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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MED VETS INC., et al.,
Plaintiffs,
v.
VIP PETCARE HOLDINGS, INC., et al.,
Defendants.

Case No. [18-cv-02054-MMC](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED COMPLAINT**

Re: Dkt. No. 51

Before the Court is the “Motion to Dismiss Plaintiffs’ First Amended Complaint,” filed January 15, 2019, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, by defendants VIP Petcare Holdings, Inc. (“VIP”) and PetIQ, Inc. (“PetIQ”). On January 29, 2019, plaintiffs Med Vets Inc. (“Med Vets”) and Bay Medical Solutions Inc. (“Bay Medical”) filed opposition, to which defendants, on February 5, 2019, replied.

Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

BACKGROUND

Plaintiffs are wholesale distributors who specialize in the distribution of pet products, namely, prescription medications and certain over-the-counter (“OTC”) medications. Plaintiffs have access to such products despite a policy whereby major animal-health manufacturers claim to limit the sale thereof to veterinary practices and pharmacies. In particular, a “secondary distribution system” exists, whereby plaintiffs and other wholesale distributors obtain these ostensibly restricted items and resell them to

¹ By order filed February 26, 2019, the Court took the motion under submission.

1 retailers. (See First Am. Compl., filed Dec. 14, 2018 (“FAC”), ¶ 6.)²

2 VIP “operates veterinary clinics” and “has served as an important independent
3 wholesale source for distributors.” (See id. ¶ 3.) PetIQ is a wholesale distributor of OTC
4 pet products “to virtually every significant retailer in the U.S.” (See id.)³ On January 17,
5 2018, PetIQ acquired VIP.

6 According to plaintiffs, defendants “are using VIP’s veterinarian status to acquire
7 large quantities” of the above-referenced products “for the purpose of re-selling . . . them
8 to PetIQ for sale to retailers” (see id.), thereby “remov[ing] an independent competitor,
9 VIP, from the market” (see id. ¶ 1) and “foreclosing competition from other
10 wholesaler/distributors” such as themselves (see id. ¶ 3).

11 Based on the above, plaintiffs bring the instant action, which has proceeded as
12 follows.

13 On April 4, 2018, plaintiffs filed their initial complaint, challenging the above-
14 described merger, and asserting claims under the Clayton Act and Sherman Act. In said
15 pleading, plaintiffs identified two “relevant . . . product markets,” namely, “the wholesale
16 markets for prescription and restricted pet parasiticides for distribution to non-veterinary
17 retailers (the secondary distribution system for prescription and restricted OTC pet
18 parasiticides, respectively).” (See Compl., filed Apr. 4, 2018, ¶ 29.)

19 On June 1, 2018, defendants moved to dismiss the complaint. Thereafter, on
20 August 3, 2018, the Court granted the motion, finding plaintiffs had not “pled a plausible
21 market” (see Tr. of Proceedings for Aug. 3, 2018, at 44:20), and, in light of plaintiffs’
22 request for sixty days to conduct additional investigation, gave plaintiffs leave to file, by
23 October 5, 2018, an amended complaint.

24 On October 3, 2018, plaintiffs, rather than filing an amended complaint, filed a

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26 ² Unless otherwise noted, the court, like the parties, uses the term “retailers” to
refer to non-veterinary retailers.

27

28 ³ PetIQ also manufactures and distributes a line of generic pet medications and
products (see FAC ¶ 18), an aspect of its business that is not at issue in the instant case.

1 “Motion for Limited Expedited Discovery,” whereby plaintiffs sought to obtain “a copy of
2 defendants’ Notification and Report Form[] submitted to the DOJ/FTC [Department of
3 Justice/Federal Trade Commission] Pre-Merger Notification Office” prior to the merger
4 (see Mot. for Ltd. Expedited Disc., filed Oct. 3, 2018, at 6:22–23), which notification,
5 plaintiffs asserted, would provide relevant market information not otherwise available to
6 plaintiffs (see id. at 11:26–28 (stating “HSR Notification and Report Form” requires
7 defendants to identify their competitors and product markets, estimate market
8 concentration, and explain anticipated competitive effects of merger)). In connection with
9 said motion, plaintiffs attached a proposed First Amended Complaint (“PFAC”), in which
10 they defined the “relevant . . . markets” in essentially the same terms as in their original
11 complaint. (See PFAC, filed Oct. 3, 2018, ¶ 32.)

