EASTSIDE VEND DISTRIBUTORS, INC.	*	IN THE
Plaintiff	*	CIRCUIT COURT
V.	*	FOR
COCA-COLA, ENTERPRISES., INC, ET AL	*	BALTIMORE CITY
	*	CASE NO.: 24-C-04-003998
Defendants	*	

* *

MEMORANDUM OF DECISION

This case comes before the Court on Defendant Mars Super Market, Inc.'s ("Mars"), Defendant Coca-Cola Enterprises, Inc.'s ("CCE") and Pepsi Bottling Group, Inc.'s ("PBG") Motions to Dismiss, Plaintiff Eastside Vend Distributors, Inc.'s ("Eastside") Responses, the Replies filed by each of the Defendants, and the parties' oral hearing.

Plaintiff's claims arise from the alleged discriminatory pricing by CCE and PBG on products purchased by Plaintiff from CCE and PBG. According to the Complaint, Plaintiff is in the business of "purchasing and reselling beverages and food" "only to vending machine suppliers, owners and operators." Complaint at ¶¶ 3 & 7. In other words, it is a wholesaler to the vending machine industry. A substantial portion of its business involves the sale of Coke and Pepsi products it purchased from CCE and PBG prior to the filing of the Complaint. Complaint at ¶¶ 3 & 8. According to Plaintiff, both CCE and PBG were the exclusive bottlers in the geographic region in which Plaintiff Eastside operates. Complaint at ¶ 4 & 5.

Essentially Plaintiff contends that both CCE and PBG charged it more than it charged other purchasers in the same geographic region for products of like grade, quality, and quantity. To support this allegation, Plaintiff alleges that various grocery store chain retailers, such as Defendant Mars, and a hybrid wholesaler-retailer (referred to in the complaint as "club stores"), Sam's Club, offered for sale to the general public CCE and PBG products at prices below which Plaintiff could have purchased those products from CCE and PBG. Complaint at ¶¶ 24-26, 32, 42-45. Plaintiff also alleges that both CCE and PBG charged "other" customers lower prices than they charged Plaintiff for the same products. Complaint at ¶¶ 23, 27 & 41. While Plaintiff did specify the exact prices PBG and CCE charged it and the other customers, it did not identify those "other" customers by name or even geographic location. *Id.*

Plaintiff further alleges that CCE and PBG "own and operate[s] vending machines that compete with vending machines owned and operated by Eastside's customer's." Complaint at ¶ 35 & 51.

Plaintiff describes Defendant Mars as "a supermarket chain consisting of seventeen stores and a distribution center." Complaint at ¶ 6. Plaintiff alleges that PBG and CCE "charged lower prices to Mars than [CCE] and PBG have charged Eastside for cola products of like grade, quality, and quantity" and "Mars knows that [CCE] and PBG have charged Mars lower prices than Eastside for cola products of like grade, quality, and quantity." Complaint at ¶¶ 56 and

57. The Complaint also alleges that Mars knowingly "received the benefit of lower prices" and "induced [CCE] and PBG to charge Mars lower prices than [CCE] and PBG charge Eastside for cola products of like, grade, quality, and quantity." Complaint at ¶¶ 68-69.

Based on these facts and others this Court may set forth below in its discussion, Plaintiff has alleged four (4) counts against Defendants CCE and PBG: Count I – Discriminatory Pricing in Violation of the Maryland Antitrust Act; Count IV - Rule of Reason Violation of Maryland Antitrust Act; Count V - Tortious Interference with Prospective Business Advantage; and Count VI – Injunctive Relief.

In addition, the Plaintiff alleges four (4) counts against Defendant Mars: Count II - Knowingly Receiving and Inducing Discriminatory Pricing from PBG and CCE; Count III - Aiding and Abetting; Count V - Tortious Interference; and Count VI - Injunctive Relief.

This case presents issues of first impression for there are few cases, and even fewer applicable, interpreting the Maryland Antitrust Act. In Part I the Court will address Plaintiff's claims against Mars. In Part II, the Court will address the claims against Defendants CCE and PBG.

ANALYSIS

Motion to Dismiss Standard

In considering a motion to dismiss filed pursuant to Maryland Rule of Civil Procedure 2-322, the Court "must assume the truth of all well pleaded relevant and material factual allegations in the complaint as well as any reasonable inferences that might be drawn from those allegations. *Hogan v. The Maryland State Dental Ass'n*, 155 Md. App. 556, 561 (2004) (citing *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 555 (1999) (other citations omitted)). A claim is properly dismissed when the alleged facts and reasonable inferences, if proven, would still fail to afford relief to Plaintiff. *Id.* (citing *Bobo v. State*, 346 Md. 706, 709 (1997); *Morris v. Osmose Wood Preserving*, 340 Md. 519 (1995)). The Court is limited to examining only the sufficiency of the allegations in the pleading and whether it pleads a legally sufficient claim. *Howard County v. Connolley*, 137 Md. App. 99, 114 (2001); *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 414 (2003).

INTRODUCTION

The few cases interpreting the Maryland Antitrust Act ("Act") do not apply to the questions and facts raised in this case. However, sections 11-202(a)(1) and (2) explicitly provide that the Act "is to complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices" and that "[i]t is the intent of the General Assembly that, in construing this subtitle, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters." The Robinson-Patman Act is the federal counterpart to the

Maryland Antitrust Act. Therefore, the Court will look to decisions interpreting the Robinson-Patman Act to complement the Maryland Antitrust Act. *See* 15 U.S.C. 13(f).

PART I: CLAIMS AGAINST DEFENDANT MARS

Count II: Knowing Receipt and Inducement of Discriminatory Pricing in Violation of the Maryland Antitrust Act

Whether the "knowing receipt and inducement of discriminatory pricing" is a violation of the Maryland Antitrust Act is an issue of first impression for the Maryland courts. In light of this void, this Court turns to the rules of statutory construction to determine whether the Act provides for buyer liability. The primary source for determining legislative intent is the language of the statute itself. *See Price v. State*, 378 Md. 378, 387-88 (2003) (citing *Marriott Employees v. MVA*, 346 Md. 437, 444-45 (1997)). As the Court of Appeals stated in *Price*, "all statutory interpretation begins, and usually ends, with the statutory text itself." *Price*, 378 Md. at 387. Accordingly, this Court will begin its analysis by looking at the plain language of the Maryland Antitrust Act.

Plaintiff alleges that Defendant Mars violated section 11-204(a)(3) of the Maryland Antitrust Act by knowingly inducing and receiving discriminatory prices from PBG and CCE. Section 11-204(a)(3) of the Act states:

> A person may not . . . directly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effect of the discrimination may: (i) Substantially lessen competition;

> (ii) Tend to create a monopoly in any line of trade or commerce; or (iii) Injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them.

Md. Code Ann., Com. Law § 11-204(a)(3). The plain language of the Act makes no mention of buyer liability.

Section 2(f) of the Robinson-Patman Act, however, explicitly creates buyer liability for the receipt of discriminatory pricing. "[T]he emphasis of the [Robinson-Patman] Act is in § 2(a), which prohibits price discrimination by sellers. Indeed, the original Patman bill as reported by the Committees of both Houses prohibited only seller activity. Section 2(f), making buyers liable for inducing or receiving price discrimination by sellers, was the product of a belated floor amendment near the conclusion of the Senate debates." *Great Atlantic and Pacific Tea Co., Inc v. FTC*, 440 U.S. 69, 76 (1979).

Section 2(a) of the Robinson-Patman Act is, in relevant part, substantively identical to section 11-204(a)(3) of the Maryland Antitrust Act. Therefore, like its federal counterpart, the plain language of the Maryland Antitrust Act clearly creates seller liability.

