UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FELDER'S COLLISION PARTS, INC.	:	CIVIL ACTION
	:	
VERSUS	:	NO. 3:12-cv-00646
	:	
GENERAL MOTORS COMPANY,	:	JUDGE JAMES J. BRADY
ALL STAR ADVERTISING AGENCY	:	
INC., ALL STAR CHEVROLET NORTH, LLC,	:	MAGISTRATE JUDGE
ALL STAR CHEVROLET, INC., and	:	STEPHEN C. RIEDLINGER
DOE DEFENDANTS 1-25	:	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

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Defendant General Motors LLC ("GM") and the All Star Defendants submit this memorandum in support of their Motion to Dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6).

SUMMARY OF ARGUMENT

On April 16, 2013, this Court entered a ruling in which it identified numerous pleading deficiencies in the predatory pricing claim that plaintiff Felder's Collision Parts, Inc. ("Felder's") asserted. Rec. Doc. 32. The Court also granted Plaintiff leave to amend and, in a subsequent order, permitted Felder's to conduct broad-based discovery so that it could allege facts in support of its claim. Rec. Doc. 36. Despite these opportunities, Felder's offers nothing new in the First Amended and Supplemental Complaint ("First Amended Complaint") to support below-cost pricing let alone an economically plausible predatory pricing claim.

The First Amended Complaint and the attached exhibits (the same exhibits attached to the original complaint) describe a GM nationwide rebate program that permits OEM parts dealers to sell collision parts for **profits** that ranged from a few dollars to over $80 per part. Rec. Doc. 50 ¶¶ 26-20, 32-34 & Exhibits 1-4. Despite these profits, Felder's stubbornly insists that the All Star Defendants engaged in below-cost pricing because their resale prices for collision parts were less than the cost of those parts before rebates.[1] *Id.* ¶¶ 36-38. This Court addressed this exact issue in its April 16, 2013 ruling, holding that rebates GM paid to the All Star Defendants must be taken into account when determining whether the All Star Defendants sell below cost. Doc. 32 at 23-26 ("More is required under the Fifth Circuit Standard" than focusing only on the cost that the All Star Defendants paid to GM and the All Star Defendants' resale

[1] Felder's does not allege that GM has engaged in below-cost pricing, nor could they consistent with their Rule 11 obligations given that GM produced documents in discovery demonstrating that GM makes a profit on every part that is in the program.

price). Despite undertaking broad-based discovery and having months to re-plead, Felder's has failed to plead the most basic element of its claim—below-cost pricing.

The First Amended Complaint makes other admissions that are equally fatal to Felder's predatory pricing claim. Significantly, Felder's concedes that Keystone Automotive Industries, Inc., "the country's largest aftermarket distributor," participates in the alleged market and has been able to "withstand" the alleged predatory pricing scheme because it has the competitive advantage of "size" and "diversification." Rec. Doc. 50 ¶ 54. The presence of Keystone in the market renders the predatory pricing scheme wholly implausible because Keystone's continuing presence in the market, without more, would prevent the GM or All Star Defendants from raising prices in the future. Additionally, Felder's concedes that the "business of automobile collision parts is driven by the automobile insurance industry." *Id.* ¶¶ 16-18. This presence of customers with significant buying power makes the predatory pricing scheme all the more implausible.

In short, the First Amended Complaint boils down to a claim that Felder's is unable to compete because the All Star Defendants sell collision parts at lower prices than Felder's while making a profit and responding directly to consumer demands. The First Amended Complaint fails to allege facts to support a geographic market, market power, or below-cost pricing. Felder's does not even bother to allege a single example in which it lost a particular sale or customer to the All Star Defendants or provide any facts to support the conclusion that its lack of success can be attributed to anything other than its own competitive decisions.

Despite ample opportunity to conduct discovery, nothing in the First Amended Complaint raises antitrust concerns. Permitting Felder's to proceed with costly and disruptive litigation under these circumstances will chill price competition and harm consumers—an outcome that the United States Supreme Court specifically cautioned against in predatory pricing cases.

Matsushita Elec. Industrial Co. v Zenith Radio Corp., 475 U.S. 574, 594, 106 S.Ct. 1348, 1360 (1986) (holding "mistaken inferences in [predatory pricing] cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

THE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT

As illustrated by Exhibit 1 to this memorandum, there is little difference between the allegations in the original complaint and the allegations in the First Amended Complaint. *See* Ex. 1 (redline comparison of the First Amended Complaint to the Complaint).

