**CASE NO. 14-30410**

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**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**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**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, THE HON. JAMES J. BRADY, PRESIDING**

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# BRIEF OF APPELLEES

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Respectfully submitted,


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|---|---|
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**Defendants – Appellees**

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## CERTIFICATE OF INTERESTED PERSONS

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Pursuant to Rule 28.2.1 of the Local Rules of the Fifth Circuit Court of Appeals, the undersigned counsel of record certifies that the following listed persons and entities 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. **Defendants/Appellees:**

   - General Motors LLC, which is a Delaware limited liability company whose only member is General Motors Holdings LLC. General Motors Holdings LLC is a Delaware limited liability company whose only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan.

- All Star Advertising Agency, Inc., which is a Louisiana corporation that has no parent company and no publicly traded company owns more than ten percent (10%) of its stock.

- All Star Chevrolet North, L.L.C., which is a Louisiana limited liability company with its principal place of business in Baton Rouge, Louisiana whose members are Matthew G. McKay, The Taylor William McKay Trust and The Hays Aldrich McKay trust. All members of All Star Chevrolet North, L.L.C. are organized under the laws of the State of Louisiana or are citizens of Louisiana.

- All Star Chevrolet, Inc., which is a Louisiana corporation that has no parent company and no publicly traded company owns more than ten percent (10%) of its stock.

2. **Counsel for Defendants/Appellees:**

- David G. Radlauer, Thomas A. Casey, Jr., Mark A. Cunningham, Tarak Anada, Jones Walker LLP, Counsel for General Motors LLC.

- Michael W. McKay, Stone, Pigman, Walther, Wittmann, LLC, counsel for All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C. and All Star Chevrolet, Inc.

3. **Plaintiff/Appellant:**

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

4. **Counsel for Plaintiff/Appellant:**

- James M. Garner, Peter L. Hilbert, Jr., Darnell Bludworth, Ryan D. Adams, Kevin M. McGlone, Sher, Garner, Cahill, Richter, Klein & Hilbert, LLC.

- Gladstone N. Jones, III, Lynn E. Swanson, H.S. Bartlett, III, Jones, Swanson, Huddell & Garrison, LLC.

Dated: August 19, 2014

/s/ Mark A. Cunningham
Attorney of record for Appellee
General Motors LLC

## STATEMENT REGARDING ORAL ARGUMENT

The district court's opinion represents a straightforward application of well-established principles of antitrust and procedural law. Plaintiff has not identified a single decision, article, or treatise to justify a departure from these well-established principles. Accordingly, oral argument is neither necessary nor warranted. However, to the extent the Court desires oral argument, Defendants wish to participate.

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the First Amended and Supplemental Complaint ("Amended Complaint") states a predatory pricing claim under federal or Louisiana antitrust laws when Felder's Collision Parts, Inc. ("Felder's"): does not allege below-cost pricing by General Motors, LLC ("General Motors" or "GM"); concedes that All Star[1]—an independent dealership—also sold at a profit; proposes a geographic market definition inconsistent with its own scant factual allegations; and fails to allege facts to support the other essential elements of a predatory pricing claim.

2. Whether the Amended Complaint states a cause of action under the Louisiana Unfair Trade Practices Statute ("LUPTA"), La. Rev. Stat. § 51:1401 *et seq.*, when Felder's does not allege facts to support a finding of fraud, misrepresentation, deception, or unethical conduct by General Motors or All Star.

3. Whether the district court properly dismissed a claim for joint and solidary liability when it is well established that Louisiana state law does not recognize an independent cause of action for civil conspiracy.

## STATEMENT OF THE CASE

Felder's, a seller of aftermarket replacement parts for GM vehicles, claims that General Motors and All Star conspired to drive Felder's out of business

[1] Defendants All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C., and All Star Chevrolet, Inc. are collectively referred to as "All Star."

through predatory pricing. Felder's does not allege that General Motors ever sold anything below cost. Nor does it allege facts to support its claim that All Star sold below cost. To the contrary, Felder's affirmatively alleges that All Star earned a profit on each and every sale. Felder's similarly failed to offer a single example of a particular sale or customer that it lost to All Star or provide any facts to support the conclusion that its alleged inability to compete successfully could be attributed to anything other than vigorous price competition.

Missing from Felder's Statement of the Case is any acknowledgement of the opportunities the district court afforded Felder's to correct these deficiencies. First, on April 16, 2013, the district court granted Felder's request for leave to amend and entered a detailed order explaining the factual allegations that Felder's would need to plead to state a plausible predatory pricing claim. ROA. 220-254. The district court, for example, cautioned Felder's that:

- "Based on *FMC Corp.*, this Court concludes that considering the transaction as a whole is appropriate. . . . To find that the relevant sales by All Star are below-cost ignores the commercial realities of the transaction – specifically the fact that All Star probably would not sell at the suggested "bottom-line" price absent GM's claims system, which allows for collection of the difference between the sales price and the dealer cost, plus a 14 percent profit." ROA. 243-244.

- "Having disposed of the parties' temporal debate, the question remains whether the sales are below-cost under Fifth Circuit standards. . . . Felder's Complaint focuses on (1) the cost that the Defendant-dealers paid to GM and (2) the Defendant-dealers' sale price. More is required under the Fifth Circuit standard. . . . Felder's must address these deficiencies by amendment." ROA. 244-245.

- "Felder's does not address whether consumers can practicably turn to other geographic areas for parts, nor does Felder's specify whether competing dealers from outside areas could come into the market. Thus, Felder's has failed to allege specific facts regarding the 'area of effective competition,' which must be cured." ROA. 230.

- "Additionally, . . . Felder's must provide specific allegations supporting that Defendants' market share is significant. Felder's 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." ROA. 234.

