UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANTAM DISTRIBUTORS LLC, D/B/A LION & BEAR DISTRIBUTORS	:	
Plaintiff,	:	Civil Action No.: 2:14-cv-06660-LFR
v.	:	
COMMONWEALTH-ALTADIS, INC., COMMONWEALTH BRANDS, INC., ALTADIS, U.S.A., INC., HAROLD LEVINSON ASSOCIATES, INC.	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Plaintiff Satnam Distributors LLC d/b/a Lion & Bear Distributors, a distributor of cigars and other products, was the victim of anticompetitive conduct by Defendants Commonwealth-Altadis, Inc., Commonwealth Brands, Inc. and Altadis U.S.A., Inc. (collectively, "CA"), and Defendant Harold Levinson Associates, Inc. ("HLA"). CA charged Plaintiff higher prices for CA's Mass-Market Cigars than it charged HLA, and provided Plaintiff with less favorable promotions than it provided to HLA, a paradigmatic case of discriminatory pricing prohibited by the Robinson-Patman Act, 15 U.S.C. § 13 (Count I). Because HLA knowingly induced or received this discriminatory pricing, it is liable under the statute as well (Count II).

Separately from and in addition to these straightforward Robinson-Patman Act claims, Plaintiff alleges that Defendants also violated the Sherman Act through their agreement to limit Plaintiff's growth and ultimately drive it from the relevant market through discriminatory pricing and refusals to deal. By means of this conduct, HLA monopolized and attempted to monopolize the market for distribution of CA's Mass-Market Cigars in Pennsylvania, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (Counts III and IV); CA and HLA conspired to monopolize, also in violation of Section 2 (Count V); and CA and HLA entered into an unlawful agreement in restraint of trade in violation of Sherman Act Section 1, 15 U.S.C. § 1 (Count VI).

Defendants' motions to dismiss Plaintiff's Complaint should be denied. Plaintiff's detailed allegations about the relevant market, Defendants' anticompetitive conduct, and the harm to competition are more than sufficient to satisfy Plaintiff's burden at this early stage of the litigation. Arguments of the type now raised by Defendants are typically and more appropriately advanced at the summary judgment stage, following discovery, and are premature now. As demonstrated below, Defendants' attack on Plaintiff's claims are without merit.

FACTUAL BACKGROUND[1]

Plaintiff is a distributor of cigars and other products to convenience stores and other distributors that service convenience stores. Compl. ¶¶ 3, 8. In particular, Plaintiff buys and resells mass-market cigars, which are machine-made, less expensive than handmade premium cigars, and principally sold via convenience stores and other retail outlets. *Id.* ¶ 17. CA, which manufactures and sells mass-market cigar brands such as Dutch Masters, Backwoods, Phillies, Hav-A-Tampa, and White Cat, does not have any exclusive distributor agreements in Pennsylvania or any exclusive territories, but rather sells to multiple distributor customers. *Id.* ¶ 26. The Pennsylvania market for CA's Mass-Market Cigars is approximately $60 million per year. *Id.* ¶ 18.

In 2011, Plaintiff entered the Pennsylvania market and immediately began to challenge the dominant distributor, HLA. *Id.* ¶¶ 37, 39. Compared to HLA, Plaintiff offered superior customer service, a better ability to form relationships with customers, and a more equitable pricing structure. *Id.* ¶ 42. When Plaintiff entered the market, HLA accounted for at least 80% of the market for distribution of CA's Mass-Market Cigars in Pennsylvania. *Id.* ¶ 39. But as Plaintiff competed with HLA, Plaintiff achieved a market share of 30%, reducing HLA's share to approximately 50%. *Id.* ¶¶ 42-43.

Aware of its dwindling share of the relevant market, HLA entered into an agreement with CA, pursuant to which HLA would receive lower pricing and increased promotional opportunities for CA's Mass-Market Cigars, in comparison to the pricing and promotional discounts offered to Plaintiff. *Id.* ¶ 44. As agreed between CA and HLA, CA charged prices to

[1] The following facts are taken from the allegations in Plaintiff's complaint, which must be accepted as true for purposes of a motion to dismiss. *See infra* at 4.

Plaintiff that were 10-20% higher than prices charged to HLA for the identical Mass-Market Cigars, on over $11 million of cigars purchased by Plaintiff from CA. *Id.* ¶¶ 41, 49-50, 66, 67.

While Plaintiff continued its attempt to compete on the basis of its superior customer service despite paying discriminatory prices, it found that HLA was **selling** to Plaintiff's customers for lower prices that those at which Plaintiff was **buying** the identical cigars from CA. *Id.* ¶¶ 48, 57-59, 64, 68, 71, 72, 78. As related to Plaintiff by a CA employee in or around May 2012, HLA had complained about Plaintiff "disrupting the marketplace" through its competition with HLA. *Id.* ¶¶ 73-74. Plaintiff repeatedly requested that CA put it on a level playing field, but CA refused to meet with Plaintiff, told Plaintiff that lower prices were not available to it, and failed to offer non-discriminatory prices to Plaintiff. *Id.* ¶¶ 53, 55, 58, 60, 63, 69-71, 76-77.

Beginning in July 2012, with the price discrimination not yet succeeding in driving Plaintiff from the market, the conspiracy entered a new phase as CA, pursuant to its agreement with HLA, refused to sell to Plaintiff. *Id.* ¶¶ 78-82. With Plaintiff now unable to compete in the relevant market, HLA regained its previously-lost market share by the beginning of 2013. *Id.* ¶ 83. Plaintiff continued its efforts to buy from CA in 2013, including by submitting purchase orders at prices set by CA, but CA refused to fill those orders. *Id.* ¶¶ 84-90.

Defendants' anticompetitive conduct caused Plaintiff to lose customers, sales, and profits, and also harmed consumers by resulting in higher prices for CA's Mass-Market Cigars in Pennsylvania compared to what prices would have been in the absence of Defendants' illegal behavior. *Id.* ¶¶ 83, 91-95. Plaintiff made efforts to discuss his treatment with CA, but he was ignored and was eventually told by a CA senior manager that he would need to talk to CA's lawyers before responding to Plaintiff. *Id.* ¶ 88. CA has never offered any explanation for its conduct, and Plaintiff was left with no choice but to initiate this lawsuit for Defendants'

violations of the antitrust laws. *Id.* ¶¶ 88-90.

