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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' 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

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 Please take notice that on March 1, 2019 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 Jefferies 2018 Consumer Conference  
7 presentation, (2) the Federal Trade Commission May 2015 Staff Report entitled “Competition in the  
8 Pet Medications Industry: Prescription Portability and Distribution Practices,” and (3) PetIQ 2018  
9 Quarter 1 Earnings Call Transcript, attached as Exhibits 1, 2, and 3, respectively, to the Declaration  
10 of David E. Dahlquist.

11  
12 Dated: January 15, 2019

WINSTON & STRAWN LLP

13  
14 By: /s/ David E. Dahlquist

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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 PetIQ’s June 19-20, 2018 Jefferies Consumer Conference presentation.<sup>1</sup>

*Exhibit 2:* 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.”<sup>2</sup>

*Exhibit 3:* a true and correct copy of PetIQ’s May 15, 2018 Quarter 1 earnings call transcript entitled “CEO McCord Christenson on Q1 2018 Results—Earnings Call Transcript.”<sup>3</sup>

The Court may properly consider Exhibits 1, 2, and 3 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, quoted from, relied upon in the allegations of the Amended Complaint, and their authenticity is not questioned. On January 15, 2019, Defendants sought Plaintiffs’ agreement for the judicial notice of the attached documents, and Plaintiffs responded that they had ‘no objection to defendants seeking judicial notice’ of these documents.

**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

<sup>1</sup> *Jefferies 2018 Consumer Conference*, PETIQ (June 20, 2018) <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Njk1Nzk0fENoaWxkSUQ9NDA3MDgzfFR5cGU9MQ==&t=1>.

<sup>2</sup> FED. TRADE COMM’N, *COMPETITION IN THE PET MEDICATIONS INDUSTRY: PRESCRIPTION PORTABILITY AND DISTRIBUTION PRACTICES* (2015), <https://www.ftc.gov/system/files/documents/reports/competition-pet-medications-industry-prescription-portability-distribution-practices/150526-pet-meds-report.pdf>.

<sup>3</sup> *PetIQ’s (PETQ) CEO McCord Christensen on Q1 2018 Results—Earnings Call Transcript*, SEEKING ALPHA, <https://seekingalpha.com/article/4174496-petiqs-petq-ceo-mccord-christensen-q1-2018-results-earnings-call-transcript> (last accessed January 7, 2019).

1 requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

2 At the motion to dismiss stage, a court may take judicial notice of adjudicative facts, such as  
3 public records. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986). The court  
4 may also take judicial notice of “records and reports of administrative bodies.” *Interstate Natural*  
5 *Gas Co. v. Southern California, Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953). See also *United States*  
6 *v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003). The court can look beyond the complaint to matters of  
7 public record without converting to a Rule 56. *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969  
8 (D.C. Cir. 1979). See also *Ritchie*, 342 F.3d at 908 (“A court may, however, consider certain  
9 materials—documents attached to the complaint, documents incorporated by reference in the  
10 complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for  
11 summary judgment.”). As a general matter, documents that are judicially noticed should not be  
12 accepted as true when they contradict a plaintiff’s allegations. See e.g., *Sears, Roebuck & Co. v.*  
13 *Metropolitan Engravers, Ltd.*, 245 F.2d 67 (9th Cir. 1956).

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

## 22 **II. JUDICIALLY NOTICEABLE EXHIBITS**

23 The Court may properly take judicial notice of Exhibits 1, 2, and 3 attached to the Dahlquist  
24 Declaration, because they are public records for which judicial notice is appropriate. *Mack*, 798  
25 F.2d 1279. Further, Exhibits 1, 2, and 3 are incorporated by reference into the Amended Complaint  
26 because they are expressly referred to in Plaintiffs’ Amended Complaint, their authenticity is not  
27 questioned, and they are specifically relied upon and quoted from in the allegations of the Amended  
28 Complaint. *Knieval*, 393 F.3d at 1076; *Branch*, 14 F.3d at 453.