12 On October 26, 2018, in response to defendant’s opposition, plaintiffs filed a reply
13 accompanied by a “Restated” proposed First Amended Complaint (“RPFAC”) (see
14 RPFAC, filed Oct. 26, 2018), in which plaintiffs defined the relevant markets by reference
15 to services provided, rather than by the above-referenced products themselves. In
16 particular, plaintiffs identified the “relevant . . . markets” as “the distributing and
17 wholesaling services involved in distributing prescription and restricted pet parasiticides.”
18 (See id. ¶ 32.)

19 By order filed November 28, 2018, the Court denied plaintiffs’ motion for expedited
20 discovery, and extended to December 14, 2018, the deadline to file an amended
21 complaint, whether “with or without modification of the most recently proposed version.”
22 (See Order Den. Pls.’ Mot., filed Nov. 28, 2018, at 5:16–17.)

23 On December 14, 2018, plaintiffs filed a third document titled First Amended
24 Complaint, this time focusing on the distribution channel, omitting the limitation to pet
25 parasiticides, and identifying a single “relevant . . . market,” namely, “the wholesale
26 distribution to non-veterinary retailers of unmeasured veterinary wellness and medication
27
28

1 products.” (See FAC ¶ 24.)⁴

2 By the instant motion, defendants seek an order dismissing the FAC with
3 prejudice.

4 **LEGAL STANDARD**

5 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure “can be
6 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
7 under a cognizable legal theory.” See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696,
8 699 (9th Cir. 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of
9 the claim showing that the pleader is entitled to relief.’” See Bell Atlantic Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a
11 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
12 allegations.” See id. Nonetheless, “a plaintiff’s obligation to provide the grounds of his
13 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
14 of the elements of a cause of action will not do.” See id. (internal quotation, citation, and
15 alteration omitted).

16 In analyzing a motion to dismiss, a district court must accept as true all material
17 allegations in the complaint and construe them in the light most favorable to the
18 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To
19 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted
20 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.
21 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be
22 enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555.
23 Courts “are not bound to accept as true a legal conclusion couched as a factual
24 allegation.” See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

25 Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider

26 _____
27 ⁴ As discussed below, plaintiffs use the term “unmeasured” to refer to products that
28 are carried by retailers, but for which sales to consumers are “not tracked” by “retail
measurement firms.” (See FAC ¶ 4.)

1 any material beyond the complaint. See Hal Roach Studios, Inc. v. Richard Feiner & Co.,
 2 Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Documents whose contents are alleged
 3 in the complaint, and whose authenticity no party questions, but which are not physically
 4 attached to the pleading, however, may be considered. See Branch v. Tunnell, 14 F.3d
 5 449, 454 (9th Cir. 1994). In addition, the Court may consider matters that are subject to
 6 judicial notice. See Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir.
 7 1986). Notably, a court “need not . . . accept as true allegations that contradict matters
 8 properly subject to judicial notice or by exhibit.” See In re Gilead Sci. Sec. Litig., 536
 9 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation and citation omitted).

10 **DISCUSSION**

11 Plaintiffs challenge defendants’ merger on the theory its effect “may be
 12 substantially to lessen competition or tend to create a monopoly.” (See FAC ¶ 1.) In
 13 particular, plaintiffs bring three claims, namely: (1) “Unlawful Merger,” in violation of
 14 Section 7 of the Clayton Act (see id. at 13:26); (2) “Monopolization,” in violation of Section
 15 2 of the Sherman Act (see id. at 14:9); and (3) “Attempted Monopolization,” in violation of
 16 Section 2 of the Sherman Act (see id. at 14:20).

