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

22 Defendants.

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

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

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I. INTRODUCTION

In support of their Motion to Dismiss, PetIQ, Inc. (“PetIQ”) and VIP Petcare Holdings, Inc. (“VIPH”) respectfully requested the Court to take judicial notice of two documents, which were attached as exhibits to the Declaration of David E. Dahlquist (“Dahlquist Declaration”) (Dkt. 26-1):

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” (the “FTC Report”) (Dkt. 26-2).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” (the “January 8 Press Release”) (Dkt. 26-3).²

Plaintiffs filed an Opposition to PetIQ and VIPH’s Request for Judicial Notice, which (1) joined the request for judicial notice of the FTC Report, and (2) objected to the judicial notice of the January 8 Press Release. (Dkt. 30, RJN Objection.) Contrary to Plaintiffs’ argument, the Court may properly take judicial notice of the January 8 Press Release because it is a public record for which judicial notice is appropriate and because the Complaint specifically quotes from the press release but is intentionally ambiguous as to which PetIQ press release it relies upon. (Compl. ¶ 31.) In the alternative, the Court may prefer to take judicial notice of PetIQ’s January 17, 2018 Press Release entitled “PetIQ, Inc. Completes Strategic Acquisition of VIP Petcare”³ (the “January 17 Press Release”), which is attached hereto as *Exhibit 1*. The January 17 Press Release likewise is a public record for which judicial notice is appropriate, and it contains the same quotation found in **both** the Complaint and the January 8 Press Release. (Compl. ¶ 31.)

II. 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

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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 22, 2018).

² Available at <http://ir.peti.com/phoenix.zhtml?c=254371&p=irol-newsArticle&ID=2325282> (last accessed June 22, 2018).

³ Available at <http://ir.peti.com/phoenix.zhtml?c=254371&p=irol-newsArticle&ID=2327146> (last accessed June 22, 2018).

1 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot
2 reasonably be questioned.” Fed. R. Evid. 201(b). A court “must take judicial notice if a party
3 requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

4 At the motion to dismiss stage, a court may take judicial notice of adjudicative facts, such as
5 public records. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986). *See also*
6 *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003). Further, the court may incorporate by
7 reference “documents whose contents are alleged in a complaint and whose authenticity no party
8 questions, but which are not physically attached to the [complaint].” *Knieval v. ESPN*, 393 F.3d
9 1068, 1076 (9th Cir. 2005) (citations omitted) (internal quotation marks omitted). And “a document
10 is not ‘outside’ the complaint if the complaint specifically refers to the document and if its
11 authenticity is not questioned.” *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994).

12 **III. THE JANUARY 8 PRESS RELEASE AND JANUARY 17 PRESS RELEASE** 13 **SHOULD BE JUDICIALLY NOTICED**

14 Plaintiffs object to the judicial notice of the January 8 Press Release and argue that it is not
15 directly referred to in the Complaint. However, this argument fails for two reasons.

16 *First*, Plaintiffs ignore the fact that Paragraph 31 of the Complaint includes a direct quote that
17 can be found in the January 8 Press Release. (*Compare* “About PetIQ” section in January 8 Press
18 Release *with* Compl. ¶ 31 (“Defendant, PetIQ, claims to provide ‘consumers convenient access and
19 affordable choices to a broad portfolio of pet health and wellness products across a network of
20 leading national retail stores in mass, club, grocery, pharmacy, and e-commerce channels.’”).) And
21 although they quote directly, the Complaint does not identify *which* PetIQ Press Release from which
22 they quote. PetIQ and VIPH presented this Court with the Press Release they believed Plaintiffs
23 quoted in the Complaint and requested that the Court take judicial notice of it in its entirety instead
24 of just relying upon the quote Plaintiffs chose. However, it should be noted that this identical quote
25 can be found in at least one other press release relevant to the Acquisition being challenged by the
26 Complaint. (*Compare* “About PetIQ” section in January 17 Press Release *with* Compl. ¶ 31.)
27 Therefore in the alternative (or in addition) to the January 8 Press Release, the Court may likewise
28 take judicial notice of the January 17 Press Release.

1 *Second*, Plaintiffs present the Court with case law that is either distinguishable or that
2 confuses the standard for judicial notice with the principle prohibiting the consideration of materials
3 beyond the pleadings when deciding a motion to dismiss. As to their judicial notice case law, the
4 cases cited can be distinguished from the request for judicial notice of publicly available press
5 releases. For example, in *Qingdao Tang-Buy Int’l Imp. & Exp. v. Preferred Secured Agents*, for
6 example, the Court noted that “the decision to take judicial notice generally lies within the court’s
7 discretion” but further noted that judicial notice denial is appropriate “where a document’s
8 authenticity is disputed.” No. 15-cv-00624, 2015 WL 7776331, at *2-3 (N.D. Cal. 2015). Here,
9 Plaintiffs make no such dispute as to the authenticity of the January 8 Press Release. Further,
10 Plaintiffs concede that “the Court may consider the press release ‘for its existence and contents’” but
11 not “for the truth of any matters contained therein.” (Dkt. 30, RJN Objection, p. 3.) However,
12 Plaintiffs ignore that the Court is not required to accept as true conclusory allegations that are
13 contradicted by documents that are incorporated by reference into the Complaint. *Steckman v. Hart*
14 *Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998). The January 8 Press Release indicates that
15 PetIQ and VIP Petcare expect the post-Acquisition business to generate \$450 million to \$500 million
16 in 2018 net sales. Comparing this to an industry size of \$10.2 billion by 2018 (*see* FTC Report, p.9), the
17 Press Release contradicts Plaintiffs’ conclusory allegations as to effect the Acquisition will have on the
18 pet parasiticide industry.

19 As to their “beyond the pleadings” case law, Plaintiffs fail to acknowledge that judicial
20 notice is an exception to this principle. *See, e.g., O’Sullivan v. Longview Fibre*, 993 F. Supp. 743,
21 745 (N.D. Cal. 1997) (Chesney, J.) (noting that “[g]enerally, a court may not consider materials
22 beyond the pleadings in ruling on a motion to dismiss” but further noting that “the Court may take
23 judicial notice of matters of public record outside the pleadings.”); *In re Apple iPhone Antitrust*
24 *Litig.*, No. 11-cv-06714, 2013 WL 4425720, at *9 (N.D. Cal. 2013) (noting that a court may
25 “consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers
26 to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the
27 authenticity of the document.”) (quotations omitted); *Retrophin v. Questcor Pharms.*, 41 F. Supp. 3d
28 906, 911 (C.D. Cal. 2014) (same).

CONCLUSION

For the foregoing reasons, PetIQ and VIPH respectfully request that the Court take judicial notice pursuant to Federal Rule of Evidence 201 of Exhibits 1 and 2 attached to the Declaration of David E. Dahlquist. PetIQ and VIPH further request that the Court take judicial notice pursuant to Federal Rule of Evidence 201 of Exhibit 1 attached hereto. These documents are publicly available records, their authenticity has not been questioned, and they are incorporated by reference into the Complaint; as a result, they can and should be properly considered when ruling on a motion to dismiss.

Dated: June 22, 2018

WINSTON & STRAWN LLP

By: /s/ David E. Dahlquist

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