UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COALITION FOR A LEVEL PLAYING FIELD, L.L.C., et al.,	ECM FILING
Plaintiffs,	04 CV 08450 (RO)(GWG)
-against-	
AUTOZONE, INC., AUTOZONE FLORIDA, L.P., ADAP, INC., AUTOZONE STORES, INC., AUTOZONE.COM, INC., AUTOZONE TEXAS, L.P., CHIEF AUTO PARTS, INC., WAL-MART STORES, INC., SAM'S WEST, INC., ADVANCE STORES COMPANY, INC., DISCOUNT AUTO PARTS, INC., ACDELCO, INC., HONEYWELL INTERNATIONAL, INC., ARVIN INDUSTRIES, INC., ASHLAND, INC., BORGWARNER , INC., CARDONE INDUSTRIES USA, DANA CORPORATION, THE CYPRESS GROUP, MARK IV, FORD MOTOR COMPANY, PENNZOIL-QUAKER STATE COMPANY, STANDARD MOTOR PRODUCTS, INC., and TENNECO AUTOMOTIVE, INC.,	
Defendants.	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT UNDER RULE 12(b)(6), F.R.Civ.P. AND IN SUPPORT OF PLAINTIFFS' CROSS MOTION TO AMEND COMPLAINT

New York, New York
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This memorandum is submitted by Plaintiffs in opposition to Defendants' Motion to Dismiss the Complaint under Rule 12(b)(6), F.R.Civ.P. filed in August, 2005 and in support of plaintiffs' cross motion for (i) leave to amend the complaint by addition of [proposed] Appendix B-6, annexed as Exhibit A to the cross-moving declaration of Carl E. Person: (ii) if the Court upholds plaintiffs' allegations that the purchase of an auto-parts "product line" is the purchase of an auto-parts "product" or "goods" under the Robinson-Patman Act, for leave to amend the complaint to eliminate the current allegations of

"product" to the extent not needed for plaintiffs' "product-line" allegations; and (iii) for leave to further amend the complaint as to any curable pleading deficiencies determined by the Court [1].

PRELIMINARY STATEMENT

A. Defendants' Similar Arguments Were Rejected by Judge Mishler

Defendants have made the same arguments in the past, unsuccessfully. Judge Mishler in the Eastern District discussed the same issues in his decision in the Coalition I Action, upholding the same plaintiffs' §§ 2(a)/2(f) and 2(d)/2(e) allegations (see quote at pages 9-10 below).

B. Case of First Impression - Product-Line Price Discrimination

Over the years, the defendants (and other major retailers and their suppliers) have become sophisticated in trying to get around the requirements of §§ 2(a)/2(f) and 2(d)/2(e) of the Robinson-Patman Act. The defendant manufacturers have facilitated this for major retailers such as the defendant retailers by entering into extensive written agreements for the sale of **product lines** to the major retailer (for resale), with the retailer free to buy any or all components of the product line, according to the retailer's needs. The mix of products from the line and the quantity of each part selected is to be determined from time to time by the purchasing retailer during the effective period of the agreement.

The vendor agreement provides that various benefits are to be paid to or received by the retailer from the manufacturer amounting to rebates or refunds of a portion of the designated or invoice purchase price for the parts. These rebates (often called fees, allowances, payments, credits, deductions, warranty programs, or even services by the manufacturer) reduce the effective per-unit cost to the retailer of each item purchased from the product line, without having the rebates appear on any invoice for any specific auto parts purchases. The invoice amount for any specific part is substantially less than the actual per-unit price for the part (when taking all of the extras into account), and the invoice price alone could be

[1] Plaintiffs have already responded to Defendants Motion to Dismiss and to Enjoin by Plaintiffs Memorandum in Opposition to Defendants' Motion to Dismiss and to Enjoin dated/filed November 14, 2005. A separate motion to dismiss by Defendant General Motors Corporation has been adjourned to June 23, 2006 by Stipulation filed for the Court's approval on April 18, 2006. General Motors Corporation was served belatedly with a summons and

fairly close in some cases to the invoice price for the same product line being charged to a competing plaintiff or WD supplier to the plaintiff. The invoice prices for each part within the manufacturer's product line are based on the manufacturer's "Blue Book" of proposed jobber prices for each part in the product line, with any negotiated discount for the major retailer being applied uniformly across the price list for the vendor agreement with few exceptions.

C. Dominant Nature of a Defendant Manufacturer's Product Line Agreement

This dominant nature of this package is the sale of auto parts to the major retailer, with an element of service (i.e., the retailer's right to determine throughout the agreement which of the parts are to be bought and in what quantity), and various fees, credits, allowances and other benefits generally flowing from the manufacturer to the major retailer. It is this package for the sale of the manufacturer's product line that is the "product" or "goods" covered by the Robinson-Patman Act including the element of deferred part selection and quantity of specific parts ordered.

Plaintiffs (or plaintiffs' supplying WD's) also buy the same product line at the same time (or overlapping times) as the defendant retailers from the same manufacturers but pay a higher per-unit "invoice" price for each part they order from the product line, and have fewer rebates provided to them in the written agreements they have with the manufacturer. These agreements generally are negotiated through a buying group which negotiates the agreement on behalf of a group of perhaps 50 to 300 or so auto parts WD's who buy directly from the manufacturer, as either 2-step or 3-step WD's.

The efforts of the defendant manufacturers and retailers in hiding their violations of the Robinson-Patman Act have not been subject to review by any court, which makes this a case of first impression.

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complaint, resulting in plaintiffs' dismissal of their Section 2(a) claims against General Motors Corporation filed at the same time.

Plaintiffs through their first litigation in the Coalition I action have discovered what is being done, and the solution to this new form of purchasing (through product-line vendor agreements prepared using the defendant retailer's form loaded with givebacks, rather than from the manufacturer's published price lists) is to treat the whole package as the product and compare the package plaintiffs (or plaintiffs' suppliers) received at the same time from the same manufacturer, instead of taking one product at a time and trying to find an invoice for the identical part sold to the major retailer at about the same time as the plaintiff (or plaintiff's supplying WD) purchased the part from the same manufacturer. Defendants want to require this costly, wasteful, unnecessary process instead of the streamlined "product line" approach now seen as permissible (if not really required to be accurate in describing the products at issue). Count V in the complaint shows the burdens being placed on the plaintiffs and the Court by having product-based Robinson-Patman Act litigation when the products are in fact the complex product lines being sold by the manufacturers of auto parts. Product lines are alleged separately for each plaintiff in Appendix C.

D. Importance to the National Economy and Jobs in the United States

Wal-Mart and its offspring, such as defendants AutoZone and Advance, through their violations of the Robinson-Patman Act, are driving United States manufacturers out of business (37 U.S. auto-parts manufacturers filed for bankruptcy during the past two years, whereas only 1 filed for bankruptcy in the year before that) and are driving competing business out of business (about 50% of the plaintiffs have gone out of business since the original action was organized, prior to filing, in 1999); and millions of American jobs are leaving or threatening to leave the United States to meet the demands of the defendant retailers and other major retailers for the lowest manufacturing and other costs, leaving Americans without jobs, money, safety nets, healthcare and many other things Americans took for granted.

Auto-industry publication "The Edge", dated April 18, 2006, prepared by the editors of the leading auto-parts industry publication *Aftermarket Business*, states:

Retail forecast a two-sided coin

As retailers grow stronger, the overall strength of the industry's manufacturers continues to weaken. Thinner margins and more demanding return policies are just some of the factors that continue to weigh on suppliers, said Dan Pike, general manager of MEMA's Financial Services Group (MFSG), who recently provided an outlook of the industry's retailers. Though retailers are thriving, he said, this isn't necessarily good news for the aftermarket, especially as smaller jobbers fall by the wayside and consolidation continues at a voracious pace. Read on

E. Defendants' Violations of the Act Are Dismantling the United States

The effect of the alleged violations is not readily apparent. The net amount of the discrimination creates a large amount of cash for the major retailer (as evidenced by the near 50% profit margin of AutoZone and Advance), including the extended period in which they keep the delivered auto parts without making payment for them (but building up cash from the resale of the auto parts to end users). This discriminatory amount is used in the following ways by the defendant retailers: (i) to maintain a lower price for parts in areas where they have not yet driven out local competition, to steal customers from the plaintiffs and others who pay substantially higher per-unit prices for the same parts and have to offer them for resale at higher prices than those offered by the major retailers; this drives the disfavored competitors out of business, enabling the major retailers to increase their resale price for all parts: (ii) force manufacturers to violate the Act by giving favored prices to the defendant retailers, including prices that are at or below the manufacturers' variable costs (which the manufacturer does to prevent a competitor from getting the major retailer's large volume of business), and hoping that somehow the manufacturer can survive by charging higher prices to the competing plaintiffs and other independent distributors, which discriminatory policy only drives the manufacturers' profitable customers out of business; (iii) force United States manufacturers to have their parts made in lower-cost countries, resulting in the wholesale movement of American jobs to foreign countries to make parts at even lower costs with the same discriminatory policy for sale of the product lines for such parts to plaintiffs and the defendant retailers (see product lines alleged in Appendix C to the complaint); (iv) the loss of American jobs, the lowering of wage rates in the United States, the

taking away of benefits from American employees, and the lowering of the American standard of living and loss of the American dream; and (v) the conversion of America's loss into immediate profits and higher stock prices for the defendant retailers. Compl. ¶¶ 86-90.

Defendant Retailers Are Not Efficient and Are Operating at Substantial Annual Losses When Using Proper Accounting Methods

The antitrust laws favor efficient producers because they provide desired benefits to the consumer. But when violations of the antitrust laws take place without any detection or enforcement, the efficient, law-abiding producers are put out of business and the inefficient, higher-cost producers wind up with most of the business, with the above disadvantages.

If in fact the retailer defendants are paying half as much for their parts as the plaintiffs' WD suppliers or the direct-purchasing plaintiffs, and if this is a violation of the Robinson-Patman Act, then the defendant retailers should have a cost of goods charge equal to two times the amount shown. Wal-Mart shows $70 billion in cost of goods, but in fact should be paying $130 billion (giving Wal-Mart a $10 billion discount for volume purchases). Yet, with this $60 billion head start each year, Wal-Mart only shows a profit after taxes of slightly more than $10 billion. If you took away $40 billion of the favored pricing, Wal-Mart would be breaking even (assuming an income tax of 50%). If you took away $50 billion, Wal-Mart would be operating at a loss and be unable to continue in business. Yet, the plaintiffs were operating for years profitably without the huge subsidies that the defendant retailers have extracted from the auto-parts manufacturers. The plaintiffs in a level playing field are more efficient than the major retailers, and the one big difference is that the defendant retailers are violating the Robinson-Patman Act and getting away with it, causing about 30,000 independent auto-parts distribution companies to go out of business during the past 20 years or so, replaced by the 20,000 or so stores of the major auto-parts retail chains, including AutoZone, Advance, Wal-Mart (accessories), Sam's Club (tires, some accessories). Now, these activities are causing the nation's auto-parts manufacturers to file for

bankruptcy, and an ever-increasing number of American jobs to move to other countries, resulting in a declining standard of living and a clear-cut dismantling of America.

