IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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SATNAM DISTRIBUTORS, LLC, doing business as LION & BEAR DISTRIBUTORS, Plaintiff	:	CIVIL ACTION NO. 14-6660
v	:	
COMMONWEALTH BRANDS, INC., et al, Defendants	:	Philadelphia, Pennsylvania July 22, 2015 9:38 a.m.

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TRANSCRIPT OF MOTION TO DISMISS HEARING
BEFORE THE HONORABLE L. FELIPE RESTREPO
UNITED STATES DISTRICT JUDGE

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(The following was heard in open court at 9:38 a.m.)

THE COURT: Good morning, Your Honor.

ALL: Good morning, Your Honor.

THE COURT: How are you doing?

ALL: Good.

THE COURT: So, probably the best thing to do here is to introduce ourselves. My name is Phil Restrepo. Let me hear from plaintiff's counsel.

MR. LANDAU: Good morning, Your Honor. Brent Landau from Hausfeld for the plaintiffs. With me is Stephanie Berger from my firm.

THE COURT: How are you?

MR. LANDAU: Very well, Your Honor, thank you.

THE COURT: Gentlemen, who represents whom here? Mr. Welsh, good to see you, sir.

MR. WELSH: Good morning, Your Honor. Good to see you. I am here on behalf of H.A. Levinson and my co-counsel is seated to my left and I will let them introduce themselves.

THE COURT: All right.

MR. LANKER: Good morning, Judge, I am Andrew Lanker of Baker Botts.

THE COURT: How are you, sir?

MR. HITTINGER: Good morning, Your Honor. Carl Hittinger of Baker Hostetler in Philadelphia and my partner Bob Brookhiser is here from Washington.

THE COURT: Gentlemen.

MR. OSTOVICH: Good morning, Your Honor, Joe Ostovich from Baker Botts for H.A. Levinson.

MR. BROOKHISER: I am Bob Brookhiser on behalf of the collectively named CA defendants, Commonwealth brands. Commonwealth Altadis and Altadis --

THE COURT: So, there are three CA defendants, correct?

MR. BROOKHISER: Correct.

THE COURT: All right. And then we will call them the HLA defendants, is that correct?

COUNSEL: H-A-L.

THE COURT: H-A-L?

MR. WELSH: No, it is HLA.

THE COURT: HLA Harold Levinson.

MR. WELSH: Right.

THE COURT: So, just by way of background, what is the organizational structure here, gentlemen, just so I can get my head around who does what here?

MR. BROOKHISER: Well, if I may, there is obviously a lot of overlap. There are separate motions

to dismiss, one on behalf of my three clients, the CA and one on behalf of HLA.

THE COURT: Yes.

MR. BROOKHISER: There is a lot of overlap and duplication and so we thought it might be helpful for the Court, but we are mindful that you may have a different view --

THE COURT: No, whatever help you can give me is appreciated, all right?

MR. BROOKHISER: -- we would divide it up more by some of the issues rather than to hear the same stuff over, twice.

THE COURT: Good.

MR. BROOKHISER: And in that regard I would address the market issues, geographic and product market, whether there is an allegation of a discrimination in price, and I might say a word about whether there is sufficient detail with regard to the individual ones of my clients.

Mr. Ostoyich would handle the remaining issues including is there a plausible allegation of an agreement. Is there an allegation of antitrust injury, is there an inducement claim against his client.

THE COURT: Fair enough.

MR. BROOKHISER: Something might fall through

the cracks, but that largely covers the waterfront we think.

THE COURT: Is there one of these entities that just manufactures cigarettes?

MR. BROOKHISER: Yes, Commonwealth Brands. And I think that's alleged, that's all that is alleged.

MR. LANKER: I think I can help.

THE COURT: Yes, help, that would be great.

MR. LANKER: So, Commonwealth, it is actually cigars that we are talking about here.

THE COURT: Right. This case is about cigars.

MR. LANKER: Correct.

THE COURT: Mass market cigars.

MR. LANKER: That's correct.

THE COURT: Now, is there one of these entities that doesn't make cigars?

MR. LANKER: Yes.

THE COURT: Which entity is that?

MR. LANKER: Harold Levinson.

THE COURT: Okay.

MR. LANKER: So, Harold Levinson is a customer of the Commonwealth entities and I believe that what we are really talking about essentially are successor entities. So, Commonwealth is a manufacturer

of cigars and they sell cigars to numerous customers, including Harold Levinson and at one point including plaintiff. So, that is the structural relationship.

MR. BROOKHISER: I need to amend that answer insofar as it relates to my client.

MR. LANKER: Fine.

MR. BROOKHISER: Commonwealth brands according to the complaint, and this is an allegation that I can say is true, makes cigarettes.

THE COURT: Commonwealth Brands, Inc.?

MR. BROOKHISER: Yes.

THE COURT: Makes just cigarettes?

MR. BROOKHISER: And always has --

THE COURT: Okay. So, should they be here?

MR. BROOKHISER: We don't think so, Your Honor.

THE COURT: Okay. Let me ask plaintiff's counsel about that specific issue.

MR. LANDAU: Your Honor, I think that the colloquy that we just heard is reflective of why at the pleading stage it is appropriate to proceed with each of the defendants.

These are three entities that have the same corporate address, the same counsel here. There are allegations in the complaint that when Commonwealth

Brands merged with Altadis and formed a combined marketing company, Commonwealth Altadis, that that was the combined marketing effort of both companies.

So, given the representations that the companies have made about their overlap and the information that is available at this stage, discovery will make clear which defendant did what, and so we would submit that for purposes of the motion to dismiss that all three of them should remain in the case.

THE COURT: Okay. Well, let's assume hypothetically that after you take your discovery you realize that Commonwealth Brands, Inc., only makes cigarettes, what are you going to do?

MR. LANDAU: Well, I would say, Your Honor, it is not a question of what they make, but what was their involvement in the conduct at issue. But, if the evidence reveals that --

THE COURT: It is limited to cigarettes.

MR. LANDAU: If the evidence reveals that they had no involvement in any of the acts complained of then we would voluntarily dismiss them.

THE COURT: All right. Well, let's start then with the issue that I think is, at least, of most concern to me, that's the relevant markets, all right?

MR. BROOKHISER: Okay.

THE COURT: Both product market and geographic market. And what I would like to do is have you make your arguments with respect to those issues and then we will turn to plaintiff's counsel as opposed to arguing everything.

MR. BROOKHISER: Okay. That works for me.

THE COURT: Let's keep things as simple as possible.

MR. BROOKHISER: Okay. By way of a little bit of background on this.

THE COURT: Sure.

MR. BROOKHISER: One of the things that I think is a little bit different here than some motions to dismiss is that it is not just are the allegations sufficiently particularized or detailed, but there are also a lot of inconsistent and contradictory allegations, and I think that is important particularly on the market issues, so that you don't have to give the inference or the benefit of inference to general conclusory allegations that are contradicted or inconsistent with other allegations.

Let me leap right into this. The market issues dispose of, in our view, all of the Sherman Act claims, and that's Counts 3 through 6 because all of those require allegation and then eventually proof of

relevant market.

There is no dispute that that is required. There is no dispute that both the product and a geographic market are required. The complaint --

THE COURT: What is your understanding of the way the product market is defined in the complaint?

MR. BROOKHISER: It is defined in paragraph 16 as market for the distribution of CA mass market cigars. By way of broad, general background, the antitrust laws, as the Third Circuit has repeatedly held and the Supreme Court has held, the focus is on interbrand competition, competition between different manufacturers of different products.

Here, by contrast, we have intrabrand market alleged, which is the products of one manufacturer. So, it is very, very rare, as I think the courts have said in, I don't believe the plaintiffs contest, for that to be a relevant product market. The focus is having brands and manufacturers compete with each other.

Now, some of the cases even say it is rare, and those cases arise, I won't say exclusively, but almost always, if not always, in the situation of an aftermarket or a derivative product where a customer buys something and then has to buy replacement parts

or components or services that can only be used with that. So, they are locked in. That's what the Eastman Kodak (ph) case was about involving copiers. That's what some of the other cases were about.

That's not the situation here. There is no claim of a lock in or that you are having to buy something because you bought something else. This is straight out that the brands of Commonwealth and Altadis are an independent relevant product market.

But, that's very rare. So, how does -- and there is no allegation of effect on interbrand competition. Although the complaint recognizes that the CA Cigars, mass market cigars, compete with other manufacturers of mass market cigars. They say that a couple of places, paragraph 11, paragraph 18.

So, how does a plaintiff try to create a plausible single product or single brand market. Two ways, basically. One is on the basis of consumer preferences. I think in paragraph 23 of the complaint they say well, you know, some consumers really want the Altadis, the CA Cigars, so we have to buy them and, therefore, it is a relevant product.

The second way is they try to manufacture distinction between the manufacturer of cigars and the distribution of cigars. Let me address both of those,

because neither of them work.

On the consumer preference argument, namely, you know, some consumers want to buy these products, so we have to buy them, so we are stuck. The first problem with that is sort of the multiple inherent implausible consequences of following that logic.

It applies equally to every other brand of mass market cigars. So, by their own allegation and logic, you know, there is a relevant product market for CA Cigars. There is a relevant product for Phillip Middleton Cigars, which is the affiliate of Phillip Morris. There is a relevant product market for, you know, the cigars of Swedish Match and others.

So, that just, you know, it is not just our cigars, it is a bunch of silos that's inherently implausible given the fact that this is supposed to be something that happens only rarely and doesn't relate to any of the aftermarkets or derivative markets where the courts have found them.

But, that logic also isn't confined just to the cigar business. It applies to any branded product. If you were to buy this logic that consumer preference, that some consumers like a product more, you know, you go into a grocery store you see, you know, Tide detergent, Peter Pan peanut butter, Ivory soap,

CocaCola, every store carries those because some consumers want them. That doesn't transform that consumer preference into a relevant product market confined to that brand.

You go into a department store or a clothing store, you see Levis jeans, Polo shirts, this is a little bit outside of my range, but Maybelline cosmetics, do they still make those, I don't know, but some consumers like all of those products. So, people buy them because they want to appeal to those consumers, but it doesn't transform that consumer preference into a relevant product market.

The same with, you know, like a hardware store, Toro Motors, Stanley Tools, you get the point, you could multiply that.