LEGAL STANDARD

A complaint must be sustained if it alleges "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010); *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). In making this determination, the Court must accept the complaint's factual allegations as true and draw all reasonable inferences and resolve all conflicts and ambiguities in favor of the plaintiff. *Nat'l Educ. Fin. Servs., Inc. v. U.S. Bank, Nat'l Ass'n*, No. 12-6651, 2013 WL 6228979, at *2 (E.D. Pa. Dec. 2, 2013). Consistent with the Supreme Court's admonition in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), that the "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts," the Complaint must be read "as a whole." *See In re Flat Glass Antitrust Litig. (II)*, Civ. A. No. 08-mc-180, 2009 WL 331361, at *3 (W.D. Pa. Feb. 11, 2009). As the Supreme Court reiterated in *Iqbal*, the *Twombly* standard does not impose a "probability requirement," and does not require as a general matter that a plaintiff plead facts supporting an inference of a defendant's liability more compelling than the opposing inference. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556).

Liberal notice pleading standards under Fed. R. Civ. P. 8 apply to antitrust claims. *See Twombly*, 550 U.S. at 554-55, 557. *Twombly* held that pleading an antitrust conspiracy requires a complaint with enough factual matter (taken as true) to plausibly suggest that an agreement was made. *Id.* at 556. Having "plausible grounds to infer an agreement" means that the complaint has "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556; *see also W. Penn Allegheny Health Sys., Inc. v. UPMC*,

627 F.3d 85, 98 (3d Cir. 2010). Plaintiff's allegations need only be "plausible"—there is no "heightened pleading standard" for antitrust cases. *Phillips*, 515 F.3d at 233-34.

On a motion to dismiss, the "question is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." *Dorsey v. Daub*, No. 09-CV-3879, 2011 WL 322887, at *3 (E.D. Pa. Feb. 2, 2011); *see also Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 318 (3d Cir. 2008); *Cummings v. Smith*, No. 09-0335, 2013 WL 5377376, at *2 (E.D. Pa. Sept. 25, 2013) ("factual issues [ ] are not properly resolved on a motion to dismiss"). Plaintiff's Complaint contains much more substance than mere "buzzwords and conclusory allegations," as Defendants wrongly contend. HLA Mem. at 12. As demonstrated through the specific allegations detailed above and referenced throughout this memorandum, Plaintiff has made numerous, detailed allegations that more than suffice at the motion to dismiss stage. When, as here, a plausible claim of illegal antitrust activity is alleged, discovery must be allowed to proceed, in order to "reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556.

ARGUMENT

I. PLAINTIFF HAS SUFFICIENTLY ALLEGED PRICE DISCRIMINATION IN VIOLATION OF THE ROBINSON-PATMAN ACT (COUNTS I-II)

A. Plaintiff Has Sufficiently Alleged that CA Violated the Robinson-Patman Act (Count I)

The elements of Plaintiff's Robinson-Patman Act claims against CA are straightforward. All that is needed is for Plaintiff to allege, as it does, that (1) CA made at least two contemporary sales of the same commodity at different prices to Plaintiff and HLA, and (2) the effect was to "injure competition," which, for purposes of the Robinson-Patman Act in a so-called "secondary line" case such as this, means only that (a) Plaintiff lost sales or profits to HLA or (b) HLA received a significant price reduction compared to Plaintiff over a substantial period of time.

Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, 546 U.S. 164, 176-77 (2006); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 228 (3d Cir. 2008).

While it is true that the Robinson-Patman Act has been construed narrowly, all this means is that courts should not extend the statute to cover conduct that does not meet the above requirements. *Volvo Trucks*, 546 U.S. at 180-81 ("declining to extend" the Robinson-Patman Act to "reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory"); *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191, 198 (3d Cir. 2010) (rejecting Robinson-Patman claim when the two purchasers were not in competition with one another). None of the cases cited by Defendants stands for the remarkable proposition that a garden-variety price discrimination case like this one, where all of the required elements are present, cannot proceed to discovery. *Cf. Wiegand Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, No. Civ. A. 03-5451, 2006 WL 847557, at *2 (E.D. Pa. Mar. 29, 2006) (denying summary judgment on Robinson-Patman Act claim, following factual and expert discovery, finding that the facts were distinguishable from those in *Volvo Trucks*, in which there was no "direct evidence of price discrimination involving head-to-head competition").

1. CA Made At Least Two Contemporary Sales of the Same Commodity at Different Prices to Plaintiff and HLA

Unlike in the cases cited by Defendants, this is not a case about mere offers to sell that were not consummated, or purchases of different products, or transactions separated by considerable lengths of time. Plaintiff actually purchased the identical products, for higher prices than were paid by HLA, in the same time frame. This is all that the Robinson-Patman Act requires.

CA Made Actual Sales, Not Just Offers to Sell. As detailed in Plaintiffs' Complaint, Plaintiff actually purchased millions of dollars of CA's Mass-Market Cigars, on numerous

occasions during the relevant period. Compl. ¶ 41 ($2.2 million in purchases between January and August 2011); *id.* ¶ 66 ($2.3 million in purchases between November 2011 and January 2012); *id.* ¶ 67 ($6.6 million in purchases between February and May 2012). Defendants' cases about mere offers to sell, or a process involving multiple bids, are therefore inapposite. *See Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.,* 159 F.3d 129, 142 (3d Cir. 1998); *Toledo Mack,* 530 F. 3d at 228; *Data Capture Solutions v. Symbol Techs.,* 520 F. Supp. 2d 343, 349 (D. Conn. 2007); *B-S Steel, Inc. v. Tex. Indus.,* 439 F.3d 653, 669 (10th Cir. 2006).

Plaintiff and HLA Purchased the Same Product. Plaintiff alleges that it paid discriminatory prices for each brand of CA's Mass-Market Cigars. Compl. ¶¶ 24, 40, 64, 68. That is, both Plaintiff and HLA purchased Dutch Masters, Backwoods, Phillies, Hav-A-Tampa, and White Cat, and for each of these brands paid more for the identical product. Because convenience stores need to carry every brand, their distributors need to purchase every brand themselves. Compl. ¶¶ 23-24. To take Defendants' analogy, Plaintiff is not lumping Cadillacs and Lincolns into the same category of "luxury cars," but rather alleging that there were discriminatory prices on both Cadillacs **and** Lincolns.

At the motion to dismiss stage, Plaintiff need not specify the specific sizes, styles, and flavors of each brand, as CA suggests. All of this will come out during discovery. *See Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245, 252-53 (S.D.N.Y. 1997) (rejecting argument that a Robinson-Patman complaint about price discrimination in the sale of books must "include allegations of particular transactions involving particular book titles"). But in any event, the Robinson-Patman Act "does not require that products be physically *identical* in order to be of like grade and quality." *Liggett Group, Inc. v. Brown & Williamson*

Tobacco Corp., 1989-1 Trade Cas. (CCH) ¶ 68,583, at 61,105 (M.D.N.C. 1988). Defendants' own principal case on this point makes this clear. *See In re Quarter Oats Co.*, 66 F.T.C. 1131, at *34 (1964) (finding that minor differences such as a change in brand name, sizing, or packaging would not justify treating the product as a different commodity). So does a recently decided district court case concerning package size. *See Woodman's Food Market, Inc. v. Clorox Co.*, No. 14-CV-734-slc, 2015 WL 420296 (W.D. Wis. Feb. 2, 2015).

