**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**

**ORDER**

**AND NOW**, this _____ day of _____, 2015 upon consideration of Motion of Defendant Harold Levinson Associates, Inc., to Dismiss the Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 7.1., together with any Reply thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

The Court finds that the Complaint does not state claims upon which relief can be granted. It is, therefore, **ORDERED** that Counts II, III, IV, V, and VI of Plaintiff's Complaint are **DISMISSED WITH PREJUDICE**.

BY THE COURT:

Restrepo, J.

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

**DEFENDANT HAROLD LEVINSON ASSOCIATES, INC.'S**
**MOTION TO DISMISS PLAINTIFF'S COMPLAINT**
**FOR FAILURE TO STATE A CLAIM**

Defendant, Harold Levinson Associates, Inc. moves this Honorable Court to dismiss Plaintiff's Complaint, specifically Counts II, III, IV, V, and VI, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 7.1. Harold Levinson Associates, Inc. incorporates in full its Memorandum of Law In Support of Its Motion to Dismiss Plaintiff's Complaint filed contemporaneously herewith.

Dated: February 12, 2015

Respectfully submitted,

By: */s/ Robert E. Welsh*
ROBERT E. WELSH, JR.
rewelsh@welshrecker.com
WELSH & BECKER, P.C.
2000 Market Street, Suite 2903
Philadelphia, PA 19103
Telephone: (215) 972-6430
Facsimile: (215) 972-6436

JOSEPH A. OSTOYICH (pending *pro hac vice*)
joseph.ostoyich@bakerbotts.com
BAKER BOTTS LLP
1299 Pennsylvania Avenue, N.W.
Washington DC 20004-2400
Telephone: (202) 639-7700
Facsimile: (202) 639-7890

ANDREW M. LANKLER
andrew.lankler@bakerbotts.com
BAKER BOTTS LLP (pending *pro hac vice*)
30 Rockefeller Plaza
New York, New York 10112-4498
Telephone: (212) 408-2500
Facsimile: (212) 408-2501

*Attorneys for Harold Levinson Associates, Inc.*

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

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

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Defendant Harold Levinson Associates, Inc. ("HLA") respectfully submits this memorandum of law, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 7.1, in support of its Motion to Dismiss Plaintiff's Complaint in its entirety. (Dkt. 1).

## INTRODUCTION AND SUMMARY OF ARGUMENT

This suit takes a garden-variety business dispute - - a disgruntled customer claims a single manufacturer would not sell him its products at the prices it wanted - - and tries to trump it up into a multi-count federal court case under a wide swathe of the nation's antitrust statutes.

The Complaint's factual allegations fail to support such overblown claims, however. Stripping out the rhetorical catchphrases - - as this Court must under Supreme Court and Third Circuit precedent - - lays bare the serious pleading defects that require the dismissal of this Complaint in its entirety as a matter of law.

Counts I and II, alleging that Plaintiff was the victim of price discrimination, fail as a matter of law because the Complaint is missing the critical parts of a Robinson-Patman Act claim: it does not contain factual allegations that (a) Plaintiff's supplier *systematically* charged Plaintiff higher prices *for comparable, contemporaneous purchases* than it charged one of Plaintiff's rival distributors (or that the rival distributor knowingly induced such lower prices) and (b) Plaintiff *and* the competitive process suffered any injury as a result of the prices it paid. Instead, the Complaint alleges the opposite effect on Plaintiff itself: it quickly grew its business after it entered Pennsylvania in early 2011 - - and by May 2012 was purchasing "more . . . than ever before" and had "achieved a market share of 30 percent." (Compl. ¶¶ 42, 67). All of Plaintiff's success occurred during the period of alleged price discrimination. Not surprisingly, then, the Complaint is also utterly silent on any harm to *the competitive process* as a result of the prices Plaintiff paid.

Counts III and IV, alleging that Plaintiff was injured because one of its rival distributors monopolized or attempted to monopolize a "market" for the distribution of a single brand of one supplier's products in Pennsylvania, fail as a matter of law because (a) a "jilted distributor" states no viable claim under Sherman Act Section 2 by alleging that its supplier chose to sell to other distributors rather than sell to it and (b) a single-brand product market, alleged in only the most generic and conclusory terms, fails as a matter of law.

Counts V and VI, alleging that Plaintiff's supplier agreed with its rival to stop selling to Plaintiff, fails to state a viable conspiracy claim as a matter of law. Manufacturers have substantial leeway under Sherman Act Sections 1 and 2 to sell, or not sell, to would-be customers. And, naturally, manufacturers can agree with some distributors to sell to them and not to other would-be distributors. Simply put, the Sherman Act does not force a manufacturer to sell to every would-be distributor; it can pick and choose those it believes will best promote and sell its products. The claims here thus fail as a matter of law. There is another defect, too. The Complaint's allegations of an agreement not to sell to Plaintiff are just conclusory buzzwords, devoid of the factual allegations necessary to state a claim under Supreme Court and Third Circuit precedent.

Finally, all six Counts fail as a matter of law because they do not allege antitrust injury, which is a term of art that requires factual allegations of an injury to the competitive process. It is a required element of every antitrust claim. And, it is entirely lacking here. A single distributor's failure to be able to buy product at the prices it wants from a single supplier has no effect on the competitive process. That is why the Complaint is silent on this critical point.

* * *

The Supreme Court, the Third Circuit, and other Circuits have all recognized the sprawling nature of antitrust cases and the incredible burdens and expense they wreak. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."); *Id.* at 573 ("[p]rivate antitrust litigation can be enormously expensive"); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n. 17 (1983) (district courts have "the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."); *In Re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 369 (3rd Cir. 2010) (explaining that "RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim.") (citation omitted); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (")[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.").

The courts thus caution district judges to scrutinize antitrust claims carefully, and to weed out claims that fail to state *factual allegations* on critical required elements and, instead, are based on mere "labels and conclusions," because "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *Id.* at 559 ("It is no answer to say that a claim just shy of plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management plan'") (citation omitted). The Complaint here is riddled with critical defects and, accordingly, this Court should dismiss it in its entirety.

## NATURE AND STAGE OF PROCEEDINGS

Plaintiff Satnam Distributors LLC ("Satnam" or "Plaintiff") alleges that Defendants violated multiple federal antitrust laws while engaging in the production and sale of "mass-market cigars." Plaintiff asserts two claims under the Robinson-Patman Act, 15 U.S.C. § 13, and five claims under Sherman Act Sections 1 and 2, 15 U.S.C. §§ 1-2. This Motion is Defendants' first responsive pleading to the Complaint. Discovery has not commenced.

