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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., et al.,	:	
Defendants.	:	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND ENJOIN PLAINTIFFS

New York, New York
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This memorandum is submitted by Plaintiffs in opposition to Defendants'[1] wholly frivolous "Motion to Dismiss the Complaint[2] with Prejudice and to Enjoin Plaintiffs from Continuing to Engage in Vexatious Litigation, including This Action" filed[3] on August 12, 2005.

1. Seven of the 13 named Manufacturer Defendants have been dismissed, by Plaintiffs' filing of a (i) Notice of Dismissal under F.R.Civ.P. 41(a)(1) (as to BorgWarner, Inc. and The Cypress Group, without prejudice); (ii) Stipulation (Honeywell International, Inc., Mark IV Industries, Inc. and Tenneco Automotive, Inc. - with prejudice, pursuant to agreement with Plaintiffs), and (iii) Notice to Court (ACDelco, Inc., non-existent entity). Additional Manufacturer Defendants have been added to the Amended Complaint: Affinia Group, General Motors, SOPUS Products, Armor All/STP and Stant. There are a total of 133 Plaintiffs in the Amended Complaint (plus 18 "related" "b", "c" Plaintiffs), hereinafter referred to as the "**133 Plaintiffs**", of which 111 are "Dismissed Plaintiffs".

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

3. Defendants filed two motions. The other motion, to dismiss the 2004 Complaint under Rule 12(b)(6), Fed. R. Civ. Proc., is moot. Plaintiffs have filed an Amended and Supplemental Complaint (hereinafter referred to as the "Amended Complaint").

Response to Matters Raised by Defendants Outside of the Complaint

A. Plaintiffs' Attorney Has Always Advocated and Assumed Meritorious Lawsuits in His Various Publications Urging Private Enforcement of the Robinson-Patman Act

Defendants base their motion on the various publications by Carl E. Person, attorney for the Plaintiffs in this action ("Person" or "Plaintiffs' Attorney"), stating that Person has been urging people to sue major retailers and their manufacturer-suppliers for violations of the Robinson-Patman Act (the "RPA"). In this regard, Person has authored and published various website pages advocating private and local governmental lawsuits under the RPA – see www.lawmall.com/rpa. During 2004, Person wrote, published and attempted to market a book advocating lawsuits under the RPA – *Saving Main Street and Its Retailers.* Also, Person has written and published a website advocating that towns and villages appoint a "Little Eliot Spitzer" as "Town Attorney General" to look after the interests of the town or village, including the commencement of RPA actions when appropriate. The website is at www.townattorneygeneral.com. As part of the activities in trying to create this new type of public office, Person tried to hold performances as "Town Attorney General", but there appeared to be insufficient marketing or interest in such type of live performance, and the planned performances were canceled without any performances taking place. The outline for the show, a file named tagout6.doc dated May 23, 2005 uses the word "meritorious" four times, including the following page 2 use:

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

In each of these publications advocating enforcement of the RPA, Person always stated that the actions had to be meritorious. This was obviously known to Defendants, who chose to disregard Person's clearly expressed limitation on RPA litigation. A simple Google search (using the two words "lawmall" and "meritorious") produces two pages of results, including

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

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

B. Defendants Attorneys' Are Invited to Have an In Camera Comparison of Legal Incomes and Expenses As to All RPA Litigation in Which Plaintiffs' Attorney Has Been Involved

Defendants would have the court believe that Plaintiffs' attorney and the Plaintiffs have found a lucrative system for suing Defendants, which is wholly false, and known to them to be false. Defendants' attorneys are making whatever lucrative income is being made, and Person

invites Defendants' attorneys and Defendants to compare (in camera) his income (through fees and settlements) with their income or fees relating to any RPA litigation in which Person has been involved. In fact, the violations of RPA law have been the main reason for the growth and profitability of the Defendant Major Retailers, and their attorneys (if they have done their due diligence) must know this, but defend as if their clients have done no wrong.

In fact, the Defendants' attorneys are attempting to turn the jury decision against the 22 Plaintiffs (for the period 1996-2000) into a permanent license to violate the RPA and other statutes.

C. The Word "Lottery" Clearly Refers to the Unexpected Value Of Meritorious RPA Litigation from the Standpoint of Plaintiffs Not Sophisticated in Antitrust Treble-Damage Litigation - and Not To Commencing or Settling Non-Meritorious RPA Actions

Person's mention of lawsuits having any similarity to winning a lottery refers to the dollar amount of damages that may be owed by the defendants in a meritorious RPA lawsuit, not to filing a non-meritorious lawsuit and having any expectation of obtaining a settlement, whether substantial or not. This is self evident in reading what Person wrote. Most individuals, including small businesspersons, when thinking about lawsuits do not understand that RPA or other meritorious antitrust litigation often involves far more money for a company or company officer than other lawsuits of the type with which they may have become familiar over the past decades. In Person's book *SAVING MAIN STREET AND ITS RETAILERS*, he did not use the word "lottery" or "lotteries", but at page 179 he wrote (about small towns and villages having the prospects for significant per-family recovery), as follows:

> .... The Town Attorney General, by filing meritorious suits against major retailers injuring the town and its small businesses and human citizens, can expect to recover amounts of money which will be small to the defendant corporation but huge when looking at the number of human citizens involved.

