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

SATNAM DISTRIBUTORS LLC, D/B/A/
LION & BEAR DISTRIBUTORS,
553 Winchester Road, Unit B,
Bensalem, PA 19020

Plaintiff,

v.

COMMONWEALTH-ALTADIS, INC.,
5900 N. Andrews, Suite 1100,
Fort Lauderdale, FL 33309

COMMONWEALTH BRANDS, INC.,
5900 N. Andrews, Suite 1100,
Fort Lauderdale, FL 33309

ALTADIS, U.S.A., INC.,
5900 N. Andrews, Suite 1100,
Fort Lauderdale, FL 33309; AND

HAROLD LEVINSON ASSOCIATES, INC.,
21 Banfi Plaza
Farmingdale, NY 11735

Defendants.

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

DEFENDANT HAROLD LEVINSON ASSOCIATES, INC.'S
REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

INTRODUCTION

Plaintiff, a disgruntled former customer, complains that a single manufacturer would not sell him its products at the prices Plaintiff wanted. Of course, every buyer would like to name its price. But that everyday grievance cannot be trumped up into a multi-count federal court antitrust complaint under the Robinson-Patman Act and Sherman Act Sections 1 and 2—and Plaintiff's Opposition underscores exactly why it is defective as a matter of law.

First, the Opposition misstates the law. It repeatedly tells this Court that not a single one of any of the elements of various claims can be decided on the pleadings. Not one. In Plaintiff's view, Fed. R. Civ. P. 12 simply does not apply to antitrust claims. *E.g.*, Opp'n. at 1 ("Arguments of the type now raised by Defendants are typically and more appropriately advanced at the summary judgment stage"), 12 (knowing inducement under the Robinson Patman Act "is an issue for summary judgment, not a motion to dismiss"), 13 (market definition is "more appropriately addressed following discovery and expert testimony"), 17 ("best addressed at a later stage of the litigation, following discovery"), 18 (" 'antitrust injury' is not typically resolved through motions to dismiss").

But that is obviously not the law. Motions to dismiss antitrust claims are regularly granted. *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548 (2007) (complaint properly dismissed for failing to state Sherman Act claim); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) (same); *Ottilio v. Valley Nat. Bancorp*, 591 F. App'x 167, 168 (3d Cir. 2015) ("[b]are allegations such as these are insufficient to survive a motion to dismiss"); *Faber v. Wells Fargo Bank*, No. Civ. A. 15-00191, 2015 WL 1636967, at *6 (E.D. Pa. Apr. 13, 2015) ("without factual backing, this conclusory statement is not sufficient to survive Wells Fargo's motion to dismiss"). Plaintiff compounds its misstatement of the law by heavily citing cases decided under the lax *Conley v. Gibson* standard for evaluating the sufficiency of pleadings, *e.g.*, Opp'n. at 13 (citing Judge Padova's pre-*Twombly* decision in *Peerless Heater Co. v. Mestek, Inc.*, No. Civ. A. 98-6532, 1999 WL 624481 (E.D. Pa. Aug. 6, 1999)),

23 (citing Judge Joyner's pre-*Twombly* decision in *Hewlett-Packard Co. v. Arch Associates Corp.*, 908 F. Supp. 265 (E.D. Pa. 1995)).

Nearly a decade ago, though, the Supreme Court held in *Twombly* that district courts must carefully scrutinize antitrust claims and find factual allegations sufficient to support each element of an antitrust claim "before allowing a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. at 558. The Court expressly held that district courts "must insist upon some specificity" in factual allegations. *Id.* It rejected the loose *Conley* standard Plaintiff so heavily relies on here and held that it had "earned its retirement" and was "best forgotten." *Id.* at 563.

Second, Plaintiff's Opposition misstates the Complaint's allegations. *Twombly* held that a claim is defective as a matter of law without specific factual allegations supporting each element of the claim. The Court held that is a plaintiff's "obligation" under Fed. R. Civ. P. 8 to provide the factual "grounds" for its claim, an obligation that "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 548.