The First Amended Complaint claims that the All Star Defendants "operate the largest parts distribution center in Louisiana at more than 50,000 square feet and $5 million in inventory," but provides no information about the number or size of other distribution centers in Louisiana, Mississippi, or elsewhere. Rec. Doc. 50 ¶ 19. Felder's even fails to allege anything about its own size and inventory. The only other competitor identified by Felder's is Keystone Automotive Industries, Inc. ("Keystone"). *Id.* ¶ 54. Felder's describes Keystone as "the country's largest aftermarket parts distributor" and states that Keystone's "size" and "diversification" have allowed it to "withstand the pressures from the defendants' predatory pricing conduct." *Id.*

The First Amended Complaint also explains that the "business of automobile collision parts is driven by the automobile insurance industry which, in most cases, pays for the repairs of damaged automobiles." *Id.* ¶ 16. According to the First Amended Complaint, "[i]nsurance companies are motivated, primarily, by a desire to have repairs completed in the shortest period of time and at the lowest price . . . [and] they often push body shops to purchase collision parts that will be delivered promptly, but at a low cost." *Id.* ¶ 17. Felder's alleges that the GM rebate program responded directly to the insurance companies' demand for low prices: "Understanding

these market conditions, entities such as All Star and GM began searching for ways to deliver collision parts for which there an aftermarket alternative at a lower cost." *Id.* ¶18.

Despite GM and the All Star Defendants having produced thousands of pages of documents, the First Amended Complaint relies on the same exhibits and pricing allegations found in the original complaint. According to Felder's, the rebate program enabled authorized parts dealers to lower prices on thousands of GM "OEM" parts "at or below the price of comparable collision parts . . . offered by sellers of after-market collision parts, such as Felder's." *Id.* ¶ 22. Felder's claims that Exhibit 1 to the First Amended Complaint represents an example of a promotional circular in which GM advertised to collision centers that its authorized dealers can offer "highly competitive pricing on … Genuine GM Parts" if the collision centers take certain steps, such as providing the dealer with "a complete insurance repair estimate." *Id.* ¶ 26 & Ex.1. Felder's also claims that GM "made it easy for collision parts customers, such as body shops, to get OEM GM parts at 'Bump the Competition' discounts." *Id.* ¶ 26.

Felder's then describes how the rebate program allegedly worked through several examples that reference Exhibits 2, 3, and 4 of the Complaint. *Id.* ¶¶ 27-30, 32-34. According to Exhibit 2, a dealer: 1) may offer an eligible part for up to 33% less than the part's specified "aftermarket average" *list* price; and 2) claim from GM the difference between the part's original dealer "cost" and the discounted price, together with 14% of the dealer's original "cost" as "profit." Thus, after selling the part and making the claim to GM, the dealer ends up with a 14% profit over the part's original dealer cost. As shown in Exhibit 3, dated January 1, 2009, the 14% profit at that time could range from a few dollars to over $80 per part, depending upon the part's original dealer price. *See id.* Ex. 3 (column "Maximum Part 2 Claim Amt"). As such, under the

program the dealer is guaranteed a profit on each transaction, but the amount of profit depends on the number and kind of parts required to repair a vehicle as specified in the repair estimate.

Finally, despite conducting extensive discovery, Felder's offers no new allegations about the average variable costs for GM or the All Star Defendants. Instead, in complete disregard of this Court's April 16, 2013 warning that "[m]ore is required under the Fifth Circuit standard," the First Amended Complaint—like the original complaint—"focuses on (1) the cost that the Defendant-dealers paid to GM and (2) the Defendants-dealers sales price." Doc. 32 at 26.

LAW AND ARGUMENT

The First Amended Complaint asserts claims for attempted monopolization and conspiracy to monopolize under Section 2 of the Sherman Act. The First Amended Complaint also drops the Robinson-Patman Act claim asserted in the original complaint in favor of a claim under Section 1 of the Sherman Act. In addition to the Sherman Act claims, Felder's alleges violations of Louisiana state antitrust laws and the Louisiana Unfair Trade Practices and Consumer Protection Act. Each of these claims is premised on the allegation that a GM rebate program for collision parts permits the All Star Defendants to engage in predatory pricing.