17 Section 7 of the Clayton Act prohibits persons “engaged in commerce or in any
 18 activity affecting commerce” from acquiring “the whole or any part of the stock or other
 19 share capital . . . of another person engaged also in commerce or in any activity affecting
 20 commerce, where in any line of commerce or in any activity affecting commerce . . . , the
 21 effect of such acquisition may be substantially to lessen competition, or to tend to create
 22 a monopoly.” See 15 U.S.C. § 18. Section 2 of the Sherman Act makes it a felony to
 23 “monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the
 24 several States.” See 15 U.S.C. § 2.

25 Where, as here, plaintiffs bring claims under Section 7 of the Clayton Act and
 26 Section 2 of the Sherman Act, they must allege a relevant market in which defendants
 27 have market power. See United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586,
 28 593 (1957) (holding, for claim under Clayton Act § 7, “determination of the relevant

1 market is a necessary predicate"); Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d
 2 1038, 1044 (9th Cir. 2008) (holding, "[i]n order to state a valid claim under the Sherman
 3 Act, a plaintiff must allege . . . both that a 'relevant market' exists" and that the defendant
 4 has power within that market"); see also United States v. Continental Can Co., 378 U.S.
 5 441, 458 (1964) (holding Clayton Act § 7 is "design[ed] to prevent undue concentration";
 6 noting "[m]arket shares are the primary indicia of market power"); Golden Gate Pharm.
 7 Servs., Inc. v. Pfizer, Inc., 433 Fed. App'x 598, 598 (9th Cir. 2011) (holding, in case with
 8 claims under both Clayton Act and Sherman Act, "[i]n order to state an antitrust claim, a
 9 plaintiff must identify a relevant market within which the defendant has market power").

10 Defendants challenge all three claims against them on the basis that plaintiffs
 11 have failed to allege "market power in a relevant market." (See Defs.' Mot. to Dism. Pls.'
 12 FAC at 8:22.)

13 **A. Relevant Market**

14 Although "the validity of the 'relevant market' is typically a factual element rather
 15 than a legal element," see Newcal Indus., 513 F.3d at 1045, "[a] complaint may be
 16 dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially
 17 unsustainable," see id. "First and foremost, the relevant market must be a product
 18 market." See id. (emphasis in original) (explaining "consumers do not define the
 19 boundaries of the market; the products or producers do").⁵ The product market "must
 20 encompass the product at issue as well as all economic substitutes for the product," see
 21 id.; see also Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (holding "[t]he
 22 outer boundaries of a product market are determined by the reasonable
 23 interchangeability of use or the cross-elasticity of demand between the product itself and
 24 substitutes for it").

25
 26 ⁵ Antitrust law also requires allegation of "a geographic market." See Newcal
 27 Indus., 513 F.3d at 1045 n.4. As defendants do not dispute plaintiffs' alleged geographic
 28 market, namely, "the United States" (see FAC ¶ 25), the Court does not address such
 issue further herein.

1 Here, as noted above, plaintiffs, in the instant complaint, allege a single market,
2 namely, “the wholesale distribution to non-veterinary retailers of unmeasured veterinary
3 wellness and medication products.” (See FAC ¶¶ 1, 24.)⁶ According to plaintiffs,
4 “[m]easured products are those that are tracked by retail measurement services” (see id.
5 ¶ 2), and “[u]nmeasured products are available in retail stores . . . , but sales of these
6 products are not tracked” by such services (see id.).⁷ As also noted above, however, a
7 relevant market is defined by the products themselves or their producers. See Newcal
8 Indus., 513 F.3d at 1045. A market definition based on whether one or more business
9 entities find it economically advantageous to collect and publish certain types of sales
10 data is facially unsustainable.

11 Moreover, the FAC, absent some other modifier or means of delineation, provides
12 no meaningful way to otherwise identify a product market. First, as to “veterinary
13 wellness and medication products,” one cannot determine what types of products are
14 encompassed by the term “wellness,” which plaintiffs do not define and which could
15 include products ranging from pet food and exercise equipment to training aids.
16 Similarly, as to “medication,” although, as plaintiffs allege, the FTC identified, in a 2015
17 report, four categories of “pet medications,”⁸ it did not, contrary to plaintiffs’ allegation,
18 identify those products as “unmeasured.” (See FAC ¶ 26.) Indeed, the FTC did not even
19 limit pet medications to those four categories or define them in the same way as plaintiffs.

