David E. Dahlquist (*pro hac vice*)
DDahlquist@winston.com
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
Telephone: (312) 558-5600
Facsimile: (312) 558-5700

Jeanifer E. Parsigian (SBN: 289001)
jparsigian@winston.com
Dana L. Cook-Milligan (SBN: 301340)
dlcook@winston.com
WINSTON & STRAWN LLP
101 California Street, 34th Floor
San Francisco, CA 94111-5840
Telephone: (415) 591-1000
Facsimile: (415) 591-1400

Attorneys for Defendants
VIP PETCARE HOLDINGS, INC.
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' FIRST AMENDED COMPLAINT

Date: March 1, 2019
Time: 9:00 AM
Place: Courtroom 7 - 19th Floor
San Francisco Courthouse
450 Golden Gate Avenue,
San Francisco, CA 94102

Judge: Hon. Maxine M. Chesney

PRELIMINARY STATEMENT

When this Court dismissed the Original Complaint, it characterized Plaintiffs' allegations as conclusory in nature and "pretty much devoid of facts." Plaintiffs were provided with time and opportunity to amend their pleadings and address the Court's concerns. However, Plaintiffs' amended allegations fail to overcome their prior deficiencies and the relevant market is even more flawed than it was previously due to the arbitrary exclusion of industry participants, inconsistent omission of substitutable products, and addition of the undefined term "unmeasured." Likewise, Plaintiffs' amended allegations of market power, antitrust injury, and harm to competition remain just as conclusory as in the Original Complaint.

Plaintiffs' Amended Complaint continues to rely on contradictory allegations, conclusory statements, and absent facts. Each failure alone demonstrates Plaintiffs' inability to satisfy their own pleading standard. Moreover, Plaintiffs' Opposition seeks to distract the Court with nonsensical arguments and irrelevant quotes from Defendants' publicly available materials that do nothing to cure the fatal deficiencies of the Amended Complaint. Because Plaintiffs have failed to present a plausible claim as required under *Twombly*, the Amended Complaint should be dismissed with prejudice.

ARGUMENT

I. APPLICABLE STANDARD

"'[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed'" beyond the motion to dismiss stage. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenter*s, 459 U.S. 519, 528, n.17 (1983)). *Twombly* cautions specifically 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." *Twombly*, 550 U.S. at 558. In view of these same considerations, this court has looked for a "'higher degree of particularity in the pleadings'" in antitrust cases. *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 v. Qualcomm Inc., 603 F. Supp. 2d 1291, 1298-99 (S.D. Cal. 2009)).

II. PLAINTIFFS HAVE NOT ALLEGED A PLAUSIBLE MARKET

The relevant market as alleged remains "facially unsustainable." *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008)). While Plaintiffs are not required to "prove" their relevant market at this stage, Plaintiffs must allege sufficient facts to explain the contours of their proposed relevant market, and the Amended Complaint fails to do so. *Id.* at 1052.

Plaintiffs spend a significant amount of the Opposition in a circular discussion of functional and economic substitutability in an effort to defend the relevant market. But this wrestling over the applicable test is nothing more than a distraction, because the Amended Complaint lacks the factual allegations to meet *Twombly's* requirements under any relevant market test. Importantly, Plaintiffs concede that their relevant market as alleged excludes functional (i.e. real) substitutes. (Opp. at 12 ("Plaintiffs acknowledge the potential functional substitutability of a range of products available to pet owners, some of which are measured products.").) This alone is fatal to their relevant market as alleged, because as they admit, it does not contain all substitutable products without any explanation as to why such products are excluded. Moreover, Plaintiffs fail to sufficiently allege why their relevant market encompasses all economic substitutes but omits functional substitutes.

As the Ninth Circuit stated last year, "Plaintiffs must plead a relevant market to state an antitrust claim under the Sherman Act." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018) (citing *Newcal Indus., Inc.*, 513 F.3d at 1045). Plaintiffs' relevant market remains just as implausible and facially unsustainable as it was in the Original Complaint.