The Fifth Circuit has held that "the standard for inferring an impermissible predatory pricing scheme is high." *FMC Corp.*, 170 F.3d at 527-28. This exacting standard is consistent with the "extreme skepticism" with which the Supreme Court approaches these claims, *id.*, and is necessary because "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Industrial Co.*, 475 U.S. at 594, 106 S.Ct. at 1360; *Taylor Publishing Co.*, 216 F.3d at 478. A predatory pricing scheme also is "difficult if not impossible to successfully complete and thus unlikely to be attempted by rational businessmen." *FMC Corp.*, 170 F.3d at 528.

The Court provided Felder's with a roadmap for stating a claim for attempted monopolization based on predatory pricing in its April 16, 2013 ruling and then permitted Felder's to conduct discovery to obtain the facts necessary to support its claim. As set forth below, however, discovery revealed nothing of value to Felder's. The First Amended Complaint makes no reference to the thousands of pages of documents that GM and the All Star Defendants produced with respect to the GM program and provides none of the factual detail that the Court demanded in its April 16, 2013 ruling. Rather, Felder's continues to rely on labels, conclusions, and legal argument to disguise the implausibility of its predatory pricing theory.

A. ATTEMPTED MONOPOLIZATION

To state a claim for attempted monopolization, Felder's must allege facts to support the conclusion "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456, 113 S.Ct. 884, 890-91(1993).

1. Below-Cost Pricing

To state a viable predatory pricing claim, a plaintiff must allege facts to support the conclusion that the defendant is charging prices below its average variable cost. *Taylor Publishing Co. v. Jostens, Inc.*, 216 F.3d 465, 478 n.6 (5th Cir 2000). In the First Amended Complaint, Felder's accuses the All Star Defendants of selling parts to collision centers below cost "at the time of sale" because their prices were below the "dealer cost" shown on the program materials. Felder's concedes, however, that the GM rebates allowed the All Star Defendants to sell collision parts at a profit. *See, e.g.,* Rec. Doc. 50 ¶¶ 32-37. Significantly, the Court specifically refused to disregard the impact of the GM rebates in its April 16, 2013 ruling, holding that "price is measured after considering any discounts or rebates." Rec. Doc. 32 at 23-26. Unable to identify a single instance in which the All Star Defendants sold collision parts at a

price below the price they paid for the parts after taking into account the rebates, Felder's responds to this holding in the First Amended Complaint in two equally ineffective ways.

First, although it admitted in the original complaint the rebates allowed the defendants to "recoup its losses," Felder's periodically qualifies this admission in the First Amended Complaint by claiming that the rebates permitted the All Star Defendants to only "partially" recoup their losses. Rec. Doc. 50 ¶¶ 33-35. These conclusory qualifications are meaningless because they are directly contradicted by the *facts*, as opposed to the conclusions, Felder's sets forth in the First Amended Complaint. Several paragraphs of the First Amended Complaint show, by reference to specific examples of how the program works, that the All Star Defendants do not merely "recoup their losses" but rather make a 14% profit. *Id.* ¶¶ 27-30. Furthermore, the Exhibits attached to the First Amended Complaint demonstrate that GM designed the rebate program to ensure that its dealers profited from collision parts sales. *Id.* Exhibits 1-4. Moreover, in other parts of the First Amended Complaint, Felder's readily admits that the All Star Defendants profited from their sales under the GM rebate program. *Id.* ¶ 23 ("After a sale below AVC to a body shop of collision center is complete, GM promises to kick-back to the All Star Defendants and the John Doe Defendants 1-25 at a future date the difference between the cost of the part paid to GM by the All Star Defendants and the John Doe Defendants, plus an alleged recoupment or measure of back-end 'profit.'"); *id.* ¶ 38 ("The All Star Defendants' ability to recoup its losses from GM is an inducement to engage in predatory pricing.").

Felder's also adds three paragraphs to the First Amended Complaint in which it makes a legal argument challenging the Court's conclusion that rebates should be part of the below cost pricing equation. *Id.* ¶¶ 36-38. In these paragraphs, Felder's does not offer any new facts. Nor does it offer any legal support for its argument. This Court correctly held that rebates should be

added to the discounted price in constructing the full price of the transaction and, in the absence of an intervening decision by the Fifth Circuit, should resist any effort to revisit the issue. *FMC Corp.,* 170 F.3d at 533 n. 15; *see also American Academic Suppliers v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1322 (7th Cir. 1991) ("[P]romotional discounts raise no antitrust problems . . . though often they are below incremental cost in a superficial sense (Superficial because they may be above that cost when the promotional value of the discounts is added to the discounted price, as it should be to construct the full price with which to compare incremental cost.)").

