

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MAXINE M. CHESNEY

MED VETS, INC.,)	
)	
)	
Plaintiff,)	
)	
vs.)	No. C 18-2054 MMC
)	
VIP PETCARE HOLDINGS, INC.,)	
)	San Francisco, California
Defendant.)	Friday
)	August 3, 2018
)	9:00 a.m.

TRANSCRIPT OF PROCEEDINGS

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1 Friday - August 3, 2018

9:01 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Civil Case No. 18-2054, Med Vets,
5 Incorporated versus VIP Petcare Holdings.

6 Will counsel please step forward and state your
7 appearances for the record?

8 **MR. RUBIN:** Good morning, your Honor. Jonathan Rubin
9 of Mogin Rubin for the Plaintiffs Med Vets and Bay Medical.

10 **THE COURT:** Good morning.

11 **MR. DAHLQUIST:** Good morning, your Honor. David
12 Dahlquist on behalf of defendant PetIQ and VIP Petcare.

13 **THE COURT:** Thank you.

14 **MR. DAHLQUIST:** With me at counsel table is Jeanifer
15 Parsigiani, also Dana Cook-Milligan. And I would like to
16 introduce Robert Mooney from PetIQ.

17 **THE COURT:** Mr. Mooney.

18 This matter is on our calendar pursuant to the defendant's
19 Motion to Dismiss. And, gee, I don't really know quite where
20 to start. There is so much being said here in the papers.

21 Maybe I'll just start with sort of an easy thing for a
22 minute, which is the Request for Judicial Notice.

23 As you know, there is one document that both parties are
24 in accord could be considered by the Court for whatever value
25 it has. And this is an FTC staff report. It was attached as

1 Exhibit 1 to the initial Request for Judicial Notice.

2 The other two documents are press releases, or however you
3 want to define them, that were issued by the defendants. And I
4 can tell you, I don't think they are judiciously noticeable.
5 To the extent that the plaintiff may have relied on some little
6 squib just to describe what the defendants do, fine, but all
7 the rest of it is really kind of self-serving hearsay about the
8 benefits of the merger.

9 If he with get to a point where we have a viable
10 complaint, then certainly whatever defenses may be supported by
11 what's described in those press releases could be, you know,
12 put before the Court. But I think it's too soon.

13 So, in effect, the request is granted as to attachment --
14 or Exhibit 1 and denied as to the other two; one being part
15 that first request and the other part of your opposition to
16 their objection to their -- their objection to your initial
17 request.

18 **MR. DAHLQUIST:** Understood. Thank you, your Honor.

19 **THE COURT:** So we'll leave that for a moment.

20 Okay. Now, that said, my concern here, and I'll just tell
21 you what it is so you don't just kind of get up and repeat all
22 your papers, because you have very detailed and lengthy papers.

23 I don't necessarily agree with all the arguments that the
24 defendant is making here as to why the Complaint may be subject
25 to dismissal, but some of the arguments I think may well be

1 persuasive.

2 It starts, frankly, with the definition of the market.
3 And it's a little bit like a stack of dominoes. If that one
4 tips over, the whole thing goes down. And you can think of a
5 lot of analogies, house of cards, pull one out, the whole thing
6 falls down.

7 And along the way you could say: Even if you had a
8 market, then you've got a problem with market share. Then if
9 you don't have a problem with market share, there are a few
10 other things, little details. But the primary concern is the
11 definition of the market because without a really -- a
12 viable -- you know, a legally viable market, a plausible market
13 in the language of the cases, you can't really go anywhere with
14 the case.

15 I understand -- just so counsel for plaintiff understands,
16 I'm sure you do, that I'm aware of your argument that if there
17 are problems with the market that may be raised down the road,
18 save them for down the road; that you don't dismiss the case
19 right at the beginning. But the market as really defined has
20 to be plausible.

21 There is a case that just came down. I don't know if
22 you've read it, but I just want to call it to your attention
23 because it does recognize this idea of dismissal based on
24 failure to define a plausible market; that it's certainly a
25 recognized way of proceeding. And you may have it already, but

1 it just came out July 27, so just within the week. It's *Hicks*
2 *v PGA Tour, Inc.* It's a golfers case. And right now the cite
3 I've got on it would be 2018 Westlaw, and then 3597316. And
4 I'll tell you the Ninth Circuit in that case just took what,
5 you know, facially weren't that bizarre a set of arguments that
6 the plaintiff had made in support of their defined market and
7 they just went no, no, no, no, conclusory at the end. Forget
8 it. You should have been given leave to amend, however, so
9 remanded to let you try again.

10 **MR. DAHLQUIST:** I haven't read the case, your Honor,
11 but I agree with it.

12 **THE COURT:** It's kind of interesting. I'm not a golf
13 fan, but for anybody that golfs, it has to do with advertising
14 on caddies' bibs. All right? And apparently the PGA had this
15 contract with caddies, they had to wear these bibs with
16 advertisements for various products, and it kind of goes down
17 from that point.

18 First of all, a recognized legal concept that a case can
19 be challenged at this point. My problem here -- and then I can
20 just hear from Mr. Rubin, but I'll tell you what my problem is.

21 The two markets that you defined are, it seems to me,
22 markets that are leaving out some significant players.

23 Now, I'm not sure that you and Mr. Dahlquist, however, are
24 on the same page as to who we're really looking at here. They
25 are looking at Fido Zone. Okay? So the pet owner. And the

1 plaintiff is looking at PetSmart or retailers who are not
2 veterinarians; correct?

3 **MR. RUBIN:** Yes, ma'am.

4 **THE COURT:** And, Mr. Dahlquist, is it your argument
5 that you could not have a market of -- well, a consumer who's
6 not at the very end of the chain or just that they haven't pled
7 one in this instance?

8 **MR. DAHLQUIST:** Your Honor, it's more the former than
9 the latter. It is our view, and based on Supreme Court
10 precedent, that the -- the consumers don't define the
11 boundaries of the market, but the products of the producers do.
12 And I'm citing *NewCal Industries versus Ikon Office Solutions*.

13 **THE COURT:** Okay. We got your brief.

14 **MR. DAHLQUIST:** Got it.

15 **THE COURT:** But it's your view that just
16 categorically you can't have a middle-of-the-road kind of
17 consumer. And I'm not sure that that's the case. Okay?

18 However, I am more in accord with your argument that there
19 are players here that have been kicked out of the market in the
20 definition. These retailers can get the product from other
21 than companies like the plaintiffs and they are not part of
22 this picture.

23 **MR. DAHLQUIST:** Correct.

24 **THE COURT:** So even if you wanted to take a market
25 for prescription pet parasiticides and another market for these

1 restricted over-the-counter pet parasiticides -- and we'll talk
2 about even if you can do that -- to just make it the chain from
3 the wholesaler to the retailer, as opposed to the manufacturer
4 to the retailer, the vet to the retailer, the portable
5 prescription to the retailer -- and I wanted to ask because in
6 the FTC report they talk about the various, I'll just call them
7 players in the market.

8 **MR. DAHLQUIST:** Sure.

9 **THE COURT:** And they call them -- they talk about
10 them, quote, manufacturers and their distributors. Are the
11 distributors there referring to something different than our
12 plaintiff wholesalers? They are. So that's another player.
13 Okay.

14 So I think that if one were going to try to say there's a
15 market there where your consumer is retailers, assuming they
16 could all be kind of the same -- and I don't even know about
17 that, but if they could be -- I think we've left out some
18 people. And then we don't have any percentages here in this
19 complaint that really go to the argument that's being made by
20 what the defendant characterizes as conclusory allegations.
21 And I think in the main they are without the factual support.

