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 Avenue, Suite 1100,
Fort Lauderdale, FL 33309

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

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

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

Defendants.

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

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

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INTRODUCTION

Defendants Commonwealth-Altadis, Inc. ("Commonwealth-Altadis"), Commonwealth Brands, Inc. ("Commonwealth"), and Altadis, U.S.A., Inc. ("Altadis") (collectively the "Companies" or Commonwealth/Altadis) submit this memorandum in support of their motion to dismiss the Complaint.

The Complaint is brought by a disgruntled former distributor of the Companies ("Satnam"). It alleges a series of inherently implausible antitrust violations against the Companies (without attempting to distinguish among them) and another distributor, Defendant Harold Levinson Associates ("HLA")---a conspiracy to monopolize (Count V) and restrain trade (Count VI) and to discriminate in price (Count I) on sales in a "relevant market" that is artificially restricted to the cigar brands manufactured by Companies.[1]

As the Court of Appeals for the Third Circuit has repeatedly held, however, the "primary concern of antitrust law" is "interbrand competition"—*i.e.* competition between different brands made by different manufacturers---not the intrabrand competition of a single company's products alleged here. *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 227 (3d Cir. 2008) (Jordan, J.) (citations omitted); *see also Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991) (Masmann, J.) ("the primary goal of antitrust law is to protect interbrand competition"). In that regard, the Complaint is devoid of *any* allegation of *any* injury to, or even effect on, *interbrand* competition in the sale of cigars. Instead, it focuses exclusively on an alleged reduction in intrabrand competition in the sale of the mass-market cigars of a single manufacturer—the Commonwealth/Altadis defendants.

[1] A detailed summary of the claims and factual allegations in the Complaint is found in the memorandum in support of HLA's motion to dismiss and is therefore not repeated here.

The Complaint's Sherman Act allegations against the Companies should be dismissed as a matter of law for several reasons. *First*, under the antitrust laws, a relevant market limited to the products of a single manufacturer occurs only in extremely rare instances not alleged to be present here, *i.e.* in a derivative or aftermarket in which the purchaser is "locked in" to purchasing parts or services compatible with the manufacturer's basic product. *See e.g. Queen City Pizza, Inc., v. Domino's Pizza, Inc.,* 124 F.3d 430, 439-440 (3d Cir. 1997) (Scirica, J.).

Second, the claimed Sherman Act violations involve an alleged vertical intrabrand agreement between a supplier (the Companies) and one of its customers (HLA), rather than a horizontal interbrand agreement among competitors. The law is clear that a manufacturer "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv, Corp.,* 465 U.S. 752, 761 (1984). There is no allegation in the Complaint that, even if credited, "tends to exclude the possibility of independent action by the manufacturer and distributor." *Id.* at 768. *See also, TruePosition, Inc., v. I.M. Ericsson Telephone Co.,* 844 F. Supp. 2d 571, 593 (E.D. Pa. 2012) (Kelly, J.) (agreement must be "designed to achieve an unlawful objective").

In addition, the Complaint's claim that the Companies sold cigars to HLA at more favorable prices fails to state a claim for price discrimination under the Robinson-Patman Act ("RPA"). "Merely offering lower prices to a customer does not give rise to a price discrimination claim." *Toledo Mack Sales & Service, Inc.*, 530 F.3d at 227. Rather, a Plaintiff must show that the defendants made "at least two contemporary sales of the same commodity at different prices" and "the effect of such discrimination was to injure competition." *Id.* at 228

Finally, the Complaint's generalized allegations against the Commonwealth/Altadis defendants "collectively" fail to identify adequately what each of the Companies are claimed to have done to apprise them of the nature of the claims against each of them.

STANDARD OF REVIEW

Fed. R. Civ. P. 8(a) (2) requires that the Complaint contain a "plain statement of the claim showing that the pleader is entitled to relief." This statement must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007). While the Complaint need not contain detailed factual allegations, the plaintiff must provide the "grounds" of his "entitlement to relief" against each defendant, not mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., should be granted if, accepting all well-pleaded allegations in the Complaint as true and viewing them in the light most favorable to the plaintiff, a court concludes that the plaintiff is not entitled to relief. The factual allegations must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 663 (2009). "A pleading that offers labels and conclusions or a formulaic recital of the elements of a cause of action will not do." *Id.* at 678. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Id.*.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST THE INDIVIDUAL COMMONWEALTH/ALTADIS DEFENDANTS

Counts I, V and VI of the Complaint purport to allege claims against Commonwealth Brands, Inc., Commonwealth-Altadis, Inc., and Altadis, U.S.A., Inc. However, the Complaint

lumps these three defendants together as a single entity which it "collectively" defines as "CA." *See* Complaint ¶¶1,11.