## STATEMENT OF ALLEGATIONS

### I. THE INDUSTRY AND THE PARTIES

Cigars sold in the U.S. range from high-end premium cigars, which are often hand-rolled and sold in higher-end specialty shops, to mass-market cigars which are machine-made, less expensive, and primarily sold in gas stations and convenience stores. (Compl. ¶¶17, 18).

Hundreds of millions of premium cigars and billions of mass-market cigars are sold each year; mass-market cigars account for the nearly 80% of the total U.S. cigar sales. (*Id.*).

In 2013, more than 5 billion mass-market cigars were sold in the country. (Compl. ¶19). "Most" of those 5 billion mass-market cigars were sold for less than $2. (Compl. ¶17).

A number of companies make and sell mass-market cigars in the U.S., but the Complaint does not allege how many manufacturers there are, any of the identities of the manufacturers (other than one of the Defendants, as discussed below), or what their relative size is.

Instead, the Complaint alleges only that the three "CA" defendants are "one of the largest" makers of mass-market cigars. (Compl. ¶18).[1] Only one of the three CA defendants, Altadis USA, makes cigars, according to the Complaint, however. It makes "premium cigar

[1] The three "CA" Defendants the Complaint lumps together into its "CA Defendants" nomenclature are Commonwealth Brands, Inc. ("Commonwealth"), Altadis, U.S.A. Inc. ("Altadis USA"), and Commonwealth-Altadis, Inc. ("Commonwealth-Altadis"). (Compl. ¶11).

products and Cuban cigar brands" and "some" of the best-selling machine-made, mass-market cigar brands in the U.S., including Dutch Masters, El Producto, Backwoods, Phillies, Hav-A-Tampa, and White Cat. (Compl. ¶¶10, 22).

Each of Altadis USA's brands of mass-market cigars has different characteristics; for example, "Dutch Masters are renowned for their high quality and craftsmanship and are considered America's #1 Natural Wrapped cigar," while "Backwoods cigars are 'a throwback to the days of the old west' and are comprised of 'an infusion of natural and homogenized tobacco with additive flavoring." (Compl. ¶¶20-22). Hav-A-Tampa cigars are "touted as an inexpensive alternative to premium cigars" and "the world's largest-selling wood-tipped cigar," while White Cat cigars are "open-headed cigarillos." (Compl. ¶22).

The Complaint alleges that 68% of all mass-market cigars are ultimately sold via convenience stores or retail outlets. (Compl. ¶17). The convenience stores and retail outlets buy mass-market cigars from a number of "cigar distributors" who distribute "primarily through other distributors and cash-and-carry wholesalers that service convenience stores directly." (Compl. ¶23).

The Complaint does not allege how many total mass-market cigar distributors there are in the U.S. or in any state, but it identifies a few specific distributors and repeatedly references other "distributors."

Defendant Commonwealth-Altadis, Inc. is a U.S.-based distribution company that sells the "tobacco brands and products" of Commonwealth and Altadis to wholesale and retail customers.[2]

---

[2] Defendant Commonwealth does not make or sell cigars, according to the Complaint. Instead, it makes and sells one of the best-selling *cigarette* brands, rolling tobacco, rolling papers, and a selection of cigarette tubes and tube-filling machines in the United States. (Compl. ¶9).

Plaintiff is also a distributor of "various items." (Compl. ¶¶8, 37). It started in Jericho, New York in 2009 and in early 2011 opened a business unit in southeastern Pennsylvania to focus on the sale of cigars and other products to convenience stores and to distributors servicing convenience stores in Pennsylvania. (*Id*.).

Defendant Harold Levinson Associates, Inc. ("HLA") is another distributor and was founded several decades ago, in 1977. It is currently "one of the nation's largest" full-line convenience store distributors, and its revenues rank it the seventh in the country. (Compl. ¶12).

The CA Defendants are the only companies that make CA-branded mass-market cigars, and the Complaint alleges there are "no reasonably substitutable products" for the CA brands of mass-market cigars because distributors "must" stock these popular brands and "cannot" purchase them from any other entity besides CA. (Compl. ¶24). If the Plaintiff could not distribute CA-brands of mass-market cigars, convenience stores and other customers would instead simply "purchase CA Mass-Market Cigars from a different distributor" and would not buy mass-market cigars manufactured by any of the other manufacturers. (Compl. ¶24).

The Complaint does not contain any reference to cross-elasticity of demand for CA-brands of mass-market cigars versus other brands of mass-market cigars or versus premium cigar brands, even though it suggests there is overlapping demand: for example, Hav-A-Tampa cigars are a less expensive "alternative to premium cigars." (Compl. ¶22). Nor does the Complaint contain any allegations regarding cross-elasticity of supply between the CA Defendants' cigars and those of other manufacturers: for example, CA's Hav-A-Tampa brand "has become the world's largest-selling wood-tipped cigar" (Compl. ¶22), but the Complaint says nothing about other manufacturers' wood-tipped brands, nor whether others who are not making wood-tipped cigars would begin doing so, if Hav-A-Tampa prices rose too high.

Nonetheless, Plaintiff alleges that CA-brands of mass-market cigars should collectively be considered a distinct relevant antitrust product market from all other brands of mass-market cigars and from premium cigars. (Compl. ¶25).

The Complaint alleges that the relevant geographic market for CA-brands of mass-market cigars is the state of Pennsylvania, which is the state Plaintiff entered in early 2011 after expanding from Jericho, New York, and the state Defendant HLA entered from its New York roots. (Compl. ¶2 ("Plaintiff entered the relevant market in 2011"), Compl. ¶8 ("Plaintiff . . . is a New York limited liability company"), Compl. ¶¶12, 37). That is because, according to the Complaint, convenience stores, and the distributors that serve them, "cannot" turn to distributors from nearby states due to "differing regulatory schemes" and "state taxes." (Compl. ¶¶33, 34). The Complaint contains no allegations explaining what regulatory schemes or taxes are involved.

Of the total of 5 billion mass-market cigars sold in the United States in 2013, "most" of which sold for less than $2, sales of the CA-brands of cigars in Pennsylvania amounted to only "$60 million." (Compl. ¶19).

The CA Defendants use "multiple distributors located throughout Pennsylvania" to distribute their mass-market cigars and have "not entered into any exclusive agreements" for distribution in the state. (Compl. ¶¶26, 99). The Complaint alleges, on information and belief, that Defendant HLA is "the dominant" distributor of CA-brands of mass-market cigars in Pennsylvania and asserts that it currently accounts for "at least 80%" of the sales of CA-brands of mass-market cigars in Pennsylvania. (Compl. ¶27).