F. How to End the Dismantling of America - By Antitrust Law Enforcement

The way of ending this dismantling of America is to have antitrust law enforcement, which today means enforcement by private plaintiffs. The enforcement of the Robinson-Patman Act through "product line" goods or products is necessary to be able to deal with the problem accurately and efficiently. The product-based method is a sham and requires the plaintiffs to put together the whole product-line package, in any event, to determine the extent of the discrimination. The individual parts sold under the product-line agreements do not have any paper trail (such as by invoice numbers) to be able to determine the actual per-unit price at which the manufacturers are selling their products to the major retailers. In fact, they are selling to them below cost, it seems, when taking all product-line costs of the manufacturer into account. This is why the nation's manufacturers are going broke and are being forced to have their auto parts lines manufactured in lower-cost countries.

ARGUMENT

I. THE ALLEGATIONS IN COUNTS I AND IV OF THE AMENDED COMPLAINT HAVE BEEN ALLEGED WITH SPECIFICITY AND WITH NON-CONCLUSORY FACTS FOR EACH OF THE PLAINTIFFS

A. Defendants' Contractual Dealings including Price Are Kept Secret by Defendants

Plaintiffs have provided defendants with sufficient notice of the elements of plaintiffs' Robinson-Patman Act claims, and have not provided vague or conclusory language. The terms and conditions of defendant manufacturers' agreements with the retailer defendants are secret, including the invoice price and the 100 or so other elements (as described in the vendor agreement) that make up the price per unit for the auto parts being purchased by the defendant retailer. Plaintiffs have done as much as they can do

to allege the per-unit price at which the defendant manufacturers are selling the subject auto parts to the defendant retailers.

B. Plaintiffs Have Alleged the Defendant Manufacturers' Price to the Defendant Retailers through a Percentage, Based on Plaintiffs' Knowledge of Overhead, Profit Margins, 2-Step and 3-Step Distribution System and the Plaintiffs' Own Costs

Because the specific prices to the major retailers are secret, plaintiffs have provided a formula enabling the defendants to determine the prices at which plaintiffs claim the defendant retailers are buying their products from the defendant manufacturers. Paragraphs 80, 97, 106C and 106J-3 allege:

> 80. Upon information and belief, the Manufacturer Defendants are selling to the Major Retailers, including the Retailer Defendants, below the Manufacturers' variable cost, and the Manufacturer Defendants have to and do charge substantially higher prices to plaintiffs or their WD suppliers and others who are not Major Retailers to be able to obtain any significant gross profits and any net profits from their manufacturing businesses. See Appendix B-1 for instances in which the Defendant Retailer's retail price is lower than the Plaintiff's cost at the same time from the same manufacturer for the same product.
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> * * *
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> 97. The product-line and part prices paid to the Manufacturer Defendants by the Retailer Defendants is approximately 50% to 40% less than the prices paid by the direct-purchasing Plaintiffs or WD Suppliers, with Wal-Mart, Sam's Club, the AutoZone Defendants and Advance getting the 50% to 45% discount and the other Major Retailers getting the 45% to 40% discount from the price to the direct-purchasing Plaintiffs and WD Suppliers.
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> * * *
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> 106C. During all or part of the Covered Period, each of the Manufacturer Defendants (or predecessors) has been selling to each of the Retailer Defendants (during the period set forth in Appendix B-4) at a price per unit for auto parts (or at a product-line price for auto parts) which is less than the manufacturer's variable cost for the auto parts and has been losing money on these sales to such customers.
>
> * * *
>
> 106J-3. The facts provided to each Defendant Retailer through discovery and trial in the Predecessor Action, including Plaintiffs' costs, resale prices and markups, and the Defendant Retailer's own costs, resale prices and markup, put each of the Defendant Retailers on notice that each of the Plaintiffs is paying about 80% to 100% more per unit, at the same time, for the same auto-part Lines and Parts than the Defendant Retailer.

C. Plaintiffs Have Made Allegations Giving Defendants More than Adequate Notice of the Discriminatory Prices at Which the Defendant Retailers Are Purchasing Their Auto Parts from the Defendant and Other Manufacturers

The foregoing paragraphs in addition to the allegations in Appendices B-1 through B-5, the new Appendix B-6, and ¶¶ 91-X, 95, 106E, 107E, 124 provide full notice of the price element of plaintiffs' claims. Also, see ¶¶ 94, 159-A(1) and 159-A(2) as to the manufacturer defendants written vendor agreements with AutoZone and Advance. There can be no doubt as to plaintiffs' allegations, which provide more than adequate notice of the plaintiffs' claims.

D. Each of the Plaintiffs Has Alleged Sufficient Facts about the Plaintiff's Claims against Specified Defendants

Each of the plaintiffs has its own set of claims, set forth in ¶ 6, Appendix C (under the plaintiff number used in ¶ 6), Appendix D (manufacturers being sued by the specific plaintiff), Appendix A (whether the plaintiff is still in business), and Appendixes B1 through B5, and B6 if the court permits plaintiffs to add proposed Appendix B6 to their complaint. These are not generalized pleadings, but highly specific information about the plaintiffs, the plaintiffs' locations, the plaintiffs' competitors, the plaintiffs' product lines (Appendix C), pricing information for specific products as to specified plaintiffs, competitive radius, whether the plaintiff is a direct and/or indirect purchaser, and other information.

These allegations are not comparable to class action allegations, and no court has ever held the Robinson-Patman Act pleadings of plaintiffs' counsel to be essentially class action pleadings. The courts have routinely upheld the pleadings after appropriate amendment. The pleadings in the Coalition I action (quite similar to the Robinson-Patman Act pleadings in the instant action) were upheld by Judge Mishler in the Eastern District, in *Coalition for a Level Playing Field, LLC v. AutoZone*, WL 1763440 (E.D. NY 2001) (Exhibit C, Person Decl., a decision somehow overlooked by the defendants) stating :

> Defendants assert that this action should be dismissed because the plaintiffs have engaged in impermissible group pleading. We find, however, that the proposed amended complaint sets forth, with sufficient particularity, the claims of each individual plaintiff. Thus, there is no impermissible group pleading.

It is well established that there are no special pleading requirements for antitrust cases. *See Nagler v. Admiral Corp.*, 248 F.2d 319, 322 (2d Cir.1957) ("antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse prolonged, and costly ··· it is quite clear that the federal rules contain no special exception for antitrust cases"); *National Assoc. of College Bookstores, Inc. v. Cambridge Univ. Press*, 990 F.Supp. 245, 252 (S.D.N.Y.1997) ("A Complaint is sufficient for the purposes of this rule if it gives the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests' " (citations omitted)). Accordingly, all that is required of an antitrust plaintiff is that the complaint provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a).

Courts have made clear, however, that although "notice pleading is acceptable in antitrust cases ··· plaintiffs may not achieve through generalized pleadings the benefits of a class action when no class allegations are made or appropriate." *Chawla v. Shell Oil Co.*, 75 F.Supp.2d 626, 654 (S.D.Tex.1999). The *Chawla* court explained that, in order to meet the pleading requirements for a Robinson-Patman Act claim, each plaintiff "must allege facts pertaining to each of the elements of the claim." *Id.* at 654. The court then directed, that in order to meet this requirement, the plaintiffs should attach an appendix to the complaint which included the following information for each plaintiff:

(i) the name and location of the source of the particular Plaintiff's [store/station], and if known, the name and location of the source of [merchandise] acquired by the [competitors].

(ii) the type of Robinson-Patman violation that is alleged ··· and whether there is a contention that Defendants use a functional discount as a subterfuge vis a vis a particular Plaintiff.

(iii) the identity and location of the particular [competitors] ··· that receive an allegedly unlawful favorable price, the approximate price that [the competitor] received (if known), and the approximate time period of the allegedly unlawful favorable treatment.

(iv) the geographic area in which the specific Plaintiff competes with each [competitor] in issue as to the Plaintiff, [and]

(v) what or how the competition has or may have been injured as a result of price discrimination suffered by that Plaintiff.
Id. at 654.

In the instant case, the plaintiffs have offered an Amended Complaint, including an appendix, which provides a more succinct statement of the facts pertaining to each of the Robinson-Patman claims. Specifically, proposed Appendix E alleges the approximate prices and dates of comparable sales between a specific manufacturer, plaintiff and competitor.[FN1] The allegations address: the name and location of the manufacturer from whom they received the automotive parts in question (as well as the address of the manufacturers headquarters), and if known, the name and location of the manufacturer from whom their competitors received similar automotive parts, whether the alleged violation was direct or indirect, the identity and location of the particular competitors receiving an allegedly unlawful favorable price, the approximate price that the product was sold for (when known), the approximate date of the unlawful favorable treatment and the specific geographic area in which the specific plaintiff competes with each competitor in issue as to that plaintiff. Plaintiffs also allege the other information required by the *Chawla* court, i.e., whether there is a contention that defendants used a functional discount as a subterfuge vis a vis the particular plaintiff and what or how competition may have been injured as a result of the price discrimination suffered by that plaintiff, as to each defendant in the Amended Complaint.

FN1. Plaintiffs do not have extensive records of such transactions, however, "[a]n antitrust plaintiff need not alleged specific transactions in the complaint ···, a 'general description of the conduct and practices at issue' will suffice." *National Assoc. of College Bookstores, Inc. v. Cambridge Univ, Press*, 990 F.Supp. 245, 252 (S.D.N.Y.1997).

E. Proposed Amendment Consisting of Addition of Appendix B-6

In addition to Appendices B-1 through B-5 (discussed below), plaintiffs are proposing to add Appendix B-6, consisting of purchases of individual products each from a product line of an identified Manufacturer Defendant during the 4-year period ending September, 2005, prior to the date of filing of the Amended and Supplemental Complaint herein. These transactions reduce or eliminate many of defendants' arguments at pages 9-19 of Defendants' moving Memorandum of Law. Plaintiffs list many hundreds of individual product purchase transactions by the plaintiffs, including the date, the product number, the seller (manufacturer or WD), the manufacturer, description of the product, the product line, and the plaintiff.

F. Plaintiff's Identification of a Manufacturer and One of Its Products Is Sufficient for Plaintiffs and Defendants to Know the Manufacturer's Product Line Involved

Defendants complain that Plaintiffs have used a brand name rather than the correct product line name for the manufacturer of products under such brand. But the identification of the part or type of part identifies the product line from which the part comes. Plaintiffs and defendants can easily identify the product line from the type of part and the name of the manufacturer.

G. Plaintiffs' Identification of a Part Number Alleges a Specific Part within the Manufacturer's Product Line Including Such Part and all Parts Having Such Number Are Interchangeable and of Like Grade and Quality at Least When Sold to Plaintiff and Defendant Retailers Contemporaneously

There is no problem of like grade and quality. The parts identified by plaintiffs by manufacturers' part number are the same product (of like grade and quality) as the product with the same number sold by the manufacturer to the retailer defendants.

H. The Transaction Dates More than 4 Years Earlier than the Original Filing of the Instant Action Are within the Statute of Limitations for Claims against the Retailer Defendants

The complaint alleges the different limiting periods covered by the complaint. See ¶¶ 58, subparagraphs A through D, and Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and to Enjoin for an explanation of the various limiting periods, and how this is governed by an Order of Judge Wexler.

