UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SATNAM DISTRIBUTORS LLC, D/B/A LION & BEAR DISTRIBUTORS, 553 Winchester Road, Unit B, Bensalem, PA 19020, Plaintiff, vs, COMMONWEALTH-ALTADIS, INC., 5900 N. Andrews Avenue, Suite 1100, Fort Lauderdale, FL 33309 COMMONWEALTH BRANDS, INC. 5900 N. Andrews Avenue, Suite 1100, Fort Lauderdale, FL 33309 ALTADIS, U.S.A., INC., 5900 N. Andrews Avenue, Suite 1100, Fort Lauderdale, FL 33309 HAROLD LEVINSON ASSOCIATES, INC., 21 Banfi Plaza, Farmingdale, NY 11735 Defendants.	Civil Action No.: 2:14-cv-06660-LFR

REPLY MEMORANDUM OF DEFENDANTS COMMONWEALTH-ALTADIS, INC., COMMONWEALTH BRANDS, INC., AND ALTADIS, U.S.A., INC. IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Satnam does not dispute that the primary goal of the antitrust laws is the protection of "interbrand" competition, not squabbles over the distribution of a single manufacturer's products that are the exclusive focus of the Complaint here. *See* CA. Mem. at 5-7. Satnam argues instead that (i) its "detailed" Complaint satisfies what it repeatedly describes as a low bar necessary to state a valid antitrust claim, (ii) CA's legal authority derives (in part) from cases that do not involve motions to dismiss, and (iii) courts routinely deny motions to dismiss before a plaintiff has the opportunity to take discovery to flesh out factual claims.

Foremost, as described in CA's[1] motion and in this reply, although the Complaint is long on irrelevant or superficial details, the Complaint fails to allege the specific facts necessary to make out the necessary elements of Satnam's antitrust claims. Moreover, many of the Complaint's conclusory allegations – which Satnam frequently mischaracterizes in its opposition – are contradicted by other, specific allegations. *See Jobe v. Bank of Am., N.A., No. CIV.A. 3:10-1710,* 2013 WL 1402970, at *5 (M.D. Pa. Apr. 5, 2013) (Mannion, J.) (dismissing amended complaint that was "[c]rippled by contradiction regarding necessary facts, … amount[ing] to a collection of bald assertions that cannot support the plaintiffs'" claims.).

Second, the fact that the governing legal standards to establish a claim may be set forth in a case that involves a different procedural posture, e.g., summary judgment, does not make those legal standards inapplicable to a motion to dismiss. *Brunson Commc'n, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550, 563-64 (E.D. Pa. 2002) (Baylson, J.) (granting motion to dismiss, noting that "though *Matsushita* was decided in the context of a motion for summary judgment, its reasoning, nevertheless, has been used to decide motions to dismiss") (collecting cases).

[1] For convenience only, the Commonwealth/Altadis defendants adopt the Complaint's collective designation of them as "CA", but they do not concede that the Complaint adequately alleges claims against each of them individually. CA Mem. at 3-5. It does not.

Third, while some courts have denied motions to dismiss antitrust claims, especially before the landmark Supreme Court case of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) explaining the standards governing such motions to dismiss,[2] many others, including courts in this Circuit, grant them.[3]

As demonstrated in CA's motion and in this reply,[4] Satnam fails to allege the necessary elements of valid claims and its Complaint should be dismissed with prejudice.

I. COUNT I FAILS TO ALLEGE A VIOLATION OF THE ROBINSON-PATMAN ACT

A. The Complaint Does Not Allege Contemporaneous Sales of Goods of "Like Grade and Quality" at Discriminatory Prices

Despite Satnam's argument to the contrary, the Complaint does not allege facts that, if accepted as true, show contemporaneous sales of products of "like grade and quality" at discriminatory prices.

1. *Sales of goods of "like grade and quality."* Satnam's brief asserts that it paid "discriminatory prices for *each* brand of CA's Mass-Market Cigars." (Opp. at 7) (emphasis

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[2] Many of the cases cited by Satnam were decided before *Twombly*, 550 U.S. 544 (2007). *See Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245 (S.D.N.Y. 1997); *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.); *Peerless Heater Co. v. Mestek, Inc., No. Civ. A. 98-6532*, 1999 WL 624481 (E.D. Pa. Aug. 6, 1999) (Padova, J.); *Pepsico, Inc. v. Coca-Cola Co.*, No. 98 Civ. 3282 (LAP), 1998 WL 547088 (S.D.N.Y. Aug. 27, 1998); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F.Supp.2d 1144 (W.D. Wash. 2005); *Bradburn Parent/Teacher Store, Inc. v. 3M (Minn. Mining & Mfg. Co.)*, No. CIV. A. 02-7676, 2000 WL 34003597 (E.D. Pa. July 25, 2003) (Padova, J.).