22 So that's why I -- my initial thought is that you should
23 go back and try again. Not that you can't do it. It's an
24 interesting idea here, but you have very broad markets and you
25 leave out people. Then you focus on Frontline Plus. That's

1 one flea product. There's got to be zillions of them out
2 there. If somebody raised the price on Frontline Plus, why
3 doesn't somebody go out and buy some other flea product?

4 I don't have a dog, but, you know, I just have to assume
5 they don't -- even if you want to say there they are the
6 leading, you know, product, what does that mean? So I think we
7 need numbers.

8 Okay. You're on, Mr. Rubin.

9 **MR. RUBIN:** Thank you, your Honor.

10 There's a very good reason why some of the players, as
11 we've referred to them, have been left out. And that is
12 because we're dealing with, first of all, market definition as
13 a factual matter in a market where there is, I don't think it's
14 exaggerating to say, rampant misrepresentation. Manufacturers
15 have for more than a decade represented that they do not sell
16 products except through veterinarians.

17 As a result, there is one clear channel which is
18 manufacturer to distributor to veterinarian to pet owner. The
19 distributors your Honor mentioned are distributors that
20 distribute, such as Shine and there are a few others, that are
21 also in the medical device and drug distribution business.
22 They distribute to veterinarians.

23 Manufacturers --

24 **THE COURT:** Exclusively?

25 **MR. RUBIN:** Exclusively.

1 **THE COURT:** Okay.

2 **MR. RUBIN:** I mean, there may be some exceptions, but
3 in general there is no channel between the manufacturer -- from
4 the manufacturer to the distributor to a retailer because the
5 manufacturers want to create the impression among their
6 veterinary customers that they do not sell to retailers.

7 **THE COURT:** Okay. Let's say that that's the story,
8 but this stuff is leaking out in some way and getting to your
9 clients.

10 **MR. RUBIN:** Yes.

11 **THE COURT:** Where is it leaking from?

12 **MR. RUBIN:** It is leaking in what the FTC referred to
13 as the secondary market.

14 **THE COURT:** Which is?

15 **MR. RUBIN:** Which is veterinarians --

16 **THE COURT:** Rogue veterinarians?

17 **MR. RUBIN:** Veterinarians -- I'm sorry.

18 **THE COURT:** Are they rogue veterinarians?

19 **MR. RUBIN:** They are rogue veterinarians in the sense
20 that they order more product than they need and they sell that
21 product to what are known as secondary distributors, such as
22 the plaintiffs in this case.

23 **THE COURT:** Okay.

24 **MR. RUBIN:** In, fact, that was how it was possible to
25 find -- and Frontline is a unique product for patent and other

1 reasons, and we'll touch on that in a moment. But that is how
2 it was possible to find these products which manufacturers
3 represent as being only available from veterinarians in retail
4 stores. How is it possible? Because manufacturers sell to
5 veterinarians who over order and then sell --

6 **THE COURT:** Okay. So the leak is from the
7 veterinarians? There is no other channel? In other words, the
8 manufacturers themselves aren't selling to the large retailers,
9 non-vet retailers?

10 **MR. RUBIN:** They are not, your Honor. With the
11 exception of Bayer, which decided, I think it was 2010, that
12 they weren't going to play this misrepresentation game and they
13 distribute directly to retailers.

14 **THE COURT:** Okay. What flea product do they make
15 that competes with Frontline Plus?

16 **MR. RUBIN:** Well, I'm not sure that there is a
17 competitive product to Frontline Plus.

18 **THE COURT:** There's got to be.

19 **MR. RUBIN:** I mean, first of all, there is a patent
20 for the combination of -- which is now off patent, but for the
21 combination of ingredients that are in Frontline Plus, and they
22 have been keeping products off that use those combinations.

23 Now, we are moving on to another generation of products --
24 Frontline Plus is unique because it is the only, you know,
25 almost billion dollar a year blockbuster pet product, pet

1 medication in the entire market.

2 **THE COURT:** Okay. Let me go back then for just a
3 minute.

4 Is it your allegation that the only way your client can
5 get -- we're not even talking prescription here. Frontline
6 Plus is an OTC product; right?

7 **MR. RUBIN:** It's OTC if they will sell to the
8 retailers, but they have not. So that's meant in the Complaint
9 by "restricted," is that they must go through veterinarians.

10 And, of course, the key to the case is that this is a
11 merger between a distributor to retailers and the country's
12 largest veterinary practice.

13 They are able to get through their veterinary practice
14 supply that can then go to retailers, and the manufacturers
15 have an interest in doing this because of the secondary --

16 **THE COURT:** Wait, wait. You're getting too far ahead
17 here.

18 **MR. RUBIN:** Sorry.

19 **THE COURT:** Let's just stay on one point, okay, at a
20 time.

21 All right. So leaving out who, you know, the two
22 defendants are for a minute and just looking at the system, if
23 we can. All right. You have one manufacturer who you say does
24 sell restricted -- otherwise restricted -- well, restricted
25 just means that the manufacturer has decided to tell somebody

1 that they can't -- you know, that they aren't going to sell to
2 it anybody except them.

3 **MR. RUBIN:** And do not sell it. They not only say
4 it, but they don't do it.

5 **THE COURT:** Wait a minute. Wait a minute. No, no.
6 Now I'm not sure what that meant.

7 Okay. When the manufacturer, let's say, Merial, says:
8 Okay, Mr. -- or Dr. Veterinarian. We're only going to give
9 this stuff to you. We're not going to sort-of let anybody
10 compete with veterinarians.

11 And then they will have some lofty reason why they do
12 that. They have a better relationship with the pet owner.
13 It's more personal. They'll be better at figuring out what
14 they need, et cetera, et cetera. Are they themselves -- other
15 than this Bayer, which doesn't purport to do that, are they
16 themselves nonetheless realizing if they can't unload some of
17 this product, that they are going to sell it to somebody like
18 PetSmart?

19 **MR. RUBIN:** They are and they do. And, in fact, the
20 question is when a manufacturer represents that the product is
21 only available through veterinarians, it's reasonable for pet
22 owners to wonder how did this product get into Costco and
23 Petco, et cetera.

24 **THE COURT:** Let's leave out the pet owner for a
25 moment because you don't want to call them the user.

1 **MR. RUBIN:** No.

2 **THE COURT:** They are not the consumer here.

3 **MR. RUBIN:** No, they are not. It is the retailers
4 that are consumers, which is the problem with --

5 **THE COURT:** All right. All right.

6 **MR. DAHLQUIST:** Can I respond to that?

7 **THE COURT:** Just a moment.

8 **MR. DAHLQUIST:** Sure.

9 **THE COURT:** We have line manufacturers who, in fact,
10 are selling to retailers. We've got vets who have promised not
11 to sell to retailers and are -- and we have -- that's what you
12 just said.

13 **MR. RUBIN:** No, your Honor. The line manufacturers
14 are selling excess products to veterinarians with the knowledge
15 that the veterinarians are introducing the product into
16 secondary retailing -- excuse me, distribution.

17 **THE COURT:** Okay.

18 **MR. RUBIN:** And that is where our clients come in and
19 the defendants as well.

20 **THE COURT:** Okay.

21 **MR. RUBIN:** And they go to retailers.

22 **THE COURT:** Okay. So veterinarians -- are you saying
23 that it's all funneling through the veterinarian to your
24 client?

25 **MR. RUBIN:** I would say yes and that whatever is

1 leaking is negligible in terms of volume.

2 So yes, and that's the --

3 **THE COURT:** You might have to plead that, okay,
4 because the --

5 **MR. RUBIN:** That's the --

6 **THE COURT:** I don't know that you have. Tell me
7 where you think you've pled that particular -- you can't just
8 say it's negligible. That's the problem. You would have to
9 show something more. Because you are trying to show that this
10 market is adversely affected by whatever arrangement is going
11 on here between these defendants; right? So -- and then in one
12 instance for your second cause of action between the
13 manufacturer and the defendants, as opposed to between the
14 defendants themselves.