Section 2(f) of the Robinson-Patman Act states that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." As indicated above, this provision creates buyer liability. Plaintiff argues that the language in section 11-204(a)(3)(iii) of the Maryland Antitrust Act similarly creates buyer liability. Section 11-204(a)(3)(iii) states that a person may not discriminate if the effect of the discrimination may "[i]njure, destroy, or prevent competition *with any person who grants or knowingly receives the benefit of the discrimination.*" (emphasis added). This language identifies one of the injury to competition elements, also known as an "antitrust injury", that a Plaintiff must prove in a case against the seller. *See Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990); *Hoover Color Corp.v. Bayer Corp*., 199 F.3d 160, 164 (4th Cir. 1999). That provision, however, does not create buyer liability and the plain language does not permit this Court to hold otherwise.

The Plaintiff cites no other language indicating a legislative intent to create buyer liability. Therefore, unlike the federal counterpart, the plain language of the Maryland Antitrust Act does not create buyer liability. Rather, the plain language creates only seller liability.

> Where the statutory language is free from such ambiguity, courts will neither look beyond the words of the statute itself to determine legislative intent nor add to or delete words from the statute itself. Only when faced with ambiguity will courts consider both the literal or usual meaning of the words as well as their meaning in light of the objectives and purposes of the enactment. As our predecessors noted, we cannot assume authority to read into the Act what the Legislature apparently deliberately left out. Judicial construction should only be resorted to when an ambiguity exists. Therefore the strongly preferred norm of statutory interpretation is to effectuate the plain language of the statutory text.

Pete v. State, 384 Md. 47, 58 (2004) (citing *Price,* 378 Md. at 387-88). Since the plain language of the Act does not mirror the Robinson-Patman Act, this Court cannot impose such liability. This Court will not create buyer liability where the statutory language creates none.

Although this Court appreciates the directive to read the Robinson-Patman Act as complementary of the Maryland Antitrust Act, this Court will not create new statutory language from general policy language.

> Even though a certain provision, which has been omitted from a statute, appears to be within the obvious purpose or plan of the statute, and to have been omitted merely by inadvertence, nevertheless the court is not at liberty to add to the language of the law; and the court must hold *that the legislature intended to omit the provision*, however improbable that may appear in connection with the general policy of the statute.

Rogan v. Baltimore and O.R. & Co., 188 Md 44, 54 (1947) (citation omitted) (emphasis added); *Simpson v. Moore*, 323 Md. 215, 225-26 (1991) ("[W]e are not free to judicially place in the statute an entire section of language which is not there.")

Assuming the truth of all well pleaded relevant and material factual allegations, and making all reasonable inferences in favor of the Plaintiff, the facts still fail to afford relief to Plaintiff. The alleged facts, if proven, would establish Plaintiff as a buyer, not a seller, of the alleged discriminatory pricing product.

For the aforementioned reasons, this Court will dismiss Plaintiff's knowing receipt and inducement claim against Defendant Mars.

Count III: Aiding and Abetting Discriminatory Pricing in Violation of The Maryland Antitrust Act

Plaintiff alleges that Defendant Mars, a purchaser of CCE and PBG products and alleged competitor of Plaintiff, aided and abetted CCE and PBG's alleged discriminatory pricing. Aiding and abetting liability of non-sellers under the Maryland Antitrust Act is not only a question of first impression in Maryland, but also a question of first impression under the Robinson-Patman Act. For those reasons, this Court must look to the statutory language of the Maryland Antitrust Act and interpretation by other courts of similar liability questions.

Section 11-204(a)(3) of the Maryland Antitrust Act states, in relevant part, that "[a] person may not . . . directly or indirectly discriminate in price among purchasers." First, the plain language of the Act makes no explicit reference to aiding and abetting. Moreover, the United State Supreme Court in interpreting a similar provision of the Securities Exchange Act of 1934 held that the general inclusion of "directly and indirectly" language does not create aiding and abetting liability because aiding and abetting liability extends beyond "directly or indirectly" liability. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 175-76 (1994).

In *Central Bank* a private plaintiff brought suit for section 10(b) violations of the Securities Exchange Act of 1934 alleging that Central Bank aided and abetted another defendant's fraud. The Court held that section 10(b) did not impose aider and abettor liability emphasizing that "the text of the statute controls our decision." *Id.* at 173. "The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." *Id*. at 177. According to the Court, the plain language of the Securities Exchange Act, "directly and indirectly", did not expressly create aider and abettor liability, and the Court refused to read into the Act that which was not there.

Moreover, the Court opined that had it not so ruled on plain language grounds, it would have reached the same result for "Congress knew how to impose aiding and abetting liability" and other private rights of action. *Id.* at 176. The Court cited other provisions in the Securities Exchange Act which explicitly provided for such liability as evidence of Congress' knowledge. *Id.* Yet, Congress did not use language creating aider and abettor liability in section 10(b). *See also Dep't Econ. Dev. v. Arthur Anderson & Co.*, 924 F.Supp. 449, 475-477 (finding that, pursuant to *Central Bank,* the plain language of RICO did not provide for aiding and abetting liability).

Just like section 10(b) of the Securities Exchange Act, the Maryland Antitrust Act employs the language "directly and indirectly" to impose liability. Similarly, it is reasonable to infer that the Maryland legislature knew how to impose additional avenues of liability because they included explicit conspirator liability language in sections 11-204(a)(1) and (2) of the Maryland Antitrust Act.

Additionally, the Court in *Central Bank* indicated that because an element of section 10(b) requires the fraudulent act to be manipulative or deceptive, imposing aiding and abetting liability would permit liability without requiring proof of that element. 511 U.S. at 177. Likewise, the Maryland Antitrust Act contains a requirement that would also be circumvented by imposing aider and abettor liability. The plaintiff is required to prove that the competitive injury is traceable to the defendant. *See Drug Mart Pharmacy Corp. v. American Home Prods. Corp*., 2005 WL 1634617 (E.D.N.Y July 15, 2005) (citing *American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1039-40 ("Plaintiffs have cited no law that permits them to average the effects of purportedly unlawful acts of many publishers and wholesalers in order to show that, on average, plaintiffs were harmed by defendants receipt of the benefit of those violations.")) (other citations omitted). Aider and abettor liability would circumvent the competitive injury element because specific injury, traceable to the aiding and abetting defendant, would not be required.

Finally, *Central Bank* also noted there is no general presumption that the plaintiff may sue aiders and abettors because "Congress has not enacted a general civil aiding and abetting statute". 511 U.S. at 182. Nor has the Maryland legislature.

In *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court permitted the conspirator liability claims to proceed against the defendants even though the Robinson-Patman Act did not explicitly provide for such liability. Although the Court granted summary judgment in favor of allegedly conspiring defendants, the Court would have allowed plaintiffs to proceed against all defendants on a conspiracy theory if the alleged facts met the summary judgment standard.

Notwithstanding *Zenith*, there lies a key distinction between that case and the present case. In *Zenith*, the court did not expand liability to make non-sellers liable. Rather the court used conspirator liability to allow plaintiff to join additional defendant *sellers* because of their alleged conspiracy to another seller's statutory violations. The application of conspiracy liability in that manner is entirely consistent with the plain language of section 2(a) of the Robinson-Patman Act, which makes *sellers* liable for price discrimination.

