c:\a2appxc\a2_decla.doc §§ ¶¶

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	:	ECM FILING
COALITION FOR A LEVEL PLAYING FIELD, L.L.C., et al.,	:	
Plaintiffs,	:	
	:	04 CV 08450 (RO)(GWG)
-against-	:	
AUTOZONE, INC., et al.,	:	
Defendants.	:	

DECLARATION OF CARL E. PERSON IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND ENJOIN PLAINTIFFS

Carl E. Person hereby declares, pursuant to the penalties of perjury under 28 U.S.C. § 1746, that the following statements are true and correct:

1. I am the attorney for the plaintiffs in the above-captioned action, am fully familiar with the facts stated herein, and make this declaration in opposition to opposition to Defendants'[1] wholly frivolous "Motion to Dismiss the Complaint[2] with Prejudice and to Enjoin Plaintiffs from Continuing to Engage in Vexatious Litigation, including This Action" filed[3] on August 12, 2005.

2. This declaration responds to the matters raised by defendants dehors the 2004 Complaint.

3. Seven of the 13 named Manufacturer Defendants have been dismissed, by Plaintiffs' filing of a (i) Notice of Dismissal under F.R.Civ.P. 41(a)(1) (as to BorgWarner, Inc. and The Cypress Group, without prejudice); (ii) Stipulation (Honeywell International, Inc., Mark IV Industries, Inc. and

Tenneco Automotive, Inc. - with prejudice, pursuant to agreement with Plaintiffs). and (iii) Notice to Court (ACDelco. Inc., non-existent entity).

4. Additional Manufacturer Defendants have been added to the Amended Complaint: Affinia Group. General Motors. SOPUS Products, Armor All/STP and Stant.

5. There are a total of 133 Plaintiffs in the Amended Complaint (plus 18 "related" "b". "c" Plaintiffs), hereinafter referred to as the "**133 Plaintiffs**". of which 111 are "Dismissed Plaintiffs".

6. The complaint in the earlier action, filed in February. 2000. is referred to as the "2000 Complaint", and the complaint in the within action, filed in October, 2004. is referred to as the "2004 Complaint".

7. On November 14, 2005. Plaintiffs served and filed an Amended and Supplemental Complaint (hereinafter referred to as the "Amended Complaint").

8. Declarant ("Plaintiffs' attorney" or "Person") has authored and published various website pages advocating private and local governmental lawsuits under the RPA – see www.lawmall.com/rpa. During 2004. Person wrote. published and attempted to market a book advocating lawsuits under the RPA – *Saving Main Street and Its Retailers.* Also. Person has written and published a website advocating that towns and villages appoint a "Little Eliot Spitzer" as "Town Attorney General" to look after the interests of the town or village. including the commencement of RPA actions when appropriate. The website is at www.townattorneygeneral.com.

9. As part of the activities in trying to create this new type of public office. Person tried to hold performances as "Town Attorney General", but there appeared to be insufficient marketing or interest in such type of live performance. and the planned performances were canceled without any performances taking place.

10. The outline for the show. a file named tagout6.doc dated May 23. 2005 uses the word "meritorious" four times, including the following page 2 use:

> 11. Every municipality needs an attorney general to manage the municipality's meritorious claims (which are contingent intangible assets) [Outline p. 2]

11. In each of these publications advocating enforcement of the RPA, Person always stated that the actions had to be meritorious. A simple Google search (using the two words "lawmall" and "meritorious") produces two pages of results, including