A. Important Industry Players Are Excluded from the Alleged Relevant Market

Plaintiffs Opposition does nothing to resolve the inconsistencies in the market allegations that existed in the Original and Amended Complaint. For example, Plaintiffs baldly state that "[v]eterinarians, manufacturers, or pharmaceutical wholesalers are not viable options since they lack the capacity to meet the retailers' logistical and other needs." (Opp. at 7.) But, Plaintiffs fail to explain *why* veterinarians, manufacturers, or pharmaceutical wholesalers should plausibly be excluded from the market they allege. They double down on this argument by then stating that "[r]etailers cannot turn to veterinarians or manufacturers for unmeasured veterinary wellness and

medication products, and those other forms of distribution are appropriately excluded from the product market . . . " (Opp. at 12.)

This assertion is not supported by any factual allegations and, in fact, is wholly inconsistent with Plaintiffs' own Amended Complaint. First, and importantly, Plaintiffs provide *no citations* from the Amended Complaint to support their argument or exclusion, and indeed the Amended Complaint contains no allegations regarding "retailers logistical and other needs."[1] Second, Plaintiffs' overarching statements about the market are contradicted by their own allegations. Plaintiffs dismiss as "phantasmagorical" the idea that "a Costco or Wal-Mart could purchase supply from a veterinary clinic or directly from an animal health manufacturer," (Opp. at 7) but this is precisely what they have admitted. Specifically, with respect to manufacturers, they plead that Bayer, a major manufacturer, has been selling directly to retailers since 2010. (FAC ¶ 28.)[2] This fact directly contradicts their position about the appropriate relevant market and renders it facially implausible.

Further, Plaintiffs' conclusory allegations regarding veterinary clinics are utterly confusing. They state multiple times that VIP was a "horizontal competitor," (FAC ¶ 11; Opp. at 9, 15), presumably in support of their claim that the merger eliminated a horizontal competitor; and yet they further insist that veterinary clinics such as VIP are *not* horizontal competitors who could sell to retailers (this is also "phantasmagorical" according to Plaintiffs). These inconsistent allegations make no sense and demonstrate the implausibility of Plaintiffs' alleged market.

Moreover, Plaintiffs yet again fail to address why the retailer is the correct customer, arguing that "pet owners do not purchase these products directly from secondary wholesale distributors and are also appropriately excluded." (Opp. at 11.) This argument is nothing more than a conclusory statement and a distraction from Plaintiffs' decision to select *some* retailers (only "unmeasured" ones) because such unmeasured retailers represent their own customer base.[3] They fail, however, to

[1] 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).

[2] Plaintiffs also plead in the Amended Complaint that Bayer manufacturers "flea and tick prevention products." (FAC ¶ 28.)

[3] Plaintiffs incorrectly state that the Court "has already rejected defendants' argument for including pet owners in the

provide logical and plausible explanations for *why* the retailer is the more appropriate consumer over pet owners, who shop for, select, purchase, and use the products, as well as ultimately pay any alleged increase in price.

B. Plaintiffs Fail to Allege Why "Unmeasured Products" Are a Plausible Market

Plaintiffs' decision to limit the market to "unmeasured products" does nothing to make their relevant market definition more plausible. To be clear, the relevant market Plaintiffs allege in the Amended Complaint—"the wholesale distribution to non-veterinary retailers of unmeasured veterinary wellness and medication products" (FAC ¶ 24)—is based on many of the same elements as the Original Complaint—"the wholesale markets for prescription and restricted pet parasiticides for distribution to non-veterinary retailers" (Compl. ¶ 29). But instead of addressing the Court's concerns that the market as pleaded was "devoid of facts" (MTD Hg. Tr. 38:9), Plaintiffs further complicated their allegations by adding the "unmeasured" limiter.