Plaintiff and HLA Purchased Contemporaneously. Plaintiff purchased CA's Mass-Market Cigars on a regular and continuous basis. *See, e.g.*, Compl. ¶ 79 ("In May 2012, Plaintiff had purchased over 1,000 cases per week, and purchased similar quantities in early June 2012 . . ."). In order to meet convenience store demand, HLA must have purchased at least as frequently, and Plaintiff alleges that HLA purchased from CA throughout the same time period. Compl. ¶¶ 44, 49, 52, 55, 59. Thus, Defendants' analogy to sales of cars and the beginning and end of a model year is inapposite, as purchases occurred multiple times each month and even each week. The same is true with respect to cases such as *Atalanta Trading Corp. v. FTC,* 258 F.2d 365 (2d Cir. 1958), which featured five to eight month gaps between the transactions. *Id.* at 371-72. The precise dates on which HLA purchased, and the prices it paid for each product on those dates, is all "information [that] might be in the possession of defendants, [thus] it could not be known by plaintiffs," and is appropriately assessed after discovery. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 718-19 (S.D.N.Y. 2013).[2]

Given the substantial detail in its Complaint, Plaintiff sufficiently alleges that CA made at least two contemporary sales of the same commodity at different prices to Plaintiff and HLA. For

[2] Cases cited by Defendants that were decided after discovery, at summary judgment, are therefore not informative of Plaintiff's burden at the pleading stage. *See, e.g.*, *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468 (7th Cir. 1980).

comparison, Judge Ditter recently denied a motion to dismiss a Robinson-Patman claim that rested on "the barest of allegations" – simply that the defendants "distributed Konasil through Univar and other distributors on more favorable terms than offered ITP" – because it was nevertheless "sufficient to establish a plausible ground for relief." *ITP, Inc. v. OCI Co.*, 865 F. Supp. 2d 672, 684 (E.D. Pa. 2012). Plaintiff has done much more here.[3]

2. Plaintiff Alleges the Requisite Competitive Injury for a Robinson-Patman Act Claim

In a "secondary line" price discrimination case such as this one – that is, a case brought by a purchaser subjected to price discrimination – a Robinson-Patman Act plaintiff can show the necessary injury to competition in one of two ways: (a) through lost sales or profits to a competitor or (b) through a significant price reduction received by the competitor over a substantial period of time. *Volvo Trucks*, 546 U.S. at 176-77. Plaintiff has alleged both. *See, e.g.*, Compl. ¶¶ 44, 48, 52, 59, 63-64, 68, 70-72, 76, 78, 81, 83.

Defendants argue that Plaintiff is required to "show that it lost *specific* customers or sales," CA Mem. at 13, but cite no case requiring that level of specificity at the pleading stage. Indeed, that is what discovery in a Robinson-Patman Act case is for:

> Reading the complaint as a whole, viewing the factual allegations in their totality, and drawing on its judicial experience and common sense, as the Court is required to do, the Court concludes that Fields's complaint alleges sufficient factual context as to competitive injury. Fields's complaint alleges a pattern of discriminatory pricing in completed sales and alleges that Fields and Skyline were in direct competition at the time of the alleged discriminatory pricing. For these reasons, the Court concludes Fields in its complaint provides enough factual context to show facial plausibility. To the extent Fields's complaint has not alleged facts as specific as NYS suggests it should, the Court notes that "further particularization" of Fields's claims "clearly is attainable through discovery procedures. In the event that [Fields] fails to uncover facts substantiating the

[3] Obviously, Plaintiff alleges discriminatory pricing only during the periods when it in fact purchased CA's Mass-Market Cigars. *Cf.* CA Mem. at 10-11.

> discriminatory sale allegations, summary judgment is available to avoid expensive trials of frivolous claims."

J.D. Fields & Co. v. Nucor-Yamato Steel, 976 F. Supp. 2d 1051, 1063-64 (E.D. Ark. 2013) (citation omitted) (quoting *Fusco v. Xerox Corp.*, 676 F.2d 322,337 n.7 (8th Cir. 1982)). Nor do Defendants acknowledge, as the Supreme Court has held, that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time." *Volvo Trucks*, 546 U.S. at 177. Even in the absence of evidence of specific transactions – though Plaintiff expects to develop that evidence through discovery – such an inference here would be appropriate. *See Nat'l Ass'n of Coll. Bookstores*, 990 F. Supp. at 252-53 ("As noted above, the Supreme Court has held that an inference of injury to competition can be drawn from evidence that some purchasers were required to pay substantially more than their competitors for the same goods. Allegations of such a price differential and identification of the relevant competitors are therefore sufficient to notify the defendants of the facts on which plaintiffs intend to establish this inference.").

Defendants suggest that Plaintiff and HLA are not in competition with one another because Plaintiff sells not only to convenience stores but also to other distributors who service convenience stores. As an initial matter, the alleged facts are that HLA does the same thing. *See, e.g.*, Compl. ¶¶ 23, 59, 68. But regardless of whether this is the case, Plaintiff and HLA are "each directly after the same dollar." *Feesers*, 591 F.3d at 197. This is why Plaintiff was once able to increase its market share at HLA's expense, and why HLA regained that share when it later forced Plaintiff out of the market. *Id.* ¶¶ 43, 83.

Defendants incorrectly conflate the requirement of "competitive injury" under the Robinson-Patman Act with "antitrust injury" as that term is used for violations of the Sherman Act. The two are "conceptually distinct." *Dayton Superior Corp. v. Marjam Supply Co.*, No. 07

CV 5215(DRH)(WDW), 2011 WL 710450, at *7 (E.D.N.Y. Feb. 22, 2011). The requirement of competitive injury is set forth above, and is sufficiently alleged by Plaintiff. *See also J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1534 (3d Cir. 1990).

As for antitrust injury, that is present in a Robinson-Patman case when there is a "causal connection between the price discrimination in violation of the Act and the injury suffered." *Dayton*, 2011 WL 710450, at *9 (quoting *United Magazine Co.*, 393 F. Supp. 2d 199, 209 (S.D.N.Y. 2005)); *see also Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 472 F. Supp. 2d 385, 424 (E.D.N.Y. 2007) ("For purposes of Robinson–Patman secondary-line cases, antitrust injury is the competitor's unfair competitive edge that is used to attract sales or profits from the plaintiffs."); *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, No. 98 Civ. 5564 (WHP), 2003 WL 22251312, at *3 (S.D.N.Y. Sept. 30, 2003) (noting that an "antitrust injury" can be shown "through some evidence of actual injury, usually in the form of lost sales or profits, and a causal connection between the price discrimination and the actual damage suffered"). Plaintiff's Complaint sufficiently alleges this type of antitrust injury. (As discussed below in Section II.B, the Complaint likewise alleges antitrust injury with respect to the Sherman Act claims.)

