No. 14-30410

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FELDER'S COLLISION PARTS, INCORPORATED
Plaintiff-Appellant,

v.

ALL STAR ADVERTISING AGENCY, INCORPORATED; ALL STAR CHEVROLET NORTH, L.L.C.; ALL STAR CHEVROLET, INCORPORATED; GENERAL MOTORS LLC
Defendants-Appellees,

On Appeal from the Judgment of the
United State District Court for the Middle District of Louisiana
Civil Action No. 3:12-cv-00646
The Honorable James J. Brady, Presiding

ORIGINAL BRIEF OF PLAINTIFF-APPELLANT FELDER'S COLLISION PARTS, INCORPORATED

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CERTIFICATE OF INTERESTED PERSONS

Case No. 14-30410

FELDER'S COLLISION PARTS, INCORPORATED
Plaintiff-Appellant,

v.

ALL STAR ADVERTISING AGENCY, INCORPORATED; ALL STAR CHEVROLET NORTH, L.L.C.; ALL STAR CHEVROLET, INCORPORATED; GENERAL MOTORS, L.L.C.
Defendants-Appellees,

The undersigned counsel of record certify that the following listed persons and entities as described in United States Court of Appeals for the Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Plaintiffs

- Fedler's Collision Parts, Incorporated, which has no parent company and no publicly traded company owns more than ten percent (10%) of its stock.

2. Counsel for Plaintiffs

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3. Defendants

- All Star Advertising Agency, Incorporated
- All Star Chevrolet North, L.L.C.
- All Star Chevrolet, Incorporated
- General Motors LLC

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Dated: June 30, 2014

/s/ *James M. Garner*
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ATTORNEYS FOR PLAINTIFF-APPELLANT, FELDER'S COLLISION PARTS, INC.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Felder's Collision Center, Inc. ("Felder's") respectfully requests oral argument of this appeal. Felder's submits that oral argument will benefit this Court to address, first, the unique issue concerning the proper standard for alleging a predatory pricing scheme; and, second, in addressing the District Court's erroneous application of the motion to dismiss standard to the allegations of the geographic market in the Amended Complaint.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction based on federal question jurisdiction to 28 U.S.C. § 1331 and 15 U.S.C. §§ 1 and 2, known as the Sherman Act. The District Court also had supplemental subject matter jurisdiction over the alleged state law claims pursuant to 28 U.S.C. § 1367.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1291 as this appeal arises from the District Court's Final Judgment of April 23, 2014. Record Excerpts ("R.E.") Tab 3. Felder's timely filed its Notice of Appeal on April 30, 2014. R.E. Tab 2.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in its conclusion that predatory pricing claims alleged by Felder's should take into account the kickbacks received by All Star from GM after the harm to competition has occurred.
2. Whether the District Court erred in its conclusion that Felder's alleged geographic market was too narrow for purposes of a claim under the Sherman Act.
3. Whether the District Court erred in dismissing the claims under the Louisiana antitrust statutes, LA. REV. STAT. ANN. §§ 51:122, 123, 124, 137, and 422 and Louisiana Unfair Trade Practices Act ("LUTPA"), LA. REV. STAT. § 51:1401, *et seq*.
4. Whether the District Court erred when it dismissed the allegations that the All Star entities could be liable *in solido*.

STATEMENT OF THE CASE

This case involves an alleged illegal predatory pricing scheme designed by defendant-appellee General Motors LLC ("GM") in which the defendants-appellees All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C., and All Star Chevrolet, Inc. (collectively, "All Star") were induced to attempt to "bump the competition" from the plaintiff-appellant Felder's Collision, Inc. ("Felder's") in the market for automobile collision parts compatible with GM vehicles and for which there is an after-market alternative. ROA.450-51; R.E. Tab 5.

Accepting the allegations of the Amended Complaint as true, as this Court must in reviewing a ruling granting a motion to dismiss under Rule 12(b)(6), GM designed a program called "Bump the Competition" whereby it induces its dealerships, including All Star, to sell automobile certain collision parts at a price below the cost for which All Star had purchased the part from GM. These collision parts are those for which an after-market alternative existed and are sold by companies like Felder's. GM induces its dealerships such as All Star to charge its customers (body shops and collision centers) a price 33% below the price for which Felder's sells a comparable after-market alternative to the collision center or body shop.

The program, as its name suggests, was designed for the sole purpose of "bumping" or eliminating competition and creating a monopoly for GM and All

Star on automobile collision parts for GM vehicles. ROA.450-451. GM induces All Star to enter into the program by creating an incentive whereby it kicks back to All Star the revenue lost as a result of the sale below cost plus a 14% recoupment or kick back, through a "claims" process between All Star and GM that occurs entirely after the sale of the parts at issue from All Star to the end-user body shop or collision center. ROA.450-451. Indeed, without such incentive, All Star likely would not lower its prices below its average variable cost and would not voluntarily assume such a loss. GM's program and All Star's participation therein had the desired effect, eliminating competition and severely damaging Felder's, a family-owned business unable to compete with the anti-competitive actions perpetrated by GM and All Star because it cannot match the below-cost pricing scheme perpetrated by GM and All Star.

Felder's filed suit under the Sherman Act, 15 U.S.C. §§ 1 and 2, and Louisiana law for alleged antitrust violations and unfair trade practices. ROA.13. Felder's alleged that the Bump the Competition scheme constituted predatory pricing by GM and All Star and that this predatory pricing was prohibited by the Sherman Act and Louisiana law. GM and All Star moved to dismiss the complaint, and the District Court denied the motion but ordered Felder's to amend its complaint to address certain deficiencies in the allegations, particularly regarding the scope of the market. ROA.99 & ROA.220; R.E. Tab 4. Second,

although it recognized that the "Bump the Competition" Program provided "reason for suspicion," the District Court further concluded that the alleged predatory pricing scheme focused on the wrong point of the transaction involving GM and All Star. ROA.224 & ROA.254; R.E. Tab 4. Whereas Felder's alleged a violation of the Sherman Act based on the sale of automobile collision parts below cost, the District Court erroneously concluded that a predatory pricing violation of the Sherman Act could occur only if the plaintiff could show that the sale was below cost after considering the post-sale recoupment by All Star of its lost profit. ROA.224; R.E. Tab 4. In this case, that meant, according to the District Court, that Felder's needed to allege that All Star was selling below its average variable cost not at the time of sale to an end-user body shop or collision center, but after the recoupment and kick back were paid by GM to All Star. ROA.224; R.E. Tab 4.

Felder's amended its complaint to address the issues raised by the District Court except for the predatory pricing issue, but it maintained that the appropriate consideration for a claim of predatory pricing was the point of sale from All Star to a collision center or body shop, as that was the moment in time at which competition posed by Felder's was damaged. ROA.443; R.E. Tab 5.