- "Critically, Felder's allegations regarding how All Star profits on OEM parts *today* has little to do with the relevant inquiry under the second prong of recoupment, which is whether All Star will be able to recover profits lost as a result of the 'Bump the Competition' sales by charging supracompetitive pricing if Felder's goes out of business *in the future*. Since such a prediction certainly relates back to the issue of market definition, Felder's must allege additional facts to show how this particular market structure is susceptible to a monopoly takeover by All Star for a long enough period so that All Star would be able to net a profit in the future by charging supracompetitive prices to offset losses sustained by the current pricing structure." ROA. 239.

In addition to providing a detailed roadmap, the district court permitted Felder's to conduct broad-ranging discovery against General Motors and All Star in advance of filing its Amended Complaint. ROA. 270. Felder's took full advantage of this opportunity and received thousands of pages of documents from General Motors and All Star. Nonetheless, when it filed its Amended Complaint, Felder's did not refer to any information it had received in discovery and provided none of the factual detail that the district court rightly demanded in its April 16, 2013 order. Instead, Felder's stubbornly relied on the same labels, conclusions,

and legal argument that appeared in its original complaint prompting General Motors and All Star to file a motion to dismiss the Amended Complaint.

The district court saw through the chaff and dismissed the Amended Complaint in a well-reasoned opinion that applied long-standing U.S. Supreme Court and Fifth Circuit precedent. The district court found that "Felder's own allegations contradict its proposed geographic market." ROA. 632. The district court also refused to reconsider its earlier decision that the transaction as whole must be considered in determining whether All Star sold below-cost and noted that Felder's did not cite "a single case, law review article, advisory opinion, or any administrative guidance to support its position." ROA. 635.

In evaluating the below-cost pricing allegations, the district court observed that it had "previously surmised that Felder's had originally failed to [allege below-cost pricing in line with Fifth Circuit precedent] as a result of lack of information related to the Defendants' costs and profits or, alternatively, the use of an incorrect formula to calculate average variable costs." ROA. 635. The district continued: this "imbalance of information was cured when the Defendants were compelled by this Court to turn over relevant documents." ROA. 635. It then went on find that Felder's "failed to amend to allege below-cost pricing pursuant to the Fifth Circuit standard as instructed by the Court in its previous ruling." ROA. 635.

## STATEMENT OF FACTS

The Amended Complaint and the attached exhibits (the same exhibits attached to the original complaint) describe a nationwide GM rebate program that has been in place (according to the Amended Complaint) since at least January 1, 2009. According to Felder's, the program enables authorized GM parts dealers to lower their prices and profitably resell collision parts in competition with aftermarket sellers, such as Felder's. The Amended Complaint does not allege that General Motors sells replacement parts to dealers below any measure of General Motors' cost or that the parts dealers re-sell the parts below their costs.

Rather, the Amended Complaint alleges that General Motors has been inducing or incentivizing dealers, such as All Star, to lower their prices by promising to pay them a rebate that includes both a reimbursement of the reduced price together with a 14% profit for the dealer. ROA. 451 ¶ 30. Thus, the Amended Complaint affirmatively alleges that after the rebate the dealer earns a 14% profit on each and every sale under the rebate program. ROA. 451-453 ¶¶ 30-35. The Amended Complaint further alleges that during the rebate program's existence, "the All Star Defendants have enjoyed a significant increase in revenue … [and] increasing profit margins on the sale of collision parts." ROA. 456 ¶ 42.

Even now, Felder's acknowledges that "without such incentive, All Star likely would not lower its prices." (Appellant Brief at 4, Document 00512682171).

Nonetheless, the Amended Complaint disaggregates the rebates from the lower prices they incentivize to arrive at an allegation that All Star resells parts below the price they pay. The Amended Complaint offers no other information about All Star's variable and fixed costs and profits even though Felder's had access to this information from General Motors and All Star in court-ordered discovery.

The 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." ROA. 447 ¶ 16. According to Felder's, "[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." ROA. 447-448 ¶ 17. Significantly, Felder's also admits 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 was an aftermarket alternative at a lower cost." ROA. 448 ¶ 18.

The rebate program enabled authorized dealers to lower prices on thousands of GM parts "at or below the price of comparable collision parts . . . offered by sellers of after-market collision parts, such as Felder's." ROA. 449 ¶ 22. Felder's pointed to Exhibit 1 of the Amended Complaint as an example of a promotional

circular in which General Motors 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." ROA. 450 ¶ 26 & Ex. 1 (ROA. 474). Felder's also claimed that GM "made it easy for collision parts customers, such as body shops, to get OEM GM parts at 'Bump the Competition' discounts." ROA. 450 ¶ 26.

Felder's described how the rebate program allegedly worked through several examples that reference Exhibits 2, 3, and 4 of the Amended Complaint. ROA. 450-453. According to Exhibit 2 (ROA. 475), 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, the 14% profit could range from a few dollars to over $80 per part, depending upon the part's original dealer price. *See* Ex. 3 (ROA. 476-494) (column "Maximum Part 2 Claim Amt"). As such, these exhibits establish that under the program, the dealer is guaranteed a profit on each transaction and that the amount of profit varied depending on the number and kind of parts required to repair a vehicle.

The Amended Complaint contains few factual allegations about the alleged relevant market, the nature of actual competition within that market, or the market power held by All Star. For example, the Amended Complaint alleges that the relevant geographic market consists of certain parishes and counties in Louisiana and Mississippi in which Felder's and All Star compete. The Amended Complaint does not say anything about whether body shops in these areas obtain collision parts from vendors in nearby cities such a Mobile, Birmingham, Memphis, Houston, Dallas, or from other parts of the country. Nor does the Amended Complaint address whether dealers in other parts of the country could move into the area to compete if All Star were to begin charging monopolistic prices.