15 So one of the problems, I don't think you can just say
16 something dominates, something is negligible, we were forced
17 out of the market. I think you're going to need to put some
18 facts on it.

19 In other words, you couldn't just come in -- let's pretend
20 this is a jury trial; right? You've got, I don't know how many
21 you want to pick, six plus two people in case you lose
22 somebody. Okay? So you have eight people sitting there and
23 you come and you say: Okay, here is our case. All right.
24 They dominate the market with Frontline. We had to get out and
25 there isn't any other way that we could really get this

1 product. And you sit down. And somebody goes: Well, yeah.
2 What do you have to show that?

3 Now, you don't have to do a full case at this point but
4 *Twombly* and *Iqbal* have almost taken summary judgment, put it
5 in a complaint form and just said you don't have to put in
6 declarations, but you've got to say the facts.

7 So that's where I think we have a little bit of this
8 difficulty.

9 **MR. RUBIN:** Right, your Honor. So if I could just
10 clarify what -- what I believe is going on factually.

11 **THE COURT:** Okay.

12 **MR. RUBIN:** And not only do we have misrepresentation
13 by the manufacturers, but we have a very secretive industry and
14 a great deal of difficulty obtaining the facts that we would
15 all like to have pled and out in the open.

16 I think those facts are easily available. The merging
17 parties, for example, filed an HSR filing that we requested and
18 they declined to provide it to us, at least at this point. So
19 I think the answers to these questions are there.

20 But the reason I said it's -- there is a negligible amount
21 is because I don't want to represent to the Court that zero
22 product can come through a non-veterinary channel. One of the
23 distributors could go to the secondary market.

24 The key thing, your Honor, is that the FTC, as they put
25 it, has realized that the policies of selling only -- or at

1 least stating that you're selling only through veterinarians
2 are restrictive and anti-competitive. And the secondary
3 market, which is how -- which is where veterinary product goes
4 through a secondary distributor to retailers is a
5 pro-competitive force that's necessary. And it is that market,
6 I believe, that is being restricted and restrained and sort of
7 taken away from the other secondary distributors, which are --
8 which are pled in the Complaint.

9 **THE COURT:** I don't know. You know, they say there
10 are various opinions on the subject, et cetera, et cetera.
11 It's kind of a more balanced, I think, perhaps report.

12 But let's assume for a moment that they play a role, all
13 right, some role. Then you've got to show in some way what
14 that role is. I mean, is it -- again for the purpose of the
15 retailer getting these products, are we talking about
16 10 percent? Are we talking about 20 percent? Are we talking
17 about 30 percent of what the retailers get? Because if they
18 can just go get this stuff elsewhere.

19 Plus, you haven't -- you've made it a one-product market.
20 For all your pleading, it's Front Line Plus. Again, even
21 though you define the market more broadly.

22 Plus, ordinarily your products are supposed to be
23 interchangeable. You've got heartworm. That's not, you know,
24 interchangeable with flea and tick stuff.

25 How these retailers buy these products. Do they buy them

1 in bulk, like they are just going to buy all parasiticides as a
2 group? Do they just buy flea and tick? Who do they buy it
3 from?

4 I just think that there is a very narrow telescoping here
5 of who is involved and what's going on. So that even if you
6 wanted to say, okay, let's just take these markets as they are,
7 you then have this question about market share.

8 Now, your whole focus has been on these, we'll call them
9 restricted OTC products. You say this is where all the -- you
10 know, the parade of horrors has already happened and we're
11 anticipating it coming down the road with prescription. Okay?
12 Your only statistics are on prescription and you haven't even
13 made that particular defendant a major -- I mean, they are a
14 significant part of the market, but they are not the biggest
15 part of the market and there are a lot of other people in it.

16 And then what happens if, for example, in the prescription
17 market you've pled that your clients got ten percent of it, of
18 prescription parasiticides. So let's say you have a minor
19 player in a market. So then you go, okay, they decided to bow
20 out? So what? How that going to change anything?

21 So, again, I'm not sure that -- and then just to go back
22 to statistics, because I keep trying to match them up and they
23 didn't match up. In -- another figure was the percentages in
24 paragraphs 1, 3 and 18 of the Complaint, which all purport to
25 represent a particular figure, one-third of all pet medications

1 that are sold by non-veterinary retailers.

2 Okay. I'm sorry. The percentage of all pet medications
3 sold by non-veterinary retailers. It's one-third in
4 Paragraph 1. It's -- in Paragraph 3 it's 40 percent. And in
5 Paragraph -- did I say 18?

6 **MR. DAHLQUIST:** 18.

7 **THE COURT:** It's 38 percent. And it's all the same
8 figure. So -- okay, wait a minute.

9 Then we have the prescription medications and, like, VIP
10 before the merger had 27 percent. Southeastern beat them with
11 33. There was somebody else. Oh, another group has 25
12 collectively.

13 So you could see that, okay, for prescription medications,
14 which is one of your classes -- not classes, but one of your
15 markets, all right, so then these retailers will just go and
16 get stuff from somebody else, you know. I just -- I think you
17 have to match it up better.

18 **MR. RUBIN:** Well, I assure your Honor that the reason
19 that the markets are pled the way they are is because that is
20 what the facts dictate. Retailers cannot go anywhere other
21 than to the secondary distribution market to get product.

22 Now, that's not to say that the distributor that sells to
23 the veterinarian -- and this is what I meant by the negligible
24 amount -- can sometimes sell to a secondary wholesaler. So in
25 other words, there is a non-veterinary source for a small

1 amount -- as I understand it from the facts that we know, a
2 small amount of non-veterinary source that goes to secondary
3 retailers, that then go to -- to the secondary distributors
4 that then go to the retailer.

5 But the retailer has no choice but to go to the secondary
6 market for its product. It cannot go to the manufacturer. It
7 cannot go to a distributor. Those distributors sell to
8 veterinarians.

9 **THE COURT:** Are you talking about prescription or
10 OTC?

11 **MR. RUBIN:** Both. And the reason that Front Line is
12 focused -- I mean, we have essentially two plaintiffs who are
13 related, but have two different claims.

14 Front Line is such a big product and there are so few
15 substitutes for it. And Bay Medical is the plaintiff that
16 dealt almost exclusively in Front Line. And they, as other
17 secondary distributors, were eliminated from the market because
18 of a deal, as we understand the facts to be, between Merial and
19 the defendants.

20 **THE COURT:** That's why I don't think you can just say
21 we are eliminated; right? I think you have to show what
22 happened to them, not just say, oh, we decided to bow out and
23 then look at it and see what happened to them later. You're
24 supposed to be able to say it now.

25 Plus, your client knows, for example, what they have

1 gotten over the years from the various sources. And one of the
2 problems is that, all right, you say, gee, this is really hard.
3 Like, for example, on your discriminatory pricing you say:
4 Well, how do we know what they charge them? They are not going
5 to tell us.

6 Well, then maybe up can't file a claim. You know, you
7 can't, like, say we think they are doing something wrong, so
8 we'll just say they are and then we'll try and discover it
9 later.

10 **MR. RUBIN:** Well, your Honor --

11 **THE COURT:** You can't do that.

12 **MR. RUBIN:** It was sort of evident to us that the
13 competing secondary distributor, which is the defendants in
14 this case or before the merger VIP, was obtaining product at a
15 much lower price because we were -- "we," and by that I mean,
16 of course, my clients, the plaintiffs -- were unable to match
17 the prices that the retailers were now telling them.

18 So for ten years they are selling to PetSmart and other
19 retailers and now suddenly PetSmart and retailers say, well,
20 now we need a very, very deep discount because we can get it
21 elsewhere for a very lower price, and it's clear because it's a
22 fairly small industry what that source is, and it must be that
23 that source is getting it at a much lower price, otherwise they
24 would not be able to sell it at that price.