GM and All Star re-urged their motion to dismiss. ROA.500. Felder's opposed, but the District Court granted the motion. ROA.627; R.E. Tab 6. The District Court found that Felder's failed to properly allege the geographic scope of

the market. ROA.632-33; R.E. Tab 6. Specifically, the District Court found that the Amended Complaint's definition of a geographic market was too narrow to survive a motion to dismiss. The District Court also refused to reconsider its earlier ruling on predatory pricing and found that Felder's failed to allege a cause of action for predatory pricing. ROA.634-35; R.E. Tab 6. The District Court also dismissed the pendent state law claims and granted judgment in favor of GM and All Star. ROA.634 n.2; ROA.636; R.E. Tab 6; and ROA.638; R.E. Tab 3. This appeal followed. ROA.639; R.E. Tab 2.

STATEMENT OF FACTS

I. The after-market automobile collision parts market and the "Bump the Competition" Program.

The following facts are taken from the Amended Complaint and must be assumed as true as this is an appeal from an order granting a motion to dismiss under Rule 12(b)(6).[1] Felder's is a seller of after-market collision parts located near Baton Rouge, Louisiana. ROA.447 at ¶ 14. Such parts are manufactured by entities other than automobile manufactures, such as GM, but are equivalent to original equipment manufacturer ("OEM") replacement parts, and are sold by Felder's and other after-market parts sellers to collision centers and body shops for

[1] The Amended Complaint is reproduced for the Court's convenience at Tab 5 of the Record Excerpts.

repair of damaged automobiles. ROA.446 at ¶ 12. All Star operates several automobile dealerships that sell GM-manufactured automobiles and sells OEM parts manufactured by GM to the same collision centers and body shops to which Felder's sells its after-market parts. ROA.446 at ¶ 11. In other words, Felder's and All Star compete with each other for the sale of collision parts compatible with GM vehicles.

After-market collision parts make up approximately 20% of the automobile collision part market. ROA.446 at ¶ 12. After-market collision parts are less expensive than OEM parts and are historically sold for a lower price than the alternative OEM parts. ROA.446. Prices of OEM parts are, on average, 25% to 50% higher than equivalent after-market parts. ROA.446. The equivalent after-market parts are of like grade and quality as the OEM collision parts. ROA.446. The remaining 80% of the automobile collision part market is already subject to a monopoly by each manufacturer as to collision parts for the cars it produces and its dealer networks sell. ROA.446.

Felder's sells after-market collision parts in the following Louisiana parishes: Acadia, Allen, Ascension, Assumption, Avoyelles, Beauregard, Calcasieu, Cameron, East Baton Rouge, East Feliciana, Evangeline, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, Point Coupee, Rapids, St. Bernard, St. Charles, St. Helena, St.

James, St. John, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermillion, Vernon, Washington, West Baton Rouge, and West Feliciana. ROA.447 at ¶ 15. Felder's also does business in the following Mississippi counties: Hancock, Harrison, Pearl River, Marion, Rankin, Forrest, Hinds, Jackson, Stone, Lamar, and Walthall. ROA.447. All Star also sells collision parts for which there is an after-market alternative in these same parishes and counties. ROA.447. For ease of reference, the above-listed parishes and counties will hereinafter be referred to as the "Geographic Market."

The purchase of collision parts is dominated by the insurance industry, which often pays for the repairs of automobiles following an accident. ROA.447 at ¶ 16. The insurance industry demands low prices and prefers after-market parts given their lower price structure. ROA.447-48 at ¶ 17. Faced with a decline in sales of OEM parts for which there was an after-market part available, GM and All Star began looking for a manner to increase the sale of OEM parts. ROA.448 at ¶ 18. Those efforts led to the creation of the "Bump the Competition" Program. ROA.448 at ¶¶ 18, 20.

All Star, in particular, enjoys a substantial share of the Geographic Market for automobile collision parts for which there is an after-market alternative and that are compatible with GM vehicles because they operate the largest OEM distribution center in the state of Louisiana. ROA.448 at ¶ 19. Through its

participation in the "Bump the Competition," described below, All Star has become the leader providing automobile collision parts compatible with GM automobiles in the Geographic Market. ROA.448.

In their effort to monopolize the market for such collision parts, GM and All Star created a price incentive program enabling All Star to "bump" any competition from the marketplace. ROA.448 at ¶ 20. The "Bump the Competition" Program made it easy for collision centers and body shops to obtain OEM parts at prices well below the price of comparable after-market parts, though those prices were below All Star's average variable cost. ROA.449 at ¶ 21.

The scheme works as follows: when a body shop or collision center requests from All Star a particular GM part for which there is an after-market alternative and the body shop or collision center has a quote from a seller of after-market parts, All Star sells the OEM part to the body shop or collision center at a price 33% below the price charged by the after-market seller. ROA.449 at ¶¶ 22-24. That discounted price is below the price All Star paid to obtain the part from GM. ROA.449. In other words, All Star records a loss on the part at the moment of sale to the body shop or collision center. ROA.449. In an initial effort to induce All Star to take this loss, GM subsequently reimburses All Star for the cost of the part and then adds a 14% recoupment or kickback that is given to the All Star. ROA.449.

The "Bump the Competition" Program is further illustrated by the following example. A GM dealer (i.e., All Star) pays GM $135.01 for a particular part. ROA.451 at ¶ 29. That part is normally listed for sale by the GM dealer to a collision center or body shop for $228.83. A comparable after-market part can be sold by an entity such as Felder's to the collision center for sale for $179.00. ROA.451. Although the dealer's cost of the part is $135.01, GM instructs the dealer to sell the part to a collision center or body shop for $119.93, a "bottom line price" that is 33% ***below*** the cost of the comparable after-market equivalent part and approximately $15.00 ***less than the cost the dealer paid GM for the part***. ROA.451. ***After*** sale of the part to the collision center for $119.93, the dealership then recoups from GM at a later date the difference between the sale price of $119.93 and the part cost of $135.01, plus an alleged back-end "profit" of 14%. ROA.451 at ¶ 30. Thus, after selling the part below cost and "bumping" the competition, the dealership is "made whole" by GM.

Significantly, All Star only lowers the price of parts for which there is an after-market alternative when the body shop, collision center, or individual consumer identifies an alternative after-market part and shows All Star a quote obtained from a seller of after-market collision parts, such as Felder's. ROA.452 at ¶ 31. All Star can only afford to engage in this below-cost pricing because it is induced by GM's promise of after-the-fact recoupment. In other words, the lower

price is offered only when there is an opportunity to beat or "bump" the after-market price. The lower price is not offered where the body shop or collision center cannot demonstrate a competing after-market price.

Upon elimination of the competition and monopolization of the market for GM collision parts for which an after-market alternative exists in the Geographic Market, GM and All Star will likely recoup any losses resulting from the sale of collision parts below AVC in two ways. First, All Star will now only sell an OEM collision part below their AVC when an after-market part is available and when GM is made aware of the after-market alternative. ROA.455 at ¶ 40. At that point, GM instructs All Star to "beat" the price (which price is below the dealers' AVC) and seek recoupment of their losses from GM. If there is no competing price from a seller of compatible after-market parts, All Star will not reduce its selling price. Where there is no longer a viable after-market seller upon which to base a "Bump the Competition" claim, All Star's existing supra-competitive price will be in place.

