No. 14-

IN THE

# Supreme Court of the United States

FELDER'S COLLISION PARTS, INC.,

*Petitioner,*

*v.*

ALL STAR ADVERTISING AGENCY, INC., *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

# PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether, for purposes of a predatory pricing claim under the Sherman Act, 15 U.S.C. §§ 1 and 2, cost should be measured at the time of the point-of-sale to the end-consumer, which is when the anti-competitive harm occurs, or whether the predatory competitor is entitled to factor in after-sale kick-backs from a conspiring supplier to show that the sale was not made below its cost.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

The Petitioner here and appellant below is Felder's Collision Parts, Incorporated.

The respondents here and appellees below are All Star Advertising Agency, Incorporated; All Star Chevrolet North, L.L.C.; All Star Chevrolet, Incorporated; and General Motors LLC.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

Felder's Collision Parts, Inc., is a privately held Louisiana corporation. It has no parent company and no publicly traded company owns more than ten percent of its stock.

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## OPINIONS BELOW

The January 27, 2015 panel opinion of the United States Court of Appeals for the Fifth Circuit (opinion by Judge Gregg Costa, joined by Judges E. Grady Jolly and Carolyn D. King) is reported at 777 F.3d 756, and is reprinted in the Appendix to this Petition ("Appx.") at 1a-16a. The two opinions of the United States District Court for the Middle District of Louisiana (Judge James J. Brady) are found at 960 F. Supp. 2d 617 (April 17, 2013) and 2014 WL 1652719 (April 23, 2014), and are reprinted, respectively, at Appx. 31a-77a and Appx. 17a-30a.

## JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1). The Fifth Circuit entered and filed its opinion on January 27, 2015.

## STATUTORY PROVISIONS INVOLVED

This case involves the question of when, during a potentially predatory transaction, "cost" is measured for purposes of a predatory pricing claim under the Sherman Act, implicating 15 U.S.C. §§ 1 and 2:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal

> shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

## STATEMENT OF THE CASE

The Fifth Circuit's opinion affirmed the district court's Rule 12(b)(6) dismissal of the predatory pricing claims brought by plaintiff-petitioner Felder's Collision Parts, Inc. ("Felder's"), under the Sherman Act, 15 U.S.C. §§ 1 and 2.[1] Because the dismissal was under Fed. R. Civ. P. 12(b)(6), this case does not involve disputed facts, but turns on the allegations in Felder's Amended Complaint, accepted as true. Accordingly, the parties do not dispute, for the purposes of the predatory pricing claim brought by Felder's, that the average variable costs ("AVC") for replacement parts sold by defendants-respondents All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C., and All Star Chevrolet, Inc. (collectively, "All Star") would be below the price at which those parts are sold to consumer body shops, if AVC is measured at the time of sale to the consumers, but that the AVC would be below the price of the parts sold to body shops if AVC is measured after All Star receives *post hoc* payments from defendant-respondent General Motors LLC ("GM"). Therefore, this case presents a purely legal issue for predatory pricing claims: whether cost (whether using AVC or some other measure of cost) is measured at the point when the consumer's participation in the transactions comes to an end, or can incorporate post-sale kickbacks from a conspiring supplier.

[1] Felder's also brought various Louisiana law claims for antitrust violations and unfair trade practices, which also hinged on the alleged predatory pricing conduct of the defendants. The dismissal of those claims is not the subject of this Petition, though a reversal of the Fifth Circuit's opinion regarding the Sherman Act claims would necessitate a reevaluation by the lower courts of the dismissal of Felder's other claims.

### A. The Allegations in Felder's Amended Complaint

Felder's initially filed suit in the District Court against GM and All Star setting forth claims under the Sherman Act, Clayton Act, Robinson-Patman Act, and Louisiana law. GM and All Star moved to dismiss the Complaint. The District Court denied the motion but ordered Felder's to amend its complaint. Appx. 31a-77a. The following facts are taken from Felder's resulting Amended Complaint ("Am. Compl.").

Felder's is a seller of after-market collision parts located near Baton Rouge, Louisiana. Am. Compl. at ¶ 14. Such parts are manufactured by entities other than automobile manufacturers, such as GM, but are equivalent to original equipment manufacturer ("OEM") replacement parts, and are sold by Felder's and other after-market parts sellers to collision centers and body shops for repair of damaged automobiles. *Id.* at ¶ 12. All Star operates several automobile dealerships that sell GM-manufactured automobiles and sell OEM parts manufactured by GM to the same collision centers and body shops to which Felder's sells its after-market parts. *Id.* at ¶ 11. Felder's and All Star compete with each other for the sale of collision parts compatible with GM vehicles.

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

Felder's sells after-market collision parts in the following Louisiana parishes: Acadia, Allen, Ascension, Assumption, Avoyelles, Beauregard, Calcasieu, Cameron, East Baton Rouge, East Feliciana, Evangeline, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, Point Coupee, Rapids, St. Bernard, St. Charles, St. Helena, St. James, St. John, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermillion, Vernon, Washington, West Baton Rouge, and West Feliciana. *Id.* at ¶ 15. Felder's also does business in the following Mississippi counties: Hancock, Harrison, Pearl River, Marion, Rankin, Forrest, Hinds, Jackson, Stone, Lamar, and Walthall. *Id.* All Star also sells collision parts for which there is an after-market alternative in these same parishes and counties. *Id.* For ease of reference, the above-listed parishes and counties will hereinafter be referred to as the "Geographic Market."

Funding for the purchase of collision parts by the consumer body shops is driven in large part by the insurance industry, which often pays for the repairs of automobiles following an accident. *Id.* at ¶ 16. The insurance industry demands low prices and prefers after-market parts given their lower price structure. *Id.* at ¶ 17. Faced with a decline in sales of OEM parts for which there was an after-market part available, GM and All Star began looking for a manner to increase the sale of OEM parts. *Id.* at ¶

18. Those efforts led to GM's creation of a program it explicitly calls "Bump the Competition." *Id.* at ¶¶ 18, 20.

All Star enjoys a substantial share of the Geographic Market for automobile collision parts for which there is an after-market alternative and that are compatible with GM vehicles because it operates the largest OEM distribution center in the state of Louisiana. *Id.* at ¶ 19. Through its participation in "Bump the Competition," All Star has become the leading provider of automobile collision parts compatible with GM automobiles in the Geographic Market. *Id.*

In their effort to monopolize the market for such collision parts, GM and All Star conspired to design and participate in a pricing program enabling All Star to "bump" any competition from the marketplace. *Id.* at ¶ 20. The "Bump the Competition" Program coerced the consumer body shops to obtain OEM parts at prices significantly below comparable after-market parts, though those prices were below All Star's AVC. *Id.* at ¶ 21.

The scheme works as follows: When the consumer—a body shop or collision center—requests from All Star a particular GM part for which there is an after-market alternative and the consumer has a quote from a seller of after-market parts (such as Felder's), All Star sells the OEM part to the consumer at a price 33% below the price quoted by the after-market seller. *Id.* at ¶¶ 22-24. That discounted price to the consumer is below All Star's AVC for that part, including the cost All Star incurs to obtain the part from GM. *Id.* All Star records a loss on the part at the moment of sale to the body shop or collision center. *Id.* Sometime after the consumer's portion of the transaction is completed, All Star registers a claim with GM, and GM subsequently reimburses All Star for the difference between the price paid by the consumer and the cost of the part incurred by All Star and adds a 14% recoupment or kickback. *Id.*

The Amended Complaint provides the following example of the "Bump the Competition" Program taken from documents produced by the defendants. An independent GM dealer (here, All Star) incurs a cost for a particular GM OEM part of $135.01. *Id.* at ¶ 29. That part is normally listed for sale by All Star to a consumer for $228.83. The comparable after-market part can be sold by an entity such as Felder's to the consumer for $179.00. *Id.* Although All Star's cost of the part is $135.01, GM instructs the dealer to sell the part to the consumer for $119.93, a "bottom line price" 33% ***below*** the cost of the comparable after-market equivalent part and approximately $15.00 ***less than the cost the dealer paid*** GM for the part. *Id.* ***After*** sale of the part to the consumer for $119.93, the dealership then recoups from GM at a later date the difference between the sale price of $119.93 and the part cost of $135.01, plus a back-end "profit" of 14%. *Id.* at ¶ 30.

Significantly, under this scheme, All Star only lowers the price of parts for which there is an after-market alternative when the consumer identifies an alternative after-market part and shows All Star a quote obtained from a competitor such as Felder's. *Id.* at ¶ 31. The lower price is not offered where the body shop or collision center cannot demonstrate a competing after-market price.

Upon elimination of the competition and monopolization of the market for GM collision parts for which an after-market alternative exists in the Geographic Market, GM and All Star will likely recoup any losses resulting from the sale of collision parts below AVC in two ways. First, because of the design of the "Bump the Competition" program, recoupment through reversion to supracompetitive pricing is inherent. Under the program, All Star sells an OEM collision part below its AVC only when an after-market part is available and documented by a quote for that part. *Id.* at ¶ 40. If there is no competing price from a seller of compatible after-market parts, All Star will not reduce its selling price. Where there is no longer a viable after-market seller upon which to base a "Bump the Competition" claim, All Star's existing supra-competitive price will automatically be in place.

Second, GM and All Star make no effort to set prices below cost or otherwise reduced from supra-competitive levels for those parts that do not have an after-market alternative because GM and its dealers already enjoy a monopoly on those parts, thus providing no incentive to reduce prices for their customers. *Id.* at ¶ 41. Once All Star and GM successfully "bump" all of the competition, they likewise will have no incentive to reduce prices for customers on those parts that do currently have after-market alternatives as well as then having a monopoly on all automobile collision parts. *Id.*

The supra-competitive prices for the parts sold by All Star are evidenced in the exhibits attached to Felder's Amended Complaint. Under the scheme as alleged by Felder's, All Star is able to recoup its losses in the short-term through the back-end kickback program administered by GM, and in the long-term through the clearing of competition from the market, allowing unfettered imposition of the existing supra-competitive prices. *Id.* at ¶ 41.

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

Barriers to entry into the market for collision parts that have an after-market equivalent are high, and All Star is the dominant player in the Geographic Market. *Id.* at ¶ 46. Once Felder's and other after-market sellers are successfully "bumped," GM and All Star can then raise prices on OEM parts to supra-competitive prices, thus giving All Star a reasonable prospect and/or dangerous probability of further recouping any global losses. *Id.* at ¶ 47. In the past ten years, no new after-market parts sellers have entered the Geographic Market in direct competition with All Star, illustrating the high barriers to entry into the market for automobile collision parts compatible with GM automobiles. *Id.* at ¶ 48. Sellers of after-market parts cannot compete with sellers of OEM parts that conspire with the manufacturer, such as GM, to reduce consumer prices below the seller's AVC. *Id.*

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

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

Ultimately, the continued existence of the "Bump the Competition" Program will have long-ranging effects on competition. *Id.* at ¶ 58. If allowed to continue unchecked, sellers of after-market parts will be forced to close their business. *Id.* Manufacturers like GM will expand programs similar to the "Bump the Competition" Program to include hard parts, such as engines, in addition to collision parts affecting the sellers of after-market hard parts. *Id.* Sellers of OEM collision parts like All Star will increase their prices of parts that formerly had after-market alternatives to supra-competitive prices just as they have done on parts that currently have no after-market alternatives. *Id.* at ¶ 59.

### B. The District Court's Dismissal Of Felder's Claims

The District Court granted the defendants-respondents' Rule 12(b)(6) motion to dismiss, concluding that Felder's had not stated a predatory pricing claim because the back-end payments to All Star by GM must be calculated into All Star's cost, and that doing so rendered All Star's AVC below the price of the parts sold to the consumer body shops.[2] The District Court held that it had no substantial reason to reconsider its earlier decision on the proper point in time to measure AVC. Appx. at 27a-28a. The District Court's prior decision analogized the "Bump the Competition" program to consumer rebate cases to reject the "contention that the analytical focus of below-cost pricing should be limited to the time of sale." Appx. at 63a. Accordingly, the District Court granted the defendants' motion to dismiss the Amended Complaint and entered a final judgment against Felder's.