> The antitrust laws provide for treble damages, which makes the prospects for meaningful recovery much greater than without treble damages. [Emphasis added.]

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

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

Defendants are misrepresenting to the Court to the extent they would have the court believe that Person is advocating the commencement of frivolous RPA lawsuits or any other non-meritorious litigation. There is no need to advocate frivolous litigation. There is too much meritorious litigation needing attention, to try to stop defendants from continued violation of the RPA and destroying other businesses as a result.

D. Wal-Mart Has Created a Purchasing Monopsony and Uses It to Move Into Other Businesses

Wal-Mart enjoys a monopsony in purchasing goods, having the largest retail operation in the world and being able to reject 98% of the manufacturers or others trying to sell their goods through Wal-Mart. A recent *Wall Street Journal* article entitled "The Long Road to Wal-Mart" by

Staff Reporter Gwendolyn Bounds, published in the 9/19/05 edition of *The Wall Street Journal* [available after subscribing at http://users2.wsj.com/lmda/do/checkLogin?], states:

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

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

E. Wal-Mart's Strategy of Obtaining Lower Per-Unit Prices from Manufacturers Accounts for Wal-Mart's Growth and the Belatedly-Recognized Evils - This Strategy of Violating the RPA Is Being Emulated by AutoZone and Other Major Retailers and Is Driving the Plaintiffs Out of Business

The allegations in the 2004 Complaint (and Amended Complaint) are quite meritorious. They describe the Defendants' activities that have been and are continuing to violate the RPA. These activities are to enter into secret agreements between Defendant Manufacturer and Defendant Major Retailer giving the Major Retailer a price per unit near or below the

Manufacturer's cost, and (obviously) at a per-unit price substantially lower than the per-unit price being paid by the WD direct-buying Plaintiffs (or Plaintiffs' WD suppliers) at the same time for the same products. This extremely low, illegal price, enables the Major Retailers to offer the goods to the public at lower per-unit prices than the direct-buying Plaintiffs (or Plaintiffs' WD suppliers) and other independent competitors, while providing the Defendant Major Retailers a healthy markup.[4] This practice is driving Plaintiffs out of business, as alleged in the 2004 Complaint and Amended Complaint.

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

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

> The jury-excluded exhibits listed on page 15 (starting with Exhibit 175) show that AutoZone acquired competitors and then calculated the dollar amount for which its competitors were over-paying for inventory (in comparison to AutoZone) and then charged the manufacturers for such overcharges and obtained payment for itself as to the

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

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

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

> Gross profit for fiscal 2003 was $2.515 billion, or 46.1% of net sales, compared with $2.375 billion, or 44.6% of net sales for fiscal 2002. This improvement was driven by $8.7 million in gains from warranty negotiations and the adoption of EITF 02-16 that reclassified $42.6 million in vendor funding to cost of sales. Prior to the adoption of EITF 02-16, vendor funding was reflected as a reduction to operating, selling, general and administrative expenses. * * * The remaining improvements in gross profit and gross margin reflect the additive impact of new merchandise, a reduction in our product warranty expense, and the benefit of more strategic and disciplined pricing derived from our category management system.

There is an admission above that margin improvement resulted from "warranty negotiations" and because AutoZone "reclassified $42.6 million in vendor funding to cost of sales", which could be RPA violations if competitors did not receive the same warranty benefits

and vendor funding (of discounts, fees and allowances), as alleged in the 2000 and 2004 Complaints and the Amended Complaint.

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

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

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

F. AutoZone, Kmart and Sears Compete with Wal-Mart and Sam's Club; The Purchasing Practices of AutoZone, Kmart and Sears Are Controlled by One Person - Financier Edward S. Lambert - and Involve Obtaining Lower Prices for Inventory to Compete with Wal-Mart's Low Prices

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

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

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

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

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

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

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

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

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

G. The Robinson-Patman Act Violations Are Putting the Nation's Aftermarket Auto-Parts Manufacturers Out of Business

The defendant retailers (AutoZone defendants, Advance Stores, Wal-Mart and Sam's Club) through their policy of squeezing auto-parts retailers to give better prices to the defendant retailers than the auto-parts manufacturers are giving to others, are contributing to the destruction of the auto-parts manufacturers. *Business Week* reported in its 10/10/05 edition, article entitled "A Run on Detroit's Parts Makers - Big money is chasing the thousands of outfits that supply U.S.

carmakers" (at p. 40) that. during 2003, one auto-parts manufacturer filed for bankruptcy, but that since January 1, 2004 there have been 35 auto-parts manufacturers filing for bankruptcy.

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

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

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

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

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

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

Plaintiffs allege that the auto-parts retailers are requiring the Defendant auto-parts manufacturers to sell to these major retailers at prices substantially lower than the per-unit prices charged to competitors, and even requiring sales to the major retailers below the manufacturers' direct costs. This accounts for the serious financial trouble for many auto-parts manufacturers on one hand, and the increase in defendant retailers' sales, profits and profit margins on the other

hand. During this time of terrible turmoil for auto-parts manufacturers, AutoZone is expanding its store base, increasing its sales, increasing its profits, and most importantly increasing its profit margins from 44.6% to 46.1% according to AutoZone's 10-K for 2004 filed August 28, 2004.