> 1. "I have outlined in my four related websites (www.**lawmall**.com/abuse; **...** In a small town, a "Town Attorney General", when bringing **meritorious** lawsuits ..."
>
> 2. "The costs of litigation constantly increase, and persons with **meritorious** claims are less and less **...**"
>
> 3. "He also sponsors an extensive website about the. Act at www.**lawmall**.com). **...** competitive injury may render **meritorious** secondary line injury cases – much **...** quoted from www.amc.gov/commission_hearings/pdf/Saferstein.pdf
>
> 4. "**LawMall** Help in Lawsuit Financing **LawMall** wants to facilitate lawsuit **...** Clients (ie, persons with a **meritorious** claim or existing lawsuit) or their **...**
>
> 5. "**...** http://www.**lawmall**.com/abuse/ How to Offset Prosecutorial Misconduct and Abuses **...** question, the victim/defendant can file a notice of **(meritorious)** claim against **...**
>
> 6. "**...** and this issue could be resolved as a ... www.**lawmall**.com **...** mechanisms for enhancing the Court system's capacity to screen out non-**meritorious** Suits . **...**
>
> 7. "**...** TAB to consult on medical matters and testify in **meritorious** cases for either plaintiff or defense. **...** http://www.**lawmall**.com/files/tg_compl.html **...**"

12. In Person's www.townattorneygeneral.com/index.php he states that the purpose of the Town Attorney General is "to detect wrongdoing and commence appropriate litigation to recover money for the town."

13. Defendants would have the court believe that Plaintiffs' attorney and the Plaintiffs have found a lucrative system for suing Defendants, which is wholly false. Person invites Defendants' attorneys and Defendants to compare (in camera) his income (through fees and settlements) with their income or fees relating to any RPA litigation in which Person has been involved.

14. Declarant has had litigation under the Robinson-Patman Act since 1970, and has determined, based on the evidence that he has seen, that the violations of RPA law have been the main reason for the growth and profitability of the Major Retailers including Defendant Major Retailers.

15. Person's mention of lawsuits having any similarity to winning a lottery refers to the dollar amount of damages that may be owed by the defendants in a meritorious RPA lawsuit, not to filing a non-meritorious lawsuit and having any expectation of obtaining a settlement, whether substantial or not. This is self evident in reading what Person wrote. Most individuals, including small businesspersons, when thinking about lawsuits do not understand that RPA or other meritorious antitrust litigation often involves far more money for a company or company officer than other lawsuits of the type with which they may have become familiar over the past decades.

16. In Person's book *SAVING MAIN STREET AND ITS RETAILERS*, he did not use the word "lottery" or "lotteries", but at page 179 he wrote (about small towns and villages having the prospects for significant per-family recovery), as follows:

> .... The Town Attorney General, by filing meritorious suits against major retailers injuring the town and its small businesses and human citizens, can expect to recover amounts of money which will be small to the defendant corporation but huge when looking at the number of human citizens involved. The antitrust laws provide for treble damages, which makes the prospects for meaningful recovery much greater than without treble damages. [Emphasis added.]

17. Person's "radio infomercial" (run in a single radio station, in California, for about 2-3 weeks), with the text published at www.lawmall.com/rpa/infomer6.html, does not use the word "lottery" or "meritorious", but does state:

The decline of small business retailers in the United States today seems to be the result of unlawful price discrimination, with the public able to buy goods at 10-40% lower prices in major chain stores than they can in the small competing stores nearby. This price differential is caused by unlawful price discrimination, not by superior business acumen. The continued price discrimination caused more than 50% of the book retailers in the U.S. to go out of business during the last 6-7 years, and the same problem is taking place with small drug, hardware, appliance, department, video, beverage stores, and many other types of small stores.
The loss in value of the business can be recovered.

18. Defendants are misrepresenting to the Court to the extent they would have the court believe that Person is advocating the commencement of frivolous RPA lawsuits or any other non-meritorious litigation. There is no need to advocate frivolous litigation. Based upon Declarant's personal experience, there is too much meritorious litigation needing attention and no need to spend any time on meritless litigation. There is a need to maintain meritorious lawsuits to try to stop defendants from continued violation of the RPA and destroying other businesses as a result.

19. Approximately 42% of Declarant's original clients have gone out of business, either by closing their doors or by selling their businesses at major financial losses to the selling Plaintiffs. The identities of these Plaintiffs are set forth in Appendix A to the Amended Complaint.

20. My antitrust experience during the past 40 plus years gives me sufficient reason to conclude that Wal-Mart enjoys a monopsony in purchasing goods (based in part on Wal-Mart's monopolies in numerous products in thousands of local geographic markets in which Wal-Mart has driven its competitors out of business or effective competition.