Second, GM makes no effort to sell below cost or reduce prices in any way for those parts that do not have an after-market alternative because GM and its dealers already enjoy a monopoly on those parts, thus providing no incentive to reduce prices for their customers. ROA.455 at ¶ 41. Once All Star and GM successfully "bump" all of the competition, they likewise will have no incentive to

reduce prices for customers on those parts that do currently have after-market alternatives as well as then having a monopoly on all automobile collision parts. ROA.455.

This scheme allows dealers to recoup their losses for the much higher OEM-priced parts by protecting its market for parts when there is either no after-market alternative or no qualifying estimate from an after-market supplier. ROA.456 at ¶ 41. Further, this program will result in significantly higher prices for automobile collision parts as evidenced by the exhibits to the Amended Complaint. ROA.456. These supra-competitive prices reflect the enormous margins through which the dealers will recoup losses in the future; hence, the dealers achieve recoupment in two time-frames, both immediately and on a grander scale in the future. ROA.456.

Since 2007, All Star has enjoyed a significant increase in revenue from the sale of collision parts as well as increasing profit margins on the sale of collision parts. ROA.456 at ¶ 42. Such trends are confirmation of the success of the "Bump the Competition" Program and All Star's ability to eliminate competition for the sale of automobile collision parts for which there is an after-market alternative. ROA.456. Such trends also reflect All Star's recoupment of any loss of revenue from the sale of automobile collision parts for which there is an after-market alternative by increasing the prices for automobile collision parts for which there is no after-market alternative to the detriment of the consumer. ROA.456.

Barriers to entry into the market for collision parts that have an after-market equivalent are high and difficult, and All Star is the dominant player in the Geographic Market. ROA.457 at ¶ 46. Once Felder's and other after-market sellers are successfully "bumped," GM and All Star can then raise prices on OEM parts to supra-competitive prices, thus giving All Star a reasonable prospect and/or dangerous probability of further recouping any global losses. ROA.458 at ¶ 47.

In the past ten years, no new after-market parts sellers have entered the Geographic Market in direct competition with Felder's, illustrating the high barriers to entry into the market for automobile collision parts compatible with GM automobiles. ROA.458 at ¶ 48. Sellers of after-market parts cannot compete with sellers of OEM parts that conspire with the manufacturer, such as GM, to reduce prices below the seller's average variable cost and then are made whole on the back end. ROA.458.

Another indication of high barriers to entry into the market for automobile collision parts compatible with GM vehicles for which an after-market alternative exists is the recent failure of three other after-market sellers that compete with Felder's, these companies having been driven out of business by the illegal, anti-competitive, and conspiratorial actions of GM and the All Star Defendants. ROA.458 at ¶ 49.

The only viable seller of after-market collision parts able to remain in business in the Geographic Market in addition to Felder's is Keystone Automotive Industries, Inc., the country's largest after-market parts distributor. ROA.459-60 at ¶ 54. Given Keystone Automotive Industries' size and diversification beyond the identified market it has, in the short run, been able to withstand the pressures from the defendants' predatory pricing conduct. ROA.460 at ¶ 54.

As a result of the effects of the "Bump the Competition" Program, Felder's has seen its once-profitable business slow drastically. ROA.460 at ¶ 56. Felder's enjoyed its most profitable year in 2008. In 2008, total annual income for Felder's was in excess of $3 million. ROA.460. By 2011, total annual income for Felder's had declined more than $1 million. ROA.460. In particular, after-market demand for bumpers and lights, the biggest sources of income, declined substantially since 2008, due to the conspiracy and collusion between GM and the All Star Defendants to undercut prices. ROA.460. Indeed, if GM is allowed to continue "bumping the competition," Felder's may well face a similar fate to the other after-market parts sellers and be forced out of business. ROA.460.

The exit of competitors and the lack of new entrants into the market for collision automobile parts for which there is an after-market alternative suggests a reasonable prospect and/or a dangerous probability that All Star will raise its prices

to supra-competitive levels once it has achieved the desired monopoly on the sales of collision automobile parts. ROA.461 at ¶ 57.

Ultimately, the continued existence of the "Bump the Competition" Program will have long-ranging effects on competition. ROA.461 at ¶ 58. If allowed to continue unchecked, sellers of after-market parts will be forced to close their business. ROA.461. Manufacturers like GM will expand programs similar to the "Bump the Competition" Program to include hard parts, such as engines, in addition to collision parts affecting the sellers of after-market hard parts. ROA.461.

Sellers of OEM collision parts like All Star will increase their prices of parts that formerly had after-market alternatives to supra-competitive prices just as they have done on parts that currently have no after-market alternatives. ROA.461 at ¶ 59. Body shops that purchase collision parts from dealerships like All Star will similarly have to increase their prices. ROA.461. Their customers, including insurance companies, will then pay more for collision parts, and insurance companies will pass along the cost increases in the form of higher premiums, potentially causing dealerships to stop selling certain collision parts. ROA.461. The end result would be an increase in the sale of new automobiles. ROA.461.

II. Proceedings in the District Court

In response to the illegal and anticompetitive nature of the "Bump the Competition" Program, Felder's filed suit in the District Court against GM and All Star setting forth claims under the Sherman Act, Clayton Act, Robinson-Patman Act, and Louisiana law. ROA.13-55. GM and All Star moved to dismiss the Complaint. ROA.99. The District Court denied the motion but ordered Felder's to amend its complaint. ROA.220; R.E. Tab 4. Felder's did so, filing an amended complaint with the District Court. ROA.220; R.E. Tab 4.

The Amended Complaint filed by Felder's sets forth claims for violation of section 1 of the Sherman Act, attempted monopolization and conspiracy to monopolize in violation of section 2 of the Sherman Act, and state law claims under the Louisiana Unfair Trade Practices Act and the Louisiana antitrust statutes. GM and All Star re-urged their motion to dismiss. ROA.443 & ROA.500.

The District Court granted the motion and concluded, first, that Felder's failed to properly plead the geographic component of an antitrust claim, finding that the alleged Geographic Market proposed by Felder's was too narrow. ROA.632-33; R.E. Tab 6. The District Court then held that the "Bump the Competition" program did not constitute a predatory pricing scheme because, at the end of the day, All Star was made whole by GM and even earned a profit. ROA.634-35; R.E. Tab 6. The District Court then concluded that the state law

claims alleged by Felder's must fail for much the same reason as the federal antitrust claims. ROA.634 n.2 & ROA.636-37; R.E. Tab 6. Accordingly, the District Court granted the defendants' motion to dismiss the Amended Complaint and entered a final judgment against Felder's. ROA.638; R.E. Tab 3. This timely appeal followed. ROA.639; R.E. Tab 2.