This practice by Defendant Retailers is forcing the Plaintiffs out of business, is hurting the auto-parts Manufacturers (who are not in a position to complain about this for fear of alienating their ever-increasing "best" customers), and leaves the auto-parts retailers with local monopolies throughout the United States where they can increase their prices in absence of the competitors they put out of business.

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

The 2000 Complaint is not only the model for the 2004 Complaint, but the same basic wording is found in all of the other Robinson-Patman Act complaints filed for other clients by the Plaintiffs' attorney herein, all of which unrelated complaints have been upheld by the courts (except where it was alleged that newspaper or yellow-page advertising was covered by the Robinson-Patman Act). Thus, the same basic wording was upheld in (1) the original auto-parts case, (2) the book case against Barnes & Noble and Borders: (3) the Florida tire case against Wal-Mart, Sam's Club, Goodyear, and (4) the magazine case against the 5 National Distributors of most of the nation's magazines. Each of those cases survived Rule 12(b)(6) motions to dismiss, usually with an amended complaint.

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

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

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

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

Wal-Mart/Sam's Club and their offspring (AutoZone and Advance Stores), through their business practices, including their violation of the Robinson-Patman Act, are injuring the long-term interests of the United States to gain their short-term profits. For well-reasoned presentations of the argument that Wal-Mart's globalization activities are hurting the United States see Lou Dobbs' book, *Exporting America - Why Corporate Greed Is Shipping American Jobs Overseas*, published in August, 2004 by Warner Business Books; the above-cited articles "U.S. Auto Supplier Sector Is in the Worst Shape Ever" and "OE Auto Parts Supplier Strategy for the Next Ten Years".

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

H. Defendant Manufacturers Are Providing Advertising and Promotional Money To the Defendant Major Retailers without Comparable Programs for Plaintiffs, Which Are Mainly Indirect Purchasers - RPA Claims against Manufacturers under 2(d), 2(e) Could Not Have Been Made or Tried in the Prior Action

In addition, the Defendant Manufacturers are providing advertising and promotional programs and moneys to the Defendant Major Retailers without any comparable programs or moneys being offered or paid to the Plaintiffs, most of whom are not direct purchasers but are nevertheless entitled to have the Manufacturers provide a comparable advertising and promotional program to them. As to such 2(d) and 2(e) violations, the Defendant Major Retailers are **not** liable, even if they knew or induced such discriminatory treatment. The 2004 Complaint and Amended Complaint do not attempt to enforce 2(d) or 2(e) liability against any of the Defendant Major Retailers.

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

I. Consequences of the RPA Violations Are Injurious to the Country

The consequences of these RPA violations by Defendants and other manufacturers and major retailers are devastating to the United States. They are forcing manufacturers to manufacture goods in foreign countries at lower labor rates to be able to meet the ever-increasing demands of the Major Retailers, which steadily increase their market share and domination of the purchasing market. This causes a decrease in employment in the United States. It also creates local monopolies by the major retailers when they drive out local competition in one town after another, which leaves them free to increase their prices in areas where competition is no longer effective. This is reflected in the ever-increasing profit margins of AutoZone, Advance and O'Reilly while continuing to obtain ever-lower prices from the manufacturers, the never-ending cessation of businesses by the Plaintiffs (see Appendix A to the Amended Complaint), and the deterioration of the financial condition of the nation's auto-parts manufacturers.

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

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

continue with their material misrepresentation of their financial condition. The illegally low prices at which they buy their products from the Defendant Manufacturers and others are reflected in the operating statements as elements making up the net profits. Instead, these Defendant Major Retailers should be segregating the illegal discounts and allowances from ordinary income, ordinary expenses and results of operations, and instead putting the billions of dollars of illegal discounts and allowances into a footnote as non-recurrent income. If they did this, they would be showing multi-billion dollar losses and would not be able to borrow and use their stock to make acquisitions as easily. They fail to report their illegal discounts and allowances and in the 2004 Complaint and Amended Complaint Plaintiffs allege that the selling Manufacturers fail to abide by the Sarbanes-Oxley Act to have systems in place detecting that they are selling to their top customers (such as Defendants Wal-Mart, Sam's Club, AutoZone and Advance Stores) at prices below cost or at substantially lower prices than they are selling to others, competitors, which practice is driving their competitors out of business and leaving the Manufacturer with an ever-increasing percentage of sales below cost to their most important customers.

Private and local governmental lawsuits are needed to enforce the RPA and stop these practices of defendants, and Person has a First Amendment right to express these ideas publicly, in his books and websites. The federal government has basically stopped enforcing the RPA, at least in the aggressive way that the FTC used to enforce the RPA. This aggressive enforcement stopped shortly after Richard M. Nixon was elected President. Starting at about this time, the Major Retailers including Wal-Mart started demanding and getting discriminatory prices, and discriminatory advertising and marketing programs, which enabled the Major Retailers to grow at the expense of the law-abiding independent retailers, and also caused wholesalers and manufacturers to merge to try to gain enough strength to offset these practices. Manufacturers are victims of the RPA violations and unless they are faced with civil lawsuits from disfavored

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

ARGUMENT

I. Federal Courts Are Enforcing the Robinson-Patman Act

The Robinson-Patman Act is not dead. Decisions by the United States Supreme Court, the Second Circuit Court of Appeals and various District Court Judges show that the RPA is being enforced by the courts. See *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535 (1990); *George Haug Co., Inc. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 1998-1 Trade Cases P 72,191 (2d Cir. 1998); *Tires Incorporated of Broward v. Goodyear Tire & Rubber Co.*, 295 F.Supp.2d 1349, 17 Fla. L. Weekly Fed. D 159 (S.D. Fla. 2003); *The Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F.Supp.2d 133 (S.D.N.Y. 2000).