Although the Plaintiff expanded into Pennsylvania from outside the state in early 2011 - - and "achieved a market share of 30 percent" (Compl. ¶42) - - the Complaint nonetheless asserts that there are "high" barriers to entering the alleged Pennsylvania market for CA-brands of mass-

market cigars because of the "importance of customer goodwill," "the time it takes for distributors to establish their reliability," and "the practices" by Defendants as alleged in the Complaint. (Compl. ¶29).

## II. THE ALLEGED CONDUCT

### A. Plaintiff Enters And Grows Its Pennsylvania Business January-August 2011

Plaintiff entered Pennsylvania in early 2011 and "began to establish a business relationship" with the CA Defendants. (Compl. ¶3). It "began purchasing from Altadis" and formed relationships with distributor customers in the state. (Compl. ¶¶38, 40). Between January and August 2011, it purchased 6,000 cases of cigars from Altadis. (Compl. ¶41).

Plaintiff ultimately "achieved a market share of 30 percent in Pennsylvania" and HLA's share declined from 80% before 2011 to 50%. (Compl. ¶¶42, 43). Plaintiff attributes its success to superior customer service and a "more equitable pricing structure" that allowed it to grow quickly "despite" alleged discriminatory pricing from the CA Defendants. (*Id.*). Indeed, "Plaintiff's superior customer service allowed Plaintiff's business to grow" "even though" Plaintiff purchased CA-brands of mass-market cigars at "discriminatory prices." (Compl. ¶48).

The Complaint alleges, on information and belief, that the CA Defendants charged Plaintiff prices that were 10-20% higher than it charged HLA. (Compl. ¶49). The Complaint does not identify any specific purchases of CA-brands of mass-market cigars by Plaintiff at higher prices than HLA paid (or any *contemporaneous* purchases of *comparable quantities and brands* of CA-mass-market cigars). Nor does it allege specific customers or jobs won by HLA or lost by Plaintiff as a result of the alleged price difference. Instead, it simply alleges (again, on information and belief) that HLA generally "paid lower prices" than Plaintiff in the January to August 2011 period "by means of more free cases and promotional funds" and that those lower

prices "cannot be explained by HLA's volume purchases" and were "not justified by any cost savings." (Compl. ¶¶48-50).

**B. The CA Defendants Stop Selling To Plaintiff For One Month (October 2011)**

In August 2011, "Plaintiff attempted to develop its relationship" with Altadis USA and requested an in-person meeting to discuss a proposed order. (Compl. ¶¶51,53). Altadis USA's representative, Andrew Panagoplos, replied that he was unable to meet that month, but suggested that Plaintiff email him the proposed order, which it did. (Compl. ¶53). Altadis USA did not accept Plaintiff's proposal, nor submit a counter-offer. (Compl. ¶55).

In early September 2011, Plaintiff offered to fly to Altadis USA headquarters to meet face-to-face, but Mr. Panagoplos declined and said his superiors were not ready to make a decision. (Compl. ¶55). In mid-September 2011, Plaintiff submitted three purchase orders to Altadis USA, but none of the three purchase orders were consummated. (Compl. ¶¶58-60).

Plaintiff thus purchased only $30,000 worth of mass-market cigars from Altadis USA in September 2011. (Compl. ¶60). On information and belief, "many of Plaintiff's competitors were purchasing from HLA at discounted prices." (Compl. ¶59).

Plaintiff did not purchase any cigars in October 2011. (Compl. ¶60). The Complaint alleges, on information and belief, that Altadis USA's failure to sell to Plaintiff in October 2011 was the "result of an agreement with HLA." (Compl. ¶55).

**C. Plaintiff's Increased Purchases November 2011-January 2012**

In November 2011, Altadis and Commonwealth Brands, Inc. announced they would be merging and new sales representatives with responsibility for Plaintiff took over. (Compl. ¶62).

Plaintiff purchased more than 5,700 cases of mass-market cigars from the CA Defendants between November 2011 and January 2012. (Compl. ¶66). Although representatives from the

CA-Defendants told Plaintiff "it was receiving the same pricing given to HLA," the Complaint alleges, on information and belief, that these statements were not true. (Compl. ¶65).

The Complaint does not allege that quantity and brands of any specific purchases by HLA at a lower price during this time period, nor the specifics brands, quantities or prices Plaintiff paid during this period. Nor does it allege any specific convenience store or other business won by HLA because of its allegedly lower prices or any business lost by Plaintiff because of its allegedly higher prices.

**D. "Plaintiff Succeeds Despite Defendants' Conduct (February- May 2012)"[3]**

Between February and May 2012, "Plaintiff purchased more of CA's Mass-Market Cigars than ever before." (Compl. ¶67). "As a result of this large volume, Plaintiff was able to capture approximately 30% of the market for distribution of CA's Mass-Market Cigars in Pennsylvania." (*Id.*). These were "significant market gains." (Compl. ¶73). "HLA's market share ultimately fell to approximately 50% of the relevant market." (Compl. ¶43). Plaintiff obtained this success - - and HLA lost nearly half its market share - - "despite" the CA Defendants' allegedly continued lower prices to HLA. (Compl. ¶¶67, 73).

The Complaint alleges, on information and belief, that HLA complained to the CA Defendants about Plaintiff's success and they agreed that CA would treat Plaintiff even less favorably than before. (Compl. ¶73). Again, though, the Complaint contains no allegations of specific quantities and brands of CA-cigars purchased by HLA at lower prices or by Plaintiff at higher prices than HLA. Nor does it contain any specific convenience store or other customer business won by HLA because it paid lower prices or lost by Plaintiff because it paid higher prices than HLA's prices. The closest the Complaint gets is an allegation of a single instance at

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[3] This quote comes from caption "E." in the Complaint's Factual Allegations section.

a trade show, apparently drawn from an opinion Plaintiff expressed in his April 2012 correspondence with the CA Defendants, that HLA's *sales* prices for Backwoods and Phillies at a single trade show were "below my dead net *cost*" and his supposition "that means their cost is at least 20% to 25% below my cost." (Compl. ¶72).[4]

In May 2012, the CA Defendants informed Plaintiff that they would only offer Plaintiff discounts of one type, "8+1" deals, through June, *i.e.*, he would get one free case for every eight cases he purchased. (Compl. ¶75).