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21 ⁶ Although defendants contend “the end user pet owner[] is the appropriate
22 customer” (see Mot. to Dism. at 11:1), the Court, for purposes of the instant analysis,
23 assumes the appropriate customer is, as plaintiffs contend, the non-veterinarian retailer.

24 ⁷ The Court finds it unnecessary to address herein defendants’ contention that,
25 contrary to plaintiffs’ allegations, “measured” and “unmeasured” are not used in
26 connection with “products,” but, rather, with “accounts” (see Mot. to Dism. at 12–13), i.e.,
27 retailers, who, according to defendants, “themselves determine whether or not to share
28 sales data with measurement firms” (see id. at 13:3–4).

⁸ While it appears plaintiffs use “veterinary” and “pet” interchangeably (see, e.g.,
FAC ¶¶ 1, 21), the two terms ordinarily are not interchangeable, the former
encompassing a wide variety of animals not ordinarily kept as “pets,” and, consequently,
plaintiffs’ use of both terms introduces into plaintiffs’ market definition an additional
measure of ambiguity.

1 (Compare id. (describing four categories as follows: “Parasiticides, Vaccines, Antibiotics,
2 and Analgesics”) with Defs.’ Req. for Jud. Not., filed Jan. 15, 2019 (“RJN”), Ex. 2 (FTC
3 report) at 17 (noting “[m]ost of the pet medications available to U.S. consumers can be
4 classified into four areas: (1) parasiticides (e.g., flea/tick/heartworm); (2) vaccines; (3)
5 anti-infectives (e.g., antibiotics); and (4) anti-inflammatory (e.g., non-steroidal anti-
6 inflammatory drugs, ‘NSAIDs’)” (emphasis added)); see also id. at 1 n.2 (noting “[t]his
7 report does not purport to identify any relevant product market for antitrust law
8 enforcement purposes”).⁹

9 Further, elsewhere in the FAC, plaintiffs allege “two product categories comprise
10 the relevant product market” (see FAC ¶ 33), namely, “Rx in Retail” and “direct
11 purchasing from animal health suppliers’ for delivery to retailers” (see id.). Even
12 assuming the first such category corresponds to prescription products, the second has no
13 meaningful boundaries.

14 In addition, apart from the above-referenced deficiencies in plaintiffs’ product
15 definition, plaintiffs define the market too narrowly with respect to its participants, whether
16 actual or potential. See Newcal Indus., 513 F.3d at 1045 (holding relevant market “must
17 include the group or groups of sellers or producers who have actual or potential ability to
18 deprive each other of significant levels of business”) (internal quotation and citation
19 omitted). In particular, plaintiffs allege the secondary distribution system is the “only
20 mechanism through which retailers can obtain unmeasured veterinary wellness and
21 medication products.” (See FAC ¶ 24.) The FAC does not, however, include any factual
22 allegations to support such conclusory assertion. Further, as set forth below, plaintiffs’
23 exclusion of veterinarians and manufacturers conflicts with various allegations in their
24 FAC, as well as with allegations in their prior pleadings and statements in the FTC report
25

26 ⁹ Defendants’ unopposed Request for Judicial Notice is hereby GRANTED as to
27 the above-cited report, as well as each of the other documents attached thereto, namely:
28 (1) a copy of “PetIQ’s June 19–20, 2018 Jefferies Consumer Conference presentation”
(see RJN at 1:5–6 & Ex. 1); and (2) a copy of “PetIQ’s May 15, 2018 Quarter 1 earnings
call transcript” (see id. at 1:10–11 & Ex. 3).

1 on which plaintiffs have relied.

2 First, as to veterinarians, given that, in the FAC, plaintiffs identify VIP, which
3 operates veterinary clinics, as a pre-merger “horizontal competitor” in the market (see id.
4 ¶ 11) and as having “competed with both PetIQ and plaintiffs” (see id. ¶ 17), it is not
5 tenable to exclude veterinarians from the alleged market. See, e.g., United States v.
6 Topco, 405 U.S. 596, 608 (1972) (referring to “competitors at the same level of the
7 market” as “horizontal”).