I. Re Alleged Flaw #1 - the Discriminatory Prices Paid by the Indirect-Purchasing Plaintiffs Resulted from Discriminatory Prices by the Manufacturer Defendants to the Plaintiffs' Supplier (a Direct-Purchasing Warehouse Distributor or WD)

The claims by indirect-purchasing plaintiffs are made by giving notice to the defendants of the per-unit price they are paying for specific parts and the allegation that the plaintiff's supplier, a WD buying directly from the manufacturer defendants, is paying almost twice as much for a part as the retailer defendants are paying at the same time for the same part bought from the same manufacturer. The discriminatory price being paid by the indirect-purchasing plaintiff is a direct result of the discriminatory price charged by the manufacturer at the same time to the plaintiff's WD supplier. The specific transactions identify the WD supplier.

J. Re Alleged Flaw #2 - Plaintiffs Have Alleged that the WD Purchases Were Contemporaneous, and that the Plaintiffs' Transactions between February 16, 1996 and May 16, 2002 Were Preserved by Order of Judge Wexler

Paragraph 158A alleges "with such auto parts, of like grade and quality, being sold contemporaneously to each of the plaintiffs or the WD's reselling to the plaintiffs". Also, see ¶ 101 ("higher prices paid by the direct-purchasing Plaintiffs and WD Suppliers to purchase the same auto-parts Lines and Parts from the same Manufacturer Defendants, at the same time").

Paragraph 58-D of the complaint alleges:

> D. As to all other claims asserted by the 111 Dismissed Plaintiffs, the Relevant Period commences on February 16, 1996 (four years prior to the filing of the original complaint in the Predecessor Action) and ends on May 16, 2002, and resumes on the date of the filing of the Notice to Reactivate Claims (on July 22, 2003). See the Stipulation, dated May 16, 2002.

In paragraph 60, plaintiffs allege that the retailer defendants purchased the same items contemporaneously to the purchase by plaintiffs or plaintiffs' WD supplier.

K. Re Alleged Flaw #3 - Plaintiffs Have Properly Pleaded Discriminatory Pricing by Reference to the Percentage Less They Are Paying for Parts in Comparison to the Per-Unit Price Being Paid by the Direct-Purchasing Plaintiffs or Their WD Suppliers

The discriminatory pricing is pleaded repeatedly, with full notice to each of the defendants. See ¶¶ 91-FF, 92B, 97., 99, 101, 102, 106J-3 and 160.

Plaintiffs' proposed Appendix B-6 provides many hundreds of examples of prices at which plaintiffs purchased auto parts indirectly or directly, to enable the allegations of favored pricing to the defendant retailers to be examined and verified or refuted by the defendant retailers and defendant manufacturers. Plaintiffs have provided sufficient notice of the favored, unlawful pricing scheme about which plaintiffs complain.

L. Plaintiffs' Alternative Price Discrimination Claims under Sections 2(a)/2(f) Based On Product-Line Allegations Are Meritorious and Should Not Be Dismissed - the Auto-Parts Purchases at Issue Are by Product Lines, Not as "Pick Up" Auto Parts from Non-Carried Lines

Defendants devote almost 10% of their memorandum of law (pages 19-24) to their argument that product-line price discrimination is not allowed under the Robinson-Patman Act.

Before dealing with their argument, it is important to discuss product lines and plaintiffs' product-line allegations (including product lines alleged in Appendix C for each plaintiff).

1. Product Lines Are Sold by the Manufacturers pursuant to Written Vendor Agreements (as to the defendant retailers) and Letter Agreements (as to buying group members)

Auto parts manufacturers are not in the business of selling individual auto parts. They are in the business, primarily, of manufacturing auto parts and marketing related auto parts through auto-parts product lines, sold to AutoZone, Advance, Wal-Mart, Sam's Club, other major auto-parts retailers, and to independent auto-parts wholesalers (known as 3-Step WD's or Warehouse Distributors, who resell to

jobbers and retailers, who resell as the 3rd step to the end customer) and to direct-buying independent auto-parts retailers (2-Step WD's, who resell as the 2nd step to the end customer).

2. The Vendor Agreements Provide a Variety of Benefits to the Major Retailers Not Made Available to the Plaintiffs or Their WD Suppliers

The vendor agreements are extensive and provide a variety of benefits to the major retailer based on dollar amount of parts purchased or to be purchased from the product line, with such benefits being provided to the retailer without reference to the invoices for specific auto parts within the line purchased by the retailer. For example, when the major retailer obtains a discriminatory "new store allowance" (consisting of, say, $20,000 of free goods upon opening a new retail store), there is no reference to any specific prior invoices that have resulted in such allowance.

3. The Defendant Retailer Is Purchasing a Package from the Manufacturer Consisting of the Option to Buy Parts from the Product Line and Receive the List of Benefits Described in ¶¶ 94 and 159-A of the Amended Complaint

The defendant retailer is purchasing a package from the manufacturer consisting of the option to buy from a catalog of auto parts or a price list (called the "Blue Sheet" - see ¶ 94) comprising the entire auto-parts line offered by the manufacturer, without actually having to buy every single part listed in the catalog, with various economic benefits and rights being given to the retailer generally based on the dollar amount of purchases the retailer makes in a given period from the manufacturer's product line. It is this bundle that is being sold by the manufacturer and purchased by the defendant retailer in competition with the plaintiffs. The product-line package being purchased by the plaintiffs contains far less in value than the product-line package (covering the same auto parts line) being sold to the defendant retailer.

4. Defendant Retailers and Plaintiffs Are Purchasing a Product Consisting of a Package Enabling the Direct Purchasers to Buy Selected Parts from the Manufacturer's Product Line Catalog of Parts and to Receive a Variety of Economic Benefits as Detailed in the Vendor Agreement or Letter Agreement

Under the Robinson-Patman Act, something is either a product (and therefore subject to the Act) or a service (and therefore not subject to the act). When the product is mixed, such as an airplane ticket with meals, snacks and beverages, the package consists of both a service (the use of the airplane seat) and various products (the meals, snacks and beverages). The Robinson-Patman Act looks to the essence or "dominant nature" of the package and in the case of the airline ticket the package is considered a "service" and not subject to the Robinson-Patman Act. *Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148, 156, 2004-1 Trade Cases P 74,410 (2d Cir. 2004) held that the "dominant nature" of a contract determines whether it is covered by the Robinson-Patman Act, stating:

> When the subject of a contract is a combination of both tangible goods and intangible rights or services, the contract is covered by the Robinson-Patman Act if its "dominant nature" or purpose is the sale of tangible products rather than the transfer of intangible rights or services. *See Tri-State Broad. Co., Inc. v. United Press Int'l, Inc.*, 369 F.2d 268, 270 (5th Cir.1966) (applying dominant nature test to transfer of broadcasting rights, where information to be broadcast was to be transferred in the form of written reports); *see also Ambook*, 612 F.2d at 609 n. 6 (citing cases that employ the dominant nature test).

Also, see *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 8 Fed.R.Serv.3d 557, 1987-2 Trade Cases P 67,657 (5th Cir. 1987) ("dominant nature test", holding contract for redelivery of stored oil was services, not goods).

If Wal-Mart or other retailer buys a package of 3 popular games put into a single package, with the right to obtain free advice from a help line maintained by the manufacturer, the package would be considered a "product", in essence, in spite of the service element involved.

A package of 3 games (with the specific games to be selected by the retailer from the top 100 games of the manufacturer), with the same help line service, the "dominant nature" or essence would be a "product", even though the product consists of 3 presently unidentified games to be selected by the manufacturer's customer.

This package of 3 unidentified games is comparable to what the nation's auto-parts retailers, jobbers and WD's are buying - a package consisting of parts from a specified line to be purchased in the desired type and number at the prices negotiated for the product line, including various elements of value (such as allowances, fees, rebates, deductions) in the package that are given irrespective of the actual parts selected, and generally do not appear on the invoice for any of the parts.

Product lines in fact are being sold by the manufacturers to the defendant retailers and to the direct-purchasing plaintiffs or their WD suppliers, and plaintiffs have made this clear in their product-line allegations (through the vendor agreement allegations and the lists of off-invoice benefits being provided to the defendant retailers, without such benefits being provided to the plaintiffs). See ¶¶ 90-A through 90-L and 94 (as to plaintiffs' 2a/2f claims) and ¶¶ 159, 159A-1, 159A-2 and 159B through 159-Q (as to plaintiffs' 2d/2e claims). Also, see Appendix C as to the product lines carried by each plaintiff.

Paragraph 94 provides:

> **Auto-Parts Line and Auto-Parts Pricing by the Manufacturer Defendants**
>
> 94. Each of the Major Retailers, including the Retailer Defendants, upon information and belief, purchases its auto-parts Lines and Parts from the Manufacturer Defendants at a price for the Lines and Parts that is not set forth in writing and which can be determined only by calculating all elements of auto-parts Line and Parts prices (set forth in the subparagraphs of ¶ 90 above) and then calculating the percentage by which the Retailer Defendant or other Major Retailer has obtained a discount on its Line and Part purchases from the Manufacturer Defendant's published suggested jobber Line and Parts price list (called the "Blue Sheet"). The price paid by the direct-purchasing Plaintiffs or WD's purchasing for the other Plaintiffs herein is based on the Manufacturers' Blue Sheet, and can be calculated by reference to the Blue Sheet and a specified part, unlike the price paid by each of the Defendant Retailers, which requires analysis and valuation of various provisions and practices under a Vendor Agreement with many terms having financial impact on the price of a part.

Paragraph 159A-1 starts off, as follows:

> 159. The elements of the advertising and promotional program provided by each of the Manufacturer Defendants are as follows:
>
> A. A written agreement providing a variety of discriminatory payments and other benefits to the Defendant Retailer including lower auto-parts per-unit prices, as compensation to the Defendant Retailer for the Manufacturer's use of the Defendant Retailer's auto-parts distribution system, including the following multi-year Vendor Agreements: * * *

5. Defendants' Strategy Is to Steer Away this Litigation Away from the Actual Package Being Sold by the Auto-Parts Manufacturers and to Focus Instead on One of the Components of the Package (i.e., the specific part), to Force Plaintiffs into Matching Parts Instead of Matching Product Lines and Comparing the Product-Line Packages for Discriminatory Terms

What the defendant retailers and the plaintiffs are buying (i.e.. the product-line packages) from the manufacturers should be the focus of the lawsuit, not the parts that are resold to the end user when the purchased packages are broken down and resold by the major retailers and the plaintiffs or their WD suppliers. If two steel fabricators are buying huge quantities of steel and related services by the steel manufacturing company. the focus should be on the package being sold from the manufacturer to the two competitors. not to compare the lengths of the steel beams that are being fabricated to resell to end user customers of the two competitors.