THE COURT: I get it. So, let me ask plaintiff's counsel.

MR. BROOKHISER: Yes.

THE COURT: Because, I think I understand your argument. Talk to me about this intramarket. It is all the same company here, right?

MR. LANDAU: Your Honor, should I approach?

THE COURT: You can do it from there. Wherever you like.

MR. LANDAU: Okay. That's right, Your Honor,

it is all the same company, but I think it is important to start with what we are not alleging here, which is we are not alleging that CA has a monopoly in the sale of its own brand.

That's what almost every single one of the cases that they cite is about, that's what Queen City Pizza is about. What the relevant market question is for this case is whether the distribution of a particular product, not by the manufacturer, but by distributors that compete with one another is a proper relevant product market.

And to answer that question --

THE COURT: Now, what's your best authority there because the way we read your papers you distinguish the defendants' cases. But, I didn't see any real strong authority suggesting that -- supporting your position. What is your best authority? Do you have anything in this circuit that says you can do this?

MR. LANDAU: Well, there are a number of cases.

THE COURT: What is your best authority in the circuit to support your position?

MR. LANDAU: I don't believe, Your Honor, that there are cases about distribution of a particular

brand like this one, but there are a number of cases including --

THE COURT: So, you are telling me there is no authority in this circuit supporting your position directly on point, is that correct?

MR. LANDAU: I am saying there is no authority either way on this question other than to say that questions about --

THE COURT: Let's keep -- again, what's your best authority, if you have any? If you have none just tell me you don't have any.

MR. LANDAU: Well, Your Honor, I don't have any authority saying that distribution of a particular manufacturer's brand constitutes a separate relevant market.

THE COURT: Okay. So, define the relevant market for me here.

MR. LANDAU: The relevant market here is the market for distribution of CA's mass market cigars, and the reason I say that is a relevant market is because to answer whether a particular product market is accurately defined you have to look at substitutes that are available for that product.

THE COURT: Are there substitutes available?

MR. LANDAU: There are not substitutes

available in the distribution market. It is important to keep in mind that we are not talking about consumers and whether a consumer would substitute one brand of cigars for another if the price were raised a significant amount.

We are talking about whether the customers of the plaintiff and the customers of HLA, these convenient store customers, if presented with a more expensive cigar would they then substitute some other brand of cigars to stock in their stores, and our allegation --

THE COURT: But, there are other mass market cigars available to your client, right?

MR. LANDAU: Right, but their customers, our client's customers and HLA's customers are going to insist on buying this brand of cigars, not because they are going to consume it, but because they need to have it available.

THE COURT: So, the retailers, you are telling me the retailer has to have this brand of cigar?

MR. LANDAU: Correct.

THE COURT: And if they can't get the cigar they can't substitute it for a like brand?

MR. LANDAU: They can't because they need to

carry the full line in their store because their customers, the consumers will come in and will have different consumer preferences for different brands.

And so the retailer can't simply say well, Dutch Masters are too expensive today, so I am just not going to stock Dutch Masters this week. They have to buy them anyway. They can't substitute some other brand of cigar because they need to buy all of the cigars.

And that's why we say this is a proper relevant market. It is also why the cases say that this is a question decided not properly on motions to dismiss, but after discovery they require facts, they require expert --

THE COURT: But, what would change --

MR. LANDAU: -- analysis.

THE COURT: -- what would change in discovery in this analysis?

MR. LANDAU: Well, if the --

THE COURT: Because, at the end of the day it is -- how is the relevant product market going to change with discovery?

MR. LANDAU: Discovery will provide facts that support the allegations that we made about the lack of substitutability between the service of

distribution of these different products.

THE COURT: So, you are telling me you have an expert that is going to redefine the market for us?

MR. LANDAU: Not redefine the market, Your Honor, but --

THE COURT: Define the market.

MR. LANDAU: -- define the market, correct. And that is typical in these cases, that they involve expert testimony following discovery based on the record --

THE COURT: I get that. But, I mean so you are telling me then that notwithstanding the fact there is no authority in the Circuit, an expert will come in and define the market for us consistent with your theory?

MR. LANDAU: Your Honor, there is no authority for the particular market that we are proposing here because it is not a situation that has come up in the cases.

THE COURT: An analogous, give me an analogous situation.

MR. LANDAU: In every case --

THE COURT: It doesn't have to be cigars, but like --

MR. LANDAU: In every case, Your Honor, where relevant market is an issue, the parties will each have experts who will look at the factors that economists and courts consider in determining whether something is a separate relevant market, principally including the substitutability with alternative products.

So, here experts would say is there substitutability between distribution of CA's mass market cigars and Phillip Morris' mass market cigars. Do the customers of these distributors, these convenience stores, would they substitute some other brand if the CA brand became more expensive, and that is why these necessarily require expert analysis, because these are very fact intensive matters that require expert opinion.

There was a recent case in this district that was decided after we completed the briefing by Judge Stengel which is called, if Your Honor can believe it, Extreme Caged Combat versus Caged Fury Fighting Championships, it is 2015 WL 344 4274. It is from May 29th.

And the issue there was about whether the plaintiff had defined the relevant market too narrowly. The defendants argued the market should be broader, the plaintiffs said it should be narrower, and Judge

Stengel found that that was an issue for discovery, that if discovery supports an expansion of the relevant market then it should be reconsidered on summary judgment. And that is the way that cases generally proceed, including the cases that the defendants cite here.

The one exception that they provide about relevant market being determined on a motion to dismiss as opposed to after discovery and expert testimony, is the Building Materials case, but that was a complaint with no factual allegations about why the relevant market was proper, unlike this one, where the complaint alleges in detail this lack of substitutability between distribution hub alternative products.

THE COURT: So, counsel, should we then play this out through discovery and see what the experts have to say?

MR. BROOKHISER: No, for a couple of reasons. One, everything you heard would still lead to all of the utterly illogical consequences. In any market where there are brand preferences and a distribution chain you could make the same argument.

You could make it for all of the other brands of mass market cigars, you could make it for every consumer product going up the chain. So, that is not,

you know, with respect, that doesn't require expert analysis. It is implausible.

But, let me make a couple more points on this. There are cases, including the Green Country Food case which we cited which says "Even where brand loyalty is intense the court rejects the argument that a single branded product constitutes a relevant market." The Apple versus Pie Star case that we cited says the same thing.

But, apart from the, sort of the case law and stuff, the complaint makes inconsistent allegations, and that is a difference, I think, of the sort that I alluded to earlier.

They specifically refer in paragraph 19 to the U.S. Market for mass market cigars. For mass market cigars, all mass market cigars, not broken down brand-by-brand. And it acknowledges the existence of many other manufacturers of that.

But, also importantly, and the complaints attempt to distinguish mass market cigars from the premium cigars, it goes through kind of a litany of the way you usually look at defining relevant product markets and the characteristics and things like that, and it lumps all mass market cigars together versus premium cigars.

It talks about the difference in price, paragraph 17, the mass market cigars, not just, you know, Commonwealth cigars or Altadis cigars or, you know, Phillip Morris cigars are less expensive, sold for less than two dollars, priced lower. No distinction among the mass market brands.

They talk about different consumer appeal, paragraph 19, the mass market cigars generally, not one particular brand, attract value driven customers. No attempt to distinguish between the mass market cigars. They all attract value driven customers.

The sales and distribution is different. The mass market cigars, without distinguishing among brands, paragraph 17, are primarily sold in gas stations and convenience stores rather than the higher and specialty priced cigar stores.

They distinguish the physical composition of all mass market cigars versus premium cigars, namely they are machine made with short filler and unlike the premium cigars.

So, the complaint itself refers to a market for mass market cigars generally and it distinguishes that from a premium cigar with the usual kind of factors, consumer preferences and things like that, but, without distinguishing any further between the

cigars that are alleged to be a single product market here.

So, that addresses that issue, the distinction between or purported distinction between manufacturing and distribution, frankly, that is I think kind of a semantic distinction. They are two sides of the same coin.

And the courts have said that every manufacturer, including courts in this circuit in the V.L. Ciccone, I think it is the case that we cite, every manufacturer has a natural monopoly in the sale and distribution of his own product. That's all we are talking about here.

The Dome Stadium case, not in this circuit, that I think HLA cited also says "In recognizing that a manufacturer's monopoly over the distribution of its own product is not illegal. That's at 732 F.2d at 487.

PSK versus Legan (ph) that we cite, rejected a proposed market for wholesale sales because "The relevant product must focus on the product rather than the distribution level."

The cases that they cite really make our point. While they do deal with distribution, it is not the distribution of a single product, it is the distribution of all healthcare services in the case of

the Cardinal Health case and all, you know, carbonated beverages, I think it is, in the Pepsi case.

So, for all of those reasons, the law, the acknowledged rarity, the illogical consequences and the fact that the allegation, the conclusory allegation is contradicted by other allegations, we think that should be dismissed, all of the Sherman Act claims.

THE COURT: What about the geographic market?

MR. BROOKHISER: Geographic market. Similar, they spend even less time on that, I think. The Geographic market, the area of effective competition, I don't think there is a -- shipping patterns are normally important in that. You have to look to see where things go and where you get them and where you can go.

The complaint alleges that the market is limited to the State of Pennsylvania. That, again, is just kind of unusual, there is one state. There is no allegation of shipping costs, there is no allegation of shipping patterns.

There is a conclusory allegation in the complaint about differences in state regulation, but there is no detail and I think they recognize that the details aren't there because they tried to provide them in their brief by referring generally to some tax laws

without any real discussion of it.

So, standing by itself that isn't enough, that's just, you know, too conclusory. But, even more importantly --

THE COURT: Could the geographic market, assuming that you get beyond too conclusory type arguments, could a geographic market consisting of the Commonwealth of Pennsylvania carry the day?

MR. BROOKHISER: I don't believe so.

THE COURT: Why not?

MR. BROOKHISER: Because as the other allegations in the complaint indicate, the flow of commerce goes from various places to other states we sell, and I think the complaint alleges that, cigars to HLA. They are not in Pennsylvania. We sell them to them in Long Island.

This leads into the other, and I believe it should be the nail in the coffin on the geographic market issue, is the other allegations in the complaint are inconsistent.