Throughout the Amended Complaint and Opposition, Plaintiffs confuse their own purported definition of "unmeasured" by providing inconsistent and vague explanations. Either *unmeasured* "products" are those found in retail stores, the sales of which "are not tracked by firms such as Nielsen;" or *measured* "products" are those "that traditionally have been available at retail stores or through online commerce." (FAC ¶ 2, Opp. at 8.) Further, Plaintiffs claim that "unmeasured products tend to include preventative medications such as *prescription and non-prescription* flea and tick treatment and heartworm medication, among others, produced by animal health pharmaceutical companies." (Opp. at 8 (emphasis added).) But Plaintiffs then claim that "nearly all of the unmeasured products flowing through the secondary distribution channel are *prescription* veterinary medications and wellness products." (Opp. at 17-18 (emphasis added).) Based on Plaintiffs' own words, it is unclear which products are included or excluded from their proposed relevant market. Plaintiffs alleged market may include products sold in retail stores, or it may not. It may include non-prescription products, or it may not. It may include flea and tick products, or it may not. The convoluted and conflicting use of the term "unmeasured" highlights Plaintiffs' misunderstanding of

relevant market . . ." (Opp. at 11, n.4.) The Court explicitly did not reach this issue, and asked for more facts to evaluate the relevant market. MTD Hg. Tr. 48:25-49:3 ("I do want to say that I'm not finding, at least making no automatic finding that you can't use as your consumer the retailers. Okay. And I'm not finding that at least at this point.").

their own alleged market.

Plaintiffs focus on a statement made by PetIQ's CEO in the Earnings Call Transcript that uses the words "measured" and "unmeasured" (Opp. at 8), arguing that this is a "practical" indicator that PetIQ has expressed "public recognition of the secondary wholesale distribution market as a distinct product market" (Opp. at 11). But Mr. Christensen's use of the term "unmeasured" is not recognition of a "secondary wholesale distribution market." Importantly, Plaintiffs acknowledge that PetIQ's CEO used the phrase "unmeasured *accounts*," not unmeasured products. (Opp. at 8 (emphasis added).) Nonetheless, Plaintiffs allege that their proposed market is *products* that are either measured or unmeasured by firms like Nielsen, but simultaneously concede that the only document on which they rely for their new proposed market says that it is *accounts*–not products—that are measured or unmeasured, a fact which hopelessly confuses their own pleading. Even the most charitable reading of the Earnings Call Transcript Plaintiffs offer for this "fact" presents no apparent connection between the term "unmeasured" with the secondary wholesaler market that Plaintiffs allege. Nor, while acknowledging that Nielsen measures a flea and tick category but dismissing it as "immaterial" (Opp. at 12), do they explain which flea and tick "products" are measured and which are not, which indicates that Plaintiffs misunderstand or misuse these terms.

Plaintiffs also incorrectly argue that "defendants urge the Court to accept their own interpretation of plaintiffs' allegations, a mistake at this stage of the pleadings." (Opp. 13.) In fact, the Rule 12 presumption of truth afforded to well-pleaded facts does not extend to "unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001)); *see also Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991) (internal citations omitted) ("[W]hen the allegations of the complaint are refuted by an attached document, the Court need not accept the allegations as being true."). It is Plaintiffs' burden to plausibly connect the dots between the quotations they are taking out of context and the conclusions they ask this Court to draw, and they have failed to do so here. As such, they cannot rely on any supposed acknowledgment by Defendants of an unmeasured market to meet their pleading burden.

III. PLAINTIFFS FAIL TO ALLEGE MARKET POWER

Other than conclusory statements that are the same as their prior pleading and remain wholly inadequate, Plaintiffs' market power allegations are based on incorrect statements regarding two numbers from the Jefferies Presentation. Plaintiffs allege that "Defendants further challenge plaintiffs' market power allegations by offering competing explanations for the 95% and 90% figures included in the FAC." (Opp. at 17.) This is incorrect.