Plaintiffs should not have to match a purchased 1/2" thick, 2" long. tapered. bronze alloy Phillips head screw with a tapered head with a screw transaction involving the identical product purchased at about the same time by the defendant retailer. There are millions of different products and the cost of finding precise equivalents makes the lawsuit very costly for all. and unnecessarily so, because the product being sold in the first place by the manufacturer is a bundle or package consisting of items to be selected during the next year from the manufacturer's catalog for the product line with various valuable benefits being given to the customer by the manufacturer relating to the dollar volume of the customer's overall purchases, and not dependent on the specific items within the line being bought. These benefits generally amount to a price reduction for any of the parts in the line. but do not appear on any invoices for the parts actually being ordered pursuant to the product-line vendor agreement.

It is important for enforcement of the antitrust laws and the right of individuals and small businesses in the United States to engage in business for the Robinson-Patman Act to be enforced according to the product the way it is now being sold. through a package giving the option to choose the precise parts throughout the period of the agreement. with the various related benefits being provided to the customer as spelled out in the vendor agreement (and to a much lesser extent in the letter agreement used with buying groups).

There is fair notice to the defendants as to plaintiffs' allegations. They are complaining that the manufacturer is charging them a substantially higher price on the invoice for all of the parts in the manufacturer's product line, and that the manufacturer is giving the major retailers a much more valuable package of extras (as detailed in the vendor agreements) than the manufacturer is providing to the plaintiffs through the letter agreements with the direct-purchasing plaintiffs buying groups. The product lines are listed for each plaintiff (in Appendix C. listed separately for each plaintiff), and an estimate of the difference in price is provided reflecting the estimated per-unit cost of the defendant retailer in comparison to the per-unit cost of the direct-purchasing plaintiff or its supplier. The invoice and calculated per-unit prices of the defendant retailers is a secret (between a manufacturer and its major retailer customer) and can only be alleged by formula, which plaintiffs have done.

6. Enforcing the Robinson-Patman Act through Comparing the Per-Unit Prices of Specific Products Requires the Production and Review of Many Thousands of Boxes of Records, and Resulted in the Warehouse Activities Alleged in Count V of the Instant Action; Product-Line Enforcement Requires Far Less Documen-tation to Prove the Manufacturer's Price to the Competing Direct Purchasers

Defendants try to steer the Court away from having product-line pricing be the way to determine whether the defendant manufacturers discriminated in price against the plaintiffs in violation of §§ 2(a)/2(f) and 2(d)/2(e) of the Robinson-Patman Act. Defendants want to have another round of requiring plaintiffs to spend hundreds of thousands of dollars needlessly, by requiring production of every document relating to each item in the various product lines ever purchased or sold by any of the plaintiffs, when the documentation for product-line pricing and the plaintiffs' total sales of the various lines would suffice.

7. Robinson-Patman Act Cases Referring to Product Line Enforcement

With the advent of the major retailers, American manufacturers have been forced into doing whatever the major retailer wants, or risk losing the major retailer's business to a competitor willing to comply with the major retailer's demands. What has happened during the past years is that manufacturers have gotten away from price lists and instead are entering into secret agreements (such as AutoZone's

form of "vendor agreement") with the largest retailers. These vendor agreements include a complex business arrangement not envisioned in the earlier "price lists". Price discrimination analysis based on product works when the transaction is governed by a price list, but you need to have product-line analysis when the contractual arrangements are complex and unique, as with AutoZone's form of vendor agreement. There appear to be no decisions under the Robinson-Patman Act covering AutoZone and its vendor agreements, making the instant product-line issue a case of first impression.

Some courts have touched upon "product line" analysis, such as the court in *National Dairy Products Corp. v. F. T. C.*, 412 F.2d 605, 623 (7th Cir. 1969), the FTC issued an order for National Dairy Products Corp. not to discriminate in price in specified product line (preserves, jellies, other food product) in its Kraft Foods Division.

The court in *Oreman Sales, Inc. v. Matsushita Elec. Corp. of America*, 768 F.Supp. 1174, 1178-1179, 1992-1 Trade Cases P 69,709 (E.D. LA 1992) ("Oreman alleges that Panasonic routinely discriminated in price in the major product lines purchased by Oreman Sales, Inc. including the printers bearing the designation P1124, P4450, P1180 and P1191. Discrimination was accomplished through the issuance of meet competition price reductions to various favored distributors.").

In *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1318, 1979-1 Trade Cases P 62,620 (9th Cir. 1979), the Court held that there was no violation of the Robinson-Patman Act by a manufacturer for refusing to several product lines to the customer. There was an implication that price discrimination claims could have been made if the customer had been allowed to carry the product lines.

8. Product Line as a Product - Like Grade and Quality Requirement Met

The "like grade and quality" requirement is met, when a "product line" constitutes a "product" or "goods". The two purchasers must make their selected purchases (whatever the product may be, as long as it is from the product line) contemporaneously. Otherwise, the "grade and quality" might be different - with different choices if the product line has changed meanwhile. Contemporaneous selection and

purchase of any products from the same product line results in compliance with the "like grade and quality" requirement, because the selection options are the same for both purchasers.

9. The Difference in Price When Comparing Purchases of Two Competitors

When plaintiffs purchase from a manufacturer's product line, the plaintiff pays the invoice price, receives a possible off-invoice advertising allowance and gets no further reductions in price from the manufacturer. The defendant retailers, on the other hand, receive a variety of payments and benefits during the effectiveness of the product-line purchase agreement which substantially reduce the per-unit price of each item purchased from the same manufacturer's product line. In showing discrimination, it is necessary to look at the total dollar amount of purchases (at invoice value) and the total amount of payments and other benefits given by the manufacturer to the defendant retailer, and then calculate the percentage reduction of the invoice price represented by such benefits.

II. NONE OF THE PLAINTIFFS SHOULD BE DISMISSED FOR LACK OF STANDING

A. Illinois Brick Does Not Prohibit Claims for Injunctive Relief by Indirect-Purchasing Plaintiffs

In *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), the Court noted that indirect purchasers in any event have a claim for injunctive relief, stating:

An equity suit neither threatens duplicative recoveries nor requires complex tracing through the distribution chain. There are no damages to be traced, and a defendant can comply with several identical injunctions as readily as with one. Illinois Brick has not therefore barred an indirect purchaser's suit for an injunction." Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law P371d, at 259 (1995); see also McCarthy, 80 F.3d at 856 (holding that "plaintiffs need not satisfy Illinois Brick's "direct purchaser" requirement in order to seek injunctive relief[.]").

15 U.S.C. Section 26 provides in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction

improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue...."

In Re Warfarin Sodium Antitrust Litigation, 214 F.3d 395, 398, 2000-1 Trade Cases P 72,932, 46 Fed.R.Serv.3d 1010, 53 Fed. R. Evid. Serv. 1394 (3d Cir. 2000) held that the consumer plaintiffs, as indirect purchasers, had a claim for injunctive relief under Section 16 of the Clayton Act. The underlying claim was under Section 2 of the Sherman Act. The Court stated starting at p. 398:

"III. - Section 16 Antitrust Standing

Section 16 of the Clayton Act, authorizing suits for injunctive relief, provides in part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, ... when and under the same conditions and principles as injunctive *399 relief against threatened conduct that will cause loss or damage is granted by courts of equity. 15 U.S.C. Section 26 (1976).

Recovery under section 16 is best understood in how it differs from recovery under section 4 of the Clayton Act. While relief sought pursuant to section 4 of the Clayton Act requires proof of loss and any damages proven are trebled, injunctive relief under section 16 only requires a threat of loss. *See* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-111, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). An antitrust plaintiff proceeding under section 16 must, however, still demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent...." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). A section 4 plaintiff's standing is tested by an application of a number of factors designed to determine if the asserted damage goes beyond speculation and, that if there is cognizable damage, the plaintiff is the appropriate person to assert it for antitrust purposes. Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), ("*Associated General*"). Section 16 is not as demanding, but it does require a showing that there is "a significant threat of injury from [a] ... violation of the antitrust laws...." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

* * *

As to the class plaintiffs' request for injunctive relief under section 16, the District Court summarily concluded, by relying upon its section 4 discussion, that the class had not sufficiently alleged the required antitrust injury or the causal connection between DuPont's alleged unlawful activity and their purported injury. Thus, the District Court decided that the class failed to allege injury of the type the Sherman Act was designed to prevent; the class, therefore, did not have standing to request injunctive relief.

7 The Coumadin class fits the stereotypical indirect purchaser mold. Indirect purchaser status, however, is not fatal to a plaintiff's request for injunctive relief under section 16 of the Clayton Act.

In Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir.1979), we explained how the difference between sections 4 and 16 claims influences *400 the question of standing as it relates to indirect purchaser status:

in contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations--such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses--that the Supreme Court emphasized when limiting the availability of treble damages. *Id.* at 590. Accordingly, we held that the plaintiffs did not have to satisfy the direct purchaser requirement as a condition of seeking injunctive relief. *Id.* at 594. *See also* Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir.1980) (Section 16 relief more encompassing because language is less restrictive than section 4 and because injunctive remedy is flexible, adaptable tool for enforcing antitrust laws). Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir.1980) (Section 16 relief more encompassing because language is less restrictive than section 4 and because injunctive remedy is flexible, adaptable tool for enforcing antitrust laws).

While direct purchaser status is not mandated, the class must still make a showing of entitlement to injunctive relief requiring the demonstration of: (1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust injury. *See* McCarthy v. Recordex Service, Inc., 80 F.3d 842, 856 (3d Cir.1996). The narrow question before us then is whether the allegations of the class members' complaints, that DuPont's conduct precluded competition which caused Coumadin users to pay inflated prices for the drug, meet this standard.

We turn first to guidance from the United States Supreme Court. The threatened injury to the class here resembles that of the plaintiff in Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). In *McCready,* the plaintiff complained of a conspiracy among psychiatrists and Blue Shield to shield psychiatrists from competition. McCready's visits to her psychologist were not covered by Blue Shield, although visits to psychiatrists were reimbursed.

In deciding *McCready,* the Supreme Court addressed the relationship between the indirect purchaser doctrine and antitrust injury. The Court stated that whether a particular injury is too remote from the alleged violation to confer section 4 Clayton Act standing, depends upon the relationship of the injury alleged and the types of injury that Congress was targeting when it legislated particular anticompetitive conduct as unlawful. Id. at 476-78, 102 S.Ct. 2540. The Court first determined that, in the absence of a risk of duplicative recovery, a plaintiff is not barred from bringing a claim under section 4 if he is a foreseeable victim of the antitrust violation. Id. at 475, 102 S.Ct. 2540. Then the Court decreed that McCready's injury was "inextricably intertwined with the injury the conspirator sought to inflict," and had standing to pursue her section 4 claim. Id., 457 U.S. at 484, 102 S.Ct. 2540.

As in *McCready,* the class alleges injury by an unlawful restraint on competition in the market, and *McCready* is thus instructive. First, *McCready* reinforces our holding in *McCarthy* that the Coumadin class cannot be barred from bringing suit simply based on its indirect purchaser status. *McCready* held that due to the absence of duplicative recovery, McCready and her class could maintain their suit for treble damages. Similarly, here, there is no risk of duplicative recovery because the class only seeks section 16 injunctive relief.