There is an express reference in paragraph 19 to the U.S. market for mass market cigars. In other places there is similar allegations, that Altadis is recognized for the best selling -- some of the best selling mass market cigars in the United States. It

refers to the mass market cigar share of the "total U.S. cigar business," in paragraph 17.

So, the combination of the conclusory allegations and the inconsistent allegations we believe dooms the product or the geographic claim and, therefore, all of the Sherman Act counts.

THE COURT: All right.

MR. BROOKHISER: So, unless Your Honor has further questions on that --

THE COURT: No, that's good. Mr. Landau, if you want to add anything to the product market and then maybe you can talk to me a little bit about these inconsistencies that have been brought to my attention and your definition of the geographic market?

MR. LANDAU: Thank you, Your Honor. First of all, there are no inconsistencies, because what is happening is that two different things are being conflated here, and it relates to what I was explaining before, that there is a market for the manufacture and sale of the product, which is what CA does.

THE COURT: What is the product here? The mass market cigars?

MR. LANDAU: The mass market cigars --

THE COURT: Is that the product?

MR. LANDAU: -- is a product, it is not the

relevant market that we allege here. The relevant market we allege is the distribution of that product in Pennsylvania.

And so there are certainly allegations in the complaint for context that explain how mass market cigars are manufactured, what consumers buy them, what different types there are.

But, it is also clearly set forth that what we are talking about is the market for distribution of those cigars. In fact, it is because there are consumer preferences for different brands of mass market cigars that it is so important that retailers carry the full line and absolutely necessary that distributors be able to buy and sell the full line because they are not substitutable from that retailer's point of view.

THE COURT: So, it is not like Coke and Pepsi here?

MR. LANDAU: Well, it is not like Coke and Pepsi because we are not talking about the manufacturers Coke and Pepsi. We are talking here about companies that distribute the product of that manufacturer to particular customers.

The cases that Mr. Brookhiser was citing are predominantly summary judgment cases. The Green County

Food case, the VNL Ciccone case, and many others as we set out in our brief, were deciding the relevant market at summary judgment, which is the way that courts almost always look at this issue because it is so fact intensive, so expert intensive.

In addition to the expert testimony that I mentioned before, what discovery will reveal is how the defendants themselves thought about and described the relevant market.

That is always an important part of the proof at summary judgment, how did the defendants describe their business and their market in their own documents.

Even in HLA's brief in this case it referred to entering the Pennsylvania market, for example, and so discovery would allow us to see what a defendants say in their documents about what they are doing, about whether their retailer customers can substitute some other brand of cigars for the cigars that are being distributed that are manufactured by HLA.

As far as the geographic market, economically that can be as small as a single city. It depends on the same sort of fact intensive expert driven analysis where you would look at what is the region in which the relevant customers can participate.

And in the recent case I mentioned before by Judge Stengel, the relevant market there that was upheld was just Philadelphia, it was just Philadelphia.

And so for purposes of a motion to dismiss, we have alleged why Pennsylvania is a distinct relevant market for the distribution of cigars than say New Jersey or Delaware because of the regulatory and tax schemes that differ by state.

You can't simply lump them all in together because there are differences, and those differences will be borne out through discovery.

THE COURT: All right.

MR. LANDAU: Thank you, Your Honor.

THE COURT: Thank you.

MR. OSTOYICH: Your Honor, do you mind if I just give you two more minutes on this topic?

THE COURT: Not at all.

MR. OSTOYICH: I think this is an important topic.

THE COURT: When you say this, which topic are we talking about?

MR. OSTOYICH: The relevant product market allegation here.

THE COURT: Okay.

MR. OSTOYICH: I think this is an important topic and I think Your Honor has put the finger right on a critical thing here. Because, when you read this complaint it has got allegations, multiple antitrust allegations going off at all different directions.

He has built this big house up here, but down here the load bearing wall is the relevant product market. And if you pull this out, and I will tell you why you should pull it out, this stuff over here is all going to collapse because, all of these claims depend upon having a relevant product market that makes sense.

So, you asked counsel what is your Third Circuit authority, well, let me give you one, which we have cited in our briefs, Queen City Pizza.

So, Queen City Pizza says as a matter of law you do not always consider relevant product market a fact question. You don't always get to hire an expert who comes in and provides evidence. You look at the allegations.

So, what do we have as an allegation here of a relevant product market? We have paragraph 24. It says literally there are no reasonably substitutable products for defendants, for CA's cigars, mass market cigars. That's a conclusion. That's a conclusion.

But, the other paragraphs of the complaint

actually say that's not true. The specific paragraphs say CA is one of many producers of mass market cigars. There are five billion mass market cigars produced a year, it is one of many manufacturers. There are also hundreds of names of premium cigars.

And then the specific allegations say Havatampa, which is one of the many CA brands is an alternative to premium cigars for some consumers. It says Dutch Masters have a different appeal for different consumers. It is the number one rated of its type. So, there are others out there.

Why is that important? That is important for the reasons Queen City set out. Queen City affirmed dismissal of a conclusory relevant product market where the plaintiff said the market is basically the sauce and the dough for Domino's Pizza.

And the district court dismissed it and the Third Circuit affirmed. The Circuit said it is not what the plaintiff asserts as a conclusion. In that case it said it flowed from a contract, a franchise agreement, it said that's not sufficient.

You look at what consumers in general would view as the substitutable products, and here we have that answer in the complaint. Consumers in general, obviously, have alternatives to CA mass market cigars,

it is only one of many producers.

They also have premium cigars for some of these brands. So, this complaint on its face says that there are lots of other producers out there, and the only thing it says in counter to that is just a legal conclusion, a lawyer word, there were no reasonably substitutable products.

So, the specifics of this complaint on its face tell you why this allegation fails. And when you pull that out, the relevant product market doesn't make any sense here on its face, which the Third Circuit affirmed in Queen City, the whole thing falls down. All of these claims fail.

So, I will say Queen City is right on point and Sweeney which we also cite in the Third Circuit it says Texaco Gas, you drive around the block, you see Citgo, you see Exxon you see Shell, you see Texaco, you see a whole bunch of different brands. Texaco gas is not its own relevant product market on its face.

So, we don't need to incur the massive expense that Twombly, the Supreme Court said in Twombly, the massive expense of an antitrust case, force everyone in this room on this side of the table to incur this massive expense, when the complaint on its face has allegations that contradict this

conclusory assertion of this relevant product market.

THE COURT: Could the complaint be amended to satisfy you?

MR. OSTOYICH: That's a tough question. I think the answer is no. Right, so on its face what this complaint says is there are lots of producers out there, premium and mass market. You can't just ignore that.

You can't just come in and say well, I have changed it somehow, that somehow you can change the allegation so that -- it already says, the plaintiff has already conceded that these are one of many suppliers and alternatives out there for consumers, so I think the answer is no.

THE COURT: Because of the inconsistencies or because you just can't have a product market defined intrabrand?

MR. OSTOYICH: Well, both. Right, so the inconsistencies make it clear factually why you can't, but legally, that's what Queen City Pizza says. It says you can't just come in and say it is limited to one manufacturer's product when you have acknowledged that there are lots of other alternatives out there. Thank you.

THE COURT: Mr. Landau?

MR. LANDAU: Your Honor, that's not what Queen City Pizza says. Queen City Pizza was about whether Domino's was monopolizing the market for the sale of its own products. The Texaco case was about whether Texaco was monopolizing the market for the sale of its own gas.

And if we were coming in here and alleging that CA had monopolized the market for the sale of its own cigars then those cases might be on point. But, that is not what we are saying.

We are not talking about whether a manufacturer can have a monopoly in the sale of its own product, though, by the way in pharmaceutical antitrust cases that happens all of the time where courts find that a single drug manufactured by a single company --

THE COURT: Well, is there an alternative to that drug?

MR. LANDAU: Very often there are and defendants in those cases will argue you have to look at whole class of drugs, because a patient might substitute or a doctor might prescribe a similar drug for another.

But, based on discovery and expert opinion courts will consider whether those truly are substitutes based on the market facts. And so that is

why cases like Queen City don't inform this question at all.

In Queen City the plaintiff was arguing that the relevant market was created by a contract between Domino's and the franchisee and the Third Circuit says you can't have a market created by contract, you have to look at consumer preferences.

And as I said, it is the consumer preferences that drive the reason why retailers must purchase the full line, and that is not just a conclusion in our complaint, but we allege facts that specify why it is that there is this need for retailers to buy the full line and for distributors to, therefore, carry every brand of cigars and that they are not substitutable with distribution of other --

THE COURT: You do a nice job distinguishing their cases, and again I come back to other than Judge Stengel's opinion, which I will read, but quite frankly I am glad you brought it to my attention.

What case should I read to inform my decision from your perspective and from any circuit in the country?

MR. LANDAU: Well, there are a number of cases, Your Honor, for the point I made about relevant market issues being decided at summary judgment not a

motion to dismiss.

THE COURT: No, I am more concerned about the intrabrand issue.

MR. LANDAU: The intrabrand issue. Well, there is a case that we cited from the Eleventh Circuit that rejects this assertion that the defendants are making here that only interbrand competition is relevant in antitrust cases, that intrabrand competition is also important for consumer welfare, that's the Graphite Products case that we have cited. I am sorry, Graphic Products case that we have cited from the Eleventh Circuit, 717 F.2d 1560, it is in our brief.

And the Eleventh Circuit does a very nice job of explaining why it is that intrabrand competition also promotes consumer welfare, particularly when, as in this case, the manufacturer has differentiated its product from other products that are out there. And so again all of these issues need to be considered based on a record.

It is not so easy to simply say this relevant market because it only involves a single brand or set of brands can't be sustained past a motion to dismiss. That's true in many cases when you are talking about whether the manufacturer has a monopoly on its own

product because then it would become circular. Then, every manufacturer would have a monopoly on every product that it makes because of its separate brand. That's not what we are saying here.

But, just the fact that there is a brand doesn't mean that there can't be a market for distribution of that brand if the facts bear out and the expert testimony supports that customers of the plaintiff and of distributors like HLA don't have the option to substitute distribution of other brands of other cigars because they need to buy the full line.

THE COURT: Okay.

MR. LANDAU: Thank you.

THE COURT: Gentlemen, who cares to go next?

MR. BROOKHISER: I was going to address the issue of whether the complaint has alleged a valid discrimination price.

MR. BROOKHISER: All right.