In a misguided attempt to cast All Star as a dominant competitor, the Amended Complaint claims that All Star operates 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. ROA. 446 ¶ 13. Felder's even fails to allege anything in the Amended Complaint about its own size and inventory.

Similarly, the Amended Complaint contains little information about the identity and strength of competitors in the alleged market and, if anything, suggests a vigorous market. For example, the Amended Complaint alleges that Felder's and All Star compete against a strong national competitor, Keystone Automotive

Industries, Inc. ("Keystone"). ROA. 459-460 ¶ 54. Felder's describes Keystone as "the country's largest aftermarket parts distributor" and candidly admits that Keystone's "size" and "diversification" have allowed it to "withstand the pressures from the defendants' predatory pricing conduct." ROA. 459-460 ¶ 54. Keystone's presence in the market makes it implausible that All Star could someday charge monopoly prices and helps explain Felder's inability to successfully compete.

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

## SUMMARY OF ARGUMENT

Predatory pricing claims are viewed with "extreme skepticism." *Stearns Airport Equipment Co., v. FMC Corp.,* 170 F.3d 518, 527-28 (5th Cir. 1999). They are "difficult if not impossible to successfully complete and thus unlikely to be attempted by rational businessmen." *Id.* at 528. Further, "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. v Zenith Radio Corp*., 475 U.S. 574, 594, 106 S.Ct. 1348, 1360 (1986). Thus, "the standard for inferring an impermissible predatory pricing scheme is high." *Taylor Publishing Co. v. Jostens, Inc*., 216 F.3d 465, 478 (5th Cir 2000).

In this case, the Amended Complaint described a nationwide rebate program that enables parts dealers to lower prices and sell collision parts for profits that ranged from a few dollars to over $80 per part. ROA. 450-453 ¶¶ 26-30, 32-34 & Exhibits 1-4 (ROA. 474-495). Despite these profits, Felder's insists that All Star engaged in below-cost pricing because it believes that the rebates should be disregarded in determining whether All Star sold at a profit. ROA. 453-454 ¶¶36-38. This myopic focus on cost "at the time of sale" ignores the commercial reality that the rebate was the inducement for All Star to sell at a lower price. Indeed, Felder's even concedes that All Star "likely" would not have lowered prices without the rebate. Not surprisingly, Felder's cannot identify any authority to support the argument that such rebates should be excluded when calculating profit.

To the contrary, in the Fifth Circuit, the entire transaction, rather than some of its individual components, must be taken into account in determining whether a defendant is selling below-cost. *FMC Corp.,* 170 F.3d at 533 n. 15. In view of the multiple allegations that the rebates incentivized dealers to lower prices and Plaintiff's acknowledgement that a dealer "likely" would not lower prices without

the promise of a rebate, disaggregation of the rebate from the pricing makes no rational sense. Thus, by admitting that All Star is selling at a profit if the rebates are considered, Felder's has conceded its predatory pricing claim as a matter of law. The district court, therefore, properly dismissed the claim.

Felder's makes other similarly fatal admissions about its claims. Significantly, Felder's concedes that Keystone, "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." ROA. 459-460 ¶ 54. Keystone's continuing presence renders the predatory pricing scheme wholly implausible because competition from Keystone would prevent General Motors or All Star from extracting monopoly profits by raising prices in the future. Additionally, Felder's concedes that the "business of automobile collision parts is driven by the automobile insurance industry." ROA. 447 ¶ 16. The presence of customers with significant buying power in the market makes the predatory pricing scheme all the more implausible.

In sum, Felder's does not plead any facts to permit an inference that All Star's pricing practices are more consistent with predation than permissible and beneficial price competition. Instead, the Amended Complaint does nothing more than describe an incentive program that has been benefitting consumers for five years. Under these circumstances, the Supreme Court and Fifth Circuit have

repeatedly cautioned that a predatory pricing claim should be dismissed as a matter of law because (1) the antitrust laws encourage price competition, and (2) price reductions very rarely have the potential to cause antitrust injury. *Matsushita Elec. Industrial Co.*, 475 U.S. at 594, 106 S.Ct. at 1360 (concluding "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.").

## ARGUMENT

### I. STANDARD OF REVIEW

Felder's appeals from a dismissal under Federal Rule of Civil Procedure 12(b)(6). This ruling is subject to de novo appellate review accepting all well-pleaded facts as true and viewing those facts in a light most favorable to plaintiff. *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir.2012). This Court should affirm the district court's grant of a motion to dismiss "when the plaintiff has not alleged enough facts to state a claim to relief that is plausible on its face or has failed to raise its right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* To state a claim that is facially plausible, a plaintiff must plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 686, 129 S.Ct. 1937 (2009).

Against this backdrop, the Court must apply the basic standards for assessing the sufficiency of a complaint. A complaint must offer "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412, 417 (5th Cir. 2010). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.*

## II. THE FEDERAL ANTITRUST CLAIMS, WHICH WERE BASED ON A PREDATORY PRICING THEORY, ARE IMPLAUSIBLE AND CONTRARY TO FIFTH CIRCUIT LAW.

In the Amended Complaint, Felder's asserted claims for attempted monopolization and conspiracy to monopolize under Section 2 of the Sherman Act, 15 U.S.C. § 2. The Amended Complaint also asserted a claim under Section 1 of the Sherman Act. Each of these claims is premised on the allegation that the GM rebate program for collision parts permits All Star to engage in predatory pricing.