Significantly, the Complaint's collective claims against the "CA" defendants do not distinguish among the individual CA defendants nor do they identify what each of those companies is alleged to have done that is unlawful. Thus, Count I alleges only that "CA" sold mass-markets cigars to HLA at "discriminatory prices", *id.* ¶ 101, that "CA's discriminatory conduct" harmed competition between Satnam and other distributors, *id.* ¶ 109; and that "CA's multiple acts of price discrimination . . . .constitute multiple violations of the Robinson-Patman Act." *Id.* ¶ 110. Count V alleges that "CA" conspired with HLA to monopolize the market for CA mass-market cigars, that "CA…specifically intended" its actions to "maintain and enhance" HLA's alleged monopoly power, and that "CA" committed acts in furtherance of the conspiracy. *Id.* ¶¶ 132, 134, and 135. Count VI alleges that "CA" and HLA entered into an agreement "for the purposes of foreclosing [Satnam] from effectively competing in the market for distribution of CA's Mass-Market Cigars." *Id.* ¶ 142

While the factual allegations of the Complaint give *some* background information regarding some of the individual companies, that does not make up for the Complaint's failure to particularize the allegations of illegal conduct with respect to each company. *See e.g. Smith v. Wetzel*, Civ. No. 14-88, 2015 WL 58839, at *5 (W.D. Pa. Jan. 5, 2015) (Kelly, J.) (Dismissing complaint in which general allegations against all defendants "fail to establish what role and/or what involvement each of the respective [Defendants] had with respect to the underlying…violation alleged"); *Appalachian Enterprises, Inc. v. ePayment Solutions, Ltd.,* Civ. No. 01-11502, 2004 WL 2813121, at *7 (S.D.N.Y Dec.8, 2004).

The Complaint's failure to particularize allegations by individual defendants is especially evident in the case of Commonwealth Brands. Although each of the Counts is based on alleged sales (or refusals to sell) cigars to Satnam, there is *no* allegation that Commonwealth Brands ever sold or offered to sell cigars to Satnam or to anyone else. Instead, the Complaint affirmatively avers that Commonwealth Brands is "one of the best-selling *cigarette* brands in the United States." *Id.* ¶ 9 (emphasis added). Nor is there any allegation that Commonwealth Brands entered into any agreement with HLA to monopolize or restrain trade in a business it is not alleged to have been a part of, *i.e.* the sale of mass-market cigars. At a minimum, the Complaint fails to state any claim against Commonwealth Brands and should be dismissed as to it.

II. THE COMPLAINT FAILS TO ALLEGE A PROPER RELEVANT MARKET

In order to state a claim for violation of the Sherman Act (Counts V and VI), a plaintiff must allege a relevant market. *Queen City Pizza,* 124 F.3d at 436. A relevant market has two components---a relevant product market and a relevant geographic market. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 513 (3d Cir. 1998). The Complaint fails to allege either a plausible product market or a plausible geographic market.

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

The "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . .the relevant market is legally insufficient and a motion to dismiss

may be granted." *Queen City Pizza*, 124 F.3d at 436 (granting motion to dismiss claims based on alleged single brand product market).

Here, as in *Queen City Pizza*, Plaintiff claims that the relevant product market is the sale of the products of a single manufacturer--mass-market cigars manufactured by the Commonwealth-Altadis companies. Compl. ¶¶ 2, 16-31. Although the Complaint contains the conclusory allegation that there are "no reasonably substitutable products for the mass market cigars manufactured and sold by CA," *id.* ¶ 24, that bald assertion is insufficient to allege a valid single brand market.

As noted, the "primary goal of antitrust law is to protect interbrand competition." *Tunis Bros. Co., Inc.*, 952 F.2d at 728. Not surprisingly, therefore, a manufacturer ordinarily cannot be deemed to have "monopolized" its own products, *United States v. E.I. DuPont De Nemours & Co.*, 351 U.S. 377, 393 (1956), and, absent extraordinary circumstances not alleged here, a relevant market cannot be limited to the products of a single manufacturer. *See e.g. PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412, 418 (5th Cir. 2010), *Green Country Food Mkt. v. Bottling Grp.*, 371 F.3d 1275, 1283 (10th Cir. 2004) (Pepsi branded products not a relevant market). *See also* cases cited in HLA's memorandum in support of its motion to dismiss at [26].

Contrary to its conclusory allegation of a market solely confined to Commonwealth-Altadis cigars, the Complaint repeatedly recognizes that there are other significant manufacturers of mass market cigars and it specifically refers to the "U.S. market for mass market cigars" in general, *not* a market limited to cigars made only by CA. Compl. ¶ 19; *see also* Complaint, ¶ 11 (Altadis is "recognized in the cigar industry for producing *some* of the best-selling…mass market cigar brands") (emphasis added); ¶ 18 (Altadis is "*one* of the largest manufacturers of machine made cigars") (emphasis added).