**E. Plaintiff's Last Purchase In July 2012**

Plaintiff's 8+1 discount from the CA Defendants expired in June 2012, and Plaintiff only purchased 500 cases of cigars in June and another 500 cases on July 3, 2012. (Compl. ¶¶78, 79). That "was the last purchase of CA's Mass-Market Cigars that Plaintiff made." (Compl. ¶80). Plaintiff placed a few orders with the CA Defendants in 2013, but those orders were never consummated. (Compl. ¶¶84-90). HLA subsequently "regained its previously-lost market share" and, on information and belief, sold "at least 80%" of CA's mass-market cigars in Pennsylvania. (Compl. ¶83).

## III. THE CLAIMS

Count I alleges that the CA Defendants violated the Robinson-Patman Act by charging Plaintiff discriminatory prices compared to the lower prices they charged Defendant HLA. Count II alleges that HLA violated the same statute because it knowingly induced or received those lower prices. Count III and IV allege, respectively, that HLA violated Sherman Act

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[4] The Complaint vaguely alleges some specific sales prices that other unidentified distributors, not HLA, are charging other distributors, not Plaintiff, for Dutch Masters cigars in February 2012, but it does not allege any connection to its allegation that Defendant HLA was paying discriminatorily low prices. (Compl. ¶68 ("DM Box is being sold by other leading distributors to other smaller wholesalers" for prices between $38.00 and $38.69 and "these smaller distributors th[e]n in turn sell this DM Box for as low as $38.75," while "my [Plaintiff's] cost on this item . . . is $38.55")).

Section 2 by willfully maintaining a monopoly over the distribution of CA-brands of mass-market cigars in Pennsylvania or attempting to do so. Counts V and VI allege that HLA and the CA Defendants conspired to maintain HLA's monopoly over CA-brands of mass-market cigars in Pennsylvania in violation of Sherman Act Sections 2 and 1, respectively.

## ARGUMENT

Antitrust cases routinely generate massive discovery and are hugely expensive. Recognizing this, the Supreme Court warned in *Twombly* that courts should scrutinize complaints to ensure a plaintiff has provided the *factual* "'grounds' of his 'entitle[ment] to relief,'" and that mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). The Third Circuit agreed in *Burtch v. Milberg Factors, Inc.*, concluding that "[i]n light of the conclusory nature of these allegations, they are not entitled to assumptions of truth," and that "bare statements" should be rejected when analyzing the viability of allegations under Fed. R. Civ. P. 12(b)(6). 662 F.3d 212, 225 (3d Cir. 2011) (citing *Twombly*, 550 U.S. at 557).

Following *Twombly* and *Burtch*, therefore, the court must ignore all Plaintiff's conclusory allegations. The Complaint here is filled with the buzzwords and conclusory allegations that the Supreme Court warned against. Without those boilerplate conclusions it is apparent that Plaintiff's Complaint fails to state viable antitrust claims and should be dismissed pursuant to Federal Rule of Procedure 12(b)(6).

Counts I and II, alleging price discrimination, fail because Plaintiff has not alleged facts suggesting that the Plaintiff paid the CA Defendants *systematic* price differences *on comparable*,

*contemporaneous purchases*, nor does it allege facts suggesting that HLA *knowingly induced* the systematic price discrimination on comparable, contemporaneous purchases. Finally, both Counts fail because the allegations do not allege harm to Plaintiff - - they allege it succeeded quite well, despite the alleged price differences - - and are utterly silent on any harm to the competitive process.

Counts III and IV, alleging that HLA willfully maintained a monopoly and attempted to monopolize the distribution of CA-brands of mass-market cigars in Pennsylvania, fail as a matter of law because Plaintiff has alleged nothing more than that it was unable to buy at the prices it wanted from the CA Defendants. But, a supplier is free to sell or not sell to any particular would-be customer and to choose one distributor over another. The antitrust laws do not require a supplier to sell to any customer who wants to buy, particularly not at the price the customer wants, and a "jilted distributor" - - like Plaintiff here - - does not have a cause of action under Sherman Act Section 2. Counts III and IV also fail because Plaintiff has not alleged *factual allegations* that support its boilerplate assertion of a single-brand product market - - the sale of CA-branded mass-market cigars in Pennsylvania. A single-brand market fails as a matter of law particularly where, as here, it is simply based on a conclusion and not on any factual allegations demonstrating why CA-brands of mass-market cigars are somehow different from other manufacturers' mass-market cigars.

Counts V and VI, alleging that the CA Defendants "conspired" with HLA by agreeing to sell to HLA and by not selling to Plaintiff, fail because, again, the antitrust laws permit a supplier to agree with one distributor to sell to it, rather than another distributor; indeed, the antitrust laws encourage distributors to compete to be the exclusive distributor - - and suppliers are generally free to agree to an exclusive distributorship. *Race Tires America, Inc. v. Hoosier Racing Tire*

*Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) ("the competition to be an exclusive supplier may constitute a 'vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress'" (citation omitted)). Moreover, the Complaint here also fails to state a conspiracy claim because it does not allege *factual allegations* suggesting any conspiracy, as *Twombly* requires.

Finally, all Counts fail because the Complaint does not allege any facts suggesting injury to the competitive process as a result of the prices Plaintiff paid or its inability to buy CA-branded mass-market cigars at the prices it wanted. Instead, the Complaint alleges that CA-branded mass market cigars still reach Pennsylvania's convenience stores and other retail outlets through multiple distributors and at discounted prices. The Complaint is utterly silent on the required element of antitrust injury.

## I. PLAINTIFF'S PRICE DISCRIMINATION CLAIMS FAIL AS A MATTER OF LAW

### A. Counts I And II Fail To Allege Systematic Price Discrimination On Contemporaneous Purchases Of Comparable Quantity And Quality

The Robinson-Patman Act is a very precise statute. It does not prohibit every price difference between every customer. If that were the case, volume discounts and a host of other ordinary price concessions - - which are ubiquitous and good for consumers - - would be outlawed. Instead, 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 the customers or the need to meet competition or for similar, legitimate reasons. *Volvo Trucks North America, Inc. 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."); *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 (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.") (quotation marks and quotation omitted); *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 142 (3d. Cir. 1998) (same) (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 219-27 (1993)).