SUMMARY OF THE ARGUMENT

The District Court erred, first, when it held that Felder's failed to plead a predatory pricing scheme. The District Court erroneously concluded that All Star could not be liable for predatory pricing because it received a kickback from GM to cover for the sale of automobile collision parts below average variable cost. Felder's submits that consideration of the entire pre- and post-sale transaction is not the appropriate analysis under the facts of this case. A predatory pricing scheme does its damage at the moment when competition is stifled because one party sells at a price below its average variable cost and the competitor cannot match the price for fear of losing profit. In other words, the appropriate analysis must focus on the point in time when competition is harmed. Thus, the "Bump the Competition" Program must be evaluated at the time of sale to the collision center or body shop, the time at which competition is adversely affected. The back-end payment by GM to All Star is a business strategy to make All Star whole after All

Star's sale to the collision center and damage to competition. Consideration of the post-sale aspects of the transaction was reversible error.

Second, the District Court erred when it concluded that the proposed Geographic Market was too narrow. Ignoring the applicable standard of review under Rule 12(b)(6), the District Court disregarded the detailed allegations of the Amended Complaint and failed to draw appropriate inferences in favor of Felder's. As discussed below, the District Court disregarded established case law holding that market definition in an antitrust case is a fact issue which is usually inappropriate for dismissal on a motion to dismiss. The alleged Geographic Market is consistent with the legal requirements and supported by sufficient factual allegations.

Third, the District Court erred in its dismissal of the alleged state law claims premised on the above-described violations of LUTPA and state antitrust statutes. Felder's has properly alleged unfair trade practices by All Star and GM, as well as violations of Louisiana's antitrust statutes based on the illegal predatory pricing scheme devised in the "Bump the Competition" Program.

Finally, the District Court erred when it held that a claim for solidary liability against the All Star entities had not been pled. Felder's properly pled a conspiracy complaint among the All Star entities who were all participants in the

"Bump the Competition" Program. For these reasons, this Court should reverse the District Court's Judgment.

ARGUMENT

I. Standard of Review

This Court applies a *de novo* standard of review to a district court's grant of a motion to dismiss. *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012). To survive a motion to dismiss the complaint must allege "more than unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)*. A plaintiff's claim must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

A claim will be considered facially plausible when the plaintiff has pled facts that allow a court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Id.* All reasonable inferences are drawn ***in favor of the plaintiff***. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232–33 (5th Cir. 2009). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. Motions to dismiss for failure to state a claim under Rule 12(b)(6) "are disfavored and should rarely be granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). Courts are especially

reluctant to dismiss antitrust cases at the pleadings stage. *See, e.g., E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc.* 637 F.3d 435, 441-445 (4th Cir. 2011) (citing numerous instances where courts have been hesitant to dismiss antitrust cases preceding discovery).

II. Felder's properly alleged a predatory pricing claim based on the harm to competition at the moment of sale.

This appeal presents, first, a fundamental legal issue regarding the meaning of the Sherman Act—whether All Star's sale of parts to collision centers and body shops at a price below the cost paid to GM for a particular part constitutes predatory pricing. The essential inquiry for this Court is whether a predatory pricing claim under the Sherman Act is properly pled if it focuses on the harm at the moment that competition is affected (i.e., the point of sale to the consumer) or at a later time when the alleged monopolist may recoup its losses. The District Court concluded that the latter point in time was the appropriate inquiry, likening the kickback to a rebate program. ROA.243-44. Felder's submits that this was reversible error because it runs afoul of the very purpose of antitrust law—the protection of competition. *See Brunswick Corp. v. Pueblo Bow-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

A claim for monopolization under the Sherman Act requires proof of (1) predatory or anti-competitive conduction; (2) specific intent to monopolize; and (3)

dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Among the anticompetitive actions prohibited by the Sherman Act is the practice of predatory pricing. A claim for predatory pricing is established by proof that (1) the prices complained of are below an appropriate measure of the defendant's costs and (2) that there is a reasonable prospect or dangerous probability of the defendant's recouping its investment in below-cost prices. *Brooke Group Ltd., v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 & 224 (1993).

The District Court initially held that Felder's properly pled the recoupment prong [ROA.242], then focused on whether the claim for below-cost pricing was properly pled. The District Court's decision ultimately turned on a purely legal issue, not a question of the sufficiency of Felder's allegations. In its Amended Complaint, Felder's described, in detail, the nature of the "Bump the Competition" Program. The issue for this Court is whether the below-cost pricing scheme should be evaluated at the moment of All Star's sale of an automobile collision part below All Star's average variable cost to a collision center, without regard to any subsequent kickback from GM. Felder's submits that this Court should answer that question in the affirmative.

A. The "Bump the Competition" Program was illegal at the moment of sale of the collision part by All Star to a collision center because that was the moment of harm to competition.

Harm to competition occurs at the point of sale to the body shop or collision center. Felder's cannot compete with All Star's below-cost pricing, and any competitive advantage for Felder's in the market for automobile replacement parts compatible with GM vehicles is lost when All Star sells parts below its costs to "bump" the competition. While antitrust laws protect competition rather than competitors, competition is threatened when a seller is able to blatantly sell its parts below cost to a consumer and attempt to "bump" its competitors from business. It is too late to consider whether anti-competitive behavior occurs after All Star receives its kickback; harm to the Felder's—and competition in general—has already occurred by that point.

In its April 17, 2013 Ruling on Defendants' Motion to Dismiss, the District Court noted that "All Star probably would not sell at the suggested 'bottom-line' price absent GM's claim system, which allows for collection of the difference between the sales price and dealer cost, plus a 14 percent profit." ROA.244. Undoubtedly, GM's offer of a kickback is the inducement that makes All Star participate in the "Bump the Competition" Program; but it cannot be the case that a collusive inducement insulates All Star's illegal conduct. The sale below cost destroys competition, the protection of which is the essence of the Sherman Act.

See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (noting that antitrust laws were enacted out of a concern for competition, not the benefit of competitors).

The cases relied on by the District Court are distinguishable from the present case because those cases did not find any evidence of harm at the time of sale when competition would be impacted. In *Stearns Airport Equipment Co., Inc. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), the plaintiff challenged whether a proposed bid for the construction of airport boarding bridges violated federal anti-trust law because the bid was submitted at a price below its cost. The bid was submitted in multiple parts, and evidence indicated that one of those parts would operate at a negative operating margin. This Court held this evidence insufficient to state a violation of predatory pricing laws, stating in a footnote that the "threshold problem with this allegation is that even if part C was bid below-cost, Stearns has not alleged that the project as a whole was unprofitable." *Id.* at 533 n.15.

This Court's reasoning in *Stearns* is not applicable to the present case. Felder's agrees that a multi-phase construction project must be evaluated as a whole, without breaking down individual parts of the project. Competition is not harmed if part of the project may be bid below cost where the entire project is not below cost. In contrast, in the present case, Felder's—***and competition as a***

whole—is damaged when All Star ***sells parts below cost*** to consumer collision centers and body shops. Viewing the transaction as a whole ***at the time of sale*** when the harm to competition would become apparent, the seller in *Stearns* provided a product that is not below cost, and its competitor must beat that cost to win the bid. In the present case, however, Felder's cannot beat the competition; Felder's, All Star's competition, is "bumped" by the sale of automobile collision parts below cost. It would be grossly unfair to competition to allow the All Star Defendants to sell collision parts below cost, irreparably damage competition, and then be absolved from any fault by virtue of GM's inducement of the after-the-fact collusive kickback to All Star.