A single-brand market *may* exist in rare circumstances not alleged here—*i.e.* in an "aftermarket" for servicing a single manufacturer's products or parts for those products, *see, e.g. Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 481-82 (1992), and customers are "locked in" due to contractual limitations or high-switching costs. *Queen City Pizza*, 124 F.3d at 439-440 (dismissing complaint alleging market limited to products used in Domino's pizza despite contractual requirements*); Brokerage Concepts v. United States Healthcare,* 140 F.3d 494, 515 (3d Cir. 1998) (Becker, CJ.) (rejecting single brand market consisting solely of members of single health care provider where plaintiffs failed to show "switching costs" locked in customers).

Critically, however, the Complaint does not, and cannot, allege that the market for the sale of cigars is an aftermarket for services or parts. Nor is there any allegation that consumers or purchasers of Altadis cigars are "locked in" due to high switching costs after purchasing some other Altadis products. As one court explained in recently rejecting a similar claim of a single brand market, the cases permitting single brand markets involve after-markets derived from a specific company's products, not "a primary independent market alleged to be limited, by definition, to a single brand of a product." *Apple Inc., v. Psystar Corp.,* 586 F. Supp. 2d 1190, 1197 (N.D. Cal. 2008). While the Complaint alleges that some consumers prefer Altadis cigars to other manufacturers' brands, that does not suffice to allege a plausible relevant product market. If it did, *every* branded product--cigars, soft drinks, cars, breakfast cereal, beer---would be a separate relevant product market, destroying the central goal of the antitrust laws "to protect interbrand competition." *Tunis Bros. Co., Inc.,* 952 F.2d at 728.

Because the Complaint fails to allege a plausible relevant product market, all of the Complaint's Sherman Act claims should be dismissed.

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

The relevant geographic market in antitrust cases is "the area of effective competition…in which the seller operates and to which the purchaser can practicably turn for supplies." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. V. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). An important, indeed, often a critical, factor in determining the scope of the geographic market is shipment patterns and transportation costs. *See e.g. United States v. General Dynamics Corp.*, 415 U.S. 486, 491 (1974) ("a realistic geographic market should be defined in terms of transportation arteries and freight charges that determined the cost of delivered coal").

The Complaint's bare allegation of a relevant geographic market confined to Pennsylvania is insufficient. *See* Compl. ¶ 32-34. The Complaint has no allegations about transportation costs or shipment patterns, nor even any allegation concerning the geographic locations to which the Companies are claimed to have shipped cigars to Satnam or to *New York* based HLA, *id.* ¶ 12. The Complaint's only allegation regarding commerce is that CA and HLA distributed cigars in the "flow of interstate commerce, including through and into this judicial district." *Id.* ¶ 35.

But that allegation is entirely consistent with a *national*, not a single state, market for cigars. Indeed, in its other allegations, the Complaint specifically asserts the existence of *"the U.S. market* for mass market cigars." *Id.* ¶ 19 (emphasis added). *See also, id.* ¶ 11 (alleging that Altadis is "recognized in the cigar industry for producing some of the best-selling . . . mass-market cigars *in the United States*…".) (emphasis added); ¶ 17 (mass market cigar share of "total U.S. cigar business").

In short, the Complaint's conclusory and inconsistent allegations regarding Pennsylvania as a relevant geographic market are simply insufficient to state a plausible claim under the antitrust laws.

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

Count I claims that CA violated the RPA, 15 U.S.C. §13, by selling CA mass market cigars to Satnam at prices that were less favorable than the prices at which CA sold cigars to HLA. Compl. ¶ 101. However, "merely offering lower prices to a customer does not give rise to a price discrimination claim." *Toledo Mack Sales & Service, Inc.,* 530 F.3d at 227. Instead, "a plaintiff must allege facts to demonstrate that (1) the defendant made at least two contemporary sales of the same commodity at different prices to two different purchasers, and (2) the effect of such discrimination was to injure competition." *Id.* at 228, quoting *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 142 (3d Cir. 1998) (Stapleton, J.).

Despite its length, the Complaint fails adequately to allege "facts to demonstrate" either of the two basic elements of a valid claim for price discrimination, *i.e.* that: (i) CA "made at least two contemporary sales of the same commodity at different prices to two different purchasers," and (ii), "the effect of [any] such discrimination was to injure competition."

In considering the sufficiency of the Complaint's allegations of price discrimination, it is important to recognize that the Supreme Court has repeatedly indicated that the RPA "should be construed narrowly" *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006), and that the Third Circuit "has dutifully followed the Supreme Court's lead by

narrowly construing the RPA." *Feesers, Inc., v. Michael Foods, Inc.*, 591 F.3d 191, 198 (3d Cir. 2010) (Smith, J.). [2]

A. Count I Fails to Allege Facts Demonstrating Contemporary Sales of the Same Commodity at Different Prices

While the Complaint contains conclusory allegations that CA sold "mass market cigars" to HLA at lower prices than it sold "mass market cigars" to Satnam, it fails to allege *facts* demonstrating (i) "contemporary sales" of (ii) the "same commodity" at different prices. *Toledo Mack* Sales *& Service, Inc.*, 530 F.3d at 228.