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[2] In its dismissal, the district court also concluded that Felder's had not pled adequately the Geographic Market. Appx. at 25a-26a. Because the Fifth Circuit did not opine on that portion of the District Court's dismissal, the Geographic Market issues are not a subject of this Petition.

### C. The Fifth Circuit's Affirmance of the District Court

Although there was no involvement by the consumer body shops in the after-sale recoupment provided to All Star by GM, the Fifth Circuit framed the issue as a "rebate" issue: "The primary issue in this appeal … is whether we consider the effect of this rebate in deciding whether Felder's can meet one of the essential elements of a predatory pricing claim: that the defendant is selling its product at a price below [AVC]." 777 F.3d at 757; Appx. at 2a.[3]

The Fifth Circuit observed that "[t]he rebate undoubtedly affects that bottom line for All Star by guaranteeing that it makes a profit on any Bump the Competition sale. That undisputed fact resolves the case[.]" *Id.* at 763; Appx. at 14a. The Fifth Circuit held that measuring All Star's AVC at the point where the consumer's participation in the transaction ended "ignores the economic realities that govern antitrust analysis." *Id.* The Fifth Circuit only was able to reach this conclusion, however, by recasting All Star from the role of competitor into the role of "consumer," thereby enabling it to engage in a "rebate" analysis: "In purchasing the parts from GM, ***All Star is a consumer. As it does for any consumer,*** a rebate reduces All Star's cost of acquiring the parts. … ***Any consumer*** would

[3] *See also id.* at 761-62, Appx. 11a ("Felder's acknowledges that its ability to show pricing below [AVC] turns on a single issue that the district court termed the 'temporal debate': should the calculation account for the rebate that All Star receives from GM? If the rebate were irrelevant as Felder's contends, then Felder's complaint would be sufficient on this issue[.]").

consider a rebate as a reduction in cost[.]"[4] *Id.*, at 763; Appx. at 14a-15a (emphasis added).

The Fifth Circuit confirmed that its approach involved viewing All Star as a consumer rather than a competitor, by expressly analogizing Felder's claims to the case of *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999). *Stearns* looked to the predatory pricing analysis under "tying" cases (which involve buy one-get one free promotions), and observed that the Fifth Circuit had held that "it would be incorrect to look at the nominal price of the 'free' product—zero—and infer predation from this fact." 170 F.3d at 533 n.15 (quoted in Fifth Circuit opinion here, 777 F.3d at 763; Appx. 15a-16a).

Under this consumer-driven rebate analysis, the Fifth Circuit affirmed the District Court's dismissal of Felder's claims.[5]

## REASONS FOR GRANTING THE PETITION

This case presents an important federal question that the Fifth Circuit has answered in conflict with bedrock principles of antitrust law as articulated by this Court and as applied by other United States courts of appeals: Should calculation of

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[4] As a general point of reference, "rebates" are generally recognized as affecting ***consumer*** behavior, defined in *Black's Law Dictionary* as "[r]efund of portion of purchase price made by manufacturer ***to consumer*** to induce purchase of product." *Black's Law Dictionary* (6th ed. 1990), at 1266.

[5] As mentioned above, the Fifth Circuit did not analyze the Geographic Market issue raised in the District Court decision.

price or cost in a predatory pricing claim include economic activity that occurs after the consumer's participation in a transaction comes to an end?

Where the key inquiry in an antitrust case is the harm to competition, rather than to competitors, and the harm to competition is the coercive effect of predatory pricing practices on a consumer's decision, then consideration of economic activity outside the zone of consumer participation is in conflict with settled precepts of antitrust law. Moreover, the open-ended "economic activity" calculation promoted by the Fifth Circuit here is a step ***away*** from this Court's directive to maintain "the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993). The Fifth Circuit's approach leaves no practical demarcation between the close of the "economic activity" and the beginning of recoupment by a predatory competitor. Therefore, this Court should grant this Petition and determine that the appropriate boundary is at the point where the consumer's participation in the transaction is at an end. If, at that point, the predatory competitor's costs[6] are below the price paid by the consumer, then that prong of a predatory pricing claim is satisfied.

[6] Felder's recognizes that this Court has not determined that AVC is the requisite measurement of cost in a predatory pricing context; however, in this matter, as AVC is the measure accepted by the Fifth Circuit, the parties do not dispute this issue.

### A. The Fifth Circuit's Decision Conflicts With the Consumer-Focused Analysis of Other Courts of Appeals

A claim for monopolization under the Sherman Act requires proof of (1) predatory or anti-competitive conduction; (2) specific intent to monopolize; and (3) dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Among the anticompetitive actions prohibited by the Sherman Act is the practice of predatory pricing. A claim for predatory pricing is established by proof that (1) the prices complained of are below an appropriate measure of the defendant's costs and (2) that there is a reasonable prospect or dangerous probability of the defendant's recouping its investment in below-cost prices. *Brooke Grp.*, 509 U.S. at 222 & 224.

"That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Grp.*, 509 U.S. at 224 (quoting *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962)). In predatory pricing cases in the U.S. courts of appeals, this axiom has been translated into a focus not on the impact of the pricing conduct on the particular competitors, but on the coercive effect on the consumer. Under these cases, where the lower price is due to the increased efficiencies reflected in the competitor's pricing structure, then a consumer's choice to buy the competitor's good is not "coerced"; however, these courts find that consumer coercion does take place where the lower price is below the competitor's cost.

In the "tying" scenario, the Ninth Circuit recently highlighted this consumer-coercion basis of the analysis. *See Collins Inkjet Corp. v. Eastman Kodak Co.*, --- F.3d ---, 2015 WL 1320675 (9th Cir. 3/16/2015). In determining the appropriate method to calculate the cost of tied goods, the *Collins* court observed that "evidence that one of the defendant's sales 'made no economic sense,'" would "'suggest[] that the buyer was 'coerc[ed]'"; and that, "[w]hen differential pricing is the only means of coercion, results other than what a competitive, unbundled market would achieve are possible only if the discount attribution standard is met and the defendant in effect selling the tied good below cost." *Id.* at *7 (quoting *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 915 (9th Cir. 2008)). The *Collins* court again emphasized the "products' value to consumers" and the "idiosyncratic customer preferences" in concluding that, "[w]hen the defendant effectively sells below its own costs, it puts pressure on its competitors to lower prices without actually lowering its own costs or otherwise creating a market efficiency." *Id.* at *8.

In tying cases, such as in *Collins* and in the cases relied on by *Stearns* (the case relied on here by the Fifth Circuit), consideration of the effect of the full transaction on the consumer, therefore, makes sense, as such an inclusive analysis fully accounts for the effect of the pricing conduct in creating true efficiencies felt by the consumer. The Third Circuit has likewise repeated this Court's emphasis on the effect of pricing conduct on consumers, in the use of long-term contracts to predatorily price competition out of a market. In *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012), the court reiterated that "'[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels [i.e., above-cost], they do not threated competition.'" *Id*. at 272-73 (quoting *Brooke Grp.*, 509 U.S. at 223 (in turn quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990))). The *ZF Meritor* court observed the focus on costs in the context of benefit to the consumer equates to supporting competition's benefit on efficiencies and cost structures: "Low, but above-cost, prices are generally procompetitive because 'the exclusionary effect of prices above a relevant measure of cost [generally] reflects the lower cost structure of the alleged predator, and so represents competition on the merits[.]'" *Id*. at 273 (quoting *Brooke Grp.*, 509 U.S. at 223); *see also Cascade Health*, 515 F.3d at 902 ("The Court's reasoning and conclusions in *Brooke Group*, as reaffirmed recently in *Weyerhauser [Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)], accordingly show a measured concern to leave unhampered pricing practices ***that might benefit consumers***, absent the clearest showing that an injury to the competitive process will result.") (emphasis added).

The unimportance of the overall effect on the allegedly predatory competitor's aggregate bottom line is highlighted by the Eighth Circuit in *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531 (8th Cir. 1989). In *H.J.*, the court rejected a defendant's attempt to escape liability for predatory pricing of a component of a piece of equipment by arguing that it profited from an aggregate cost lower than aggregate price of all the separately sold components. *Id*. at 1541-42.

Here, the Fifth Circuit's decision conflicts with these principles as articulated by this Court and as applied by the Ninth, Third, and Eighth Circuits. As a preliminary matter, of course, none of these cases involve the same type of claim as at issue here. Here, All Star—a competitor of Felder's—was able to sell below its AVC because its supplier, GM, kicked back money to All Star in the aftermath of the transaction with the consumer body shops. The principle is the same, however, that the crucial point of analysis in predatory pricing cases must focus on the effect on consumer behavior. If All Star's lower prices on the particular transactions for which an after-market alternative had been identified were caused by a legitimate efficiency and lower price structure reflected in All Star's costs at the time the consumer completed its transaction, then under *Brooke Group* and its progeny, no predatory pricing claim lies. However, as was the concern in *Collins* and *ZF Meritor*, if All Star's lower price does not reflect a true lower price structure, then the consumer choice is "coerced."

Looking only to All Star's aggregate actions, without regard to the consumer's participation in the transaction, to determine if All Star is turning the profit at the end of some open-ended day, would leave the market vulnerable to transparent monopolization, the concern of the court in *H.J.*

Harm to competition occurs at the point of sale to the ***consumer***—the body shop or collision center. While antitrust laws protect competition rather than competitors, competition is threatened when a seller is able to blatantly sell its parts below cost to a consumer and attempt to "bump" its competitors from business. It is too late to consider whether anti-competitive behavior occurs after All Star receives its kickback; harm to the Felder's—and competition in general—has already occurred by that point. Undoubtedly, GM's offer of a kickback is the inducement that makes All Star participate in the "Bump the Competition" Program; but it cannot be the case that a collusive inducement insulates All Star's illegal conduct. The sale below cost destroys competition, the protection of which is the essence of the Sherman Act.

The Fifth Circuit implicitly seems to realize that an analysis that goes beyond the focus on the consumer is flawed, because to complete its analysis it conceptually converts All Star from a competitor to a "consumer," on the basis that it is the consumer of GM's parts. 777 F.3d at 763; Appx. at 14a-15a. Of course, in almost every antitrust case not involving competing manufacturers, the competitors are selling parts that they have bought from a supplier; this does not convert all actors in an antitrust claim into "consumers." Here, that conversion of one of the competitors into a "consumer" for analytical purposes allowed the Fifth Circuit to consider aggregate economic effects on the predatory competitor; as a result, All Star's short-term recoupment of its losses at the point of sale to the actual consumer were treated by the Fifth Circuit as affecting All Star's "cost." This blurring of the line between the transaction and the recoupment provides a blueprint for permissible predatory-pricing-based monopolization by any conspiring set of suppliers and competitors.

The Fifth Circuit's reliance on its earlier decision in *Stearns* only shows further the ill fit between consumer-focused analysis and a measure of aggregate competitor impact. In *Stearns*, the plaintiff challenged whether a proposed bid for the construction of airport boarding bridges violated antitrust law because the bid was submitted at a price below its cost. The bid was submitted in multiple parts, and evidence indicated that one of those parts would operate at a negative operating margin. The Fifth Circuit held this evidence insufficient to state a claim of predatory pricing, stating in a footnote that the "threshold problem with this allegation is that even if part C was bid below-cost, Stearns has not alleged that the project as a whole was unprofitable." 170 F.3d at 533 n.15.

The *Stearns* court's focus on "the project as a whole" is not contrary to Felder's contentions here, and does not support what the Fifth Circuit held here. Felder's agrees that a multi-phase construction project must be evaluated as a whole, without breaking down individual parts of the project. Competition is not harmed if part of the project may be bid below cost where the entire project—as priced to the consumer—is not below cost. In contrast, in the present case, Felder's—***and competition as a whole***—is damaged when All Star ***sells parts below cost*** to consumer collision centers and body shops. Viewing the transaction as a whole ***at the time of sale*** when the harm to competition would become apparent, the seller in *Stearns* provided a product that is not below cost, and its competitor must beat that cost to win the bid.

