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11 *and PETIQ, INC.*

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 MED VETS INC. and BAY MEDICAL
16 SOLUTIONS INC.,

17 Plaintiffs,

18 v.

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

21 Defendants.
22
23
24

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

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEFENDANTS VIP PETCARE
HOLDINGS, INC. AND PETIQ, INC.'S
MOTION TO DISMISS PLAINTIFFS'
COMPLAINT**

Date: July 13, 2018
Time: 9:00 AM
Place: Courtroom 7 - 19th Floor
San Francisco Courthouse
450 Golden Gate Avenue,
San Francisco, CA 94102

Judge: Hon. Maxine M. Chesney

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 Please take notice that on July 13, 2018 at 9:00 AM, or as soon thereafter as the matter may
3 be heard, in the Courtroom of the Honorable Maxine M. Chesney, Courtroom 7 - 19th Floor, San
4 Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants VIP
5 PetCare Holdings, Inc. (“VIPH”) and PetIQ, Inc. (“PetIQ”) (collectively, “Defendants”) will, and
6 hereby do, request that the Court take judicial notice of (1) the Federal Trade Commission May 2015
7 Staff Report entitled “Competition in the Pet Medications Industry: Prescription Portability and
8 Distribution Practices,” and (2) PetIQ’s January 8, 2018 press release entitled “PetIQ, Inc. Enters
9 Into Definitive Agreement to Acquire VIP Petcare,” attached as Exhibits 1 and 2, respectively, to the
10 Declaration of David E. Dahlquist.

11
12 Dated: June 1, 2018

WINSTON & STRAWN LLP

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14 By: /s/ David E. Dahlquist

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23 *Attorneys for Defendants*
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25 *and PETIQ, INC.*

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Evidence 201, PetIQ hereby respectfully requests that the Court take judicial notice of the following exhibits attached to the accompanying Declaration of David E. Dahlquist (“Dahlquist Declaration”):

Exhibit 1: a true and correct copy of the Federal Trade Commission May 2015 Staff Report entitled “Competition in the Pet Medications Industry: Prescription Portability and Distribution Practices.”¹

Exhibit 2: a true and correct copy of PetIQ’s January 8, 2018 Press Release entitled “PetIQ, Inc. Enters Into Definitive Agreement to Acquire VIP Petcare.”²

The Court may properly consider Exhibits 1 and 2 under the incorporation by reference doctrine because (1) they are public records for which judicial notice is appropriate and (2) they are specifically referred to, their authenticity is not questioned, and they are relied upon in the allegations of the Complaint.

ARGUMENT

I. LEGAL STANDARD

Pursuant to Federal Rule of Evidence 201, a “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 source whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). A court “must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

At the motion to dismiss stage, a court may take judicial notice of adjudicative facts, such as public records. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986). The court may also take judicial notice of “records and reports of administrative bodies.” *Interstate Natural Gas Co. v. Southern California, Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953). *See also United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003). The court can look beyond the complaint to matters of

¹ Available at <https://www.ftc.gov/system/files/documents/reports/competition-pet-medications-industry-prescription-portability-distribution-practices/150526-pet-meds-report.pdf> (last accessed June 1, 2018).

² Available at <http://ir.peti.com/phoenix.zhtml?c=254371&p=irol-newsArticle&ID=2325282> (last accessed June 1, 2018).

1 public record without converting to a Rule 56. *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969
2 (D.C. Cir. 1979). *See also Ritchie*, 342 F.3d at 908 (“A court may, however, consider certain
3 materials—documents attached to the complaint, documents incorporated by reference in the
4 complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for
5 summary judgment.”). As a general matter, documents that are judicially noticed should not be
6 accepted as true when they contradict a plaintiff’s allegations. *See e.g., Sears, Roebuck & Co. v.*
7 *Metropolitan Engravers, Ltd.*, 245 F.2d 67 (9th Cir. 1956).

8 Further, the court may incorporate by reference “documents whose contents are alleged in a
9 complaint and whose authenticity no party questions, but which are not physically attached to the
10 [complaint].” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citations omitted) (internal
11 quotation marks omitted). And “a document is not ‘outside’ the complaint if the complaint
12 specifically refers to the document and if its authenticity is not questioned.” *Branch v. Tunnell*, 14
13 F.3d 449, 453 (9th Cir. 1994). And the Court is not required to accept as true conclusory allegations
14 that are contradicted by documents that are incorporated by reference into the complaint. *Steckman*
15 *v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

16 **II. JUDICIALLY NOTICEABLE EXHIBITS**

17 The Court may properly take judicial notice of Exhibits 1 and 2 attached to the Declaration of
18 David E. Dahlquist, because they are public records for which judicial notice is appropriate. *Mack*,
19 798 F.2d 1279. Further, Exhibits 1 and 2 are incorporated by reference into the Complaint because
20 Plaintiffs are specifically referred to, their authenticity is not questioned, and they are relied upon in
21 the allegations of the Complaint. *Knievel*, 393 F.3d at 1076; *Branch*, 14 F.3d at 453.