1. The Complaint does not allege facts sufficient to demonstrate that there were "contemporary sales" at different prices. *Id. See also Crossroads Cogeneration Corp.,* 159 F.3d at 142. The requirement of contemporary sales reflects the fundamental economic reality that prices are not static but change in response to competitive, market, and other conditions. [3] Thus, for example, the sale of a car at the start of the new model year in the fall is not comparable to the sale of the "same" car in the spring when the models are no longer "new." Prices that differ because of changing circumstances do not give rise to claims of price discrimination---if they did, no manufacturer or seller could ever change its prices.

Here, the Complaint concedes that there were *no* allegedly discriminatory sales for the great bulk of the period at issue because "[p]laintiff has not *purchased* CA's Mass-Market Cigars

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[2] The reason for narrowly construing the RPA is that "[i]nterbrand competition"---*e.g.* competition between brands rather than competition within a brand, as is the case alleged here---"is the primary concern of antitrust law," *Toledo Mack* Sales *& Service, Inc.*, 530 F.3d at 227, quoting *Volvo Trucks North America, Inc.,* 546 U.S. at 180, and the RPA "often has anticompetitive effects that promote rather than prevent monopolistic pricing practices." *Feesers,* 591 F.3d at 198 (citations omitted).

[3] The requirement of reasonably "contemporaneous" sales also applies to claims for discriminatory promotional allowances under Sec. 2(d) of the RPA, 15 U.S.C. §13(d). *See Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371-372 (2d Cir. 1958) (no violation when allegedly discriminatory services were six months apart).

from CA since July 2012."[4] Compl. ¶ 125 (emphasis added). *See also id.* ¶¶ 6, 100, 106, 107. As a result, the Complaint fails to allege an RPA claim regarding sales to HLA *after* July 2012. *Cf. Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389-90 (10th Cir. 1985) (purchases stopped before defendant's more favorable pricing program implemented).

Nor does the Complaint sufficiently allege discrimination on contemporary sales for the period *before* it concedes that CA's sales to Satnam stopped. Even though the Complaint recognizes that there were general changes in price levels and pricing allowances for CA's mass-market cigars throughout the applicable time period, *see e.g.* Compl. ¶ 58 (describing general price increase), the Complaint alleges only that HLA generally received more favorable prices than Satnam. It does not identify a single specific transaction on which HLA received favored prices or any date on which such a transaction occurred. Accordingly, the allegations are insufficient to show that a favored transaction occurred at all or that it occurred at or about the same time Satnam purchased cigars from the CA companies. *See e.g.* Compl. ¶¶ 100-102. As a result, the Complaint fails to allege two "contemporary sales" at discriminatory prices.

2. Even assuming the Complaint adequately alleged that the allegedly discriminatory sales were "contemporary sales," it does not allege that CA sold "the same commodity" to Satnam and HLA at different prices. *Id.* Price discrimination under the RPA requires that the

[4] Section 2(a) of the Robinson-Patman Act applies only to goods "sold" to two or more "purchasers." "In order for there to be a discrimination between purchaser violative of [the RPA] there must be actual sales at two different prices to two different actual buyers." *Toledo Mack* Sales *& Service, Inc.*, 530 F. 3d at 228, quoting *M.C. Mfg., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975). "Mere offers to sell at different prices do not suffice to state a claim under the Robinson-Patman Act." *Data Capture Solutions v. Symbol Techs.*, 520 F. Supp. 2d 343, 349 (D. Conn. 2007). Nor do a sale and a refusal to sell satisfy the requirement of two discriminatory sales. *B-S Steel, Inc. v. Tex. Indus.*, 439 F.3d 653, 669 (10th Cir. 2006); *L&L Oil Co., v. Murphy Oil Corp.*, 674 F.2d 1113, 1120 (5th Cir. 1982). The same considerations apply to allegedly discriminatory allowances to "customers" under §2(d). *See Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468 (7th Cir. 1980) (only purchasers are protected by §2(d)).

allegedly discriminatory prices be on sales of "the same commodity," specifically, products of "like grade and quality." 15 U.S.C. §13(a).[5] Two products are not of "like grade and quality" where there are physical differences or clear consumer preferences among them. In *In re Quarter Oats Co.*, 66 F.T.C. 1131, 1192 (1964), for example, the Federal Trade Commission found that an oat flour product with higher hull content (and also less consumer acceptability) was not of "like grade or quality" with other oat flour products whether or not it cost the same to manufacture them. Likewise, in *Utah Foam Prods., Co. v. Upjohn Co.*, 154 F.3d 1212, 1217-18 (10th Cir. 1998), the Court found that products were not of "like grade and quality" when they had various different properties and customers had a clear preference for one over the other even though products were similar in structure and could be used interchangeably.