25 They didn't bow out. They were unable to match an

1 extremely low price prior to the merger.

2 **THE COURT:** Okay. So now what we have is the
3 ultimate consumer is benefiting. All right. The pet owner is
4 now benefiting from lower prices and you would have to say
5 something, in order to get a -- an antitrust injury, you would
6 have to say that whatever they are doing has caused us to have
7 to leave the market and once we do, we end. Some other people
8 maybe, but wherever you are as a percentage in the market,
9 well, if we go out, then they are just going to be able to
10 raise the price afterwards.

11 **MR. RUBIN:** Which is what we have seen after the
12 merger, your Honor.

13 I mean, we're not unaware, your Honor, that ultimately the
14 purpose of the antitrust law, is to ensure the competition
15 operates to lower prices. That's the conundrum with a price
16 discrimination case of this kind.

17 But what we've here is an initial deal, which then
18 undermined a number of secondary distributors, including my
19 client, and other secondary distributors who were specializing
20 in Front Line.

21 **THE COURT:** Okay. But we don't have that really
22 described here. For example, even -- I'm not sure I know where
23 your clients fit in the secondary distribution market. Are
24 they significant? If they leave the market, what's going to
25 happen to the market?

1 I mean, it's like there are so many different layers that
2 really don't have much flesh on them at the moment.

3 And you are saying your client was told that they got a
4 better deal from -- who did -- the retailer --

5 **MR. RUBIN:** They didn't say who, but it was sort of
6 known, at least there was a well-founded suspicion, that it was
7 one of the parties to the merger.

8 This is before the merger, your Honor. So, I mean, the
9 case combines two different claims; one of which being a price
10 discrimination claim that eliminated my client and other
11 secondary distributors from the Front Line market, and then a
12 merger, which then -- in post merger we get an increase in
13 price in Front Line, which we can demonstrate, and I believe is
14 pled. I don't -- I can't point to it at the moment. I can
15 look at it if -- with an opportunity.

16 But the other part of it is that it -- and I -- I think
17 this should come through from the Complaint, that this was a
18 test arrangement, where let's see whether the combination of
19 this extremely large veterinary firm, that because they are --
20 veterinarian services firm, because they have so many clinics
21 and mobile clinics and thousands and thousands of them, have
22 the ability to get a very large volume of product, both the
23 restricted and the prescription, and combining that with a
24 distributor, PetIQ, which has very deep and broad relationships
25 with retailers and can we -- and I'm looking at it from the

1 manufacturer's point of view because it's clear that the
2 manufacturer supported this merger. Can we get a handle on the
3 secondary distribution market by combining these two companies
4 and supporting them, or if these two companies should combine
5 and support them. And, in fact, that is what happened.

6 So Front Line -- they eliminated the secondary market for
7 Front Line with a price discrimination scheme.

8 The merger --

9 **THE COURT:** Slow down just a little.

10 **MR. RUBIN:** I'm sorry.

11 **THE COURT:** Okay. You're going to burn out the court
12 reporter and it's going to be harder for me to follow you.

13 **MR. RUBIN:** Thank you, your Honor.

14 **THE COURT:** Do you want her to read back your last
15 sentence?

16 **MR. RUBIN:** No, I'm all right.

17 The Front Line arrangement was, in fact, a test case for
18 whether or not the combination of this very large veterinary
19 service organization, VIP, and this very substantial
20 distributor with broad and deep relationships with retailers
21 would enable in this case Merial, the manufacturer, to control
22 and otherwise limit and, in essence, eliminate the other
23 secondary distributors.

24 So with the price -- pre-merger price discrimination
25 arrangement, the other secondary distributors were forced out

1 of the market because there was no way that they could respond
2 to the prices that were offered.

3 **THE COURT:** Let me go back for a minute as to these
4 two defendants for a second.

5 So VIP has got a bunch of veterinary clinics; right?

6 **MR. RUBIN:** I believe they are the largest in the
7 country.

8 **THE COURT:** All right. They are big. Okay.

9 They in the past would get, let's say, Front Line Plus or
10 prescription drugs, whatever, from the manufacturer directly or
11 through a distributor like the company they merged with?

12 **MR. RUBIN:** No, your Honor. The company they merged
13 with would sell unrestricted products to retailers. There is
14 a --

15 **THE COURT:** Okay. Just unrestricted.

16 **MR. RUBIN:** Yes, your Honor.

17 **THE COURT:** Okay. Well, I mean, somebody is shaking
18 their head.

19 But if you plead it -- if you plead it, then it's up to
20 them to disprove it. If it's important, you know. Okay.

21 But just so that I can sort of get clear who these
22 entities are. You've got a company that owns a bunch of pet
23 clinics, all right, veterinary services. They were getting
24 product either directly from the manufacturer or some
25 distributor of the manufacturer.

1 **MR. RUBIN:** That's correct.

2 **THE COURT:** Okay. And in the past were they one of
3 the leakers?

4 **MR. RUBIN:** They, along with my clients and several
5 others mentioned in the Complaint, were doing precisely that --

6 **THE COURT:** No, no, no, no, no. Your clients are
7 downstream.

8 **MR. RUBIN:** No, your Honor.

9 **THE COURT:** These people are veterinarians.

10 **MR. RUBIN:** I'm sorry. Are they one of the leakers,
11 meaning are they veterinarians that sell into the secondary
12 distributors?

13 **THE COURT:** Yes.

14 **MR. RUBIN:** Yes, they were, along with many other
15 veterinarians because that is the source --

16 **THE COURT:** Let's just stay with one question for a
17 moment. This is why I had so much trouble reading the
18 Complaint and your respective arguments. Okay? It wasn't
19 limited to just yourself. You guys were just all over the
20 board here. So let's try to stay focused for a moment.

21 Let's take VIP and call them big veterinarian. All right?
22 They used to get extra product and they would sell it to your
23 client, or not.

24 **MR. RUBIN:** Yes. And -- well, they would sell it to
25 secondary distributors, including my client. Yes, your Honor.

1 **THE COURT:** So the answer is yes. Okay? They sold
2 it to your client. I just want to look at one group for a
3 second. Okay. They sold to it your client.

4 **MR. RUBIN:** Yes.

5 **THE COURT:** They also sell to PetSmart?

6 **MR. RUBIN:** No, your Honor. Because they are
7 veterinarians and there needs to be -- or there has been a
8 distributor-type entity who can do the logistics of
9 distribution. Veterinarians are not --

10 **THE COURT:** No, they didn't sell to PetSmart.

11 **MR. RUBIN:** No, ma'am. They did not sell to
12 retailers.

13 **THE COURT:** There are no ma'ams in the courtroom.
14 Are you southern? No. Okay? Then no excuse.

15 Okay. So going back. All right. Now we keep going. So
16 we've got before this merger, okay, VIP would in the ordinary
17 sense, just like Dr. Welby, you know, veterinarian, get
18 product. Okay. Then they would on occasion give it to people
19 like your client.

20 After this merger, did they stop doing that? Stop giving
21 the product to your client?

22 **MR. RUBIN:** Yes, they did, your Honor.

23 **THE COURT:** Okay. Then you have the other defendant
24 PetIQ, and you're saying they were a distributor not -- as that
25 right?

1 **MR. RUBIN:** Yes, your Honor.

2 **THE COURT:** Okay. So they were going -- they would
3 get the product from the manufacturer just like VIP would.

4 **MR. RUBIN:** No, your Honor.

5 **THE COURT:** No? Okay.

6 **MR. RUBIN:** Because they are not veterinarians. So
7 they are not --

8 **THE COURT:** They distributed --

9 **MR. RUBIN:** But not those products. They distribute
10 Hartz Mountain and the other --

11 **THE COURT:** Well, they have not -- I'm sorry. They
12 have not even the restricted stuff.