Allowing GM's conduct to pardon All Star's illegal conduct ignores the fact that the "Bump the Competition" Program is designed to create maximum damage to competition at the point of sale to the consumer, before any reimbursement or inducement occurs. Immunizing such conduct would irreparably damage competition. The District Court's reliance on *Stearns* is misplaced because there is no harm to competition simply because a ***part*** of the same project may be below cost. In *Stearns*, the "point of sale" was the conclusion of all the parts of the contract between the contractor and the project owner, which in that case was the "consumer." Harm does occur in this case, however, where the All Star Defendants are allowed to sell a given collision part at a price well below their cost

and then GM later makes All Star whole, damaging Felder's and other after-market sellers that cannot compete with All Star's below-cost pricing and GM's deep pockets.

Felder's does not challenge this Court's holding in *Stearns* that, in certain circumstances, an entire project must be considered to evaluate whether someone is engaged in predatory pricing. Felder's simply submits that it is wrong to assume that the holding of *Stearns* and other cases cited by the District Court apply to the unique and distinguishable facts of the present case. For the purpose of examining a whole transaction in a predatory pricing claim, there is nothing in conflict between the *Stearns* holding that the "transaction" included all parts of a contract with the consumer, and Felder's argument here that the "transaction" does not include economic activity that occurs ***after the consumer's participation in the transaction is complete***.

The *Stearns* court relied on this Court's decision in *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253 (5th Cir. 1988), the holding of which does not support dismissal of the Amended Complaint in this case. In *Stitt Spark Plug*, the plaintiff, a manufacturer of spark plugs, alleged that the defendant, a competitor, was selling original-equipment spark plugs at a loss in an effort to monopolize the market on replacement spark plugs on the theory that consumers of replacement spark plugs would purchase the same brand as the original spark plug

to be replaced. This Court held that any consideration of predatory pricing must concern both markets because the theory of the case looked to both markets. *Id.* at 1256. In the present case, however, the concern is not sales between two markets.

There is a single sale at issue in this case. That sale is clearly below cost and, therefore, "bumps" competition. This Court has never addressed a case applying facts such as the ones in this case in which a manufacturer induces and assists its dealer/seller to engage in illegal predatory pricing activities with the inducement of making that dealer/seller whole after the point of sale to the dealer's consumer. Such post-transaction inducement would construct a massive freeway for manufacturer-dealer colluders to circumvent the anti-trust laws. Competition cannot thrive in such an environment, and the anti-trust laws were designed to protect competition in these circumstances. *See, e.g., Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 320 (5th Cir. 2009) ("The federal antitrust laws protect competition, not competitors.").

Similarly unavailing is reliance on *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989). *A.A. Poultry Farms* challenged whether certain discount prices on eggs were in violation of predatory pricing laws. The court offered the following analysis:

> No case of which we are aware holds, however, that fluctuations over time to the same customer are "price discrimination" within the meaning of the Robinson–Patman Act. Consider two contracts: Rose

> Acre agrees to sell the first supermarket 100% of its needs for 8¢ . . ., and the second supermarket 67% of its requirements for 6¢ . . . and the other 33% for 12¢ back of the index. . . . Yet the two supermarkets are getting the identical price: 8¢ under the index for 100% of their eggs. Selling a chain 100% of its requirements at 80¢/ dozen is the same as furnishing 80% of the requirements at $1.00/ dozen and giving it the other 20% for "free." Whether price discrimination has occurred depends, therefore, on the price after all discounts, specials, and so on.

Id. at 1407.

From the opening line of the passage cited above, it is clear that *A.A. Poultry* involved a course of conduct involving one seller and the question of whether price fluctuations impacted the end-consumer. This case, in contrast, involves the pattern of the sale of prices below cost in an effort to "bump" the competition. There is no selling below cost where the effective price does not change ***at the point of sale***. The defendant supplier in *A.A. Poultry* was simply negotiating different prices at different times with its customers, but, at the end of the day, it was not selling its product below cost to its consumers, the supermarkets. ***In other words, competition is not harmed.*** Any temporary discount afforded was canceled out by the second contract. There is no after-the-fact kickback designed to compensate a party for intentionally taking a loss. In contrast, at the point of sale in the present case, the sale is made below cost. All Star does not sell the collision parts at identical prices. It is accepted as true that the collision parts are being sold below cost. *A.A. Poultry* is not applicable to the present case.

Finally, reliance on *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317 (7th Cir. 1991), is misplaced. Defendants seize on the statement that "promotional 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 the incremental cost.)" *Id.* at 1322. Defendants take this statement out of context.

In *American Academic Suppliers*, the Seventh Circuit addressed whether a defendant's actions trying to enter the market for the sales of school supplies were considered predatory pricing. The court found that the defendant's actions were not illegal because they were common actions taken by new entrants to a market. Unlike defendants in the present case, there was no long-term intent to injure competition or establish a monopoly. It was simply a traditional marketing strategy to obtain a foothold on what the court repeatedly described as a very competitive marketplace.

Such facts are clearly distinguishable from the present case. Here, All Star does not sell at a promotional discount to gain a foothold in the market. In this case, GM is providing an after-the-sale inducement to All Star to sell below cost so to "bump" competition and monopolize the entire market at a supra-competitive level. Its actions are much different from those described in *American Academic*

Suppliers, and it was error for the District Court to rely on such a line of cases in reaching its conclusion.

The allegations in the Amended Complaint are not contrary to the holdings in these cases. The cases cited above were all concerned with defining the full "transaction" at the point the price is paid by the consumer. The rebates and promotions described therein were beneficial to competition because they were part of the transaction at the point of the consumer's participation. In contrast, in the present case, Felder's cannot compete with All Star because, due to GM's post-transaction inducement, All Star can artificially reduce the price and make its sale, while "bumping" Felder's and other competition. There is no rebate or promotional discount the consumer participates in, but only an after-the-fact recoupment by All Star, made possible by GM. Competition is hurt because the scheme is only triggered by the existence of a competing after-market part, and the below-cost behavior (and any tangential benefit to the consumer) is eliminated along with the elimination of the competition.

Given the lack of any case law permitting the kind of clearly anti-competitive behavior engaged in by the defendants, Felder's urges this Court to hold that this predatory pricing scheme should be evaluated at the point of sale because that is the point when the harm to competition occurs. Such a holding

would comport with traditional notions of antitrust law, which are concerned with the protection of competition.

B. The definition of "price" supports the conclusion that predatory pricing focuses on the moment when competition is harmed.