And, it only prohibits that very narrow price discrimination when the Plaintiff alleges (and can prove, ultimately) that the higher prices it systematically paid caused it to lose business in head-to-head downstream competition with a favored distributor and also caused harm to the competitive process. *See Reeder*, 546 U.S. at 166 ("'the effect of such discrimination may be . . . to injure, destroy or prevent competition'") (quoting 15 U.S.C. § 13(a)); *Mack Sales*, 530 F.3d at 228 (requiring that "the effect of such discrimination was to injure competition.") (citation omitted). None of that is alleged here. Instead, the Complaint is simply a vague assertion -- that Plaintiff believes it either paid or was unable to buy at the same low prices HLA paid - - without any of the factual allegations necessary to state a viable claim.

The Complaint fails to state a claim against HLA for the same reasons stated in the CA Defendants' motion to dismiss. HLA incorporates that motion by reference, rather than repeat each defect of Plaintiff's Count I in further detail here. *See United States v. Dowdy*, 149 Fed. Appx. 73, 75 n. 1 (3d Cir. 2005) (explaining that "[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

The Count II "knowing inducement" claim against HLA thus fails because there can be no knowing inducement where there is no price discrimination in the first place. A claim of

knowing inducement under Section 2(f) of the Robinson- Patman Act is contingent on the CA Defendants' liability under Section 2(a). *See Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U.S. 61, 74 (1953) ("a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses."); *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 212 n. 6 (3d Cir. 2007) (because the plaintiff "was unable to establish a section 2(a) claim, its section 2(f) claim . . . necessarily fails.") (internal quotation marks and quotation omitted); *see also Labrador, Inc. v. Iams Co.*, No. CV 94-4463, 1995 WL 714454, *7 (C.D. Cal. Sept. 18, 1995), *aff'd*, 105 F.3d 665 (9th Cir. 1997) ("A prerequisite to maintaining a Section 2(f) claim is proof of a party's claim against the manufacturer/seller for violation of a Section 2(a) claim. If the plaintiff cannot maintain a Section 2(a) claim against the manufacturer/seller, then plaintiff's Section 2(f) claim against the distributor must fail as a matter of law.") (internal citation omitted).

Even if Plaintiff's price discrimination claim against the CA Defendants survives, however, its knowing inducement claim against HLA fails as a matter of law. That is because Plaintiff has failed to allege that HLA "knowingly induced" systematically lower prices than Plaintiff paid on contemporaneous purchases of comparable quantity and quality (and that those lower prices were not justified by lower costs, the need to meet competition, or for other reasons permitted by the Robinson-Patman Act). *Automatic Canteen*, 346 U.S. at 79 ("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."). Plaintiff alleges none of these required factual allegations and, instead, simply asserts a boilerplate conclusion: that "[o]n information and belief," "HLA would receive lower pricing

and increased promotional opportunities . . . in comparison to the pricing and promotional discounts offered to Plaintiff." (Compl. ¶ 44). But that generic allegation contains none of the required factual allegations: that HLA knowingly induced *systematically* lower - - and *unjustified* - - prices on *contemporaneous* purchases of *comparable quantity* and *quality*. There are simply no factual allegations in the Complaint that HLA *knew* that it was receiving prices that constituted price discrimination under the Robinson-Patman Act and did not qualify for any defense. Knowingly receiving a lower price alone is not sufficient to establish that HLA knew that the price was *discriminatory*. "Buyers are not liable if they are innocent beneficiaries of discriminatory prices." *Gorlick Distribution Centers, LLC v. Car Sound Exhaust Sys., Inc*., 723 F.3d 1019, 1022 (9th Cir. 2013) (citing *Automatic Canteen*, 346 U.S. at 70-71). If simply receiving a lower price was all that was necessary, then buyers would face Robinson-Patman liability whenever they bargained for lower prices. This would undermine competition, and is certainly not what Congress intended. *See Brooke Grp. Ltd.*, 509 U.S. at 220 ("Congress did not intend to outlaw price differences that result from or further the forces of competition," and the Act "should be construed consistently with broader policies of the antitrust laws.")[5] (internal quotation marks and quotation omitted).

[5] Plaintiff's allegation that HLA received more promotional allowances than Plaintiff did is not actionable under the Robinson-Patman Act. (Compl. ¶ 44 ("increased promotional opportunities"); Compl. ¶ 47 ("promotional funds"). A buyer is not liable for receiving discriminatory promotional allowances. *See Sofa Gallery, Inc. v. Mohasco Upholstered Furniture Corp.*, 639 F. Supp. 677, 678-79 (D. Minn. 1986) (granting motion to dismiss because the receipt of promotional allowances is not actionable under Section 2(f)).

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

### A. A "Jilted Distributor" Fails To State A Claim

This is a classic "jilted distributor" case. The Complaint alleges that the CA Defendants chose to sell to a number of distributors, including HLA, but not to Plaintiff after July 2012. It is well-established that a supplier has broad freedom to sell - - or not sell - - to whoever it wants. *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("'The trader or manufacturer . . . carries on an entirely private business, and can sell to whom he pleases.'" (citation omitted)). Indeed, a supplier can decide to sell through a single, exclusive distributor and the antitrust laws encourage distributors to compete for that privilege. *Race Tires*, 614 F.3d 57 at 76 ("Rather, it is widely recognized that in many circumstances [exclusive dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all."(citation omitted)).

As a result, courts have consistently held that a complaint, like the Plaintiff's, that does no more than state a single distributor's "commercial disappointment at losing a distribution contract with a manufacturer fails to allege restraint of trade." *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); *Id.* at 29 ("It is not 'a violation of the antitrust laws, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . and to appoint an exclusive distributor.'") (citation omitted); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 806 (6th Cir. 1988) (distributor "jilted" so that manufacturer could award exclusive distributorship to another has no cause of action under the Sherman Act"); *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987) (no antitrust violation occurs when

distributors are terminated unless the exclusive agreement is intended to or does harm to competition). This reflects the generally shared view by the courts that "it is the nature of competition that at some point there are winners and losers, and the losers are excluded." *Konik v. Champlain Valley Physicians Hosp. Medical Center*, 733 F.2d 1007, 1015 (2d Cir. 1984), *cert. denied*, 469 U.S. 884 (1984) (affirming the dismissal of an antitrust complaint because hospital was not required to allow any anesthesiologist access to its operating rooms); *SanDisk Corp. v. Kingston Tech. Co., Inc.*, 863 F. Supp. 2d 815 (W.D. Wisc. 2012) (granting judgment in SanDisk's favor on Kingston's Sherman Act counterclaims); *id.* at 830 ("the federal antitrust laws are concerned not with the welfare of competitors but the health of the competitive process, and healthy competition has winners and losers.") (citation omitted).