13 **MR. RUBIN:** Right, your Honor.

14 **THE COURT:** So were the restricted and the
15 prescription treated by the manufacturers kind of as a package?

16 **MR. RUBIN:** Well, not as a package, but similarly and
17 not in the standard way that you get a manufacturer going to a
18 distributor going to a retailer.

19 **THE COURT:** Okay. All right. So then -- all right.
20 So PetIQ is just getting this other product.

21 And your view why it was then beneficial for them -- maybe
22 not the market, but for them to join up, VIP and PetIQ, was so
23 that what?

24 They weren't -- in other words, it wasn't two entities
25 that were individually buying a small amount that are now

1 buying a big amount and get some discount because of that.
2 They were buying different stuff.

3 **MR. RUBIN:** Correct, your Honor.

4 **THE COURT:** So how did that work?

5 **MR. RUBIN:** Well, the -- and I think that this is
6 clear from the defendant's publications and --

7 **THE COURT:** Yeah. Well, you can just tell me
8 without -- you don't have to say where you're getting it from
9 for the moment.

10 **MR. RUBIN:** PetIQ, the distributor to retailers, did
11 not have a source of Front Line and prescription because those
12 products had to go through veterinarians and secondary
13 distributors.

14 **THE COURT:** Okay. They didn't get them.

15 **MR. RUBIN:** They didn't get them. So by -- by
16 acquiring VIP Petcare, they also acquired a -- their very large
17 allocation of veterinary -- restricted veterinary and
18 prescription veterinary products, which they could then sell to
19 their retailers who they had pre-existing relationships with
20 for other products.

21 **THE COURT:** I see. Okay.

22 And you're saying that -- first of all, one argument
23 you're making in support of your first and third causes of
24 action is by reason of that, they can their prices; right?

25 And then, on the other hand, for your second cause of

1 action you're saying they have managed to be able to lower
2 their prices.

3 So there is a --

4 **MR. RUBIN:** It's a time difference, your Honor.

5 **THE COURT:** There is a disconnect here.

6 **MR. RUBIN:** That's correct. And, obviously, we're
7 aware of this dynamic and clearly aware of the requirement to
8 demonstrate an antitrust injury.

9 And in the -- before the merger there was a -- it's one of
10 a piece, as we see it, which is a strategic merger designed to
11 place the secondary distribution in the hands of one company.

12 **THE COURT:** You know --

13 **MR. RUBIN:** And so the way they did it was to first
14 eliminate the Front Line distributors that were not VIP/PetIQ,
15 which is my client and the other Front Line distributors, which
16 they did by giving favorable and discriminatory prices to just
17 VIP, which then could be passed on and the benefits given to
18 the retailer. That's fine. But that was temporary.

19 When the merger occurred, Front Line prices went up and
20 the -- and the secondary distributors that were there doing
21 Front Line were no longer there.

22 **THE COURT:** I'm still having a little bit of a
23 problem with that first part again. The merger or even the
24 joint venture, it doesn't really matter, but let's say the
25 merger. You don't have any more veterinary clinics by reason

1 of this merger. It's the same amount. It's just that
2 essentially PetIQ acquired VIP; right?

3 **MR. RUBIN:** (Nodding.)

4 **THE COURT:** Okay. They are still, I thought, not
5 supposed to sell this stuff to retailers.

6 In other words, PetIQ's deal, if you will, with the
7 manufacturers was just for over the counter, not restricted
8 stuff. And just because suddenly they are in the picture with
9 VIP, why does VIP/PetIQ suddenly get the green light from the
10 manufacturer to sell to retailers?

11 **MR. RUBIN:** Well, your Honor, the manufacturer --

12 **THE COURT:** Did they?

13 **MR. RUBIN:** They did. And at least from the facts on
14 the ground one can infer that they got the green light, because
15 the manufacturers have been aware of the existence of the
16 secondary market for over a decade, as the FTC reports.

17 **THE COURT:** That pre-dates what you've got going
18 here.

19 No. I'm just saying that the rules don't appear to have
20 changed by reason of this merger. In other words, the
21 manufacturers are still saying that they will only sell to
22 vets. And then they are looking the other way when the
23 veterinarians pass it on. And the vets buy more than they
24 really need because the manufacturers want to be able to sell
25 more product. They don't want to sell it directly to the

1 retailers. I'll just call them retailers and vets, just for
2 shorthand here.

3 Okay. Just because somebody with no authority to do
4 anything -- you're going to get a note, I think, from your
5 client.

6 But just because somebody with no authority -- why don't
7 you wait a minute? You can pick that up in a second or you can
8 just -- why don't you just come up here, sir, and hand it to
9 him?

10 **UNIDENTIFIED SPEAKER:** I'm sorry, your Honor.

11 **THE COURT:** If you want to sit here at counsel table,
12 you're more than to do that as the client, if you want.

13 Okay. Do you want to read the note first?

14 **MR. RUBIN:** No, your Honor. I'm listening.

15 **THE COURT:** That's okay. I don't want to throw you
16 off here. Read the note.

17 (Brief pause.)

18 **THE COURT:** Did you read it? Okay. I mean, he may
19 know how this works from the front lines, but just a moment.

20 So, okay. You have a veterinary clinic that has been
21 given the green light to sort of, wink wink, distribute more
22 than they need to retailers. Stores, we'll just call them
23 stores. And now they have merged with someone who has got some
24 entirely different part of the business, that they've got these
25 over the counter things. And they have always had this green

1 light, in effect, to do whatever they have been doing.

2 Are you saying they are getting more product than they did
3 before because PetIQ has got, I don't know, some better
4 relationship with the retailers? I don't know. What's the
5 benefit that VIP got by merging?

6 **MR. RUBIN:** Well, let's put it -- that VIP got from
7 the merger?

8 **THE COURT:** It looks like PetIQ just picked up a
9 profitable business. I'm not sure where it went after that.

10 **MR. RUBIN:** Well -- well, they did. And they also
11 picked up enough capacity to replace every other secondary
12 distributor, but the VIP supplied secondary --

13 **THE COURT:** That's what I don't understand. Because
14 they were selling to -- according to you, this is where your
15 client got the product before. Okay? In other words, they got
16 it from the veterinarians and then the veterinarians also were
17 selling to the retailer.

18 **MR. RUBIN:** Our client got some product from VIP, not
19 by any means a large proportion of their product, in the past.

20 **THE COURT:** Where did they get the rest of it?

21 **MR. RUBIN:** The rest of it from other veterinarians.

22 **THE COURT:** Oh, okay. Fine.

23 **MR. RUBIN:** So -- so the point -- the point is is
24 that before the merger there was -- there were a number of
25 secondary distributors that were competing for the business of

1 retailers. After the merger, there is only the PetIQ/VIP as
2 the -- they have captured the secondary distribution market.

3 **THE COURT:** When you say that, are you saying they
4 are not selling like they used to to veterinarians and they
5 somehow just selling to retailers?

6 **MR. RUBIN:** "They" being who, your Honor?

7 **THE COURT:** VIP. The other people don't get the
8 product if it's prescription and over-the-counter restricted.
9 They only get it because of VIP. In other words, they are --
10 otherwise, you know, they are in the plebeian group and just
11 gets, you know, over-the-counter stuff.

12 **MR. RUBIN:** I'm not sure I'm following what your
13 Honor is asking.

14 **THE COURT:** All right. Well, all I'm saying is that
15 VIP used to sell to your client.

16 **MR. RUBIN:** That's correct.

17 **THE COURT:** And other --

18 **MR. RUBIN:** As other veterinarians --

19 **THE COURT:** And other veterinarians did, too. Have
20 they stopped, these other veterinarians?

21 **MR. RUBIN:** The other veterinarians have stopped
22 because there is no -- there are no longer secondary
23 distributors, like my client, to sell to.