Next, concerning remoteness, the high price paid by consumers for Coumadin clearly resulted in " 'the type of loss that the claimed violations ... would be likely to cause,' " id. at 479, 102 S.Ct. 2540, (quoting Brunswick, 429 U.S. at 489, 97 S.Ct. 690). The class members here, like McCready, were "foreseeable and necessary victims" of DuPont's efforts to exclude the generic drug from the market. Indeed, if *McCready*, who voluntarily *401 sought uncovered treatment from psychologists, did not suffer from remoteness, then the purchasers of Coumadin, who have no choice in which warfarin sodium they purchased, were more predictable and more compelling victims of antitrust violations.

Finally, *McCready* determined that an antitrust injury occurred because the higher cost for services paid by McCready was so "inextricably intertwined" with the true target of the conspiracy, the psychologists, that McCready also suffered antitrust injury. Utilizing this same rationale, we find that Coumadin consumers clearly suffer antitrust injury. Coumadin purchasers were the target of DuPont's antitrust violation. Regardless of the existence of the various links of middlemen, if there were no

> ultimate consumer of Coumadin, prices charged for the drug by DuPont to distributors, pharmacies, etc., would be irrelevant. The excess amount paid by Coumadin users not only is "inextricably intertwined" with the injury DuPont aimed to inflict, the overcharge was the aim of DuPont's preclusive conduct. It is difficult to imagine a more formidable demonstration of antitrust injury.
>
> The District Court's refusal to recognize standing to pursue this relief is also, as alluded to above, contrary to our jurisprudence.
>
> The authority of McCarthy v. Recordex, 80 F.3d at 845, strongly supports a favorable standing determination. In *McCarthy*, the plaintiffs had complained that they paid inflated prices for photocopies of their medical records due to a conspiracy between hospitals and copy centers to inflate the cost of records. The plaintiffs were clients of the lawyers who were the direct purchasers of the fixed price copies. Despite the plaintiffs' status as indirect purchasers, we refused to view the multifaceted chain of distribution as too attenuated to support a finding of causation. [FN3]
>
> FN3. In *McCarthy*, we acknowledged the appropriateness of injunctive relief, but remanded because the District Court had not expressly addressed the question of indirect purchaser standing.

Defendants' argument that the indirect plaintiffs have no Section 2(a) claim of any type against the defendant manufacturers is clearly erroneous. The indirect purchasers have a claim for injunctive relief and therefore have standing in this action under Section 2(a) against the defendant manufacturers.

B. The Paragraph 87 Five Individual Shareholders Have Claims and Standing as Distributees of the Defunct Auto-Parts Jobber Corporations

Five plaintiffs, 87d Ralph A. Dickson, Jr., 87e Ralph A. Dickson, III, 87f Janice D. Mercer, 87g Wendell Whelchell and 87h Myra Myers, are alleged in footnote 4 (at page 5) of the Amended and Supplemental Complaint to be owners of the claim through liquidation of the two auto-parts jobber corporations, as follows:

> [87d-87h] Shareholder holding a percentage of the assets of one or both of liquidated corporations NAPA Gaffney Auto Parts, Inc. (a South Carolina corporation) and Genuine Parts, Inc. (a North Carolina corporation).

As owners of the antitrust claim through liquidation, the former stockholders are entitled to maintain the defunct corporation's antitrust claims in their own right, with standing as successors to the injured corporations. Cf. Standing to sue under securities law for shareholder of liquidated corporation as a "forced sale" of the shareholder's stock. *Alley v. Miramon*, 614 F.2d 1372, 1380-81, 1384-85 (5th Cir.1980) (liquidation deemed forced sale).

The five former stockholders, as assignees of the corporation, are the real parties in interest under New York law. *White v. Hardy*, 180 Misc. 63, 39 N.Y.S.2d 911 (Sup. Ct. 1943) (former stockholders were ordered to become parties, as the real parties in interest, to ensure payment of costs if the opposing party prevailed).

Plaintiffs 87a Millenium Automotive Logistics, Inc., 87b Southport Auto & Marine, Inc., and 87c NAPA Clover Auto Parts, Inc. are corporations that had not gone out of business, and their shareholders are not listed as plaintiffs for any of the claims of such 3 corporations. As to the other two corporations (NAPA Gaffney Auto Parts, Inc. and Genuine Parts, Inc.), the claims are made only for the 5 shareholders of such two liquidated corporations, plaintiffs 87d, 87e, 87f, 87g, 87h. Thus, there is no duplication of claims within the allegations for the 8 plaintiffs named in paragraph 87.

Also, viewed as an assignment, the law would uphold the standing of the assignee to pursue the claim in court. See *Lutin v. New Jersey Steel Corp.*, 122 F.3d 1056 (2d Cir. 1997), in which the Second Circuit stated:

> When considering assignments of legal claims, "the general trend in New York [is] toward adopting principles of free assignability of claims...." *Id.* at 153.

III. PLAINTIFFS HAVE STATED MERITORIOUS CLAIMS IN COUNTS II AND III OF THE AMENDED COMPLAINT

Defendants argue that plaintiffs' claims concerning AutoZone's Pay on Scan activities and the RFID (radio frequency identification tag) development for Wal-Mart and Sam's Club involve no violations of the Robinson-Patman Act. However, an analysis of plaintiffs' pleadings indicate otherwise. The alleged activities impose costs on the defendant manufacturers incurred for the competitive benefit of the AutoZone Defendants, without any comparable expenditure for the benefit of the plaintiffs competing with AutoZone, putting the plaintiffs at a disadvantage as a result of the discriminatory activities. Wal-Mart and Sam's Club are imposing costs on the defendant manufacturers by requiring them to develop RFID technology for the competitive benefit of Wal-Mart and Sam's Club, without the defendant

manufacturing having any comparable program for any of the plaintiffs or the warehouse distributors (WD's) from whom they buy the manufacturer's auto parts.

A. COUNT II: Plaintiffs Have Pleaded a Cognizable Claim with Respect to Present and Future Pay on Scan Retailing

Defendant manufacturers, independently of the Pay-on-Scan ("POS") activities of AutoZone, have been selling to AutoZone at per unit prices substantially lower than the per-unit prices at which the manufacturers are selling goods of like grade and quality to the plaintiffs or the plaintiffs' suppliers (paragraphs 92-B, 106D). Also, plaintiffs allege that the per-unit price at which the manufacturers are selling to AutoZone is below the manufacturer's variable cost. (Amended Complaint, paragraphs 124, 80, 91-X, 95 and 106E).

1. Plaintiffs Are Not Barred from Litigating any of the Present Claims by Reason of the Jury Verdict in the Coalition I Action

Plaintiffs respectfully refer the Court to plaintiffs' full discussion of the res judicata issue in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and to Enjoin dated and filed November 14, 2005, at pages 22-30.

As alleged in the amended complaint (at ¶ 114A) "Plaintiffs first heard about AutoZone's POS initiatives approximately one week before the start of trial in January 2002, and had no fact or expert discovery as to AutoZone's POS activities or the perceived impact of POS on Manufacturers, and there were no POS allegations in the complaint in the original action."

Defendants' claim (Def. Memo. p. 29), that the final judgment in the earlier action "involv[ed] the same cause of action" is wholly inaccurate. POS is not mentioned in any of the pleadings in the prior action: there was no discovery concerning POS (requested or obtained) in the prior action: the jury answered no special verdict or instructions concerning POS; the jury made no finding as to POS. The POS issue was not tried. In addition, there are additional defendants (all manufacturers) and plaintiffs in the present action, enabling plaintiffs to allege Section 2(d)/2(e) violations for the first time.

Asking live witnesses a few questions about POS (revealed publicly only 1 week earlier) does not turn the case into a POS case. The only POS case is the instant case. Out of at least 621 pages of trial

transcript. defendants cite only 3 pages relating to POS (619. 620 and 621 - see p. 30, Def. Memo.) [Note: the full trial transcript is 794 pages.]

Also, it should be noted, that the plaintiffs had rested their case (Trial Tr. P. 597) before any evidence was offered or received relating to POS. Defendants, as their first witness, put on Brett Easley, AutoZone's Senior Vice President for Customer Satisfaction, and during cross examination of Mr. Easley by the plaintiffs' lawyer (Carl Person) the POS testimony was first elicited.

2. There Are Allegations of Price Discrimination and that POS Prices Are, in Fact, Lower than Non-POS Prices

Defendants' argue that there are no allegations that AutoZone's POS causes any reduction of the manufacturer's per-unit price to AutoZone. This assertion is erroneous. In ¶ 126A, plaintiffs allege "the POS program is a promotional program of the POS Manufacturer Defendants that is being used to resell the Manufacturer's auto parts to end users and jobbers by giving AutoZone ... (ii) lower per-unit costs to enable AutoZone to offer even lower prices than would otherwise exist in absence of the POS program, ... and (iv) a higher profit margin on sales...." Also, see ¶ 115F, in which plaintiffs allege that plaintiffs are paying more per unit than AutoZone under its new POS agreements.

Also, plaintiffs allege in ¶ 115D that the substance of AutoZone's POS program is (i) to extend the existing discriminatory terms for AutoZone's purchase of fast-moving parts to the slower moving parts ... [and] (iv) to defer payment on ordered parts to a period beyond the resale of the part". Plaintiffs allege that the actual POS price to AutoZone needs to be found out through discovery. See ¶ 115E.

Finally, plaintiffs allege in ¶ 119 that AutoZone's POS dealings with the manufacturers "threatens to destroy the only competitive advantage which plaintiffs have over AutoZone" - which is that AutoZone, with all of its favored pricing arrangements, cannot afford to buy slower-moving parts without extending its time for payment beyond the lengthy period it already takes to pay for parts. Meanwhile, plaintiffs are paying for all of their parts, both fast moving and slow moving, in 30 days.

Plaintiffs have alleged their costs of purchasing auto parts and the percentage by which AutoZone's costs for the same parts are lower. Plaintiffs can do no more. The prices being paid by AutoZone and are secret.

3. POS Transactions Are Reasonably Comparable to Non-POS Sales

The auto parts are the same, whether sold at high per-unit prices on 30 day terms to plaintiffs or sold to AutoZone at low or below-cost per-unit prices on terms enabling AutoZone to pay in 100 days or 365 days or longer. POS is no more than a manufacturer supplying capital to AutoZone. to enable AutoZone to have reduced per-unit costs and take away more of the market from independents (plaintiffs) who pay higher per-unit costs, and make payment within 30 days. even if the part remains on the plaintiff's shelf for 1 or 2 years. The arrangements between AutoZone and the manufacturers is only about money. with each aspect of the vendor agreement having a calculable value and providing AutoZone with a calculable lower cost than the plaintiffs or their suppliers are paying when they buy the same products at the same time directly from the same manufacturers.

The substance of the transaction is lower price, not a different type of transaction. The parts continue to be resold to customers for which plaintiffs and defendants are competing, and the lowering of AutoZone's effective price through POS and other vendor agreement provisions, enable AutoZone to offer the same items at lower prices than the plaintiffs. The substance of POS is lower AutoZone resale price to the consumer at higher cost to the manufacturer. with the effect of driving plaintiffs out of business.