Here, however, allowing GM's conduct to pardon All Star's illegal conduct ignores the fact that the "Bump the Competition" Program is designed to create maximum damage to competition at the point of sale to the consumer, before any reimbursement or inducement occurs. Simply stated, GM and All Star have conspired to harm competition by making it impossible for any competitor to beat All Star's price. In *Stearns*, the "point of sale" was the conclusion of all the parts of the contract between the contractor and the project owner, which in that case was the "consumer." 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. Harm occurs here where All Star is allowed to sell a given collision part at a price well below its cost and then GM later makes a payment so that All Star can recoup those losses.[7]

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[7] Here, the Fifth Circuit made the statement that the kickback should be considered as part of the overall transaction because essentially, GM was selling the part to All-Star for a price equal to the original price minus the rebate and thus, All-Star was not selling the part below cost. This formulation of the "transaction" misses two important aspects of the economic reality of the "Bump the Competition" program: (1) All-Star only sold the part at the below-cost price for particular transactions where the consumer body shop had an estimate from an aftermarket seller (such as Felder's), but never to certain types of customers such as a non-body-shop customer off the street or to any customer that did not have an estimate for the aftermarket alternative when ordering from All-Star; those consumers always paid the higher, supracompetitive price that garnered no kickback to All Star from GM. (2) Therefore, All-Star paid the full price to GM with no kickback when it made those sales (benefitting GM); accordingly, the only common economic reality of the transactions in the identified product market (GM replacement parts for which there is a non-OEM aftermarket alternative). The Fifth Circuit's formulation of the "transaction" would be correct only if GM sold all of the parts to All-Star at the same lower price, enabling the kickback on all

For the purpose of examining a whole transaction in a predatory pricing claim, there is nothing in conflict between the *Stearns* holding that the "transaction" included all parts of a contract with the consumer, and Felder's argument here that the "transaction" does not include economic activity that occurs ***after the consumer's participation in the transaction is complete***.

Because the Fifth Circuit's opinion in this case conflicts with the decisions of other United States courts of appeals (as well as this Court) that require courts to focus on the effect on the consumer in predatory pricing cases, granting of a writ of certiorari is justified under U.S. S. Ct. Rule 10(a).

### B. The Issue of When "Cost" Should Be Captured in a Predatory Pricing Claim Has Not Been, But Should Be, Settled by this Court

While this Court has had occasion to settle various issues regarding predatory pricing claims, it has not resolved the temporal issue presented here: at what point a competitor's cost should be captured for purposes of determining whether the price paid by the consumer is below the competitor's cost.

As this Court has reiterated many times, and Felder's repeats above, "It is axiomatic that the

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such transactions. That hypothetical pricing program, not at issue here, would not have the anticompetitive effect here of targeting only the consumers that would otherwise take advantage of the lower aftermarket prices (*i.e.*, the consumers who buy from aftermarket sellers, the competition All Star, with GM's enablement, seeks to "bump").

antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Grp.*, 509 U.S. at 224 (quoting *Brown Shoe*, 370 U.S. at 320). Here, as discussed above, the Fifth Circuit's analysis focused solely on the aggregate economic impacts on the allegedly predatory competitor, which it erroneously equated with a consumer, and treated as temporally irrelevant the actual consumer's participation in the transaction. For the reasons discussed above, this approach looked to the role of competitors rather than the protection of competition, turning the antitrust axiom on its head.

Almost equally axiomatic, however, is this Court's insistence on clear, workable standards in the antitrust arena:

> We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited "to act as central planners, identifying the proper price, quantity, and other terms of dealing." "'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'"

*Pac. Bell Tel. Co. v. Linkline Comms., Inc.*, 555 U.S. 438, 452-53 (2009) (quoting *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004), in turn quoting Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 Antitrust L.J. 841, 853 (1989)); *see* *also Brooke Grp.*, 509 U.S. at 223 ("As a general rule, the exclusionary effect of prices above a relevant measure of cost … is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.").

Here, by cutting the actual consumer out of the temporal analysis of *when* to capture the predatory competitor's costs, the Fifth Circuit has created an open-ended—and thus unclear—rule to apply to predatory pricing claims. It is clear that a predatory pricing claim must meet two elements: (1) sale at a price below the defendant's cost, and (2) a dangerous probability of recoupment of the resulting losses. *Brooke Grp.*, 509 U.S. at 222 & 224. The Fifth Circuit's decision destroys this clarity, however, by allowing recoupment economic activity to be factored into calculation of the defendant's cost.

Where the court focuses only on the aggregate activity of the predatory competitor, the defendant has completely in its control the ability to fabricate a "permissible" strategy by arguing that its recoupment (here made possible with the design and participation of the conspiring supplier, GM) should really be counted against its cost. This approach has no inherent rationale for when the capture-point for cost has been reached. Under the rationale proffered by GM and All Star and accepted by the Fifth Circuit, a competitor and its supplier could conspire to eliminate competition and never face the consequences. However, were this Court to establish a clear capture-point, then the consequences for economic behavior are clear and predictable, as this Court has required previously. Because antitrust laws are to protect *competition*, for the benefit of the consumer, then focusing temporally on the costs of the competitor at the time that the consumer's participation in the transaction is at an end is a clear boundary.

The Fifth Circuit's decision lays bare that this temporal issue in federal antitrust claims is an important question that should be settled. Because it has not been addressed yet by this Court, granting of this Petition for a writ of certiorari is appropriate under U.S. S. Ct. Rule 10(c).

## CONCLUSION

For the reasons discussed above, this Petition should be granted and a writ or certiorari issued.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 27, 2015**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-30410

FELDER'S COLLISION PARTS, INCORPORATED,

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees.*

Filed January 27, 2015

Appeal from the United States District Court
for the Middle District of Louisiana.

Before KING, JOLLY, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:

It would not be an antitrust opinion without the line that the antitrust laws were designed for "the protection of competition, not competitors." *Brown Shoe Co. v.*

*United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). Though often included by rote, the axiom is particularly apt in this case.

The competitors are Felder's Collision Parts, Inc., a Louisiana dealer of aftermarket auto body parts that are compatible with General Motors vehicles but not manufactured by GM, and All Star, a dealer of GM-manufactured parts. Felder's filed this antitrust suit against All Star and GM alleging that GM's "Bump the Competition" program is an unlawful predatory pricing scheme. The program lowers the consumer price for GM-manufactured parts below the prices of equivalent "generic" auto parts manufactured by others. It does so by providing rebates to dealers like All Star that sell GM-manufactured parts for the reduced prices. The rebates ensure that the dealers still make a profit on these sales despite the lower price charged consumers.

The primary issue in this appeal from a dismissal of the antitrust claims is whether we consider the effect of this rebate in deciding whether Felder's can meet one of the essential elements of a predatory pricing claim: that the defendant is selling its product at a price below average variable cost. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993); *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999).

## I.

There are two types of automobile parts.[1] Original equipment manufacturer (OEM) parts are produced by the same manufacturer that created the vehicle, in this case GM, or by a submanufacturer; these parts are considered "name brand." Aftermarket equivalent parts are non-name brand and are produced by a supplier other than the vehicle manufacturer. OEM parts and their aftermarket equivalents are interchangeable. But not all parts have an aftermarket counterpart; for certain parts, the only option is to purchase an OEM part. For the collision parts that are the subject of this case, OEM parts make up about 80% of the market. As is typical for generic products, aftermarket equivalents historically have enjoyed a significant price advantage over their brand-name counterparts. Prior to the pricing program at issue in this case, OEM collision parts were often priced 25% to 50% higher than aftermarket equivalents.

Motivated by the cost-conscious insurance companies that are the primary purchasers of auto body parts, GM instituted a program in 2009 to eliminate its historic price disadvantage and offer "highly competitive pricing" with aftermarket equivalents. The program, transparently named "Bump the Competition," is available only for GM parts that have an aftermarket equivalent; prices remain the same for parts with no aftermarket equivalents. A "GM Collision Conquest Calculator" determines prices.

1. This section comes from the First Amended Complaint, which details the challenged GM plan and also includes attached exhibits obtained from GM and All Star through discovery.

The calculator provides a dealer of OEM parts with the "bottom line price" at which they should sell the part. This price is 33% less than the prevailing market price for an aftermarket equivalent. That "bottom line price" is also below GM's list price—the price All Star and other dealers pay GM for the part on the front end. But after a dealer sells a highly discounted part under the program, it is entitled to a rebate from GM. The rebate compensates the dealer for the difference between the sale price and the price it paid GM for the part. On top of making up for that loss, GM also pays the dealer a 14% profit based on the part's original price.

An example from the complaint illustrates how the program works.[2] Prior to Bump the Competition, a dealer would have purchased a part from GM for $135.01. It would have then sold the part to a customer—usually a collision center or body shop—for $228.83, which is more than 30% above the $179 price for an aftermarket equivalent part.

Under Bump the Competition, a dealer like All Star would still pay an initial purchase price of $135.01 from GM. It would then sell the part for $119.93, 33% less than the market price for an aftermarket equivalent ($179 * .67). This sale price would also be about $15 less than the $135.01 the dealer had initially paid GM for the part. By submitting the rebate, however, the dealer would get back this $15 "loss" and would also receive a 14% profit, which for this part would be about $18.90 ($135.01 * .14).

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2. Although Bump the Competition has been in existence since 2009, the examples Felder's provides in the complaint are not based on actual sales or transactions.

Felder's filed this suit alleging that Bump the Competition is a predatory pricing scheme that violates federal and Louisiana antitrust laws as well as other Louisiana laws.[3] Established in 1993, Felder's is a seller of aftermarket equivalent collision parts based in Louisiana. It sells the parts to various customers including collision centers and body shops. The suit names All Star, GM, and 25 unnamed dealers of OEM parts as defendants. All Star's OEM parts distribution center opened in 2003 and is now the largest parts distribution center in Louisiana. It has $5 million in inventory and more than 50,000 square feet of space. All Star and John Doe Defendants 1-25[4] compete with Felder's to sell GM-compatible collision parts.

The district court denied Defendants' first motion to dismiss but raised a number of concerns with Felder's complaint that the court instructed Felder's to address in its amended complaint. On the issue of below-cost pricing, the district court found that Felder's failure to incorporate the rebate into All Star's price improperly dissected the transaction into pieces rather than treating it as a whole. In hopes that more information would help cure these

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3. The state claims are for violations of the Louisiana antitrust laws, the Louisiana Unfair Trade Practices Act, as well as a conspiracy claim for joint and solidary liability pursuant to Louisiana Civil Code article 2324.

4. Felder's sued General Motors; All Star Automotive Group, which includes All Star Advertising Agency, Inc., All Star Chevrolet, Inc., and All Star Chevrolet North, L.L.C.; and 25 John Doe Defendants. For clarity, the All Star and John Doe Defendants are collectively referred to as All Star.

defects, the district court also compelled Defendants to turn over documents relevant to their costs and profits. With this information, Felder's amended its complaint. Defendants again moved to dismiss for failure to state a claim, asserting that the complaint lacked facts to support the alleged geographic market, below-cost pricing, and recoupment. The district court dismissed the federal antitrust claims, citing Felder's failure to adequately define the relevant geographic market and its earlier finding that Felder's did not allege below-cost pricing. The resolution of the federal claims also warranted dismissal of the state law antitrust claims, which depend on a finding of federal antitrust liability. *See S. Tool & Supply, Inc. v. Beerman Precision, Inc.*, 862 So.2d 271, 278 (La. App. 4 Cir. 11/26/03) ("Because [the Louisiana antitrust statutes] track almost verbatim Sections 1 and 2 of the Sherman Act, Louisiana courts have turned to the federal jurisprudence analyzing those parallel federal provisions for guidance.").[5] We therefore need analyze only whether Felder's has stated a claim for predatory pricing under the Sherman Act.