21. Wal-Mart has the largest retail operation in the world and is able to reject 98% of the manufacturers or others trying to sell their goods through Wal-Mart. A recent *Wall Street*

Journal article entitled "The Long Road to Wal-Mart" by Staff Reporter Gwendolyn Bounds, published in the 9/19/05 edition of *The Wall Street Journal* [available after subscribing at http://users2.wsj.com/lmda/do/checkLogin?], states:

> Getting into Wal-Mart is an entrepreneur's equivalent of making it to Broadway. Even a short run on the shelves there can help transform an invention from niche product to household name. And while Wal-Mart certainly isn't the only retail path to commercial success, nor the right outlet for every product, for mass-market merchandise at a certain price point no other bricks-and-mortar retailer reaches so many shoppers. Today the company has 5,300 outlets world-wide, and gets more than 138 million customers a week.
>
> But as with Broadway, there's more than enough talent to fill the stage. Last year about 10,000 new suppliers applied to become Wal-Mart vendors. Of those, only about 200, or 2%, were ultimately accepted. "We just don't have very many empty shelf spaces," says Excell La Fayette Jr., Wal-Mart's director of supplier development.

22. A serious threat today is Wal-Mart's going into the banking business. See the United Food and Commercial Workers' website opposing Wal-Mart's move into banking, at www.ufcw.org/worker_political_agenda/worker_issues/walmart/walmart_banking.cfm, and see a 4/4/05 letter to an editor from Robert J. Wingert, President of the Community Bankers Association of Illinois, opposing Wal-Mart's banking initiatives, at www.cbai.com/ad%20for%20sjr.pdf. He unequivocally states that Wal-Mart should be stopped to "limit financial concentration" and to permit higher-cost smaller/local banks to continue providing the better customer services they provide.

23. The allegations in the 2004 Complaint (and Amended Complaint) are quite meritorious. They describe the Defendants' activities that have been and are continuing to violate the RPA. These activities are to enter into secret agreements between Defendant Manufacturer and Defendant Major Retailer giving the Major Retailer a price per unit near or below the Manufacturer's cost, and (obviously) at a per-unit price substantially lower than the per-unit price being paid by the WD direct-buying Plaintiffs (or Plaintiffs' WD suppliers) at the same time for the same products.

24. This extremely low, illegal price, enables the Major Retailers to offer the goods to the public at lower per-unit prices than the direct-buying Plaintiffs (or Plaintiffs' WD suppliers) and other independent competitors, while providing the Defendant Major Retailers a healthy markup. This practice is driving Plaintiffs out of business, as alleged in the 2004 Complaint and Amended Complaint.

25. Defendant Advance Stores has an even higher profit margin, of 46.8% for 2004; CSK's profit margin is 46.5%; and O'Reilly's profit margin is 43.2%. See Appendix B-2 to the Amended Complaint. It should be noted that the profit margins are understated, not including all of the fees, allowances and other benefits obtained by the Major Retailer from the Manufacturer, such as the value of not paying for their auto parts for as much as a one-year period. Also, the Defendant Retailers' profit margins are immense, when taking into account that they are selling the auto parts at "discount prices" in relation to the higher retail prices at which Plaintiffs are forced into selling the same parts.

26. AutoZone, in spite of its discounting (lower retail prices for hard core auto parts than any other hard-core auto parts retailer), boasts a 46.1% profit margin (up from 44.6%) [3] while AutoZone's independent competitors (such as Plaintiffs) are being driven out of business, are being driven out of business, as alleged in the 2000 and 2004 Complaints, as amended. See Appendix A to the Amended Complaint

27. The WD (wholesaler) Plaintiffs' profit margins are substantially lower than the profit margins of AutoZone, Advance Stores, CSK and O'Reilly in spite of such Plaintiffs' higher resale prices, and average in about 33-35%. If the Plaintiffs resold their auto parts at the retail prices offered by AutoZone, Advance Stores, CSK and O'Reilly, Plaintiffs' profit margins would be substantially lower, perhaps 10-20% and in some instances would even have a negative profit margin (in instances where the Defendant Retailers' per-unit retail prices exceeds the Plaintiff's

per-unit cost from the same manufacturer. :Litigation under the Robinson-Patman Act appears to be the only way that the Plaintiffs still in business have any hope to save their businesses against the destructive business practices of the defendants in violation of the RPA.