As a result, conclusory assertions—saying that the prices on whatever products were purchased in whatever quantities they were purchased were "discriminatory" or saying that defendants "conspired" or "agreed" to stop selling to plaintiff without alleging any facts showing any meeting of the minds between them (or even any communications at all)—fail as a matter of law. In *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009), the Supreme Court expanded on *Twombly* and held that "[w]e begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth." The Court held that conclusory assertions (that a defendant "knew of" certain facts or was "the principal architect" of a violation of law) must be disregarded on a motion to dismiss because they were only "conclusory and not entitled to be assumed true." *Id.* The Third Circuit has repeatedly followed this mandate and disregarded conclusory allegations. *E.g.*, *Burtch*, 662 F.3d at 225 (affirming dismissal of Sherman Act Section 1 conspiracy claim because "[i]n light of the conclusory nature of these allegations, they are not entitled to assumptions of truth") (citing *Twombly*, 550 U.S. at 557).

But conclusory assertions are all the Complaint here contains, as Plaintiff's Opposition makes clear. For example, Plaintiff acknowledges that the Complaint does not contain factual allegations showing *any* sales of specific CA-branded mass-market cigars to Plaintiff and HLA at different prices, let alone contemporaneous sales of similar quantities and qualities of cigars at prices that were systematically different and had no justification at all. Instead, Plaintiff asserts, it "need not" provide those factual allegations and it is enough to allege a series of conclusions: that Plaintiff purchased unidentified types of CA's mass-market cigars at unidentified prices "on a regular and continuous basis," that "HLA must have purchased at least as frequently," and that "Plaintiff alleges it paid discriminatory prices." Opp'n. at 7-8.

Plaintiff's Opposition highlights the Complaint's equally conclusory assertions that HLA "knowingly induced" CA's alleged price discrimination and "agreed" that CA would stop selling Plaintiff. What factual allegations support those conclusions with the specificity required by *Twombly* and show, for example, that someone employed by HLA had actual knowledge (or requested or agreed with someone from CA) that CA systematically charged Plaintiff higher prices for comparable purchases? The Opposition offers only more conclusions: "HLA's liability under the Robinson-Patman Act for its knowing receipt or inducement of discriminatory prices flows from CA's liability. Plaintiff alleges that HLA entered into an agreement with CA." Opp'n. at 12. After *Twombly*, such conclusory assertions fail as a matter of law. The Complaint should be dismissed in its entirety.

ARGUMENT

I. PLAINTIFF HAS FAILED TO ALLEGE SYSTEMATIC PRICE DISCRIMINATION IN VIOLATION OF THE ROBINSON-PATMAN ACT

The Robinson-Patman Act is very precise. The statute only prohibits price differences on *contemporaneous* purchases of *comparable quality and quantity* of goods that are *systematic* and *not justified* by differences in the cost of serving customers or meeting competition for legitimate reasons. *Volvo Trucks v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 178 (2006) ("The compared incidents were

tied to no systematic study . . . . We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality.") (internal citations omitted).

A. The Complaint Fails to Allege Systematic Price Discrimination on Contemporaneous Purchases of Comparable Quantity and Quality

To illustrate what Plaintiff is required and ultimately fails to plead, the Robinson-Patman Act and *Twombly* require that Plaintiff show that the price it paid for specific brands of CA's mass-market cigars, e.g., Dutch Masters, were *systematically* higher than what HLA paid. Plaintiff must show that the specific brands of CA mass-market cigars it bought were within the same time period when HLA bought, and that the difference in price was not justified by, for example, meeting competitors' prices.

Instead, Plaintiff argues that it "sufficiently alleges that CA made at least two contemporary sales of the same commodity at different prices to Plaintiff and HLA." Opp'n. at 8. Plaintiff would have this court believe that this is enough following Judge Diter's denial of a motion to dismiss that rested on only "the barest of allegations." *ITP, Inc. v. OCI Co., Ltd.*, 865 F. Supp. 2d 672, 684 (E.D. Pa. 2012); Opp'n. at 9. But in *ITP* the plaintiff alleged a specific brand of distributed silica, "Konasil." *ITP*, 865 F. Supp. 2d at 676. By contrast, Plaintiff consistently refuses to identify the specific brands of CA mass-market cigars that are the subject of its allegations as "[a]ll of this will come out during discovery." Opp'n. at 7. The *ITP* case is also inapposite as the court noted that the plaintiff: "(a) identified the goods purchased; (b) the desired quantity; (c) the price; (d) delivery terms; and (e) payment terms." *Id. at* 676.

