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

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

GLADSTONE N. JONES, III (#22221)
LYNN E. SWANSON (#22650)
H.S. BARTLETT, III (#26795)
JONES, SWANSON, HUDDELL & GARRISON, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, Louisiana 70130
Telephone: (504) 523-2500
Facsimile: (504) 523-2508

JAMES M. GARNER, T.A. (#19589)
PETER L. HILBERT, JR. (#6875)
DARNELL BLUDWORTH (#18801)
RYAN D. ADAMS (#27931)
KEVIN M. MCGLONE (#28145)
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street, Suite 2800
New Orleans, Louisiana 70112-4046
Telephone: (504) 299-2100
Facsimile: (504) 299-2300
E-Mail: jgarner@shergarner.com

ATTORNEYS FOR PLAINTIFF-APPELLANT, FELDER'S COLLISION PARTS, INC.

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INTRODUCTION

Plaintiff-Appellant Felder's Collision Parts, Inc. ("Felder's") respectfully submits this Reply Brief in support of its appeal of the District Court's April 23, 2014 Judgment dismissing the First Amended and Supplemental Complaint. Defendants-Appellees All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C., All Star Chevrolet Inc., (collectively, "All Star") and General Motors, LLC ("GM") have failed to demonstrate why this Court should affirm the District Court's Judgment.

First, contrary to their argument, the kickback to All Star from GM cannot be considered as part of the entire predatory pricing transaction. It provides no benefit to the consumer, unlike a traditional rebate program, and serves the sole purpose of eliminating competition from the market for automobile collision parts compatible with GM vehicles.

Second, All Star and GM disregard any reasonable inferences favorable to Felder's that may be drawn from the allegations of the Amended Complaint and focus only on their own perceived inferences that they contend demonstrate that Felder's failed to adequately plead the geographic market. Such spin by GM and All Star, however, is improper when reviewing dismissal of a case under Rule 12(b)(6). The issues raised by GM and All Star are more appropriately addressed at a later time in discovery and trial.

Third, GM and All Star incorrectly take issue with the District Court's determinations that they have or were likely to obtain market power and that Felder's allegations of recoupment are plausible. Finally, GM and All Star erroneously contend that Felder's has not demonstrated antitrust injury sufficient to have standing to assert its claims. Felder's has properly alleged that the illegal anti-competitive actions of GM caused its damages, thus giving it standing to bring this lawsuit.

I. The proper focus of a predatory pricing complaint is at the time of sale to the consumer when harm to competition occurs.

The fundamental issue on appeal is whether a predatory pricing scheme such as the "Bump the Competition" Program should be evaluated at the time that competition is harmed, i.e., the point of sale to a consumer below cost, or whether it is appropriate to consider post-sale conduct ***that does not affect the consumer*** and serves only to "bump" competition. GM and All Star make much of the statement by the District Court and Felder's that All Star would not participate in the "Bump the Competition" Program absent the recoupment or kickback after the sale is completed. This kickback, of course, is the incentive to anti-competitive behavior, but it cannot excuse such action. Predatory pricing schemes are normally viewed as unreasonable or nonsensical because parties would not willingly lose money to achieve a monopoly. But, the function of the kickback in

this case allows All Star to have its cake and eat it, too. All Star can take an initial loss and "bump" competition from Felder's and then recoup that money via a kickback from GM that justifies All Star's initial action. Such conduct, however, is not a defense to antitrust laws designed to protect competition.

"Federal antitrust laws protect competition, not competitors." *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009). Competition is harmed in this case when All Star undercuts Felder's by 33% and sells below All Star's own cost, only to have GM make up the difference while Felder's suffers because it cannot afford to cut its own price by 33%. *See, e.g.*, ROA.460 at ¶ 55 ("As a result of the illegal and discriminatory pricing practices described herein, body shops now will turn to the All Star Defendants for their automobile collision parts needs, and Felder's cannot compete because it cannot lower its prices to match the All Star Defendants' anti-competitive prices and remain in business.").

GM and All Star put heavy reliance on a single footnote in this Court's decision in *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999).[1] *Stearns*, however, does not address a rebate or discount program that is

[1] GM and All Star refer to this case throughout its brief as "*FMC Corp.*," whereas Felder's referred to this case in its principal brief as "*Stearns*." For the sake of consistency, Felder's will continue to refer to it as "*Stearns*" but makes this observation to save this Court any confusion that the parties are discussing the same case.

even remotely comparable to the present case. The reliance on *Stearns* by GM and All Star, as well as the District Court, is greatly misplaced.