This Court should also reverse the District Court's dismissal of the Amended Complaint because the kickbacks at issue are not within the ordinarily understood meaning of the term "price." *By definition,* kickbacks or refunds are not considered the "price" of an object. Black's Law Dictionary defines "price" as "the amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold." BLACK'S LAW DICTIONARY (9th ed. 2009). According to this definition, the price of a product is dictated by the value or consideration transferred from the buyer to the seller to obtain the product, not the overall value the seller may later receive from its original supplier. This definition of price is consistent, then, with the focus of antitrust law on competition. In other words, "price" in the context of predatory pricing is concerned with whether the consumer (i.e., the body shop), in the end, is paying below the seller's (i.e., All Star's) cost—not with whether that payment, plus any later inducement from an entity unrelated to the consumer (i.e., GM), adds up to a value below the seller's cost.

For example, when a car dealership sells a car to a buyer, one would not say that the price of the car is the amount of money paid by the buyer to the seller *plus* any bonuses the dealership may get from a specific car manufacturer for selling that car. The price is clearly the price paid ***by the buyer to the seller*** independent of any additional money or valuables the seller might receive from a third party as a result of the sale.

On the other hand, a rebate may be part of the price because it inures to the benefit ***of the buyer,*** putting money back ***in the buyer's*** pocket. That is not what happens with the kickback in the present case. The kickback is for the benefit ***of the seller*** and puts money ***in the seller's*** pocket. The kickback, then, is not part of the "price" for purposes of a predatory pricing analysis.

Scholarly literature also supports a focus on the predatory pricing at the point at which competition is affected. When discussing their ideal price-cost test, a form of which was adopted by the Supreme Court in *Brooke Group*, Phillip Areeda and Donald Turner use phrases such as "*selling* at unremunerative prices", "*charge* less than a profit-maximizing price", and "price *charged*." Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697, 705, 707 (1975). *See Brooke Group Ltd.*, 509 U.S. 122. Although the article does not expressly state that the purchase price should be the focus, the language used throughout the article suggests this to

be the case. The common sense interpretation of the phrases "price charged" and "selling at … prices" is that those phrases are referring to the purchase price of a particular item, or the price at the time of the sale. It would be irrational to say that the "price charged" by All Star included the after-the-fact inducements given to All Star by GM. All Star didn't "charge" GM anything. Further, GM was not even a party to the contract of sale to between All Star and the collision shops. The "price charged" is obviously the price paid by collision shops for the GM parts that All Star sold before GM later made All Star whole.

This argument is consistent with the Supreme Court's holding in *Brooke Group*. If, as the Court in *Brooke Group* suggests, the goal of antitrust laws is to "protect competition" for the benefit of the consumer, then the only rational price to look at is the price that is paid by consumers. The additional value received by All Star through kickbacks from GM should not be included in the "price" of the item because those kickbacks are not accurately represented in the price paid by the consumer and occur after competition is harmed.

In the antitrust context, placing the focus on the actual price paid for a product is appropriate because that is the point at which the competitors will be negatively affected. Felder's is negatively affected because the *purchase price* is set below costs. Competition is harmed when one competitor *sells* at a price point that is below costs with the idea that consumers will choose the unreasonably low

priced product over the competitor's fairly priced product for a long enough period of time to drive the competitor out of the market and then charge supra-competitive prices to the consumers. Antitrust laws are designed to prevent such conduct. It is only the purchase price which entices consumers to purchase one product over another like product which then affects competition. Therefore, the purchase price should be the focus when determining whether the price is below-costs, not any after-the-fact recoupment that induced the seller to charge below cost.

III. The District Court erred in its conclusion that Felder's failed to adequately plead a geographic market.

A. Motions to dismiss for failure to allege a geographic market should rarely be granted.

Contrary to the District Court's conclusion, Felder's did not plead a narrow geographic market. In fact, Felder's alleges 49 specific Louisiana parishes and Mississippi counties within which both it and the All Star Defendants sell collision parts for which there is an after-market alternative. ROA.447 at ¶ 15. Felder's also specifically alleges that no new after-market sellers have begun direct competition (*i.e.*, in the same geographic market) with Felder's. ROA.458 at ¶ 48. Coupled with this lack of new entrants into the geographic market, Felder's alleges that, due to the Defendants' actions, "three after-market competitors of Felder's who sell after-market parts in the same geographic markets as Felder's and All

Star, have already been driven out of business[.]" ROA.458 at ¶ 49; ROA.459 at ¶¶ 51-53.

These allegations, which must be accepted as true, emphasize both that "the sale of collision parts is a relationship-driven business in which sellers and buyers develop long-time histories of sales, making it difficult for newcomers to enter the market," ROA.459 at ¶ 50, and that the auto repair industry is driven by a need for repairs to be "completed in the shortest period of time." ROA.447 at ¶ 17; ROA.460 at ¶ 55. These allegations allow for inferences contrary to those articulated by the District Court in granting the Defendants' motion to dismiss on the basis that the alleged geographic market was too narrow.

Monopolization claims require allegations of a relevant market to measure the defendant's ability to eliminate competition. *See Spectrum Sports*, 506 U.S. at 458; *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). The definition of the appropriate market has a product component and a geographic component. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

Although the District Court dismissed the Amended Complaint, it found that Felder's had satisfied the product component of the market requirement. ROA.631. However, the District Court dismissed the Amended Complaint, in part, because it determined that the geographic component had not been sufficiently

pled. The appropriate geographic market is the "area of effective competition … in which the seller operated, and to which the purchaser can practically turn for supplies." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963). In *Brown Shoe*, the Court explained:

> The geographic market selected must … both correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.

Brown Shoe, 370 U.S. at 336-37.

As noted, the definition of geographic market is a fact question left for the jury. *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1184 (5th Cir. 1988). A court should not lightly dismiss an antitrust claim at the motion to dismiss stage for failure to adequately plead the relevant market given the fact-intensive nature of the definition of the market. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 443 (4th Cir. 2011). Motions to dismiss for failure to plead the geographic market should be limited to cases where "glaring deficiencies" in the allegations are present. *Id.* at 444 (quoting *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp.2d 323, 399 (D. Vt. 2010)). In *Todd v. Exxon Corp.*, 275 F.3d 191 (2nd Cir. 2001), the court identified the types of cases that have been identified as appropriate for dismissal for failure to allege the geographic market:

> Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Id. at 199-200 (internal citations omitted).[2]

District courts in this Circuit have followed the lead of *E.I du Pont* and *Todd*, holding that dismissal for a failure of an antitrust claim to state the relevant market "should not be done lightly." *See, e.g., In Re Pool Prods. Distribution Market Antitrust Litig.*, 940 F. Supp.2d 367, 378 (E.D. La. 2013). Other courts have reached a similar conclusion. *See Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 WL 1063175 at *3 (D. Ariz. 2007); *Delano Farms Co. v. California Table Grape Com'n*, 623 F. Supp.2d 1144, 1176 (E.D. Ca. 2009); *see also Christou v. Beatport, LLC*, 849 F. Supp.2d 1055, 1066 (D. Col. 2012) (noting its agreement with "the sentiment of the Second Circuit as well as other circuits that 'because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead the relevant product market'") (quoting *Todd*, 275 F.3d at 199-200).

