Opp. at 13.) In fact, Plaintiffs allegations **in the Complaint** suggest that they would economically benefit from the alleged conduct because it could lead to higher prices. (*See, e.g.*, Compl. ¶ 2.)

Plaintiffs offer nothing to oppose this point except inappropriate additional allegations with no support in the Complaint. However, it is worth noting that their allegation that "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" (Opp. at 13) is a classic example of complaints of effects to a **competitor** and not **competition** at large, making Plaintiffs' alleged injury outside the scope of what antitrust laws are intended to prevent. Plaintiffs have therefore done nothing more than confirm that they have insufficiently plead antitrust injury and, on this basis, have no antitrust standing under which to bring the claims they assert.

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

The Opposition provides no response or persuasive authority to combat Defendants' arguments in the Motion to Dismiss that the Complaint fails to state cognizable claims under the Clayton Act and Sherman Act sections asserted. Therefore, notwithstanding the continuing issues with relevant market, market power, and standing, the Complaint should be dismissed for failure to state claims upon which relief may be granted.

A. Clayton Act Section 7

The Opposition confirms that Plaintiffs have failed to sufficiently plead a Clayton Act Section 7 claim. 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. The statute presents a high bar, and plaintiffs must sufficiently allege "that [their] 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. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (citation omitted). However, Plaintiffs attempt to rely on conclusory statements that the Acquisition risks lessening competition or tends to create monopoly (*see e.g.*, Compl. ¶¶ 16, 43), but fail to allege **facts** to support such a conclusion. Plaintiffs' conclusory statement that the Acquisition may "eventually result in increased concentration . . . . but not as a result of the immediate combination of the two transacting parties" is a striking admission and defeats any Section 7 claim because Plaintiffs admit the Acquisition did not result in any increased market power or concentration. (Opp. at 10.)

Further, Plaintiffs' argument as to why one case cited in the Motion to Dismiss should be disregarded does nothing to overcome the deficiencies in the Complaint. Plaintiffs ask the Court to distinguish *Purex Corp. v. Procter & Gamble Co.* because the case involved an acquisition from years prior to the Ninth Circuit's decision. However, *Purex* states that under the standard set by *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, a Plaintiff must establish "that the acquisition had anti-competitive effects, or that the anti-competitive acts made possible by the acquisition occurred." *Purex*

Corp. v. Procter & Gamble Co., 596 F.2d 881, 887 (9th Cir. 1979) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977)). And while it is not necessary for Plaintiffs to have **proved** that they have suffered from anti-competitive effects as a result of the Acquisition, they must at least plead sufficient **facts** to suggest 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). Plaintiffs' attempt to quibble with only one of the cases cited by Defendants does nothing to cure the deficiencies in their allegations, and on this basis, the Court should dismiss their Clayton Act Section 7 claim.

B. Clayton Act Section 2(f)

The Opposition also does nothing to overcome the deficiencies of Plaintiffs' price discrimination claim, and therefore the Clayton Act Section 2(f) claim should also be dismissed. Plaintiffs complain that "Defendants are seeking a level of specificity that is not required to place them on notice of the nature of the claims." (Opp. at 14.) First, it is not Defendants that seek this level of specificity; rather, the law of this Circuit requires such a level of specificity. And Defendants do nothing more than point out that the Complaint fails to allege key elements of a price discrimination claim.

For example, a prerequisite of a buyer liability claim under Section 2(f) is that seller liability be adequately pled first. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006); *Gorlick Distribution Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1021 (9th Cir. 2013). Further, the Supreme Court has stated that a seller liability claim must allege (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." *Volvo*, 546 U.S. at 176. Plaintiffs' failure to allege two different sales is fatal without even reaching the further failures to allege that the two different sales were at different prices, reasonably contemporaneous, and of like grade and quality. Moreover, they ignore completely that they have failed to establish **buyer** liability, which is the claim they seek to bring. They make bold statements that all "that is required" is to allege that VIP (i.e., only one of the defendants) knowingly engaged in receipt of discriminatory prices" (Opp. at 14-15) without providing

any specific allegations supporting such a conclusory statement.