Stearns involved an alleged predatory pricing scheme regarding a multi-phase construction project. Plaintiff uncovered evidence that one section of the project would allegedly be completed with a negative operating margin. *Id.* at 533. The court noted that the reference to the negative profit margin actually meant that the project would not meet a benchmark profit target, ***not a bid below average variable cost*** as required for a successful predatory pricing claim. *Id.* Nonetheless, the court mentioned in a footnote that the price of the project as a whole should be considered, noting that "the fact that FMC may have chosen ***for internal reasons or salesmanship purposes*** to shift costs in this manner is not objectionable without a showing that the project as a whole was not priced above its variable cost." *Id.* at 533 n.15 (emphasis added).

This conclusion in *Stearns* is distinguishable from the present case and does not assist GM or All Star for several reasons. First, the construction project in Stearns and the "Bump the Competition" Program are about as similar as apples and oranges. As Felder's noted in its principal brief, there is a critical distinction between a construction project where there is no competitive advantage because ***part*** of a project is priced below cost and a scheme whereby a competitor seeks to harm competition by setting its price so far below a its own and its rival's costs

that the rival cannot possibly counter the price reduction. Thus, competition is harmed even though the competitor may one day be made whole for its sale below cost. GM and All Star ignore this distinction and cling blindly to footnote 15 in *Stearns*, even though it does not say what they want it to say. In *Stearns*, the internal accounting distribution of pricing and costs among different phases of a project did not ultimately result in a total price below cost for the consumer. Here, however, the post-transaction kickback involved has ***no*** impact on the transaction price-versus-cost at the point of sale to the consumer. It is at that point that the harm to competition has occurred, and *Stearns* does not provide authority to alter that analysis.

Stearns is further distinguishable because the admitted purpose of the accounting manipulations in *Stearns* was done, as this Court noted, for internal purposes, not to eliminate a competitor from the business. In contrast, the stated goal of the "Bump the Competition" Program was to "bump" the competition from Felder's and others. Felder's admits that any seller wants to beat competition and be the best in the business, but the anti-trust laws limit the extent to which a competitor can engage in cutthroat tactics, and, in this case, a blatant sale below average variable costs is illegal.

All Star and GM ignore the fact that the "price" of an object does not include payments from a manufacturer to a seller. Rather, "price" is more appropriately

determined at the point when the seller sells the object to the purchaser. Rebates, which inure to the benefit of the purchaser, are properly considered in the calculation of the "price." Bonuses or kickbacks, inuring solely to the benefit of the seller and providing no benefit to the purchaser, do not fall within the meaning of "price." For these reasons, Felder's properly pled a cause of action for predatory pricing.

II. Felder's properly alleged the geographic market, and GM and All Star compound the District Court's error by failing to make reasonable inferences from the allegations in the Amended Complaint that favors Felder's.

GM and All Star discuss the sufficiency of the Amended Complaint's allegations regarding the geographic market, but their arguments ignore the procedural posture of this case. As Felder's noted – and GM and All Star do not dispute – the strength of allegations of a geographic market are best left for a jury. *See Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1184 (5th Cir. 1988). A motion to dismiss for failure to plead the relevant market should not be granted lightly. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 443 (4th Cir. 2011). GM and All Star to not point out any "glaring deficiencies" that would justify dismissal in this case; rather, they attempt to make inferences from the allegations that support their theory of the case while otherwise ignoring any

inferences favorable to Felder's, contrary to the law on dismissals under Rule 12(b)(6). *See Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232-33 (5th Cir. 2009).

GM and All Star challenge the market because Felder's did not assert why customers in Jackson or Lake Charles could not turn to other geographic areas, such as Memphis or Lake Charles, to obtain collision parts compatible with GM vehicles. The geographic market is the "area of effective competition" that considers the area in which the seller operates and to which the purchaser can turn for supplies. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961). In *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620 (5th Cir. 2002), this Court found the definition of a geographic market lacking because it did not consider the full geographic scope of the area in which the plaintiff did business. *Id.* at 628-29.