The facts about POS are not known to determine whether POS sales are so different that they enable a manufacturer to disregard the price and other terms at which the manufacturer sells the same products to competing companies. The end customers are the same. which strongly suggests that POS is only a system for lowering AutoZone's price and not a system for distributing auto parts to a new group of customers.

The *Cleveland* Blockbuster case (Deft. Memo., p. 33) involved the sale of products manufactured by the retailer upon demand, rather than manufactured by the manufacturer and shipped to the retailer. The manufacturer was no longer selling products to the retailer, but was licensing the retailer to make the products in the retailer's own stores. Such case is not analogous to the instant facts (where the products themselves are made by the manufacturer and are interchangeable whether sold by POS to AutoZone or sold without POS to plaintiffs).

4. Product Distribution under the POS Program Does Involve "Sales Transactions"

AutoZone buys the auto parts under the POS program and has various compelling reasons to ensure that it purchases and resells the parts, even with POS arrangements. If AutoZone wanted to become a auto-parts "broker", not taking title and accepting only a commission, it could do so, but it has chosen not to do so. To say that AutoZone in substance is a commission broker when in fact it is buying the parts and has all sorts of valuable provisions designed for a reseller in its vendor agreements, is attempting to provide the benefits of both dealer and broker and the disadvantages of neither. Even the costs imposed on manufacturers to try to reinvent their business to conform to the requirements of AutoZone are discriminatory payments for the benefit of AutoZone not made available by discount or promotional program to AutoZone's independent competitors, including the plaintiffs. Any special program for AutoZone alone creates the probability of a joint venture and a partnership arrangement to some extent, with additional factors required to determine the actual price at which AutoZone is obtaining its parts. It should be noted that AutoZone has a 46% profit margin while 37 auto-parts manufacturers have filed for bankruptcy during the past 2 years, and while almost half of the plaintiffs have gone out of business.

The issue raised by AutoZone is at best a factual issue to be determined by discovery and trial. At this stage of the litigation, the plaintiffs and court do not know enough details about POS as specifically implemented with any one or more manufacturers to be able to conclude that POS transactions are other than a sale by the manufacturer to AutoZone, and resale by AutoZone to the end

customer. If AutoZone wanted to make the transaction a consignment or commission type, it could do so, but it has chosen not to do so, for reasons that need to be determined. Plaintiffs have not alleged that POS is consignment. Plaintiffs have consistently alleged that AutoZone is purchasing the POS parts under highly favorable terms that are highly discriminatory when compared to the terms given to plaintiffs.

5. Count II Is Replete with Allegations that POS Pricing Is Not Available to the Plaintiffs

Defendants assert that there are no allegations that plaintiffs are denied POS dealings with the manufacturers. This is wholly erroneous, as about 40% of the paragraphs in Count II demonstrate.

In ¶ 114A, plaintiffs allege that all POS "activities by the Manufacturers and AutoZone resulting in POS agreements have been kept secret from the industry and the Plaintiffs"; in ¶ 115B, plaintiffs allege "upon information and belief AutoZone knows that the POS Manufacturer Defendants have provided AutoZone with exclusivity of POS arrangements"; in ¶ 118, plaintiffs allege they "are still being required by the same POS Manufacturer Defendants to pay for such parts, usually within 30 days after receipt"; in ¶ 120, plaintiffs allege defendants refuse to publicly reveal their POS agreements; in ¶ 126, plaintiffs allege they are entitled to an injunction to stop defendants "unless and to the extent that the same POS Manufacturer Defendant or other Manufacturer offers the same POS terms for the same auto-parts product lines to each of the plaintiffs without any requirement of third-party guarantees"; in ¶ 126A, plaintiffs allege that "up to this complaint has not been offered any POS terms or conditions of any type, whether comparable or proportionate to the terms and conditions given to AutoZone"; and see ¶¶ 129A (failure to provide a proportionate or functionally equivalent POS program to the Plaintiffs); 129B (each Plaintiff wants a POS program on the same terms and conditions now given to AutoZone); 133 (injunction against purchasing auto parts on POS terms not offered to the plaintiffs); 134 (unless made available and offered to all of the operating plaintiffs).

6. There Are Allegations that AutoZone Had Knowledge of Manufacturer Price Discrimination

Defendants claim that plaintiffs have not alleged that AutoZone had knowledge of the price discrimination. This assertion is erroneous. Paragraph 115B in Count II provides as follows:

> 115B. AutoZone induced each of the POS Manufacturer Defendants to enter into its POS agreement with AutoZone, with the full awareness from each of the POS Manufacturer Defendants that no other auto-parts WD or Jobber had any POS agreement with the Manufacturer; and upon information and belief AutoZone knows that the POS Manufacturer Defendants have provided AutoZone with exclusivity of POS arrangements, to the exclusion of each of the Plaintiffs.

7. Plaintiffs' Alternative Allegations Establish a Claim under Sections 2(d) and 2(e)

In ¶ 126A, plaintiffs allege that, as an alternative to the Section 2(a)/2(f) allegations against AutoZone and the POS Manufacturers, Plaintiffs are alleging that the POS programs are a violation of Section 2(d)/2(e). As in plaintiff's other 2(d)/2(e) allegations, the allegations of liability are made only as to the manufacturers (i.e., the POS Manufacturers).

POS is intended to facilitate the resale of the POS Manufacturers' products by providing slower-moving products to AutoZone under terms that will enable AutoZone to distribute such products, a lower per-unit price when taking all of the POS terms into account, including the delay and condition that resale take place before AutoZone is required to pay for the POS goods. The most important and entire essence of POS is resale of the manufacturer's product. Thus, POS is truly a promotional program that must meet the requirements under Sections 2(d)/2(e). As alleged in ¶ 126A,

> 126A. As an alternative allegation to 2(f)/2(a) liability of AutoZone and the POS Manufacturer Defendants, Plaintiffs allege that the POS program is a promotional program of the POS Manufacturer Defendants that is being used to resell the Manufacturer's auto parts to end users and jobbers by giving AutoZone (i) a larger, more complete inventory of auto parts and lines, (ii) lower per-unit costs to enable AutoZone to offer even lower prices than would otherwise exist in absence of the POS program, (iii) financing to enable AutoZone to increase its number of retail stores, and (iv) a higher profit margin on sales to enable AutoZone to obtain capital for additional expansion costs – all to the injury of Plaintiffs and competition which up to this complaint has not been offered any POS terms or conditions of any type, whether comparable or proportionate to the terms and conditions given to AutoZone.

B. COUNT III: Plaintiffs Have Pleaded a Cognizable Section 2(a) Claim with Respect to the Manufacturer Defendants or Section 2(f) Claim with Respect to Wal-Mart or Sam's Club, Concerning Radio Frequency Identification Technology Chips

Defendants fail to recognize the issue. The issue is not whether any auto-parts with chips are being sold as a product. Instead, the issue is whether the manufacturers incurred expenses at the request and for the benefit of Wal-Mart and Sam's Club, without providing a comparable program for plaintiffs. These expenses amounted to an estimated hundreds of millions of dollars spent by the manufacturers for Wal-Mart's technology program, thereby reducing the net cost to Wal-Mart of its purchases of auto parts and auto-parts lines from such companies, and giving Wal-Mart a further advantage in the market place.

1. Count III Alleges a Claim under Section 2(a)

The manufacturers incurred the technology expenses for Wal-Mart for several years without having any RFID tags or chips attached to any products delivered to Wal-Mart or Sam's Club. The problem is not with the tags or chips when they finally come into use (if ever), but in the expenditure during the past few years to create the technology for Wal-Mart and Sam's Club at the expense of their manufacturers, instead of at Wal-Mart's expense, without any comparable technology development fund being offered or made available to the plaintiffs. Such expenditures by the manufacturers are capital contributions to Wal-Mart and Sam's Club having an immediate effect of reducing the net cost of the products being bought from the manufacturers by Wal-Mart and Sam's Club.

This is a meritorious 2(a) claim against the manufacturers, and a meritorious 2(f) claim against Wal-Mart and Sam's Club, without any actual use of the technology or chips. The chips are not the products being sold to two competing sellers, it is the auto parts made by the manufacturers, and the manufacturers are taking a significant portion of the price they get for such auto parts from Wal-Mart and Sam's Club and giving it back to Wal-Mart and Sam's Club through these technology expenditures on behalf of Wal-Mart and Sam's Club. The *United Magazines* case (cited at Deft. Memo. p. 43) has nothing to do with the issue. In such case, the disfavored purchaser (United Magazines) had increased costs imposed on it by action of the manufacturer (i.e., the publisher of the magazines), whereas in the instant

case the favored purchaser (Wal-Mart and Sam's Club) is forcing the manufacturer to incur costs for the benefit of the favored purchaser.

2. Count III States a Claim Because It Meets the "Same Seller to Two Different Actual Purchasers" Requirement of Section 2(a) - the RIFD Chip Is Not the Product; It Is What the Manufacturer Expended Money for Wal-Mart/Sam's Club to Develop

Plaintiffs allegations that there were two competing purchasers of the Manufacturers' product have been made, and the allegations do not need to be changed to allege the discrimination involved in the manufacturers developing RIFD technology for Wal-Mart and Sam's Club at the manufacturers' expense. The technology's use in later years to identify and locate auto parts is not part of the product being purchased by the end user. The product remains the same, whether or not RFID technology has been used. Furthermore, the expenditure is being made, on a discriminatory basis, for Wal-Mart and Sam's Club, years before any actual chips are put into use. It is the discriminatory expenditure for technology development for the benefit of, and at the direction of, Wal-Mart and Sam's Club that is at issue, not whether any resulting products are being sold or used. Wal-Mart has required the defendant manufacturers to expended hundreds of millions of dollars in recent years for the benefit of Wal-Mart, to develop technology for use only by Wal-Mart, and this is an unlawful, discriminatory rebate of Wal-Mart's price of the products it is buying from the manufacturers. It is therefore a violation of Section 2(a) of the Robinson-Patman Act by the manufacturers, and a 2(f) violation by Wal-Mart and Sam's Club.

Alternatively, such expenditures for Wal-Mart and Sam's Club are violations of Sections 2(d)/2(e), as discriminatory services. See *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959) (2(e) liability affirmed, without any cost justification).

IV. ADDITIONAL REASONS WHY PLAINTIFFS' CLAIMS IN COUNT IV STATE MERITORIOUS CLAIMS UNDER SECTIONS 2(d) AND 2(e) OF THE ROBINSON-PATMAN ACT

The moving Defendants (at p. 45 of their Memorandum) refer to arguments made in Part I (pp. 19-23) that Plaintiffs' allegations in Count IV do not incorporate the allegations of the appendices. This is

not so. Plaintiffs clearly alleged in paragraph 157 that "Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1-156 above". Any person reading paragraph 157 understands that the reference to paragraphs 1-156 includes whatever is alleged in such paragraphs, including all appendices incorporated by reference. All of the transactions described in the appendices are part of the allegations in Count IV. The promotional and advertising allowances at issue are described in Count IV, for the transactions described throughout Counts I-IV and in the appendices. Plaintiffs have provided fair notice to the Count IV Defendants as to the transactions being alleged and as to the advertising and promotional programs at issue. Nobody would expect each line describing an auto-part purchase to include a footnote of several pages describing all of the promotional and marketing programs affiliated with such part purchase. These advertising and promotional programs are described in the body of Count IV.