[2] Although the *Todd* court was focused on product market, "[t]he criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe*, 370 U.S. at 336. *See also E.I. du Pont de Nemours*, 637 F.3d at 443 n.3 (quoting *Todd*).

The allegations in the Amended Complaint by Felder's as to geographic market fit neither of these categories. Yet, despite this and despite the warnings of this Court and others against dismissal on the pleadings for failure to allege the geographic market, the District Court dismissed the Amended Complaint. Such a result was incorrect and should be reversed by this Court.

Contrary to established case law, the District Court ignored these well-pled allegations, as well as the reasonable inferences that must be drawn in favor of Felder's at the Rule 12(b)(6) stage. *See Lormand*, 565 F.3d at 232–33. Instead, the District Court drew adverse inferences and criticized Felder's for failing to address all conceivable issues. This was error on the part of the District Court.

For example, the District Court questioned whether the geographic market could be nation-wide in scope because Felder's mentioned the presence of a national competitor (with a dealer branch physically located in the Geographic Market) [ROA.632], yet the District Court ignored the very specific factual allegations noting that the collision parts business is a cost-driven industry that depends on quick service. From these allegations, it can be inferred that body shops in New Orleans may wait for a part to come from Baton Rouge, but they likely not be inclined to order the part from Houston or Dallas.

The Amended Complaint also included specific allegations regarding barriers to entry from out-of-area vendors, including the importance of the

"relationship-driven business in which sellers and buyers develop long-time histories of sales, making it difficult for newcomers to enter the market," ROA.459 at ¶ 50; and the importance of delivering parts "in the shortest period of time," which could necessitate not just overnight shipment but also same-day delivery, ROA.442 at ¶ 17; ROA.460 at ¶ 55. Such allegations are hardly conclusory in nature, yet they were ignored by the District Court.

B. The case law cited by the District Court does not support dismissal for failure to plead a Geographic Market.

In reaching its conclusion that Felder's drew the relevant geographic market too narrowly, the District Court relied on several cases from this Court finding that the proposed geographic market was too narrow. These cases, however, are easily distinguishable from the present case and illustrate the error of the District Court's reasoning.

In *Wampler v. Southwestern Bell Telephone Co.*, the plaintiffs alleged that the contract of a single multiple dwelling unit ("MDU") with a single company for "exclusive right to provide video, voice and broadband internet," violated the Sherman Act as an illegal restraint on trade. *Wampler*, 597 F.3d 741, 743-744 (5th Cir. 2010). This Court rejected the plaintiffs' market definition that a single MDU could be the market on the grounds that MDUs compete with each other and therefore have incentive to provide fast and cheap services. *Id.* at 745-746. If

prospective tenants did not want the company with exclusive rights to provide their video, voice, and broadband service, they could choose to go elsewhere. *Id.* at 745. This Court noted that the appropriate market should have been the city of San Antonio, the broader area in which the MDUs were located, because competition existed between the MDU owners within that city. *Id.* Here, of course, the 49-parish/county scope of the proposed Geographic Market is certainly not as narrowly drawn as a single MDU and is far broader even than the single-city market suggested by the *Wampler* court.

The District Court also cited *Jayco Systems, Inc. v. Savin Bus. Machines Corp.* to support the conclusion that "the trial court may dismiss a § 2 claim for a plaintiff's failure to define the relevant market." [ROA.228]. *See Jayco Sys., Inc. v. Savin Bus. Machines Corp.*, 777 F.2d 306, 319 (5th Cir. 1985). The *Jayco* Court did, in fact, dismiss the plaintiff's § 2 claim. *Jayco*, 777 F.2d at 310. However, *Jayco* involved a plaintiff whose definition of the relevant market asked the court to "arbitrarily limit the geographic market to a single purchaser," and had offered "not a shred of evidence" as to why it should do so. *Id.* at 319, 320. This Court, moreover, noted that the relevant area of competition "is influenced by such factors as transport costs, price relationships and actual sales patterns in the area, and buyer conveniences and preferences." *Id.* By contrast, in the Amended Complaint, Felder's addressed these very issues, particularly in its discussions of

the insurance companies' need for fast and cheap repairs as well as the fact that after-market parts is a relationship-driven business, as to why the market should be limited to the defined geographic market. ROA.447 at ¶ 17; ROA.459 at ¶ 50. A reasonable inference may be drawn from such allegations that a geographic market broader than what is alleged in the Amended Complaint is not appropriate given the demand for local parts available on short notice. Moreover, Felder's does not propose a Geographic Market restricted to a single body shop or collision center buyer, such that the lesson of *Jayco* is truly inapplicable here.

The District Court also erroneously relied on *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.* in dismissing the Amended Complaint's allegations regarding the geographic market. *Apani Sw., Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620 (5th Cir. 2002); *Ruling* Doc. 61, at 7. In *Apani*, this Court noted that the geographic market "must respond to commercial realities of the industry and be economically significant." *Apani*, 300 F.3d at 628. In *Apani*, the plaintiff attempted once again to define the market too narrowly, but, once again, much more narrowly than Felder's. The plaintiff in *Apani* alleged that the City of Lubbock's exclusive contract with the defendant to provide beverages to facilities owned and operated by the city violated antitrust law and defined the relevant geographic market as the specific 27 facilities owned by the city. *Id.* at 620, 623-624. This Court analyzed the market definition under the two requirements above

and rejected the plaintiff's market definition as legally insufficient on both requirements. The court noted that "there were no limitations based on size, cumbersomeness, or perishability … that would warrant restricting the geographic market," and that there were also "no regulatory requirements or inherent shipping limitations," to support the restriction. *Id.* at 628. The court, moreover, stated that "at the very least, commercial realities of the industry must include the entire city of Lubbock." *Id.* at 629. As for economic significance, the plaintiff's market definition again failed, because the plaintiff did not allege that the city's twenty seven facilities constituted a significant portion of the market for bottled water in the Lubbock area. *Id*. And, as in *Wampler*, the proposed Geographic Market here is far broader even than the court's suggested single-city geographic area.

In contrast to the facts before this Court in *Apani*, in the present case Felder's alleged both elements of the *Apani* analysis that would support its proposed geographic market. First, Felder's noted the need to restrict the geographic market given the economic realities of the market for automobile collision parts for GM vehicles for which there was an after-market alternative. Felder's alleged that the automotive industry is driven by a need for repairs to be completed in the shortest period of time, limiting the scope of the geographic market by "inherent shipping limitations." *Apani,* 300 F.3d at 628; ROA.447 at ¶ 17. Felder's also alleged that the auto-parts business is a relationship-driven

business, which prevents competitors located outside the region from selling within it. Felder's also clearly addressed the economic significance of the market.