1           **A.       Jefferies Consumer Conference Presentation**

2           Exhibit 1 is a true and correct copy of PetIQ's June 19-20, 2018 Jefferies Consumer  
3 Conference presentation. Courts in the Northern District of California have recognized that a  
4 PowerPoint presentation made publicly available may be the proper subject of judicial notice. *See In*  
5 *re Century Aluminum Co. Sec. Litig.*, 749 F. Supp. 2d 964, 979-80 (N.D. Cal. 2010) (taking judicial  
6 notice of PowerPoint slides presented by the defendant holding company to analysts); *see also*  
7 *Finjan, Inc. v. SonicWall, Inc.*, No. 17-CV-04467-BLF, 2018 WL 2234370, at \*2 (N.D. Cal. May 16,  
8 2018) (taking judicial notice of a PowerPoint presentation where plaintiffs referred to the  
9 presentation in their complaint and did not dispute the presentation's authenticity); *Russian Hill*  
10 *Capital, LP v. Energy Corp. of Am.*, No. 15-CV-02554-HSG, 2016 WL 1029541, at \*3 (N.D. Cal.  
11 Mar. 15, 2016) (holding that judicial notice of PowerPoint slides used during an investor  
12 presentation were the proper subjects of judicial notice where the slides were publicly available and  
13 plaintiffs presented no objection to the defendant's request). PetIQ's 2018 Jefferies presentation,  
14 which takes the form of PowerPoint slides, was made publicly available on PetIQ's website, and its  
15 accuracy should not be disputed, making judicial notice of the Jefferies presentation appropriate.

16           Additionally, Plaintiffs have incorporated PetIQ's Jefferies presentation into the Amended  
17 Complaint by reference. The Jefferies presentation is directly quoted and relied upon in Plaintiffs'  
18 Amended Complaint, and a reproduced image from the presentation is also included in the Amended  
19 Complaint. Am. Compl. ¶ 33. Plaintiffs also previously attached the entirety of the Jefferies  
20 presentation to their Motion for Limited Expedited Discovery, filed with the Court on October 3,  
21 2018. *See* Dkt. 38-3, Exhibit A to Plaintiffs' Motion for Limited Expedited Discovery. The  
22 Jefferies PowerPoint slides are referenced in the Amended Complaint, and are integral to Plaintiffs'  
23 allegations against PetIQ. The Court may, therefore, take judicial notice of the Jefferies presentation  
24 and incorporate its contents by reference when considering Defendants' Motion to Dismiss  
25 Plaintiffs' First Amended Complaint filed concurrently.

26           **B.       FTC Staff Report**

27           Exhibit 2 is a true and correct copy of the Federal Trade Commission's May 2015 Staff  
28 Report about the pet medication industry, entitled "Competition in the Pet Medications Industry:

1 Prescription Portability and Distribution Practices” (the “FTC Report”). As the Ninth Circuit has  
2 recognized, Federal Trade Commission documents that are made available to the public are  
3 appropriate for judicial notice. *See, e.g., Romine v. Diversified Collection Services, Inc.*, 155 F.3d  
4 1142, 1146 (9th Cir. 1998) (“We take judicial notice of a 1996 Federal Trade Commission (FTC)  
5 letter indicating that a service similar or identical to Western Union's AVT service amounted to an  
6 indirect form of debt collection.”); *Clark v. Citizens of Humanity LLC*, 97 F. Supp. 3d 1199, 1203  
7 (S.D. Cal. 2015) (judicially noticing three Federal Trade Commission documents because the  
8 “documents are available to the public and maintained by an official government entity. Their  
9 accuracy, therefore, cannot be reasonably disputed.”). After its publication by the FTC, the FTC  
10 Report was made available to the public via the FTC’s website, and its accuracy cannot be disputed,  
11 making it appropriate for judicial notice.