[3] *E.g. Burtch v. Milberg Factors, Inc.*, 662 F.3d 212 (3d Cir. 2011) (affirming dismissal of price fixing and group boycott claims); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d. Cir. 1997) (affirming dismissal of antitrust claims for failure to allege proper relevant market); *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F.Supp 2d 571 (E.D. Pa. 2012) (Kelly, J.) (granting motion to dismiss conspiracy to restrain trade and conspiracy to monopolize claims); *Superior Offshore Int'l, Inc., v. Bristow Grp., Inc.*, 738 F.Supp. 2d 505 (D.Del. 2010) (dismissing antitrust claims for failure to allege plausible conspiracy); *Brunson, supra* (dismissing conspiracy and monopolization claims for failure to allege agreement and proper relevant market).

[4] CA also adopts and incorporates the arguments made in HLA's reply brief.

added). However, the Complaint paragraphs which Satnam cites in support do not make even that conclusory allegation. Instead, they refer generally to the fact that CA sells a variety of different brands (Compl. ¶ 24), that Satnam began to purchase a number of different CA brands (*id.* ¶ 40), or that several of Satnam's competitors were *selling*—not buying—unspecified CA brands at lower prices (*id.* ¶¶ 64 and 68). There is simply no allegation in the Complaint that HLA was charged a more favorable price on each brand of CA cigars, as Satnam now claims.

That failure is significant because different CA cigar brands are *not* products of "like grade and quality." Evidently recognizing this problem, Satnam argues that the RPA "does not require that products be physically identical in order to be of like grade and quality." Opp. 7. Yet, the case on which Satnam relies makes clear that this is only true when differences "have no effect on consumer preferences or the competitive environment." *Liggett Grp., Inc., v. Brown & Williamson Tobacco Corp.*, No. C-84-617-D, 1988 WL 161235, at *14 (M.D.N.C Sept. 30, 1988).[5]

Critically, however, the Complaint's allegations show that the physical and other differences (packaging, advertising, pricing) among CA brands have a direct effect on different consumer preferences. Thus, for example, the Complaint alleges that Dutch Masters cigars "are renowned for their high quality and craftmanship," Compl. ¶ 21, are "recognizable due to their packaging which features a famous Rembrandt painting," *id.* ¶ 20, and are considered 'America's #1 Natural Wrapped cigar," *id.* The Complaint makes similar allegations regarding the unique

[5] *Liggett* also notes that "[i]n fashioning a 'like grade and quality' standard, courts have generally emphasized the presence, or absence, or significant physical differences between products and the effect of those differences upon consumer preferences." *Id.* at *11. *Woodman's Food Mkt., Inc. v. Clorox Co.*, No. 14-CV-734-SLC, 2015 WL 420296, (W.D. Wis. Feb. 2, 2015) (Opp. at 8) does not involve price discrimination under Section 2(a) and does not even mention the concept of goods of "like grade and quality."

consumer preferences targeted by other CA brands.[6] Since the Complaint's specific allegations contradict its general allegations, its conclusory allegations are not entitled to be credited on a motion to dismiss. *See DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 151-52 (2d Cir. 2014) ("Although factual allegations of a complaint are normally accepted as true on a motion to dismiss … that principle does not apply to general allegations that are contradicted by more specific allegations in the Complaint.") (internal quotation omitted) (collecting cases).[7]

2. *Contemporaneous sales.* Although conceding that CA made *no* sales (much less discriminatory sales) to Satnam after July 2012, Satnam argues that it has adequately pled the requirement of "contemporaneous" discriminatory sales because it purchased cigars on "a regular and continuous basis" during two months in 2012. Opp. at 8. Without pointing to *any* allegation in the operative Complaint—there is none— Satnam then hypothesizes that HLA "must have purchased at least as frequently." But even if the Complaint made this conclusory allegation (and it does not), such allegation would not be sufficient because the Complaint fails to identify which different brands were purchased, and when they were purchased at allegedly