Predatory pricing involves a three-stage process: (1) a firm sells its products in a particular market at prices below its cost; (2) this below-cost pricing drives competitors out of that market because they cannot profitably compete; and (3) once the competitors are driven out of the market, the firm can raise its prices high enough, and long enough, to recover — or "recoup"— all of its lost revenue and make a profit. As one court explained: "Predatory prices are an investment in a

future monopoly, a sacrifice of today's profits for tomorrow's." *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989).

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. Thus, the Fifth Circuit has held that "the standard for inferring an impermissible predatory pricing scheme is high." *Id.* 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.

Although the district court issued a detailed opinion identifying the deficiencies in the original complaint, provided Felder's with an opportunity to amend, and then permitted Felder's to conduct discovery, the Amended Complaint (like the original complaint) relied on labels, conclusions, and legal argument to disguise the implausibility of its predatory pricing theory.

### A. THE DISTRICT COURT CORRECTLY RULED THAT PLAINTIFF DID NOT ALLEGE FACTS TO SUPPORT THE CONCLUSION THAT GENERAL MOTORS OR ALL STAR PRICED BELOW THEIR AVERAGE VARIABLE COSTS.

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.*, 216 F.3d at 478 n.6. In the Amended Complaint, Felder's accused All Star 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 conceded, however, that the GM rebates enabled All Star to lower prices and sell collision parts at a profit. *See, e.g.*, ROA. 452-454 ¶¶ 32-37. Significantly, the district 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." ROA. 242-245. Unable to identify a single instance in which All Star sold collision parts at a price below the price they paid for the parts after taking into account the rebates, Felder's responded to this holding in the Amended Complaint in two equally ineffective ways.

First, although it admitted in the original complaint that the rebates allowed All Star to "recoup its losses," Felder's periodically qualified this admission in the Amended Complaint by claiming that the rebates permitted All Star to only "partially" recoup its losses. ROA. 452-453 ¶¶ 33-35. However, these conclusory qualifications were directly contradicted by the factual allegations in the Amended Complaint and, therefore, are meaningless and must be disregarded.

For example, several paragraphs of the Amended Complaint show, by reference to specific examples of how the program works, that All Star does not merely "recoup [its] losses" but rather makes a 14% profit. ROA. 450-451 ¶¶ 27-

30. Furthermore, the Exhibits attached to the Amended Complaint demonstrate that GM designed the rebate program to ensure that its dealers profited from collision parts sales. Exhibits 1-4 (ROA. 474-495). Moreover, in other parts of the Amended Complaint, Felder's readily admitted that All Star sold at a profit under the GM program. ROA. 449 ¶ 23 ("After a sale below AVC to a body shop or 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.'"); ROA. 454 ¶ 38 ("The All Star Defendants' ability to recoup its losses from GM is an inducement to engage in predatory pricing.").

Felder's continues to make these admissions in its briefing before this Court. Felder's concedes that "[s]ince 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." Appellant Brief at 12, Document 00512682171. Felder's also concedes that All Star lowered its prices only because it was receiving rebates from General Motors and that All Star would not have done so without this inducement: "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." Appellant Brief at 4, Document 00512682171.

In short, there is no debate that All Star made a profit from selling GM collision parts. Indeed, as demonstrated by the exhibits attached to the Amended Complaint, GM only promises the incentive payment to make a dealer whole and provide a profit if, in fact, the dealer lowers its resale pricing. Consequently, the promise of an incentive payment for lower resale prices cannot reasonably be divorced from the dealer's decision to offer the lower price. Yet, without citing any accounting or legal principles, Felder seeks to take apart—or disaggregate—the transaction in an effort to obtain a fictitious below-cost outcome. The incentives that GM paid were part of All Star's cost calculus in setting its price. As such, by Felder's own admission, All Star did not sell below its costs. Rather, Felder's predatory pricing claim is premised on constructing an alternative reality—one contrary to law, accounting practices, and commercial realities—where rebates are disregarded in calculating profits.

To support this alternative reality, Felder's added three paragraphs to the Amended Complaint in which it made a legal argument challenging the Court's conclusion that rebates should be part of the below cost pricing equation. ROA. 453-455 ¶¶ 36-38. In these paragraphs, Felder's did not offer any new facts. Nor did it offer any legal support for its argument. In holding that "price is measured after considering any discounts or rebates," the district court properly followed Fifth Circuit precedent. *See FMC Corp.,* 170 F.3d at 533 n. 15.

Plaintiff dedicates much of its brief to arguing that the district court's ruling on the law was wrong—in particular, Plaintiff argues that *FMC Corp.* does not apply to this case because below-cost pricing calculations should be measured at the time of sale. The district court responded to this same argument in its April 16, 2013 order correctly finding that the "more reasonable inference drawn from *FMC Corp.* is that the cost and revenue associated with a particular sale should not be dissected into pieces, but rather treated as a whole, regardless of the time associated with any discount or rebate programs." ROA. 243.

In addition to *FMC Corp.*, this conclusion is support by how other courts have approached predatory pricing cases involving rebates. *See 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.)"); *A.A. Poultry Farms. Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989) ("Whether price discrimination has occurred depends, therefore, on the price after all discounts, specials, and so on.").

Plaintiff attempts to distinguish these decisions by arguing that none of them involved the same rebate program at issue in this case or a long-term intent to harm

competition. These arguments fall flat. Divorcing the rebate from the transaction makes no commercial sense when the rebate induces the dealer to sell at lower prices. Further, Felder's does not allege any facts to support the conclusion that there was anything unique about the GM rebate program to suggest that it was more likely to harm competition than other rebate programs or that it reflected a long-term intent to harm competition. Instead, Felder's relies entirely on the name of the GM Program—"Bump the Competition"—claiming that it represents some sort of smoking gun demonstrating that the line between legal and illegal price cutting has been crossed. However, as the district court concluded, the name of a discount program does not say anything about whether the program harms competition. To the contrary, the program encourages healthy price competition.