24 **THE COURT:** Well, you haven't said that. You
25 certainly don't say that in your complaint. You don't say

1 everybody else went out of business because of something that I
2 still don't understand.

3 Because from what you've said you had VIP. They got
4 product, okay, because they are vets.

5 **MR. RUBIN:** Right.

6 **THE COURT:** Not because they are something else.

7 It's because they are veterinarians. And they had an idea that
8 they would buy more than they needed that would help them
9 because they could pass it on at a profit to people like your
10 client and the manufacturer looked the other way because they
11 could sell more product. Okay. I got that.

12 After the merger, I don't see what changed. Okay? That's
13 what I don't quite understand. Because who they merged with
14 wasn't another veterinary clinic. So now they are monstrous
15 and they have all this stuff. And for some reason they've
16 decided to cut you folks out and just sell to retailers or they
17 are getting a better deal because they are so big.

18 It's not clear to me why the -- the combination changed
19 the lay of the land.

20 **MR. RUBIN:** Because, your Honor, they were large
21 enough to handle the volume that otherwise was flowing through
22 numerous veterinarians and secondary distributors.

23 **THE COURT:** Are you saying that they themselves
24 cornered the market on --

25 **MR. RUBIN:** Secondary distribution, yes, your Honor.

1 **THE COURT:** No, not secondary. Okay. Wait a minute.
2 I want to understand who. They are veterinarians. Okay? Are
3 the veterinarians the secondary people or are you the secondary
4 people?

5 **MR. RUBIN:** We are the secondary people.

6 **THE COURT:** Well, then what are the veterinarians?
7 What are you calling them? They are not secondary.

8 **MR. RUBIN:** No, they are not -- they are not
9 distributors --

10 **THE COURT:** They are ghost players in this thing.

11 **MR. RUBIN:** They are the leakers, so to speak.

12 **THE COURT:** Yeah, and --

13 **MR. DAHLQUIST:** And other veterinarians. It's not --
14 if there is no demand for other veterinarians to over order and
15 they can't make money off of it, then they won't do it.

16 And whereas there was a market for the leaking, so to
17 speak, from the other veterinarians when there were Lambert and
18 our client and several other secondary distributors, there is
19 no market any more for that so they are not doing it.

20 **THE COURT:** Why isn't there?

21 **MR. RUBIN:** Well, because there are no retail
22 contracts available for those secondary distributors to sell
23 to. The PetSmarts of the world and Costco and the rest of it,
24 they have all gone to PetIQ, who can get as much as they
25 require because PetIQ now owns this very large veterinary

1 practice. That is what has happened to the secondary
2 distribution market.

3 **THE COURT:** Well, what you're saying is for some
4 reason because of this merger VIP, in effect, is selling
5 directly -- more directly -- well, directly to the retailers,
6 which they used to do before, but now they are selling
7 everything to the retailers.

8 **MR. RUBIN:** Pretty much, your Honor.

9 **THE COURT:** Okay.

10 **MR. RUBIN:** With respect to Front Line, and they have
11 the capacity to do it for the prescription. And that is the
12 incipient problem that we have with the --

13 **THE COURT:** I get where you're going with that.
14 Okay. They got an exclusive, you say, this company.

15 **MR. RUBIN:** Yes.

16 **THE COURT:** Okay. So now they've got an exclusive
17 distributorship of an over-the-counter restricted flea product.

18 Okay. In and off itself exclusivity is not an antitrust
19 violation. So you have to show, again, that ultimately the
20 retailers are getting -- charging more or will get charged more
21 because they don't have, for example, anywhere else to go to
22 get competing product.

23 But you can't just say we don't get Front Line and so
24 that's the end of it. That's a one product market. In effect,
25 that's what you're arguing. And you can't do that.

1 There are -- I'm -- I'm convinced that they are not the
2 only flea product. I don't care if they have a patent. There
3 are drugs out there for all kinds of things that people have
4 patents on. They all purport to cure the same problem. People
5 are prescribed different ones. And then after awhile, stuff
6 goes generic.

7 So what is it? Do you take a pill? Do you dab it on? Is
8 it a collar?

9 **MR. RUBIN:** Front Line is a spot-on. And there is a
10 special place in this ecosystem for Front Line because it is
11 recommended by veterinarians. They tell their customers get
12 Front Line. If you're a pet owner and your veterinarian tells
13 you to use Front Line, you're not going to buy an off brand.

14 Now, I'm not saying that there are not other spot-on flea
15 and tick. There is another little factual thing going on here
16 that's part of the dynamic, which is that the spot-on are kind
17 of going out of fashion now and the manufacturers are moving
18 that market over to what are known as the chewable. You know,
19 the pet ingests the drug now. That's the new blockbuster drug
20 and that is where veterinarians are moving.

21 Of course veterinarians, you know, they have this very
22 close relationship with the manufacturers, because they believe
23 that the manufacturers have their interest in mind in the way
24 they distribute the product. So they are specifically
25 telling -- I mean, Front Line is a historical example of what

1 can happen when a manufacturer decides to favor a particular
2 distribution channel and it -- and as we pleaded, it was the
3 first step in a progression where manufacturers are essentially
4 eliminating the competition that's happening in secondary
5 distribution.

6 **THE COURT:** Okay. And once again, that's all very
7 nice as closing argument, but not as the facts.

8 And that's why I say that this complaint is pretty much
9 devoid of facts. It has a lot of overarching statements about
10 the market, but they are not really supported by facts. And so
11 someone looks at it and says: Yeah, fine. And what-have-you
12 got to show that?

13 So I think that you do need to come up with some. I'm not
14 saying that you can't make out a case, but to this point I
15 don't think you have. And these two markets, at least at the
16 moment, don't seem to add up to what would be a plausible
17 market because there are other channels. There are other
18 products. There are -- I don't know. It's just there are so
19 many other things here that seem to be ignored, I guess is the
20 best way to put it.

21 **MR. RUBIN:** Your Honor, if I could briefly respond to
22 your comments on the facts?

23 **THE COURT:** Right. Okay.

24 **MR. RUBIN:** We love facts. We would like to have the
25 ability to lay out many more facts than we have. We don't have

1 that ability.

2 A combination of the subterfuge that is occurring in this
3 industry, a rampant misrepresentation by manufacturers, secrecy
4 about who is distributing what to whom. And all of that --

5 **THE COURT:** Okay. You're saying it's too hard to
6 plead a good complaint.

7 **MR. RUBIN:** Well, your Honor, I'm saying all of that
8 is available to us in the HSR filing that the merging parties
9 have filed.

10 **THE COURT:** Okay. All right. All I can -- now the
11 HSR filing -- HSR stands for.

12 **MR. RUBIN:** Hart-Scott-Rodino. It's the pre-merger
13 notification of the --

14 **THE COURT:** A government document.

15 **MR. DAHLQUIST:** No.

16 **MR. RUBIN:** It's a -- no, it's a party's document
17 submitted to the government and it's a necessary --

18 **THE COURT:** Can you get it under FOIA?

19 **MR. RUBIN:** I cannot, your Honor. And we requested
20 it from the defendants and they have declined to provide it to
21 us.

22 **THE COURT:** Okay. Well, here is the problem. Okay?
23 If you don't have the facts and you're just assuming what they
24 are, you may not be able to plead a case.

25 You know, sometimes people need flies on the wall. You

1 need all kinds of things, but they don't -- you don't have
2 them.

3 Now, you may be able to patch together some circumstantial
4 showing, but at the moment it's -- it's more speculative. And
5 that's -- that's where I see the problem.

6 And I understand, you know, that you say, gee, they are
7 not going to give us their secret, this, that and the other.
8 But you do know and can get from, I'm sure, all manner of
9 publications what the percentages are that people represent in
10 the market.