While the Complaint alleges general sales of "mass market cigars" to HLA at allegedly favored prices, it does not identify the specific brands sold to HLA at the allegedly favored prices, much less the sizes, styles or flavors of those brands, nor does it indicate when such brands were sold. Compl. ¶¶ 62, 60, 66, 67. Those omissions are critical because, as the Complaint concedes, there are significant differences in "grade and quality" among the various brands of mass market cigars CA sells, including differences in size and appearance, differences in composition and manufacture, differences in advertising, marketing and consumer acceptance, and differences in prices and pricing. *See* Compl. ¶¶ 20-22.

Accordingly, the sales of different brands of CA mass market cigars are not sales of "same commodity" any more than sales of Cadillacs and Lincolns are sales of luxury cars of "like grade and quality." Without identifying which brands (or sizes or styles) were sold to HLA

[5] The requirement of "like grade and quality" also applies to allegedly discriminatory promotional allowances under Sec. 2(d) of the RPA, 15. U.S.C. § 13(d). *See Atalanta Trading Corp., v. FTC*, 258 F.2d 365, 368-371 (2d Cir. 1958) (requirement of "commodity" under § 2(d) is identical to "like grade and quality" requirement of §2(a)).

at allegedly favored prices and when they were sold—*i.e.* to establish the critical element that a defendant sold the same product at the same time for different prices--- the allegations of the Complaint lack sufficient detail to allege a valid claim under the RPA

B. Count I Fails to Allege Facts Demonstrating Injury to Competition

Even assuming, contrary to fact, that the Complaint adequately alleges discriminatory prices on the same commodity on contemporary sales, Satnam must also allege facts that demonstrate that "the effect of such discrimination was to injure competition."[6] *Toledo Mack Sales & Service, Inc.*, 530 F.3d at 228.[7]

The Complaint fails to do so in at least two respects.

1. An allegedly disfavored customer claiming injury to competition must show that it lost *specific* customers or sales in actual competition with the favored purchaser as a direct result of the differentially priced transaction. In a recent decision, the Supreme Court directly addressed the issue of whether "a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination . . . absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the *same* retail customer." *Volvo Trucks North America, Inc.*, 546 U.S. at 169 (emphasis added).[8] In that case, the Court rejected the plaintiff's price discrimination claim because the plaintiff failed to identify

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[6] Injury to competition usually occurs either at the level of competition with the supplier (known as "primary line injury") or, as alleged here, at the level of competition between favored and disfavored customers (known as "secondary line injury").

[7] Similarly, the requirements of §2(d) are limited to "all other *customers competing* in the distribution of such products or commodities." (emphasis added).

[8] The Supreme Court granted certiorari on the question: "May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the *same* retail customer?" *Volvo Trucks North America, Inc.*, 546 U.S. at 175 (emphasis added).

"any differentially priced transaction in which it was… 'in actual competition' with a favored purchaser for the *same customer*." *Id.* at 177 (emphasis added).

Although the Complaint generally alleges that Satnam lost business, it does not identify *any* customer to whom it claims to have lost business to HLA as a result of favorable prices given to HLA. To the contrary, the Complaint alleges that Satnam gained sales, "capture[ing] approximately 30% of the market for distribution of CA's Mass-Market Cigars in Pennsylvania" "despite continued discriminatory pricing." Compl. ¶ 67. It was only *after* Satnam stopped purchasing CA cigars in July 2012 that it lost sales and "HLA regained its previously-lost market share." Compl. ¶ 83. But that was not the result of any discriminatory sales; rather, it was the result of CA's alleged refusal to sell cigars to Satnam. Compl. ¶ 107 ("As a result of CA's refusal to deal with Plaintiff after July 2012…."); *id.* ¶ 6 ("After July 2012, CA refused to deal with Plaintiff, resulting in Plaintiff making zero purchases of CA's Mass-Market Cigars…"). The refusal to sell cigars does not constitute unlawful price discrimination which, as noted previously, requires the purchaser to have actually made a purchase at a discriminatory price. *See* pp. 9-12, *supra*.

Any claim that Satnam lost specific customers or sales *to HLA* as a result of allegedly discriminatory prices is further undercut by the Complaint's allegations that Satnam and HLA operate at *different* levels of the distribution chain and therefore are likely to have *different* customers. The law requires the companies are "in economic reality acting on the same distribution level" and are competing for the same business---*i.e.* that they are "after the same dollar." *Feesers, Inc. v. Michael Foods, Inc.,* 591 F.3d 191, 197 (3d Cir. 2010). According to the Complaint, however, Satnam "sells…mass market cigars to convenience stores and *to other*

distributors servicing convenience stores," Compl. ¶ 8 (emphasis),[9] whereas HLA is "the dominant convenience store distributor in Pennsylvania." *Id.* ¶ 12. To the extent that Satnam sells mass market cigars to "other distributors" rather than to the convenience stores directly served by HLA, Satnam concedes that the companies did not compete at the same level of distribution for the same customers and, therefore, Satnam could not have lost customers or sales to HLA as a result of any discriminatory pricing.