Other courts have rejected similar efforts to turn "competition" into a dirty word. For example, in another predatory pricing case, a plaintiff argued that the court should draw a negative inference based on memoranda that, among other things, discussed "ways to shut down" and "kill" the competition. *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper*, 462 F.3d 690, 696 (7th Cir. 2006). In rejecting the argument, the Seventh Circuit explained:

> Yet as we remark frequently in antitrust litigation, "cutthroat competition" is a term of praise rather than condemnation….Businesses need not love their rivals (or firms that compete with their customers); customers gain when firms try to "kill" the competition and take as much business as they can. The question is not whether the defendant has tried to knock out other

> businesses but whether the means it has employed to that end are likely to benefit or injure consumers.

*Id.* (citations omitted); *accord A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) ("[A] desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition."). Similarly here, far from showing an intent to violate the antitrust laws, "Bump the Competition" is entirely consistent with conduct the antitrust laws were designed to protect.

Plaintiff also has not alleged that any transaction as a whole was unprofitable. *FMC Corp.* teaches that any below-cost pricing analysis must look at an entire transaction rather than at individual subparts. 170 F.3d at 533 n. 15 ("When a company has a 'buy one, get one free' promotion, it would be incorrect to look at the nominal price of the 'free' product—zero—and infer predation from this fact"). The Amended Complaint alleges that transactions between All Star and a collision center routinely involve multiple parts. ROA. 474 (explaining that the collision center must provide a copy of the "complete insurance repair estimate" to the GM dealer to "take advantage of savings."). Nonetheless, in the Amended Complaint, Plaintiff focuses only on a comparison of the price paid for a particular part and the sales price for that part and does not offer a single example of an actual transaction involving multiple parts between All Star and a collision center. In the district court, Plaintiff mistakenly conflated this issue with its argument that GM rebates should be disregarded in the below-cost pricing analysis. ROA. 572-

573. ("[T]here is nothing in conflict between the *FMC* 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 two points are unrelated. Failing to allege that a particular transaction as a whole priced below variable cost represents a fatal "threshold problem" under *FMC Corp.* that is distinct from the question of whether "price is measured after considering any discounts or rebates." Plaintiff has fallen short on both counts.

Finally, even without Plaintiffs' admission that the GM rebate program permitted All Star to lower prices and sell at profit, the Amended Complaint does not offer any facts to support a finding of below-cost pricing. In order to support a below-cost pricing allegation, Felder's had an obligation to explore "the relationship between variable costs, fixed costs, and profits." *FMC Corp.*, 170 F.3d at 532. Instead, Felder's has only compared the sales price of a particular part with how much All Star paid for that part. Despite having been permitted to conduct extensive discovery, the Amended Complaint is silent on All Star's cost structure. The Fifth Circuit has been clear "that judgment as a matter of law is appropriate when the plaintiff fails to adequately specify how the challenged pricing undercuts the defendant's variable costs." *Id.*

In sum, Plaintiff is just wrong on the law. The rebates paid by General Motors permitted All Star to lower its prices while still earning a profit on the parts sold. The courts have been clear in holding that such price cutting is always procompetitive. Accordingly, by its own admission, Felder's cannot meet a fundamental element of its predatory pricing claim—below-cost pricing.

### B. THE DISTRICT COURT CORRECTLY RULED THAT THE ALLEGATIONS IN THE AMENDED COMPLAINT CONTRADICT THE PROPOSED GEOGRAPHIC MARKET DEFINITION.

In its April 16, 2013 ruling, the district court stated that an "adequate definition of the relevant market is critical because it 'provides the framework against which economic power can be measured.'" ROA. 228 (citing *Jayco Sys., Inc. v. Savin Bus. Machines Corp.*, 777 F.2d 306, 319 (5th Cir. 1985)); *see also Wampler v. Southwestern Bell Tel. Co.,* 597 F.3d 741, 744 (5th Cir. 2010) (citations omitted) (affirming dismissal because proposed geographic market was not plausibly pled). 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." ROA. 230. In granting Felder's leave to amend, the district court cautioned 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." ROA. 231.

In the Amended Complaint, Felder's identified specific parishes and counties in Louisiana and Mississippi in which Felder's and All Star allegedly sell collision parts in competition with each other. ROA. 447 ¶ 15. Felder's did not say anything about whether body shops in these areas obtain collision parts from vendors operating outside the alleged market, such as nearby Mobile, Birmingham, Memphis, Houston, and Dallas. Nor did 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. Indeed, none of the factors that the Fifth Circuit enumerated in decisions like *Jayco* and *Wampler* (e.g., reasonable interchangeability and cross-elasticity of demand) are even mentioned.[2]

On the other hand, the Amended Complaint included other allegations that suggested a geographic market much larger than the one proposed by Felder's. For example, Felder's, which is located in Baton Rouge, alleged that it competes for business in areas as far away as Jackson, Mississippi and Lake Charles, Louisiana.

[2] In *Wampler*, the Fifth Circuit explained that in "defining the relevant geographic market, this Court looks at 'the area of effective competition.' This is the area 'in which the seller operates and to which buyers can practicably turn for supplies.' In addition, the proposed market must 'correspond to the commercial realities of the industry and be economically significant.'" 597 F.3d at 744.

Felder's also alleged that a competitor in Shreveport competed in Alexandria (ROA. 459 ¶ 53) and that another competitor, Keystone, has a national presence by virtue of its status as the "country's largest aftermarket parts distributor." ROA. 459-460 ¶ 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 Amended Complaint did 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 failed to include Shreveport, Houston, Memphis, Birmingham, and Dallas in its geographic market and provided no explanation for why the market should not be national in scope when distribution centers can deliver parts via overnight delivery from anywhere in the country.