Starting with the 95% figure, Plaintiffs failed to connect the 95% figure to their own alleged market because it relates *only to prescription* (and does nothing to distinguish measured and unmeasured "products"). Plaintiffs' relevant market contains far more than just prescription—Plaintiffs allege that "unmeasured pet medications" include "parasiticides, vaccines, antibiotics, and analgesics. Of these, parasiticides account for approximately 40% of market sales." (FAC ¶ 26.) Further, Plaintiffs acknowledge that flea and tick medications (expressly a part of the relevant market alleged), such as Merial's Frontline Plus (Opp. at 18, n.7), are over-the counter medications, which means they are *not* prescription and thus *not* included in the 95% figure. Moreover, Plaintiffs plead in their Amended Complaint that Plaintiff Bay Medical's "entire customer base" is Frontline Plus (FAC ¶ 14) and that Frontline Plus is one of the "largest brands in animal healthcare" (FAC ¶ 22).[4] Plaintiffs then contradictorily argue that "nearly all of the unmeasured products flowing through the secondary distribution channel are prescription veterinary medications and wellness products." (Opp. at 17-18.) It cannot be simultaneously correct that prescription medications represent "nearly all" unmeasured "products" *and* that over-the-counter flea and tick medications represent 40% of market sales, with Frontline Plus as one of the largest brands in the industry. Plaintiffs' own allegations are self-defeating and belie their reliance on the 95% figure to attempt to plead market power because this figure is unrelated to the market as they have defined it.

With respect to the 90% figure, Plaintiffs ask the Court to accept as true that PetIQ's sales represents 90% of all U.S. supply to retailers, when the slide upon which they rely specifically states that PetIQ *purchases* 90% of their supply from manufacturers. (Jefferies Presentation, p.12.)

[4] It is also worth noting that, according to the Amended Complaint, Plaintiff Bay Medical does not even distribute prescription pet medications, further exemplifying the implausibility of this argument.

Plaintiffs cannot mischaracterize a "fact" that is refuted by the very same document upon which they rely and simultaneously demand the presumption of truth. *In re Gilead Scis. Sec. Litig.*, 536 F.3d at 1055; *Luciw*, 2011 WL 566833, at *2; *Roth*, 942 F.2d at 625 n.1. Because this figure is so boldly misused, it should be given no import in the market power analysis.[5]

IV. PLAINTIFFS FAILED TO PROPERLY ALLEGE ANTITRUST STANDING

The Opposition further demonstrates the conclusory nature of Plaintiffs' antitrust injury allegations, offering nothing more than unsupported statements that the Amended Complaint sufficiently alleges antitrust injury without any citations to support this statement. Plaintiffs do not allege from whom they have been foreclosed or how any loss of customers is related to the Acquisition, despite the Court's admonitions. Plaintiffs' entire defense of their antitrust injury allegations is a limited to a perfunctory "not so" and a general reference to the Amended Complaint. (Opp. at 19.) Moreover, Plaintiffs fail to avail themselves of the information and statistics *about their own business*. MTD Hg. Tr. 19-:25-20:1 ("Plus, your client knows, for example, what they have gotten over the years from the various sources."). These conclusory allegations and the failure to include alleged facts about their own business make clear that the Amended Complaint does not plausibly allege antitrust injury, which is fatal to all claims.

V. PLAINTIFFS FAILED TO ALLEGE COGNIZABLE CLAIMS UNDER CLAYTON ACT SECTION 7 AND SHERMAN ACT SECTION 2

Again, the Opposition confirms that the Amended Complaint is rife with conclusory statements that fail to sufficiently allege cognizable claims under Clayton Act Section 7 and Sherman Act Section 2, and these claims should be dismissed under *Twombly*.