The below-cost pricing allegations also fail because Felder's, ignoring this Court's admonition, parses a single transaction into multiple sub-parts and focuses on the cost and resale price of a single collision part in a futile effort to identify examples of below-cost pricing.[2] Rec. Doc. 50 Ex. 1 (explaining that the collision center must provide a copy of the "complete insurance repair estimate" to the GM dealer to "take advantage of savings."). In doing so, Felder's ignores that transactions often involve multiple collision parts and that any calculation of average variable costs and profits requires an assessment of the entire transaction. The Court provided Felder's with an opportunity to conduct discovery on this exact issue so it could do more than focus on "(1) the cost that the Defendant-dealers paid to GM and (2) the Defendants-dealers sales price." Doc. 32 at 26. Despite having received this explicit instruction and expansive discovery of GM and the All Star Defendants, Felder's failed to undertake the exploration of costs and profits required by the April 16, 2013 ruling. Rec. Doc. 32 at 26.

2. Market Definition

"As a predicate to an attempted monopolization claim, a plaintiff must show that the defendant has significant market power." Doc. 32 at 9. As explained by the Court, in the

[2] As discussed above, Felder's failed to identify a single part that was sold below cost after taking rebates into account and admits that the All Star Defendants sold at a profit.

absence of market power, "it is unlikely that a plaintiff will be able to 'show a dangerous probability that [the defendant] will gain monopoly power in' the relevant market, as required for an attempted monopolization claim." *Id.* (citing *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 Tangipahoa Parish*, 309 F.3d 836, 840 (5th Cir. 2002)). As such, in order to prevail on its attempted monopolization claim, Felder's has an obligation to allege facts to support the conclusion that GM and the All Star Defendants have market power such that they could charge monopolistic prices if they drove Felder's from the market.

In its April 16, 2013 ruling, the Court cautioned that an "adequate definition of the relevant market is critical because it 'provides the framework against which economic power can be measured.'" Rec. Doc. 32 at 9 (citing *Jayco Sys., Inc. v. Savin Bus. Machines Corp.*, 777 F.2d 306, 319 (5th Cir. 1985)). The Court then concluded that Felder's had failed to allege facts to support a relevant geographic market because it did "not address whether consumers could practicably turn to other geographic areas for parts, nor does Felder's specify whether competing dealers from outside areas could come into the market." *Id.* at 11. The Court instructed Felder's to "allege further detail regarding . . . the area of effective competition, whether buyers can practicably turn to other sellers for supplies, and whether other dealers can reasonably move into the market to compete." *Id.* at 12. Felder's completely ignored this Court's directive and alleges nothing new in the First Amended Complaint on this crucial aspect of the case.

The only difference between the geographic market allegations in the original complaint and First Amended Complaint is that the First Amended Complaint identifies specific parishes and counties in Louisiana and Mississippi in which Felder's and the All Star Defendants allegedly sell collision parts in competition with each other. Rec. Doc. 50 ¶ 15. Felder's does not say anything about whether body shops in these areas obtain collision parts from vendors

operating in Mobile, Birmingham, Memphis, Houston, Dallas, or other parts of the country. Nor does Felder's address whether dealers in other parts of the country could move into the market to compete or whether Felder's operates in areas outside its proposed geographic market.

The First Amended Complaint, if anything, suggests a geographic market much larger than the one proposed by Felder's. For example, Felder's is located in Baton Rouge and alleges that it competes for business in areas as far away as Jackson, Mississippi and Lake Charles, Louisiana. Felder's also alleges that a competitor in Shreveport competed in Alexandria (*id.* ¶ 53) and that another competitor, Keystone, has a national presence by virtue of its status as the "country's largest aftermarket parts distributor." *Id.* ¶ 54. The only inference that can be drawn from these allegations is that collision parts distributors are capable of competing effectively in geographic areas hundreds of miles away from where they are located. Indeed, the First Amended Complaint does not allege any facts to suggest that metropolitan areas similarly distant from Jackson (e.g., Memphis) and Lake Charles (e.g., Houston) should be excluded from the market. Yet Felder's fails to include Shreveport, Houston, Memphis, Birmingham, and Dallas in its geographic market and provides no explanation for why the market should not be national in scope when aftermarket and OEM distribution centers can deliver parts to Louisiana and Mississippi via overnight delivery from anywhere in the country.