THE COURT: Before you go there, how do they do this to your satisfaction without getting discovery? Is it possible to plead this sufficiently without getting discovery?

MR. BROOKHISER: The price discrimination?

THE COURT: Yes.

MR. BROOKHISER: Yes, I think they could certainly do a lot more than they have.

THE COURT: Well, what else do they need to do?

MR. BROOKHISER: Well, I will tell you. There are at least four ways, I think, in which they have failed to state a price discrimination claim.

THE COURT: Okay.

MR. BROOKHISER: There is no dispute that just a difference in price is not enough. I think everyone agrees with that, and the courts agree with that.

THE COURT: Do you agree with that, Mr. Landau?

MR. LANDAU: I agree, Your Honor, that there are defenses that they could advance as to why there was a difference in price that was justified. They haven't done that in their motion to dismiss. That would be for later in the case.

MR. BROOKHISER: I am referring to other things than defenses. The Third Circuit has articulated in the Toledo Mack (ph) case, you know, exactly what must be alleged.

"The plaintiff must allege facts to

demonstrate that one, defendant made at least two contemporary sales of the same commodity at different prices to two different purchasers," and they failed to adequately allege either of those points.

Two, "The effect of such discrimination was to injure competition," and they failed to do that in two ways. By way of background RP Act is kind of an old outlier, it is very technical. The Third Circuit and the Supreme Court have said you need to construe it narrowly because it sometimes has anti-competitive consequences.

But, the contemporary sales of the same commodity at different prices. They have failed to alleged adequately, anyway, that the goods are of like grade and quality, and that's one of those sort of technical things of the Robinson Patman Act, but it is a requirement.

They haven't alleged the same commodity. And that makes perfect sense that they have to be of like grade and quality because if they are not then there is really no "discrimination" in price. There may be a difference, but there is no discrimination if the products aren't of like grade and quality.

Here, the complaint simply says that CA sold mass market cigars, generally, to HLA at favored

prices, but it doesn't identify any of the specific brands and it doesn't -- that would claim that a lower price. It doesn't identify, you know, how much or when it was sold.

So, the complaint or the brief kind of recognizes --

THE COURT: Aren't there --

MR. BROOKHISER: I'm sorry.

THE COURT: -- quite a few references in the complaint about their efforts to negotiate prices, that the structure of a free case for purchasing X number of cases?

MR. BROOKHISER: There are a lot of allegations about cigars generally, but as the complaint makes very clear, each of the different Commonwealth brands are different by consumer preference and physical characteristics.

So, that there is no actual specification of what was sold at a different price. It is just this morass or mish mash of general allegations. And even the complaint -- the plaintiff's own case, this Liggett case, which they say supports their position that mere differences aren't necessarily conclusive, and the very next sentence says "While it doesn't require that products be physically identical to be of like grade

and quality, that is only when those differences have no effect on consumer preferences or the competitive environment."

And it goes on to say, "In fashioning a like grade and quality standard, courts have generally emphasized the presence or absence of significant physical differences between the products and the effect of those differences upon consumer preferences."

So, let's look at the actual allegations of the complaint with regard to the CA or Altadis products. Paragraph 21 refers to Dutch Masters. They are renowned for their high quality and craftsmanship. Paragraph 20, they are recognizable due to their packaging which features the famous Rembrandt painting and are Americans' number one natural cigar.

None of the other cigars that Altadis makes have those attributes. Backwoods, in paragraph 22, "Are a throwback to the days of the old west. They 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," all in distinction to the other brands.

"Phillies are made with short or chopped

filter tobacco and the homogenized binder to give them a distinctive tobacco flavor," again different, not of like grade and quality.

Havatampa marketed as a wood tipped cigar. Different, none of the other cigars were like that. Whitehat cap, open head cigarillos, none of the other brands are like that.

So, even in the complaint in paragraph 22 and 21 and 20 there are differences alleged among the CA cigar products so that they are not of like grade and quantity, an absolute requirement to state a valid price discrimination claim.

The other part of that first prong is that they must have contemporary sales. That makes sense, you know, if you sell at different times the price of the market could change. So, it is not a discrimination in price. Maybe a difference in price, but it is not a discrimination.

And there is certainly after July of 2012 there aren't any more sales under the complaint. So, there can't be any discrimination there. You have to have two sales, and there is -- there can't be any after that.

So, what do we have before that? Just general allegations that, you know, they bought and we

bought at different prices. But, I think in the brief they recognize that the complaint is a little shaky on that because they say well, HLA must have bought at least as frequently as Satnam. Well, that is not in the complaint.

It is just general allegations, we bought and they bought. So, we don't think that they have adequately alleged the second prong of that, the contemporaneous sales.

Now, let's look at the other part of the Third Circuit test, which is injury to competition, and there are really two aspects of that which are not met here.

One is the aspect that, or the requirement that is in the Supreme Court case of Volvo Trucks and in some of the other cases that they cited, frankly, and we cited, the J.B. Fields case that there must be a discrimination in price on sales where there are two entities who allegedly got the different prices were competing to sell to the same customer. That's what the Supreme Court said in Volvo Trucks, that's what J.B. Fields cited by the plaintiffs said. There is no allegation of that here.

In fact, other allegations of the complaint make it implausible that even with discovery you could

prove that because the allegations show that they are operating, HLA and Satnam, at different levels of the market, at least for some of their sales.

HLA sells direct to convenience stores. Satnam sells direct to some convenience stores, but also to other distributors, so that when you are at different levels of the market you are not competing for the same customer.

Now, and in fact, the idea that they have lost sales to customers is contradicted, again, by the allegations of the complaint. Where during the period of alleged discrimination they went from a zero share of the market to 30 percent of their market, which we don't agree with in terms of the definition, but it is completely inconsistent with the allegation they lost sales, when they grew exponentially, more than exponentially, almost infinitely from zero to 30 percent.

So, we don't think that the complaint has adequately alleged the required injury competition for specific customers, had lost sales for a specific customers.

The other aspect of that injury to competition is that it is not just enough to prove that, you have to prove that there was injury to

competition because the antitrust laws are designed to protect the competition, not injury to competitors.

In fact, you know, that's the essence of competition. Somebody gets hurt, that's the purpose of it. There are winners and losers, some people thrive, some entities thrive, others don't.

So, it is not just the injury to a particular person or company that is enough to satisfy that, and here that is really all they complain -- that's all they say. It is like well, we weren't able to compete as effectively. They said that in 142 and 109.

But, there is no allegation other than a general lawyer conclusion that competition was effected. In fact, you know, what they allege is that other people were apparently getting discounts and competing vigorously.

They may feel that they were hurt, but there is no allegation that competition, even in this bizarrely limited market for CA mass market cigars was hurt.

So, for all four of those reasons we don't believe the complaint has stated a valid claim for discrimination and price. And so both Count 1 and Count 2 should be dismissed and counsel for HLA may offer other reasons why Count 2, the inducement, should

be dismissed as well.

THE COURT: Let me hear from Mr. Landau and then we will get back to defense counsel.

MR. BROOKHISER: Sure.

(Pause in proceedings.)

THE COURT: So, how has competition been harmed?

MR. LANDAU: As Mr. Brookhiser said the Robinson Patman Act is a very specific antitrust statute. In order to establish the requisite injury to competition under that statute, we are not talking about the Sherman Act, but the Robinson Patman Act, all you need to show is that there was an injury to the competitor in the form of higher prices for contemporaneous sales.

You can show that injury of competition, the Supreme Court and the Third Circuit say in one of two ways, either lost sales or lost customers to that competitor or a sustained price difference over a period of time from which you can infer this kind of competitive harm.

THE COURT: And you are suggesting both happened to your client?

MR. LANDAU: We have alleged both. At the motion to dismiss stage, as Your Honor pointed out,

there are only certain facts that are in our possession.

What we can't possibly know without discovery is what are the precise dates on which HLA purchased, what are the precise prices that HLA paid to CA, because that is information that is exclusively in their possession and not in ours.

But, the reason why our complaint alleges plausible violations of the Robinson Patman Act is because there are a number of facts that are alleged in the complaint that show why we believe that discovery will show this discrimination in price, including that the customers of HLA were buying from HLA at a lower price than the plaintiff could buy from CA.

Meaning that HLA must have bought at an even lower price. So, it is plausible, which is all that Twombly requires, that we are going to be able to show this difference in price.

And that should be very straightforward to get in discovery, because they are going to have records of what they charged at what dates, and they are going to produce those to us and we are going to be able to see exactly what the facts are about that.

There are a number of cases that we have

cited in our brief, including the ITP case from this district, where even vaguer allegations than we've got, because our allegations aren't vague at all, about difference in price that's not specified as to what it is or when it was or even who it was, were deemed sufficient.

And there is another case that was decided after the briefing was concluded from the Western District of Pennsylvania, which is the Alarmax Distributors case, it is 2015 WL 364 5259, it is just June 9th from this year.

The defendant argued that the plaintiff had not pled which products it bought from whom at what time and at what allegedly higher prices. So, much less information than what we have got in our complaint, but the Court said that there is no requirement for sales to be pled with that level of detail and that that level of detail is not required at this early stage of the proceedings.

There is also the National Association of College Bookstores case that we cite where the court said that the complaint didn't have to include the specific book titles on which there were price differences, that it was enough to generally allege that there was this discrimination in the pricing of

different sorts of books.

The reason why this whole like kind and quality is kind of a red herring, Your Honor, is because the plaintiff and HLA are distributors. They both buy the full line of brands on a regular ongoing basis, they have to. That's the nature of their business. They have to be able to consistently supply all of these brands to everyone.

Our allegations set forth in the complaint is that this price discrimination effected all of these purchases across all of these different brands. So, the Dutch Masters, the Phillies, the White Cat, all of these different brands sold which both plaintiff and HLA bought on a regular, ongoing basis featured this price discrimination.

It is certainly plausible discovery will reveal what were the exact dates and what were the exact prices. The defendants would like you to interpret the allegations as not supporting this kind of regular and continuous participation by distributors.

But, there are allegations in the complaint that repeatedly discuss the need of these distributors to buy the full range, numerous specific points in time when the plaintiff complained to CA about differences

that it was perceiving in the market between the prices it was actually paying and the prices at which other distributors were buying from HLA, lower prices than the plaintiff could get directly from CA.