8 Next, plaintiffs’ exclusion of manufacturers conflicts with factual allegations in each
9 of the prior iterations of their complaint, specifically, allegations that retailers also obtain
10 pet medications from manufacturers and their approved distributors. (See Compl. ¶ 3
11 (alleging “retail outlet[s]” are “supplied” both “directly by a manufacturer or its distributor”
12 and “by the ‘secondary distribution system’”); PFAC ¶ 3 (same); RPFAC ¶ 3 (same)); see
13 also Royal Primo Corp. v. Whitewater West Indus., Ltd., 2016 WL 1718196, at *3 (N.D.
14 Cal. Apr. 29, 2016) (holding court “may look to prior pleadings in determining the
15 plausibility of an amended complaint”). Further, the exclusion of manufacturers is
16 inconsistent with other allegations in the FAC and with the FTC report. (See FAC ¶ 30
17 (alleging Bayer, a “major veterinary pharmaceutical manufacturer, . . . support[s] the
18 sales of its pet medications by retailers, pharmacies, and on-line merchants”); see also
19 RJN Ex. 2 (FTC report) at 4 (stating “some manufacturers . . . supply . . . non-veterinary
20 retailers”); id. at 20 (noting “[s]ome stakeholders report that . . . large retail pharmacies
21 and stores have been able to purchase pet medications directly from the manufacturers”).

22 In sum, for all of the above reasons, the Court finds plaintiffs’ proposed market is
23 not facially sustainable and, consequently, the FAC is subject to dismissal. See Newcal
24 Indus., 513 F.3d at 1045; see also Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1123 (9th Cir.
25 2018) (affirming dismissal of antitrust complaint where proposed markets were “facially
26 unsustainable”) (internal quotation and citation omitted).

27 **B. Market Power**

28 As noted above, in addition to alleging a relevant market, plaintiffs must also

1 allege defendants have market power in such market. "Market power is the power to
2 force a purchaser to do something that he would not do in a competitive market."
3 Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464 (1992) (explaining
4 market power "has been defined as the ability of a single seller to raise price and restrict
5 output") (internal quotations and citations omitted). "A failure to allege power in the
6 relevant market is a sufficient ground to dismiss an antitrust complaint." Rick-Mik
7 Enterprises, Inc. v. Equilon Enterprises LLC, 532 F.3d 963, 972 (9th Cir. 2008).

8 "Market power may be demonstrated through either of two types of proof": (1)
9 "direct evidence of the injurious exercise of market power"; or (2) "circumstantial evidence
10 pertaining to the structure of the market." See Rebel Oil Co., Inc. v. Atlantic Richfield
11 Co., 51 F.3d 1421, 1434 (9th Cir. 1995). Direct evidence includes "evidence of restricted
12 output and supracompetitive prices." See id.; see also Oltz v. St. Peter's Cmty. Hosp.,
13 861 F.2d 1440, 1448 (9th Cir. 1988) (holding "proof of actual detrimental effects such as
14 a reduction of output can obviate the need for elaborate market analysis"; noting "the
15 finding of actual harm to competition suffices") (internal quotation and alterations
16 omitted). To show market power circumstantially, a plaintiff must: "(1) define the relevant
17 market, (2) show that the defendant owns a dominant share of that market, and (3) show
18 that there are significant barriers to entry and . . . that existing competitors lack the
19 capacity to increase their output in the short run." See Rebel Oil, 51 F.3d at 1434; see
20 also Eastman Kodak, 504 U.S. at 464 (defining market power as "the ability of a single
21 seller to raise price and restrict output"; holding "[t]he existence of such power ordinarily
22 is inferred from the seller's possession of a predominant share of the market") (internal
23 quotation and citation omitted). Here, even assuming, arguendo, plaintiffs have alleged a
24 plausible market, plaintiffs, as set forth below, have failed to allege facts sufficient to
25 show, either directly or circumstantially, that defendants possess the requisite market
26 power.