Additionally, Felder's proposed geographic market definition consisting of several state parishes and counties is implausible because it makes no economic sense. Without further allegations about the dimensions of the market, it is impossible to determine the number of competitors, their respective market shares, or any of the other facts about competition necessary for Felder's to prove its predatory pricing claim. As such, Felder's failure to allege a relevant market is not a technical point. The recoupment element of a predatory pricing claim requires

Felder's to allege a plausible scheme where the All Star Defendants could drive Felder's out of the market and then raise prices long enough to recoup their losses and make a profit. *FMC Corp.*, 170 F.3d at 528. None of this analysis is possible because Felder's has not alleged a relevant geographic market.

3. Market Power

The Court also admonished Felder's to allege additional facts "regarding the definition of the relevant market(s), the number of competitors in the market, and the current state of competition." Doc. 32 at 15. The Court further explained that "even though courts do not require a specific market share percentage to warrant recovery for a § 2 claim, Felder's must provide specific allegations supporting that Defendants' market share is significant" and "must provide further specifics as to why Defendants have legally significant market power given (1) the nature of the relevant market(s) and (2) Defendants' market share therein." *Id.*

The First Amended Complaint offers none of the facts that the Court demanded. Although Felder's alleges that the All Star Defendants "operate the largest parts distribution center in Louisiana at more than 50,000 square feet and $5 million in inventory," it provides no factual allegations about the number, size, or location of competing distribution centers operated by Keystone, Felder's, or others. Rec. Doc. 50 ¶ 19. Alleging that the All Star Defendants "operate the largest parts distribution center in Louisiana" also says nothing about its ability to control prices or exclude competition. While Felder's claims that the distribution center permits the All Star Defendants "to deliver parts to body shops in a short period of time," there is nothing in the First Amended Complaint to suggest that having the largest distribution center in Louisiana gives the All Star Defendants an insurmountable competitive advantage. *Id.* For example, a business model with several small distribution centers spread out across a region would arguably provide delivery, customer service, and other market penetration advantages that

a single large distribution center does not offer. The First Amended Complaint also does not disclose the number, size, or location of distribution centers in surrounding states, such as Mississippi, Texas, Alabama, or Tennessee, or address whether those distribution centers sell collision parts in Louisiana and Mississippi or would be likely to enter the market in response to a price increase. Felder's also does not mention the role played by distribution centers located in other parts of the country and their ability to ship parts to Louisiana and Mississippi overnight.

The scant market information that does appear in the First Amended Complaint suggests that GM and the All Star Defendants have no prospect of being able to exercise market power. The First Amended Complaint describes a GM rebate program that is nationwide in scope and not limited to Felder's service area. It also alleges that distribution centers compete in metropolitan areas hundreds of miles away from where they are located. Further, according to Felder's, Keystone is "the country's largest aftermarket parts distributor" and has been able to "withstand the pressures from the defendants' predatory pricing conduct" based on its size and diversification beyond the market. *Id.* ¶ 54. Thus, the First Amended Complaint reveals that Keystone's business is national in scope and unlikely to be driven out of business.

The First Amended Complaint also explains that the "business of automobile collision parts is driven by the automobile insurance industry" rather than collision parts distributors and that the GM rebate program responded directly these insurance companies' demands for prompt service and low prices. *Id.* ¶¶ 17-18. To suggest that the All Star Defendants have sufficient market power to raise prices in a market where competition caused GM to design a rebate program directly responsive to customer demands for lower prices is implausible. *See Stewart Glass & Mirror, Inc. v. US Auto Glass Discount Centers, Inc.*, 200 F.3d 307, 315 (5th Cir. 2000) (holding that small auto glass repair shops failed to allege economically plausible conspiracy to

engage in predatory conduct when two larger rivals established repair shop networks to provide additional services demanded by automobile insurance companies).