[6] Backwoods cigars, on the other hand, "are a throwback to the days of the old west," are "comprised of an infusion of natural and homogenized tobacco…aimed at smokers who are looking for more than just the taste of tobacco", and are "identified by their frayed ends, tapered bodies, and unfinished heads." *Id*. ¶ 22. In contrast, Phillies cigars "are made with short or chopped filter tobacco and a homogenized binder to give them 'a distinct tobacco flavor,'", *id.*, while Hav-A-Tampa cigars are marketed as a "wood-tipped cigar," *id*., and White Cat cigars are "open-head cigarillos" with "a smooth, seductive aroma," *id*. Further, individual brands of CA cigars are not interchangeable because, according to the Complaint, convenience stores and distributors "need to stock all major brands of mass market cigars," *id*. ¶ 23, something stores would not need to do if the individual brands were the same commodity.

[7] The allegations in the Complaint in this case are therefore unlike the uncontradicted allegations in the complaint in *ITP, Inc. v. OCI Co.*, 865 F. Supp. 2d 672 (E.D. Pa. 2012) (Ditter, J.) on which Satnam relies. Opp. at 9.

discriminatory prices. Without doing so, the Complaint's general allegation of a short period of purchases by Satnam and the unsupported speculation in Satnam's brief about what HLA "must have" done do not satisfy the requirement of "contemporaneous" sales at discriminatory prices.

B. The Complaint Does Not Allege Facts Demonstrating Injury to Competition

The Complaint's conclusory allegations of injury are contradicted by the specific allegation that Satnam *increased* its share of the "market" from 0% to 30% *during* the period of the alleged discriminatory pricing. Compl. ¶ 67. In other words, far from supporting an inference of competitive injury, the Complaint claims that Satnam dramatically increased its sales and customers during the same period it claims to have been injured.

1. *Actual competition for specific customers.* Satnam claims that a secondary line injury price discrimination claim does not require the Plaintiff to allege actual competition with the favored purchaser for specific customers. Satnam relies on the Supreme Court's statement in *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177 (2006) that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time." Opp. at 10. Significantly, Satnam omits the very next sentence from *Volvo* in which the Supreme Court expressly held that "absent actual competition with a favored…dealer, however, [Plaintiff] cannot establish the competitive injury required under the Act." 546 U.S. at 166; *see also id*. at 177 (rejecting price discrimination claim when plaintiff failed to identify "any differentially priced transaction in which it was … 'in actual competition' with a favored purchaser for the same customer").[8]

[8] Satnam relies on *J.D. Fields &Co. v. Nucor-Yamato Steel*, 976 F. Supp. 2d 1051 (E.D. Ark 2013) regarding the level of specificity required at the pleading stage, Opp. at 10, but fails to note that the court specifically held that price discrimination requires discrimination "between dealers competing to resell its products to the same retail customer," *id.* at 1060-1061.

As previously demonstrated, CA Mem. at 13-14, the Complaint contains no allegation of "actual competition" for—much less lost sales to—any specific customer(s). The Complaint's failure to include such allegations is dispositive because the Complaint alleges that Satnam and HLA occupy different positions in the chain of distribution for many sales, i.e. they are not competing for the same customers. Mem. at 14-15(citing Compl. ¶¶ 8, 12). While Satnam's brief denies this (Opp. at 10), at least one of the allegations Satnam cites in purported support confirms that "many of Plaintiff's competitors [not its customers] were purchasing from HLA at discounted prices." Compl. ¶ 59. And, in any case, Satnam's claim that it lost sales as a result of discriminatory pricing is contradicted by its claim of dramatic market share growth, i.e., it *gained, not lost*, sales and customers.

2. *Injury to competition, not specific competitors.* Satnam argues in conclusory fashion that there is injury to competition in the distribution of CA mass market cigars. Opp. at 18-19. However, the Complaint's general allegations to that effect are contradicted by other specific factual allegations that other "distributors" (plural) received favorable prices from CA. *See e.g.* Compl. ¶ 77("please put me in a level pla[ying] field along with other major distributors"); ¶ 81 ("other major distributors are getting at least 22% to 28% off list price..."). Thus, even if Satnam were affected by any discrimination in price, general competition among distributors of CA cigars was not. Satnam does not dispute that the Supreme Court and the Third Circuit have both cautioned against applying the RPA to protect "existing competitors" rather than "to the stimulation of competition." *Volvo*, 556 U.S. at 181; *Feesers, Inc., v. Michael Foods, Inc.*, 591 F.3d 191, 200 (3d Cir. 2010). But that is exactly what Satnam's Complaint seeks.