Defendants in Count IV and footnote 44 (at p. 45) refer to their argument about allegations of discriminatory treatment with respect to specific products and products of like grade and quality set forth earlier in their Memorandum. Plaintiffs refer to pages 12, 13, 25 and 35 of this memorandum for Plaintiffs' responsive argument. Also, see ¶¶ 86, 89, 91-M, 92-B, 92-J, 99, 158A and Appendix B-1 to the complaint.

The Count IV Defendants go on to identify 3 specific types of programs alleged by Plaintiffs as programs that Defendants argue are not subject to Sections 2(d) and/or 2(e) of the Robinson-Patman Act.

A. Deferred-Payment Arrangements When Equivalent to Capital Contributions or Partnership Arrangements and When Part of a Written Vendor Agreement for Product Distribution Are Subject to Sections 2(d) and 2(e)

Extension of credit by a manufacturer to a direct purchaser is not ordinarily considered part of an advertising and promotional program for the resale of the manufacturer's products. However, the plaintiffs have alleged that the manufacturers are extending credit for a long period (157 days or more, or 3 to 12 months or longer, as to the AutoZone Defendants), far beyond the number of days (usually 30) given to direct-purchasing plaintiffs. Plaintiffs further allege that this so-called extension of credit in fact is providing interest free capital to the Defendant Retailers "as an advertising and promotional program",

with payment occurring long after the parts generating the account receivable have been resold by the Defendant Retailer. This makes the manufacturer's extended-credit program an advertising and promotional program for resale of its goods through the favored retailer, and also makes the manufacturer an investor in and partner of the major retailer. Trial testimony by AutoZone's expert, Kenneth Elzinga, revealed that all of the benefits provided by the manufacturer to AutoZone were payment for enabling a manufacturer to sell its product line(s) through AutoZone's distribution system. Elzinga testified in part:

> "... a retailer says to the manufacturer I'll promote your part. I'll market it. I'll merchandise it for you, and I'll incur costs in doing that and to be compensated for that. I will get what we call a functional discount to pay me for the services that I'm offering you, the manufacturer. [Tr. 688]
> * * *
> "They look at this as a bundle. There's tough head-to-head negotiations that go on and out of that comes a functional discount, an allowance, a rebate, all of these terms that exist in the industry, I bundle it together as a functional discount." [Tr. 692]
> * * *
> ... there may be six or seven discrete discounts that cannot always be tied in some dollar for dollar, wooden and mechanical way to particular services. * * * So you don't want a company that is so laden with accounting expenses where you have 50,000 accountants trying to track every particular deal to a particular downstream marketing service." [Tr. 697]
>
> [Person Decl., Exhibit B.]

Plaintiffs have reflected this testimony in their amended complaint, as follows:

> 159. The elements of the advertising and promotional program provided by each of the Manufacturer Defendants are as follows:
> A. A written agreement providing a variety of discriminatory payments and other benefits to the Defendant Retailer including lower auto-parts per-unit prices, as compensation to the Defendant Retailer for the Manufacturer's use of the Defendant Retailer's auto-parts distribution system, including the following multi-year Vendor Agreements:
>
> (1) between AutoZone and **Cardone** dated 4/19/94, **ArvinMeritor** for Gabriel dated 5/1/00, 8/4/94, for Maremont dated 8/24/94, with ArvinMeritor dated 04/05/00; **Pennzoil** for Quaker State dated 7/28/92, for Pennzoil dated 11/12/92, 7/12/99 for Pennzoil; with **Dana** for Raybestos dated 8/21/01, 9/5/01, 1/16/02, 2/7/02; with **Standard Motor Products** dated 9/24/91, for G P Sorensen dated 2/8/93, for Four Seasons dated 2/10/93, for G P Sorensen dated 8/9/93, for Four Seasons dated 9/8/94, for G P Sorensen dated 10/27/97; **Ashland/Valvoline** agreement dated 8/27/91, 8/14/92, for Valvoline dated 4/3/96, 4/4/96, 4/1/97, 11/26/01, 3/8/01: and
>
> (2) between Advance Stores Company, Inc. and **Cardone** dated 10/27/98, 11/15/96, 12/14/96; with **ArvinMeritor** - Gabriel/Maremont 10/16/96; with **Pennzoil/Quaker State** dated 2/13/97, 11/17/97, 10/30/98, 4/4/99, 1/6/00, 1/19/00, 7/14/00, 10/24/00, 5/31/01 (offers subsequently accepted); with **Standard Motor Products:** Factory Air/Four Seasons dated 12/6/96; Standard Ignition dated 10/7/98; 12/22/00 Standard; 10/19/01 Engine Management; 10/29/01 Wire and Cable; and with **Ashland/Valvoline**: 11/17/97, 1/7/01, 9/9/01;

* * *

K. Deferred-payment arrangements of 157 days or more as to the AutoZone Defendants and an unknown number of days as to the other Competing Retailers beyond the number of days for payment given to plaintiffs purchasing from the manufacturers, amounting to the placement of interest-free capital as an advertising and promotional program;

L. Allowances paid by Manufacturer Defendants for return of goods to the Manufacturers (a) partly as reimbursement of the return freight costs, and (b) partly as a fee or allowance to the Competing Retailer for their time spent in making and accounting for the auto-parts returns. This discriminatory return policy is part of the program for products actually sold, to enable the Competing Retailers to have more than sufficient inventory on hand for resales through excess ordering of auto parts by the Competing Retailer with the excess costs paid by the Manufacturer;

* * *

N. Honoring lifetime warranty programs of Competing Retailers by giving 100% (or more) refunds for products returned to a Competing Retailer, which the Competing Retailer returns to the Manufacturer Defendants for such credit; such warranty programs by the Competing Retailers are part of their promotion and advertising of the auto-parts, and connected with the resales of such products;

* * *

P. Providing lengthy delays (3 to 12 months or longer) for payment to be made after delivery of the goods to the Competing Retailers which functions as the equivalent of a capital contribution to the Competing Retailer by the Manufacturer Defendant; such payment-delay programs by the Competing Retailer are part of their advertising and promotion of the products, and connected with the resales of such products, making the payment to the Defendant Manufacturer after the auto part has been resold by the Competing Retailer;

* * *

The era of price lists has ended as to purchasing of inventory by the nation's major retailers. The major retailers do not get price lists that manufacturers still present to lesser customers (independent competitors of the major retailers). Instead, the major retailers such as the retailers defendants in this lawsuit prepare "vendor agreements" for the manufacturers to sign and, after execution, these agreements provide the terms under which the major retailer is to distribute (i.e., purchase from the manufacturer and then resell) the manufacturer's products. Every paragraph in the vendor agreement has financial implications and the whole package is an advertising and promotional program for the distribution of the manufacturer's designated products through the major retailer's distribution system. The lengthy delay in making payment to the manufacturer, the allowances given to the retailer when it returns goods to the manufacturer, and the warranty programs provided to customers of the retailer, through the vendor agreement, are all part of the vendor agreement for the distribution of the manufacturer's goods through the contracting retailer. These and many other features covered in the written agreement provide the terms

for the product distribution (including resale to the retailer's customers). As to "vendor agreements" see paragraphs 94 and 159 of the amended complaint.

Under these agreements, the manufacturer and major retailer become close business partners, with allocation of business interests determined by the agreement, to maximize the resales and profitability for the major retailer, with the manufacturer increasingly having to sell below cost to the major retailer to keep its business. See paragraphs 80, 91-X, 95, 106-D, 106-E, 107-E and 124 of the amended complaint as to selling below cost.

B. Allowances for the Return of Goods When Part of a Written Vendor Agreement for Product Distribution Are Subject to Sections 2(d) and 2(e)

See the discussion under "A" immediately above. When a manufacturer provides an allowance to the retailer for returning goods to the manufacturer the allowance was negotiated as part of a vendor agreement for the distribution of products of the manufacturer through the contracting major retailer and is an integrated part of the advertising and promotional program built into the vendor agreement. The purpose is to encourage the major retailer to resale as much as it can with an inducement to provide a fee if the journey, for a specific part, from manufacturer to retailer to purchaser is not over, and the party makes a trip back from purchaser, to retailer to manufacturer (or perhaps, with permission, directly from purchaser to manufacturer), for credit, repair/return or other adjustment.

C. Discriminatory Warranty Programs When Part of a Written Vendor Agreement for Product Distribution Are Subject to Sections 2(d) and 2(e)

See the discussions under "A" and "B" above. When a manufacturer provides a warranty program the retailer to repair, replace or give credit for a failing part, such program was negotiated as part of a vendor agreement for the distribution of products of the manufacturer through the contracting major retailer and is an integrated part of the advertising and promotional program built into the vendor agreement. The purpose is to encourage the major retailer to resale as much as it can with an inducement to provide repair, replacement or credit if a part breaks down or is defective from the start. The warranty program encourages resale of the part to the end customer, and relates to distribution of a substitute part

in some cases, or the resale of another part with the warranty credit. The vendor agreement is the advertising and promotional program and the included warranty program is part of the program for distributing the manufacturer's product to the retailer for resale to the end customer.

The extent to which deferred credit, return allowances and warranty programs are part of an advertising and promotional program is a question of fact, for resolution by the trier of fact, and should not be resolved by dismissal of the claims.

V. COUNT V (THE "WAREHOUSE CLAIM") STATES A CLAIM AND IS NOT BARRED AS A MATTER OF LAW

A. The Warehouse Claim Is Not a Restatement or "Repackaging" of the Claims in the 2000 Antitrust Complaint ("Coalition I Proceedings")

The Count V 19 Plaintiffs never alleged in any pleading in the Coalition I Proceedings that the Count V defendants had committed any violations of law or actionable conduct in connection with obtaining or obtaining a continuing of the District Court's order that the 19 Plaintiffs get and use a warehouse for their documents. Because there were no warehouse pleadings, there was no discovery and no opportunity to find out the Count V Defendants' purpose in obtaining or maintaining the Court's order.

The warehouse activities occurred outside of the pleadings in the Coalition I Proceedings and in no way are the current warehouse pleadings (Count V) a repackaging of the Coalition I Proceedings.

There was no trial on the warehouse issues, and there was no opportunity for a trial on the warehouse issues because there was no pleading as to the warehouse issues.

The facts as to the Count V Defendants' purpose in obtaining the order, and their intention not to make use of the documents, and their intention to deceive the Court into giving the order by making false statements about the defendants' intention to look at the documents (and specifically to have 100 paralegals spend 12 hours each day for 60 straight days looking at the documents in the warehouse) need to be proven through discovery, with defendants' making a motion for summary judgment if, after discovery, they believe that plaintiffs cannot prove what they have alleged in the instant complaint.

Plaintiffs had no opportunity for discovery or any opportunity for the warehouse issue (after any discovery) to be heard by judge or jury, which means that the motion practice and appellate issue relating to the warehouse did not give the plaintiffs their day in court as to the warehouse issues. If there was no fraud practiced by the Count V Defendants, the plaintiffs agree that the Coalition I Proceedings amounts to final disposal of the warehouse issue.