11 **MR. RUBIN:** Judge, we've -- we have purchased --
12 we've looked everywhere --

13 **THE COURT:** Not from them.

14 **MR. RUBIN:** No, not from them. I'm talking about
15 from the research groups, investment houses that do studies.
16 We've looked at everything everywhere. People do not talk in
17 this market because of an overarching subterfuge.

18 And if you -- if you allow me an opinion, your Honor, I
19 think it's wrong for the defendants to sit with a compiled file
20 of all the essential facts about the industry and not give it
21 to us when we know that there is so much smoke here that we
22 know that there is fire.

23 I'm -- I truly believe that we would be able to satisfy
24 Your Honor's requirement for a more detailed explication of
25 what's happening here if we had access to the HSR filing.

1 **THE COURT:** Did the Department of Justice look at
2 this merger at all?

3 **MR. RUBIN:** The Federal Trade Commission did. They
4 did not approve it. They simply let the time period run out.
5 And without a challenge within the 30-day period, the parties
6 are free to merge.

7 So essentially what's happening is that the merging
8 parties are saying: Well, we've got all the essential --

9 **THE COURT:** Slow down.

10 **MR. RUBIN:** We've got all the essential facts
11 regarding the market, regarding market shares, regarding
12 competition. And we know as -- as participants in this market
13 the way we're being injured by this relationship and the way
14 the commerce is moving into -- you know, away from us and into
15 a specific channel. And for them to say, well, we've got this
16 file, but you can't have it, good luck pleading your case, we
17 just think that's wrong.

18 And we think that -- you know, we think we should have
19 access to it and if we cannot prove a case with the facts that
20 are laid out for the Government, which the Government requires
21 in order to review the merger, then that's fair.

22 But to have the -- you know, to have such a readily
23 available source of factual material and not have access to it
24 because the defendants don't want to share it with us, we think
25 that that's wrong and unjust, your Honor.

1 **THE COURT:** You know, you do have some percentages.
2 You gave them -- where did you get these from?

3 **MR. RUBIN:** We made the best estimate we could on a
4 good faith basis. My clients are a small -- relatively small
5 player --

6 **THE COURT:** You tried to figure it out from whatever
7 you knew about the market.

8 **MR. RUBIN:** From circumstantial evidence, yes, your
9 Honor.

10 **THE COURT:** And, apparently, in good faith didn't
11 make like VIP the total -- you know, I understand that. But
12 why can't you do that with other percentages? And do the best
13 you can.

14 I mean, you always have a Rule 11 problem, yes. But there
15 is some way that you can deal with this, it would seem to me.

16 But the fact that one wants to say you're not playing
17 fair, but it's not illegal, then, you know, we have a -- I've
18 got a problem with that. You're saying, you know, morally.
19 You people are -- you know, you're acting immorally.

20 **MR. RUBIN:** I don't think we're saying that, your
21 Honor. I think we're saying that if the -- that the case
22 and -- including the motion to dismiss the sufficiency of the
23 complaint should be obtained on the evidence that's available,
24 not inferences behind, you know, a veil of secrecy, which is
25 what we're faced with.

1 **THE COURT:** What you're saying is that if we could do
2 discovery, we could figure out if we have a case.

3 **MR. RUBIN:** Discovery --

4 **THE COURT:** But that's, unfortunately -- and,
5 frankly, that used to be the way. Okay? That used to be what
6 happened, that people had noticed pleading. You are a bad
7 defendant. We lost money. And you sit down.

8 Okay. Then you go and you get all this discovery and you
9 find out what the case is about. And if you're lucky, you can
10 prove it up.

11 But now with, you know, the two cases -- *Iqbal* that didn't
12 plead enough and Twombly plea that pled too much, pled
13 themselves out of a case -- you're in a different arena and --

14 **MR. RUBIN:** That's fair, your Honor.

15 **THE COURT:** You have some percentages and you may
16 have to -- you may have to figure out how you can get some
17 more.

18 **MR. RUBIN:** That's fair, your Honor. But we're not
19 just asking for discovery. We're asking for a specific piece
20 of evidence that we know to exist that's in the possession of
21 the defendants which would be costless nearly for them to
22 provide for us and which would fully inform the case so that it
23 could be decided on the facts.

24 **THE COURT:** I'm not even sure what that shows. What
25 do you anticipate this document would even show?

1 **MR. RUBIN:** The market shares your Honor is looking
2 for. The --

3 **THE COURT:** How did they get them? How did they get
4 them if nobody publishes them?

5 **MR. RUBIN:** Well, we would need to see the file to
6 see what -- you know --

7 **MR. DAHLQUIST:** We're a big company, your Honor.
8 There is a lot of information out there in the public sector.

9 **THE COURT:** You mean, just in the public filings?

10 **MR. DAHLQUIST:** Absolutely, your Honor.

11 **THE COURT:** The SEC filings?

12 **MR. DAHLQUIST:** Absolutely. As well as multiple
13 other competitors in this industry are public companies.

14 **MR. RUBIN:** Not about a distribution system --

15 **THE COURT:** Wait a minute.

16 You think that they were able to get the information that
17 you think you can't get. And that's why I'm -- you know, I'm
18 questioning whether you couldn't at least make an effort.

19 But I don't think you can do what you've got here. I
20 don't think you've pled a plausible market, at least without
21 showing why there -- where these other players fit in and,
22 also, other products.

23 **MR. RUBIN:** Well, that's a substitutability issue,
24 and in the prescriptions there an issue there.

25 But, your Honor, one of the main things that they are

1 asking for in their pre-merger notification filing is what do
2 you -- what is your estimate? What is your sense of who your
3 competitors are and the market and all of the facts that we
4 believe would show the anticompetitive problem.

5 **THE COURT:** Not to cut you off again, but, I mean, I
6 know that's -- they are saying no. Okay? They are not going
7 to give it to you. Okay. And I at the moment can't make them
8 do it.

9 And what you think is that they could help fill in the
10 percentages that ordinarily someone would need to show market
11 share. You say, you know, you don't need market share. The
12 cases are all saying you need market share. And even though
13 there isn't a 2(f) case, there is a 2(a) case and 2(f) is just
14 kind of derivative of 2(a). I just --

15 **MR. RUBIN:** More to the point, your Honor --

16 **THE COURT:** I think you have to come up with some
17 figures. You have to come up with some harder facts.

18 **MR. RUBIN:** Well, Judge, this is a Section 7 case.

19 **THE COURT:** Well, you have several. You have
20 several. You have 7. You have --

21 **MR. RUBIN:** An attempted to and price discrimination.

22 **THE COURT:** Attempted to and then a 2(a).

23 **MR. RUBIN:** Right. And then --

24 **THE COURT:** 2(f), 2(f).

25 **MR. RUBIN:** Yeah. 2(f), right. But our focus is

1 this merger because this has a permanent longstanding effect on
2 the industry. And whether -- you know, what the merging
3 parties told the FTC with respect to market share and the rest
4 of it, that has got to be an estimate based on their knowledge
5 of the industry and we are -- you know, that is -- that would
6 put us -- you know, at least give us --

7 **THE COURT:** You're asking, in effect, for their work
8 product. I mean, in a way.

9 All I'm saying is that this is information that is not,
10 you know, available only to them. And what they are is they
11 are a corporation. Somehow they got this stuff. I don't know
12 where they found it. They don't want to tell you where they
13 found it either. I'm sorry.

14 Okay. But I just -- I'm happy to give you some extended
15 time to look into this. And if you just think I'm just totally
16 wrong, then, you know, don't try and file an amended complaint
17 and see if somebody agrees with you in another -- you know, a
18 higher court. But when I read it, I read mostly a string of
19 conclusions that might support something, if they had factual
20 support.

21 And then also it just seemed to me that the two proposed
22 classes are not plausible, at least without pleading something
23 to show why they are and facts of some sort. In some respects
24 it seems too narrow and in other respects it seems too broad.
25 I don't know.