While Defendants point to the limited success that Plaintiff was able to achieve despite price discrimination, Plaintiff is not required to demonstrate that the discriminatory prices caused it to lose **all** of its sales. *See Wiegand Mack Sales & Serv.*, 2006 WL 847557, at *1 (loss of some sales sufficient); *J.F. Feeser*, 909 F.2d at 1537 (more than "de minimis" violations). But for the Robinson-Patman Act violations, Plaintiff would have been more successful than it was, because it would not have lost customers and sales to HLA. *See, e.g.*, Compl. ¶ 59.

B. Plaintiff Has Sufficiently Alleged that HLA Violated the Robinson-Patman Act (Count II)

HLA's liability under the Robinson-Patman Act for its knowing receipt or inducement of discriminatory prices flows from CA's liability. Plaintiff alleges that HLA knowingly entered into an agreement with CA. *See* Compl. ¶¶ 44, 48-50, 91-92. Plaintiff further alleges that HLA complained to CA about Plaintiff "disrupting the marketplace," following which HLA and CA agreed that CA would treat Plaintiff even less favorably than before. *Id.* ¶ 73-74. Thus, contrary to HLA's assertions, it was not an "innocent beneficiary" of preferential pricing from CA. Moreover, as HLA's own case demonstrates, this is an issue for summary judgment, not a motion to dismiss. *See Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc*., 723 F.3d 1019, 1022 (9th Cir. 2013) ("innocent beneficiary" issue decided at summary judgment).

HLA asks the Court to disregard Plaintiff's well-pleaded allegations because certain of them are made on "information and belief," as contemplated by the Federal Rules of Civil Procedure. But as Judge Baylson recently explained, "the well-pleaded allegations accepted as true for purposes of a Rule 12(b)(6) motion to dismiss include 'facts alleged on information and belief.'" *Certainteed Ceilings Corp. v. Aiken*, No. CIV.A. 14-3925, 2015 WL 410029, at *3 (E.D. Pa. Jan. 29, 2015) (quoting *Melo–Sonics Corp. v. Cropp*, 342 F.2d 856, 859 (3d Cir. 1965)). In good faith, Plaintiff expects discovery to provide admissible evidence supporting its allegations as to Defendants' conduct.[4] The Court should permit such discovery to occur.

[4] HLA's footnoted argument that a buyer cannot be liable for receiving discriminatory promotional allowances does not support dismissal of Plaintiff's Complaint. HLA Mem. at 17 n.5. First, Plaintiff alleges that HLA induced and received lower **prices**, not just more favorable promotional allowances. Second, the case cited by HLA, *Sofa Gallery, Inc. v. Mohasco Upholstered Furniture Corp.*, 639 F. Supp. 677 (D. Minn. 1986), is at odds with two subsequent district court cases holding that "[a] promotional allowance provided by a seller to a buyer that bears little relationship to the buyer's actual advertising costs provides a cash windfall to the favored buyer and, thus, can only be viewed as a reduction in the buyer's costs of goods." *Am. Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (2001) (N.D. Cal. 2001)

II. PLAINTIFF HAS SUFFICIENTLY STATED CLAIMS FOR VIOLATION OF THE SHERMAN ACT (COUNTS III-VI)

Plaintiff's Sherman Act claims are separate from and in addition to the Robinson-Patman claims discussed above. Claims for monopolization (Count III) and attempted monopolization (Count IV) are brought against HLA alone, and claims for conspiracy to monopolize (Count V) and agreement in restraint of trade (Count VI) are brought against all Defendants. Defendants challenge all of the Sherman Act claims for failure to allege a proper relevant market and failure to allege injury to competition; these attacks are without merit. Equally misplaced are Defendants' arguments against the alleged conspiracy claims.

A. Plaintiff Has Sufficiently Alleged a Proper Relevant Market

Although Defendants challenge the relevant product and geographic market alleged by Plaintiff, their arguments are premature. In antitrust cases, market definition is a fact-intensive inquiry more appropriately addressed following discovery and expert testimony, and "courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2nd Cir. 2001) (Sotomayor, J.). That was the conclusion reached by Judge Padova in *Peerless Heater Co. v. Mestek, Inc.*, No. Civ. A. 98-6532, 1999 WL 624481 (E.D. Pa. Aug. 6, 1999) (Padova, J.), in which CA's counsel here represented the plaintiff whose alleged market definition survived a motion to dismiss: "Moreover, the type of challenges made by Defendants to Plaintiffs' definition of the relevant market are best resolved on a motion for summary judgment or at trial." *Id.* at *1.

(citing *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 138 (S.D.N.Y. 2000); *see also* Compl. ¶ 47 (describing promotional funds for "'shows' that were . . . virtual (i.e., internet based)"). Given that this point raises factual issues not appropriate for resolution on a motion to dismiss, and especially because HLA's argument, even if adopted, would not dispose of Count II, further consideration may be deferred until a later stage of the litigation.

As discussed below, the facts alleged by Plaintiff support the relevant market defined in the Complaint: a market for the distribution of CA's Mass-Market Cigars in Pennsylvania. Unlike nearly all of the cases cited by Defendants, this is not a case where a manufacturer is alleged to have monopolized the sales of its **own** product. Instead, one of CA's distributors – HLA – has monopolized the market for **distribution** of products that it buys from CA, which HLA's convenience store customers must purchase in order to offer a full section of cigar brands to consumers. Because convenience stores need to stock **all** cigar brands, they cannot simply substitute another manufacturer's cigars in place of CA's Mass-Market Cigars.

Moreover, the geographic market is properly pleaded as limited to Pennsylvania given the regulatory and tax issues affecting cigars that are specific to that state. As one court recently held in upholding an alleged market consisting of a single drug sold by a single manufacturer, further inquiry into market definition should await a later stage of the litigation: "The defendants are free to argue otherwise on an eventual summary judgment motion or at trial, but it is premature on a motion to dismiss for the court to make a more probing factual inquiry than that, and the defendants cannot persuasively argue that the complaints should be dismissed for failure to plead monopoly power within a sufficiently defined market." *In re Aggrenox Antitrust Litig.*, No. 3:14-md-2516 (SRU), 2015 WL 1311352, at *16 (D. Conn. Mar. 23, 2015).