2. But even if the Complaint adequately alleged facts demonstrating that Satnam lost specific customers or sales to HLA, that allegation is not sufficient to establish injury to *competition*, as opposed to injury to a specific *competitor*. The purpose of the antitrust laws, including the RPA, is to protect competition, not individual competitors. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 458 (1993); *Atl. Richfield Co., v. USA Petroleum Co.,* 495 U.S. 328, 338 (1990). The essence of competition is that there are winners and losers---*i.e.* some competitors are "injured" by the actions of their competitors.

The distinction between injury to competition and injury to an individual competitor is especially important in cases alleging RPA violations. As noted, the "primary concern of antitrust law" is "interbrand competition," *Toledo Mack* Sales *& Service, Inc.*, 530 F.3d at 227, not intrabrand competition of the sort alleged here. Recognizing that fact, the Supreme Court has warned that courts should resist "interpretation[s of the RPA] geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo Trucks North America, Inc.,* 556 U.S. at 181 (emphasis in original). *See also, Feesers,* 591 F.3d at 200 (same); *RSI*

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[9] The Complaint also alleges that Satnam's "business efforts in Pennsylvania" were focused on "form[ing] relationships with distributor customers in this commonwealth." [sic] ¶ 38. *See also id.* ¶ 37 ("Plaintiff opened a unit of its distribution business in Southeastern Pennsylvania to focus on the sale of cigars and other products to other distributors and convenience store customers").

Wholesale v. *Rollex Corp.*, 1993 U.S. Dist. LEXIS 15839 at *5 (W.D. Mich.1993) ("injury to a specific competitor without more . . . is not enough to show that price discrimination may substantially lessen competition").

The allegations of the Complaint do not support a plausible claim of injury to *competition* (even to intrabrand competition)—as opposed to injury to a specific competitor, Satnam. [10] To the contrary, the Complaint alleges that other "distributors" (plural), not just HLA, received favorable prices from CA. *See e.g.* Compl. ¶ 58 ("those who will be buying huge quantities will be those distributors who….have been buying from Altadis for years…."),¶ 71 ("other smaller and bigger distributors are getting more PM money on the above items than what I have requested"), ¶ 77 ("please put me in a level pla[ying] field along with the other major distributors"), ¶ 81 ("other major distributors are getting at least 22 to 28% off list price…").

Thus, according to the allegations of the Complaint, even if *Satnam* did not receive the same favorable terms as HLA, general *competition* among other distributors of CA cigars would not have been affected because other distributors also received favorable prices. In fact, the allegations of the Complaint confirm that Satnam's real "beef" is its own alleged injury as an individual competitor, and not injury to general competition among distributors of CA mass market cigars, much less injury to interbrand competition in the sale of mass market cigars. *See e.g.* Compl. ¶ 142 (CA and HLA entered into agreement "for the purposes of foreclosing *Plaintiff* from effectively competing in the market…") (emphasis added); ¶ 109 ("CA's discriminatory conduct…has injured, destroyed and/or prevented fair competition *among Plaintiff and its competitors*, particularly HLA…") (emphasis added).

[10] The Complaint's failure to allege injury to "competition" so as to confer antitrust standing applies to all of its claims as described in further detail in Part IV of HLA's memorandum in support of its motion to dismiss.

Because Count 1 does not adequately allege either (i) two contemporary sales of the same product at different prices or (ii) injury to general competition in the sale of cigars, as opposed to injury to a single competitor, it should be dismissed.

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

Count V alleges a conspiracy to monopolize the alleged market for distribution of CA mass-market cigars in Pennsylvania in violation of Section 2 of the Sherman Act. Count VI alleges an agreement to restrain trade in the same alleged market in violation of Section 1 of the Sherman Act. Although both counts purport to assert claims based on an alleged agreement between CA and HLA,[11] neither adequately alleges *facts* sufficient to state a plausible claim that there was an unlawful agreement by CA and HLA.

The predicate for any conspiracy claim is proof of the existence of an *agreement* between two or more parties. "To prevail on a section 1 claim or a section 2 conspiracy claim, a plaintiff must establish an agreement, sometimes also referred to as a 'conspiracy' or 'concerted action.'" *W. Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 99 (3d. Cir. 2010) (Smith, J.). "An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds or a conscious commitment to a common scheme." *Id.* (citing *Copperweld Corp. v. Indep. Tube Corp*, 467 U.S. 752, 771 (1984).