28. In the 22 Plaintiffs' Brief of Appellants filed July 9, 2003, at page 18-19, the 22 Plaintiffs described some of the evidence against Defendants and how some of it was excluded at trial by Judge Wexler (in some instances because the documents were created after the 2000 Complaint had been filed), as follows:

> The jury-excluded exhibits listed on page 15 (starting with Exhibit 175) show that AutoZone acquired competitors and then calculated the dollar amount for which its competitors were over-paying for inventory (in comparison to AutoZone) and then charged the manufacturers for such overcharges and obtained payment for itself as to the discriminatory overcharges which probably forced the competitor to sell out to AutoZone. Other excluded documents contain admissions from the manufacturer that AutoZone is getting the best price, such as A-654 which states in part: "We compared your overall pricing to our other customers and determined your pricing to be significantly below all others, as it should be. We did find a few individual items above others which when adjusted down brought your overall pricing down by just 1%." (A-654). A-655 entitled "AutoZone Pricing Strategy" was excluded as a document dated after the filing of the original complaint (A-655, 7/3/01).
>
> This is an important document because it shows how AutoZone is on its way toward getting parts without paying for them, in what AutoZone calls "Tactics for achieving 100% payables" (A-656). A-203 dated 7/8/02 states that vendors are asking about AutoZone's gathering allowance because AutoZone has had no gatherings. A-660 dated 3/14/01 from Cardone, which states that "you (AZ) are the lowest retail cost in most sku's and markets. I've also taken this new pricing against the lowest retail pricing to ensure you'll have plenty of margin (hopefully more than you are getting now"). Also (A-662) Cardone is "working on a KILLER QUOTE on Power Steering and Racks for you. Since we are going 'deeper than ever before' we are really taking a careful look at each of the top moving sku's and seeing how far we can go." All of the excluded documents were of great importance to the plaintiffs' case, but were excluded mainly because of date, and in some instances (where date was not a problem) because they did not refer to one of the 5 parts.

29. AutoZone's purchasing at lower per-unit prices than its competitors, even at below-cost per-unit prices, has enabled AutoZone to boost its profit margins to exceedingly high levels. In its 10-K for 2004 dated 8/28/04 (at page 28), AutoZone states:

> Gross profit for fiscal 2003 was $2.515 billion, or 46.1% of net sales, compared with $2.375 billion, or 44.6% of net sales for fiscal 2002. This

> improvement was driven by $8.7 million in gains from warranty negotiations and the adoption of EITF 02-16 that reclassified $42.6 million in vendor funding to cost of sales. Prior to the adoption of EITF 02-16, vendor funding was reflected as a reduction to operating, selling, general and administrative expenses. * * * The remaining improvements in gross profit and gross margin reflect the additive impact of new merchandise, a reduction in our product warranty expense, and the benefit of more strategic and disciplined pricing derived from our category management system.

30. There is an admission above that margin improvement resulted from "warranty negotiations" and because AutoZone "reclassified $42.6 million in vendor funding to cost of sales", which could be RPA violations if competitors did not receive the same warranty benefits and vendor funding (of discounts, fees and allowances), as alleged in the 2000 and 2004 Complaints and the Amended Complaint.

31. AutoZone does not pay for its goods when Plaintiffs' clients are required to pay for their goods by the same manufacturer. Instead, AutoZone takes between 6 and 12 months to pay, enabling AutoZone to open up new stores all over the country without having to pay for initial inventory, and being able to hold onto the resale revenue for substantial periods before turning any money over to the manufacturer. This extended financing and below-cost pricing to AutoZone, and to a lesser extent to the other Defendant Major Retailers, is a violation of the RPA and is driving competitors out of business all over the United States. More than 42% (at least 60) of the 143 plaintiffs in the 2000 action (disregarding related entities) are now out of business (through closing or sale of losing business) - See Appendix A to the Amended Complaint.