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

22 Finally, the Court previously granted Defendants’ Request for Judicial Notice of the FTC  
23 Report at the Motion to Dismiss Hearing on August 3, 2018. MTD Hg. Tr. 3:13-14. The Court  
24 recognized that “both parties are in accord” with one another regarding the document, and Plaintiffs  
25 presented no objection to Defendants’ request. MTD Hg. Tr. 2: 23-25. Given Plaintiffs’ consistent  
26 reliance on the FTC Report in the Amended Complaint, the Court’s previous grant of Defendants’  
27 Request for Judicial Notice of the FTC Report, and Plaintiffs’ lack of objection to PetIQ’s request,  
28 this Court should again take judicial notice of the FTC Report and incorporate it by reference into

1 the Amended Complaint when considering Defendants’ Motion to Dismiss Plaintiffs’ First Amended  
2 Complaint filed concurrently.

3 **C. Earnings Call Transcript**

4 Exhibit 3 is a true and correct copy of PetIQ’s May 15, 2018 Quarter 1 earnings call  
5 transcript entitled “CEO McCord Christenson on Q1 2018 Results—Earnings Call Transcript” (the  
6 “Earnings Call Transcript”). As Courts in this Circuit have acknowledged, judicial notice is  
7 appropriate for transcripts of conference earning calls that are made publicly available. *See, e.g.,*  
8 *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064, n.7 (9th Cir. 2008) (finding  
9 judicial notice appropriate for the defendants’ publicly available financial documents and reported  
10 stock price history); *Primo v. Pac. Biosciences of Cal., Inc.*, 940 F. Supp. 2d 1105, 1115, n.1 (N.D.  
11 Cal. 2013) (taking judicial notice of earnings call transcripts which the defendant argued are  
12 “capable of immediate determination by resort to accurate sources and not subject to reasonable  
13 dispute”); *City of Miami General Employees’ & Sanitation Employees’ Retirement Trust v. RH,*  
14 *Inc.*, 302 F.Supp.3d 1028, 1033 (N.D. Cal. 2018) (“The Court may properly take judicial notice of  
15 public SEC filings, earnings call transcripts, and press releases under Federal Rule of Evidence  
16 201(b)(2).”). As with the FTC Report, the Earnings Call Transcript was made available to the  
17 public, and its accuracy cannot be disputed. Judicial notice of the Earnings Call Transcript is thus  
18 appropriate.

19 Further, Plaintiffs’ discussion of the Earnings Call Transcript and its specific contents are at  
20 the heart of Plaintiffs’ allegations, making the Earnings Call Transcript highly relevant to the  
21 pleadings for which incorporation by reference is appropriate. *See* Compl. ¶ 34; *In re Bare*  
22 *Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1067 (N.D. Cal. 2010) (holding that where the  
23 complaint references and relies on a document, such as the earnings call transcript, the document is  
24 incorporated by reference into the complaint); *In re LeapFrog Enterprises, Inc. Sec. Litig.*, 200 F.  
25 Supp. 3d 987, 993 (N.D. Cal. 2016) (holding that the contents of earnings call transcripts that are  
26 expressly referred to and relied upon in the complaint may be properly incorporated by reference).  
27 Incorporation of the Earnings Call Transcript does not convert the Motion to Dismiss to one for  
28 summary judgment. Instead, this Court should consider the Earnings Call Transcript to the extent it

1 contradicts allegations of the Complaint. As such, this Court should take judicial notice of and  
2 incorporate by reference the Earnings Call Transcript when considering Defendants' Motion to  
3 Dismiss Plaintiffs' First Amended Complaint filed concurrently.

4 **CONCLUSION**

5 For the foregoing reasons, PetIQ respectfully requests that the Court take judicial notice  
6 pursuant to Federal Rule of Evidence 201 of Exhibits 1, 2, and 3 attached to the Declaration of  
7 David E. Dahlquist. These documents are publicly available records and should be incorporated by  
8 reference into the Complaint, and they can therefore be properly considered when ruling on the  
9 Motion to Dismiss.

10  
11 Dated: January 15, 2019

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