To support the supposed sufficiency of its vague allegations, Plaintiff cites pre-*Twombly* case law. Plaintiff wrongly avers that it is sufficient to allege "a plausible claim of illegal antitrust activity." Opp'n. at 5. As authority, Plaintiff cites the Third Circuit out of context, as follows: "[t]he question is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." *Dorsey v. Daub*, No. 09-CV-3879, 2011 WL 322887, at *3 (E.D. Pa. Feb. 2, 2011) (dismissing plaintiff's civil rights claims as a matter of law and state law claims for lack of subject matter jurisdiction) (citing *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996)). But the *Dorsey* court was quoting *Nami v. Fauver*, which is pre-*Twombly* case law, under which it was sufficient to provide a

"short and plain statement of the claim" based on the old *Conley* standard that was ***abrogated*** by *Twombly*. *Nami v. Fauver*, 82 F.3d 63, 65, 69 (3d Cir. 1996); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief."); *Twombly*, 550 U.S. at 561-63 (abrogating *Conley v. Gibson*).

Plaintiff similarly cites pre-*Twombly* case law in an attempt to support its other arguments that it has met the burden to show that Plaintiff and HLA purchased contemporaneously. Plaintiff argues that because CA sold its mass-market cigars to Plaintiff between January and August 2011 (eight months), November 2011 and January 2012 (three months), and February and May 2012 (four months) that its sales are contemporaneous with sales to HLA based on its own assumption that HLA must have purchased CA mass-market cigars during the same periods. Opp'n. at 8-9.

Alleging sufficiently long periods of time to create the assumption that some sales were contemporaneous is exactly the type of vagueness that the Supreme Court targeted in *Twombly*. *See, e.g. Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 228 (3d Cir. 2008) ("a plaintiff must allege facts to demonstrate that . . . the defendant made at least two contemporary sales of the same commodity . . . .") (citations omitted). Not surprisingly, therefore, the Robinson-Patman case authority that Plaintiff tries to rely on to argue that its vague assertions of contemporaneity are sufficient pre-dates *Twombly*. *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 372 (2d Cir. 1958) (granting petition to review and set aside a Federal Trade Commission order that a distributor had violated the Robinson-Patman Act by giving one customer a promotional allowance that it did not grant another). But even in that case, cited by Plaintiff, the court stated: "[t]he Commission considered it immaterial whether the subsequent sale followed the promotion allowance by a matter of weeks or months. *However, the time interval is a determining factor*.") *Id.* (emphasis added). This case can be further distinguished as the court was focused on "substantial sales" that were around the July 4 holiday as opposed to "two trivial sales isolated in time by at least five months." *Id.*

In an attempt to shore up its arguments, Plaintiff cites a 2013 non-Robinson-Patman Act case, *In*

re LIBOR-Based Fin. Instruments Antitrust Litig, 935 F. Supp. 2d 666, 685 (S.D.N.Y. 2013) (the amended complaints asserted a cause of action under Section 1 of the Sherman Act, and the equivalent section under California's Cartwright Act, but do not contain a Robinson-Patman Act cause of action). That case is inapposite as, unlike under the Robinson-Patman Act, contemporaneity of sales is not necessary for Sherman Act liability.

The Complaint further fails to state a claim against HLA for the same reasons that CA Defendants' state in their Reply. HLA incorporates that Reply by reference, instead of repeating each defect in Plaintiff's Claim I in additional detail here. *See United States v. Dowdy*, 149 F. App'x 73, 75 n. 1 (3d Cir. 2005) ("[w]hen appropriate, a district court can allow defendants to incorporate by reference the arguments of their co-defendants.").

B. The Complaint Fails to Allege That HLA "Knowingly Induced" Price Discrimination

An additional requirement to state a price discrimination claim against HLA is that Plaintiff must allege that HLA "knowingly induced" systematically lower prices than Plaintiff paid on contemporaneous purchases of comparable quantity and quality except for reasons permitted by the Robinson-Patman Act, such as meeting competitors' prices. *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 79 (1953) ("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, nevertheless proceeded to exert pressure for lower prices.").

Once again, Plaintiff notes that it "expects discovery to provide admissible evidence supporting its allegations." Opp'n. at 12. But this is deficient as a matter of law as Plaintiff has failed to allege that HLA knowingly induced *systematically* lower, and *unjustified*, prices on *contemporaneous* purchases of *comparable quantity* and *quality*. There are no factual allegations that HLA *knew* that it was receiving prices that contravened the Robinson-Patman Act and did not have an associated defense. After all, buyers are "not liable if they are innocent beneficiaries of discriminatory prices." *Gorlick Distrib'n Centers, LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1022 (9th Cir. 2013) (citation omitted).