27 Plaintiffs allege PetIQ, as a result of the merger, "has come to dominate the
28 secondary distribution market and forced other secondary distributors to exit by virtue of

1 its acquired market power.” (See FAC ¶ 11.) To the extent plaintiffs rely on direct
 2 evidence, such reliance is unavailing. Plaintiffs have not alleged any output restriction or
 3 supracompetitive pricing; indeed, as to price, plaintiffs do not allege any increase at all.
 4 Nor have plaintiffs alleged any other “actual harm” to competition, see Oltz, 861 F.2d at
 5 1448; other than plaintiff Bay Medical, the FAC identifies no wholesale distributor as
 6 having been “foreclosed from the market” (see FAC ¶ 32),¹⁰ and, in any event, such
 7 “foreclosure” appears to be limited to a single product, “Frontline Plus” (see id.).

8 Plaintiffs’ effort to show market power circumstantially likewise fails. Plaintiffs
 9 allege defendants “claim[] to control over 90%” of the alleged market (see id. ¶ 3; see
 10 also ¶ 37),¹¹ an allegation that is based on a PetIQ presentation slide, which, plaintiffs
 11 allege, shows “PetIQ now claims to distribute . . . 90% of ‘direct purchasing from animal
 12 health suppliers’ for delivery to retailers” (see id. ¶ 33). Plaintiffs have submitted,
 13 however, only a portion of the slide (see id. at 11:1–15), whereas a review of the entire
 14 slide, titled “Significant Improvements in Our Supply Chain,” makes clear the 90% figure
 15 pertains to the source of PetIQ’s own supply of products for distribution, not its share of
 16 the alleged wholesale market. (See RJN Ex. 3 at 12; see also id. Ex. 1 at 12 (reporting
 17 “roughly 90% of our distribution business is through a direct relationship with the animal
 18 health manufacturers”).) Plaintiffs’ reliance on said exhibit is, consequently, misplaced.
 19 See In re Gilead Sci. Sec. Litig., 536 F.3d at 1055; see also Roth v. Garcia Marquez, 942
 20 F.2d 617, 625 n.1 (9th Cir. 1991) (holding, “when the allegations of the complaint are
 21 refuted by an attached document, the Court need not accept the allegations as being

22
 23 ¹⁰ Plaintiffs allege the other wholesale distributors include, along with plaintiffs,
 24 “Southeastern Veterinary Exports, Lambert Vet Supply, Rainbow Vet Supply, Pet Vet
 25 Supplies, and other distributors not known to plaintiffs” (see FAC ¶ 37), and then allege,
 26 in conclusory and imprecise fashion, such entities “are being foreclosed from the retail
 customer base and have been or may be forced to exit the market” (see id.) (emphasis
 added).

27 ¹¹ Plaintiffs also allege the merger “establishes a single distributor for several
 28 competing veterinary pharmaceutical manufacturers” (see FAC ¶¶ 12, 38), but do not
 identify those manufacturers or provide factual support for said allegation.

1 true”).

2 Next, relying on a different slide, plaintiffs allege PetIQ “claims to distribute a ‘95%
3 Share of Rx in Retail.” (See FAC ¶ 33.) Such allegation, although an accurate
4 characterization of the slide’s content, does not correspond to the alleged market, which
5 encompasses “unmeasured pet wellness and medication products,” a different, and much
6 broader, array of products than prescription products. Notably, plaintiffs have not
7 provided any figures corresponding to PetIQ’s share of ostensibly restricted OTC
8 products or its share of prescription and such restricted OTC products combined, nor
9 provided any figures as to what share of the market either defendant possessed prior to
10 the merger. See, e.g., Continental Can, 378 U.S. at 460 (analyzing market power of
11 acquiring firm by reference to market shares possessed, prior to merger, by acquirer and
12 acquiree; finding violation of Clayton Act § 7, where acquisition both “added significantly
13 to [acquirer’s] position” and “reduced from five to four the most significant competitors”).¹²