The District Court properly refused to consider much the same argument advanced now by GM and All Star because it impermissibly inserts factual questions regarding the extent of the geographic market into the analysis. Indeed, the District Court noted that Felder's properly alleged "whether and where buyers can turn to other sellers for supplies." ROA.632. The District Court further recognized that "Felder's included allegations to support an inference that it is difficult for other dealers to reasonably move into the proposed market to compete." ROA.632.

Instead, the District Court, like GM and All Star in their brief, focus on the allegations in the Amended Complaint concerning the presence of a nation-wide competitor with a presence in the proposed Geographic Market to contend that said alleged market was too narrow. Such argument by GM and All Star would effectively require that the presence of a nation-wide competitor in a proposed geographic market make the geographic market national in scope.

Further, the allegations in the Amended Complaint are not contradictory. The fact that the automotive collision repair parts business is, like almost all business, cost-driven does not preclude the fact that sales are a relationship-based business. Insurance companies may make demands on body shops and collision centers to make repairs at the lowest cost, but those body shops must still make decisions on where to turn for parts. At best, the arguments raised by All Star and GM are but one of different permissible inferences that a court could draw from the allegations in the Amended Complaint. GM and All Star have not shown that dismissal under Rule 12(b)(6) is appropriate in light of the significant factual allegations presented in the Amended Complaint.

III. Felder's properly alleged the likelihood that All Star would achieve market power.

GM and All Star further challenge whether Felder's has properly alleged that All Star would achieve monopoly power or "the power to control price or exclude

competition." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Notably, the District Court did not find that this was a defect in the Amended Complaint, presumably finding that Felder's followed its previous instruction to provide specific allegations regarding Defendants' market share and "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.

Felder's properly pled that All Star operates the largest parts distribution center in Louisiana with a facility more than 50,000 square feet and carrying $5,000,000 in inventory. ROA.446 at ¶ 13. GM and All Star isolate this allegation and conclude that this says nothing about their ability to control prices or exclude competition. Such an argument completely ignores other significant allegations in the Amended Complaint. Felder's noted that All Star has "enjoyed a significant increase in revenue from the sale of collision parts. At the same time, the All Star Defendants have enjoyed increasing profit margins on the sale of collision parts. 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 aftermarket alternative." ROA.456 at ¶ 42.

Felder's further noted the high and difficult barriers to entry in the market for collision parts given the dominance of GM and All Star. ROA.457 at ¶ 46. In

fact, in the past 10 years, no new aftermarket parts sellers entered the market because they cannot compete with the sellers, such as All Star, that conspire with GM to reduce prices below the seller's AVC. ROA.458 at ¶ 48. Felder's further alleged a link between the going out of business of three competitors of Felder's and the anti-competitive actions of GM and All Star. ROA.458 at ¶¶ 49, 51-53.

GM and All Star ignore all of these allegations and ask this Court to make numerous impermissible inferences, all in their favor. They contend, for example, that it would be more beneficial to have numerous distribution centers rather than a single, large distribution center and would cut into All Star's competitive advantage. Clearly, the facts cited above regarding the increasing profit margins All Star enjoys on the sale of collision parts is an indication that their single large distribution center is doing just fine; this is a permissible reasonable inference that the Court must make under the standard applicable at the Rule 12 stage of these proceedings.

GM and All Star further suggest that it is implausible that it could obtain sufficient market power where GM was forced to design the "Bump the Competition" Program to respond to a demand for low prices. This statement ignores critical allegations of the Amended Complaint. First, All Star can afford to lower prices on parts that have an aftermarket equivalent considering the substantial profit it enjoys from the sale of OEM parts that have no aftermarket

equivalent and can be purchased only from All Star. All Star faces no pressure to reduce the prices on these parts. It is only logical to assume that, once All Star achieves its monopoly of parts compatible with GM vehicles, it will raise prices. After all, if one is the only game in town, one can set its own rules. It is also likely that market power can be achieved from such low prices because All Star's competitors, such as Felder's, cannot continue to compete with All Star when it reduces its prices below its own cost and 33% below the price charged by Felder's for an equivalent aftermarket part.

Such facts are sufficient to establish the likelihood that All Star will achieve monopoly power. The impermissible inferences advanced by All Star and GM are all better left for discussion in discovery and at trial rather than in a motion to dismiss under Rule 12(b)(6). The District Court did not err in refusing to hold that Felder's had failed to allege monopoly power.