## II.

Predatory pricing occurs when a defendant "sacrifice[s] present revenues for the purpose of driving [a competitor] out of the market with the hope of recouping the losses through subsequent higher prices." *Int'l Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975). Most

5. And failure to plead a state or federal antitrust conspiracy required dismissal of the remaining solidary liability claim under Louisiana law.

courts analyze predatory pricing claims as "an attempt by the defendant to preserve or extend its monopoly power" under section 2 of the Sherman Act. IIIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 724, at 36 (3d ed. 2008). That points to an unusual feature of this case. It is unclear which defendant is alleged to be the attempted monopolist or if they both are.[6] The typical predatory pricing case is brought solely against the plaintiff's competitor who is allegedly selling at low prices in order to increase market share by driving the plaintiff out of the market. *See, e.g., Stearns*, 170 F.3d 518 (suit brought by manufacturer of airplane jet bridges against competitor alleging exclusionary manipulation of

6. The Automotive Body Parts Association filed an amicus curiae raising the issue of monopoly leveraging in which a monopolist—in this case, GM—is able to leverage profits from goods on which it holds a monopoly to cover losses arising from the below-cost sale of another good for which it does not have a monopoly. The amicus argues primarily that the use of average variable cost as the "appropriate measure" may be erroneous, stating that "where a monopolistic leverage is used to decrease a predator's overall costs, courts ought to consider those fixed costs which are being covered by the illegal leverage." Amicus Br. at 7 (quoting David M. Magness, Comment, *Getting Past Summary Judgment in Predatory Pricing Cases After* American Airlines: *Will Post-Chicago Analysis Ever Prevail*?, 5 Hous. Bus. & Tax L.J. 421, 449 (2005)). The amicus, however, is "limited to the issue of pricing and costs and the effect that timing and monopoly leveraging may have on whether costs are classified as fixed or variable in the determination of appropriate measure of cost and variable cost." *Id*. at 13. It does not characterize Felder's claims as one for monopoly leveraging, and Felder's does not raise this claim and its complaint does not allege that GM prices below any measure of costs.

municipal bids and predatory pricing); *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253 (5th Cir. 1988) (suit brought by spark plug company against other spark plug company alleging anticompetitive practices including predatory pricing); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884 (5th Cir. 1984) (suit by rental car company accusing competitor of employing predatory pricing in two cities in attempt to monopolize). All Star is Felder's competitor in the sale of collision parts at the dealer level in the supply chain. But Felder's also sued All Star's supplier, GM, and pursues conspiracy claims. GM is the moving force behind the challenged conduct, as Bump the Competition is its program. And the only specific allegations of market share in the complaint also target GM, mentioning its 80% share of the market for certain types of replacement parts for GM vehicles. Indeed, it would seem that a successful predatory pricing scheme of this nature would primarily benefit GM by driving aftermarket equivalent parts from the market. But Felder's has never alleged that GM is selling parts below its costs, focusing instead on allegations that GM dealer All Star is selling parts at prices below its costs. The viability of Felder's claims thus turns on whether it can show that All Star is engaged in predatory pricing at the dealer level.

Although there is no heightened pleading standard in an antitrust case, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), we are wary of predatory pricing allegations as "mistaken inferences in [predatory pricing] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *see also Stearns*, 170 F.3d at 527 ("The Supreme Court has expressed extreme skepticism of predatory pricing claims."). To ensure that antitrust liability is not imposed for conduct resulting in lower prices today but carrying no viable risk of supracompetitive pricing in the future, a plaintiff must prove two things. First, it must show that "the prices complained of are below an appropriate measure of its rival's costs." *Brooke Grp.*, 509 U.S. at 222 (1993). Second, it must show that the defendant has "a dangerous probability[] of recouping its investment in below-cost prices." *Id*. at 224; *see also Am. Academic Suppliers, Inc. v. Beckley-Cardy Inc.*, 922 F.2d 1317, 1319 (7th Cir. 1991) ("Consumers like lower prices. The plaintiff must therefore show that the defendant's lower prices today presage higher, monopolistic prices tomorrow."). We focus our analysis on the first requirement, given that it was one of the grounds on which the district court dismissed the case.

Low prices benefit consumers and are usually the product of the competitive marketplace that the antitrust laws are aimed at promoting. *Brooke Grp.*, 509 U.S. at 223 ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)). The Supreme Court has thus emphasized that a predatory pricing claim should go forward only when the defendant is pricing below its costs because "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Grp.*, 509 U.S. at 223 (citing Areeda & Hoveknkamp ¶¶ 714.2, 714.3).

The "appropriate measure" of cost has been the subject of much scholarly and judicial debate. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 n.12, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986) (citing cases and articles discussing various measures of cost). The debate is settled in our court, however, as we use average variable cost. *Stearns*, 170 F.3d at 532. Our practice follows the landmark 1975 article *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, in which Professors Phillip Areeda and Donald F. Turner explained why "marginal-cost pricing is the economically sound division between acceptable, competitive behavior and 'below-cost' predation."[7] 88 Harv. L. Rev. 697, 716.

7. They provided the following explanation for why marginal cost is the best measure: "Under conditions of perfect competition, a firm always maximizes profits (or minimizes losses) by producing that output at which its marginal cost equals the market price." 88 Harv. L. Rev. at 702. Because rational firms attempt to maximize profits or minimize losses, a firm selling at a "shortrun profit-maximizing (or loss-minimizing) price is clearly not a predator." *Id*. at 703. On the other hand, "a firm producing at an output where marginal cost exceeds price is selling at least part of that output at an out-of-pocket loss." *Id*. at 712. "A monopolist pricing

Although marginal cost should theoretically serve as the dividing line, the article also notes that businesses rarely account for marginal cost on their books. *Id.* at 716. Average variable cost, which is more commonly accounted for, is thus a suitable "surrogate." *Id.* at 716-18; *accord* Areeda & Hovenkamp, *supra* ¶ 724, at 39.

Even calculating average variable cost can be time-consuming and challenging in many cases. *See Stearns*, 170 F.3d at 532-35 & 533 n.14 (discounting the plaintiff's expert because he "relied on an erroneous interpretation of the law regarding predatory pricing" by failing to mention average variable cost and did not "explain what [general and administrative expenses] represented or state that it was a variable cost"). Variable costs include "inputs like hourly labor, the cost of materials, transport, and electrical consumption at a plant." *Id.* at 532. But that complicated inquiry of defining the proper inputs does not arise here because Felder's acknowledges that its ability to show pricing below average variable cost turns on a single issue that the district court termed the "temporal debate": should the calculation account for the rebate that All Star receives from GM?

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below marginal cost should be presumed to have engaged in a predatory or exclusionary practice" because "[t]he monopolist is not only incurring private losses but wasting social resources when marginal costs exceed the value of what is produced. And pricing below marginal cost greatly increases the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist." *Id.*

If the rebate were irrelevant as Felder's contends, then Felder's complaint would be sufficient on this issue because it alleges that "at the point of sale to body shops and collision centers, the All Star Defendants and the John Doe Defendants 1-25 sell collision parts lower than their average variable cost" and that "at the time of sale, the price of the good sold was less than the cost to All Star Defendants or the John Doe Defendants plus the costs of selling that part." The example it gives, which was described above, illustrates the basis for this contention: "At the point of sale"—that is, without taking into account the rebate it later receives—All Star would sell a part for \$119.93 that it purchased from GM for \$135.01.

The calculus is quite different if the rebate is considered. After the rebate, that \$15 loss turns into a \$19 profit.[8] The district court thought it appropriate to consider the rebate because 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 claim system, which allows for collection of the difference between the sales price and dealer cost, plus a 14 percent profit." *Felder's Collision*

8. Felder's allegations seem to limit All Star's costs to the purchase price of the parts from GM, without including other potentially variable costs for each unit of sale. Notably, however, Felder's assumes that All Star is making a profit on each sale after the rebate is included. And at the Rule 12 stage, we review only the allegations that a plaintiff makes; we cannot speculate about costs it may have missed. There is no allegation that All Star is pricing below average variable cost if the rebate is considered.

*Parts, Inc. v. Gen. Motors Co.*, 960 F. Supp. 2d 617, 635-36 (M.D. La. 2013).

Felder's main challenge to the district court's analysis is to argue that it improperly added the rebate amount to the price at which All Star sold the parts to its customers. In predatory pricing cases, Felder's contends, what matters for the "price" side of the equation is the price at which a product is sold in the relevant market. This argument misses the mark. For starters, we do not read the district court opinion as adding the rebate amount to All Star's sales price. Instead, it concluded 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."[9] *Id.* at 635 (citing *Stearns*, 170 F.3d at 533 n.15 ("[T]he fact that [the defendant] 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.")). We turn then to that fundamental question: not the side of the ledger on which the rebate should be placed, but whether it should be considered at all.

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9. Felder's may have gotten this impression from the district court's discussion of rebate cases, which the district court read for the proposition that "price is measured after considering any discounts or rebates." *Id.* at 635 (citing *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989)). As discussed below, All Star is receiving the rebate as a purchaser of parts from GM, so it makes the most sense to read the district court's opinion as viewing the rebate as a reduction in the cost of acquiring the parts.

We agree with the district court that the rebate should be considered in the predatory pricing analysis. The price versus cost comparison focuses on whether the money flowing in for a particular transaction exceeds the money flowing out. The rebate undoubtedly affects that bottom line for All Star by guaranteeing that it makes a profit on any Bump the Competition sale. That undisputed fact resolves the case, as a "firm that is selling at a shortrun profit-maximizing (or loss-minimizing) price is clearly not a predator." Areeda & Turner, 88 Harv. L. Rev at 703.

Felder's "freeze frame" approach of comparing price and cost as they exist only on the day of the sale ignores the economic realities that govern antitrust analysis. *See United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 209, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968) ("In interpreting the antitrust laws, . . . [w]e must look at the economic reality of the relevant transactions."); *Sec. Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 965-66 (5th Cir. 1979) ("There usually is no substitute for a careful analysis of the economic realities presented by the facts of a given case in light of the underlying purpose of the relevant antitrust statute."). Although All Star's profitability is what ultimately matters, it makes sense conceptually to view the rebate as a reduction in All Star's cost of purchasing the parts from GM. In purchasing the parts from GM, All Star is a consumer. As it does for any consumer, a rebate reduces All Star's cost of acquiring the parts. So although All Star would initially pay $135.01 for the example part, the rebate would reduce the price to $101.03.

Felder's conceded at oral argument that if GM had sold the part to All Star at this lower price up front, then Felder's would have no case. The concession was an obvious one because in that scenario, All Star would be selling the part for more than the $101.13 it would have paid GM (and recall that there is no allegation that GM's price is below its average variable cost). Different timing does not change that analysis. A firm's costs related to a transaction are not set in stone on the day of the sale. *See Fruitvale Canning Co.*, 52 F.T.C. 1504, 1520 (1956) ("It is the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances with which we are concerned here."), *cited in A.A. Poultry*, 881 F.2d at 1407.

Any consumer would consider a rebate as a reduction in cost, even if the consumer were "refunded" months after the actual sale for the higher price. Just ask the purchaser of a new "$600" cellphone for which a $300 rebate were available. Perhaps Felder's position in this case stems from the extra step in the transaction; All Star gets a rebate from GM on a product that All Star passes on to its consumers. But any confusion resulting from that extra step is eliminated by considering an example involving a different cost input: If All Star received a rebate on the costs of shipping the collision parts, is there any doubt that rebate would reduce its shipping costs even though the discount would not be realized the day the shipping would take place? An analogy used in a prior predatory pricing case also supports rejecting Felder's isolated view of the transaction. We have noted that 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." *Stearns*, 170 F.3d at 533 n.15. The economic reality in that situation is that the two products are both being sold at a 50% discount. The undisputed reality in this case is that All Star is making money on its sale of parts after it receives the GM rebate. And with respect to GM, Felder's does not allege that it is selling its parts below average variable cost, whether the rebate is considered or not.

Although it has remained in business during the five years in which Bump the Competition has been in effect,[10] Felder's no doubt is having a tougher time selling aftermarket equivalent parts for GM vehicles in light of GM's decision to reduce the price of its parts at the dealer level by large percentages (almost a 50% reduction from $228.33 to $119.93 for the example part). But antitrust law welcomes those lower prices for consumers of collision parts so long as neither GM nor its dealers is selling parts at below-cost levels. *See Matsushita*, 475 U.S. at 594 ("[C]utting prices in order to increase business often is the very essence of competition."). Because the district court properly concluded that the rebate GM provides its dealers should be considered in making that determination, its judgment is AFFIRMED.

10. Felder's makes no mention of whether it sells parts other than GM-equivalent parts, which is relevant to whether Felder's can stay in business in spite of All Star's lower prices.

## APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT, M.D. LOUISIANA, DATED APRIL 23, 2014

2014 WL 1652719

United States District Court,
M.D. Louisiana.

FELDER'S COLLISION PARTS, INC.

v.

GENERAL MOTORS COMPANY *et al.*

Civil Action No. 12–646–JJB–SCR.
Signed April 23, 2014.

**RULING ON DEFENDANT'S MOTION TO DISMISS FIRST AMENDED AND SUPPLEMENTAL COMPLAINT**

JAMES J. BRADY, District Judge.

This matter is before the Court on a Motion (doc. 54) to Dismiss First Amended and Supplemental Complaint brought by Defendants, General Motors LLC ("GM"), and All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C., and All Star Chevrolet, Inc. (collectively referred to herein as "All Star"). Plaintiff, Felder's Collision Parts, Inc. ("Felder's"), has filed an opposition (doc. 56), to which the Defendants have filed a reply (doc. 59). Oral argument is unnecessary. The Court's jurisdiction exists pursuant to 28 U.S.C. § 1331. For the reasons stated herein, the Defendants' Motion (doc. 54) is GRANTED.

## I. Background

Felder's has brought this action pursuant to several federal and state antitrust statutes as well as other Louisiana state laws. Specifically, Felder's has brought claims pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, the Louisiana Unfair Trade Practices and Consumer Protection Act ("LUTPA"), La.Rev.Stat. § 51:1401, *et seq.,* and several other Louisiana revised statutes, La. R.S. §§ 51:122, 123, 124, 137, and 422. Additionally, Felder's contends that GM, All Star, and John Doe Defendants 1–25 ("Doe Defendants") should be held jointly and severally liable for conspiring to aforementioned violations under La. Civ.Code art. 2324.

The facts of this case have been detailed in a previous ruling and therefore will be summarily addressed herein. The suit arises out of a price incentive program called "Bump the Competition" in which distributors like All Star can sell GM's original equipment manufacturer parts ("OEM parts") at a deep discount below its costs to consumers and then apply to GM for a rebate to account for the lost cost. The distributors are also entitled to receive a lost profit. Felder's alleges that this program is only available for OEM parts that have an aftermarket equivalent. Felder's further alleges that the program is nothing more than a predatory pricing scheme intended to drive aftermarket part dealers out of the market in an effort to obtain monopoly power.

Defendants filed a Motion (doc. 22) to Dismiss Felder's complaint arguing that the claims were insufficiently pled. Upon reviewing the complaint and the memorandum filed in both support and opposition to the motion to dismiss, the Court agreed with the Defendants but granted Felder's leave to cure the complaint's insufficiently pled claims (doc. 32). Though there were many deficiencies in Felder's complaint, the Court found that the most glaring were that the complaint failed to allege facts to adequately define the proper geographic market, demonstrate All Star's market power in the relevant market, and demonstrate that All Star participated in predatory below-cost pricing. The Court set forth a detailed roadmap, firmly rooted in federal antitrust jurisprudence, to guide Felder's as it cured its insufficiently pled claims. Further, Felder's was allowed to conduct discovery to unearth facts to support its claims before it was required to file its Amended and Supplemental Complaint ("Amended Complaint") (doc. 47).

All Star now argues by way of the motion to dismiss presently before the Court, that Felder's has failed to heed the Court's instruction and therefore failed to sufficiently plead its claims. In response, Felder's argues that it has provided the required factual matter to support each and every one of its claims. Thus, its Amended Complaint is sufficient to withstand Felder's motion to dismiss. After considering the parties' arguments and reviewing the Amended Complaint, the Court is ready to rule.

## II. Discussion

### A. Rule 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED.R.CIV.P. 12(b)(6). When reviewing the complaint, a court must accept all well-pleaded factual allegations as true. *C.C. Port. Ltd. v. Davis–Penn Mortg. Co.,* 61 F.3d 288, 289 (5th Cir.1995). In order to survive a motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A court need not determine at this preliminary stage whether the plaintiff's claims will ultimately succeed on the merits. *Id.* at 556. Instead, a court must identify the factual allegations entitled to the presumption of truth and determine whether they state a plausible claim for relief. *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009).

### B. Federal Antitrust Claims

Felder's would like this Court to believe that at the heart of this case "is a fundamental legal question—whether the All Star Defendants' practice of selling parts to collision centers and body shops at a price below the cost paid to GM for a particular part constitutes predatory pricing." *Opposition,* Doc. 56, at 13. However, what is fundamental to any antitrust analysis is a proper definition of the relevant market and a defendant's power to detrimentally effect competition therein. Indeed, this inquiry into both market definition and market power is fundamental to properly evaluating the plausibility of a predatory pricing scheme. *See Ruling,* Doc. 32, at 17 (recognizing that "market power and market definition are essential to the analysis of whether Felder's could be (or is being) driven out of the market due to Defendants' conduct."); *see also A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.,* 881 F.2d 1369 (7th Cir.1989) ("Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost."). For this reason, the Court will first determine whether Felder's has properly pled the relevant market definition before delving into Felder's substantive antitrust claims.

**i. Market Definition**

An adequate definition of the relevant market is critical because it "provides the framework against which economic power can be measured." *Jayco Sys., Inc. v. Savin Bus. Machines Corp.,* 777 F.2d 306, 319 (5th Cir.1985). The relevant market is determined by analyzing the relevant geographic and product markets. *Apani Sw., Inc. v. Coca–Cola Enterprises, Inc.,* 300 F.3d 620, 626–28 (5th Cir. 2002). The Fifth Circuit has recognized that a trial court may dismiss a § 2 claim for a plaintiff's failure to define the relevant market. *Jayco Sys.,* 777 F.2d at 319; *see also Apani Sw.,* 300 F.3d at 628 (explaining that deficient market definition may be grounds to grant a motion to dismiss a § 1 claim).[1] The complaint must account for cross-

1. According to the Fifth Circuit,

> Whether a relevant market has been identified is usually a question of fact; however, in some

elasticity of demand, *i.e.*, whether a product is "reasonably interchangeable by consumers for the same purposes." *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412, 417 (5th Cir.2010). A plaintiff must offer evidence demonstrating where consumers currently purchase the product and where alternative products or alternative sources of the product could be found if a competitor raises prices. *Doctor's Hosp. v. Southeast Med. Alliance,* 123 F.3d 301, 311 (5th Cir.1997); *see also Apani,* 300 F.3d at 628 (explaining that geographic market "must correspond to the commercial realities of the industry and be economically significant.").

As it pertains to the relevant product market, the Court previously found that the allegations found in the complaint were sufficient to withstand a motion to dismiss but cautioned that Felder's failure to specify the relevant market(s) was something that needed to be corrected in the Amended Complaint. *Ruling,* Doc. 32, at 11. Felder's has done this by defining the market as one for "automobile collision parts for which there is an aftermarket alternative and that are compatible with GM

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> circumstances, the issue may be determined as a matter of law. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted.

*Apani,* 300 F.3d at 628 (internal quotations and citations omitted).

vehicles." Doc. 50, at ¶ 10. The issue is whether Felder's has alleged enough facts to sufficiently define the relevant geographic market.

The Court found Felder's definition of the relevant geographic market to be insufficiently pled. Specifically, the Court found that "Felder's does 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." *Ruling,* Doc. 32, at 11. To cure this deficiency, the Court instructed Felder's to "allege further detail regarding the number of competitors in the geographic area, the area of effective competition, whether buyers can practicably turn to other sellers for supplies, and whether other dealers can reasonably move into the market to compete." *Id.* at 12.

In its motion to dismiss, All Star argues that Felder's has failed to follow the Court's instructions. All Star acknowledges that Felder's has included information listing the counties in Louisiana and Mississippi in which both it and All Star compete. Nevertheless, All Star avers that Felder's Amended Complaint remains deficient because Felder's neither mentions whether body shops in these counties obtain collision parts from dealers outside of the geographic area, nor whether outside dealers in other parts of the country could move into the market to compete. Furthermore, Felder's fails to mention whether it operates in areas outside of the proposed geographic market. Felder's responds by arguing that it has pled a sufficient geographic market. In addition to highlighting the counties listed in which both it and All Star compete, Felder's points to the facts it added concerning competitors who have been driven out of the market, competitors who have not entered into the market to compete, and discussed how difficult it is to enter into the proposed market. All Star replies by arguing that Felder's is merely attempting to persuade the Court to make impermissible inferences about the definition of the geographic market without alleging the requisite facts. Additionally, All Star argues that Felder's proposed geographic market is implausible as a matter of law because the Amended Complaint establishes, by including a national dealer of after-market parts, that the geographic market is larger than that demonstrated by the listed counties.

After reviewing the Amended Complaint, the Court disagrees with All Star's contention that Felder's has completely failed to follow the Court's instructions. Indeed, Felder's has included information about a competitor in the proposed market in its discussion of Keystone Automotive Industries, Inc. ("Keystone"), the country's largest after-market parts distributor. Doc. 50, at ¶ 54. This new allegation also demonstrates whether and where buyers can turn to other sellers for supplies. Finally, Felder's included allegations to support an inference that it is difficult for other dealers to reasonably move into the proposed market to compete. *Id*. at ¶ 48–50. Nevertheless, the Court agrees with the Defendant's ultimate contention that Felder's has failed to adequately define the geographic market. Critically, Felder's own allegations contradict its proposed geographic market.

First, Felder's amendment includes a national seller of after-market parts as a competitor in the proposed geographic market. While it does not naturally follow that the inclusion of a national seller leads to the conclusion that the geographic market should be national in scope, it does lead to the plausible inference that the actual geographic scope of competition is larger than that which is proposed in the Amended Complaint. It further leads to more questions as to the existence of other national or regional sellers, which may not be "the country's largest aftermarket parts distributor," but nonetheless are sellers to which buyers in the proposed market could reasonably turn. Second, Felder's alleges that a direct competitor operating in the proposed geographic market was forced out of the market by the alleged predatory pricing scheme. Doc. 50, at ¶ 53. The fact that this direct competitor is located over 100 miles away from any of the counties also included in the proposed geographic market also leads to the plausible inference that the geographic market is larger than presently defined in the Amended Complaint. Therefore, the Court must conclude that the proposed geographic market is too narrowly drawn and thus insufficiently pled. *Wampler v. Southwestern Bell Telephone Co.,* 597 F.3d 741 (5th Cir.2010) (affirming the dismissal of a plaintiff's claim when the proposed geographic market was too narrowly defined to represent a plausible geographic market).

In sum, the Court finds that Felder's has failed to sufficiently define the effective area of competition because the Amended Complaint's allegations belie its own alleged proposed geographic market. For this reason, Felder's has failed to adequately plead its antitrust claims because they are all dependent upon a sufficient definition of the relevant market. *See Apani,* 300 F.3d at 632–33 (affirming the district court's dismissal of all of the plaintiff's antitrust claims for failure to adequately define the geographic market). Accordingly, Felder's federal antitrust claims are dismissed.[2]

**i. Predatory Pricing**

Though it has found that the predatory pricing claim has been insufficiently pled due to Felder's failure to properly allege the geographic market, the Court will nevertheless briefly address this claim. This is due primarily in part to Felder's request for reconsideration of the Court's previous ruling in which the Court held that whether the dealers engaged in below-cost pricing should be determined at the time that the dealers were reimbursed.

Rule 54(b) of the Federal Rules of Civil Procedure provides that:

2. The Court's findings as to the sufficiency of the federal antitrust claims apply with equal force to Felder's claims brought pursuant to state law antitrust statutes. Because the state statutes track the Sherman Act almost verbatim, "Louisiana courts have turned to the federal jurisprudence analyzing those parallel federal provisions for guidance." *Southern Tool & Supply, Inc. v. Beerman Precision, Inc.,* 862 So.2d 271, 278 (La.App. 4 Cir. 11/26/03). Having found that the federal antitrust allegations are insufficient as pled, the Court must also find that the alleged violations of state law are likewise insufficiently pled.