The district court correctly pointed to these allegations in concluding that "the Amended Complaint's allegations belie its own alleged proposed geographic market." ROA. 633. In its briefing before the Court, Felder's does not address the inconsistency between its proposed market definition and its factual allegations. Instead, it argues that its market definition was supported by other allegations, namely the allegation that "the sale of collision parts is a relationship driven business" and the allegation that repairs must be "completed in the shortest period of time." However, in drawing inferences, the Court must look at the allegations

in the Amended Complaint as a whole. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 2509 (2007) (concluding that the court should "consider the complaint in its entirety . . . . [and] not whether any individual allegation, scrutinized in isolation, meets the standard."). As such, the Court should reject this effort to cherry pick to cobble together a claim.

Moreover, although Plaintiff asserts that collision parts sales is a relationship-based business, it contradictorily concedes that insurance companies make purchasing decisions based primarily, if not solely, on price. Similarly, while Plaintiff claims that repairs must be "completed in the shortest period of time," it concedes that it competes effectively for customers hundreds of miles away from its warehouse and that other collision parts distributors do the same. Thus, even if the allegations of a relationship-based business and immediate service could be considered in isolation, they are equally consistent with a national market since modern technology permits business to work closely with, and quickly deliver goods to, other businesses thousands of miles away. In contrast, Felder's examples of collision parts sellers actively competing in cities hundreds of miles away from their places of business and admission that the largest collision parts seller competes nationally cannot be squared with its proposed market.

Finally, Felder's proposed geographic market definition consisting of several gerrymandered state parishes and counties is implausible because it makes no

economic sense. The parishes and counties included in the market were selected by Felder's solely based on where it conducts business rather than on where customers can turn for collision parts. The failure to allege a market with reference to consumers is not a technical point. A market definition untied to where consumers can practicably turn is no definition at all. Further, without a relevant market definition, 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, the district court properly concluded that the predatory pricing claim fails as a matter of law.

### C. PLAINTIFF ALLEGED NO FACTS TO SUPPORT THE CONCLUSION THAT DEFENDANTS HAVE OR WERE LIKELY TO OBTAIN MARKET POWER.

To prevail on their predatory pricing theory, Felder's had to allege facts sufficient to support the conclusion that All Star had a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 890-91(1993). Monopoly power is the "power to control price or exclude competition." *United States v. E. I. du Pont de Numours & Co.*, 351 U.S. 377, 391 (1956). Stated differently, monopoly power refers to a firm's ability to raise prices significantly above competitive levels for an extended period of time without inducing rapid expansion or new entry by rivals, sometimes referred to as the ability to charge "supracompetitive" prices. *See, e.g., American Academic*

*Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1319 (7th Cir. 1991); P. Areeda & H. Hovencamp, Antitrust Law, §501 at 111 (2007).

The district court did not reach this issue in its order dismissing the Amended Complaint. However, in its April 16, 2013 order, the district court 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." ROA. 234. The district 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." ROA. 234. Despite this admonition, the Amended Complaint offered none of these specific facts.

Although Felder's alleges that All Star operates the "largest parts distribution center in Louisiana at more than 50,000 square feet and $5 million in inventory," it provided no factual allegations about the number, size, or location of competing distribution centers operated by Keystone, Felder's, or others. ROA. 446 ¶ 13. Alleging that All Star "operate[s] the largest parts distribution center in Louisiana" says nothing about its ability to control prices or exclude competition. While Felder's claimed that the distribution center permits All Star "to deliver parts to

body shops in a short period of time," there is nothing in the Amended Complaint to suggest that having the largest distribution center in Louisiana gives All Star an insurmountable competitive advantage. ROA. 448 ¶ 19. 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 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 overnight.

The scant market information that does appear in the Amended Complaint suggests that All Star has no prospect of being able to exercise market power. The 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 the Amended Complaint, 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. ROA. 459-460 ¶ 54. Thus, if anything, the Amended Complaint suggests that competition is unlikely to be driven from the market. Indeed, Keystone's continuing presence by itself renders the predatory pricing scheme wholly implausible because competition from Keystone would prevent General Motors or All Star from extracting monopoly profits.

The 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 to these insurance companies' demands for prompt service and low prices. ROA. 447-448 ¶¶ 17-18. It is simply implausible that All Star currently has, or has any prospect of obtaining, sufficient market power to raise prices in a market where competition caused General Motors to design and implement a rebate program directly responsive to customer demands for lower prices. *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 plausible conspiracy to engage in predatory conduct where two larger rivals established repair shop networks to provide services demanded by automobile insurance companies).

In the Amended Complaint, Felder's also makes the conclusory allegation that All Star drove three companies located in Jackson, New Orleans, and Shreveport, respectively, out of business. ROA. 459 ¶¶ 51-53. In its April 16,

2013 ruling, the district court suggested that the demise of these competitors might suggest "some degree of market power." ROA. 232. On this point, the district court assumed too much. The 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 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 the businesses identified by Felder's. *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 district 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." ROA. 234. Although Felder's alleged in the Amended Complaint that there 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 General Motors

and All Star, Felder's only describes their market share as "substantial"—a term so vague as to have no real meaning. ROA. 448 ¶ 19. Thus, the Amended Complaint provides absolutely no factual basis to assess market power.