II. This Litigation is Not Vexatious

This action is not "vexatious" litigation, which has been defined within the following quotation from *U.S. v. Gladstone*, 141 Supp.2d 438, 446 (S.D.N.Y. 2001):

> Although the Second Circuit has not defined these terms in the context of the Hyde Amendment, both the Fourth and Eleventh Circuits have held:
>
> By its plain language, vexatious means without reasonable or probable cause or excuse. A frivolous action is groundless ... with little prospect of success; often brought to embarrass or annoy the defendant. And, bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will.

This action has been brought with reasonable or probable cause; the action is not groundless: it has substantial prospects for success; it was not brought to embarrass or annoy any of the Defendants. There is no dishonest purpose or moral obliquity involved, or any mind affirmatively operating with furtive design or ill will.

Plaintiffs' memorandum of law in opposition to Defendants' anticipated motion to dismiss the Amended Complaint will provide detailed reasons why the action is meritorious, except that the issues of collateral estoppel, res judicata, stare decisis are fully discussed below.

It should be noted that **none** of the original Defendants that had settled with the Plaintiffs during the course of proceedings under the 2000 Complaint, as amended, have been included as Defendants in the 2004 Complaint.

The evidence obtained by discovery and at trial during in the 2000 action clearly shows that the Manufacturer Defendants have been giving substantially lower prices to the Major Retailer Defendants, as explained above (at pages 7-8).

III. Parties Stipulated that the 220 Dismissed Plaintiffs May Reactivate Their Claims within 6 Months of Trial Outcome; Judge Wexler Signed 2/13/04 Order Permitting Filing of the 2004 Complaint as Part of Plaintiffs' Timely Reactivation

During May, 2002, the parties were ordered by the assigned Magistrate Judge to organize the 2000 action to make it manageable, and the parties did, by reaching an agreement that 22 plaintiffs would remain active, and the remaining 220 plaintiffs would be dismissed, with the right to reactivate their claims by the filing of a letter of reactivation within 6 months after the trial verdict for the 22 plaintiffs (or any settlement of the 22 Plaintiffs' claims). The language in the 5/16/02 Stipulation (Exhibit 2 to moving Prager Declaration) reads in relevant part:

> 2. Each of the plaintiffs in the 2nd Amended Complaint who or which is not in the caption above is hereby dismissed without prejudice, and without loss of any claim for

relief asserted by any of them in the 2nd Amended Complaint, and without loss by any such plaintiff of any right to assert a claim for any damages which have resulted therefrom for such plaintiff from four years preceding the commencement of this action to the date this stipulation is so-ordered by the Court.

3. After completion of any trial (or after any settlement) of the claims of the above-captioned plaintiffs has taken place, the remaining plaintiffs (the "Dismissed Plaintiffs") have a period of six (6) months in which to reactivate their claims in the 2nd Amended Complaint, by the service and filing of a notice of reactivation of their claims (hereinafter, "Notice of Reactivation of Dismissed Plaintiffs and Claims"), with proof of service.

This letter reactivating the Dismissed Plaintiffs and Claims was filed on July 22, 2003, within the required 6-month period, with the required proof of service.

IV. Stare Decisis Is Applicable

Judge Wexler, over the objections of Defendants, signed an order permitting the Dismissed Plaintiffs to put their reactivated claims into a new complaint and file the new complaint (the 2004 Complaint). The plaintiffs did this, adding additional parties and claims to the claims of the 220 (formerly-Dismissed) Plaintiffs (and eliminate many of the related, "b", "c", etc., Plaintiff corporations).

Defendants made their claim at the time (see Exhibit 10 to moving Prager Declaration, letter dated 9/29/03) that, because the trial went against the 22 Plaintiffs, the remaining Plaintiffs should not be able to pursue their reactivated claims (stating it would be "a baseless re-litigation of a unanimous jury verdict"). Judge Wexler held in favor of the Plaintiffs' position in his 2/13/04 "Order of Dismissal", which amounts to *stare decisis* or a highly-persuasive decision as to this 2004 action. The Order of Dismissal dated 2/13/04 states (as substantially alleged in Paragraph 73-K of the 2004 Complaint, and Amended Complaint):

Whereas part of this action involving 22 plaintiffs (the "22 Plaintiffs") having come before the Court for a trial by jury as to liability and the issues for the 22 Plaintiffs having been tried and the Clerk of the Court having entered a final Judgment on January 28, 2003 against the 22 Plaintiffs and in favor of defendants; and the Second Circuit having