In the case before this Court, however, Plaintiff alleges that Defendant Mars is liable in a buyer capacity, not a seller capacity. Complaint ¶¶ 68-69 (alleging that Mars knowingly received and induced the benefit of lower prices); *Id.* at ¶ 75 (Mars aided and abetted [CCE] and PBG's discriminatory pricing). Plaintiff does not allege that Mars discriminated in price when it sold CCE and PBG products to its purchasers. Since the plain language of the Maryland

Antitrust Act does not provide for non-seller liability, there is no basis to apply aider and abetter liability to Defendant Mars in reliance on the *Zenith* ruling.

Most recently, in *Drug Mart Pharmacy Corp. v. American Home Products Corp*., 2005 WL 1634617 (E.D.N.Y July 15, 2005), over 3,000 pharmacies brought suit against pharmaceutical manufacturers for, among other things, conspiracy under the Robinson-Patman Act. The plaintiffs alleged that the defendant pharmaceutical manufacturers conspired to "giv[e] discounts or rebates on brand name prescription drugs to health maintenance organizations and mail order pharmacies, while denying discounts to [plaintiffs]." *Id.* at *1. The Court granted summary judgment in favor of the defendant as to the conspiracy claim holding that there is no cause of action for conspiracy under the Robinson-Patman Act. *Id.* at *5.

In arriving at its decision, the Court did not discuss *Zenith*.[1] However, it did question the authority of a similar case, *Sidney Morris & Co. v. Nat'l Ass'n of Stationers, Office Outfitters & Mfrs, et al*, 40 F.2d 620 (7th Cir. 1930). The Court in *Drug Mart* indicated that the *Sidney* Court initially appeared to find that the Robinson-Patnam Act does not provide for conspirator liability, but then ruled that the defendants could be held liable for price discrimination based solely on their participation in the conspiracy. *See Drug Mart*, 2005 WL 1634617, at *3. This

[1] Although *Zenith* and *Drug Mart* are arguably in conflict with one another because *Zenith* would have permitted buyer conspirator liability under the Robinson-Patman Act while *Drug Mart* did not, the issue before the Court does not require it to resolve this difference. As indicated earlier, the facts of *Zenith* are distinguishable from our case.

Court does not find *Sidney Morris* authoritative for the reason that it is internally inconsistent.[2]

The Court in *Drug Mart* supports its decision not to follow *Sidney Morris*, in part, on the basis of the Robinson-Patman Act's plain language.[3] "The word conspiracy is not mentioned either in the statute or in its legislative history." *Id.* at *4. Additionally, the *Drug Mart* Court states, as this Court indicated above, that permitting aider and abettor liability would circumvent a required element of section 11-204(a)(3) of the Maryland Antitrust Act.

As the cases cited previously indicate, the Court must not look beyond the words of the statute when confronted with unambiguous language. Therefore, it must conclude that there is no aiding and abetting liability under the Maryland Antitrust Act. While the Maryland Antitrust Act does provide for conspiracy liability with regard to some violations, no where does it provide for aider and abettor liability. As the Court stated in *Alleco, Inc. v. Harry & Jeanette Weinberg Found.*, 99 Md. App. 696, 701 (1994), "[u]ntil either the Legislature or the Court of Appeals creates [civil liability for aiding and abetting a tortfeasor] in Maryland, it would serve no purpose to expound upon how the elements of the tort should be defined." This Court will not create aiding and abetting liability

[2] Even if *Sidney* was authoritative, it is distinguishable from the facts of this case for the same reason that *Zenith* is distinguishable.

[3] The other two reasons for *Drug Mart*'s decision are: (1) allowing evidence of a conspiracy is not relevant to the surviving damage claim and would merely provide for a remedy where one is not provided for and (2) Plaintiff and Defendant settled as to the Sherman Act claims and allowing this conspiracy claim would allow Plaintiff to recover twice.

when the General Assembly has clearly not provided for it. If the Court permitted the aiding and abetting claim to proceed, it would contravene the statute's plain language making only sellers liable. For the aforementioned reasons, this Court will dismiss the claim for aiding and abetting discriminatory pricing in violation of the Maryland Antitrust Act.

Count V: Tortious Interference with Prospective Business Advantage

To state a claim for tortious interference with a prospective business advantage under Maryland law, a plaintiff must allege: "(1) intentional and willful acts; (2) calculated to cause damage to the plaintiff in her lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting." *Carter v. Aramark Sports and Entertainment Servs., Inc.*, 153 Md. App. 210, 240 (Md. 2003) (citations omitted).

Therefore, an essential element of a claim for tortious interference with a prospective business advantage is that the defendant committed the act with an "unlawful purpose which constitutes malice." Plaintiff alleges that either of two of Defendant Mars' actions satisfy that element: (1) receipt of discriminatory pricing and (2) aiding and abetting discriminatory pricing. These two allegations are precisely what is alleged in the first two counts discussed *supra*. As already stated above, this Court holds that Defendant Mars cannot be held liable for either of those acts. Although a violation of the Maryland Antitrust Act would fulfill the unlawful purpose/with malice element, the Court has not found such a violation. *See Martello v. Blue Cross and Blue Shield of Maryland, Inc., et al*, 143 Md. App. 462, 478 (2002); *Purity Prods., Inc. v. Tropicana Prods., Inc.,* 702 F.Supp 564, 575 (D.Md. 1988). The viability of the tortious interference count is contingent on the viability of the Maryland Antitrust Act violations. *See Martello*, 143 Md. App. at 478 (dismissing the tortious interference count because all other antitrust counts were dismissed); *see also Faulkner Adver. Assocs., Inc. v. Nissan Motor Corp. in U.S.A*, 905 F.2d 769, 775 (1990) (citing *Purity Products, Inc.,* 702 F. Supp at 575) (the [malice element of tortious interference] necessarily hinges on whether defendants' actions constitute a violation of federal or state antitrust laws). Therefore, the count for tortious interference cannot survive a motion to dismiss.

In addition, Plaintiff has not alleged that Defendant Mars' actions were "calculated to cause damage to the plaintiff in her lawful business." Plaintiff makes only a general allegation that "supermarket chains . . . who paid these lower prices have solicited Eastside's customers and offered to sell them Pepsi [and CCE] products at more favorable prices than Eastside is able to offer the same customers" and "[t]he discriminatory prices that [CCE] and PBG have charged Eastside directly resulted in the loss of profits and diversion of profits and sales from Eastside. Complaint at ¶¶ 37, 53 & 61. Plaintiff does not allege that Defendant Mars' actions have resulted specifically in injury to Plaintiff.

For the aforementioned reasons, this Court will dismiss Plaintiff's claim for tortious interference.

Count VI: Injunctive Relief

The injunctive relief count contains no independent allegation that Defendant Mars violated any laws other than those in the above Counts. Therefore this count cannot stand independently of the remaining claims. For that reason, the Court dismisses the claim for injunctive relief.

PART II: Counts Against CCE and PBG

Count I: Discriminatory Pricing in Violation of the Maryland Antitrust Act

Plaintiff contends that both CCE and PBG violated section 11-204(a)(3) of the Maryland Antitrust Act which provides in relevant part:

> A person may not.... [d]irectly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effects of the discrimination may... [s]ubstantially lessen competition...or [ ] [t]end to injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them.[4]

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4 The federal counterpart of section 11-204(a)(3) is section 13(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). The language for all relevant purposes is nearly identical. Therefore, as there are no cases on point interpreting section11-204(a)(3), this Court will look to federal cases interpreting section 13(a) of the Robinson-Patman Act.

In addition to the jurisdictional requirement, to establish a prima facie case a disfavored purchaser must plead and prove that (1) the same defendant-supplier (2) contemporaneously sold (3) commodities of like grade and quality (4) to different purchasers at different prices (5) over time (6) causing a prohibited competitive injury (substantially lessening competition in the instant action or tending to injure, destroy or prevent competition). *Lupia v. Stella D'Oro Biscuit Co.,* 586 F.2d 1163, 1170 (7th Cir.1978), *cert. denied,* 440 U.S. 982 (1979); *see also Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990); *Hoover Color Corp. v. Bayer Corp*., 199 F.3d 160, 164 (4th Cir. 1999); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584 (2d Cir. 1987).