22 **A. FTC Staff Report**

23 Exhibit 1 is a true and correct copy of the Federal Trade Commission’s May 2015 Staff
24 Report about the pet medication industry, entitled “Competition in the Pet Medications Industry:
25 Prescription Portability and Distribution Practices” (the “FTC Report”). As the Ninth Circuit has
26 recognized, Federal Trade Commission documents are appropriate for judicial notice. *See, e.g.,*
27 *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142, 1146 (9th Cir. 1998) (“We take
28 judicial notice of a 1996 Federal Trade Commission (FTC) letter indicating that a service similar or

1 identical to Western Union's AVT service amounted to an indirect form of debt collection.”); *Clark*
2 *v. Citizens of Humanity LLC*, 97 F. Supp. 3d 1199, 1203 (S.D. Cal. 2015) (judicially noticing three
3 Federal Trade Commission documents because the “documents are available to the public and
4 maintained by an official government entity. Their accuracy, therefore, cannot be reasonably
5 disputed.”). After its publication by the FTC, the FTC Report was made available to the public via
6 the FTC’s website, and its accuracy cannot be disputed, making it appropriate for judicial notice.

7 Further, the Court may properly consider the FTC Report under the incorporation by
8 reference doctrine. As the Ninth Circuit has recognized, “when [the] plaintiff fails to introduce a
9 pertinent document as part of his pleading, [the] defendant may introduce the exhibit as part of his
10 motion attacking the pleading.” *Branch*, 14 F.3d at 453 (quotations omitted) (alteration in original).
11 Such documents “may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without
12 converting the motion to one for summary judgment. *Id.* Here, Plaintiffs repeatedly reference and
13 discuss the FTC Report throughout the Complaint. Compl. ¶¶ 3, 27, 28, 38. They rely heavily on
14 the findings of the FTC Report and yet do not attach it to the Complaint. The FTC Report cannot be
15 considered “outside” the Complaint, because it is specifically referred to and its authenticity cannot
16 be denied. Given Plaintiffs’ consistent reliance on the FTC Report in the Complaint, this Court
17 should take judicial notice of the FTC Report and incorporate it by reference into the Complaint
18 when considering Defendants’ Motion to Dismiss Plaintiffs’ Complaint filed concurrently.

19 **B. Press Release**

20 Exhibit 2 is a true and correct copy of PetIQ’s January 8, 2018 press release entitled “PetIQ,
21 Inc. Enters Into Definitive Agreement to Acquire VIP Petcare.” As courts in this Circuit, including
22 this Court, have acknowledged, judicial notice is appropriate for press releases, provided that they
23 are not being offered for the truth of the contents. *See, e.g., Wozniak v. Align Technology, Inc.*, 2011
24 WL 2269418, *6 n.4 (N.D. Cal. 2011) (Chesney, J.) (“Defendants request the Court take judicial
25 notice of the above-referenced exhibits to the Declaration of Molly Arico. . . . As plaintiff refers to
26 the challenged exhibits throughout the FAC, . . . those exhibits likewise are subject to judicial
27 notice.”); *In re Foundry Networks, Inc Securities Litigation*, 2003 WL 23211577, *10, n.11. (N.D.
28 Cal. 2003) (Chesney, J.) (Defendants request for judicial notice of press releases granted “to the

1 extent it requests that the Court take judicial notice of the content of such documents.”); *Brodsky v.*
 2 *Yahoo! Inc.*, 630 F. Supp. 2d 1104, 1111 (N.D. Cal 2009) (“The Court also grants Defendants’
 3 request as to Exhibits 31 through 47, Yahoo! press releases, news articles, analyst reports, and third
 4 party press releases to which the SAC refers, but not for the truth of their contents.”). As with the
 5 FTC Report, the Press Release was made available to the public via PetIQ’s website, and its
 6 accuracy should not be disputed. Judicial notice of the Press Release is thus appropriate.

7 Further, Plaintiffs’ discussion of the Press Release and the contents of the Press Release itself
 8 are at the heart of the allegations, making the Press Release highly relevant to the pleadings for
 9 which incorporation by reference is appropriate. *See e.g.*, Compl. ¶ 35. Incorporation of the Press
 10 Release does not convert the Motion to Dismiss to one for summary judgment, but this Court should
 11 consider the Press Release to the extent it contradicts allegations of the Complaint. As such, this
 12 Court should take judicial notice of and incorporate by reference the Press Release when considering
 13 Defendants’ Motion to Dismiss Plaintiffs’ Complaint filed concurrently.

14 CONCLUSION

15 For the foregoing reasons, PetIQ respectfully requests that the Court take judicial notice
 16 pursuant to Federal Rule of Evidence 201 of Exhibits 1 and 2 attached to the Declaration of David E.
 17 Dahlquist. These documents are publicly available records and should be incorporated by reference
 18 into the Complaint, and they can therefore be properly considered when ruling on a motion to
 19 dismiss.

20
 21 Dated: June 1, 2018

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