II. THE COMPLAINT FAILS TO ALLEGE A PROPER RELEVANT MARKET

A. The Complaint Improperly Alleges a Market Limited to the Products of a Single Manufacturer.

Satnam does not dispute that the Complaint fails to allege any injury to competition between CA and other manufacturers of mass-market cigars—the type of injury to "interbrand competition" that is the object of the antitrust laws.[9] Indeed, the Complaint affirmatively—and inconsistently—alleges the existence of a "market for mass market cigars" in general, not just a market limited to CA brand cigars. *Id.* ¶ 19. Moreover, Satnam repeatedly touts *the competition among* other manufacturers and distributors of mass market cigars in that market, thus conceding that the conduct it alleges causes no harm in that market. *See e.g.* Compl. ¶ 18 (Altadis is "one of the largest manufacturers of machine made cigars"). *See also* Opp. at 14.

Nevertheless, Satnam contends that CA and HLA have conspired to monopolize the sale and distribution of mass market cigars *manufactured by a single company*—CA. As CA demonstrated, however, the law is clear that the products of a single manufacturer can almost never constitute a relevant market for purposes of the antitrust laws. CA Mem. at 2, 5-7.[10] If the law were otherwise, *every* manufacturer would have an illegal monopoly on the sale and distribution of its own products.

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[9] *Toledo Mack Sales & Serv., Inc., v. Mack Trucks, Inc.*, 530 F.3d 204, 227 (3d Cir. 2008); *Tunis Bros. Co., Inc. v. Ford Motor Co*., 952 F.2d 715, 728(3d Cir. 1991) ("primary goal of antitrust law is to protect interbrand competition")

[10] The Third Circuit in *Queen City Pizza, Inc. v. Domino's Pizza*, 124 F.3d 430, 439-440 (3d. Cir. 1997), explained the limited circumstances in which a single product might constitute a relevant product market, when the products are in derivative or aftermarket in which the purchaser is "locked in" to parts or service compatible with the manufacturer's basic product, e.g. repair or replacement parts for a piece of equipment. That is not the situation with respect to the sale of cigars, which are consumer products without any need for follow-on parts or services.

Recognizing that it is almost never appropriate to have a product market limited to the products of a single manufacturer, Satnam relies on a claimed, but artificial, distinction between a market for a manufacturer's own products and a market for the distribution of that manufacturer's products. Opp. at 15. But manufacture and distribution are simply opposite sides of the same coin. "Every manufacturer has a natural monopoly in the sale and distribution of his own product, especially when the products are sold under trademark …Because [defendant] possessed a natural monopoly with respect to its [product], it could choose to market it in any way that it desired." *V&L Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F. Supp. 643, 651 (E.D. Pa. 1975) (Broderick, J.), *aff'd* , 565 F.2d 154 (3d Cir. 1977). The cases cited by Satnam do not hold otherwise.[11]

Satnam next argues that its customers must purchase *all* brands of mass market cigars—including cigars manufactured by CA—in order to compete in the general market for mass market cigars. Opp. at 15. Even if true, however, that does not suggest that either the manufacture or distribution of CA cigars is a plausible separate relevant market. If it did, CA would also unlawfully "monopolize" the distribution of its cigars by selling them directly to convenience stores. That is not the law, as Satnam effectively concedes that result is entirely legal by claiming a distinction between a *market* for a manufacturer's products and a market for the *distribution* of its products. Similarly, if Satnam were correct, CA could not legally sell its products through an exclusive distribution agreement, even though such agreements are commonplace and are as the Second Circuit noted, "presumptively legal." *Elecs.*

[11] *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 39 (D.D.C. 1998) concerned whether there was a relevant market of wholesale distribution of all drug products, not whether a company could monopolize or conspire to monopolize the distribution of a particular company's products. Similarly, *Pepsico, Inc. v. Coca-Cola Co.*, No. 98 Civ. 3282 (LAP), 1998 WL 547088 (S.D.N.Y. Aug. 27, 1998) addressed the issue of whether Coca-Cola monopolized the market for distribution of all soft drinks, not just Coca-Cola products.