The disfavored purchaser need not prove that the price discrimination did in fact cause a competitive injury, but rather only establish “a reasonable possibility that a price difference may harm competition.” *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). This harm may “be inferred from evidence that some purchasers [over time] had to pay their supplier ‘substantially more for their goods than their competitors had to pay.’” *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 559 (1990) *quoting FTC v. Morton Salt Co*., 334 U.S. 37, 46-47 (1948). This inference of reasonable possibility “is sufficient to support injunctive relief [ ] and to authorize further inquiry by the courts into whether the plaintiff is entitled to treble damages....” *Falls City Indus.*, 460 U.S. at 435 *citing J. Truett Payne v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

A disfavored purchaser seeking damages under section 11-209(b)(4) must also *prove* "the extent of his actual injuries." *Texaco*, 496 U.S. at 556, *citing J. Truett Payne v. Chrysler Motors Corp.*, 451 U.S. at 562; *Falls City Indust.*, 460 U.S. at 435.

CCE and PBG mount a two-prong attack on Count I. First, in their Motions to Dismiss,[5] they challenge the sufficiency of Plaintiff's allegations as they relate to the elements defined above except element (3) requiring the commodities to be of like grade and quality. As a corollary, they also argue that Plaintiff needs to plead sufficient facts to maintain its action for damages under sections 11-204(a)(3) and 11-209(b)(4) (that section of the Act providing for treble damages) and has failed to do so.[6]

Defendants CCE and PBG also attack the competitive injury theories on which Plaintiff asserts the section 11-204(a)(3) violations. Specifically, Defendants contend that the Plaintiff, as a wholesaler to the vending operator industry, can not be in competition (1) with CCE and PBG who the Plaintiff has alleged operate their own vending machines, (2) with CCE and PBG who

5 CCE and PBG filed separate Motions to Dismiss. However, CCE filed a Memorandum of Law setting forth its arguments in support of its Motion in which PBG joined. Thus, this Court will address CCE's arguments as they relate to both CCE and PBG.

6 Under section 11-209(b)(2) any "person whose business or property has been injured or threatened with injury by a violation of section 11-204 of this subtitle may maintain an action for damages or for an injunction or both…." Section 11-209(b)(4) further provides that "if an injury due to a violation of section 11-204 of this subtitle is found, the injured shall be awarded three times the amount of actual damages which results from the violation, with costs and reasonable attorney's fees."

Plaintiff has alleged sold directly to Eastside's vending industry customers, (3) with grocery store retailers and the hybrid club stores who purportedly also sell to vending machine owners and operators, or (4) with the vending machine owners and operators to whom PBG sells directly.[7]

Plaintiff counters that it competes with the grocery stores and club stores in that they all compete for the vending operator business. Eastside further complains that it competes with the vending service providers to whom PBG sells directly because Plaintiff's customers compete directly with these providers. Finally, Plaintiff contends that it directly competes with CCE and PBG because these two defendants have sold to Plaintiff's own vending operator customers and because its customers compete with CCE's and PBG's own vending machines for sales to the ultimate consumer.

This Court will first address the argument that Plaintiff has failed to sufficiently allege that Eastside competed with CCE and PBG. It will then address whether Plaintiff's theories that it competes with the grocery store chain retailers, the club stores and the vending service providers to whom PBG sells directly are legally cognizable competitive injuries. Because, as discussed in detail below, this Court holds that both of these theories do state competitive injuries, it will address whether Plaintiff has alleged sufficient facts to withstand

7 In paragraph 55 of the Complaint Plaintiff only alleges that PBG sold directly to vending service providers who purportedly compete with Eastside's customers. The Complaint contains no similar allegation as to CCE.

CCE's and PBG's Motions to Dismiss Plaintiff's section 11-204(a)(3) claim as to both theories.

1. Levels of Competitive Injuries

An actionable competitive injury may occur at three (3) levels: (1) the primary-line, (2) the secondary-line and (3) the tertiary or customer level. A "[p]rimary line injury [ ] occurs at the direct level of competition [between suppliers such as CCE and PBG][and] customarily results when a seller [such as CCE or PBG] uses predatory pricing policies to enhance his market position over competitors, thereby diminishing the vigor of competition and increasing market concentration." *Eximco, Inc. v. Trane Co.*, 737 F.2d 505, 515 (5th Cir. 1984); *See, eg., Brook Group Ltd. V. Brown and Williamson Tobacco Corp.*, 509 U.S. 209 (1993). An example would be if either CCE or PBG reduced its sales price below its cost to increase its market share over the other supplier. *See Lago & Sons Dairy, Inc. v. H.P. Hood*, 1994 WL 484306 (D.N.H. 1994) (setting forth elements for primary line violation) (citations omitted); *See also Indian Coffee Corp. v. Proctor & Gamble Co.*, 482 F. Supp. 1104, 1108 (W.D.Pa. 1980) (includes examples and explanations of various levels of injury).

A secondary-level injury occurs when a seller/supplier discriminates in price between two different buyers, *i.e.* the favored and disfavored buyer. "Secondary-line injury customarily results when a larger purchaser uses its vast purchasing power to obtain low prices from the manufacturers or distributors whose products it stocks, thereby enabling it to undersell competitors." *Eximco, Inc.*, 737 F.2d at 515; *See also Indian Coffee Corp*, 482 F. Supp at 108. This injury, as discussed further below, is the crux of any competitive injury in this case.

Finally, there is a tertiary or customer–level injury. It occurs when "the seller's price discrimination harms competition between the customers of the favored and disfavored purchasers even though the favored purchasers and disfavored purchasers do not compete" directly. *Hygrade Milk & Cream Co., Inc. v. Tropicana Prods., Inc*., 1996 WL 257581 Fn. 6 (S.D.N.Y.) *citing Falls City Indus. V. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983). An example of this injury is set forth in *Falls City*. In *Falls City* the Supreme Court found a competitive injury when a supplier/manufacturer sold to two non-competing wholesalers operating in wholly distinct markets at different prices because their retail customers were in actual competition within a unified market region.

2. Eastside's Proposed Competition with CCE and PBG

Plaintiff asserts that it competes directly with CCE and PBG because CCE and PBG "have sold Eastside's customers the same products [they have sold Eastside] at lower prices." Complaint at ¶ 34 & 50. This Court need not decide whether this theory would sustain one of the outlined-above competitive injuries because it amounts to no more than a conclusory statement. It is completely devoid of any supporting facts. It fails to identify with any particularity the customers to whom the Plaintiff refers, what prices Plaintiff and/or the Plaintiff's customers paid for the products and the timeframe of these purported transactions. In other words, the allegations fall well short of pleading the necessary elements of a section11-204(a)(3) violation.

Plaintiff's allegation that it competes with PBG and CCE because PBG and CCE operate their own vending machines, thereby competing with Plaintiff's vending machine customers directly and Plaintiff indirectly, also fails. No competitive injury exists when a seller/supplier sells directly to the ultimate user at a lower price than it sells to wholesalers or retailers. *See O'Byrne v. Checker Oil Co.*, 727 F.2d 159, 165 (7th Cir. 1984); *Secatore's, Inc. v. Esso Standard Oil Co.*, 1717 F. Supp 665 (D. Mass. 1959); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp 345 (E.D.N.Y. 1960).