Competition is the "*sine qua non* of the antitrust laws," and that includes competition to be a distributor. *Care Heating & Cooling, Inc. v. American Standard, Inc.*¸ 427 F.3d 1008, 1014 (6th Cir. 2005) (affirming dismissal for failure to state a claim as servicer of HVAC systems did not suffer antitrust injury due to manufacturer's failure to designate it as an authorized dealer). "[A] complaint alleging only adverse effects suffered by an individual competitor cannot establish an antitrust injury." *Id.* at 1014-15 (citing *Crane & Shovel Sales Corp.*, 854 F.2d at 807). Plaintiff has failed to plead how competition is harmed independent of harm to itself. Therefore, Plaintiff has failed to state a violation of the antitrust laws and its Complaint should be dismissed.

### B. The Complaint's Conclusory Allegation Of A Single-Brand of Mass-Market Cigars Fails As A Matter Of Law

The Third Circuit previously rejected such conclusory allegations of a single-brand market definition as the Plaintiff makes here in *Queen City Pizza, Inc. v. Domino's Pizza* 124 F.3d 430 (3d Cir. 1997) (affirming dismissal as the products within the proposed market were

interchangeable with products outside of the proposed market). A Section 2 claim requires "(1) possession of monopoly power in a relevant market and (2) the willful acquisition or maintenance of that power." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-1 (1966). "The first step in determining whether a § 2 violation has occurred is to define the relevant market." *Desai v. Impacta, S.A.*, No. Civ. 89-4817, 1990 WL 132709, at *5 (D.N.J. Sept. 7, 1990) (internal quotation marks and quotation omitted) (dismissing monopolization claim as plaintiffs failed to sufficiently plead a relevant market "within which to judge monopoly power."). In addition, Plaintiff has "the burden of defining the relevant market" so that potential effects on competition resulting from CA's distribution policy can be assessed. *See Queen City*, 124 F.3d at 442; *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996) (explaining that plaintiff has the initial burden of "adducing adequate evidence of market power or actual anticompetitive effects.").

According to the Third Circuit, "The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff but 'commodities reasonably interchangeable by consumers for the same purposes.'" *Queen City Pizza*, 124 F. 3d at 438 (quoting *United States v. E.I. du Pont de Nemours & Co*, 351 U.S. 377, 395 (1956); *Tunis Brothers Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991)); *Id.* at 436 ("Where the plaintiff fails to define its proposed interchangeability and cross-elasticity of demand . . . the relevant market is legally insufficient and a motion to dismiss may be granted.") (citation omitted). The Supreme explained this rationale in *U.S. v. E.I. du Pont* when it reversed a conclusory determination that du Pont's cellophane wrapping, which it pioneered, was its own relevant product market separate and distinct from the many other types of flexible wrapping materials simply because customers liked it and they were able to command a higher price. In what became known as the

"cellophane fallacy" the Court reversed the district court's boilerplate conclusion that du Pont's product must be its own relevant product market. Instead, the Court called for an appraisal of the cross-elasticity of demand. *Id.*

Courts have routinely rejected such single brand product market arguments of the type that Plaintiff now makes. *See, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117–118 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (affirming district court's finding of no antitrust violations because single brand of Texaco gasoline was insufficient); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487–91 (5th Cir. 1984) (affirming summary judgment as Holiday Inn hotel rooms were not a pertinent market); *Parsons v. Ford Motor Co.*, 669 F.2d 308, 312 (5th Cir. 1982), *cert. denied*, 459 U.S. 832 (1982) (affirming summary judgment as the relevant market was larger than "new Ford automobiles"); *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 679 (S.D.N.Y. 1987) (dismissing Sherman Act Section 1 and 2 claims on the pleadings: no need for "protracted discovery" to find that "Rolex watches are reasonably interchangeable with other high quality timepieces.").

Without a plausible market, Plaintiff cannot adequately allege how the proposed anticompetitive effects in that market could realistically occur. Without alleging a plausible market, not only can anticompetitive effects not be presumed, Satnam's Complaint should be dismissed. *Iqbal*, 556 U.S. at 678 ("pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth, " and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *see also Queen City Pizza*, 124 F.3d at 442-43 (finding that the claim failed because the alleged market was "not a relevant market for antitrust purposes."). Failure by the Plaintiff to allege *facts* suggesting that the distributors of CA Defendants' mass-market cigars are a "market unto themselves" must lead to

dismissal. *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 264-65 (S.D.N.Y. 2000) (dismissing plaintiff's claim for failure to adequately plead a relevant product market).

The Section 2 counts should be dismissed as the Complaint does not contain *factual allegations* that support its boilerplate assertion that CA-branded mass-market cigars are their own relevant product market (as distinct from all other manufacturers' mass-market cigars and/or premium cigars). For example, the Complaint acknowledges that the CA Defendants are only one of several manufacturers of mass-market cigars, "[b]illions of units of mass-market cigars are sold annually," and that some of its cigars are also alternatives to premium cigars, "Hav-A-Tampa cigars also are touted as an inexpensive alternative to premium cigars," but contains no *factual allegations* that explain why those alternatives are not part of the relevant market and no allegations regarding the cross-elasticity of demand for CA-branded cigars compared to those other cigars. (Compl. ¶¶17, 22). That is error as a matter of law. Without a properly-alleged market definition, the conclusory allegation that HLA possessed market power in the distribution of CA-brands of mass-market cigars fails as a matter of law. Instead of factual allegations, the Complaint offers only boilerplate.

Apart from improperly alleging a product market, the Complaint also contains insufficient allegations of an adequate geographic market. This is pled in the CA Defendants' Motion to Dismiss at Section II.B. HLA incorporates that section by reference.

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

The Complaint alleges that the CA Defendants "conspired" with HLA to sell to HLA, rather than Plaintiff, after July 2012. This is what is known as a vertical agreement (that is, one between a supplier and its customer), rather than a horizontal agreement (which is between two competing inter-brand suppliers). Vertical "conspiracy" claims are judged under the more

lenient rule of reason standard, which looks at the market effects of the agreement, rather than the *per se* illegality that often applies to competitor agreements.

The core elements of a vertical "conspiracy" are the same under Sherman Act Sections 1 and 2: the plaintiff must allege (1) a "meeting of the minds" to do something unlawful, (2) an overt act in furtherance of the conspiracy; and (3) a causal connection between the vertical "conspiracy" and an injury to both Plaintiff and the competitive process. *Howard Hess Dental Labs Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 253 (3d Cir. 2010) ("*Dentsply II*") (affirming the district court's dismissal of antitrust class actions brought by dental laboratories against manufacturers of artificial teeth). In addition, a vertical "conspiracy" to monopolize claim under Sherman Act Section 2 requires factual allegations that the alleged conspirators possessed the "specific intent" to bestow a monopoly on one of the parties to the agreement.