In *Apani*, this Court concluded that "[w]hether a segment is 'appreciable' depends on whether the segment includes either an appreciable proportion of the product market as a whole, or a proportion of the product market largely segregated from, independent of, or not affected by, competition elsewhere." *Apani*, 300 F.3d at 627 (quoting Earl W. Kintner, FEDERAL ANTITRUST LAW: VOLUME IV THE CLAYTON ACT, SECTION 3, SECTION 7, MERGERS AND MARKETS § 38.2 (1984)). Applying this standard to the Amended Complaint, Felder's alleged that Felder's and All Star do not face competition outside the defined Geographic Market, as Felder's cited several examples of businesses that have failed as a result of the anticompetitive practices of GM and All Star *within* the Geographic Market. ROA.458 at ¶ 49.

Felder's additionally alleged that the time and relationship aspects of the after-market parts business insulate the region from entities outside the geographic market that may otherwise seek to compete in it. ROA.447 at ¶ 17; ROA.459 at ¶ 50. In fact, Felder's alleged that due to the anticompetitive practices of the defendants, no new after-market sellers have entered into direct competition in the region. ROA.458 at ¶ 48. Unlike the *Apani* case, where the court found "no set of facts under which [the plaintiffs] can recover," Felder's has alleged facts that

support its definition of the geographic market. *Apani*, 300 F.3d at 629. The District Court's reasoning raises questions that are more properly addressed in discovery or at trial, not in the context of a motion to dismiss. Felder's has not sought to artificially narrow down the market, but has included the entire region in which it and the defendants compete. ROA.447 at ¶ 15.

The District Court, rejecting the Amended Complaint's definition of the relevant geographic market, relied heavily on the fact that Felder's "include[d] a national seller of after-market parts as a competitor in the proposed geographic market," and that the inclusion lead to an inference that the market should be larger than the one Felder's proposes. ROA.633. In both *Wampler* and *Apani*, however, a national competitor was involved (AT&T and Coca-Cola, respectively) and the courts advocated only a geographic market the size of the city in which the plaintiff and defendant competed. *Wampler*, 597 F.3d at 745; *Apani*, 300 F.3d at 629. The District Court's rationale is inconsistent with the holdings in *Wampler* and *Apani*. The mention in the Amended Complaint of Keystone as a competitor, which has been able to stay afloat due to its diversification, does not undermine the Amended Complaint's definition of the relevant geographic region. However, Keystone *is in business **in** the geographic market*. This does not, by extension, mean that the geographic market must be nation-wide in scope. Based on the reasoning in *Wampler* and *Apani*, the fact that Keystone is also in business

elsewhere does not lead to a conclusion that the relevant geographic market must include everywhere Keystone operates. *Wampler*, 597 F.3d at 745; *Apani*, 300 F.3d at 629.

The District Court's ruling also relied on the fact that a direct competitor was located over 100 miles away as reasoning for a "plausible inference" that the geographic market is larger than Felder's defined. ROA.633. However, the cases the District Court cites for dismissal did not rely on a "plausible inference" that the plaintiff's market may be too narrow, but dismissed only when there was ***no support*** for plaintiff's market definition. *See*, *Wampler*, 597 F.3d at 745-746 (stating that due to competitive forces, the court could not hold that a single MDU represented a plausible geographic market); *Apani*, 300 F.3d at 629 (stating plaintiff's proposed market "did not comport with commercial realities" and that plaintiff "failed to allege" the economic significance of the allegedly illegal agreement), *Jayco*, 777 F.2d at 319 (finding plaintiff "[***had] not offered one single shred of evidence***" to support its proposed geographic market) (emphasis added). Whether the Amended Complaint's reference to a competitor more than 100 miles away from the geographic market detracts from the other allegations in the Amended Complaint is more properly a matter to consider in discovery and at trial.

IV. The District Court erroneously dismissed the state law claims of Felder's.

The District Court also dismissed the ancillary claims of Felder's under Louisiana law. Counts Four and Five of the Amended Complaint set forth claims for violations of LUTPA, LA. REV. STAT. § 51:1401, *et seq.*, and the Louisiana Antitrust Statutes, LA. REV. STAT. ANN. §§ 51:122, 123, 124, 137, and 422. Causes of action for violations of both statutes can be established based on allegations of violations of the federal antitrust statutes. *See Van Hoose v. Gravois*, 70 So. 3d 1017, 1024 (La. App. 1st Cir. 2011) (holding that allegations of antitrust violations, if sufficiently pled, would also state a cause of action for violations of LUTPA); *Southern Tool & Supply, Inc. v. Beerman Precision, Inc.*, 862 So. 2d 271, 278 (La. App. 4th Cir. 2003) (holding that state antitrust laws are interpreted by reference to federal antitrust laws).

LUTPA, like the Sherman Act, is concerned with preventing "unfair methods of competition and unfair or deceptive acts or practices." LA. REV. STAT. ANN. § 51:1405(A). Felder's submits that its detailed factual allegations of a scheme devised by GM and in which All Star participated constituted unethical conduct designed to unfairly "bump" or eliminate competition from Felder's and state a claim under LUTPA and the state antitrust statutes. For these same reasons

discussed in this Brief, Felder's requests that this Court reverse the District Court's judgment against Felder's on these state law claims.

V. The District Court erroneously dismissed allegations of joint and solidary liability against All Star.

Finally, the District Court also dismissed the allegations in the Amended Complaint alleging solidary liability among the All Star entities. Under article 2324(A) of the Louisiana Civil Code, one "who conspires with another person to commit an intentional or willful act is answerable, *in solido,* with that person, for the damage caused by such act." LA. CIV. CODE ANN. Art. 2324(A). The Amended Complaint affirmatively states that All Star Advertising Agency, Inc. is the parent company that owns the trade name under which the other defendants do business as the All Star Automotive Group. All Star Chevrolet North, L.L.C. and All Star Chevrolet, Inc. are owners of GM dealerships and sellers of GM collision replacement parts. The Amended Complaint further alleged in detail that all of these defendants conspired with GM to participate in the "Bump the Competition" program. Felder's has pled sufficient facts to state a claim for conspiracy to commit antitrust violations and trigger joint and several liability among the Defendants. To the extent the parent company believes it should be dismissed, that is a matter for further discovery, not a motion to dismiss filed before the answer.

Thus, Felder's respectfully requests that this Court reverse the District Court's conclusion that Felder's failed to plead a claim for solidary liability.

PRAYER FOR RELIEF

The Amended Complaint set forth a detailed complaint of antitrust violations and unfair trade practices related to the scheme designed by GM and carried out by All Star designed to "bump the competition" from Felder's for the sale of automotive collision parts compatible with GM automobiles for which there is an after-market equivalent. The District Court erred when it granted the Defendants' motion to dismiss the amended complaint and failed to apply the appropriate standard for considering a motion to dismiss under Rule 12(b)(6) and federal law concerning predatory pricing violations. For these reasons, and those set forth above, Felder's respectfully requests that this Court reverse the District Court's Judgment and remand this matter for further proceedings.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to FED. R. APP. P. 25 and 5TH CIR. R. 25, the above and foregoing Appellate Brief was electronically filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, and that a copy has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

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On this, the 30th day of June, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 10,954 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Professional Plus 2013, in 14 point Times New Roman font.

Dated: June 30, 2014

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