Despite these facts suggesting that GM and the All Star Defendants lack market power, Felder's makes the conclusory allegation that the All Star Defendants drove three companies located in Jackson, New Orleans, and Shreveport, respectively, out of business.[3] *Id.* ¶¶ 51-53. In its ruling, the Court suggested that the demise of these competitors might suggest "some degree of market power" if they operated in the relevant market. Rec. Doc. 32 at 13. Although Felder's now alleges that these competitors conducted operations in the alleged relevant market and elsewhere, the First Amended Complaint does not allege any other facts about these businesses or the reasons why they failed. Replacement parts for GM vehicles may have represented only a fraction of the business for these competitors and had little, if any, impact on their bottom lines. The competitors may have had too much debt, provided poor service, or offered low quality parts. Alternatively, Keystone may have offered their customers better pricing or the business owners may have just decided to retire. The First Amended Complaint simply provides no facts upon which this Court can infer that the GM rebate program had any role whatsoever in the failure of these businesses. *Ashcroft v. Iqbal,* 556 U.S. 662, 677, 129 S.Ct. 1937 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

Additionally, this Court directed Felder's to "provide further specifics as to why Defendants have legally significant market power given (1) the nature of the relevant market and (2) Defendants' market share therein." Rec. Doc. 32 at 15. Although Felder's alleges that there

[3] In the original complaint, Felder's alleged that GM and the All Star Defendants drove four competitors out of business. The First Amended Complaint makes no mention of a fourth competitor other than Keystone which it describes as "the country's largest aftermarket parts distributor" and as being able to "withstand" the predatory conduct. Rec. Doc. ¶¶ 51-54.

has been no recent entry into the market, it is silent about its own business and ability to compete. It is equally silent about Keystone's market share. With respect to GM and the All Star Defendants, Felder's only describes their market share as "substantial"—a term so vague as to have no real meaning. Rec. Doc. 50 ¶ 19. Thus, despite this Court's instructions, the First Amended Complaint provides absolutely no factual basis to compare Keystone's or Felder's market power to that of the All Star Defendants within the alleged relevant market.

What is known from the First Amended Complaint is that the country's largest aftermarket distributor, Keystone, participates in the relevant market and has been able to "withstand" the alleged predatory conduct over the course of several years[4] based on its size and diversification. What is also known is that the ultimate customer—the insurance companies—demand low prices. Thus, if the allegations in the First Amended Complaint are accepted as true, the All Star Defendants could not raise prices without losing business even if Felder's were driven from the market. Indeed, it is far more likely that competition from Keystone—an aftermarket parts distributor like Felder's—has had a far more direct impact on Felder's and other aftermarket parts distributors than the All Star Defendants, which distribute OEM parts.

4. Recoupment

The Fifth Circuit has held that predatory pricing claims should fail in the absence of the possibility of recoupment. *FMC Corp.,* 170 F.3d at 528; *see also A. A. Poultry Farms*, 881 F.2d at 1401 ("Predatory prices are an investment in a future monopoly, a sacrifice of today's profits

[4] The Court will recall that, according to Felder's, the GM price incentive program has been in place since at least January 1, 2009, and collision centers and body shops continue to take advantage of the low prices offered by All Star to this day. The Fifth Circuit has been clear that a predatory pricing scheme doomed to failure is not actionable because it is not plausible—rational businessmen simply do not intentionally incur losses over extended periods of time to gain uncertain profits someday in the distant future. *E.g., FMC Corp,* 170 F.3d at 527-28.

for tomorrow's. The investment must be recouped. If a monopoly price later is impossible, then the sequence is unprofitable and we may infer that the low price now is not predatory"). To demonstrate recoupment, a plaintiff must allege that the below-cost prices inflicted losses upon the target competitors of sufficient magnitude to drive them from the market. *Brooke Group,* 509 U.S. at 225. Second, "there is still the further question whether it would likely injure competition in the relevant market." *Id.* As the Fifth Circuit explained: "To show recoupment, the plaintiff must 'demonstrate that the scheme could actually drive the competitor out of the market' and that 'the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market.'" *FMC Corp.,* 170 F.3d at 528.