1 So I gather that you've made some effort before you ever
2 filed this complaint to try and get some more detail and
3 weren't able to do it. But you did come up with what you have
4 in Paragraph 37 and even though -- that's kind of on the
5 periphery of all the allegations you have. So, I don't know.
6 Maybe you can come up with something else.

7 **MR. RUBIN:** We're certainly willing to try, your
8 Honor.

9 **THE COURT:** I'm happy to give you a shot at it. You
10 tell me how much time you think you would need to do this?

11 You know, in other words, if I dismissed with leave to
12 amend today, and just -- without having more and more time go
13 by to write a big thing. I'll just say, okay, for the reasons
14 stated, the claims are dismissed with leave to amend. How much
15 time do you think you would need to try and collect some of
16 this stuff that you say it's not fair to make you come up with,
17 but that I'm thinking you need.

18 **MR. RUBIN:** Judge, I'll give you an outside number.
19 I think if we can't do it in 60 days, then we can't do it. So
20 I would ask -- and hope to have it filed before then, but we
21 would -- you know, obviously, our task would be -- is an
22 investigatory one and, you know, that's hard to sort of
23 predict.

24 **THE COURT:** Sixty days isn't too far off.

25 I don't know. Let me see what -- what do you have to say

1 about that, Mr. Dahlquist? Ordinarily I would give you three
2 weeks in a regular case, maybe a month.

3 **MR. DAHLQUIST:** This won't come as a surprise, your
4 Honor. We don't believe they can do it for numerous reasons.
5 Nonetheless, we understand your order. And if they need 60
6 days, they can have 60 days. We think they can do it much
7 sooner, but...

8 **THE COURT:** In other words, rather than give you a
9 more limited period of time and then say if you need more, show
10 you've made progress and that you need more, to save that why
11 don't we just start with the 60 days.

12 Now I'm going to -- but I'm not going to say 60 days. I'm
13 going to give you a date. Okay. So let's look here at where
14 we are. Today, August 3. So if I just ran it across, we would
15 be talking about November 2 -- no, wait a minute. That's
16 wrong. October 5, I guess.

17 What have you got?

18 **THE CLERK:** October 5.

19 **THE COURT:** I actually gave you 90. So we'll say
20 October 5. Hang on.

21 I am going to grant the motion for reasons that I have
22 stated. So the first amended complaint would be due no later
23 than October 5 of this year, and then we'll see where we are at
24 that point.

25 I do want to say that I'm not finding, at least making no

1 automatic finding that you can't use as your consumer the
2 retailers. Okay. And I'm not finding that at least at this
3 point.

4 Let me see if I can just say there were a couple of other
5 things that I didn't find, if I can just go back for a minute
6 over all that -- you know, sort of notes I have here.

7 (Brief pause.)

8 **THE COURT:** Oh, yes. I think part and parcel was
9 kind of the argument that because you are essentially
10 competitors, that you can't bring a claim and show antitrust
11 injury, I'm not accepting that. I think you can, although you
12 have to show that ultimately what hurts you, hurts competition.
13 So there is an extra step. But I'm not just accepting the
14 competitors are out of the game.

15 So, okay. I just want to look at a couple of these, just
16 to clear the air on that so you don't have to spend too, too
17 much time.

18 (Brief pause.)

19 **THE COURT:** You don't need -- I guess there is a
20 question about where this all fits in. The merger has been in
21 place for awhile, but not an exceptionally long period of time.
22 Courts have looked at completed -- you know, completed mergers
23 a little differently sometimes than they have a proposed
24 merger.

25 But you don't always have to show the harm has occurred

1 already. You may just be able to show that it may happen with
2 some reasonable possibility of it happening or likelihood, but
3 not that it's already happened.

4 Let's see here. I think there may -- I'm not sure if
5 there was an argument -- there may have been an argument, I'm
6 trying to remember, of -- that went along the lines something
7 like this. Whatever harm you sustained came from the joint
8 venture. Nothing changed after the merger. So you can't
9 really bring a merger claim.

10 There other claims that you might be able to plead, by the
11 way, that would answer that particular argument, but also I'm
12 not sure that one couldn't say that solidifying something that
13 was less formal into -- and anti-competitive would give rise to
14 a separate claim itself.

15 In other words, before it was kind of an informal
16 arrangement. Now you've made it a matter of, you know --

17 **MR. RUBIN:** Ownership.

18 **THE COURT:** The merger has formalized and solidified.
19 I'm not sure.

20 But, anyway, you can look at that a little bit, including
21 whether there is some other claim that in the alternative if we
22 can't do this, we can do this, you know.

23 And let's see. Just looking quickly.

24 (Brief pause.)

25 **THE COURT:** Yeah. With your price discrimination,

1 you are going to need to show that it may substantially less
2 than competition. Just somebody getting a better deal isn't
3 good enough.

4 And if you did that, then, of course, you get into what
5 the courts call burden shifting. They come back and say, here
6 is why it's great. And you say you can do it a different way,
7 that kind of stuff.

8 Oh, there hadn't really been any allegation in the
9 Complaint, just looking at some of the factual allegations for
10 the 2(f) claim, on the knowledge requirement. You do have to
11 make some showing that they knew they were getting a better
12 deal and that it was not legit essentially. Just putting it in
13 kind of layman's terms, that they would have to show that the
14 manufacturer wouldn't have a good defense if they got sued
15 effectively.

16 So it isn't just enough to say somebody got a better deal.
17 You have to show what the anti-competitive effect of that would
18 be.

19 I think we're -- the last claim is a lot like the first
20 one in terms of what kind of goes wrong there. And, in fact,
21 that one "dangerous probability of achieving monopoly power,"
22 which we don't have any percentages of, so I have no idea
23 whether it's in any endanger or not.

24 **MR. DAHLQUIST:** Your Honor, a housekeeping point. I
25 presume we are going to strike the case management conference

1 set for September 14th.

2 **THE COURT:** That's a good point. Thank you. I
3 hadn't paid attention to when that was coming up.

4 Why don't we continue that, just so you don't drop off the
5 face of the earth, given the October 5 date. And I know you're
6 going to come back, you know, shortly thereafter. So we could
7 tack -- let's see, October 5.

8 **MR. DAHLQUIST:** We'll absolutely plan to move to
9 dismiss again.

10 **THE COURT:** Why don't we just say maybe in -- oh, I
11 don't know. Maybe in mid January. And then if it turns out
12 that that's too far off, someone could ask to advance it. If
13 it's premature, we will push it back.

14 **MR. DAHLQUIST:** Sure.

15 **THE COURT:** Because I don't know how things are going
16 to work with all this. So we'll say -- I'll say -- here, I'll
17 make it January 25 with a statement by the 18th. Okay? So the
18 of the -- the case management conference is continued to
19 January 25 of next year, and joint statement due by the 18th.

20 **MR. DAHLQUIST:** Thank you, your Honor.

21 **THE COURT:** Thank you for pointing that out. It just
22 saves, you know, having to say that later.

23 All right. Well, I'll be interested to see. I suppose I
24 would be even more interested if I were a pet owner, but I
25 think it's pretty interesting the whole pet industry has sort

1 of been elevated into a people industry, in effect. And so I
2 may not have the first-hand knowledge about going into a store
3 and seeing or going to a vet or trying to do an end run with
4 chewy.com or something, but it's interesting. And I appreciate
5 the work you put into it. But I guess I'm going to see more in
6 a couple months.

7 **MR. DAHLQUIST:** Yes, you shall.

8 **THE COURT:** Thank you very much.

9 **MR. RUBIN:** Thank you, your Honor.

10 **MR. DAHLQUIST:** Thank you.

11 **THE COURT:** All right. We're in recess.

12 (Proceedings adjourned.)
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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, August 13, 2018