1. Plaintiff Sufficiently Alleges a Relevant Product Market

Defendants argue that "a manufacturer ordinarily cannot be deemed to have 'monopolized' its own products," CA Mem. at 6, but that is not what Plaintiff alleges in this case. Plaintiff does not contend that **CA** has monopolized the market for its own Mass-Market Cigars, but rather that **HLA**, which buys cigars from CA and resells them, has monopolized the market for **distribution** of those cigars, to the exclusion of a competing distributor, Plaintiff. For this reason, nearly all of the single-product market cases on which Defendants rely are

inapposite.[5] A market for a particular product is not the same thing as a market for distribution of that product. *See, e.g., F.T.C. v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45-46 (D.D.C. 1998); *Pepsico, Inc. v. Coca-Cola Co.*, No. 98 Civ. 3282 (LAP), 1998 WL 547088, at *7-16 (S.D.N.Y. Aug. 27, 1998).[6]

Plaintiff has alleged that a distributor **must** offer each and every cigar brand, as the demand from convenience stores is for all brands so that they can in turn meet the demands of their own customers for various brands:

> Because convenience stores, and therefore the distributor customers of Plaintiff and HLA, need to stock all major brands of mass-market cigars to meet customer demand, distributors such as Plaintiff and HLA must offer a supply of all of the

[5] *See Queen City Pizza, Inc. v. Domino's Pizza*, 124 F.3d 430 (3d Cir. 1997) (alleged monopolization by Domino's of pizza ingredients sold to its own franchisees); *Brokerage Concepts v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998) (alleged tying by U.S. Healthcare in the market for its own member's prescription benefits); *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715 (3d Cir. 1991) (alleged market allocation by Ford of its own tractors); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980) (alleged monopolization by Texaco of its own gasoline); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010) (alleged resale price maintenance by Leegin of its own handbags, belts, and jewelry); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984) (alleged monopolization by Holiday Inn of its own hotel rooms); *Parsons v. Ford Motor Co.*, 669 F.2d 308 (5th Cir. 1982) (alleged monopolization by Ford of its own cars); *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190 (N.D. Cal. 2008) (alleged monopolization by Apple of its own operating system); *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674 (S.D.N.Y. 1987) (alleged monopolization by Rolex of its own watches). Defendants also cite *United States v. E.I. DuPont De Nemours & Co.*, 351 U.S. 377, 393 (1956), which similarly involved DuPont's alleged monopolization of its own cellophane product, but when HLA refers to the so-called "cellophane fallacy" from that case, HLA Mem. at 20-21, it gets the meaning backwards: courts and economists have pointed out that the "fallacy" was committed by the Supreme Court in rejecting the proposed market definition. *See, e.g., Aegerter v. City of Delafield, Wis.*, 174 F.3d 886, 892 (7th Cir. 1999).

[6] *Green Country Food Mkt. v. Bottling Grp.*, 371 F.3d 1275 (10th Cir. 2004), cited by Defendants, is distinguishable for several reasons. First, like many of Defendants' cases, it was decided under a summary judgment standard not applicable here. *Id.*at 1278. Second, though the court cited federal case law, the case was brought not under the federal antitrust laws, but rather the Oklahoma Antitrust Reform Act. *Id.* Third, while the court ultimately concluded that the plaintiff had not offered "evidence" supporting its proposed market definition for purposes of summary judgment, the court did identify the factors relevant to the analysis, which are highly fact-intensive. *Id.* at 1282-83.

> different cigar varieties. Thus, distributors such as Plaintiff must buy all of the major mass-market cigar brands to ensure an adequate supply.

Compl. ¶ 23. If Plaintiff or another distributor cannot offer CA's Mass-Market Cigars, a convenience store will not simply purchase another manufacturer's cigars through that distributor; instead, the convenience store will purchase all of its cigar requirements through another distributor. Thus, there are not substitutes at this level of the distribution chain, and distribution of CA's Mass-Market Cigars is a properly alleged relevant product market:

> With respect to cigar distribution, there are no reasonably substitutable products for the mass market cigars manufactured and sold by CA. CA is the only manufacturer that manufactures popular brands such as Dutch Masters, Backwoods, Phillies, Hav-A-Tampa, and White Cat. Distributors such as Plaintiff must stock these popular cigar brands and cannot purchase CA's Mass-Market Cigars from any entity besides CA. If Plaintiff could not supply its customers with CA Mass-Market Cigars, the customer would not substitute another manufacturer's cigar but would instead purchase CA Mass Market-Cigars from a different distributor.

Compl. ¶ 24; *cf. In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (denying motion for judgment on the pleadings as to a market limited to Division I-A football).

Unlike the dough, tomato sauce, and paper cups in *Queen City Pizza* that were "interchangeable with dough, sauce and cups available from other suppliers and used by other pizza companies," 124 F.3d at 438, CA's Mass-Market Cigars are differentiated from other cigar brands. Compl. ¶ 20 ("unique packaging and advertising"); *id.* ¶ 21 ("high quality and craftsmanship"); *id.* ¶ 22 (discussing other distinctive aspects of each brand). And while the *Queen City Pizza* court held that a market could not be defined with reference to contractual restrictions, 124 F.3d at 438, Plaintiff's alleged market is "based on consumer demand, not on contractual restrictions." *Pepsico*, 1998 WL 547088, at *11 (distinguishing *Queen City Pizza* on this basis).

While this is not an "aftermarket" case – in which a manufacturer is alleged to have monopolized a separate market for service of its own product – what those cases have in common with this one is that both involve customers who have no choice but to purchase a particular product. Just as the customers in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), were "locked in" to using Kodak to service their equipment, *id.* at 496, so too are the customers of Plaintiff and HLA that are required by the demands of their own customers to purchase CA's Mass-Market Cigars. These fact-intensive questions are best addressed at a later stage of the litigation, following discovery.

2. Plaintiff Sufficiently Alleges a Relevant Geographic Market

The relevant geographic market for a Sherman Act claim is "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Brokerage Concepts, Inc., v. U.S. Healthcare, Inc.*, 140 F.3d at 515 (quoting *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984)). The relevant geographic market is a question of fact best resolved by a jury. *See Weiss v. York Hosp.*, 745 F.2d 786, 825 (3d Cir. 1984). While shipment patterns and transportation costs may help determine the scope of a geographic market, equally important are any characteristics which make the market different for potential buyers, such that they would operate within one geographic area but not another. *See Synthes, Inc. v. Emerge Med., Inc.*, Civil A. No. 11-1566, 2012 WL 4473228, at *6 (E.D. Pa. Sept. 28, 2012). As with the product market, Defendants improperly conflate the market for distribution of cigars with the market for the cigars themselves.