Communications Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 245 (2d Cir. 1997). Indeed, the Complaint implicitly recognizes as much by alleging that "CA has not entered into any exclusive distributor agreements in the Pennsylvania geographic market." Compl. ¶ 26.

B. The Complaint Improperly Alleges a Geographic Market Limited to Sales in a Single State

Satnam contends that the Complaint's conclusory allegation regarding different regulatory schemes in other states is sufficient to support its implausible claim that Pennsylvania is a proper relevant geographic market, citing various state laws that are *not* referred to in the Complaint. Opp. at 17-18. Satnam's claim of a limited state-specific market is contradicted, however, by the Complaint's other, specific allegations that recognize that the market is national in scope, Compl. ¶ 19 ("…the U.S. market for mass market cigars"), and further recognize that cigar sales take place in interstate commerce, *id.* ¶ 12 (sales to Pennsylvania and New York), *id.* ¶ 35 (CA and HLA sales in the "flow of interstate commerce…").

III. COUNTS V AND VI FAIL TO ALLEGE AN UNLAWFUL AGREEMENT

Satnam does not dispute that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Instead, it argues that allegations "that defendants had a motive to conspire and acted contrary to their self-interest are sufficient to demonstrate unlawful agreement." Opp. at 22. Satnam then refers to the allegation that HLA complained to CA about Satnam. Compl.¶ 74. However, the mere fact that a customer has complained about another customer does not demonstrate the existence of an unlawful *agreement* between the manufacturer and that customer. "Dealer complaints and responses are not sufficient to support a conspiracy claim as proof of opportunity alone is insufficient to sustain an inference of conspiracy." *RDK Truck Sales &Serv., Inc. v. Mack*

Trucks, Inc., No. CIV. A. 04-4007, 2009 WL 1441578, at *6 (E.D. Pa., May 19, 2009) (Buckwalter, J.) (internal quotation omitted).[12] Similarly, contrary to Satnam's claim, Opp. at 3, allegations that CA refused to sell cigars to Satnam do not indicate action contrary to CA's interest because there is *no* allegation that CA's sales volume went down as a result and because, as CA previously demonstrated, CA Mem. at 18, a manufacturer "has a right to deal, of refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co., v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).[13] In this regard, exclusive dealing agreements, i.e. agreements in which a supplier "refuses" to deal with all customers except one, are commonplace and generally pro-competitive. *See supra* at 8-9. Here, there is no allegation that HLA threatened CA in any way. Comparably vague allegations of unlawful "agreement" have been routinely dismissed. *E.g.*, *Alpern v. Cavarocchi, No. CIV. A. 98-3105*, 1999 WL 257695, at *7 (E.D. Pa. Apr. 28, 1999) (O'Neill, J.) (dismissing complaint that "provides no allegations of fact to support [its] conclusory allegations that defendants conspired or combined …").

CONCLUSION

As demonstrated, the Complaint fails to state valid antitrust claims against the CA defendants, and it should be dismissed with prejudice. Satnam had an opportunity to file an amended complaint, rather than oppose CA's motion to dismiss. It did not do so and should not be given another opportunity now.

Dated: May 13, 2015

[12] *See also InterVest, Inc., v. Bloomberg, L.P*, 340 F.3d 144, 166 (3d Cir. 2003) ("Even if the evidence showed that [defendants] responded to complaints from…broker-dealers, this fact would be legally insufficient to prove a conspiracy.").

[13] For the same reason, the Complaint fails to adequately allege the specific intent to attain an "illegal monopoly" necessary to state a valid claim for conspiracy to monopolize—even assuming that the sale and distribution of a single manufacturer's brands of cigars could constitute a relevant antitrust market.

Respectfully submitted,

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553 Winchester Road, Unit B,
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Plaintiff,

v.

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5900 N. Andrews Avenue, Suite 1100,
Fort Lauderdale, FL 33309

COMMONWEALTH BRANDS, INC.
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HAROLD LEVINSON ASSOCIATES, INC.,
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Defendants.

Civil Action No.: 2:14-cv-06660-LFR

CERTIFICATE OF SERVICE

I, Carl W. Hittinger, hereby certify that on May 13, 2015, I caused the foregoing Reply Memorandum of Defendants Commonwealth-Altadis Inc., Commonwealth Brands, Inc., and Altadis, U.S.A., Inc. in Support of Their Motion to Dismiss Plaintiff's Complaint to be served electronically upon the following:

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