II. PLAINTIFF'S MONOPOLIZATION AND ATTEMPT CLAIMS FAIL AS A MATTER OF LAW

A. A "Jilted" Distributor Fails to State a Claim

Recognizing that "jilted distributor" case law is well-recognized authority cited by courts to dismiss claims such as Plaintiffs where "commercial disappointment at losing a distribution contract with a manufacturer fails to allege restraint of trade," Plaintiff seeks to distinguish that line of cases. *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23 (2d Cir. 2006) (affirming District Court's dismissal for failure to state a claim as complaint failed to allege facts that could demonstrate competitive injury). Plaintiff argues that it is not a "jilted distributor" because "CA's actions were **not** unilateral" and there are "plausible allegations of concerted conduct." Opp'n. at 19-20. However the courts also dismissed those jilted distributor plaintiffs' claims that defendants' refusal to sell amounted to a Sherman Act Section 1 conspiracy. For example, a district court's dismissal for failure to state a cause of action was affirmed as "[Plaintiff's] allegations that [defendants] conspired . . . to exclude [plaintiff] from distributing construction machinery parts were too general to state a conspiracy in restraint of trade"). *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 804 (6th Cir. 1988) (distributor "jilted" so that manufacturer could award exclusive distributorship to another has no cause of action under the Sherman Act). Similarly, in *Rutman Wine Co. v. E. & J. Gallo Winery*, "Rutman complain[ed] that Gallo terminated its distributorship agreement as part of a conspiracy or combination." 829 F.2d 729, 732 (9th Cir. 1987) (no antitrust violation is present when distributors are terminated unless the exclusive agreement is intended to or does harm to competition). The *Rutman* court affirmed the district court's grant of a motion to dismiss as "the specific intent to harm competition [was] insufficiently pleaded . . ." and a "pleader may not evade these requirements by merely alleging a bare legal conclusion."). *Id.* at 736 (citation omitted).

Plaintiff further references *Chase v. Nw. Airlines Corp.* to argue that "[a] close examination of the typical jilted distributor cases . . . rest on facts and circumstances substantially distinguishable from the present case." Opp'n. at 19; 49 F. Supp. 2d 553, 566 (E.D. Mich. 1999). The facts of *Nw. Airlines*

are distinguishable from typical distributor cases. Even a cursory examination of that case is sufficient to show that the facts are different to a typical jilted distributor case as the plaintiff was an airline passenger—not a distributor —"jilted" or otherwise. Moreover, the anticompetitive conduct alleged was a "refusal to sell" policy that prohibited various Northwest ticket agents from offering other, less expensive alternatives. *Id.* at 568-69. Not a situation, as is the case here, where a disgruntled distributor tries to turn its grievances at the loss of its supplier's business into antitrust claims. An examination of the typical jilted distributor cases do, therefore, show that they are directly on point.

B. The Complaint's Conclusory Allegation of a Market Consisting of the Distribution of CA's Mass-Market Cigars in Pennsylvania Fails as a Matter of Law

In direct opposition to what Third Circuit precedent requires Plaintiff contends that market definition is more properly considered during discovery. Opp'n. at 13. This is in error. Plaintiffs are required to sufficiently allege a relevant market at the motion to dismiss stage, and the alleged relevant market must include all interchangeable substitute products. *Building Materials Corp. v. Rotter*, 535 F. Supp. 2d 518, 524 (E.D. Pa. 2008) (where a plaintiff alleges a "relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's failure, the relevant market is legally insufficient and a motion to dismiss may be granted.").

The Complaint's conclusory allegation of a market consisting of CA's mass-market cigars in Pennsylvania fails as a matter of law as pled in CA Defendants' Reply to Plaintiff's Opposition. HLA incorporates that motion by reference. *See Dowdy*, 149 F. App'x at 75.

III. THE "CONSPIRACY" COUNTS FAIL AS A MATTER OF LAW

Plaintiff tries to argue that its claims are different and should avoid a motion to dismiss because it alleges a conspiracy. Opp'n. at 19 ("Importantly, Plaintiff alleges that CA's actions were **not** unilateral, and this case falls outside what other courts have described as "jilted distributor" cases."). As explained, this is in error as the "jilted distributor" cases often allege Section 1 or 2 conspiracy claims.