Here, a distinctly different regulatory scheme leads both distributor and convenience store customers of Plaintiff and consumers of mass-market cigars themselves to regard Pennsylvania as a distinct geographic market. Compl. ¶ 34. For example, unlike its neighboring states, Pennsylvania has no cigar tax. *See, e.g.*, Del. Code Ann. tit. 30, § 5305 (15% tax on cigars

in Delaware); N.J. Stat. Ann. § 54:40B-3 (30% tax on cigars in New Jersey). And indeed, HLA describes itself as having "entered" Pennsylvania "from its New York roots." HLA Mem. at 7.

Therefore, Plaintiff has properly alleged a relevant geographic market. As with the product market, Defendants will have an opportunity to challenge this market definition on a fully-developed record, following discovery.

B. Plaintiff Sufficiently Alleges Antitrust Injury

As with Defendants' arguments about relevant market, "[t]he existence of an 'antitrust injury' is not typically resolved through motions to dismiss." *Bradburn Parent/Teacher Store, Inc. v. 3M (Minn. Mining & Mfg. Co.)*, No. CIV.A. 02-7676, 2000 WL 34003597, at *2 (E.D. Pa. July 25, 2003) (quoting *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876 (3d Cir. 1995)). At the pleading stage, all that is required is that a plaintiff alleges "harm of the type the antitrust laws were intended to prevent" and that "flows from that which makes defendants' acts unlawful." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 924 n.6 (3d Cir. 1999). Demonstrating antitrust injury is not meant to be an "unduly rigorous standard." *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 573 (1990).

As the Third Circuit has explained, "[w]hen the plaintiff's injury is linked to the injury inflicted upon the market, such as when . . . a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the antitrust law—the preservation of competition." *UPMC*, 627 F.3d at 101. "[E]ven the foreclosure of 'one significant competitor' from the market may lead to higher prices and reduced output." *LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (citation omitted). Plaintiff has alleged precisely this sort of antitrust injury. Compl. ¶ 94. And the ultimate result, as alleged by Plaintiff, is higher prices for consumers:

> As a result of the anticompetitive conduct alleged herein, prices for CA's Mass-Market Cigars in Pennsylvania were higher than they would have been in the absence of the anticompetitive behavior. Specifically, customers could have purchased CA's Mass-Market Cigars at lower prices if Plaintiff and HLA competed with each other to offer the lowest prices in a competitive market. With HLA now encompassing at least 80% of the relevant market, customers have more limited options in purchasing CA's Mass-Market Cigars and pay higher prices than they otherwise would pay.

Compl. ¶ 95.

Contrary to Defendants' suggestion, there is no rule that mandates dismissal of every antitrust claim brought by a distributor so long as a defendant can paint it as "jilted." When, as here, a distributor plaintiff sufficiently alleges the elements of its claims, those claims should be allowed to proceed to discovery. While Defendants argue that there can be no antitrust injury here because CA **could have** refused to deal with Plaintiff unilaterally, another district court recently rejected a similar argument:

> Defendants' argument – that there can be no antitrust injury where they could have accomplished unilaterally the same result that they allegedly achieved through collusion – does not even implicate the concept of antitrust injury. The argument has nothing to do with whether Plaintiffs allege that they suffered an injury of the kind the antitrust laws were intended to prevent – which they do. Rather, Defendants' argument, if accepted, would impose an additional pleading requirement: that private antitrust plaintiffs must plead that the alleged antitrust violation could not have occurred through Defendants' unilateral action. Such a pleading requirement has no support in the law. While a plaintiff must present evidence to "rule out the possibility of independent action" at summary judgment or trial in order to prove an illegal conspiracy, no such requirement applies at the pleading stage.

In re Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789 (LGS), 2015 WL 363894, at *11 (S.D.N.Y. Jan. 28, 2015). Importantly, Plaintiff alleges that CA's actions were **not** unilateral, and this case falls outside what other courts have described as "jilted distributor" cases. *Cf. Chase v. Nw. Airlines Corp.*, 49 F. Supp. 2d 553, 565 (E.D. Mich. 1999) ("A close examination of the typical jilted distributor cases, however, reveals that they rest on facts and

circumstances substantially distinguishable from the present case.").[7] Indeed, Defendants concede that a manufacturer's right to refuse to deal applies only "as long as it does so unilaterally," meaning that in cases such as this one – where there are plausible allegations of concerted conduct – an antitrust claim exists. CA Mem. at 18 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).

According to Defendants, intrabrand competition is simply irrelevant to the question of antitrust injury. Not so, as the Eleventh Circuit has explained:

> The argument, pressed by [defendant] at length here, that the reduction or elimination of intrabrand competition is, by itself, never sufficient to show that a trade restraint is anti-competitive must rest, at bottom, on the view that intrabrand competition—regardless of the circumstances—is never a significant source of consumer welfare. This view is simply not supported by economic analysis, or by the cases. A seller with considerable market power in the interbrand market—whether stemming from its dominant position in the market structure or from the successful differentiation of its products—will necessarily have some power over price. In that situation, intrabrand competition will be a significant source of consumer welfare because it alone can exert downward pressure on the retail price at which the good is sold.

[7] The majority of Defendants' "jilted distributor" cases deal only with one company refusing to do business with another and instead substituting a competitor as opposed to conspiring with that competitor. *See, e.g.*, *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 809 (6th Cir. 1988) (merely alleging the substitution of one distributor by the manufacturer for another without evidence of conspiracy with new distributor); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) (sports sanctioning body has a special interest in establishing certain brands of tires that can be used); *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23 (2d Cir. 2006) (no allegations of conspiracy in exclusive distributorship arrangement); *Rutman Wine Co. v. E& J Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987) (same); *Konik v. Champlain Valley Physicians Hosp. Med. Ctr.*, 733 F.2d 1007, 1015 (2d Cir. 1984) (same); *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1014 (6th Cir. 2005) (same); *SanDisk Corp. v. Kingston Tech. Co.*, 863 F. Supp. 2d 815 (W.D. Wisc. 2012) (patent-holder's licensing requirements not a conspiracy); *L & M Beverage Co. v. Anheuser-Busch, Inc.*, Civ. A. No. 85-6937, 1987 WL 16682, at *2 (E.D. Pa. Sept. 8, 1987) (no allegations in conspiracy for distributorship being terminated in favor of company distributing itself); *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 616 (6th Cir. 2001) (no allegations of conspiracy for distributorship being terminated in favor of exclusive arrangement); *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1248-49 (5th Cir. 1979) (unilateral termination of a distributor); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 243-44 (6th Cir. 1982) (replacement of one dealer with another, with no allegation of "collective action").