32. The same practices were perfected by Wal-Mart and Sam's Club, forcing manufacturers to sell to Wal-Mart at much lower per-unit prices than being charged to Wal-Mart's competitors, even selling below cost to Wal-Mart and Sam's Club, which practice makes it impossible for independent retailers to compete.

33. AutoZone is obviously trying to do what Wal-Mart is doing. Edward Lambert is or could be considered to be a controlling person of AutoZone, although he is not mentioned in any of the last 3 10-K's for AutoZone.[1] *Business Week*, 11/22/04 edition, in a cover story entitled "The Next Warren Buffet? – Financier Eddie Lambert turned once-bankrupt Kmart into a $3 billion cash cow. Will he build it into a new Berkshire Hathaway?". See http://www.businessweek.com/magazine/content/04_47/b3909001_mz001.htm

34. Edward S. Lambert caused the growth at AutoZone, according to a story entitled "Setup for a Flameout?" in the 9/10/05 *Chicago Tribune*, by Chief Financial Correspondent David Griesing, which stated in part:

> Even before he bought into Kmart and Sears, Lampert [sic] directed one corporate turnaround, at AutoZone Inc., closely guiding his hand-selected CEO. [source: http://www.chicagotribune.com/business/chi-0509100111sep10,1,1968061.story?coll=chi-business-hed&ctrack=1&cset=true]

35. The same Edward Lambert recently acquired control of Wal-Mart's two principal competitors (Kmart and Sears, and merged Kmart and Sears), with AutoZone's fate unknown. Violations of the RPA are the basis for Wal-Mart's growth, and AutoZone is following suit, to apply the lessons to assist the rapid growth of acquired Kmart/Sears, to the detriment of manufacturers and competitors. See http://changewave.com/WaveWire.html?Source=/Archive/2004/11/17-27714.html, which states:

> Kmart and Sears have reached a deal to merge to form the nation's third-largest retailer. The leader of the new entity will be Edward Lambert, a Connecticut hedge fund manager who is the largest shareholder in both companies. Some skeptics think that he is orchestrating this deal to make a pile of cash out of the merger and run.
> There are a lot of other questions that come with the merger like. "They haven't been able to solve their problems separately, so how can they solve them jointly?" ....

36. Edward S. Lambert is turning to cost controls to become competitive with Wal-Mart, according to the following 11/17/04 *Chicago Tribune* article by David Greising, Chief Business Correspondent, entitled "Showy Moves Lose Luster", republished at http://narse.org/breaking.htm:

> ... Investors are not optimistic that Lampert [sic] can turn around Kmart, which has had declining sales for three years, and Sears, where sales have declined for most of the last four years. "The show is over" says Ivan Feinseth, director of research at Matrix Investment Research. "Now you're back to the reality of competing with Wal-Mart." Lampert so far has focused on cost cutting and real estate plays.

37. "Cost-cutting" obviously includes if not means purchasing inventory at lower prices, or increasing the violations of the RPA to become competitive with Wal-Mart. Edward S. Lambert has this experience with his control of AutoZone, as can be determined from the allegations in the 2004 Complaint about AutoZone's purchasing activities.

38. The defendant retailers (AutoZone defendants, Advance Stores, Wal-Mart and Sam's Club) through their policy of squeezing auto-parts retailers to give better prices to the defendant retailers than the auto-parts manufacturers are giving to others, are contributing to the destruction of the auto-parts manufacturers. *Business Week* reported in its 10/10/05 edition, article entitled "A Run on Detroit's Parts Makers - Big money is chasing the thousands of outfits that supply U.S. carmakers" (at p. 40) that during 2003 1 auto-parts manufacturer filed for bankruptcy, but that since January 1, 2004 there have been 35 auto-parts manufacturers filing for bankruptcy.