But proof of an agreement, or "conscious commitment to a common scheme," is not enough. The agreement must be one "*designed to achieve an unlawful objective*." *TruePosition,* 844 F. Supp. at 593 (emphasis in original) (quoting *Monsanto Co.*, 465 U.S. at 764). Here, it is important to recognize that Counts V and VI allege claims of a *vertical*,

[11] As Judge Kelly noted in *TruePosition,* 844 F.Supp. 2d at 593, "to the extent it bans conspiracies to monopolize, section 2 is largely superfluous, as conspiracies to monopolize will usually—if not always---run afoul of section 1's prohibition of conspiracies that unreasonably restrain trade," citing *UPMC,* 627 F.3d at 98.

intrabrand, conspiracy between the supplier (CA) and a customer (HLA) of the supplier's own products (CA mass-market cigars), rather than a *horizontal* interbrand conspiracy among competing suppliers of different brands of mass market cigars.

In considering allegations of vertical agreements in restraint of trade, the Third Circuit has repeatedly made clear that "the primary goal of antitrust law is to protect interbrand competition." *See e.g. Tunis Bros. Co., Inc.*, 953 F.2d 715. In the case of *vertical* restraints of the sort alleged here, the law is also clear that a supplier ordinarily has the right to choose with whom it wishes to do business. A manufacturer "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co.*, 465 U.S. at 761. "Unilateral activity, no matter what its motivation, cannot give rise to a §1 violation." *Rossi v. Standard Roofing, Inc.,* 156 F.3d 452, 465 (3d. Cir. 1996) (Becker, CJ.).

In order to establish an anticompetitive agreement between a supplier and a customer, a plaintiff must present evidence that "tends to exclude the possibility of independent action by the manufacturer and distributor." *Monsanto Co.,* 465 U.S. at 768. At the pleading stage, therefore, a plaintiff must allege facts that, if proven, "tend to exclude the possibility of independent action by the manufacturer and the distributor." "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).[12]

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[12] In addition, both the Third Circuit and the Supreme Court have cautioned against 'permitting the inference of a conspiracy from ambiguous circumstantial evidence because it might "chill the very conduct the antitrust laws are designed to protect."' *Matsushita Elec. Indus. Co., Ltd.,* 475 U.S. at 594. "Care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon defendant's freedom, so long as it acts independently, to refuse to deal." *Big Apple BMW v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (Masmann, J.).

The "conduct" alleged in the Complaint is neither "inconsistent with permissible competition", nor does it "tend to exclude the possibility of independent action by the manufacturer". There is no allegation of either direct or circumstantial *evidence* of an agreement between CA and HLA to refuse to deal with Satnam (or refuse to deal except on discriminatory terms).[13]

Direct evidence is evidence that is "explicit and requires no inference to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d. Cir. 1999) (Rosenn, J.). Phrased differently, direct evidence is evidence of the sort that courts have referred to "as the proverbial 'smoking gun.'" *TruePosition*, 844 F. Supp. 2d at 593, quoting *Rossi*, 156 F.3d at 465. No "smoking gun" is alleged here. To the contrary, the Complaint is conspicuous for its failure to allege the existence (let alone the specifics) of any written or oral agreement between CA or HLA (or anyone employed by either of them) that CA would refuse to deal with Satnam or do so only on discriminatory terms, much less allegations of specific facts necessary to support any conclusory allegation of such an agreement. That is not sufficient to state a claim. "A complaint which 'mention[s] no specific time, place, or person involved in the alleged conspiracies' [is] deficient because it d[oes] not allege who 'supposedly agreed or when and where the illicit agreement took place.'" *McCullough v. Zimmer, Inc.*, 382 Fed. Appx. 225, n.6 (3d Cir. 2010) (quoting *Twombly*, 550 U.S. 544, 565, n.10 (2007))

Nor is there any allegation of circumstantial or indirect evidence that "tends to exclude the possibility of independent action by" CA. The complaint's only allegation of any action by CA is that CA refused to sell mass market cigars to Satnam and/or that it sold cigars to Satnam at prices that were not as favorable as the prices at which it sold cigars to other distributors,

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[13] An agreement may be established either by direct evidence or by circumstantial evidence. *UPMC*, 627 F.3d at 99.

especially HLA. But, nothing about either allegation is inconsistent with, much less tends to exclude the possibility of, CA acting unilaterally rather than pursuant to a "commitment to a common scheme [with HLA] designed to achieve an unlawful objective." As noted, a supplier such as CA has a right to choose to deal, or refuse to deal, with any distributor it wants. *Monsanto Co.,* 465 U.S. at 761. The Complaint's bare allegation that CA refused to deal with Satnam is therefore entirely consistent with lawful, independent action on the part of CA. In stark contrast to other situations in which there was circumstantial evidence of an unlawful vertical agreement between a supplier and a customer, there is *no* specific allegation of any threat to Satnam by CA[14], *no* allegation of any threat to Satnam by HLA, and *no* allegation that CA acted contrary to its independent interest or to any of its policies. *See, e.g., Rossi* 156 F.3d.at 478-79.