Graphic Prods. Distrib., Inc. v. Itek Corp., 717 F.2d 1560, 1572 n.20 (11th Cir. 1983); *see also Chase*, 49 F. Supp. 2d at 566-69. As noted above, Plaintiff has alleged successful product differentiation by CA, as well as higher prices that have resulted from Defendants' anticompetitive conduct. And it bears repeating that this case is about the market for **distribution** of a product, for which there are no substitutes. *See supra* Section II.A.1.[8] At this stage of the litigation, Plaintiff's allegations of antitrust injury are sufficient.

C. Plaintiff Sufficiently Alleges an Unlawful Agreement Among Defendants

An agreement between Defendants to achieve an unlawful objective can be established when it can be shown that there was "a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571, 593 (E.D. Pa. 2012) (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984)). Plaintiff's Complaint includes specific allegations supporting its claim that CA and HLA reached such an agreement. *See, e.g.*, Compl. ¶ 73 ("HLA complained about Plaintiff to CA"); *id.* ¶ 74 ("In or around May 2012, Mr. Murphy [of CA] related to Plaintiff that it was accused of 'disrupting the marketplace' through its competition with HLA."). Plaintiff's complaint also sets out the terms of this alleged agreement:

> On information and belief, HLA – aware of its dwindling share in the market for distribution of CA's Mass-Market Cigars in Pennsylvania – entered into an

[8] When Plaintiff occasionally referred in its correspondence with CA to prices received by other "distributors," it was either making a general reference rather than identifying HLA by name, or was referring to the distributor customers of Plaintiff and HLA, which did not purchase from CA directly. The fact that HLA could resell to these other distributors for lower prices than Plaintiff could buy the same cigars from CA is further evidence of the discriminatory pricing scheme. *See* Compl. ¶ 59 ("Upon information and belief, many of Plaintiff's competitors were **purchasing from HLA** at discounted prices.") (emphasis added). In any event, such use of the plural "distributors" does not, contrary to Defendants' argument, signal the absence of injury to competition. CA Mem. at 16. Discovery will make clear which distributors were paying what prices.

> agreement with Altadis, which was continued by CA following the merger of Altadis with Commonwealth. On information and belief, this agreement provided that HLA would receive lower pricing and increased promotional opportunities for CA's Mass-Market Cigars, in comparison to the pricing and promotional discounts offered to Plaintiff.

Id. ¶ 44.

"A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two." *TruePosition*, 844 F. Supp. 2d at 593 (quoting *UPMC,* 627 F.3d at 99).[9] While direct evidence, or the proverbial "smoking-gun," is generally the most compelling means by which a plaintiff can make out its claim, such evidence is frequently difficult for antitrust plaintiffs to come by. Thus, plaintiffs have been permitted to rely solely on circumstantial evidence (and the reasonable inferences that may be drawn therefrom) to prove a conspiracy. *See Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998). Allegations that defendants had a motive to conspire and acted contrary to their self-interest are sufficient to demonstrate an unlawful agreement at the motion to dismiss stage. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1244 (3d Cir. 1993); *Flat Glass*, 385 F.3d at 360-61 ("Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market.").

Here, Plaintiff expects to have both direct and indirect evidence of Defendants' unlawful agreement. As noted above, Plaintiff alleges that it was specifically told by a named CA employee in or around May 2012 that HLA had complained to CA about "disrupting the marketplace." Compl. ¶ 74. In addition, Plaintiff has made several allegations of CA's conduct against its self-interest, as refusing to accept offers for sale from Plaintiff makes no sense from a

[9] This is true whether the anticompetitive effects of a conspiracy will ultimately be evaluated under the "rule of reason" or as per se illegal. HLA Mem. at 22-23.

profit perspective. *Id.* ¶¶ 53-55. 84-86, 88-90. And as explained above, that some of these allegations were properly made "on information and belief" is no reason to discount them at the pleading stage. *See supra* at 12 (quoting *Certainteed*, 2015 WL 410029, at *3).

Moreover, as discussed above, the mere possibility that one or more defendants could have engaged in the complained-of conduct unilaterally does not mean than they are immunized from antirust liability when they collude. *See, e.g., Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 539-40 (4th Cir. 1998) (rejecting argument that plaintiffs did not "demonstrate a sufficient causal relationship between their alleged injury and [defendants'] alleged violation of the antitrust laws" because defendants could not challenge "causation simply on the basis that it could have achieved the same result through lawful means"); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 648 n.16 (E.D. Mich. 2000) ("There are many things a defendant can do unilaterally without offending the antitrust laws that it cannot do collusively."). Indeed, Judge Joyner rejected precisely this argument in *Hewlett-Packard Co. v. Arch Associates Corp.*, 908 F. Supp. 265 (E.D. Pa. 1995), in which it was alleged only that HP conspired with "certain members of its authorized distribution network":

> HP professes that because it can choose with whom to deal, it cannot have violated antitrust laws by deauthorizing Arch. . . . Arch maintains that its Counterclaim sufficiently alleges that HP acted in concert with others to coerce its resellers from selling outside of designated markets and threatened Arch with loss of reseller status. . . . We find that Arch's Counterclaim sufficiently pleads concerted activity.

Id. at 269.

Finally, even were it **plausible** that Defendants engaged in their anticompetitive acts independently, the Court cannot make "[t]he choice between two plausible inferences that may be drawn from factual allegations . . . on a Rule 12(b)(6) motion . . . ." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). Cases cited by Defendants that addressed

evidence – as opposed to allegations – at the summary judgment stage are therefore inapposite. *See, e.g., Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc..,* 588 F.3d 908, 914, 920-21 (6th Cir. 2009) (affirming grant of motion for summary judgment filed over a year after motion to dismiss was denied, "[a]fter discovery was complete, and after [the plaintiff] filed a second amended complaint," ultimately concluding, among other things, that the plaintiff "failed to put forth persuasive **evidence** that [the defendants] are colluding" and that the plaintiff's contention that the defendants "have colluded against it is unsupported by the **record**") (emphases added).[10] Defendants will have an opportunity to make arguments about the facts following discovery.[11]

D. Plaintiffs Sufficiently Alleges that Defendants Possessed the Specific Intent to Conspire

Defendants make one additional argument limited to Plaintiff's conspiracy to monopolize claim (Count V), contending that the Complaint does not sufficiently allege "specific intent" to create a monopoly for HLA. As the Third Circuit explained in *Howard Hess*, a court may "feasibly infer . . . specific intent" if the plaintiff has "stated enough factual matter to suggest some coordination . . . ." 602 F.3d at 258. Although the allegations in *Howard Hess*, where there

[10] In denying the motion to dismiss, the district court in *Kentucky Speedway* rejected the defendants' argument that "the allegations of a conspiracy . . . are 'unsupported by any factual assertions' in the amended complaint," properly noting that the plaintiff was entitled to discovery on the allegations it had made in good faith: "It may well be that plaintiff's case will fail when scrutinized after discovery under the higher standards of proof that will prevail on summary judgment or at trial. However, this is the pleading stage, and dismissal of the case at this time would be premature. This court will require the plaintiff at the close of discovery to plead with particularity the theories it believes can be pursued in good faith, in light of the facts disclosed by the discovery." *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 410 F. Supp. 2d 592, 597, 600 (E.D. Ky. 2006).