14 Lastly, with respect to the two parts of the final element required for a
15 circumstantial showing of market power, “barriers to entry and barriers to expansion,” see
16 Rebel Oil, 51 F.3d at 1439, plaintiffs’ allegations are wholly conclusory as to the former
17 and absent as to the latter. As to barriers to entry, plaintiffs allege that “[o]ffering . . .
18 distribution services [in the secondary market] requires veterinary licensing and other
19 regulatory authorizations and appropriate relationships with manufacturers and retailers.”
20 (See FAC ¶ 39.) In connection therewith, however, plaintiffs provide no factual
21 elaboration. Plaintiffs do not, for example, include any allegation as to the degree of
22 difficulty involved in obtaining such authorization, nor do they explain their assertion that

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24 ¹² Plaintiffs’ effort to connect the 95% figure, which pertains solely to prescription
25 products, with their alleged market (see Opp’n at 17:21–18:1) (contending “nearly all of
26 the unmeasured products flowing through the secondary distribution channel are
27 prescription” products) is not consistent with their contention that Frontline Plus, an OTC
28 product, “contributes significantly to defendants’ dominance over the relevant market”
(see id. at 18 n.7), nor is it supported by their citations to the FAC (see, e.g., FAC ¶ 2
(alleging “[m]ost or all of the products served by the relevant market in this case are
preventative medications, . . . , both prescription and non-prescription”).

1 it would be “practically impossible” to cultivate the above-referenced business
2 relationships. (See id.) In any event, given plaintiffs’ failure to include any allegation
3 bearing on barriers to expansion, the requisite showing has not been made. See Rebel
4 Oil, 51 F.3d at 1434.

5 In light of the foregoing, the Court finds the FAC is subject to dismissal for failure
6 to allege market power in a relevant market. See Rick-Mik Enters., 532 F.3d at 972.¹³

7 **C. Leave to Amend**

8 In their opposition, plaintiffs, without providing any additional facts they could
9 allege, request another opportunity to amend.

10 As discussed above, however, the operative pleading, notwithstanding its title, is in
11 fact the fourth iteration of plaintiffs’ complaint, over the course of which filings plaintiffs
12 have repeatedly changed their definition of the relevant market. Last August, at the
13 hearing on defendants’ first motion to dismiss, plaintiffs asked the Court for sixty days to
14 amend their complaint. At this point, having been granted not only the requested sixty
15 days, but an additional extension as well, the instant complaint fares no better than its
16 predecessors, and, as noted, plaintiffs have not identified any factual allegations that
17 could be added to cure the above-described deficiencies. In short, it appears plaintiffs
18 have pleaded all the facts they have, and those facts are not sufficient to support their
19 claims. Under such circumstances, the Court finds further leave to amend would be
20 futile. See Dougherty v. City of Covina, 654 F.3d 892, 901 (9th Cir. 2011) (finding leave
21 to amend would be futile where plaintiff failed to allege facts sufficient to state claim and
22 did not identify any additional facts that could be pled); see also Simon v. Value
23 Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000) (affirming denial of leave to
24 amend antitrust complaint; explaining “[a]lthough it is theoretically possible for [plaintiff] to
25 allege more specific facts, his failure to do so after the district court had given him three

26 _____
27 ¹³ Given the above findings as to plaintiffs’ failure to allege a relevant market and
28 market power, the Court does not reach defendants’ additional arguments in support of
dismissal.

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opportunities to amend his original complaint and had discussed with him the substantive problems with his claims suggests the futility of further amendment”), overruled on other grounds by Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (en banc).

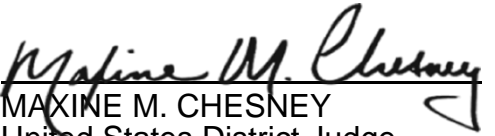
CONCLUSION

For the reasons stated above, defendants’ Motion to Dismiss is hereby GRANTED and the FAC is DISMISSED without further leave to amend.

The Clerk is directed to close the file.

IT IS SO ORDERED.

Dated: April 22, 2019


MAXINE M. CHESNEY
United States District Judge