Significantly, Felder's does not allege that it is the sole remaining after-market parts dealer in the alleged market or even that the number of competitors in any of those markets is limited. Thus, in addition to Keystone, there could be numerous other after-market parts sellers with significant market shares competing against All Star at this time. As such, even if Felder's were driven from the market, there is no suggestion that All Star would be immune to ordinary competitive forces. Without information about the number of competitors and their significance, the Court must assume that consumers are benefiting from the low prices that All Star offers and that they will benefit further if inefficient firms selling high priced, low quality parts are driven out of the market.[3]

What is known from the 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 based on its size and diversification. What is also known is that the ultimate

[3] Felder's has offered no explanation for why it has failed to allege facts to support the conclusion that its financial woes or those of the four unidentified bankrupt firms were attributable to the alleged predatory pricing scheme as opposed, for example, to competition from other aftermarket resellers.

customer – the insurance companies – demand low prices. Thus, if the allegations in the Amended Complaint are accepted as true, All Star 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 than All Star, which distributes OEM parts. In light of this, there is simply nothing in the Amended Complaint to suggest that All Star's pricing practices are more consistent with predatory conduct than permissible, encouraged price-cutting. Yet, this is precisely what the pleading standards require and why the Supreme Court and the Fifth Circuit view allegations like this with "extreme skepticism."

### D. RECOUPMENT IS IMPLAUSIBLE.

The United States Supreme Court and Fifth Circuit have repeatedly held that predatory pricing claims should fail in the absence of allegation to support the possibility of recoupment. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 224 (1993) ("Recoupment is the ultimate object of an unlawful predatory scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."); *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 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 below-cost prices inflicted losses upon competitors of sufficient magnitude to drive them from the market. *Brooke Group*, *Ltd.* 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. A relevant market definition is essential to this analysis because it provides the context through which a court assesses a defendant's market power and ability to "recoup" the revenue it supposedly sacrificed. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 325-326, 127 S.Ct. 1069, 1078.

In its April 16, 2013 ruling, the district court held that Felder's had alleged sufficient facts to meet the first element of the recoupment analysis. ROA. 236-238. Defendants strongly disagree with this conclusion. To be actionable, below cost pricing must inflict losses upon the target competitor(s) of sufficient magnitude to drive it (them) from the relevant market. *Brooke Group*, *Ltd.*, 509 U.S. at 224-25. As discussed above, Felder's simply does not plead any market or

competition facts to permit an inference that the GM incentive program drove, or is likely to drive, competitors from the market—whatever the market may be.

Even the program's duration contradicts the conclusory allegation that All Star could actually drive competitors from the market. According to Felder's, the GM price incentive program has been in place since at least January 1, 2009. Nonetheless, the Amended Complaint concedes that Keystone has been able to withstand the program. So has Felder's. Thus, after five years of alleged predatory pricing, All Star has yet to drive its competitors from the market or raise prices above competitive levels. Therefore, far from alleging a viable predation strategy, the scheme outlined by Felder's is one where All Star is unlikely to ever recoup its alleged five-year-plus investment in below cost pricing.

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. Further, even if plausible, "futile below-cost pricing effectively bestows a gift on consumers, and the Sherman Act does not condemn such inadvertent charity." *Id.* at 530 (quoting *Advo Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1200 (3d Cir. 1995)). Thus, the admission by Felder's that competitors have not been

driven from the market after five years of alleged predation demonstrates that Felder's has not alleged facts to support the first prong of the recoupment analysis.

Even if Felder's had alleged facts to support the conclusion that the predatory pricing scheme might drive competitors from the market, the district court also recognized that Felder's would have to do more in the Amended Complaint to support the second prong of the recoupment analysis. According to the district court, the second element of the recoupment analysis turns on whether Felder's alleged a relevant market in which All Star could exercise sufficient market power to be able to exclude rivals from entering the market. ROA. 241-242. The original complaint offered nothing on this point and the Amended Complaint did not cure this deficiency. As more fully discussed above, Felder's simply has not alleged a relevant market or facts to support the conclusion that All Star has the requisite market power to raise price and recoup lost profits.

Finally, at its core, Felder's theory of recoupment – that the incentive payments demonstrate a dangerous probability of recoupment – is fatally flawed. First, as discussed above, Felder's alleges that All Star makes a profit at the end of the completed transaction under the rebate program. This means that All Star incurs no losses. Second, All Star's contemporaneous receipt of financial incentives from GM under the Program is simply not the sort of recoupment through future monopoly pricing that is the gravamen of a predatory pricing claim.

"For the investment [in below-cost sales] to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Brooke Group, Ltd.*, 509 U.S. at 224 (emphasis added). Thus, the argument that recoupment may be proven through incentive payments that are part of the allegedly "below cost" sales—rather than through sustained increased prices on future sales—is in direct conflict with *Brooke Group, Inc.*

The district court did not reach the recoupment element in its ruling dismissing the Amended Complaint. However, 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. As such, the failure to allege recoupment stands as an independent basis for dismissal.

### E. PLAINTIFF ALLEGED NO FACTS TO SUPPORT AN INFERENCE OF INJURY IN FACT OR CAUSATION AND, THEREFORE, LACKS STANDING.

To establish standing under 15 U.S.C. §15,[4] Felder's had an obligation to allege facts sufficient to support an inference that it suffered injury and that the alleged predatory conduct was the proximate cause of its injury. However, in the Amended Complaint, Felder's only allegation concerning injury is that its "total

[4] The District Court did not reach the standing issue in its April 16, 2013 order or in its order dismissing the Amended Complaint.

income" has declined from "the last year before the start of the pricing program" through 2011. ROA. 460 ¶ 56. This allegation does not support an inference of injury in fact or causation because the Amended Complaint does not establish any link between the GM incentive program and the lost sales. Felder's, for example, does not disclose whether its "total income" represents sales within the market or includes other sources. Nor does Felder's disclose whether it (or any other after-market seller) could profitably sell at or below All Star's prices in real world transactions or whether it (or any other firm) lost any specific sale(s) due to the incentive program. In the absence of facts to support an inference of causation and injury, Felder's Complaint also should be dismissed for lack of standing. *E.g., Chrysler Credit Corp., v J. Truett Payne Co.*, 670 F.2d 575, 578 (5th Cir. 1982).