39. The leading auto-parts supplier in the auto-parts aftermarket (Federal Mogul) is already in bankruptcy, and the number two aftermarket supplier, Defendant Dana Corporation, reports that its profits are down by 50%. AP story of 9/15/05 entitled "Dana Cuts Profit Outlook Due to Costs - Soaring Energy and Steel Costs Force Dana Corp. to Cut Its Profit Outlook for This Year in Half". http://biz.yahoo.com/ap/050915/dana_outlook.html?.v=12. The article states:

> Suppliers say the restructuring moves also are being forced by automakers that are increasing pressure to sell them parts at lower prices. "This cost pressure problem is overwhelming," Cole said.

40. Other articles have reported that the automobile manufacturers are driving the auto-parts manufacturers into bankruptcy through improper cost-cutting drives. In its 8/5/05 article entitled "U.S. Auto Supplier Sector Is in the Worst Shape Ever", Executive Intelligence Review states:

> the Big Three broke contracts with the auto suppliers, demanding that the suppliers cut the cost of their goods by 5%, 8%, 12%, again and again. They did this to the suppliers, despite the fact that they had had working relationships with the suppliers for decades. The lower prices drove the suppliers below break-even.

41. Also, the 8/25/05 *Business Week* article entitled "Johnson Controls Looks beyond Auto Sector", which stated:

> Private equity investors active in this sector say the big car makers torment their suppliers with low-margin and no-margin deals and a take-it-or-leave it attitude.

42. Plaintiffs allege that the auto-parts retailers are requiring the Defendant auto-parts manufacturers to sell to these major retailers at prices substantially lower than the per-unit prices charged to competitors, and even requiring sales to the major retailers below the manufacturers' direct costs. This accounts for the serious financial trouble for many auto-parts manufacturers on one hand, and the increase in defendant retailers' sales, profits and profit margins on the other hand. During this time of terrible turmoil for auto-parts manufacturers, AutoZone is expanding its store base, increasing its sales, increasing its profits, and most importantly increasing its profit margins from 44.6% to 46.1% according to AutoZone's 10-K for 2004 filed August 28, 2004.

43. This practice by Defendant Retailers is forcing my clients out of business, is hurting the auto-parts manufacturers (who are not in a position to complain about this for fear of

alienating their ever-increasing "best" customers), and leaves the auto-parts retailers with local monopolies throughout the United States where they can increase their prices in absence of the competitors they put out of business.

44. The government fails to enforce the Robinson-Patman Act, enabling the major retailer Defendants to cause their damage to competition as described, and the only possible hope is for private enforcement of the Robinson-Patman Act to function in absence of the federal government, to create a level playing field for American businesses before it is too late. Already, 42% of my unrelated clients have gone out of business (see Appendix A to the complaint).

45. My initial complaint is not only the model for the instant complaint, but the same wording is found in all of my Robinson-Patman Act complaints, all of which have been upheld by the courts (except where I alleged that newspaper or yellow-page advertising was covered by the Robinson-Patman Act). Thus, the same basic wording upheld in (1) the original auto-parts case, (2) my book case against Barnes & Noble and Borders; (3) my Florida tire case against Wal-Mart, Sam's Club, Goodyear, and (4) my magazine case against the 5 National Distributors of most of the nation's magazines. Each of those cases survived Rule 12(b)(6) motions to dismiss, usually with an amended complaint.

46. Defendants refer to my motion for a preliminary injunction after reinstatement of claims of the 220 plaintiffs and state that the motion was denied. The motion was denied as part of the Court overall decision to have the plaintiffs file a new complaint, which plaintiffs did. The motion itself explained that AutoZone had maintained secrecy about its Pay-on-Scan dealings and that until just prior to the motion the Plaintiffs did not know whether any manufacturer in fact had given AutoZone the Pay-on-Scan terms that AutoZone was demanding.