And this business about being at different levels of the market isn't supported by the allegations either because, first of all, the allegations are that both the plaintiff and HLA sold directly to convenience stores and also to other distributors that sold directly to convenience stores.

That's the whole source of this allegation about these other distributors buying for cheaper prices than the plaintiff could get from the manufacturer.

So, they are at the same level of the market, they are competing with each other head to head. That is the whole reason why the plaintiff was able to go from zero to 30 percent at the same time that HLA went from 80 percent to 50 percent, because it was directly taking market share away from HLA. They are directly after the same dollar.

It is totally unlike cases, like the Volvo case in the Supreme Court or the Toledo Mack case in the Third Circuit where the plaintiff wasn't competing at all with the other distributors because they weren't

buying the same product or they were competing for the opportunity to buy it, but didn't actually make the purchase.

The plaintiff, as we have alleged, purchased $11 million in CA cigars over a year and a half period on a regular basis, all of these brands at the same time that HLA was competing for the same business in the same market buying the same brands over the same period of time.

That's all the Robinson Patman Act requires. All you need are two sales. We are going to have many more than two sales by the time that discovery is over because of the volume of commerce that is involved in this case and the length of time that's at issue.

And the only other point I wanted to make unless Your Honor had questions is that there were a couple references to the relevant market, which as Mr. Brookhiser said before is an issue for the Sherman Act claims, but not an element of the Robinson Patman Act claims.

We mentioned it in the context of the plaintiff taking market share away from HLA because it shows the head to head competition, but we don't need to prove a relevant market in order to have our

Robinson Patman claim, unlike with the Sherman Act claims that we discussed earlier.

THE COURT: As a point of curiosity, what are your damages in this case?

MR. LANDAU: Well, the damages will be measured by the lost profits and the lost sales from the plaintiff.

THE COURT: Ball park it for me.

MR. LANDAU: Your Honor, it is something that we haven't calculated. It is going to require experts. One reason why we can't calculate it is because we don't yet have the records --

THE COURT: So, you've got no idea. You can't ball park a number for me?

MR. LANDAU: I can't, Your Honor.

THE COURT: I am not going to hold you to it.

MR. LANDAU: No. But, Your Honor, the reason I can't is because that sort of calculation requires that --

THE COURT: Discovery.

MR. LANDAU: -- we have access to what the prices were that were charged to HLA and when.

THE COURT: Fair enough.

MR. LANDAU: We believe it was in the range of 20 percent less than what we paid, and we had $11

million in sales, and so if that were the only form of damage, which it is not because of the refusal to deal and the total exclusion from the market, it is at least several million dollars in damages.

THE COURT: All right.

MR. LANDAU: Thank you, Your Honor.

MR. BROOKHISER: Can I make a couple responses to that, Your Honor?

THE COURT: He passed you the note. Aren't you going to let him say it?

MR. OSTOYICH: Actually, he passed the note, so --

THE COURT: Oh, all right. I am just kidding. Whoever wants to go.

MR. BROOKHISER: Just a few points. The -- in broad strokes, it requires -- the Robinson Patman Act requires, you know, that similarly situated customers get treated differently in similar situations.

What we just heard, I think, establishes that that didn't happen. The examples that you heard about why there was a discrimination concerned sales from HLA to distributors that were competing with Satnam.

In other words, it wasn't the sale from us to HLA that they are complaining about. They are

complaining about that they were hurt by the fact that HLA was able to resell to their competitors.

So, they are at different levels. They are not similarly situated. That was the only specific fact that you heard other than the general conclusions.

And that is important because although the Supreme Court in Volvo did talk about the sustained price difference, the very next sentence in that decision said, "However, absent actual competition with a favored dealer, plaintiff cannot establish the competitive injury required under the Act," and that's just what we heard. No competition for the -- with the favored dealer, it is with the favored dealer's, allegedly favored dealer's customers.

So, again, for the multiple reasons that we articulated, they have failed to state a claim for actual price discrimination.

MR. LANDAU: Your Honor, it is not correct, because both plaintiff and the HLA bought directly from CA. They both dealt directly, they paid CA, they got the product from CA.

Then, they both dealt downstream with convenience stores and with other distributors. The reason we talk about what HLA was selling to the other

distributors is because that's how we know that they were getting better prices directly from CA than we were getting from CA.

That's why it is plausible so that we should get discovery into what --

THE COURT: And you know that because they were charging the retailers less?

MR. LANDAU: Right. They were either selling everything at a loss, which raises different antitrust problems for them, or they were getting better prices from CA than we were getting.

That's why it is plausible for purposes of the amended complaint and courts have sustained Robinson Patman complaints with way less than that, that the prices that plaintiff and HLA were being charged by CA, which are the transactions that we care about, were discriminatory.

THE COURT: All right.

MR. OSTOYICH: Can I add a little bit, Your Honor?

THE COURT: Sure.

MR. OSTOYICH: Are you tired of this topic?

THE COURT: No, go ahead.

MR. OSTOYICH: Let me just reiterate in my own words what counsel said. So, the Robinson Patman

Act is a very ticky tack statute, mind you. It has lots of little requirements.

It is tempting to read a complaint like this and just go eh, there is a lot of little detail in here about pricing that's enough. It is detailed enough and let's just let discovery play out.

I am a practical lawyer, right. My client, if discovery goes forward, is facing a huge amount of expense to litigate this case. The Supreme Court in Twombly says massive antitrust discovery should cause courts to look really closely at complaints.

There is a good reason for it, a practical reason. It doesn't change the standard. But, it says you must insist upon some specificity in the complaint. And you can't credit just conclusions, just labels and conclusions, right, you have to look at specifics.

So, you ask what is -- what is missing from this complaint. So, when I read the complaint I thought this is kind of odd. The plaintiff has lots of detail on pricing, but I can't find a specific purchase of a specific product at the same time that my client paid a lower price than their client paid a lower price for.

So, the complaint says Havatampas are

different than White Owls, are different from Phillie Blunts, they all have their own demand. Different consumers like different things.

Did we buy a box of Havatampas at the same time and pay a different price? I can't tell from this complaint. I can't tell. It says generally well, stuff was purchased at a different price, was it the same quantity of product of the same brand? Was it Havatampas, was it a carton? I can't tell.

Now, you might say well, how would they know what we paid for them? Okay. Maybe, maybe, although I would think that due diligence reading through the complaint would lead you to find that if you could, but here is something that they certainly could tell.

We have to be competing for the same customer. Counsel agrees. That's not just a generic well, we are in the same state and we call on the same general customers. That's did the price that my client paid for a carton of Havatampas at the same time they paid a higher price, did we turn around -- there is a Wawa on every corner, right?

There is a gas station on every corner, did we call on the same Wawa and were we able to clinch that sale because we had a lower price in buying it from Commonwealth than they had?

I have absolutely no idea. That is something that is within their control. They should be able to define which specific convenience stores they were calling on that we won the sale. We might have been calling on a Wawa in Pittsburgh, they might have been calling on Wawas in Philadelphia. I have absolutely no idea.

Now, you might say well, let discovery sort it all out, but that's what Twombly says should be done up front. You have to have some specificity in the complaint. I have absolutely no idea.

I just know that somewhere in the great State of Pennsylvania my client was selling something to someone at some time which they say they couldn't sell, right.

Now, the other odd thing, though, about the complaint is it says that plaintiff grew from zero to 30 percent of the overall Pennsylvania market during a period he claims there was price discrimination going on.

That's a specific allegation that actually says whatever price he was paying was not hurting his ability to sell, was not inhibiting him from selling. So, when you couple those two things together you kind of scratch your head and go well, there is price

discrimination kind of generally alleged in here somewhere, there literally is no specific customer that they were calling on at the same time that he can point to a loss of sale of a carton of Havatampas or Dutch Masters and actually he says he has done really well during this period.

So, apparently whatever price he was getting was not inhibiting from whatever he was selling to whoever he was selling it whenever he was selling it. So, on the face of it you are looking at a complaint you go well, maybe there is something vague in there, but the specifics actually contradict the vague generalities, and that is important. That is important.

You are looking at clients that are looking at hundreds of thousands of dollars, maybe millions of dollars in litigation expense. Right, that is a lot.

So, Twombly says and the Third Circuit in Birch says take a real close look at the complaint. Don't rest on generalities. Look at the specifics. If they had not alleged the elements of their claim and they have not, if they have not alleged the elements of their complaint don't let their complaint go forward in discovery.

THE COURT: So, could they -- same question for you then, could a plaintiff satisfactorily allege the elements with no discovery?

MR. OSTOYICH: Sure. Yes, you could literally say look, my truck pulled up to the Wawa on the corner of 6th and Market at the same time as your truck pulled up and I actually saw the invoice, because customers do this all of the time, right, they go hey, I would love to buy from you, but this guy over here is giving me a better price, look, you can see it. If you bid lower you can get the business.

You could actually allege that. Clients have this kind of information all of the time. That's what competition promotes, right. So, yes, absolutely, they could have alleged that. They could have had those facts at their fingertips. I am sure they do, if they exist.

They could have put them in the complaint, but they haven't.

THE COURT: And that is what Twombly requires?

MR. OSTOYICH: That's what Twombly requires. In the Robinson Patman Act context that's exactly what Twombly requires. It requires something that actually shows head to head competition.

If you look at the language from Reader Symco, so counsel paraphrased, Reader Symco and Toledo Mack in the Supreme Court and the Third Circuit have said actual competition for a sale of the same product at different prices of purchase to the same customer at the same time.

You have to show that the disfavored hurt customer, Satnam here, the higher price he paid caused him to lose a sale. He could have lost a sale for lots of reasons, right. You could lose sales because they just don't like the delivery times or the schedule of deliveries or the packaging or the way the driver looks when they deliver the product, who knows.

But, you have to show for a Robinson Patman Act case under Reader Symco and under Toledo Mack a concrete we were head to head at the Wawa on the corner of 6th and Market and the price you got was so much lower than the price I got when I bought the product I lost that sale, and that is nowhere in this complaint, nowhere. Thank you.

THE COURT: Mr. Landau, I guess two questions. Did you plead with that amount of specificity and do you need to plead with that amount of specificity?

MR. LANDAU: Can I answer the second question

first, Your Honor?

THE COURT: Yes.