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

FED.R.CIV.P. 54(b). A Court retains jurisdiction over all claims in a suit and may alter its earlier decisions until a final judgment has been issued. *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.,* 259 F.Supp.2d 471, 475 (M.D.La.2002). "District courts have considerable discretion in deciding whether to reconsider an interlocutory order." *Keys v. Dean Morris, LLP,* 2013 WL 2387768, at (M.D.La. May 30, 2013). "Although courts are concerned with principles of finality and judicial economy, 'the ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law.'" *Id.* (quoting *Georgia Pacific, LLC v. Heavy Machines, Inc.,* 2010 WL 2026670, at (M.D.La. May 20, 2010)). Nevertheless, "rulings should only be reconsidered where the moving party has presented substantial reasons for reconsideration." *Louisiana v. Sprint Communications Co.,* 899 F.Supp. 282, 284 (M.D.La.1995).

After review, the Court does not find substantial grounds for reconsideration pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Felder's has not presented "substantial reasons for reconsideration." Instead, Felder's attempts to persuade this Court that the case law that it has already thoroughly evaluated and found to apply to the facts of this case is unavailing. Critically, Felder's attempts to do so without citing a single case, law review article, advisory opinion, or any administrative guidance to support its position.[3] Accordingly, Felder's request for reconsideration is denied.

With its holding in place, the Court turns to whether Felder's has amended its complaint to allege below-cost pricing in line with Fifth Circuit precedent. The Court previously surmised that Felder's had failed to originally do so as a result of a lack of information related to the Defendants' costs and profits, or alternatively, the use of an incorrect formula to calculate average variable costs. The imbalance of information was cured when the Defendants were compelled by this Court to turn over relevant documents. After reviewing the Amended Complaint, the Court finds that Felder's has failed to amend to allege below-cost pricing pursuant to the Fifth Circuit standard as instructed by the Court in its previous ruling. Therefore, even if Felder's had sufficiently pled the relevant geographic market, it would still have failed to properly plead a predatory pricing scheme.

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3. The Automotive Body Parts Association has filed a Motion for Leave to File an Amicus Brief in Support of Plaintiffs (doc. 57). The Court has in its broad discretion elected not to grant leave. The amicus brief deals primarily with the issue of monopoly leveraging which is not an issue that is before the Court. Accordingly, the Motion (doc. 57) is denied.

**C. LUTPA**

The Court previously found that Felder's had failed to sufficiently plead a claim under LUTPA but granted Felder's leave to amend its claim. *Ruling,* Doc. 32, at 31. The Court agreed with the Defendants' reading of *Van Hoose v. Gravois,* 70 So.3d 1017, 1024 (La.App. 1 Cir. 7/7/11) and found that Felder's failure to sufficiently allege an antitrust violation prevented it from being able to sufficiently plead a violation of LUTPA. *Id.* The Court also found that Felder's failed to specifically allege that the Defendants committed fraud, misrepresentation, deception, or unethical conduct. *Id.* Instead, Felder's asserted that the Defendants engaged in an effort to sell repair parts below cost, thereby committing an unfair or deceptive practice as contemplated by LUTPA. *Id.* This the Court found to be "nothing more than a naked assertion followed by a recitation of the applicable law."Neither a naked assertion nor a mere recitation is entitled to the presumption of truth. *Ashcroft,* 556 U.S. at 678. Given that Felder's has again failed to sufficiently plead an antitrust violation and failed to amend its LUTPA claim to specifically allege that the Defendants committed fraud, misrepresentation, deception, or unethical conduct, the Court has no choice but to find that Felder's LUTPA claim must be dismissed.

**D. Solidary Liability Under La. Civ.Code art. 2324**

La. Civ.Code art. 2324 provides the basis for solidary liability under Louisiana law. The article 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 that act." *Id.* Courts have clarified that Art. 2324"does not recognize an independent cause of action for civil conspiracy." *Rhyce v. Martin,* 173 F.Supp.2d 521, 535 (E.D.La .2001). Rather, the actionable element is the wrong perpetrated by the actors involved in the conspiracy. *Id.* Stated differently, the conspiracy is the mechanism that must exist for a plaintiff to recover under Art. 2324. The mere existence of a conspiracy, however, is not a basis for liability.

The Court previously found that Felder's failure to plead the existence of a conspiracy made its claim for solidary liability deficient. *Ruling,* Doc. 32, at 32. Though Felder's has amended its complaint to include allegations concerning the existence of a conspiracy, the Court has found that these allegations are insufficiently pled and therefore dismissed. Accordingly, Felder's claim for solidary liability is dismissed.

**III. Conclusion**

For the reasons stated herein, the Defendants' Motion (doc. 54) to Dismiss is GRANTED. Accordingly, all of the claims contained in the Amended Complaint (doc. 50) are DISMISSED.

The Motions (docs. 57 & 60) filed by the Automotive Body Parts Association as amicus curiae are DISMISSED AS MOOT.

## APPENDIX C — RULING OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA, FILED APRIL 17, 2013

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 12-646-JJB

FELDER'S COLLISION PARTS, INC.

versus

GENERAL MOTORS COMPANY, *et al.*

April 16, 2013, Decided
April 17, 2013, Filed

**RULING ON DEFENDANTS' MOTION TO DISMISS**

JAMES J. BRADY, District Judge

This matter is before the Court on a Motion to Dismiss (Doc. 22) pursuant to Federal Rule of Civil Procedure 12(b)(6), filed by Defendants General Motors LLC[1] ("GM"), All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C., and All Star Chevrolet, Inc. (the All Star Defendants are referred to as "All Star"). Plaintiff, Felder's Collision Parts, Inc. ("Felder's"), has filed an opposition (Doc. 25), to which Defendants have filed a

1. Defendants assert that the Complaint incorrectly identifies General Motors LLC as General Motors Company.

reply (Doc. 28). In opposition, Felder's has requested leave to amend any allegations that this Court deems insufficient. Oral argument is not necessary. The Court's jurisdiction exists pursuant to 28 U.S.C. § 1331. For the reasons herein, the Defendants' Motion to Dismiss (Doc. 22) is DENIED, and Plaintiff's request for leave to amend (Doc. 25 at 22-23) is GRANTED.

I.

Felder's brought this action pursuant to the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13, the Sherman Act, 15 U.S.C. § 2, the Louisiana Unfair Trade Practices and Consumer Protection Act ("LUTPA"), La. Rev. Stat. § 51:1401, *et seq.*, and several other Louisiana revised statutes, La. R.S. §§ 51:122, 123, 124, 137, and 422 (Doc. 1). Additionally, Felder's contends that GM, All Star, and John Doe Defendants 1-25 ("Doe Defendants") should be held jointly and severally liable for conspiring to aforementioned violations under La. Civ. Code art. 2324. Defendants' Motion to Dismiss is brought on the following grounds: (1) the claims are insufficiently pled, (2) the RPA claim must fail because Felder's does not allege price discrimination, (3) Felder's fails to state a predatory pricing claim because the allegations inadequately address relevant market(s), market power, and barriers to entry, (4) dismissal is appropriate because Felder's cannot establish below-cost pricing, (5) Felder's lacks antitrust standing, (6) the Louisiana antitrust claims must fall because the federal claims are deficient, (7) Felder's' other state law claims fail as a matter of law, and (8) Felder's impermissibly refers to the three All Star entities as "All Star."

The following facts are from the Complaint (Doc. 1) and are accepted as true for the purposes of this motion. *See Bass v. Stryker Corp.*, 669 F.3d 501, 507 (5th Cir. 2012). There are two types of automobile parts: original equipment manufacturer parts ("OEM parts"), which are produced by the manufacturer, and aftermarket parts, which are produced by other entities. All Star and the Doe Defendants sell OEM parts, specifically GM-compatible parts, to collision centers and body shops throughout southern Louisiana and southern Mississippi. Felder's operates in the same geographic area and at the same level of the distribution chain as All Star and Doe Defendants, but Felder's sells aftermarket parts. Aftermarket collision parts consist of approximately 20% of the automobile replacement party market and historically, have been sold for lower prices than their OEM counterparts.

In 2009, GM established a price incentive program called the "Bump the Competition" program, which offers "highly competitive pricing" on GM parts (Doc. 1, Ex. 1). As part of the program, GM created a "GM Collision Conquest Calculator," which Felder's alleges is a facilitating device for Defendants' conspiracy to resell OEM parts for a price below the average variable cost ("AVC")[2] paid by dealers to GM for the parts. According to Felder's, Defendants' intention is to undercut aftermarket dealer prices in order to drive the aftermarket competition out of business.

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2. As will be addressed, *infra*, AVC is the "appropriate measure of cost" for a predatory pricing claim under the prevailing Fifth Circuit standards. Since Felder's' Complaint incorrectly defines AVC, the formula offered in the Complaint is not included in the statement of facts in an attempt to minimize confusion.

Under the program, distributors, like All Star, may sell OEM parts at a "bottom line price," which is 33% lower than the price for the aftermarket equivalent, and then apply to GM for a rebate. The rebate enables dealers to collect the difference between the sale price and the cost paid to GM, plus an additional profit. Additionally, GM allegedly offers cash rebate cards to sales representatives to induce sales under the program's terms. The pricing program is available for 4,400 parts. According to Felder's, the pricing program has only been instituted with respect to OEM parts with a comparable aftermarket alternative. GM does not incentivize OEM dealers to sell parts without an aftermarket alternative at prices below cost. Ultimately, Felder's alleges that Defendants conduct is an unlawful attempt to obtain monopoly power.

Felder's provides several examples[3] to illustrate its assertion that Defendants are conspiring to obtain a monopoly by engaging in predatory pricing. For instance, GM offers to sell one particular OEM part for $135.01, which is normally listed by the dealer for $228.83. The comparable aftermarket part is listed for $179.00. Under the pricing program, an OEM dealer can sell the part for a "bottom line price," which is the aftermarket price less 33%. Here, the bottom line price is $119.93. After selling the part for $119.93, the dealer is entitled to a rebate from GM for the difference between the price paid for the part, $135.01, and the price for which the dealer sold the part, $119.93, plus an additional 14% profit, which is $18.90.

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3. Although Felder's provides three examples of this pricing program, only one will be repeated here.

Felder's alleges that, in recent years, the pricing program has significantly impacted the sale of aftermarket parts throughout southern Louisiana and southern Mississippi. Felder's asserts that four of its competitors have already gone bankrupt due to the Defendants' conduct. Felder's also alleges that it has suffered a steady profit decline during the program's existence. In 2008, the last year before this program was implemented, Felder's had a total income in excess of $3 million. By 2011, Felder's' income had decreased by more than $1 million.

Felder's contends that All Star and Doe Defendants have a "reasonable prospect and/or dangerous probability of recouping any losses resulting from the sale of collision parts below AVC." (Doc. 1 at 9). Felder's contends that once the competition has been "bumped," Defendants will reap monopoly profits by ceasing to offer reduced prices on parts that currently have aftermarket alternatives. Defendants will be able to maintain these supracompetitive prices, according to Felder's, because "high and difficult" barriers to entry in the automobile parts industry will prevent new entrants from effectively competing with Defendants (Doc. 1 at 10).

II.

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When reviewing the complaint, the court must accept all well-pleaded facts in the complaint as true. *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). In order to survive a motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

## III.

## FEDERAL ANTITRUST CLAIMS

Felder's has alleged that Defendants engaged in predatory pricing, thereby violating both the RPA and § 2 of the Sherman Act. Since the standards applicable under these acts are distinct, these claims will be addressed in turn.

To establish a claim under the RPA, a plaintiff must show: (1) sales made in interstate commerce; (2) the commodities sold were of like grade and quality; (3) the defendant-seller discriminated in price between buyers; and (4) that the price discrimination had a prohibited effect on competition. *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692 (5th Cir. 2003). The complained-of injury[4] must flow from a defendant's acts of price discrimination, which is "merely a price difference." *Water Craft Management, L.L.C. v. Mercury Marine*, 361 F.

4. Two basic types of injury are recognized under RPA: primary-line injury and secondary-line injury. *Infusion*, 351 F.3d at 692. A primary-line injury results when one seller's acts of price discrimination between favored and disfavored buyers results in an injury to a market player competing at the same level of direct competition. *Water Craft*, 361 F. Supp. 2d at 565. A secondary-line injury results from a seller's price discrimination between favored and disfavored buyers. *Infusion*, 351 F.3d at 692.