> affirmed the Judgment; and pursuant to Stipulation Amending the 2nd Amended Complaint and Dismissing Certain Parties and Issues dated May 16, 2002 (the "5/16/02 Stipulation") the approximately 220 remaining plaintiffs have reactivated their previously-dismissed claims on a timely basis, and the Court deciding that any such claims should be made pursuant to the filing of a new complaint, subject to the terms and conditions of the Stipulation, it is
>
> **ORDERED, ADJUDGED AND DECREED:** that this reactivated case involving approximately 220 plaintiffs (not including any of the 22 Plaintiffs) is hereby dismissed, and the Clerk of the Court is hereby directed to dismiss the complaint without prejudice with respect to the 220 Plaintiffs identified as reactivating their claims in the July 22, 2003 Notice of Reactivation of Dismissed Plaintiffs and Claims, with any new complaint(s), wherever filed, to be subject to the terms and conditions of the 5/16/02 Stipulation.

The 5/16/02 Stipulation permitting reactivation did not restrict the 220 (or 111) Dismissed Plaintiffs from reactivating their case and claims if the 22 Plaintiffs lost at their trial, for the many good and sufficient reasons set forth below. There was no agreement that if the 22 Plaintiffs prevailed at trial that the 220 Dismissed Plaintiffs would have any special advantages, such as establishment of liability of any of the Defendants to them. The Stipulation envisioned that either way, whether the 22 Plaintiffs won, lost or settled, the 220 Dismissed Plaintiffs could reactivate their claims, which they did (as to 111 or 129 of the 220 Dismissed Plaintiffs). The total number of Plaintiffs in the Amended Complaint is approximately 129 plus 22 or 151. When subtracting the 18 related Dismissed Plaintiffs, there are 133 Plaintiffs in the Amended Complaint (the "133 Plaintiffs").

Judge Wexler reflected this interpretation of the 5/16/02 Stipulation in his 2/13/04 Order of Dismissal, permitting the Dismissed Plaintiffs (who had already reactivated their claims) to file one or more new complaints in any courts and that such complaint(s) be subject to the terms and conditions of the 5/16/02 Stipulation. See Exhibit 2 to the Prager Declaration.

V. The January 2003 Trial Consisting of 5 Auto Parts, 5 Wholesaler, Direct-Purchasing Plaintiffs and 4 Manufacturers from Whom the 5 Plaintiffs Purchased Was Acknowledged by the 22 Plaintiffs to Be Binding Upon the 22 Plaintiffs -- But This Trial Structuring Occurred on the Eve of Trial, 8 Months after the 220 Plaintiffs Had Been Dismissed without Prejudice from the Action and Is Not Applicable to or Binding upon Them

It should be noted that the trial for the 22 Plaintiffs (all wholesalers buying directly from their respective Manufacturers) involved only 5 specific auto parts (out of the many hundreds of thousands of different auto parts purchased by the 22 Plaintiffs, and out of the 25 different auto parts Plaintiffs had selected and identified for trial): each of such 5 parts was manufactured by one of four Manufacturers (out of the 16 Manufacturers listed in the 2000 Complaint, as amended); and that only 5 Plaintiffs were allowed to testify (Eric Prevatte for Pltf. #51, Kevin Sullivan for Pltf. #64, Jeff Levine for Pltf. #73, John Bokencamp for Pltf. #74; and Irwin Young for Pltf. #110) - out of Plaintiffs' list of 32 witnesses - about their purchases of 2 or 3 of the 5 auto parts (out of the 22 WD/Wholesaler Plaintiffs involved in the case).

The 5 auto parts for testimony at trial were: (i) **Cardone's** 42-144 window lift motor; (ii) **Cardone's** 48-158 wiper motor; (iii) **Fel Pro's** MS92758 exhaust manifold gasket; (iv) **Allied's Fram** Oil Filter PH8A; and (v) **Tenneco's Monroe** Shocks 71831. Only Cardone is a Manufacturer Defendant in the Amended Complaint.

This trial was considered binding on the 22 Plaintiffs, and treated as such by the 22 Plaintiffs, without question, in subsequent motions and appeal. Any appellate issues were made for all 22 Plaintiffs instead of being limited to the 17 Plaintiffs that did not have their claims heard during the trial.

For many good reasons set forth below, this trial binding on the 22 wholesaler, direct-purchasing Plaintiffs is not applicable to the 220 (or 111) Dismissed Plaintiffs, the vast majority of which are jobbers, buying their auto parts indirectly through wholesalers that for the most part were not part of the group of 22 wholesaler Plaintiffs.

VI. The Doctrine of Res Judicata Is Not Applicable - The Claims Are Different; Most of the Dismissed Plaintiffs Are Indirect Purchasers, Not Wholesaler/Direct Purchasers

Defendants claim that the doctrine of res judicata applies and that the action should be dismissed for such reason. The Defendants are in error. The elements of res judicata are not met. Res judicata is analyzed and its elements set forth in *Commer v. McEntee*, 283 F.Supp.2d 993, 999 (S.D.N.Y. 2003):

> It is also "well settled, however, that a prior judgment 'cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.' " *Id.* (*quoting Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955)*).
>
> In order to determine "[w]hether a claim that was not raised in the previous action could have been raised therein," the court must consider "whether the same transaction or a connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." Marvel Characters, 310 F.3d at 287.
>
> In order [t]o determine whether two actions arise from the same transaction or claim, [the Court] look[s] to whether the underlying facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations ...
> *Id.* (*quoting Pike, 266 F.3d at 91*).
>
> To establish defense of res judicata, a party must show that (1) previous action involved an adjudication on merits, (2) previous action involved the parties or those in privity with them, (3) claims in subsequent actions were, or could have been raised in prior action.