In the same way that newly discovered material evidence could enable the plaintiffs to open up a final judgment, newly discovered evidence (obtained through discovery) as to fraud practiced by the Count V Defendants concerning the warehouse matter afford the basis for a meritorious claim against such defendants, as alleged in Count V of the instant complaint. There is no limitation as to opening up a prior judgment because the warehouse issue was not pleaded or tried and was not part of the final judgment.

B. Count V Should Not Be Dismissed under the First Amendment or the *Noerr-Pennington* Doctrine

The Count V Defendants have lost their *Noerr-Pennington* immunity because their tactic in question was a sham - falsely representing to the Court that they intended to review the plaintiffs' documents after being shipped to a warehouse in Brooklyn, and failing to tell the Court that their purpose was to require the plaintiffs to incur substantial costs that plaintiffs could not afford and to interfere with preparation for trial by the plaintiffs' attorney, and the purpose of prevailing on defendants' defenses at trial by imposing huge, unnecessary costs of money and time on defendants and their attorney during the critical 60-day period before trial and during the trial itself.

These sham litigation activities by the defendants were successful, and defendants were able to obtain a jury verdict in their favor by reason of such sham activities and intended diversion of the legal and monetary resources of the 17 Plaintiffs.

Thus, defendants' argument that they won the trial is not a sufficient answer. Plaintiffs argue that the sham litigation activities of the Count V Defendants resulted in preventing plaintiffs from enforcing

their antitrust rights against such defendants, and that such activities by the Count V Defendants are not protected under the First Amendment or the *Noerr-Pennington* doctrine.

The sham warehouse activities of the Count V Defendants were "objectively baseless" and "intended to cause harm to the [plaintiffs and the plaintiffs' attorney] 'through the use of governmental process – as opposed to the outcome of the process.....'" *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993) ("objectively reasonable effort to litigate cannot be sham, within meaning of exception to Noerr doctrine immunity from antitrust liability"). Also, see, *e.g.*, *T.F.T.F. Capital Corp. v. Marcus Dairy Inc.*, 312 F.3d 90, 92 (2d Cir. 2002) (sham exception to the *Noerr-Pennington* doctrine); and *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510-11 (1972) (sham exception to the *Noerr-Pennington* doctrine); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) ("Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action" – citing *Noerr*, 365 U.S. at 144); and *Sosa v. DirectTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006) ("To establish that a petition to the court is a **sham,** the party seeking to impose liability must establish both that the legal claim is objectively baseless and that the suit was brought for an anticompetitive purpose" – citing *Professional Investors*).

The allegations of fraud and misrepresentation in the Count V Defendants' activities concerning the warehouse order go "to the core of ... [the] legitimacy" of the defendants' warehouse activities. *Gunderson v. Univ. of Alaska, Fairbanks*, 902 P.2d 323, 329 (Alaska 1995) (quoting *Liberty Lake Invs. Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993)). The defendants' warehouse activities were objectively baseless and caused the 12 Plaintiffs to be unable to enforce their antitrust claims against the Count V Defendants. The alleged warehouse activities of the Count V Defendants made it impossible for the plaintiffs to prove their claims and disprove the defendants' defenses at the trial of plaintiffs' antitrust claims.

The Count V claims of the plaintiffs in the instant action were not part of any of the pleadings or defenses in the Coalition I Proceedings.

Accordingly, the Count V Defendants' motion to dismiss should be denied in its entirety.

C. Count V States a Claim for Fraud

Defendants argue that "the 19 Plaintiffs never sought post-judgment relief for any alleged fraud under Rule 60 in the Eastern District from its judgment or discovery orders." (Defts' Memo., p. 54). The plaintiffs have had no discovery to prove the alleged fraud and, because none of the pleadings in the prior action related to the warehouse activities, the 19 Plaintiffs never had an opportunity to obtain evidence of the fraud through discovery. Only by filing this action could the 19 Plaintiffs obtain discovery to prove their allegations of fraud. [Plaintiffs never considered that the filing of the original complaint (i.e., the allegations) in this action could be construed as a "motion to vacate the result in the *Coalition I* case under Rule 60(b)(3) of the Federal Rules of Civil Procedure" – see n. 50, p. 55, Defts' Memo.] Defendants are arguing that the 19 Plaintiffs should have made a request for relief [under Rule 60(b)(3)] that the plaintiffs could not have won, and for such reason they should be denied their present effort to obtain the needed discovery to prove the fraud alleged in Count V.

Defendants are confusing the statement of a claim for fraud with having sufficient evidence to prove the allegation of fraud.

Plaintiffs have alleged at subparagraphs A through F of paragraph 225 (and paragraphs 225A through 229) that the Count V Defendants made false material representations by which they intended to defraud the Plaintiffs and the Court, and (at subparagraphs A and B of paragraph 230 and paragraph 231) that the Plaintiffs and the Court reasonably relied upon the representations, and (at paragraphs 232-233) that the Plaintiffs were damaged as a result.

Plaintiffs' allegations that the Count V Defendants' false material representations were made with a present intention that the representations would not be carried out are set forth in paragraphs 225-A and 234, alleging as follows:

> 225 A. That the Warehouse Defendants intended to review (for purposes of asserts [asserting] their alleged defenses) each of the invoices in the thousands of boxes of plaintiffs' invoices to be produced (the "Warehouse Invoices"), to identify each relevant invoice and extract from it the relevant facts for use in defending themselves in the forthcoming trial in the Predecessor Action:

* * *

234. The Warehouse Defendants in fact never intended to review any of the Warehouse Invoices or, in the alternative, as a backup plan, any more than a token amount of the Warehouse Invoices, representing less than 1% of all the Warehouse Invoices.

The Count V Defendants' intention not to review as promised and represented existed at the time that the representations were made (when obtaining the Court order) and, in furtherance of such existing intention, the Count V Defendants made a motion to dismiss the lawsuit for alleged unsuitable warehouse working conditions (to justify defendants' failure to review the documents as promised and represented).

The token review was done for the purpose of making such motion, not in furtherance of the promised review of all produced documents by the 100 paralegals defendants represented were going to be used to look at each and every produced document.

Defendants' opposition to closing the warehouse during the trial had the same sham purpose as requiring the 19 Plaintiffs to transport their many thousands of boxes of documents to a warehouse in Brooklyn, and succeeded. The fact that there was an arguable legitimate purpose to requiring the warehouse and the continuation of the warehouse does not eliminate the described and alleged sham purpose of both.

Plaintiffs' Four Other Claims in Count V State Meritorious Claims and Should Not Be Dismissed

1. Tortious Interference with Prospective Economic Advantage Claim. The activities of the Count V Defendants as alleged constitute a classic claim for tortious interference with a prospective economic advantage (consisting of the prosecution of the 19 Plaintiffs' antitrust claims against the Count V Defendants). By reason of the business dealings of the 19 Plaintiffs, the Count V Defendants incurred antitrust liabilities (i.e., prospective economic advantage) to the plaintiffs, and the defendants unlawfully interfered with plaintiffs' efforts in converting this prospective economic advantage into a monetary judgment and injunctive relief from the Court. In *Tang v. Jinro America, Inc.*, slip copy, 2005 WL

2548267, ***6 (E.D.N.Y. 2005) [Exhibit D, Person Decl.] ("[A] claim for interference with advantageous business relationships must specify some particular, existing business relationship through which plaintiff would have done business but for the allegedly tortious behavior").

2. **Breach of a Contract Implied in Law between Parties to a Lawsuit.** The parties in a lawsuit are required by law to follow the rules for litigation, and compliance by the Count V Defendants and their counsel is something to which the Plaintiffs and their counsel can expect and to which they are entitled. The obligations are contractual in nature, and implied in law, and failure to perform the obligations by a party and/or its counsel provides various remedies to the opposing party and/or counsel. Sham litigation is a breach of the rules and entitles the aggrieved party to seek relief outside of the court and pleadings in which the sham litigation took place.

3. **The Benefits Obtained by the Defendants through Their Sham Litigation Tactics Unjustly Enriched Defendants at the Plaintiffs' Expense.** Plaintiffs allege that they spent $400,000 in time and effort needlessly concerning the warehouse, and that they lost the trial of their antitrust claims (for a loss of many millions of dollars). The Count V Defendants obtained the benefit of prevailing in a lawsuit they should have lost, and were unjustly enriched (through the saving of many millions of dollars) by reason of their sham litigation activities. The plaintiffs are entitled to a recovery of the $525,000 (in money and legal time) needlessly spent, as well as the amount they would have won at trial, but for the activities of the defendants (less any overlapping amount). The legal theory for liability does not create any duplicable payment possibility because any duplication in recovery would be eliminated through election of remedies or otherwise.

4. **Per Se Conspiracy to Restrain Trade in Violation of Section 1 of the Sherman Act.** If a group of defendants are violating Section 1 of the Sherman Act in violation of the rights of a specific competitor, it would seem that sham litigation activities in furtherance of the violation would be

actionable as a conspiracy to restrain trade in violation of Section 1. When the same sham litigation activities take place as to violations of United States antitrust statutes other than Section 1, it would seem logical that there is also a Section 1 conspiracy to restrain trade. In other words, it seems to be illegal and in violation of Section 1 for a group of competitors who are violating other antitrust laws to injure a specific competitor to conspire together to eliminate their respective liabilities to the competitor through joint sham litigation. It should be illegal for competitors to engage jointly, through conspiracy, in sham litigation to prevent a competitor from enforcing its rights under any of the antitrust laws.

The Count V Defendants' motion to dismiss the 19 Plaintiffs' Count V should be dismissed in its entirety.

VI. PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT, TO ADD APPENDIX B-6 AND ANY REQUIRED NON-FUTILE AMENDMENTS, AND DELETE UNNECESSARY PRODUCT-BASED ALLEGATIONS SHOULD BE GRANTED

Plaintiffs have prepared a list of descriptions of purchases of parts from products lines of the defendant manufacturers, including dates, per-unit price, name of seller, part number, description of the part and product line. The proposed Appendix B-6 provides a significant amount of information defendants claim is absent from the present complaint.

Also, to simplify the case for everyone, if the Court upholds the plaintiffs' "product line" allegations as meeting the pleading requirements for goods of like grade and quality and contemporaneous sales, plaintiffs seek leave to delete unnecessary product-based pleadings to be able to keep discovery focused on the product lines and not with matching of transactions between plaintiffs and the retailer defendants as to products within the product lines.

In addition, plaintiffs' seek leave of the Court to further amend the complaint as to any pleading deficiencies determined by the Court. It is urged that the opportunity to attempt to cure any pleading deficiencies, after the Court's initial review and ruling on the pleading, should be granted, as something "which justice so requires" at this stage, unless no amendment could cure any such determined deficiency.

Under Rule 15(a), F.R.Civ.P., leave to amend the complaint "shall be freely given when justice so requires".

CONCLUSION

For the reasons set forth above, it is respectfully requested that Defendants' motion to dismiss the complaint under Rule 12(b)(6) be denied in its entirety, and Plaintiffs' motion for leave to amend the Complaint should be granted in its entirety.

New York, New York
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