### F. MONOPOLY LEVERAGING WAS NEVER ALLEGED AND IS NOT A CLAIM RECOGNIZED IN THE FIFTH CIRCUIT.

ABPA, a trade association that represents the interests of aftermarket parts distributors throughout the country, has filed an amicus brief mostly arguing that the GM rebate program constitutes monopoly leveraging. When this matter was pending in the trial court, ABPA attempted to file a brief substantially identical to the one filed with this Court. The district court denied leave because the brief dealt "primarily with the issue of monopoly leveraging which [was] not an issue . . . before the Court." ROA. 635 n. 3. In reaching this conclusion, the district court correctly recognized that Felder's was pursuing a predatory pricing claim, not a

monopoly leveraging theory, and that ABPA provided nothing to support Felder's claim. Moreover, even if such a theory had been alleged in this case, the Fifth Circuit does not recognize monopoly leveraging as a valid claim under Section 2 of the Sherman Act. *Eleven Line, Inc. v. North Texas State Soccer Ass'n*, Inc., 213 F.3d 198, 206 n. 16 (5th Cir. 2000). As such, the ABPA brief is of no value.

## III. THE STATE ANTITRUST LAW CLAIMS ALSO FAIL.

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; *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. 1 Cir. 1990). Accordingly, the Louisiana state antitrust claims in the Amended Complaint fail for the same reasons as the federal antitrust claims.

## IV. WITHOUT SPECIFIC FACTUAL ALLEGATIONS OF FRAUD, MISREPRESENTATION, DECEPTION, OR OTHER UNETHICAL CONDUCT, THE LUPTA CLAIM FAILS AS A MATTER OF LAW.

In its April 16, 2013 ruling, the district court found that Felder's had failed to allege "that Defendants committed fraud, misrepresentation, deception, or unethical conduct" and that the predatory pricing allegations alone could not support a claim under LUPTA. ROA. 250. The district court supported its

decision by pointing to the teachings of the Louisiana Supreme Court in *Cheramie Servs. v. Shell Deepwater 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 under LUPTA. *See also Cargill, Inc. v. Degesch America, Inc.*, 875 F.Supp.2d 667, 676-77, (E.D. La. 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 the unfair trade practice allegations in its Amended Complaint. Instead, it relied exclusively on its predatory pricing theory to support the claim. The district court dismissed the LUPTA claim, finding that a "naked assertion" of a LUPTA violation followed by a recitation of the law was insufficient to support a cause of action. There is no reason to disturb this ruling. The LUPTA claim fails as a matter of law because Felder's had to do more than allege predatory pricing—it had to allege that Defendants committed "fraud, misrepresentation, deception, or unethical conduct." *Cheramie Servs.*, 09-1053 (La. 4/23/10), 35 So. 3d at 1060. There are no such allegations in this case.[5] Moreover, even if predatory pricing

[5] Felder's argues that the name of the program "Bump the Competition" suggests unethical conduct. As explained above, there is nothing unethical about seeking to drive a competitor out of business. To the contrary, the "desire to

allegations were sufficient to support a LUPTA claim, Felder's has failed to allege predatory pricing by General Motors or the All Star Defendants.

## V. THERE IS NO INDEPENDENT CAUSE OF ACTION FOR SOLIDARY LIABILITY.

The district court correctly dismissed Felder's joint and solidary liability claim. Louisiana Civil Code art. 2324 provides, in pertinent part: "He who conspires with another person to commit an intentional and willful act is answerable, in solido, with that person, for the damage caused by such act." Louisiana courts have been clear in holding that Article 2324 does not create an independent cause of action for civil conspiracy. *See Louisiana v. McIlhenny*, 9 So. 2d 467, 472 (1942); *Junior Money Bags, Ltd. v. Segal*, 798 F. Supp 375, 379 (E.D. La. 1990); *Silver v. Nelson*, 610 F. Supp. 505, 517 n. 15 (E.D. La. 1985). Rather, the "actionable element under article 2324 is the intentional tort the conspirators agreed to commit and committed in whole or in part causing plaintiff's injury." *Rhyce v. Martin*, 173 F. Supp.2d 521, 535 (E.D. La. 2001).

In its brief, Felder's does not identify any Louisiana state court decisions suggesting that an independent cause of action exists for solidary liability. Instead, Felder's merely argues that it has "pled sufficient facts to state a claim for conspiracy to commit antitrust violations." Appellant Brief at 46, Document

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extinguish one's rivals is entirely consistent with, often is the motive behind, competition" *A.A. Poultry Farms*, 881 F.2d at 1402

00512682171. For the reasons set forth above, Felder's has not stated facts to support an antitrust violation under federal or state law. More importantly, Felder's is attempting to assert a cause of action that simply does not exist. Accordingly, the district court properly dismissed the solidary liability claim.

## CONCLUSION – RELIEF SOUGHT

For the reasons set forth above, the Court should affirm the district court's order dismissing with prejudice all claims in the Amended Complaint.

## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type volume limitations as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,063 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 Office Word 2010 in Times New Roman 14pt.

Dated: August 19, 2014

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been forwarded to all unrepresented individuals and all counsel of record by the Court's CM/ECF electronic notice system, by e-mail, by hand, and/or by placing same in the U.S. Mail, postage prepaid, on August 19, 2014.

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