MR. LANDAU: You don't need to plead with that level of specificity. You are also not required to do that even to win the case. So, the Volvo versus Reader Symco case, which is a Supreme Court case, first of all, it is a question about what happens at summary judgment and trial, not what happens on the motion to dismiss.

And the problem for the plaintiff in that case was that it was discovery revealed and the plaintiff didn't contest they weren't competing with the other Volvo dealers for the same sales.

They were competing to be the Volvo bidder, and the ones who lost out didn't buy the trucks. So, there wasn't competition. Totally unlike this case when both the plaintiff and HLA are buying the same set of brands on a regular basis.

It is also not true that the only way to win the case at trial, which we are a long way away from is to show particular customers that you lost. Look, if we -- if Your Honor thought we had to allege specific names of customers, we could do that. We could amend, it is not required.

They don't have any case where the Robinson

Patman claim was dismissed because a failure to allege specific customers whose sales were lost. The complaint does have a lot of information about contemporaneous communications from the plaintiff to CA talking about this customer of mine is saying that he is getting a better price from HLA than he can get from me.

What Volvo says and it dates back to the Morton Salt case from the Supreme Court and it has been reiterated by the Supreme Court and the Third Circuit is that there are two ways to show the necessary competitive injury.

One way, certainly is specific lost sales to specific customers. But, what the Supreme Court says is if you don't have that then you can still show the necessary injury if you can show a significant price reduction received by a competitor over a substantial period of time.

It is true, it has to be an actual competitor, but these guys are actual competitors. They are both buying the product, actual sales, $11 million that my client bought over this year and a half period where we say HLA was getting better pricing.

So, even if we don't get through discovery

specific sales that were lost, or even if we don't amend the complaint to name the customers whose sales were lost at particular times, that's not required even to win on the merits.

But, if we look at the cases where courts consider motions to dismiss Robinson Patman Act claims, like the ITP case, the J.D. Fields case, the Dayton case, the College Bookstores case or the Alarmax case from the Western District from just last month, none of them have this level of specificity about the particular products, the particular times and the particular prices.

There is just no way for my client to know all of the dates on which HLA purchased and all of the prices that they got, and while it is possible that in some other case maybe we would have caught a glimpse of HLA's invoice, that's not the only way to have a Robinson Patman Act claim, that's why we have discovery.

We have alleged with specificity why it is plausible that there was this difference in price for the same products at the same time, and to get over a motion to dismiss that's all that we have to do.

THE COURT: All right.

MR. LANDAU: Thank you.

MR. OSTOYICH: Can I add two more minutes, Your Honor?

THE COURT: Sure.

MR. OSTOYICH: So, two things. One is yes, the complaint has lots of communications of the plaintiff saying I heard that so and so told me that the price was lower.

But, the complaint does not have, and you did not hear, in fact he says he doesn't need to plead it, a concrete customer, a Wawa on that corner that they both called on, that they pulled up their trucks and they said ah, I missed a sale, I would have sold a carton of this or a carton of that, I lost it because you have a lower price. That is within his control. That is something a seller would know.

Did they actually contemporaneously, because that's what the Robinson Patman Act requires, sell like quantity of goods, the same thing, no Wawa purchases 100 boxes of Havatampas, 100 boxes of Dutch Masters every Monday at 6:00 a.m., pulled up the truck together, they would know that, but it's not in the complaint.

Now, one other point. On the law he cited this presumption, this presumption that it is okay to sort of generally have a lower price over time. That's

wrong. That's wrong. I would submit just take a real close look at Reader Symco of the Supreme Court and Toledo Mack in this Circuit.

Reader Symco says you are only competing for Robinson Patman Act purchases, for Robinson Patman Act claims, if you are buying the same product at the same time of like quantity and all of that stuff and selling to the same customer.

So, a general well, you were selling in Western Pennsylvania and I was selling in Eastern and our trucks were pulling up at different Wawas in different locations doesn't do it.

And I will give you a quote. Reader Symco says "Absent actual competition with a favored Volvo dealer," so in that case you had a favored Volvo dealer and the disfavored Volvo dealer,

"Absent actual competition to sell the same truck to the same truck fleet Reader cannot establish the competitive injury required under the Act." Has to be for the same customer.

Again, that is within his control. He ought to know when his trucks pulled up and who they were selling to at the corner of Market and 6th. Toledo Mack same thing.

The expert in that case, the plaintiff's

expert in that case had generalized averages. Well, over time this guy got a higher price and this guy got a lower price. Not good enough.

Toledo Mack says the expert did not compare the amount of different price Mack offered to Toledo and to other dealers when they were competing directly against one another for a sale to the same customer. That's the Wawa on the corner of Market and 6th. That's what is required.

And yes, they were summary judgment cases, but as a matter of law, you don't get to a jury. What that says is you don't get to a jury by just saying well, just generally over an eleven-month period they got a different price than I did in some places and at some point that hurt me.

Particularly when, as the complaint also says, actually, we weren't really hurt that much, we grew from zero to 30 percent. To impose that million expense to go forward with discovery, I would just ask you to ask them you can't say on one hand we did really well, we did super well across the state, but just trust us, somewhere out there on the corner of somewhere and somewhere there is a Wawa that we both pulled up our truck and I lost that business because of you. Define it. Maybe amend the complaint and define

it if it is out there. That's all. Thank you.

MR. LANDAU: Your Honor, the one thing that we agree upon so far is that Your Honor should take a close look at what the Supreme Court and the Third Circuits say about how you prove injury to competition in a Robinson Patman Act case, because what Your Honor will find is that the defendants are consistently only citing one half of the equation.

They are totally eliminating this Morton Salt doctrine which is that you can prove competitive injury not just by means of lost sales, but by a significant price reduction over a substantial period of time.

But, this is an argument that we will be having at summary judgment because there is no case where a motion to dismiss is granted that has been cited because we haven't proven lost customers or sales on the merits. We will do that.

We believe discovery will reveal that, but even at the merits, even at trial we don't have to do that. The actual competition requirement is that there need to be actual sales.

In the Volvo case the disfavored customer wasn't buying at all. They didn't make the purchase. They say they got a different price quoted to them, but then they didn't buy.

And all that that means and all that the Toledo Mack means, because it is about the same sort of situation, is that if you don't actually make the purchase then you are not actually in competition because just competing for the opportunity to buy isn't enough under the Robinson Patman Act. But, that is not what we have here.

And then on this point about the market share, I do just want to say a word about that.

THE COURT: Yes, why don't you touch on the fact they are making a big deal on the fact that you grew 30 percent, that that's not good enough.

MR. LANDAU: Well, we would have done better, Your Honor, that's the whole point, is that the fact that we are able to have some limited success despite the discrimination in price, doesn't mean that we wouldn't have done better if we were actually on a level playing field with HLA.

And, again, the fact that we were able to take any market share away from them is, itself, proof that we are competing for the same dollar, we are head to head for the same customer.

That's why when our market share goes up, theirs goes down, and when they force us out of the market ours goes down and theirs goes up again, because

we are competing for the same customers.

THE COURT: All right. Give me just a few minutes, gentlemen, but before I go, just something I want you to think about. I mean, from what I am hearing there is a lot of money on the table on both sides of the V, have you folks talked at all about trying to resolve this case, at all?

MR. LANDAU: Not yet, Your Honor.

MR. BROOKHISER: We have not.

THE COURT: All right. Something to think about. I will be right back.

(Recess, 10:57 a.m. to 11:10 a.m.)

THE COURT: I want to circle back to where I kind of started. If I correctly understand your market, right, are you taking the position that the distribution of any manufacturer's brand could define the market?

MR. LANDAU: No, Your Honor, I am not. It would depend on the facts of each case. The reason why the distribution of this particular brand is a separate relevant market is because of the specific allegations we make about the distribution of mass market cigars.

The need for convenience stores to carry the full line of brands because of the product differentiation that CA has accomplished.

THE COURT: Right. But, you define it by the CA here, right, because could the same argument then be made to Phillip Morris?

MR. LANDAU: I don't know, Your Honor. I wouldn't assume that it could, but we have supported our proposed definition of the relevant market with facts that if validated through the discovery and expert testimony would qualify this as a separate relevant market.

I don't know that it would apply to other types of products or even other types of cigars.

THE COURT: But, it is a subset of the mass market cigars, right?

MR. LANDAU: Correct.

THE COURT: So, you have carved it out of the mass market cigars to the facts of this case, to the distribution of this case of this product line, right?

MR. LANDAU: Yes, Your Honor.

THE COURT: So, in theory, the same argument could be made to any product line of cigars?

MR. LANDAU: I am not sure that that is true, Your Honor. I think it is important here as alleged that CA is a leading manufacturer of these. It might not be the case for a smaller manufacturer that their

products were so important for convenience stores to carry that they had no choice but to deal with distributors that could provide them.

THE COURT: I get your argument that it's facts specific to this case, but on a more global scale you've carved out a sub-group, as it were, of the mass market cigars, right?

MR. LANDAU: That's true, Your Honor. But, it is not unusual where relevant markets are concerned to have markets and sub-markets, and as long as the market at issue in the case is adequately supported from an economic perspective, which has to do with substitutability, you might have relevant markets that are subsets of other relevant markets.

I don't know that even other types of cigars would fit that definition because the reason why distribution of these cigars is a separate relevant market has to do with the way in which these products by this manufacturer are differentiated even from other cigar products and the leading position that they have in the market.

THE COURT: And the individual retailers needed or wanted access to the full line of this product, right?

MR. LANDAU: Correct.

THE COURT: From this manufacturer?

MR. LANDAU: From this manufacturer. That might not be true from every manufacturer. It might not be true from a manufacturer that is less successful.

THE COURT: Like Phillip Morris for instance?

MR. LANDAU: It might not be. It might not be.

THE COURT: But, that is your theory of the market definition, right? Am I understanding it correctly?

MR. LANDAU: That for CA that's true, correct.

THE COURT: Okay.

MR. BROOKHISER: The complaint says the opposite.

THE COURT: I am familiar with the complaint.

MR. BROOKHISER: Okay.

THE COURT: That's why I am trying to get it straight here. Okay

MR. BROOKHISER: Yes.

THE COURT: Is there anything else I need to address today?

MR. OSTOYICH: I have something. So, we have a unique count against us, Your Honor. So, HLA is a

distributor with the plaintiff. We are a buyer.