Supp. 2d 518, 526 (M.D. La. 2004) (citing *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 559, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)). Price discrimination is "defined as charging different buyers different prices for the same items." *Id.*

Under § 2 of the Sherman Act, three broad categories of conduct are actionable: monopolization, attempted monopolization, and conspiracy to monopolize. The measure of proof for each is distinct. *See generally Vaughn Medical Equipment Repair Services, L.L.C., v. Jordan Reeses Supply Co.*, 2010 U.S. Dist. LEXIS 88958, 2010 WL 3488244, at *9-10 (E.D. La. Aug. 26, 2010). To state a claim for *monopolization*, the plaintiff must allege that the defendant: (1) possesses monopoly power in the relevant market, and (2) willfully acquired or maintained that power. *Eastman Kodak Co. v. Image Tech Servs., Inc.*, 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). To state a claim for *attempted monopolization*, the plaintiff must allege that "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power" in the relevant market. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). Finally, to state a claim for *conspiracy to monopolize*, the plaintiff must allege: (1) specific intent to monopolize, (2) the existence of a combination or conspiracy to monopolize, (3) an overt act in furtherance of the combination or conspiracy, and (4) an effect upon a substantial portion of interstate commerce. *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Centers, Inc.*, 200 F.3d 307, 316 (5th Cir. 2000).

At the outset, the Court addresses two areas of ambiguity in the pleadings. First, the Complaint is unclear about whether Defendants have engaged in actual monopolization, an attempt to monopolize, or a conspiracy to monopolize.[5] Predatory pricing can serve as a basis for either actual monopolization or an attempt to monopolize. *See, e.g., Stearns Airport Equipment Co., Inc. v. FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) (discussing plaintiff's actual monopolization claim based on predatory pricing); *Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 477-79 (5th Cir. 2000) (analyzing predatory pricing under first of three elements relative to plaintiffs claim for attempted monopolization). Notably, Defendants cite the elements for *attempted* monopolization, tailoring the analysis therein accordingly.[6] Confusing matters, Felder's' opposition cites to the same elements, but indicates that the elements relate to actual monopolization.[7] Despite the fact that Felder's' opposition refers to the attempted monopolization

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5. According to the Complaint, Defendants "have *colluded and conspired* to *and have engaged* in the below cost predatory pricing described herein *in an attempt* to monopolize the sale of collision repair parts in southern Louisiana and Mississippi." (Doc. 1 at 13).

6. As Defendants state in their Motion to Dismiss, "To state an *attempt to monopolize* claim: a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." (Doc. 22-1 at 11).

7. According to Felder's' opposition, "A claim for *monopolization* under the Sherman Act requires proof of (1) predatory or anti-competitive conduction; (2) specific intent to monopolize; and (3) dangerous probability of achieving monopoly power." (Doc. 25 at 10).

elements as the elements for actual monopolization, the analysis below treats Felder's' Sherman Act § 2 claim as an attempted monopolization claim.

Second, Felder's' arguments regarding the federal antitrust claims ignore key distinctions between the predatory pricing claims cognizable under the RPA and § 2 of the Sherman Act. It is true that predatory pricing is actionable under either statute. Indeed, "primary-line *injury* under the [RPA] is of the same general character as the *injury* inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (emphasis added). Nevertheless, there are fundamental distinctions between the *claims* that are cognizable under either statute,[8] which are outlined below.[9]

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8. According to the Supreme Court, in *Brooke Group*:

> There are, to be sure, differences between the two statutes. For example, we interpret § 2 of the Sherman Act to condemn predatory pricing when it poses 'a dangerous probability of actual monopolization,' whereas the Robinson—Patman Act requires only that there be 'a reasonable possibility' of substantial injury to competition before its protections are triggered....

*Brooke Group*, 509 U.S. at 222 (citation omitted).

9. For example, hiring away a competitor's employees may be unlawful under § 2 of the Sherman Act, *Taylor Pub.*, 216 F.3d at 480 n.11; but the lack of price discrimination renders the same not violative of the RPA.

## A. Robinson-Patman Act

Under the RPA, a plaintiff must show that (1) sales were made in interstate commerce; (2) the commodities sold were of like grade and quality; (3) the defendant(s) engaged in price discrimination; and (4) this discrimination had an anticompetitive effect. *Infusion*, 351 F.3d at 692. Defendants argue that the Complaint fails to address the first three elements. However, the Complaint does support an inference that sales were made in interstate commerce. All Star is located in Louisiana and the Complaints refers to sales in both Louisiana and Mississippi. Any sale by All Star to a buyer in Mississippi involves interstate commerce.

As for the second element—commodities of like grade and quality—Felder's argues that the direct competition between aftermarket and OEM parts suggests that the goods are reasonably interchangeable and, thus, of like grade and quality. Defendants counter that Felder's' argument is irrelevant to the second element. The Court agrees. The issue is not whether aftermarket parts are comparable to OEM parts. Rather, the question is whether Felder's alleged that Defendants sold goods of like quality to different buyers for different prices. *Supra* note 4; *see also Infusion*, 351 F.3d at 692 (asking whether goods sold to disfavored purchaser were comparable to goods sold to others). Since Felder's' allegations do not address this issue, the second element of the RPA claim is insufficiently pled.

As for the third element, price discrimination, Felder's argues that this is shown by establishing (1) below-cost pricing and (2) a reasonable prospect of recoupment (Doc. 25 at 10 (citing *Brooke Group*)). However, this is legally incorrect. Below-cost pricing and recoupment are prerequisites to recovery for *predatory pricing. Brooke Group*, 509 U.S. at 223. Price discrimination requires a showing that the defendant charged different buyers different prices for the same item(s). *Water Craft*, 361 F. Supp. 2d at 526. The Complaint does not allege that GM discriminated in price as between All Star and Felder's (or, for that matter, between any two distributors), nor does it allege that that any of the Defendant-dealers charged different buyers different prices for the same item. Thus, Felder's does not allege facts from which a fact finder could plausibly find Defendants engaged in price discrimination.[10] Nevertheless, the Court grants Felder's' request to amend its complaint.

**B. Sherman Act**

Turning to the attempted monopolization claim under § 2 of the Sherman Act,[11] in order to withstand a motion to dismiss, the Complaint must sufficiently allege (1) that

10. Where price discrimination is not alleged, as required by the third element, the Court must also conclude that fourth element is deficiently pled because, by its terms, the RPA "condemns price discrimination only to the extent that it threatens to injure competition." *Brooke Group*, 509 U.S. at 220.

11. The Court reiterates that the elements for attempted monopolization will be applied to the § 2 claim. *Supra*, p. 6.

Defendants have engaged in in exclusionary conduct; (2) that Defendants engaged in such conduct with a specific intent to monopolize; and (3) that there is a dangerous probability that Defendants will obtain monopoly power in the relevant market. *Spectrum Sports*, 506 U.S. at 456. Exclusionary conduct is defined as conduct "other than competition on the merits...that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." *Taylor Pub.*, 216 F.3d at 475 (citing 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651, at 82 (1996)) (internal quotation omitted).

**1. Market Structure and Market Power**

As a predicate to an attempted monopolization claim, a plaintiff must show that the defendant has significant market power. Market power is a measure of a firm's "ability to control prices or exclude competition." *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1386 (5th Cir. 1994). Where a defendant's market power is insignificant, it is unlikely that a plaintiff will be able to "show a dangerous probability that [the defendant will] gain monopoly power in" the relevant market, as required for an attempted monopolization claim. *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 840 (5th Cir. 2002). However, before market power can be assessed, a definition of the relevant market is required. *Jayco Sys., Inc. v. Savin Bus. Machines Corp.*, 777 F.2d 306, 319 (5th Cir. 1985).

**a. Market Definition**

An adequate definition of the relevant market is critical because it "provides the framework against which economic power can be measured."[12] *Id.* The Fifth Circuit has recognized that a trial court may dismiss a § 2 claim for a plaintiff's failure to define the relevant market. *Id.*; *see also Apani Sw., Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 628 (5th Cir. 2002) (explaining that deficient market definition may be grounds to grant a motion to dismiss a § 1 claim).[13] A plaintiff's complaint must "plausibly define the relevant product and geographic markets." *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615

12. Here, for example, an analysis of market power would vary depending upon whether the product market is defined as a market for "auto parts" or, alternatively, a market for "collision parts compatible with GM automobiles for which there is an aftermarket alternative."

13. According to the Fifth Circuit,

> Whether a relevant market has been identified is usually a question of fact; however, in some circumstances, the issue may be determined as a matter of law. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted.

*Apani*, 300 F.3d at 628 (internal quotations and citations omitted).

F.3d 412, 417 (5th Cir. 2010) (internal citation omitted). The proposed product market must account for cross-elasticity of demand, i.e., whether a product is "reasonably interchangeable by consumers for the same purposes." *Id.* The plaintiff must offer evidence "demonstrating not just where consumers currently purchase the product, but where consumers could turn for alternative products or sources of the product if a competitor raises prices." *Doctor's Hosp. of Jefferson*, 123 F.3d at 311. The proposed geographic market "must correspond to the commercial realities of the industry and be economically significant." *Apani*, 300 F.3d at 628, and it must account for "the area of effective competition...in which the seller operates, and to which the purchaser can practicably turn for supplies." *Id.* (citation omitted).

The Complaint vaguely and inconsistently refers to numerous markets without stating which is relevant. The various product markets referred to by Felder's include markets for: (1) car collision parts compatible with GM vehicles and for which there is no aftermarket equivalent; (2) replacement parts compatible with GM vehicles for which there is no aftermarket alternative; and (3) collision parts compatible with GM vehicles and for which there is an aftermarket alternative. Defendants note that the first two markets are not the same because "collision" parts and "replacement" parts are different, and the third market is completely different from the first two markets. This inconsistency without specifically identifying relevant product market(s), according to Defendants, is grounds for dismissal. Additionally, Defendants argue that the proposed geographic market is legally insufficient because the Complaint does not allege the number of competitors in the market, where market competitors operate or where they may reasonably turn for supplies, and does not state that Felder's is the only aftermarket dealer in the relevant market. Further, notwithstanding Felder's' allegation that four of its competitors were driven into bankruptcy by the pricing program, Defendants argue that the market definition is inadequate because Felder's fails to state whether the bankrupted entities competed with All Star, sold only GM-compatible parts, or operated in the relevant geographic area.

The Court recognizes the potential for confusion regarding the multiple product markets mentioned in the Complaint. However, the Fifth Circuit has recognized that multiple markets may be relevant. "[E]conomically significant submarkets may exist which themselves constitute relevant product markets." *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487 (5th Cir. 1984). Thus, the Court finds that the allegations are sufficient to withstand the motion to dismiss. It is at least plausible that there are at least two product markets working in tandem. The first market is the market for OEM automobile parts, which GM sells to All Star, where there is an aftermarket equivalent. The second market is the market for OEM automobile parts compatible with GM vehicles for which there is no aftermarket equivalent. However, Felder's' failure to specify the relevant market(s) in the Complaint is a deficiency which must be cured.

Turning to the proposed geographic market, southern Louisiana and southern Mississippi, Felder's does 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. Thus, Felder's has failed to allege specific facts regarding the "area of effective competition." *Apani*, 300 F.3d at 628, which must be cured. To establish a relevant geographic market, Felder's must allege further detail regarding the number of competitors in the geographic area, 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.

In sum, the definition of the relevant market is critical because it is the leg upon which much of the attempted monopolization analysis stands. Felder's cannot vaguely propose a series of markets without identifying which are relevant in the Complaint and expect that this Court will analyze, for example: (1) whether Defendants have market power in each market, (2) whether barriers to entry exist in each market, and (3) whether there is a dangerous probability that Defendants will achieve monopoly power in each market. Accordingly, more specificity will be required in the amended complaint.

**b. Defendants' Market Power**

Defendants argue that Felder's' Complaint should be dismissed for failure to allege sufficient facts regarding Defendants' market power. The Court agrees, as this conclusion must be reached since the Court has found that the Complaint insufficiently defines the relevant market(s).

Quite simply, "[a]n assessment of market power requires a definition of the relevant market." *Roy B. Taylor*, 28 F.3d at 1386.