Despite this attempt to rely on its conspiracy allegations to avoid the "jilted distributor" cases, Plaintiff fails nonetheless to adequately allege the core elements to avoid a motion to dismiss. The

required elements that a plaintiff must allege for a vertical "conspiracy" between a supplier and distributor includes a "meeting of the minds" to do something unlawful. *Howard Hess Dental Labs Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 253 (3d Cir. 2010) (affirming the district court's dismissal of antitrust class actions brought by dental laboratories against manufacturers of artificial teeth).

Plaintiff tries to make hay out of its vague allegation that an unidentified person purportedly complained to a CA-employee that Plaintiff was "disrupting the marketplace." Compl. at ¶ 74. That lone allegation does not allege that anyone from HLA complained, nor does it say anything at all about an agreement that CA would, in fact, stop selling to Plaintiff—and this Court cannot leap to the rescue to supply factual allegations Plaintiff has not alleged. Accordingly, Plaintiff does not allege *any* facts, circumstantial or direct, that support its allegation that there was an agreement. Compl. at ¶¶ 44, 48-50, 91-92. It is not enough to assert "a conclusory allegation of agreement at some unidentified point" as that "does supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557.

Realizing that it cannot allege any direct facts, Plaintiff argues that it is permitted to allege circumstantial facts of the purported conspiracy. The authority cited by Plaintiff requires that to sufficiently allege such circumstantial facts Defendants must have "acted contrary to [their] interest[s]," which "means evidence of conduct that would be irrational assuming that the defendant[s] operated in a competitive market." Opp'n. at 22. But Plaintiff cannot allege that either CA or HLA ever acted contrary to their interests. As the Third Circuit explained in *Race Tires*, there are many circumstances where a supplier may decide to deal with one distributor "to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) (affirming district court's grant of summary judgment as plaintiff was granted the opportunity to compete for exclusive contracts that are not in and of themselves unlawful). Furthermore, any promotions or discounts HLA received from CA were obviously in its interests. Accordingly, there is nothing in the behavior alleged by Plaintiff to construe that HLA and CA were acting contrary to their interests. Plaintiff has not sufficiently alleged, therefore,

any direct—or circumstantial—facts to support even the inference of an agreement between CA and HLA.

Nor does Plaintiff sufficiently allege the specific intent that is required to establish a Section 2 conspiracy or attempt claim. *See, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 516 F. Supp. 2d 324, 341 (D. Del. 2007) (requires plaintiffs to plead that alleged conspirators "had a conscious commitment to [Dentsply's] common scheme designed to achieve an unlawful objective, namely that of endowing [Dentsply] with monopoly power."). Plaintiff essentially bases its allegations that CA had the specific intent necessary to conspire because it supplied both HLA and Plaintiff, and then stopped supplying Plaintiff. Then, Plaintiff tries to convert what are everyday transactions into a conspiracy by adding the conclusory statements that the prices charged were "discriminatory" and that HLA had complained that Plaintiff was "disrupting the marketplace." These are yet more examples of why the Complaint does not satisfy *Twombly* and this Court should grant Defendants' motions to dismiss.

IV. ALL OF PLAINTIFF'S CLAIMS FAIL BECAUSE THE COMPLAINT DOES NOT CONTAIN FACTUAL ALLEGATIONS OF ANTITRUST INJURY

Antitrust injury requires a plaintiff to "show both: (1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant's act unlawful." *Steamfitters Local Union v. Philip Morris, Inc.*, 171 F.3d 912, 924 n. 6 (3d Cir. 1999) (concluding that negative effects were not sufficiently proximate to meet the requirements of antitrust injury) (citation omitted). This means that Satnam must allege that distributors like it were harmed by the anticompetitive effects of Defendants' alleged conduct. It is insufficient for Plaintiff to argue, as it does, that only Plaintiff was harmed. Opp'n. at 11. Even so, the Complaint implicitly contradicts itself as Plaintiff claims to have suffered antitrust injury at the same time its share increased from 0% to 30%. Compl. ¶¶ 42, 43, 48.

CONCLUSION

For the foregoing reasons, Harold Levinson Associates, Inc. respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

Dated: May 13, 2015

Respectfully submitted,

By: */s/ Robert E. Welsh*_____

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CERTIFICATE OF SERVICE

I, Amy B. Carver, do hereby certify that on this date I caused a true and correct copy of the foregoing document to be served upon the following counsel via electronic means:

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