This conclusion is premised on the simple logic that the ultimate consumer is not in competition with anyone for the resale of the product, and, therefore, their receipt of favorable pricing cannot harm competition. *Obyrne*, 727 F.2d 165. Moreover, if a supplier can sell to a consumer at the same price it sells to the wholesaler or retailer, then the supplier cannot harm competition further by selling to the consumer at a lower price. *Secatore's, Inc.*, 1717 F.Supp. at 667; *Sano Petroleum Corp.*, 187 F. Supp. at 354. Basic economics dictates that the reseller, be it wholesaler or retailer, must append some margin to its purchase price when it resells it; otherwise it would be selling the product at a loss given overhead. *Id.* Thus, the reseller cannot realistically compete with the supplier because the manufacture will always have a price advantage. *Id.*

Even if such a theory did constitute a competitive injury, Plaintiff has pled no underlying facts to support this claim. It has not identified any price discrepancy, the customers who purportedly compete directly with CCE and PBG, the relevant timeline, etc. Thus, Plaintiff has not pled a cognizable competitive injury based on this theory.

3. Theories of Eastside's Competition with Grocery Store Chain Retailers and Club Stores

On the other hand, assuming the sufficiency of the allegations, Plaintiff's theories (1) that it competes with the retail grocery store chains and club stores for vending machine operators and (2) that it competes with the vending service providers to whom PBG sells directly can establish a secondary-line injury. To establish a secondary-line injury the disfavored purchaser must establish that it was "in actual competition with the favored purchaser as of the time of the price differential." *Best Brands Beverage, Inc. v. Falstaff Brewing Co.*, 842 F.2d 578, 584 (2nd Cir. 1987).

The plaintiff can satisfy this competitive nexus by showing that "the favored and disfavored purchasers competed at the same functional level, *i.e.* all wholesalers or all retailers, and within the same geographical market." *Id.* at 585. However, this is not a prerequisite because the Supreme Court has categorically rejected any contention that the favored and disfavored purchasers *must be* all wholesalers or retailers. *See Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 55 (1948) (holding that a volume discount given by a manufacturer/supplier to large qualifying retailers but not to smaller wholesalers whose retail customers competed with the favored retailers stated a competitive injury under the federal counterpart of § 11-204(a)(3)); *see also Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 567 (1990) (holding the converse of *Morton Salt* whereby the wholesalers received the discount). *See also Hygrade Milk & Cream Co., Inc*, 1996 WL 257581 *10. (S.D.N.Y.). Rather the emphasis is on the purchaser's "actual position in the distributive chain" and, more importantly, whether the price discrimination may have harmed competition, not on the label of wholesaler or retailer. *Federal Trade Comm'n v. Fred Meyer*, 390 U.S. 341, 349 n. 9 (1967); *see also Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 567 (1990) (J. Scalia, concurring) ("[T]he Act prohibits differentials in the prices offered to wholesalers and retailers.... [I]f that factor could make any difference, it would bear … upon whether it affected competition"). To determine a purchaser's position requires "careful analysis of each party's customers." *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (1975). The question ultimately asks whether the favored and disfavored purchasers competed for the same dollar. *Id.*

Plaintiff's first theory of competitive injury in this case is that PBG and CCE sold the same products they sold to Eastside to grocery store chains and club stores at lower prices. These favored purchasers then resold the products to vending machine owners and operators, the same customers to whom the disfavored purchaser Eastside sold the same products. In other words, both the Plaintiff and favored grocery store chains and club stores competed as functional wholesalers for the same dollar: that of the vending machine owners and operators. This is a viable allegation of secondary-line injury to competition.

Generally, consumers constitute the majority of a retailer's customer base. However, they are not necessarily the retailer's exclusive customers. As Plaintiff has alleged in its Complaint, retailers are open to the general public and nothing precludes vending machine owners and operators from shopping at a retailer. The same can be said about the club stores. In fact, it may be even more likely that vending machine owners and operators shop at the club stores than at the retail grocery store chains as the club stores market more directly to business operators. Therefore, this Court holds that this theory of competitive injury, if proven, would be sufficient to constitute a violation of section 11-204(a)(3) of the Act.

Plaintiff's second theory, that it competes with the vending service providers to whom PBG allegedly sold identical product at a lower price, likewise alleges a viable claim. The vending service providers are essentially "retailers" who vend their products to the ultimate consumer. Therefore, the favored direct-buy "retailers" and the "retailers" who purchase through the intermediary Plaintiff compete for the same consumer dollar.

PBG relies on the logic set forth in both *Secatore's, Inc. v. Esso Standard Oil Co.*, 1717 F. Supp 665 (D. Mass. 1959) and *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp 345 (E.D.N.Y. 1960). In *Secatore's* the court held that a supplier could sell directly to the consumer at a price below which it sold the same to a retailer. The court reasoned that "[i]f [the retailer] could not compete with [the supplier] for [the consumer purchaser] when there is no price differential, it is not harmed by any further reduction which [the supplier] may make in the price it charges to them." *Secatore's, Inc.*, 1717 F.Supp at 667. Because the retailer could not compete with the price offered by the supplier, even if equal, the price discrimination itself could not adversely effect competition between it and the supplier. In *Sano*, a different court applied this rationale to a situation in which a supplier sold product to a consumer for less than it sold the same to a wholesaler and held that such a theory could not support a competitive injury.

Sano Petroleum Corp., 187 F. Supp. at 354. In so holding it stated: "The gist of *Secatore's* is that if equality cannot help, discrimination cannot injure." *Id.*

This Court declines to extend the logic of these decisions to the facts of the instant case. In *Sano* and *Secatore's* the favored buyers were the ultimate *consumers* whereas here the alleged favored buyers were retailers. Here, the purported favored purchasers were retailers who resold the product and therefore, could be in competition with Eastside for the ultimate consumer dollar. A consumer does not compete with a retailer or wholesaler for the resell of a product.

"A supplier's sale to its retailer at a price lower than that charged wholesalers whose customers compete with the favored retailer may violate" the federal counterpart of § 11-204(a)(3). *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942, 950 (D. Conn. 1966) *citing F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948); *J. T. Jones v. Metzger Dairies, Inc.*, 334 F.2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965) (dictum); *Krug v. Int'l Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956) (other citations omitted); s*ee also Texaco Inc. v. Habrouck*, 496 U.S. 543, 577 (1990) (J. Scalia, concurring) ("As long ago as [*Morton Salt*] we held that the Act prohibits differentials in the prices offered to wholesalers and retailers.") In fact "one of the well-known purposes of the Robinson-Patman amendment to the Clayton Act was to protect independent wholesalers from discriminatory concessions given by manufacturers to retailers whose size and volume of sales lead to a by-passing of the wholesaling function." *Krug*, 142 F.Supp. at 235. The injury to competition under such a theory occurs between the wholesaler's retail customers and the favored direct-buy retailers. If the wholesaler must pay more for the product than the favored retailer, it certainly follows that their customers will as well. If the wholesaler's customers are unable to compete, the wholesaler in turn will sustain injury in the form of lost sales and profits.

This is the same factual scenario Plaintiff purports to allege in paragraph 55 of the Complaint. It complains that PBG charges Eastside more for the same product than it charges vending service providers to whom it sells directly. It further alleges that this discriminatory pricing affects "Eastside's customers ability to compete." As Plaintiff has alleged that it sells exclusively to vending operator and owners, one can infer that its customers compete with the direct-buy vending service providers. As stated previously, both Plaintiff's and PBG's vending customers function as retailers through their vending machines. Thus, if adequately alleged, Plaintiff's theory that PBG sold the same product to a "retailer" at a price lower than to the Plaintiff wholesaler, can support the competitive injury element under section 11-204(a)(3).