The Complaint here does not contain any of these required factual allegations and, thus, fails to state valid "conspiracy" claims as a matter of law.

**A. Supplier Can Agree To Sell To One Distributor Rather Than Another**

The Supreme Court's *Colgate* Doctrine is directly applicable. The Court recognized a trader's or manufacturer's right to exercise its own discretion to choose its trading partners:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct does not restrict the long recognized right of trader or manufacturer engaged in entirely private business, *freely to exercise his own independent discretion as to parties with whom he will deal*; and, of course, he may announce in advance the circumstances under which he will refuse to sell . . . .
>
> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (emphasis added).

Courts have repeatedly held that the substitution of distributors does not unreasonably restrain trade "even if the effect . . . is to seriously damage the former distributor's business." *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1248-49 (5th Cir. 1979) (affirming grant of

summary judgment as "a manufacturer may discontinue dealing with a particular distributor for business reasons sufficient only to itself. . . ."); *Crane & Shovel Sales*, 854 F.2d at 806 ("We have consistently held that a complaint which simply alleges that a manufacturer substituted one distributor for another fails to state a violation . . . ."). Accordingly, choosing one distributor over another cannot constitute a Sherman Act conspiracy claim. *Dunn & Mavis, Inc. v. Nu-Car Driveaway*, 691 F.2d 241, 243-44 (6th Cir. 1982) (complaint that does no more than state commercial disappointment at losing a distribution contract with a manufacturer fails to allege a restraint of trade).

### B. The Complaint Does Not Contain Factual Allegations Suggesting That HLA Agreed With The CA Defendants Not To Sell To Plaintiff

In order to survive a motion to dismiss, a complaint must comply with Federal Rule of Civil Procedure 8 and the Supreme Court's decisions in *Twombly* and *Iqbal*. The Court held in *Twombly* that a Section 1 claim should have been dismissed because the complaint did not set forth "a single fact in a context that suggests an agreement." *Twombly*, 550 U.S. at 561-62. The Court was not swayed by the "few stray statements" about the existence of a conspiracy since "these [were] mere legal conclusions resting on the prior allegations." *Id*. at 564-65.

The Court later explained in *Iqbal* that a court considering a motion to dismiss should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. A complaint is, therefore, valid only if it contains ***factual allegations*** that if true, meet the elements of a cause of action. It is not enough to simply assert the boilerplate conclusion that two parties "conspired."

But this is all that Satnam does. The Complaint alleges an agreement between the CA Defendants and HLA on "information and belief." (Compl. ¶ 27). Without more, this accusation

by Satnam that CA Defendants and HLA formed an anticompetitive agreement is merely conclusory. This is not enough to meet the pleading standard set out by the Court in *Twombly* and *Iqbal.*

As the Third Circuit has held, in cases where plaintiffs allege an agreement, a significant "plus factor" to show the existence of an agreement encompasses "non-economic evidence that there was an actual, manifest agreement not to compete," which may include "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004) (internal quotation marks and quotation omitted) (holding, *inter alia*, that purchasers of automotive replacement glass failed to prove that the manufacturer engaged in a horizontal price-fixing conspiracy); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) (explaining that "some form of concerted action" is required) (citation omitted). But the Complaint fails to allege the "who," "what," "when," and "where" of the supposed agreement. There is not a single fact that could "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 557.

The Third Circuit in *Baby Food* explained further that "no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (affirming summary judgment as a matter of law because plaintiffs failed to exclude the possibility of independent action); *see also Brokerage*, 618 F.3d at 326 (explaining that "a claim of conspiracy predicated on parallel conduct" is insufficient when "'common economic experience,' or the facts alleged in the complaint itself, show that independent self- interest is an

'obvious alternative explanation.' for [the] defendants' common behavior." (quoting *Twombly*, 550 U.S. at 565, 567 (2007)).

Moreover, there is no factual support that HLA entered into any agreement with the "specific intent" to maintain its alleged monopoly.

### C. The Complaint Lacks Factual Allegations To Sustain Its Conclusory Assertion That HLA Acted With "Specific Intent"

Specific intent is a required element of a Sherman Act Section 2 conspiracy to monopolize claim, as noted above, and "requires plaintiffs to plead that both 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." *See, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 516 F. Supp. 2d 324, 341 (D. Del. 2007), *aff'd Dentsply II*, 602 F.3d at 358.

Not only that, as per *Dentsply II*, without factual allegations "to suggest that [CA Defendants] knew that [HLA] was spearheading an effort to squash its competitors by pressing [CA Defendants] into its service and keeping prices artificially inflated" - - CA Defendants' alleged specific intent to further HLA's supposed monopolistic ambitions cannot be inferred. *Dentsply II*, 602 F.3d at 260; *see also Desai v. Impacta, S.A.*, Civ. A. No. 89-4817, 1990 WL 132709, at *11 (D.N.J. Sept. 7, 1990) (element of conspiracy to monopolize offense is "[s]pecific intent to monopolize the relevant market") (citing *Fleer Corp. v. Topps Chewing Gum, Inc.* 658 F.2d 139, 153 (3d Cir. 1981)).

The Complaint contains "no facts from which it can reasonably be inferred" that either CA Defendants or HLA (let alone both of them) "formulated the [intent]" that maintaining HLA's alleged monopoly "was a goal that they themselves wanted to accomplish." *Dentsply II*, 602 F.3d at 258.

*In toto*, in a complaint consisted of 145 paragraphs, Plaintiff alleges specific intent once:

> HLA has specifically intended its conduct, as alleged herein through its agreement with CA, to have the effect of controlling prices and/or destroying competition in the market.

(Compl. ¶ 127).

But that is simply a boilerplate conclusion. The Complaint contains no factual allegations that the CA Defendants had the specific intent of facilitating HLA's monopolization of the market or that HLA itself specifically intended to monopolize the distribution of CA-brands of mass-market cigars in Pennsylvania. This is unsurprising as it would make no sense for CA Defendants to reduce the competition for distribution of their tobacco products as to do so would limit CA Defendants' own options to secure competitive distribution arrangements.

Instead of repeating further detail here on the defects of Plaintiff's Count V, HLA incorporates CA Defendants' motion by reference.