Plaintiffs would have this Court disregard well-established Supreme Court precedent to overcome their complete failure to allege the elements of seller liability. They complain that the standards asserted in the Motion to Dismiss "would place a claim for price discrimination outside the reach of plaintiffs." (Opp. at 14.) However, the case law is very clear that these elements are precisely what is required for a price discrimination claim. The conduct that the Robinson-Pattman Act condemns as impermissible price discrimination is intentionally narrow, because price competition is such a critical part of market economies, and Congress and the courts do not want to discourage lower pricing any more than absolutely necessary to prevent abuse. *Volvo*, 546 U.S. at 175 ("Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that Robinson–Patman does not ban all price differences charged to different purchasers of commodities of like grade and quality; rather, the Act proscribes price discrimination only to the extent that it threatens to injure competition.") (citations omitted).

C. Sherman Act Section 2

Again offering no case law to support their positions, the Opposition fails to explain why their Sherman Act Section 2 claim should survive a Motion to Dismiss. As articulated in the Motion to Dismiss, Sherman Act Section 2 claims require Plaintiffs to allege "(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). Further, Plaintiffs must properly allege that "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." *In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027, 1031 (N.D. Cal. 2008) (quotations omitted). Here, Plaintiffs attempt to rely on 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), but the Complaint is devoid of alleged **facts** to support the required elements or to explain how the alleged growth is not due to "superior product, business acumen, or historic accident." *eBay*, 545 F. Supp. 2d at 1031.

In addition, Plaintiffs inappropriately and inaccurately argue that Defendants "concede" any anticompetitive restraints in the secondary wholesale distribution channel to trump up their allegations as to attempted monopolization. (Opp. at 15.) Further, Plaintiffs again introduce "allegations" without any citations to the Complaint itself, attempting to introduce points outside the pleadings to cure the clear deficiencies in their Complaint. Despite the fact that these "allegations" should be disregarded, they do nothing to oppose the case law cited in the Motion to Dismiss. Yet again, Plaintiffs make clear that their real point of concern is with the manufacturers themselves, and they are using the existence of the Acquisition as a vehicle to bring claims they choose not to bring against the manufacturers directly.

V. PLAINTIFFS LACK STANDING FOR ANY FORM OF INJUNCTIVE RELIEF

Finally, the Opposition fails to overcome the fatal flaws of the Complaint in pleading that Plaintiffs are entitled to injunctive relief of any time, and particularly divestiture. Absent quoting Section 16 as to the exact standard for injunctive relief, Plaintiffs provide no support for their argument that injunctive relief is appropriate. As the Motion to Dismiss argues, injunctive relief is inappropriate for a number of reasons. *First*, 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). *Second*, injunctive relief is only appropriate to prevent future violations. *See, e.g.*, *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952) (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"). *Third*, they have failed to show that an adequate remedy at law does not exist, and Plaintiffs in fact seek such a remedy in the form of monetary damages. *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1122 (N.D. Cal. 2011), *aff'd*, 554 F. App'x 598 (9th Cir. 2014) (finding injunctive relief under the Clayton Act unwarranted because plaintiffs failed to show remedies available at law were inadequate). *Fourth*, the balance of equities does not favor injunctive relief because it would provide Plaintiffs with an unprecedented

windfall. *See Orson, Inc. v. Miramax Film Corp.*, 836 F. Supp. 309, 314 (E.D. Pa. 1993) (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"). And *fifth*, specifically for divestiture, Plaintiffs have failed to establish the elements necessary for any form of permanent injunctive relief. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (For permanent injunctive relief, and plaintiff must establish "(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.") (quotations omitted).

Contrary to Plaintiffs' assertions, Defendants do not seek "an assessment of the evidence." (Opp. at 16.) Rather, Defendants are asking the Court to do nothing more than apply the law of this Circuit and hold Plaintiffs to the standard required. And because Plaintiffs have failed to meet that standard and provide no compelling reason or case law as to why they should be excepted from such a standard, injunctive relief of any form should be denied.

CONCLUSION

For all the foregoing reasons and for the reasons articulated in the Motion to Dismiss, PetIQ and VIP Petcare Holdings respectfully request that the Court dismiss the Complaint with prejudice.

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