4. Sufficiency of Plaintiff's Allegations to Support a Second-Line Injury

This Court now turns to the sufficiency of the Plaintiff's allegations to plead these two secondary-line violations of section 11-204(a)(3) of the Act. To withstand a motion to dismiss a section 11-204(a)(3) claim, the plaintiff must plead more than conclusory allegations: the complaint "must allege *facts* that if proven would establish each element of the claim." *Oreman Sales, Inc. v. Matsushita Elec. Corp. of America*, 768 F. Supp. 1174, 1184 (E.D. La. 1991) (emphasis in original and citations omitted). However, this Court must be mindful that "dismissals prior to giving the plaintiff ample time for discovery should be granted very sparingly" in an antitrust case because "the proof is largely in the hands of the alleged conspirators." *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976) (internal quotation marks and citations omitted).[8]

It is through this lens that the Court will address the sufficiency of Plaintiff's allegations in support of the following required elements except (3): (1) the same defendant-supplier (2) contemporaneously sold (3) commodities of like grade and quality (4) to different purchasers at different prices (5) over time (6) causing a prohibited competitive injury (substantially lessening competition in the instant action or tending to injure, destroy or prevent competition). The competitive injury requirement in a second-line injury action can be satisfied by showing that the favored and disfavored purchasers were competitors as discussed above.

8 Although Plaintiff has not alleged a conspiracy with respect to its section 11-204(a)(3) claim, this Court believes the logic still applies. As in antitrust conspiracy cases, Plaintiff is not likely to have access to the exact prices a supplier has charged the alleged favored purchasers or when those purchases occurred. This information is most likely to be revealed in discovery.

Plaintiff has failed to allege sufficient facts to support its theory that PBG sold directly to vending service providers and that these providers competed with Plaintiff's customers. It only alleges that PBG is "presently" charging Eastside more for the product(s) without any reference to time frame, and, thus, fails to meet the "over time" requirement. It also fails to identify any of the impacted customers and what injury they have sustained as a result of the competition. Accordingly, Plaintiff has failed to sufficiently plead this theory of competitive injury.

This Court now turns to whether Plaintiff has pled sufficient facts to support the elements of its theory premised on competition with the retail grocery stores and the club stores for the vending owner and operator business. This Court will first address elements (1), (2), (4) and (5) as they are all related. To establish these elements Plaintiff pled that "on September 5, 2001 [CCE] charged Eastside $6.50 per case of Coke brand products in 12 ounce cans" and that on the same day an identified grocery store chain "offered to the general public… cases of Classic Coke [a Coke brand product][9] in 12 ounce cans for $5.00 per case." Complaint at ¶ 26. The Complaint contains additional allegations of this nature as to both CCE and PBG. *See* Complaint at ¶ 24-26, 32, 42-45. With regard to element (4) requiring a sale to two different purchasers, Plaintiff contends that

9 CCE's nor PBG's Motions to Dismiss challenge whether Plaintiff adequately alleged that the products sold to Eastside and the alleged favored purchasers were of like grade and quality. Therefore, this Court will assume that the products are of like grade and quality for purposes of this decision.

because these other purchasers offered to sell a product at a price below which Plaintiff could purchase the same, they must have also purchased the product at a lower price. This is a viable argument and a reasonable inference. Without the benefit of discovery, it would be difficult, if not impossible, for the Plaintiff to know the exact prices these purchasers paid for the products. Thus, Plaintiff employed the best substitute for the purchase price: the sales price. Of course, discovery may establish that indeed these grocery store chains and club stores did sell the products at a price below their purchase price as, for instance, a loss leader. However, this Court believes Plaintiff has pled sufficient underlying facts to satisfy element (4).

This representative allegation is also sufficient to satisfy element (2) that the sales be contemporaneous. Again, without an invoice or discovery it is difficult for Plaintiff to meet its burden to plead facts regarding when the retail grocery store chains and club stores purchased these commodities. So, Plaintiff alleged the next best alternative: it cited its competitor's contemporaneous sales price, *i.e.* a competitor's sales price within close temporal proximity to Plaintiff's purchase price.

The Complaint also satisfies element (5) that the sales occur over time as it includes at least nine (9) factually-similar allegations from January, 2001 through December, 2003. *See* Complaint at ¶¶ 24-26, 32, 42-45. They all allege an Eastside purchase price higher than a competitor's contemporaneous sales price. At least nine (9) incidents spanning three (3) years is more than isolated and is sufficient to sustain an allegation of price discrimination over time.

Next, CCE and PBG challenge the sufficiency of element (1). They argue that these sales price/purchase price allegations fail to identify them as the seller/supplier who actually *sold* the product to the purportedly favored grocery store retailers and club stores because the plaintiff only alleged the sales price and not the purchase price. However, the allegations clearly state that CCE or PBG "charged Eastside more for these beverages than it charged" the identified grocery store retailer or club store. *See* Complaint at ¶¶ 24-26, 32, 42-45. When coupled with the allegations that the grocery store or club store offered the product for sale, it is quite reasonable to infer that CCE or PBG, depending on the allegation, made the initial sale to the reselling grocery store or club store. Moreover, paragraph 4 of the Complaint identifies CCE as the "exclusive producer, bottler, and canner of Coca-Cola soft drinks in the District of Columbia, most of the state of Maryland, most of the Commonwealth of Virginia, and in much of the mid-Atlantic region of the United States. Paragraph 5 states that "PBG has the exclusive right to manufacturer, sell, and distribute Pepsi beverages in the Mid-Atlantic region of the United States." Assuming the truth of these allegations that CCE and PBG were the exclusive sellers of their respective products in the relevant market (where the favored purchasers operated), makes it likely that they sold the products to the allegedly favored grocery retailers and club stores. Thus, this Court is satisfied that Plaintiff has alleged sufficient facts to support element (1) that the two sales be from the same seller/supplier.

Discovery may reveal that some of the inferences upon which Plaintiff relies to support these allegations cannot be borne out. However, at this stage of litigation one can naturally infer from these allegations that CCE and PBG made contemporaneous sales over time to the identified grocery store chains and club stores at prices below which it sold the same to Eastside.

CCE and PBG further challenge the sufficiency of Plaintiff's allegations with respect to element (6), competitive injury. Specifically they contend that the Complaint fails to allege that Plaintiff competed with the identified grocery store retailers and club stores. This Court believes Plaintiff has also pled sufficient facts to support its theory that Plaintiff competed with the identified grocery store chains and club stores for the vending machine owner and operator business. Plaintiff has alleged that the identified grocery store chains and club stores offered the same products Plaintiff purchased from CCE and PBG "to the general public." Complaint at ¶ 24-26, 32, 42-45. As members of the general public, vending machine owners and operators can purchase from these stores. Many variables factor into one's decision as to where to purchase a product, but price is a significant one. A significant price differential can lure long-term customers away from a wholesaler who may be more convenient. Thus, it is conceivable that Eastside did compete with the retail grocery chains and club stores for the vending operator business.

Plaintiff also directly alleges that "club stores [and] supermarket chains are direct competitors of Eastside" who "have solicited Eastside's customers and offered to sell them [the respective products] at more favorable prices...." Complaint at ¶ 37, 38, 53 & 54. As Plaintiff sold exclusively to the vending operator industry, one must infer that by labeling the grocery store chains and club stores as "direct competitors," Plaintiff alleged that they, too, sold to the vending industry. Moreover, according to the Complaint, the only customers these purported favored purchasers could solicit from Eastside would be vending machine owners and operators. Therefore, these allegations are sufficient to establish Plaintiff's claim for a secondary-line competitive injury.