IV. The District Court correctly determined that Felder's had included sufficient allegations of recoupment.

GM and All Star also challenge whether Felder's properly alleged the likelihood of recoupment. Their essential argument is that there cannot be a possibility of recoupment because the program has been in place since January 1, 2009. This is merely one of many factors to consider, and, again, is properly addressed in discovery. Felder's alleged that All Star and GM have driven

competitors from the market and have erected substantial barriers to entry of new competitors. There mere existence of Keystone in the market is not proof that GM and All Star do not have a possibility of recoupment. First, All Star enjoys recoupment from the kickbacks provided by GM to induce participation in the "Bump the Competition" program. When the scheme is properly viewed in its separate parts – first the sale that harms competition and second, the kickback – recoupment is easy to understand.

V. Felder's alleged antitrust injury in fact and, therefore, has standing to proceed.

In its April 17, 2013 Ruling on Defendants' Motion to Dismiss, the District Court noted that GM and All Star only raised the issue of standing in a footnote and declined to address the issue because it was insufficiently briefed. *See* ROA.246-247. Nonetheless, GM and All Star again contend that Felder's lacks standing to bring its anti-trust complaint because it cannot allege standing. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Supreme Court observed that, to succeed in an antitrust claim, a plaintiff must show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 489. This Court

recognizes that standing exists if a plaintiff demonstrates: "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendant's conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997).

This court cautioned that "the antitrust laws do not require a plaintiff to establish a market-wide injury to competition as an element of standing." *Id.* at 305. Further, "antirust injury for standing purposes should be viewed from the perspective of the plaintiff's position in the market place, not from the merits-related perspective of the impact of a defendant's conduct on overall competition." *Id.*

The allegations of the Amended Complaint are analogous to the facts before this Court in *Doctor's Hospital of Jefferson, supra*. In that case, the plaintiff, Doctor's Hospital of Jefferson ("DHJ") alleged that the defendants East Jefferson Hospital ("East Jefferson") and Southeast Medical Alliance ("SMA") conspired to exclude DHJ from SMA, the second-largest preferred provider organization in the New Orleans area to create a monopoly for East Jefferson for health services on the East Bank of Jefferson Parish. The District Court granted summary judgment to East Jefferson and SMA finding that DHJ lacked standing. This Court disagreed

with the District Court's standing analysis, but affirmed the grant of summary judgment on other grounds. Discussing standing, this Court held:

> So viewed, DHJ's ***alleged losses and competitive disadvantage because of its exclusion from SMA fall easily within the conceptual bounds of antitrust injury***, whatever the ultimate merits of its case. DHJ is a would-be provider of services for SMA and a direct competitor of East Jefferson, the alleged monopolist. DHJ has asserted that SMA and East Jefferson conspired to remove DHJ from SMA in response to East Jefferson's market power and in order to weaken it as a competitor for East Jefferson. Although these theories of antitrust violations arise from the complex and rapidly evolving health care "market," they are hardly novel, and DHJ is no remote or indirect victim of the alleged scheme. ***DHJ's alleged injury flows from the allegedly exclusionary conduct of its competitor East Jefferson and is exactly the kind of anticompetitive effect that East Jefferson sought.***

Id. at 305-06 (emphasis added).

This Court noted, further, that standing analysis may be helpful in atypical cases to determine whether the plaintiff has sustained injury-in-fact or is the proper plaintiff, but it cautioned that "standing should not become the tail wagging the dog in 'classical' antitrust cases such as this one by an allegedly excluded competitor." *Id.* at 306.

The allegations in the Amended Complaint establish standing in a similar manner as did DHJ in *Doctor's Hospital*. GM and All Star wrongfully suggest that the Amended Complaint's only allegation supporting standing is the contention that Felder's had less income the year before the "Bump the Competition" Program

started as compared to its income after the program commenced. They further contend that there is no inference between the program and the lost sales. Felder's did much more than simply allege a decline in income. It particularly noted that "after-market demand for bumpers and lights, the biggest sources of income, has ***substantially declined due to the conspiracy and collusion between GM and the All Star Defendants . . . to undercut prices***." ROA.460 at ¶ 56 (emphasis added).