The prior action, severed from the instant action, did involve an adjudication on the merits for the 22 Plaintiffs involved, but not for the other 220 Plaintiffs. Their claims had been dismissed without prejudice with the right to reactivate them by letter, which was done on a timely basis. The court permitted them to file a new complaint (the 2004 Complaint) to effectuate the right they had to continue their litigation under the Stipulation and Agreement dated May 16, 2002.

The 220 Plaintiffs are not in privity with the 22 Plaintiffs. Each of the 220 Plaintiffs had its own claims involving different manufacturers, Major Retailer competitors, auto-parts suppliers and auto parts and auto-part line purchases. [Some of the 220 Plaintiffs were corporate affiliates

of one or another of the 22 Plaintiffs and each of such 22-Related Plaintiffs was excluded as a Plaintiff in the 2004 Complaint - for example see Plaintiffs ## 64a, 67a, 73a, 74a, 97a and 120 as to which all related Plaintiffs were excluded, as to which corporations related to the 22 Plaintifffs the doctrine of privity arguably might have applied.] Thus, all of the 133 Plaintiffs in the 2004 Amended Complaint are unrelated to each other, other than being named as Plaintiffs in the 2000 and 2004 Complaints, but only 22 as Plaintiffs in the 2nd Amended Complaint or 3rd Amended Complaint filed in the 2000 action, as to which a trial during January 2003 took place.

Many of the claims in this present 2004 Complaint were not possible to be raised in the 2000 Complaint, as amended. First of all, none of the manufacturers had been included as defendants in the initial litigation or trial. This 2004 Complaint is the first time that any of the manufacturers became a Defendant. The claims of the 22 Plaintiffs in the 2000 action date back to the 4-year period preceding the filing of the 2000 Complaint (February, 1996 through February, 2000). The 22 Plaintiffs are alleging claims in the 2004 Complaint dating back only to October, 2000. This means that none of the claims of the 22 Plaintiffs in the 2004 Complaint were being made by any of the 22 Plaintiffs against any of the defendants in the 2000 Complaint.

As to the Dismissed Plaintiffs whose claims have been reactivated, their claims go back to 1996, four years prior to the filing of the 2000 Complaint, as agreed to in the Stipulation dated May 16, 2002. Even as to these Dismissed Plaintiffs, however, their claims against the Manufacturer Defendants only go back 4 years from the 10/27/04 date of filing of the 2004 Complaint.

Accordingly, there can be no res judicata because the claims in the 2004 Complaint (other than for the Dismissed Plaintiffs having claims going back to 1996 against the Major Retailer Defendants), there are no claims being made in the 2004 Complaint that were alleged in or could have been alleged in the 2000 Complaint. The court during trial limited Plaintiffs' documentary evidence to documents preceding the date of filing of the 2000 Complaint.

Accordingly, there was no trial on defendants' alleged RPA violations taking place subsequent to the date of filing of the 2000 Complaint.

As a result of the 2000 filing date of the 2000 Complaint, the claims of the 22 Plaintiffs tried in January, 2003 were claims against the AutoZone Defendants, Advance Stores (and Discount Auto) dating bacl to a 4-year period from February, 1996 to February, 2000. (The 22 Plaintiffs' claims against Defendants Wal-Mart and Sam's Club were not tried at all.)

In addition, the claims of any one of the 22 or 220 Plaintiffs differed in many respects from the claims of all or most other Plaintiffs in various ways:

1. Most importantly, most of the Dismissed Plaintiffs did not buy directly from the Manufacturer Defendants. Their purchases were made from wholesalers or "WD's" which made direct purchases from the Defendant Manufacturers, and then resold the auto parts to the "Jobber" Plaintiffs. See Appendix C. Most of these Jobber Plaintiffs did not buy from any of the 22 WD Plaintiffs and there has been no discovery to learn at what prices these supplying WD's bought their auto parts from the Defendant Manufacturers.

2. The locations of the Plaintiffs' places of business – the Plaintiffs, with few exceptions, were from different states or towns in the United States:

3. The competition of the Plaintiffs was different, as to the specific competitors (including a mix of AutoZone, Advance Stores, CSK, Wal-Mart, Sam's Club, Keystone Automotive Operations, Pep Boys, O'Reilly Automotive, and Discount Auto Parts, ranging from only one competitor up to all of the foregoing as competitors):

4. The mix of products purchased directly from any of the 16 (or 18) manufacturers listed in paragraph 45 of the 2000 and 2004 Complaints (M#01-M#16 or M#01-M#18), as amended (but not as defendants), ranging from none (as to most of the plaintiffs, being indirect purchasers) up to most of the 16 manufacturers:

5. The mix of products purchased indirectly from any of the 16 manufacturers listed in paragraph 45 of the 2000 Complaint, as amended (but not as defendants), ranging from none (as

to some of the plaintiffs, called "Jobbers", which made all of their purchases directly) up to many or most of the 16 manufacturers (but not as to any of the 22 Plaintiffs, all of whom were "Wholesalers" or "WD's").