So, I talked all morning about market definition and price discrimination by Commonwealth to Satnam and HLA, but there is a separate count against us for knowingly inducing the price discrimination.

So, let's back up for a second. So, the antitrust laws promote competition. They want companies to lower prices, customers want to buy, each customer is always trying to buy at a lower price. When I go to a store I am not trying to pay a high price, I try to negotiate a lower price if I can.

So, my client did that. That's what the complaint says. That's not a violation of the antitrust laws. Right. That's what the case law says. That's what the statute says and that's what the case law says, price differences by themselves are not a violation of the anti-trust laws.

A lower price, paying a lower price for something is obviously something we want to encourage. It is not something we want to penalize. In fact, the Supreme Court has gone as far in the Matsushida (ph) case and the Brooke Group case is to say you don't want to chill price competition, lower prices.

So, my client bought at a lower price. Okay.

So, what? That's not price discrimination. The case law, which we have cited, the Gorelick (ph) case in the Third Circuit says "An innocent beneficiary of lower prices is obviously not in violation of the Robinson Patman Act."

We just did what we are supposed to do, asked for a lower price and they gave it to us. So, what is the hook for keeping us in this case? Well, the hook is, in sum total, complaint paragraph 113 which says "HLA knowingly induced and/or knowingly has received discriminatory prices for CA's mass market cigars in the relevant geographic market."

That's about as generic and boilerplate and it is legalese, right, that's a conclusion. Well, who at HLA, when, which products? Were they purchased at the same time? Were we calling on the same stores? Again, none of that is in there.

There is just well, it happened and it is knowing -- it must have been knowingly induced. It has got to be that you knew, and I will read you a quote from the Supreme Court, "You knew that you were inducing a discriminatory price, an unjustified lower price systematically with no reason for it other than to take business away from this guy," this is the American Canteen case, the Supreme Court.

"The buyer whom Congress in the main sought to reach was the one who knowing full well that there was little likelihood of a defense for the seller," Commonwealth, "nevertheless proceeded to exert pressure for lower prices." Well, that's not in the complaint.

Then, in the Gorelick case, the Ninth Circuit said buyers "are not liable if they are the innocent beneficiaries of discriminatory prices." So, we've got a lower price because we just actually were better at negotiating, there is no violation.

So, what makes this a violation? Well, they just say, conclusion, boom, lawyer word, "knowingly induced and/or knowingly has received," and that is about as legalese as you can get. So, there is nothing beyond that.

Now, we briefed that and their opposition, here is what they came back with, HLA's liability under the Robinson Patman Act for its knowing receipt and/or knowing inducement of discriminatory prices flows from their liability, just, you know, luckily flows, no but that's not what Gorelick says, right? That's not what American Canteen says. It says you actually have to show that we exerted pressure systematically knowing it was unjustified to get lower prices.

So, that's what Rule 12 requires in the

pleading, to state a claim you actually have to allege some specific facts, not just boom, the lawyer is hired, he says knowingly induced and/or knowingly received. Not enough.

So, we are -- we have a separate reason for kicking out the Robinson Patman Act case against us. Okay.

THE COURT: Mr. Landau?

MR. LANDAU: Your Honor, the Gorelick case, which is the Ninth Circuit, not the Third Circuit, has to do with this innocent beneficiary, but it was decided at summary judgment after discovery.

And discovery revealed that, in fact, that buyer was an innocent beneficiary, and if discovery in this case reveals that HLA is an innocent beneficiary then we are not going to have a claim against them.

But, we get to have discovery for that. We get to have discovery for what HLA knew and said and when. We have alleged more than just the legal conclusion, we have alleged facts plausibly supporting that there was an agreement between HLA and CA to discriminate and ultimately to exclude the plaintiff from the market.

And specifically, in paragraphs 73 and 74 of

the complaint we refer to a complaint that HLA made to CA that the plaintiff was disrupting the market through its competition, and that is one of the facts that we allege that makes it plausible that discovery will reveal more evidence of an agreement.

We don't need to have a smoking gun at the motion to dismiss stage. We just have to to satisfy Twombly show that the alleged agreement that we plead is plausible, and we have done that not just through actions that CA took against its self-interest like not supplying or not filling orders that the plaintiff placed with it that would have made it money, but also the specific allegation about a specific complaint made around a specific time about the plaintiff from which we can, at this early stage of the case, plausibly infer an agreement.

MR. OSTOYICH: Can I address that, Your Honor?

THE COURT: Sure.

MR. OSTOYICH: So, here is what it says in the sum total. In or around --

THE COURT: Tell me where you are reading from, paragraph?

MR. OSTOYICH: I am reading from paragraph 74 he just cited of the complaint. In or around May,

2012 Mr. Murphy. Okay, well who is Mr. Murphy? Mr. Murphy is a Commonwealth employee, he is not an HLA employee.

So, "Mr. Murphy related to plaintiff that it was accused of disrupting the marketplace through its competition with HLA," it doesn't say we said it. It doesn't say anybody said it. We don't even know. It just says it was accused. By whom? When? Okay. May, 2012.

By whom? We don't know. Even if it was, that's it? That's all you've got to plead? One sentence, some guy some time said something that you -- not clear we did, but let's just say, let's just pretend it does, that you accused them of disrupting the marketplace, that's enough to state a knowing inducement that you exerted pressure knowing full well, under American Canteen that it was unjustified and you systematically got a lower price.

Now, that is also kind of odd because it is May, 2012, that is at the end of price discrimination period. There is literally nothing for the first 15 months of the alleged price discrimination that says my client, any one at my client, because it is people, all right, it is the people who work for an entity, what specific person knowing full well exerted pressure to

get an unjustified systematic lower price, knowing it was a violation of the Robinson Patman Act, there is literally nothing in the complaint.

So, I would submit to you that, again, it is not enough. Mr. Landau keeps saying well, just let it all go to discovery, you can deal with it later. That's what Twombly says you can't do. You can't just weed it out through careful discovery, careful oversight of discovery.

It would be nice in a perfect world if we could. It would be nice if we could have an antitrust case that had discovery that didn't cost a million bucks for everybody.

That's just not the way it works and that's what Twombly recognizes. The Supreme Court says these cases are massive. And let's make no bones about it. This case has six different antitrust violations. This is massive times six. This is to the sixth power of massive. It is going to cost a fortune.

That's it, you just say well, boom, it must have been knowingly induced. It just necessarily flows from whatever Commonwealth did. It can't be right. It can't be right.

There is one other part of this case, which we haven't talked about.

THE COURT: Sure.

MR. OSTOYICH: So, if you will bear with me for five minutes I will just sum it up. So, there is no price discrimination after July, 2012 according to the complaint because they weren't buying. There has got to be two purchases at the same time of the same product. So, after 2012 they weren't buying.

They allege that's a violation of the Sherman Act Section I and Section II and I think the five different permutations. They say it is a conspiracy to monopolize, an attempted monopolization, monopolization and a conspiracy, so four permutations.

Well, what happened? Commonwealth didn't sell it. Okay. Lots of companies, lots of suppliers don't sell to lots of customers for lots of reasons. That's not a violation of antitrust laws.

Colgate, we are going back 30 years now, the Supreme Court said in Colgate a manufacturer has the right to deal or not deal with whoever it wants. All right.

So, the allegation is Commonwealth decided to sell to us instead of them, us and a bunch of others, by the way, because it says we are one of multiple distributors of Commonwealth banded mass market cigars in the State of Pennsylvania.

So, Commonwealth just said I like these guys, but not that guy, well, that is not a violation of anything. We cited a bunch of cases. It is called the Jilted Distributor Doctrine. There is a whole line of cases, they put a doctrine on it.

It is called the Jilted Distributor Doctrine. Lots of distributors, manufacturers say it all the time, I want to streamline. I don't need eight guys out there selling my product, calling on the same Wawa over here, this guy, maybe for whatever reason we just don't want him.

Okay. That's not an antitrust violation. So, Crane in the Sixth Circuit, we've cited Fifth Circuit cases and we've cited a Third Circuit case, Race Tires, manufacturers can decide that they want to sell to one less distributor.

It has no effect on interbrand competition, Commonwealth versus the other guys who are making the mass market cigars and the premium cigars. It has no effect on interbrand competition. It is not a violation of anything as a matter of law. All right.

Crane was a motion to dismiss case. The Sixth Circuit affirmed dismissal. If you want I can give you a quote on it, but it is a matter of law just saying I decided to stop selling to one distributor,

but continue to keep selling to the other eight distributors or however many there are, doesn't violate Sherman Act Section I or Sherman Act Section II.

Crane was both the Sherman Act Section I and a Sherman Act Section II case. In fact, Race Tires in the Third Circuit said a manufacturer who wants to have an exclusive, so he wants to just stop selling to the other seven guys too, that doesn't violate anything.

We should -- the antitrust laws encourage competition to be the exclusive, for good reason, right. If I am a manufacturer like Commonwealth I might say this guy, if I give him all of my business and he distributes, he is my only distributor in the State of Pennsylvania he is probably going to do a better job against my interbrand competitors.

He is actually going to focus all of his efforts on beating Phillip Morris, not fighting between Satnam and HLA and the other seven or eight guys who are out there selling my own products. That doesn't help me.

So, Race Tires says we want to promote competition to be the exclusive. It is okay for a manufacturer to stop selling to one or even all of the other distributors without violating anything, and that

was affirming summary judgment, but it is the same classic Jilted Distributor Doctrine, the Sixth Circuit, the Fifth Circuit, we cited a bunch of different circuits in there.

So, my client said okay, we would like to buy from you, we did. Commonwealth decided not to sell to them, it is not a violation of Sherman Act Section I or Sherman Act Section II. Thank you.

MR. LANDAU: A manufacturer can deal with whoever it wants if it does so unilaterally. The defendants concede that in their brief. If it is not unilateral, if it results from an agreement then it is a whole other situation, and that's what the antitrust laws are about.

THE COURT: Well, when you say an agreement, an agreement with whom?

MR. LANDAU: Between the distributor and the manufacturer. So, what we allege is that when CA was discriminating in price and when it ultimately refused to deal with the plaintiff, stop selling to it, that wasn't just CA's unilateral decision.

We allege it was part of an agreement. And we are not going to be able to detail all of the aspects of that agreement, who said what to whom on every occasion without discovery. We can support that

that agreement is plausible.