With respect to Clayton Act Section 7, Plaintiffs continue to rely on conclusory statements and recitations of the Section 7 standard in an effort to disguise the lack of specific allegations regarding how PetIQ's acquisition of VIP may "substantially . . . lessen competition, or . . . tend to create a monopoly." 15 U.S.C. § 18; *see also 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) (To state a claim, "a plaintiff

[5] Plaintiffs' attempt to disregard the stark difference between PetIQ's projected $450-500 million business for 2018 (Jefferies Presentation, p.16) and the $10.2 billion pet medication sales for 2018 (FTC Report, p.9) is likewise unpersuasive. (*See* Mot. at 15.)

must allege that the acquisition will create an appreciable danger of anticompetitive consequences."). Moreover, Plaintiffs fail to allege any facts regarding how the Acquisition has affected their own business, as the Court suggested they do (MTD Hg. Tr. 7:24-8:1, 24:19-25:25, 38:8-17), and the Opposition does nothing to address this point. Their conclusory statements and failure to allege any facts regarding *how* the Acquisition risks lessening competition justifies a dismissal of their Clayton Act Section 7 claim.

With respect to the Sherman Act Section 2 claims, the Amended Complaint contains nothing more than conclusory statements that fail to allege a cognizable claim for monopolization or attempted monopolization. Plaintiffs claim that they have pleaded their Section 2 claims sufficiently by arguing that they "allege that defendants (1) control 90% of the supply in the relevant market; (2) acquired that dominant position through the VIP acquisition; and (3) have foreclosed plaintiffs and other market participants from access to customers with the likelihood of increasing prices." (Opp. at 19.) Nothing about these points is specific enough to satisfy *Twombly*, and the recitation in this manner merely highlights the conclusory nature of the allegations. A Sherman Act Section 2 claim requires Plaintiffs to allege predatory or anticompetitive conduct *with a specific intent to monopolize*. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). The failure to plead such facts is fatal to these claims.

VI. PLAINTIFFS LACK STANDING FOR INJUNCTIVE RELIEF

The Opposition fails to overcome the fatal flaws of the Complaint in pleading that Plaintiffs are entitled to injunctive relief, particularly divestitutre, at any time. 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 points out, injunctive relief is inappropriate for a number of reasons. (See Mot. at 19-20.) Plaintiffs incorrectly suggest that Defendants "ask this Court to assess the evidence." (Opp. at 20.) Rather, Defendants are asking the Court to apply the law of this Circuit and hold Plaintiffs to the standard required. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008); *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952); *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); *Orson, Inc. v. Miramax Film Corp.*, 836 F. Supp. 309, 314 (E.D. Pa. 1993); *Sierra Forest*

Legacy v. Sherman, 646 F.3d 1161, 1184 (9th Cir. 2011). 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.

VII. DISMISSAL WITH PREJUDICE IS APPROPRIATE

Plaintiffs unsurprisingly make no mention of why dismissal without prejudice would be appropriate at this stage, given the absence of facts presented in the Amended Complaint and Plaintiffs' own admission that ""if we can't do it in 60 days, then we can't do it" (MTD Hg. Tr. 47:18-19). This is now the fourth time that Plaintiffs have attempted to cure the deficiencies of their allegations and it is clear that any further amendment would be futile. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). This Court should take them at their word that they "can't do it" and dismiss the Amended Complaint with prejudice.

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 Amended Complaint with prejudice.

Dated: February 5, 2019

WINSTON & STRAWN LLP

By: */s/ David E. Dahlquist*

David E. Dahlquist (*pro hac vice*)
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
Telephone: (312) 558-5600
Facsimile: (312) 558-5700
Email: DDahlquist@winston.com

Jeanifer E. Parsigian (SBN: 289001)
Dana L. Cook-Milligan (SBN: 301340)
WINSTON & STRAWN LLP
101 California Street, 34th Floor
San Francisco, CA 94111-5840
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
Email: jparsigian@winston.com
Email: dlcook@winston.com

Attorneys for Defendants
VIP PETCARE HOLDINGS, INC.
and PETIQ, INC.