6. The mix and amount of products and product lines (as described in paragraph 45, M#01-M#16) purchased directly or indirectly from any specific manufacturer listed in paragraph 45 of the 2000 Complaint, ranging from no purchases up to millions of dollars in purchases per year as to direct purchases or from no purchases up to perhaps $100,000 per year in indirect purchases.

7. The purchase price for any of the purchases, differing as to price because of various factors including (i) whether the Plaintiff was buying directly or indirectly; (ii) the volume of the purchases being made by the Plaintiff at any one time or in the aggregate during the year; (iii) the location of the Plaintiff; (iv) whether the Plaintiff was purchasing from a wholesaler or "WD" or directly from a manufacturer through a buying group, and which buying group was involved, with each buying group having a separate agreement and price per unit with each manufacturer.

8. The dollar amount of the Plaintiff's damages, which is Plaintiff specific, and then depending on which mix of Major Retailer and Manufacturer Defendants is involved.

9. The specificity of the evidence, being documents or trial testimony showing generally the relationship between AutoZone or Advance Stores and a specific one of the 16 listed manufacturers as of the date of the document (usually during the 4-year period preceding the filing of the 2000 Complaint).

10. Various causes of action in the 2004 Complaint, as amended by the Amended Complaint, were not included in the 2000 Complaint, as amended, including (i) Count II, involving an RPA claim based on AutoZone's Pay-on-Scan program started in late 2002; (ii) Count III, involving a claim that Wal-Mart and Sam's Club "starting in late 2002" required manufacturers to incur RFIC development expenses for Wal-Mart, in violation of 2(a)/2(f) and 2(d)/2(e); (iii) Count IV, involving claims against Manufacturers only under 2(d)/2(e) for failing

to make available proportionate advertising and promotional moneys to the 133 Plaintiffs: and (iv) Count V, involving a claim against original defendants in the 2000 action for fraudulently forcing $525.000 in unnecessary warehouse costs upon the 22 Plaintiffs in the initial action (claims accruing after the filing of the 2000 Complaint, as amended) .

Because of these above factors, there is no res judicata applicable as to any of the claims made by any of the Plaintiffs in the 2004 Complaint or Amended Complaint. The claims by the Dismissed Plaintiffs involve different transactions, a different time period, different product mixes, different manufacturers, different prices, and different damages from any of the claims of the 22 Plaintiffs that went to final judgment. Likewise, any claims by the 21 (of the 22) Plaintiffs in the 2004 Complaint have been limited to events subsequent to the filing of the 2000 Complaint, which filing date was the cutoff date for the January 2003 trial involving the 22 Plaintiffs.

Judge Wexler's 2/13/04 Order of Dismissal makes it clear, by necessary implication, that he did not believe the trial of the 5 Plaintiffs in January 2003 precluded the Dismissed Plaintiffs from pursuing their claims and permitted the instant 2004 Complaint to be filed on behalf of the Dismissed Plaintiffs, instead of dismissing their claims an ordering entry of a final judgment.

VII. The Doctrine of Collateral Estoppel Is Not Applicable

The elements of collateral estoppel under New York law are set forth in *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995), as follows:

> Under New York law, the doctrine of issue preclusion only applies if (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding. See ... [2 citations omitted]. Issue preclusion will apply only if it is quite clear that these requirements have been satisfied, lest a party be "precluded from obtaining at least one full hearing on his or her claim." ... [1 citation omitted.] The party asserting issue preclusion bears the burden of showing that the identical issue was previously decided, while the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in the prior proceeding. ... [1 citation omitted.]

A. The Issues in Question Were Not Actually and Necessarily Decided in the Prior Trial or Final Judgment for the 22 Plaintiffs

The trial involving the 22 Plaintiffs related to the purchase by 5 of the 22 Plaintiffs of 1 specified auto part from one, two or three of the 16 Manufacturers. Seventeen of the 22 Plaintiffs were not permitted to testify or assert their claims (by reason of the court-imposed limitation of 5 fact witnesses). Only 5 parts (1 for each of 3 manufacturers and 2 for 1 manufacturer) out of the many hundreds of thousands of different auto parts (with different SKU numbers) purchased by the 22 Plaintiffs that were involved at the trial.

None of the 220 Dismissed Plaintiffs testified or had the opportunity to testify (their cases had already been dismissed without prejudice, with the right to be reactivated after the trial involving the 22 Plaintiffs was finished).

The time period for the alleged Section 2(a) violations by AutoZone, Advance Stores (and affiliate Discount Auto, dismissed prior to the end of trial) was limited to the four-year period preceding the filing of the 2000 Complaint, in February, 2000. Thus the time period ran from February, 1996 to February, 2000.

Violations of Sections 2(a)/2(f) of the RPA by 12 of the 16 (or 18) listed manufacturers were not at issue in the trial, and because no Manufacturer was a defendant there was no issue at any time from filing of the 2000 Complaint through the final judgment and appeal as to the Manufacturers violating Sections 2(d)/2(e) of the RPA. These 2(d)/2(e) claims now predominate in the current action because most of the Dismissed Plaintiffs are Jobbers, purchasing their auto-parts indirectly, and having no 2(a)/2(f) claims against any of the Defendants except for injunctive relief.