There is, at least one example that we know of, we think discovery will reveal more where HLA complained to CA about plaintiff disrupting the market and Mr. Ostoyich read to you from paragraph 74, but I would just encourage Your Honor to read that in conjunction with paragraph 73, which specifically says that it was HLA that was complaining to CA. That's what we allege.

The point, though, about whether a manufacturer can choose an exclusive distributor isn't an issue in this case, because CA didn't have exclusive distributors, HLA wasn't an exclusive distributor for CA.

And just because a defendant could accomplish something lawfully doesn't mean that if it goes about it in a different way that that is also necessarily lawful. Lots of things that are appropriate and legal for a company to do unilaterally become unlawful when it is the result of a conspiracy or agreement.

And the cases about manufacturers substituting one distributor for another, like the Crane and Shovel case and most of the other cases that the defendants cite, occur in that context of you have one distributor, you replace them with another

distributor as an exclusive, and when you do that, when that is what is at issue the distributor who is left out doesn't have a claim because the manufacturer is allowed to have an exclusive distributor.

But, they have made a choice not to do that, not to have exclusives, but to sell to anybody, except they didn't sell to my client and we allege the reason they didn't sell to my client is because of this agreement between HLA and CA.

The Race Tires case which is the Third Circuit authority is very different from this one in a few respects. One is it was a summary judgment case, not on a motion to dismiss.

So, it was decided on a full record about what the facts really were, and it was about exclusive distributors and the opportunity to compete for exclusive contracts, which is not what happened here.

Race Tires doesn't say that getting rid of one distributor and keeping others is the same thing as choosing one exclusive over another. Race Tires was about substituting one exclusive distributor for another.

But, even so, the Third Circuit in Race Tires specifically held that exclusive arrangements are not exempt from antitrust scrutiny. So, it is not some

talismanic thing that a defendant can say well, it was an exclusive agreement, even though this wasn't.

You still need to scrutinize it under the antitrust laws, and that has to happen on a fully developed record at the summary judgment stage, not on a motion to dismiss before we have the opportunity to develop those facts.

MR. OSTOYICH: May I respond, Your Honor?

THE COURT: Sure.

MR. OSTOYICH: So, Mr. Landau's response is part one, wow, this is a little different than (inaudible) of distributor because there was an agreement, an alleged agreement between HLA and Commonwealth, so Commonwealth and HLA agreed well, we, Commonwealth are going to sell to you and a bunch of other guys, but not that guy.

Okay. Crane, Sixth Circuit case, affirmed dismissal on a motion to dismiss of a Sherman Act Section I conspiracy claim that the manufacturer and the distributor agreed. Also affirmed dismissal on a Section II monopoly claim, the same exact situation.

He said well, this is a conspiracy, Crane affirmed dismissal on a conspiracy count where the manufacturer agreed to sell to this guy, but not that guy. Here is what they said. By the way, they are not

the only circuit, because here is what they said.

"The Fifth Circuit held that even if a conspiracy between a supplier and its distributor to eliminate another distributor were proven, the supplier would not have violated the antitrust laws. This is not a violation because," point two, he says well, Race Tires is different, it is a summary judgment case, Race Tires says "As a matter of law it is okay for a manufacturer to have an exclusive with a company." So, if you can have an exclusive logically you can have a less than exclusive, and that is what he has alleged. He has alleged that after July of 2012 Commonwealth decided, agreed with us that it would sell to us and a bunch of other guys, but not them.

Well, if you can go so far as to say I am going to give all of my sales to HLA, if that would be okay under virtually all circumstances, well, logically it has go to be okay to say I am not even going to go that far. I am just going to give some of my business, some if it is going to go to these other guys, but not that guy because we just decided for whatever reason we don't want to do that.

Again, when you look in any anti-trust Horn book I guarantee you will see the classic Jilted Distributor Doctrine, because this happens all of the

time. Our economy is premised on having distributors who distribute products, and not everybody who wants to buy a distributor product gets to have a distributorship.

Manufacturers can say I like that guy, that guy, that guy, but not this guy. There is no antitrust violation. And I will put it in other terms too. All right.

You kind of negotiated a contract, even if you have a contract you can say I may have a contract exclusive with that guy, but not this guy, but that is not even what we are talking about here. We are just talking about the purchaser or the purchaser, I guess, because the complaint doesn't say they were in a contract.

So, of course they can say and we can accept I like to buy your products, so would these other five or six guys, but, I don't want to sell to that guy, you are not required to, that's the Colgate Doctrine, it is a long doctrine in antitrust and the classic Jilted Distributor Doctrine goes right along with it and this case is that case exactly. Thanks.

THE COURT: Last round on this issue.

MR. LANDAU: Your Honor, competition to be the exclusive distributor isn't the same thing as

competition among distributors. The Crane and Shovel case is about becoming the exclusive distributor.

Of course in that situation the manufacturer has to talk to the new distributor to make sure they are going to take over. That is not the same thing that we have in this case where we allege that HLA complained about this specific competitor that was a threat and as a result they got forced out of the market.

In the Third Circuit the Toledo Mack case which we talked about before has Robinson Patman elements to it, there is also a conspiracy element to it, and in that case dealer complaints were part of, but not the entirety of the evidence relied upon to find the conspiracy evidence sufficient.

So, just the fact that we've got dealer complaints about another dealer, distributor complaints about another distributor doesn't mean that it is irrelevant as a matter of antitrust law. It can be part of the evidence that would sustain the case on summary judgment.

And just again about Race Tires, it is just not true that Race Tires said exclusive agreements are always okay. It said the opposite. It said exclusive arrangements are not exempt from antitrust scrutiny,

and here we don't even have an exclusive arrangement.

They are saying we are going to sell to anybody who wants to buy from us. We are not going to force you to compete to be the exclusive distributor, which might have some benefits for consumer welfare, because you are really going to go in with your best effort.

But, even if that is what they did, it wouldn't be exempt from antitrust scrutiny and a case like Race Tires at the summary judgment stage is going to look at all of the facts and the evidence and make a determination.

Thank you, Your Honor.

THE COURT: Gentlemen, anything else?

MR. BROOKHISER: Can I add a couple of points, and I know you said this was the last round, but on this agreement thing, we have heard a lot about complaints, that isn't enough.

Two Third Circuit cases have said that specifically, the Intervest versus Bloomberg and the RDK Trucks versus Mack case that we cite in our reply brief, and this debate about exclusive distributorship versus other things, you know, this whole allegation is a bootstrap operation.

Because in order to prove an agreement under

Matsushida and Monsanto in a vertical arrangement you have to allege and ultimately prove things -- evidence that is more that there is an agreement on an illegal scheme and that if conduct is equally consistent with lawful competition and unlawful that doesn't do it.

That's all they have alleged that we didn't sell to them. So, you can't infer from that that there must be something wrong, and that's all the complaint says absent the argument that there was a complaint from HLA, which is insufficient in going to the Third Circuit.

MR. OSTOYICH: Just for the record it actually doesn't even say it is a complaint from HLA, just so we are clear.

THE COURT: I remember that, Mr. Murphy.

MR. OSTOYICH: Some other guy said he heard it from someone. Can I, I know you are at the saturation point, Your Honor, can I just say one other thing?

THE COURT: You came all of the way from D.C., sir.

MR. OSTOYICH: Thank you, and I can't get back, and probably the trains are shut down.

So, two of these counts have yet another

element that is required. There is an attempted monopolization count against HLA, so think about this, so he says there are lots of mass market cigar producers out there, CA is one of them, and there are a bunch of premium cigar producers out there.

HLA just distributes these guys and it is attempting to monopolize these guys' cigars only in the State of Pennsylvania. Okay. Attempt and a conspiracy to monopolize, which they have also alleged, both require specific intent.

Okay. Now, again, Twombly says you have to kind of look at the allegations to see if they are just lawyer words and conclusions or if they are facts. Because, it is going to cost a lot of money to go through discovery, you can't just weed it out later and make everybody pay that money.

So, what is the sum total of the allegations of specific intent? My client, HLA, had the specific intent to preserve a monopoly, to get a monopoly and preserve a monopoly, well, it says the sum total.

Paragraph 145 of the complaint, HLA has specifically intended its conduct as alleged herein to have a direct -- have the effect of controlling prices and/or destroying competition. That's a conclusion. That's a lawyer word.

All right. It doesn't say who at HLA, it doesn't say when, it doesn't say how they would have formulated that, I mean, it doesn't say anything else. Boom, just stick it in there.

Here is what Dentsply II in the Third Circuit says. In affirming dismissal of a conspiracy count because the specific intent allegation was too conclusory.

Here plaintiffs point us to their allegation that defendants "have acted with the specific intent to unlawfully maintain a monopoly." Pretty much verbatim the same with what they have done. Boom, stick it in the complaint, it is good enough.

"There are no facts behind it, so it does not plausibly suggest knowledge of unlawfulness on the dealer's part," the defendants' part. "At bottom, the plaintiff's allegations of specific intent rest not on facts, but on conclusory statements that strung together with antitrust jargon," if that is not antitrust jargon I don't know what is, I have been doing this a long time.

To say the defendant acted with specific intent to do dah, dah, dah is antitrust jargon. "It is an axiom of antitrust law, however, that merely saying so does not make it so for pleading sufficiency

purposes."

I submit, Your Honor, if you took the paragraph I just read, 145, and you lined up the words, HLA acted with the specific intent to do this that and the other thing, and you compared to the language that the Third Circuit affirmed dismissal of in the Dentsply II case, you see that they are almost verbatim the same, didn't work there, it doesn't work here. Thank you.

THE COURT: All right, Mr. Landau, this is really it.

MR. LANDAU: Your Honor, in our brief we discuss the Dentsply II case and how you can infer specific intent from agreement, so I am happy to rest on what we said here.

THE COURT: Excellent, all right. So, I will remind you folks that Judge Hey is available should you at some point get a hankering to discuss resolution of this case, just reach out to Judge Hey. All right. Have a good one. Thanks for coming in today, you will hear from us shortly.

ALL: Thank you, Your Honor.

THE COURT: Take care.

(Proceedings adjourned at 11:41 a.m.)

* * *

CERTIFICATION

I, Brad Anders, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

7/27/15
Date

Brad Anders