Taken as a whole, the allegations of the Amended Complaint establish that GM and All Star conspired to commit antitrust violations and eliminate competition from All Star's competitor, Felder's. Like DJH, Felder's alleged that its competitor (All Star) conspired with another party (GM) to achieve a monopoly and drive Felder's out of business. This is a classic antitrust case of a party alleging exclusionary and unfair practices of a competitor. Such allegations are sufficient to establish standing under Rule 12(b)(6).

VI. CONCLUSION

In summary, Felder's submits that this District's Court's Judgment was in error. For the reasons stated herein and in its principal brief, Felder's respectfully requests that this Honorable Court reverse the District Court's Judgment and remand this matter for further proceedings.

RESPECTFULLY SUBMITTED

/s/ *James M. Garner*
JAMES M. GARNER, T.A. (#19589)
PETER L. HILBERT, JR. (#6875)
DARNELL BLUDWORTH (#18801)
RYAN D. ADAMS (#27931)
KEVIN M. MCGLONE (#28145)
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street, Suite 2800
New Orleans, Louisiana 70112-4046
Telephone: (504) 299-2100
Facsimile: (504) 299-2300
E-Mail: jgarner@shergarner.com
philbert@shergarner.com
dbludworth@shergarner.com
radams@shergarner.com
kmcglone@shergarner.com

- and -

/s/ *Gladstone N. Jones, III*
GLADSTONE N. JONES, III (#22221)
LYNN E. SWANSON (#22650)
H.S. BARTLETT, III (#26795)
JONES, SWANSON, HUDDELL & GARRISON, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, Louisiana 70130
Telephone: (504) 523-2500
Facsimile: (504) 523-2508
E-Mail: gjones@jonesswanson.com
lswanson@jonesswanson.com
tbartlett@jonesswanson.com

ATTORNEYS FOR PLAINTIFF-APPELLANT, FELDER'S COLLISION PARTS, INC.

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:

Michael W. McKay, Esq.
STONE PIGMAN WALTHER WITTMANN L.L.C.
301 Main Street, Suite 1150
Baton Rouge, LA 70825
Telephone: (225) 490-5800
Facsimile: (225) 490-5860
E-Mail:
mmckay@stonepigman.com
Counsel for Defendants/Appellees, All Star Advertising Agency, Incorporated; All Star Chevrolet North, L.L.C.; and All Star Chevrolet, Incorporated

David G. Radlauer, Esq.
Thomas A. Casey, Jr., Esq.
Mark A. Cunningham, Esq.
Tarak Anada, Esq.
JONES WALKER L.L.P.
201 St. Charles Avenue, Suite 4900
New Orleans, LA 70170-5100
Telephone: (504) 582-8000
Facsimile: (504) 582-8011
E-Mail:
dradlauer@joneswalker.com
tcaseyjr@joneswalker.com
mcunningham@joneswalker.com
tanada@joneswalker.com
Counsel for Defendant/Appellee, General Motors LLC

On this, the 5th day of September, 2014.

/s/ *James M. Garner*
JAMES M. GARNER

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 3,605ar 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:

/s/ *James M. Garner*
JAMES M. GARNER

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 08, 2014

Mr. James M. Garner
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.
909 Poydras Street
Suite 2800
New Orleans, LA 70112

No. 14-30410 Felder's Collision Parts, Inc. v. General Motors Company, et al
USDC No. 3:12-CV-646

Dear Mr. Garner,

The following pertains to your brief electronically filed on 9/5/2014.

- You must submit the seven (7) paper copies of your brief required by 5TH CIR. R. 31.1 within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Dawn D. Victoriano

By: _____
Dawn D. Victoriano, Deputy Clerk
504-310-7717

P.S. To Amicus Attorney, Mr. Robert Oake: You must file an appearance form within 5 days of the date on this notice.

cc: Mr. Ryan Duane Adams
Mr. Tarak Anada
Mr. Harvey Sylvanous Bartlett III
Ms. Darnell Bludworth
Mr. Thomas Alcade Casey Jr.
Mr. Mark Aaron Cunningham
Mr. Peter L. Hilbert Jr.
Mr. Gladstone Nathaniel Jones III
Mr. Kevin Michael McGlone
Mr. Michael W. McKay
Mr. Robert Glenn Oake Jr.
Mr. David G. Radlauer

Ms. Lynn Elizabeth Swanson