Most of the claims in the 2004 Complaint (see Counts II through V) were not made in the 2000 Complaint, as amended, and could not have been. For example, the claims involving Wal-Mart and Sam's Club requiring manufacturers to develop RFIC chips for Wal-Mart at the manufacturers' expense; AutoZone's attempts to have manufacturers get paid by AutoZone only

after AutoZone resold their products (called "Pay on Scan"): Plaintiffs' RPA claims against the Defendant Manufacturers for violation of Section 2(d)/2(e) for discriminatory advertising and promotional programs; and the original Defendants' alleged fraudulent inducement to obtain an order requiring the 22 Plaintiffs to incur more than $500,000 in needless warehouse expenses in the 2000 action – all occurred several years after the filing of the 2000 Complaint (or as to Count IV, 9 to 57 months after filing of the 2000 Complaint.

Also, see the factors under the heading "**VI. The Doctrine of Res Judicata Is Not Applicable - The Claims Are Different; Most of the Dismissed Plaintiffs Are Indirect Purchasers, Not Wholesaler/Direct Purchasers**" above for additional reasons that the issues involved in the present action were not actually or necessarily decided.

Clearly, there is no basis for any application of the doctrine of collateral estoppel to any of the claims within the 2004 Complaint. Even the claims of the 22 Plaintiffs are made only as to events taking place after the filing of the 2000 Complaint; none of the 22 Plaintiffs is making any claims for relief against any of the manufacturers from whom the Plaintiff is directly purchasing its auto parts: none of the corporations related to the 22 Plaintiffs (any "b", "c", "d" affiliated corporations listed immediately together with a Plaintiff in paragraph 6 (subparagraphs 1-145) of the initial complaint, as amended, e.g. 22 Plaintiffs 64a, 67a, 73a, 74a, 97a and 120) has been included as a Plaintiff in the 2004 Complaint.

B. The Plaintiffs Did Not Have a Full and Fair Opportunity To Litigate the Issues in the Prior Proceedings

The 220 Plaintiffs (reduced to 111 because of elimination of the "a", "b", "c" Plaintiffs related to the 22 Plaintiffs) did not have any opportunity to litigate the issues in the prior proceedings, under the 2000 Complaint. They were dismissed from the 2000 action (prior to the 2nd Amended Complaint) without prejudice prior to the start of discovery, and remained

dismissed until after the entry of final judgment. They produced no documents and obtained no document production. They were not deposed, and no depositions were taken on their behalf. They answered no interrogatories and submitted no interrogatories for response by any of the defendants in the 2000 Complaint, as amended.

For the additional reasons set forth above under the headings "**VI. The Doctrine of Res Judicata Is Not Applicable ....**" and "**VII - B. The Plaintiffs Did Not Have a Full and Fair Opportunity To Litigate the Issues in the Prior Proceedings**", none of the 220 Dismissed Plaintiffs had a full or fair opportunity, or any opportunity at all, to litigate the issues in the prior proceedings. In addition, as stated above, the issues now involved in the 2004 Complaint were not part of the 2000 Complaint because of the time period involved, the products involved at trial, the persons who testified (all wholesalers buying direct) and because some of the claims were not made at all in the 2000 Complaint because they arose subsequent to the filing of the 2000 Complaint

Also, the original 22 Plaintiffs did not have a full and fair opportunity to litigate the issues in the prior proceedings because the time period for the claims against the Defendant Major Retailers is wholly different (after the filing of the 2000 Complaint, instead of before), and many of the claims in the 2004 Complaint were not in existence at the time of the filing of the 2000 Complaint, as amended. See the additional reasons set forth above under the headings "**V. The Doctrine of Res Judicata Is Not Applicable ....**" and "**VI - B. The Plaintiffs Did Not Have a Full and Fair Opportunity To Litigate the Issues in the Prior Proceedings**".

VIII. The Present Action with 133 Plaintiffs Is Manageable by Appropriate Stipulation for Trial Structuring

The action with 133 Plaintiffs is manageable with an appropriation stipulation, to be so-ordered by the Court, setting forth such trial provisions as (i) the minimum number of Plaintiffs and Plaintiffs' fact witnesses: (ii) the maximum number of expert witnesses; (iii) the minimum number of Manufacturers and Manufacturers parts or product lines; and (iv) that liability would be established (perhaps 50% if half of the selected Plaintiffs prevailed in proving liability at trial whereas the other 50% did not) or no liability at all if all of the Plaintiffs at trial failed to establish liability. Although 5 parts. 4 manufacturers and 5 plaintiffs is clearly insufficient, there are appropriate numbers (possibly 25, 8 and 10) for the parties to be able to avoid further trials as to liability, and probably as to damages, if the Defendants wanted to venture into an agreement in that area. This is particularly so because much of this case involves damages under 2(d)/2(e).

CONCLUSION

For the reasons set forth above, it is respectfully requested that Defendants' motion (i) to dismiss the 2004 Complaint be denied as moot, and (ii) to enjoin Plaintiffs be denied in its entirety as a meritless motion.

New York, New York
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