Finally, CCE and PBG assert that Plaintiff must also plead what is known as an antitrust injury to sustain an action for damages under section 11-109(b)(4). An antitrust injury is one to the Plaintiff's business or property that the antitrust "laws were intended to prevent" such as lost customers or profits, resulting from Defendants' violation of the antitrust laws (such as discriminatory pricing). *Brunswick Corp. v. Pueblo Bowl-O-Mat*, Inc., 429 U.S. 477, 489 (1977); *J. Truett Payne*, 451 U.S. at 564 n. 4; see also § 11-209(b)(2) of the Act (authorizing private rights of action to those who have sustained an injury to their "business or property... by a violation of § 11-204....").

However, a prima facie case for a violation of section 11-204(a)(3) does not require the Plaintiff to establish an antitrust injury and "is sufficient to … authorize further inquiry by the courts into whether the plaintiff is entitled to treble damages…." *Falls City Ind.*, 460 U.S. at 435 *citing J. Truett Payne v. Chrysler Motors Corp.*, 451 U.S. 557, 562. But, the plaintiff must *prove* "the extent of his actual injuries" to recover treble damages under section11-204(a)(3). *Texaco*, 496 U.S. at 556 *citing J. Truett Payne v. Chrysler Motors Corp.*, 451 U.S. 557, 562; *Falls City*, 460 U.S. at 435.

Plaintiff has, at a minimum, alleged sufficient facts to warrant discovery and further inquiry as to the extent of damages Plaintiff may have sustained as a result of the alleged secondary-line violation by CCE and PBG. Paragraph 17 of the Complaint states that as a result of CCE's and PBG's discriminatory pricing, discussed above, "Eastside has been forced to resell the defendants' products at below Eastside's cost, at cost, or at a substantially reduced price." This is obviously an allegation of diminished profits. In paragraph 32, Plaintiff substantiated this claim with respect to CCE when it alleged that the discriminatory pricing forced it to sell CCE product purchased at $18.48 per case for $14.95 per case. In paragraph 53, Plaintiff alleged that as a result of the discriminatory pricing, "PBG customers have sold Eastside's customers Pepsi products at lower prices than Eastside pays PBG for those same products and is able to offer its customers without substantially reducing its profit." This is a claim of lost customers or diverted sales. Unlike in the case of lost profits, where the Plaintiff can consult its own records for substantiation, Plaintiff may not have clear evidence to plead this allegation in detail. Plaintiff may not know at this stage of litigation how many customers simply purchased from the purported favored purchasers and what price they may have paid for the product. The discovery process will not only give Plaintiff the proper incentive to substantiate these claims if possible, but it will also give Defendants an opportunity to probe further these alleged damages. Should Eastside not be able to provide sufficient evidence to support its claim for damages, CCE and PBG can then file the appropriate motions. However, Plaintiff has sufficiently pled damages to warrant discovery. Resolution of damages is best addressed after discovery.

Accordingly, Plaintiff has alleged sufficient facts to support all the required elements for its section 11-204(a)(3) claim, including treble damages under section 11-204(b)(4). Thus, Defendants CCE's and PBG's Motions to Dismiss Count I are denied to the extent that Plaintiff has alleged that CCE and PBG sold their respective products to grocery store chains and club stores at a price below which it sold the same to Eastside and that these favored purchasers competed with Eastside for the vending operator business.

Count IV: Rule of Reason Violation

Count IV of the Complaint alleges that CCE's and PBG's "conduct has constituted an unreasonable restraint of trade...." Complaint at ¶ 77. As the Complaint failed to identify any statutory authority for such a complaint, this Court will assume that Plaintiff intended to allege a violation of section 11-204(a)(1) of the Maryland Antitrust Act, Md. Code Ann., Com. Law § 11-204(a)(1). This section of the Act makes it illegal for a person "by contract, combination, or conspiracy with one or more other persons, [to] unreasonably restrain trade or commerce." Again, considering the relatively few cases interpreting the Act and its purpose "to complement the body of the federal law governing restraints of trade," this Court will look for guidance from federal court interpretations of section 11-204(a)(1)'s federal analog, section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; *See Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 53 (1984).

A section 11-204(a)(1) violation consists of two elements: "(1) There must be at least two persons acting in concert, and (2) the restraint complained of must constitute an unreasonable restraint on [ ] trade or commerce." *Estate Constr. Co. v. Miller & Smith Holding Co*., Inc., 14 F.3d 213, 220 (4th Cir. 1994) (citations omitted). A practice can be an unreasonable restraint of trade in one of two ways: it can be unreasonable *per se*, or it can be deemed unreasonable under a "rule of reason" analysis. *Natural Design, Inc.*, 302 Md. at

667. Certain practices, such as price fixing, resale price maintenance, group boycotts and horizontal divisions of markets, are presumed unreasonable per se "because of their pernicious effect on competition and lack of any redeeming virtue…." *Id.* (citations and internal quotations omitted); *See also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Klor's Inc. v. Broadwat-Hale Stores, Inc.*, 339 U.S. 207 (1959); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

Other practices may be found unreasonable under the "rule of reason" analysis which "requires a weighing of all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* (citations and internal quotation marks omitted). "To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Id.* (citations and internal quotation marks omitted). "[T]he reasonableness of the restraint is evaluated based on its impact on competition as a whole within the relevant market." *Oksanon v. Page Mem'l Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992).

The practice of which Plaintiff complains is known as a non-price vertical restraint.[10] Such restraints are not unreasonable *per se*, but are to be assessed

10 A vertical restraint involves an "agreement[ ] between persons at different levels of the market structure, such as manufacturers [like CCE and PBG] and distributors [like Eastside]." *Natural Resources, Inc.*, 302 Md. at 56, n. 4. A horizontal restraint would involve "agreements between

under a “rule of reason” analysis. *Natural Design Inc.*, 302 Md. at 57-59; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In support of this violation Plaintiff alleges that “For a number of years, [CCE] and PBG have forced Eastside to agree not to sell any products sold by [CCE] and PBG to any of” Eastside’s non-vending owner/operator customers. Complaint at ¶ 19. It further complains that had CCE and PBG “not forced Eastside not to sell any of their products to these customers, Eastside would have attempted to sell to these customers, and would have charged them lower prices and provided better service than the service provided by [CCE] and PBG.” Complaint at 20.

As a threshold matter, these facts, even if true, would not support an unreasonable restraint of trade. Plaintiff’s theory of injury to competition is economically implausible. Even if CCE and PBG did not “force” Plaintiff to agree not to sell to non-vending service industry customers, there is absolutely no reason to believe that those forbidden customers would purchase from Eastside. In fact, common sense and reason would dictate that the forbidden customers would continue to purchase from CCE and PBG as neither supplier is obligated to sell product to a wholesaler at a price lower than it sells consumers or retailers to ensure the wholesaler’s profit margin. *See Klein v. Lionel Corp.*, 138 F. Supp. 560 (D.C. Del. 1956) (holding that Robinson Patman Act does not require suppliers to sell product to wholesalers at price below that sold to large

competitors at the same level of the market structure to minimize competition” as for instance between CCE and PBG. *Id.*

retailers so that wholesaler's smaller retail customers can compete with large direct-buy retailers); *Accord, Secatore's Inc.*, 171 F. Supp. at 667 (A supplier is "under no obligation to sell to [a wholesalers] at a lower price than it charges [other customers] who buy directly from it in order to enable [the wholesaler] to compete with it for the business of these customers.") Thus, even if CCE and PBG would charge both the forbidden customers the same price they charged Plaintiff, CCE and PBG would *always* have a price advantage. See *Secatore's Inc.*, 171 F. Supp. at 667 (Even if supplier charged retailer the same price it sold to consumer, plaintiff-retailer "could not compete with [supplier] for the [direct-buy consumer business] for it would as a matter of practical economics have to charge the [consumers] more than it paid the [supplier]... to cover its expenses of operation, to say nothing of a making a profit on the transaction.") Therefore, ultimately this non-price vertical restraint would not even affect competition as the customers would continue to purchase from CCE and PBG.