Comparable claims by "jilted distributors" of improper or unequal treatment by their suppliers are routinely denied. *See e.g. Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Ltd.*, 588 F.3d 908, 921 (6th Cir. 2009). As one court of appeals stated, "absent an allegation of anticompetitive purpose or effect at the interbrand level," complaints by disfavored distributors "state nothing more than 'commercial disappointment' of the eliminated distributors." *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 809 (6th Cir. 1988). Here, there is no allegation of any effect on interbrand competition. The Complaint hardly even mentions interbrand competition and, instead, seeks to improperly define the market as limited to CA mass-market cigars. Under the circumstances, the Complaint fails to allege a plausible claim of an *unlawful* conspiracy to monopolize or restrain trade

[14] To the contrary, one of Satnam's principal complaints is that CA did not respond to requests to meet or discuss potential sales. *E.g.* Compl. ¶¶ 53-60, 86.

The Complaint's conclusory but often repeated incantation that CA and HLA entered into an agreement to restrain trade and/or to harm Satnam, *see e.g.* Compl. ¶¶ 44-45, 82, 91-92, is simply an unsupported restatement of the elements of a conspiracy claim. As such, the Court need not assume that it is true for purposes of this motion to dismiss. "Mere restatements of the elements of [a] claim…are not entitled to the assumption of truth." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) (Greenway, Jr., J.). "[A] bare assertion of conspiracy will not suffice." *Twombly*, 550 U.S. at 556.

Accordingly, neither Count V nor Count VI sufficiently allege unlawful agreements in restraint of trade (or to monopolize). Both should be dismissed.

V. COUNT V ALSO FAILS TO STATE A CLAIM BECAUSE IT DOES NOT ADEQUATELY ALLEGE SPECIFIC INTENT

"Specific intent is an essential element of a conspiracy to monopolize claim." *Howard Hess Dental v. Denstply International,* 602 F.3d 237, 257 (3d Cir. 2010) (Fisher, J.). Critically, the "specific intent" required is not simply an intent to do an act or take action; rather, the defendant "must have 'intended to achieve an illegal monopoly.'" *Id.*

Although the Complaint claims that CA (and HLA) "specifically intended" that favorable prices to HLA would enhance and maintain HLA's monopoly power in the relevant market, that conclusory allegation is not sufficient to state a valid conspiracy to monopolize claim for at least two reasons.

First, there is no necessary factual or logical connection between providing favorable prices to HLA and the existence of a "specific intent" to enhance HLA's alleged monopoly power. There are many reasons for favorable pricing just as there are many reasons why a supplier may prefer to deal with one customer over another. The fact that a supplier favors one customer over another does not plausibly suggest a "specific intent" to confer or enhance the

favored customer's market power. If it did, any supplier's refusal to deal with one distributor could be used to support a claim for conspiracy to monopolize.

Second, even if the Complaint alleged facts that plausibly suggested "specific intent" to enhance HLA's market power, the "specific intent" that Plaintiff must allege is the intent to achieve "an illegal monopoly." *Howard Hess Dental*, 602 F.3d at 257. As noted, however, the antitrust laws are principally designed to protect interbrand competition. In that regard, the Complaint fails to allege a relevant antitrust market that could be *illegally* monopolized because the only market allegedly monopolized is limited to the marketing of a single company's products—*i.e.* CA mass market cigars—in a single state---Pennsylvania. Even if HLA accounted for 100% of the sales of CA mass-market cigars in Pennsylvania that would not be an illegal monopoly. Indeed, the Complaint recognizes as much because it acknowledges that CA could lawfully have limited its sales solely to HLA simply by designating HLA as an exclusive distributor. *Id.* ¶ 26. If CA could lawfully sell 100% of its mass-market cigars in Pennsylvania to HLA as an exclusive distributor, any intent to increase HLA's share of those sales, even if proven, would not establish "specific intent" to confer an "illegal monopoly."

In short, "Plaintiffs' allegations of specific intent rest not on facts but on conclusory statements strung together with antitrust jargon. It is an axiom of antitrust law, however, that merely saying so does not make it so for pleading sufficiency purposes." *Howard Hess Dental*, 602 F.3d at 258, citing *Twombly,* 550 U.S. at 555.

CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Court dismiss Plaintiff's claims with respect to them with prejudice.

Dated: February 12, 2015

Respectfully submitted,

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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 Avenue, Suite 1100, Fort Lauderdale, FL 33309 COMMONWEALTH BRANDS, INC. 5900 N. Andrews Avenue, Suite 1100, Fort Lauderdale, FL 33309 ALTADIS, U.S.A., INC., 5900 N. Andrews Avenue, Suite 1100, Fort Lauderdale, FL 33309 HAROLD LEVINSON ASSOCIATES, INC., 21 Banfi Plaza, Farmingdale, NY 11735 Defendants.	Civil Action No.: 2:14-cv-06660-LFR

CERTIFICATE OF SERVICE

I, Carl W. Hittinger, hereby certify that on February 12, 2015, I caused the foregoing Memorandum of Law in Support of the Motion of Commonwealth/Altadis to Dismiss Plaintiff's Complaint to be served electronically upon the following:

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