In its April 16, 2013 ruling, the Court held that Felder's had alleged sufficient facts to meet the first element of the recoupment analysis. Rec. Doc. 32 at 17-19. However, the Court also recognized that the second prong of the recoupment analysis would turn on whether Felder's alleged a relevant market in which the All Star Defendants exercised sufficient market power to be able to exclude rivals from entering the market. *Id.* at 22-23. As set forth above, Felder's has not alleged a relevant market or facts to support the conclusion that the All Star Defendants have the requisite market power to raise price and recoup lost profits. To the contrary, the First Amended Complaint alleges that "the country's largest aftermarket parts distributor"—Keystone—has been able to "withstand" the alleged predatory conduct based on its "size" and "diversification." Not only will the All Star Defendants face competition from a larger rival in the form of Keystone, the First Amended Complaint makes clear that they will need to contend with insurance companies, which exercise sufficient buying power to cause collision parts distributors to lower prices. Indeed, Felder's candidly alleges that "the business of automobile collision parts is driven by the automobile insurance industry" rather than collision parts

distributors and that the GM program reflects a competitive response to the insurance companies' demand for lower priced collision parts. Rec. Doc. 50 ¶¶ 17-18.

Under these circumstances, without facts to support a likelihood of recoupment, "it would seem improbable that a scheme would be launched. Given the high error cost of finding companies liable for cutting prices, the court should thus refuse to infer predation." *FMC Corp.*, 170 F.3d at 52

B. CONSPIRACY TO MONOPOLIZE

In order to state a claim for conspiracy to monopolize, a plaintiff must allege "(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." *Stewart Glass & Mirror, Inc. v. US Auto Glass Discount Centers, Inc.*, 200 F.3d 307, 316 (5th Cir. 2000). The Fifth Circuit has cautioned that a conspiracy cannot exist where the defendants "had no rational motive to conspire, and if their conduct is consistent with other, equally plausible explanations." *Id.* at 315 (quoting *Matsushita*, 475 U.S. at 587). The Fifth Circuit also has been clear in holding that a predatory pricing scheme doomed to failure is not actionable because it is not plausible—rational businessmen simply do not intentionally incur losses over extended periods of time to gain uncertain profits someday in the distant future. *E.g., FMC Corp,* 170 F.3d at 527-28.

Felder's conspiracy to monopolize claim fails for the same reasons that the attempted monopolization claim fails—the alleged predatory price scheme is implausible. The First Amended Complaint does not support the conclusion that the GM or the All Star Defendants are pricing below cost, had market power, or that any below-cost pricing scheme would likely succeed in the face of competition from their larger rival, Keystone, and the buying leverage of the insurance companies who "drove" the market. The absence of such allegations makes any

predatory pricing conspiracy economically irrational and precludes the Court from inferring the existence of a conspiracy between GM and the All Star Defendants.[5] *Id.*; *FMC Corp.*, 170 F.3d at 528 ("If there is no likelihood of recoupment, it would seem improbable that a scheme would be launched. Given the high error cost of finding companies liable for cutting prices, the court should thus refuse to infer predation."); *see also A. A. Poultry Farms*, 881 F.2d at 1401 ("Predatory prices are an investment in a future monopoly, a sacrifice of today's profits for tomorrow's. The investment must be recouped. If a monopoly price later is impossible, then the sequence is unprofitable and we may infer that the low price now is not predatory").

C. SECTION 1 OF THE SHERMAN ACT

"To prevail on a Section 1 claim, plaintiffs must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market." *Stewart Glass & Mirror, Inc.*, 200 F.3d at 312. Felder's Section One claim fails on all three elements for the very same reasons that the attempted monopolization and conspiracy to monopolize claims fail—the alleged predatory price scheme is implausible. As discussed above, there are no facts alleged to support a finding of below cost pricing. Additionally, the First Amended Complaint alleges an economically implausible conspiracy because the alleged predatory pricing scheme cannot succeed if the All Star Defendants lack the market power to raise prices to monopolistic levels for long enough to recoup their alleged lost profits. Similarly, if the alleged predatory

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[5] Other courts have reached the same result by concluding that where an alleged conspiracy, if successful, would not amount to illegal monopolization, there can be no liability for conspiracy to monopolize. *See Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (affirming the dismissal of conspiracy to monopolize claim because, without allegations regarding market power or market share, plaintiff failed to show that the challenged could have the anticompetitive effect required for a §2 claim.). In this case, the First Amended Complaint falls far short of establishing any risk of monopolization. Felder's has failed to allege a relevant geographic market and its allegations about the marketplace competition exclude any possibility that GM and the All Star Defendants could succeed in recouping any losses incurred in a rebate program that has been in existence since 2009 through monopoly pricing.

pricing scheme cannot succeed, the GM program has not caused an anticompetitive effect.[6] Rather, consumers have enjoyed low prices since 2009 and will continue to enjoy low prices in the future. Finally, as set forth above, the First Amended Complaint does not allege facts to support the proposed geographic market since it is clear from the allegations that area of effective competition is much larger than the state parishes and counties listed by Felder's.