Moreover, Plaintiff has failed to adequately plead the antitrust injury, an unreasonable restraint on trade or commerce. "[T]he antitrust laws were enacted to protect *competition*, not *competitors*." *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, (1990) (citations and internal quotation marks omitted) (emphasis in original). Thus, simply pleading an economic injury to oneself or conclusory allegations is insufficient. *Oksanon*, 945 F.2d at 709. Rather, a plaintiff must plead and prove "what market he contends was restrained[,] [ ] that the defendants played a significant role in the relevant market," the condition of the market before and after the restriction was imposed and the actual or probable effect of the restraint imposed. *Id.*; *Natural Design, Inc.*, 302 Md. at 667.

In the instant case, Plaintiff has failed to identify any of the above; it has only averred that it would have charged customers lower prices and provided better service. At best this is an allegation that the Plaintiff has sustained some economic injury to itself from which one could possibly infer that the effect was to increase the overall sale price of the product. However, Plaintiff fails to identify the relevant market. It does not state to what type of customers it would have sold but for the restriction. Nor does it identify CCE's or PBG's market power. Finally, it makes no reference to the condition of the market before and after the restriction was imposed. Again, it bears reiteration that the focus of the antitrust laws is on the effect of competition in the *market as a whole*, not the individual competitors. Plaintiff's allegations fall far short of pleading any effect on the market as a whole.

Finally, "in order to adequately allege an antitrust conspiracy, the pleader must provide, whenever possible, some details of the time, place and alleged effect of the conspiracy…."[11] *Estate Constr. Co. v. Miller & Smith Holding Company, Inc.*, 14 F.3d 213, 221 (4th Cir. 1994). Plaintiff could provide

11 Plaintiff has not pled the elements of a contract, so without more, this Court will treat Plaintiff's allegations as attempting to aver a conspiracy.

approximate dates on which CCE and PBG "forced" it to agree to restrict its resale market, the manner in which they did so, the parties and representatives involved in any discussions that constitute the agreement or conspiracy, and the locations of any of these discussions. Plaintiff could also provide some details on how, when and where CCE and PBG "forced" Plaintiff to agree to restrict its resale market. In short, Plaintiff should have, and could have, pled more to sustain the conspiracy element.

For the aforementioned reasons, this Court grants both CCE's and PBG's Motions to Dismiss Count IV.

Count V: Tortious Interference with Prospective Business Advantage

As stated in Part I, a plaintiff must allege the following elements to sustain an action for tortious interference with a prospective business advantage under Maryland law: (1) intentional and willful acts; (2) calculated to cause damage to the plaintiff in her lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting. *Carter v. Aramark Sports and Entertainment Servs., Inc.*, 153 Md. App. 210, 240 (Md. 2003) (citations omitted).

Essentially CCE and PBG argue in their Motions to Dismiss that Plaintiff has failed to allege the malice element, *i.e.* any unlawful action on behalf of CCE and PBG. They contend that CCE and PBG competed with Eastside by Eastside's own admission and a price inducement to purchase from one competitor over another is an essential and natural aspect of competition. Thus, so the argument goes, any purported price discrimination on their part could not be unlawful.

While competition may be a "just cause for damaging another in his business... the right to compete has its limits." *Natural Design, Inc.*, 302 Md. at 72-73. A violation of the Maryland Antitrust Act constitutes one of these limitations. *See Id.* at 72-75; *See Martello v. Blue Cross and Blue Shield of Maryland, Inc., et al*, 143 Md. App. 462, 478 (2002); *Purity Prods., Inc. v. Tropicana Prods., Inc.,* 702 F.Supp 564, 575 (D.Md. 1988).[12] Moreover, if a complaint that an entity has violated the Act is still viable, then "the common law tort [such as tortious interference with perspective advantage] which could be predicated upon [a violation of the Act,] [is] *ipso facto* also still viable." *Martello*, 143 Md. App. at 478; *see also Natural Design, Inc.*, 302 Md. at 74.

This Court has already held, *supra*, that Plaintiff has sufficiently pled a price discrimination claim in violation of section 11-204(a)(3) of the Act. As this claim is still viable, so is Count V for tortious interference with perspective business advantage. Accordingly, this Court denies CCE's and PBG's Motions to Dismiss

12 All of these cases involved allegations that the defendants' actions gave rise to an unlawful restraint of trade under section 11-204(a)(1). This Court finds that their logic applies equally to an allegation of price discrimination under section 11-204(a)(3) for both involve a violation of the Maryland Antitrust Act and, thus, satisfy the unlawful purpose/malice element for a tortious interference with perspective business advantage claim.

as to Count V.

Count IV: Injunctive Relief

Section 11-209(b)(2)(i) of the Act specifically provides that “[a] person whose business of property has been injured or threatened with injury by a violation of § 11-204 of this subtitle may maintain an action … for an injunction.” Therefore, as this Court has held that Plaintiff has sufficiently pled that it has sustained an injury or has been threatened by a violation of section 11-204(a)(3), CCE’s and PBG’s Motions as to Count IV are denied.

Conclusion

For the aforementioned reasons in Part I, this Court grants Defendant Mars’ Motion to Dismiss as to each Count. This Court also grants both CCE’s and PBG’s Motions to Dismiss as to Count IV. However, this Court holds that Plaintiff has sufficiently pled a violation of section 11-204(a)(3) against CCE and PBG in so much as it alleges that it competes with grocery chain retailers and club stores for the vending owner and operator business. Therefore, CCE’s and PBG’s Motions to Dismiss as to Counts I, V and VI are denied.

__________	____________________
Date	Kaye A. Allison Judge

EASTSIDE VEND DISTRIBUTORS, INC.	*	IN THE
Plaintiff	*	CIRCUIT COURT
V.	*	FOR
COCA-COLA, ENTERPRISES., INC, ET AL	*	BALTIMORE CITY
	*	CASE NO.: 24-C-04-003998
Defendants	*	

* *

ORDER

Upon consideration of Defendant Mars Super Market, Inc.'s ("Mars"), Defendant Coca-Cola Enterprises, Inc.'s ("CCE") and Pepsi Bottling Group, Inc.'s ("PBG") Motions to Dismiss, Plaintiff Eastside Vend Distributors, Inc.'s ("Eastside") Responses, the Replies filed by each of the Defendants, and oral hearing, for the reasons set forth in the in the accompanying Memorandum of Decision, it is this ________ day of May, 2006 by the Circuit Court for Baltimore City hereby

ORDERED that Defendant Mars' Motion to Dismiss is **GRANTED** in its entirety; and it is

FURTHER ORDERED that all claims against Defendant Mars be **DISMISSED** with prejudice; and it is

FURTHER ORDERED that Defendants CCE's and PBG's Motions to Dismiss are hereby **GRANTED** only as to Count IV for a Rule of Reason Violation: and it is

FURTHER ORDERD that CountT IV for a Rule of Reason Violation be **DISMISSED** against Defendants CCE and PBG; and it is

FURTHER ORDERED that Defendants CCE's and PBG's Motions to Dismiss as to Count I for Discriminatory Pricing in Violation of the Maryland Antitrust Act, Count V for Tortious Interference with Prospective Business Advantage, and Count VI for Injunctive Relief are hereby **DENIED**.

____
Date

____
Kaye A. Allison
Judge