[11] Defendants cite the standard for **summary judgment** from *Monsanto*, 465 U.S. at 768, and then go on in the next sentence to assert—without any citation at all—that this standard applies to allegations at the pleading stage. CA Mem. at 18. As set forth above, Plaintiff's allegations are more than sufficient for purposes of a motion to dismiss, prior to any discovery having occurred.

were no allegations to "suggest that [the alleged conspirators] knew that [the monopolist] was spearheading an effort to squash its competitors," were deemed insufficient, *id.*, Defendants cannot credibly argue that CA lacked knowledge, when it was CA that charged Plaintiff discriminatory prices and ultimately stopped selling to Plaintiff altogether, with the foreseeable effects of limiting Plaintiff's share and then driving it from the market, all while HLA was complaining about Plaintiff "disrupting the marketplace." Compl. ¶ 74. Again, discovery will reveal what each defendant knew and intended.[12]

III. PLAINTIFF HAS STATED SUFFICIENT CLAIMS AGAINST EACH OF THE CA DEFENDANTS

Defendants Commonwealth Brands, Inc., Altadis U.S.A., Inc., and Commonwealth-Altadis, Inc. are affiliated companies represented here by the same counsel and with their principal places of business at the same address. Compl. ¶¶ 9, 10, 11. As a shorthand, Plaintiff's complaint refers to the three collectively as "CA." *Id.* ¶ 11.[13] CA's argument that Plaintiff is required to "particularize the allegations of illegal conduct with respect to each company" is without merit. CA Mem. at 4.

A complaint may refer to defendants collectively. *See, e.g.*, *In re OSB Antitrust Litig.*, No. 06 Civ. 826, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007) ("Antitrust conspiracy allegations need not be detailed defendant by defendant."); *Hinds County, Miss. V. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 394 (S.D.N.Y. 2010) (holding that there is no requirement that a complaint "be detailed with overt acts by each defendant"). And where, as here, a complaint

[12] Defendants' argument that Defendants cannot have "specific intent" because any monopoly would not be "illegal," CA Mem. at 22, is circular. If Plaintiff's allegations are true, and CA conspired with HLA as opposed to acting unilaterally, than Defendants' conduct was illegal. *See supra* Section II.B.

[13] The Complaint inadvertently includes two paragraphs numbered 11. In the text above, the first reference is to the first paragraph 11, and the second reference is to the second paragraph 11.

describes how the members of a corporate family are related and generally how each was involved, they may be referenced collectively. *See, e.g., Precision Assocs., Inc. v. Panalpina World Transport, (Holding) Ltd.*, No. CV-08-42 (JG)(VVP), 2013 WL 6481195, at *15-20 (E.D.N.Y. Sept. 20, 2013), *report and recommendation adopted*, 2014 WL 298594 (E.D.N.Y. Jan. 28, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1019 (N.D. Cal. 2010); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184-85 (N.D. Cal. 2009).[14]

Plaintiff's Complaint explains that Altadis and Commonwealth Brands merged in or around November 2011. Compl. ¶ 61. Prior to the merger, Plaintiff purchased cigars from Altadis, and the Complaint alleges that Altadis charged Plaintiff discriminatory prices during that time. Compl. ¶¶ 40-60. Plaintiff further alleges that prior to the merger, HLA "entered into an agreement with Altadis, which was continued by CA following the merger of Altadis with Commonwealth." *Id.* ¶ 44. At the time of the merger, Altadis and Commonwealth Brands created a combined sales and marketing company, Commonwealth-Altadis. *Id.* ¶ 10. As alleged in the Complaint, the discriminatory pricing and anticompetitive conduct was continued post-merger. *Id.* ¶¶ 62-90.

[14] CA cites two cases, both of which are distinguishable in that they did not involve corporate affiliates. *See Smith v. Wetzel*, Civ. No. 14-88, 2015 WL 58839, at *5 (W.D. Pa. Jan. 5, 2015) (inmate suing different prison officials); *Appalachian Enters., Inc. v. ePayment Solutions, Ltd*, Civ. No. 01-11502, 2004 WL 2813121, at *7 (S.D.N.Y Dec. 8, 2004) (plaintiff suing unrelated companies). Although Defendants do not cite it, Judge Pratter addressed a grouping issue in *In re Processed Egg Products Antitrust Litig.*, 821 F. Supp. 2d 709 (E.D. Pa. 2011), finding that under the facts of that case some (but not all) of the defendants in a particular "group" should be dismissed. *Id.* at 745-50. Notably, however, the defendants at issue in that case were not "part of a conventional parent and wholly-owned subsidiary corporate structure" but "merely are alleged to have individuals in overlapping ownership or controlling roles, and it cannot be said these allegations plausibly suggest that the entities are under common ownership or control such that a single decision-making source exercises definitive control over each of them." *Id.* at 749.

CA appears to concede that Altadis (which sold the cigars pre-merger) and Commonwealth-Altadis (the sales and marketing company post-merger) are proper defendants, focusing its arguments mostly on Commonwealth Brands. CA Mem. at 5 ("there is *no* allegation that Commonwealth Brands ever sold or offered to sell cigars to Satnam or anyone else"). Yet Plaintiff does allege facts specific to Commonwealth Brands. *See, e.g.*, Compl. ¶ 62 (Plaintiff's new sales representatives came from Commonwealth Brands); *id.* ¶ 76 ("I am seen as a CommonWealth guy and not an Altadis guy"); *id.* ¶ 82 (managers who had come from Commonwealth were fired around September 2012). More generally, following the merger, Commonwealth-Altadis acted as an agent for both Commonwealth Brands and Altadis. Compl. ¶ 10 (alleging that Commonwealth-Altadis "represents the combined sales, marketing, and operational history of Defendants Altadis U.S.A. and Commonwealth Brands, Inc., both owned by Imperial Tobacco Group, PLC"). Any questions that remain regarding the corporate organization of these defendants can be resolved in discovery.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied. To the extent the Court concludes that any facts must be alleged in more detail, Plaintiff respectfully requests leave to amend its complaint to do so.

Dated: April 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brent W. Landau, hereby certify that on April 13, 2015, I caused the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss to be served electronically upon the following:

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