47. AutoZone has been able to obtain POS financing for $141,000,000 if its inventory (instead of the $200,000,000 envisioned by AutoZone), from only 20% of its manufacturer suppliers, according to blogger Jeff Matthews, in his May 27, 2005 article entitled "AutoZone: A Tale of Two Companies, Part II", located at

jeffmatthewsisnotmakingthisup.blogspot.com/2005/05/autozone-tale-of-two-companies....

Matthews states:

> Those [vendors] that have gone along with AutoZone tend to be vendors trying to gain shelf space and dislodge other products.
>
> If 20% of AutoZone's vendors are doing "pay-on-scan," as the company reported last quarter, it means, of course, that 80% have refused."

48. In an article entitled "OE Auto Parts Strategy for the Next Ten Years", published 5/2/05 in online publication *e Auto Portal*, the author described the pressures brought to bear on OE auto-parts manufacturers to lower their prices to the automobile manufacturers:

> The purchasing and engineering associates from any one of the Big Three would rather do business with you, their long time U.S. based supplier, than someone 7,000 or more miles away. They know what you have done and can do for them. If left to their own devices they would probably continue to do business with you. But their employer is in serious trouble and losing market share. They are told that they must lower costs in order to sell cars. The only way they can do this is to get you to lower your prices and to design out costs wherever possible. Since you have a lot invested in capital equipment and have a lot of fixed financial costs, you initially accede to these "requests". After a long enough period of time selling above variable costs but below total costs leads to bankruptcy. This is exactly what is now happening as suppliers are experiencing a secular decline in business not a cyclical one.
> www.eautoportal.com/news/Supplier-Strategy-article.asp

49. The Defendant retailers purchase more auto parts than the Big Three automobile manufacturers, because the auto-parts aftermarket keeps automobiles and trucks going with an average life of about 9 years (for automobiles) and 8 years (for light trucks) - for these R. L. Polk registration statistics see http://www.fhwa.dot.gov/ohim/onh00/onh2p3.htm. They are using the techniques employed by automobile manufacturers to lower their purchasing costs, but in doing so are violating the Robinson-Patman Act and driving my clients and others competitors out of business.

50. Wal-Mart/Sam's Club and their offspring (AutoZone and Advance Stores), through their business practices, including their violation of the Robinson-Patman Act, are injuring the long-term interests of the United States to gain their short-term profits. For well-reasoned presentations of the argument that Wal-Mart's globalization activities are hurting the United States see Lou Dobbs book, *Exporting America - Why Corporate Greed Is Shipping*

American Jobs Overseas, published in August, 2004 by Warner Business Books; the above-cited articles "U.S. Auto Supplier Sector Is in the Worst Shape Ever" and "OE Auto Parts Supplier Strategy for the Next Ten Years".

51. Wal-Mart's business activities are subject to increasing criticism, for driving merchants out of business when Wal-Mart opens up a new store; for imposing Wal-Mart's healthcare costs for employees on the local communities; for sex discriminaton; for low wages; and other matters. See walmartwatch.com/home/pages/issues .

52. These favored prices to Defendants Wal-Mart, Sam's Club, AutoZone, Advance Stores and other major retailers are secret, and not even known to other favored competitors, making it difficult if not impossible for the Defendant Retailers to assert any meeting competition defense. In fact, the defendants do not calculate the actual per-unit price at which auto-parts purchases from the respective manufacturers are taking place, presumably to avoid reporting that the manufacturers are selling below cost to their largest customers.

53. The lawsuit is wholly meritorious, trying to enforce the Plaintiffs' rights to purchase the same goods at the same per-unit prices, subject of course to the various RPA exceptions or defenses.

54. In addition, the Defendant Manufacturers are providing advertising and promotional programs and moneys to the Defendant Major Retailers without any comparable programs or moneys being offered or paid to the Plaintiffs, most of whom are not direct purchasers but are nevertheless entitled to have the Manufacturers provide a comparable advertising and promotional program to them.

55. The 2004 Complaint and Amended Complaint do not attempt to enforce 2(d) or 2(e) liability against any of the Defendant Major Retailers.