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

The Complaint alleges that at all times the CA Defendants used multiple distributors to sell their mass-market cigars to convenient stores and other retail outlets in Pennsylvania, but that after July 2012, they stopped selling to one of those distributors, Plaintiff. That does not state a viable antitrust claim of any type because one fewer distributor has no effect on competition as a matter of law. And that is why the Complaint is utterly silent on any *antitrust injury*, a required element of each and every one of Plaintiff's claims.

It is black-letter law that to sustain an antitrust damages claim, a claimant must not only allege injury to itself, but also harm to competition in a relevant market, *i.e.*, "antitrust injury." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (holding that independent

marketer of gasoline had suffered no "antitrust injury" as it had failed to show that its claimed loss stemmed from a "competition-reducing aspect or effect of the defendant's behavior.").

As the Supreme Court and the Third Circuit have held, "to establish antitrust standing a plaintiff must 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 No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 924 n. 6 (3d Cir. 1999) (holding that the negative effects were not proximate enough to meet the requirements for antitrust standing); *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n. 31 (1983) (found that plaintiff's allegation of harm resulting from antitrust violations were insufficient as a matter of law as the "causal relationship" was too "tenuous and speculative"). The most relevant factor in this analysis is "whether the plaintiffs alleged injury is of the type for which the antitrust laws were intended to provide redress." *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 274 (3d Cir. 1999) (held that a physician had antitrust standing to bring a suit against hospitals for allegedly engaging in exclusive dealing and a group boycott).

In this context, Satnam must allege sufficient facts to support its allegations that the type of competition harmed was between distributors. Alleging that only one distributor was harmed is insufficient. *Crane & Shovel*, 854 F.2d at 806 ("substituting one distributor for another . . . fails to state a violation . . . unless it also alleges anticompetitive effect at the interbrand level."); *Id.* at 174-75 ("[D]efendants merely allege injury to themselves, which is insufficient to confer standing to assert antitrust violations.") (citation omitted). Satnam's allegations that *it* was injured are insufficient. They are allegations by a single competitor, and even more precisely, a single distributor—precisely what the antitrust laws do not protect. *Brunswick Corp. v. Pueblo*

*Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for "the protection of competition not competitors.") (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

While Plaintiff has made boilerplate allegations of harm to competition (e.g., Compl. ¶108), such allegations do not suffice. It is well established in this Circuit, that "to survive a [m]otion to [d]ismiss, [p]laintiff's Complaint must contain more than conclusory allegations of 'harm to competition.'" *Bradburn Parent/ Teacher Store, Inc. v. 3M*, No. Civ. A. 02-7676, 2000 WL 34003597, at *2 (E.D. Pa. July 25, 2003) (citing *Microsoft Corp. v. Computer Support Servs. of Cal.*, 123 F. Supp. 2d 945, 951 (W.D.N.C. 2000) (requiring plaintiff to show how 3M's conduct harmed both plaintiff and competition itself). Falling short of this pleading standard, the only competition that the Plaintiff identifies as affected is its own: "CA and HLA . . . have harmed competition by ensuring that *Plaintiff* was deprived from receiving equal pricing terms . . . . Under healthy and fair competition, *Plaintiff* would have received similar prices, rebates, and promotional discounts to those offered to HLA, and *Plaintiff* would have *continued providing competition* to HLA in the Pennsylvania region." (Compl. ¶ 144) (emphasis added).

It is insufficient for Satnam to establish standing on a concern that it, Satnam, did not receive similar prices and promotions as HLA. *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir. 1989) ("[T]he fact that a particular competitor in a particular market has lost profits does not inevitably mean that competition as a whole is lessened."). *See also L&M Beverage Co., Inc. v. Anheuser Busch, Inc.*, Civ. A. No. 85-6937, 1987 WL 16682, at *2 (E.D. Pa. Sept. 8, 1987) (granting summary judgment on antitrust claim under Rule 12 because a distributor terminated by a supplier has not suffered harm of the type that the antitrust laws were intended to prevent "plaintiffs' injury does not flow from the reduction in competition, but rather

from the fact that their distributorships were terminated."); *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 616 (6th Cir. 2001) (affirming summary judgment as a terminated distributor could not show antitrust injury).

The Plaintiff does not, because it cannot, allege facts showing harm to competition. Accordingly, its claims should be dismissed as a matter of law for lack of antitrust injury.

## CONCLUSION

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

Dated: February 12, 2015

Respectfully submitted,

By: */s/ Robert E. Welsh*
ROBERT E. WELSH, JR.
rewelsh@welshrecker.com
WELSH & BECKER, P.C.
2000 Market Street, Suite 2903
Philadelphia, PA 19103
Telephone: (215) 972-6430
Facsimile: (215) 972-6436

JOSEPH A. OSTOYICH
(pending *pro hac vice*)
joseph.ostoyich@bakerbotts.com
BAKER BOTTS LLP
1299 Pennsylvania Avenue, N.W.
Washington DC 20004-2400
Telephone: (202) 639-7700
Facsimile: (202) 639-7890

ANDREW M. LANKLER
andrew.lankler@bakerbotts.com
BAKER BOTTS LLP (pending *pro hac vice*)
30 Rockefeller Plaza
New York, New York 10112-4498
Telephone: (212) 408-2500
Facsimile: (212) 408-2501

*Attorneys for Harold Levinson Associates, Inc.*

**CERTIFICATE OF SERVICE**

I, Robert E. Welsh, Jr., 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:

Brent W. Landau
Hausfeld LLP
325 Chestnut Street, Suite 900
Philadelphia, PA 19106
*Counsel for Satnam Distributors LLC*

Robert J. Brookhiser, Jr.
BakerHostetler LLP
1050 Connecticut Ave., N.W., Suite 1100
Washington DC 20036-5304
*Counsel for Commonwealth-Altadis, Inc., Commonwealth Brands, Inc. and Altadis, U.S.A, Inc*

Carl W. Hittinger
BakerHostetler LLP
2929 Arch Street
Cira Center 12th Floor
Philadelphia, PA 19104-3439
*Counsel for Commonwealth-Altadis, Inc., Commonwealth Brands, Inc. and Altadis, U.S.A, Inc*

Elizabeth B. McCallum
Robert J. Brookhiser, Jr.
BakerHostetler LLP
1050 Connecticut Ave., N.W., Suite 1100
Washington DC 20036-5304
*Counsel for Altadis, U.S.A., Inc.*

/s/ Robert E. Welsh, Jr.
Robert E. Welsh, Jr.

Date: February 12, 2015