D. LOUISIANA STATE ANTITRUST LAW CLAIMS

Because the Louisiana antitrust laws "track almost verbatim Sections 1 and 2 of the Sherman Act, Louisiana Courts have turned to the federal jurisprudence analyzing those provisions for guidance." *Southern Tool & Supply, Inc. v. Beerman Precision, Inc.*, 03-960 (La. App. 4 Cir. 11/26/03); 862 So. 2d 271, 278; 859 So. 2d 110; *Tuban Petroleum, L.L.C. v. SIARC, Inc.*, 09-0302 (La. App. 4 Cir. 4/15/09); 11 So. 3d 519, 523; *Reppond v. City of Denham Springs*, 572 So. 2d 224, 228, n. 2 (La. App. I Cir. 1990). Accordingly, the Louisiana state antitrust claims in the First Amended Complaint fail for the same reasons as the federal antitrust claims.

E. THE LUPTA CLAIM

In its April 16, 2013 ruling, the Court specifically found that Felder's had failed to allege "that Defendants committed fraud, misrepresentation, deception, or unethical conduct" and that it could not rely on its predatory pricing allegations alone to support a claim under the Louisiana Unfair Trade Practices and Consumer Protection Act. Rec. Doc. 32 at 31. This decision followed the teachings of the Louisiana Supreme Court in *Cheramie Servs. v. Shell Deepwater*

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[6] Felder's alleges that the "predatory pricing scheme" is unlawful per se and unlawful under the rule of reason. The per se analysis is applied to a narrow set of agreements generally involving horizontal competitors and has no application whatsoever in a predatory pricing case. *State Oil Co. v. Khan*, 522 U.S. 3, 118 S.Ct. 275, 281 (1997) (limiting the application of the per analysis to practices that have predictable and pernicious anticompetitive effect and limited potential for procompetitive benefit). To the contrary, the "Supreme Court has expressed extreme skepticism of predatory pricing claims." *FMC Corp.*, 170 F.3d at 528.

Prod., 09-1053 (La. 4/23/10), 35 So. 3d 1053 which held that a plaintiff must allege specific acts of fraud, misrepresentation, deception, or other unethical conduct to support a claim. *Id.* at 1060; *see also Cargill, Inc. v. Degesch America, Inc.*, No. 11-2036, --- F.Supp.2d ----, 2012 WL 2367392, at *6 (E.D. La. Jan. 21, 2012); *Shaw Indus. v. Brett*, 884 F.Supp. 1054, 1058 (M.D. La. 1994); *High Tech Communications v. Panasonic Co.*, No. 94-1477, 1995 WL 65133, at *3 (E.D. La. Feb. 15, 1995) (citing *Turner v. Purina Mills*, 989 F.2d 1419, 1422 (5th Cir. 1993)). Despite having been granted an opportunity to amend its claim, Felder's chose not to modify its unfair trade practice allegations and, therefore, has not alleged the specific acts of "fraud, misrepresentation, deception, or unethical conduct" mandated by this Court. At this juncture, the Court should dismiss the LUPTA count with prejudice for failure to state a claim.

F. JOINT AND SOLIDARY LIABILITY

The Court held in its April 16, 2013 ruling that joint and solidary liability can arise only in cases of conspiracy and that La. Civil Code art. 2324 does not provide for an independent cause of action. Rec. Doc. 32 at p. 32. GM and the All Star Defendants established above that Felder's has not alleged a plausible conspiracy claim. Moreover, since La. Civil Code art. 2324 does not create a private right of action, the claim for solidary liability should be dismissed.

CONCLUSION

For the reasons set forth above, GM and All Star respectfully request that the Court dismiss Counts 1-6 of the First Amended Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this motion was electronically filed with the Clerk of Court on November 18, 2013 by using the CM/ECF system which will send an electronic notice of filing to filing users and that each attorney representing plaintiff is a filing user.

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