56. Such 2(d) and 2(e) claims could not have been brought in the earlier complaints because no manufacturers were named as defendants therein, and such claims cannot be made against Plaintiffs' competitors.

57. My experience in antitrust law generally and with the Robinson-Patman Act specifically, enables me to conclude that the consequences of these RPA violations by Defendants and other manufacturers and major retailers are devastating to the United States. They are forcing manufacturers to manufacture goods in foreign countries at lower labor rates to be able to meet the ever-increasing demands of the Major Retailers, which steadily increase their market share and domination of the purchasing market. This causes a decrease in employment in the United States. It also creates local monopolies by the major retailers when they drive out local competition in one town after another, which leaves them free to increase their prices in areas where competition is no longer effective.

58. This is reflected in the ever-increasing profit margins of AutoZone, Advance and O'Reilly while continuing to obtain ever-lower prices from the manufacturers, the never-ending cessation of businesses by the Plaintiffs (see Appendix A to the Amended Complaint), and the deterioration of the financial condition of the nation's auto-parts manufacturers with the leading auto-parts manufacturer (Federal Mogul) in bankruptcy and others (such as Dana) getting out of the auto-parts business.

59. Furthermore, as to Wal-Mart, the practice has enabled Wal-Mart to expand its activities to threaten various industries, such as the banking industry. During the past several weeks, Wal-Mart has made it clear that it plans to open up a bank, with branches in the Wal-Mart and Sam's Club stores, which would devastate many of the existing banks.

60. Wal-Mart, Sam's Club (a subsidiary of Wal-Mart) and the Defendant Major Retailers are operating at a financial loss, as alleged in the complaint, and should not be able to

continue with their material misrepresentation of their financial condition. The illegally low prices at which they buy their products from the Defendant Manufacturers and others are reflected in the operating statements as elements making up the net profits. Instead, these Defendant Major Retailers should be segregating the illegal discounts and allowances from ordinary income, ordinary expenses and results of operations, and instead putting the billions of dollars of illegal discounts and allowances into a footnote as non-recurrent income. If they did this, they would be showing multi-billion dollar losses and would not be able to borrow and use their stock to make acquisitions as easily. They fail to report their illegal discounts and allowances.

61. In the 2004 Complaint and Amended Complaint, Plaintiffs allege that the selling Manufacturers fail to abide by the Sarbanes-Oxley Act to have systems in place detecting that they are selling to their top customers (such as Defendants Wal-Mart, Sam's Club, AutoZone and Advance Stores) at prices below cost or at substantially lower prices than they are selling to others, competitors, which practice is driving their competitors out of business and leaving the Manufacturer with an ever-increasing percentage of sales below cost to their most important customers.

62. My experience with Robinson-Patman Act litigation during the last forty plus years, makes me conclude that private and local governmental lawsuits are needed to enforce the RPA and stop these practices of defendants, and I have been exercising my First Amendment right to express these ideas publicly, in my books and websites, referred to above.

63. The federal government has basically stopped enforcing the RPA, at least in the aggressive way that the FTC used to enforce the RPA. This aggressive enforcement stopped shortly after Richard M. Nixon was elected President. Starting at about this time, the Major Retailers including Wal-Mart started demanding and getting discriminatory prices, and

discriminatory advertising and marketing programs, which enabled the Major Retailers to grow at the expense of the law-abiding independent retailers, and also caused wholesalers and manufacturers to merge to try to gain enough strength to offset these practices.

64. Manufacturers are victims of the RPA violations and unless they are faced with civil lawsuits from disfavored customers or government officials (such as Declarant's envisioned Town Attorneys General), the Manufacturers have little incentive to stop violating the RPA, or at least that is how it appears to Declarant. A substantial amount of meritorious litigation by disfavored customers and Town Attorneys General would probably cause the Manufacturers to start obeying the RPA as something less costly to them than defending an ever-increasing amount of RPA litigation. Private and local governmental litigation is needed to offset the federal government's failure to enforce the RPA.

Executed this 14th day of November, 2005, at New York, New York.

Carl E. Person