Substantial market power "may result solely from control of a large share of the market, or from control of some significant part of a market containing characteristics that allow it to be controlled by a participant not having a grossly disproportionate share of it." *Domed Stadium*, 732 F.2d at 489. But a firm's market share is only one measure of the firm's market power, *id.*, as measurement of market power also requires consideration of other factors including: "the strength of the competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand." *Pastore v. Bell Tel. Co. of Pennsylvania*, 24 F.3d 508, 513 (3d Cir. 1994). Even when a firm has a statistically high market share, these additional factors may undercut the firm's true market power. For instance, absent barriers to entry, "a competitor waiting on the sidelines can deny those in the market the power to control prices-because current players cannot exclude competition." *Roy B. Taylor*, 28 F.3d at 1388. Still, in order to establish attempted monopolization under § 2 of the Sherman Act, a plaintiff must show that "a defendant must have [a] legally significant share of the market." *Pastore*, 24 F.3d at 513.

Felder's asserts that GM must necessarily dominate the market because "the relevant product market in this case is for collision replacement parts compatible with GM automobiles." (Doc. 25 at 21). Such a naked assertion of market domination is not legally sufficient under the Fifth Circuit's standards to establish market power.[14] Rather, Felder's' statement regarding GM's dominant position only speaks to the firm's market share. Additionally, Felder's' assertion about GM's market share does not directly address whether the Defendant-dealers—All Star and Doe Defendants—dominate the market to the potential exclusion of Felder's and other aftermarket parts distributors. Felder's argues that, since four of its competitors have closed since the pricing program commenced, it could plausibly be inferred that Defendants have some degree of market power. The Court recognizes Felder's' position, and this inference could be drawn if it is also assumed that the bankrupted competitors operated in the relevant market. However, as previously stated, Felder's must amend to provide further factual support as to whether the bankrupted competitors operated in the relevant market.

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14. As the Fifth Circuit has explained:

> We do not suggest here a market share percentage that of itself rises to the level of legal significance, but note that a share of less than the fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present.

*Domed Stadium*, 732 F.2d at 490.

Regarding one of the other factors for market power, barriers to entry,[15] the Complaint states that "barriers to entry into the automotive parts industry are high and difficult...." (Doc. 1 at 10). Defendants retort that this is a legally insufficient conclusory statement. Felder's counters that the Complaint establishes the overall scheme in which All Star can undersell Felder's and then collect a rebate for lost profits. Felder's argues that, at this stage of litigation, it is sufficient to allege an "anticompetitive scheme that itself creates the barriers to entry." (Doc. 20 at 20). *See Nat'l Athletic Trainers' Ass'n, Inc. v. American Physical Therapy Ass'n*, 2008 U.S. Dist. LEXIS 70131, 2008 WL 4146022, at *14 (N.D. Tex. 2008). Defendants reply that "it is impossible to tell whether any barriers exist with respect to parts manufacturing or parts distribution, or both." (Doc. 22-1 at 14). The Court is inclined to agree with Defendants, but the underlying flaw in Felder's' position is a failure to identify exactly which market(s) it references when it says barriers to entry exist in "the market."[16] Thus, the Court reiterates that Felder's must clarify which markets are relevant in an amended complaint. However, the Court agrees with Felder's that it is plausible that new

15. The market power analysis, here, assesses market power in light of *existing* barriers to entry. Notably, barriers to entry are also discussed, *infra*, but the inquiry below assesses the potential existence of *future* barriers to entry which might contribute to a dangerous probability that Defendants will recoup.

16. If "the market" is the "automotive parts industry," then Defendants' market share is statistically different than it would be if the relevant market were defined as "collision parts compatible with GM vehicles." This is an illustration of why the Fifth Circuit requires definition market of relevant market(s). *See supra* note 13.

market entrants dealing aftermarket parts would find it difficult to compete with OEM dealers, like All Star, while the challenged pricing program exists. Furthermore, "[t]he question is not whether there are barriers to entry, but rather whether the barriers in a particular industry are large enough to trigger judicial concern." *FMC Corp.*, 170 F.3d at 531. Thus, although Felder's' allegations are thin, the Court finds that Defendants' sudden and drastic reduction in prices warrants judicial concern and that Felder's' allegations are sufficient to withstand a motion to dismiss.

Felder's must amend its Complaint to include more specific allegations regarding the definition of the relevant market(s), the number of competitors in the market, and the current state of competition. Additionally, 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. Finally, 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.

**2. Attempted Monopolization Elements**

As referenced above, the first element of an attempted monopolization claim is exclusionary conduct. Here, the alleged exclusionary conduct is predatory pricing. The essence of a predatory pricing claim is as follows: "A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Brooke Group*, 509 U.S. at 221. A predatory pricing claim under § 2 of the Sherman Act must sufficiently allege facts supporting the two prerequisites to recovery—namely, that (1) the defendant's pricing is below an appropriate measure of its costs, and (2) there is a dangerous probability that the defendant will recoup any losses sustained during the below-cost pricing period. *Brooke Group*, 509 U.S. at 222-24.[17]

Although *Brooke Group*'s predatory pricing prerequisites strike at the first and third elements of an attempted monopolization claim, the prerequisites do not directly relate to the second element of attempted monopolization—namely, the issue of specific intent. Regarding the first element (sometimes, the "conduct element") of attempted monopolization, predatory pricing is generally one form of exclusionary behavior. Furthermore, since "[t]he success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (emphasis in original), the recoupment prong of a predatory pricing claim overlaps with the third element of attempted monopolization. Put differently,

17. While § 2 of the Sherman Act condemns "predatory pricing when it poses a dangerous probability of actual monopolization," the RPA "requires only that there be a reasonable possibility of substantial injury to competition before its protections are triggered." *Brooke Group*, 509 U.S. at 222 (internal quotations and citations omitted).

in order to establish that a defendant has a dangerous probability of recoupment, the plaintiff must also offer proof that the defendant has a dangerous probability of acquiring monopoly power or already possesses such power.

Therefore, Felder's must provide facts sufficient to support inferences that: (1) Defendants' prices are below an appropriate measure of their costs, (2) there is a dangerous probability that Defendants' will recoup profits lost due to below-cost sales, and (3) Defendants' engaged in the alleged predatory practice with the specific intent to gain monopoly power.

**a. Predatory Pricing**

When analyzing a claim of predatory pricing, courts routinely address the recoupment element first, because "[i]f there is no likelihood of recoupment, it would seem improbable that a scheme would be launched." *FMC Corp.*, 170 F.3d at 528.[18] "Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost." *A.A. Poultry Farms*, 881 F.2d at 1401. Recoupment has two prongs. First, a plaintiff must show that the predatory scheme "could actually drive the competitor out of the market." *FMC Corp.*, 170 F.3d at 528. Second, "there must be evidence that the surviving monopolist could then raise prices to consumers long

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18. Accordingly, the recoupment analysis assumes *arguendo* that below-cost pricing can be established. *See FMC Corp.*, 170 F.3d at 532 (explaining this procedure for analysis of predatory pricing).

enough to recoup his costs without drawing new entrants to the market." *Id.* at 528-29 (citing *Brooke Group*). The question is whether a defendant will be able to offset losses by recovering "in the form of later monopoly profits." *Brooke Group*, 509 U.S. at 224.

Defendants contend that Felder's has failed to plead sufficient facts to permit such an inference because: (1) Felder's has failed to sufficiently allege facts regarding the relevant market and the state of competition therein; (2) in several places, Felder's merely recites the legal element for recoupment; (3) Felder's has failed to specifically allege barriers to entry exist that make recoupment feasible; and (4) Felder's admits that the program has existed for years, yet pricing remains competitive. In opposition, Felder's argues that it has pled facts sufficient to meet the first prong of recoupment because Felder's has suffered a steady decline in profitability and market share since Defendants implemented the pricing program.

**i. First Prong of Recoupment — Possibility of eliminating Felder's**

Under the first prong, Felder's must adequately support the proposition that Defendants' alleged predatory conduct could drive Felder's out of the market. The Court recognizes Defendants' position—namely, that market power and market definition are essential to the analysis of whether Felder's could be (or is being) driven out of the market due to Defendants' conduct. However, having addressed these issues above, the Court's analysis must proceed under the assumption that a relevant market exists and that Defendants have sufficient market power to warrant antitrust concern under § 2 of the Sherman Act.

Before delving into the issue of whether Felder's could be driven out of business by the alleged predatory scheme, the Court first rejects the implication that the name of the program evidences such a likelihood. Felder's asserts that the title of the program, "Bump the Competition," is "very telling nomenclature." (Doc. 25 at 11). However, the name of the program has no bearing on whether predatory pricing exists.[19] The Court will not entertain arguments about the title of GM's program. Furthermore, "[i]t is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*." *Brooke Group*, 509 U.S. at 224 (emphasis in original) (internal quotation and citation omitted). Since competition is the "conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594, Felder's is simply incorrect to imply that "competition" is a dirty word.

When determining whether an alleged predatory scheme could eliminate a competitor, relevant considerations include "the extent and duration of the alleged predation, the relative strength of the predator and its intended victim, and their respective incentives and will." *Brooke Group*, 509 U.S. at 225 (internal quotation and citation omitted). Pushing aside the issue of the parties' relative strength, the Court addresses the extent and duration of alleged predation.

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19. *See R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696 (7th Cir. 2006) (observing that phrases like "kill the competition" do not support inference of predatory pricing).

Defendants reference the duration of the pricing program in the course of arguing that All Star is unlikely to ever recover profits.[20] Defendants do not, however, argue that the duration of the program evidences that Felder's will continue to coexist while the program continues. In opposition, Felder's further explains its theory of why it could be driven out of the market if the pricing program is not condemned, relating its theory to the extent and duration of the program in the course of the argument (Doc. 25 at 14-16). Felder's argues there are two ways in which All Star profits[21] from sales of OEM parts. First, when All Star sells OEM parts that have an aftermarket equivalent, GM's program provides All Star with the option to sell at a price below dealer cost and collect a rebate. Second, even though the program does not apply to OEM parts without an aftermarket equivalent, All Star nevertheless profits on the sale of these OEM parts

20. All Star's ability to recover profits does not have to do with whether Felder's will be driven out of business, but rather has to do with the second prong of the recoupment analysis.

21. Felder's actually uses the word "recoup." As Defendants correctly point out, this is technically inaccurate, since recoupment has to do with recovering lost profits after an alleged predator has driven its competition out of business. The term "recoup," therefore, properly refers to the ability to recover profits lost as a result of below-cost pricing by charging supracompetitive prices after other firms have been driven out of business by a predator. Notwithstanding Felder's' technical misuse of the term recoup, its point is well taken—that Defendants make money (1) by selling OEM parts that have no aftermarket equivalent at high prices, and (2) by selling OEM parts with aftermarket equivalents at prices that undercut competition.

by keeping prices high since GM already has a monopoly on these parts. Felder's asserts that Defendants will be able to eliminate Felder's and other similarly situated aftermarket dealers, at which point the OEM dealers will be able to increase the price on parts for which there were once aftermarket parts. Furthermore, Felder's alleges that, since the implementation of the program, its revenues have significantly decreased and four other distributors have been driven to bankruptcy. At this stage of the litigation, although Felder's has not adequately addressed market power and definition, the Court finds that the allegations regarding extent and nature of the program support a plausible inference that Felder's could be driven out of business by the program's continued existence.[22] Therefore, Felder's' allegations regarding the first prong of recoupment are sufficient to withstand a motion to dismiss.

**ii. Second Prong of Recoupment — Plausibility of Recoupment**

The second prong assesses the probability of whether Defendants could charge supracompetitive prices for a period of time long enough to recoup profit lost as a result of the challenged program. The object of this inquiry is to determine the likelihood of a predator's success in achieving the end goal of any predatory plan—net profit.

22. Since the Court has already stated that Felder's must amend to clarify whether the bankrupted entities competed in the relevant market, *supra* at p. 12-13, the conclusion reached here assumes that the bankrupted entities did in fact compete in the relevant market.

Courts will not condemn behavior where it appears likely that a predator's plan will fail to be profitable, because such behavior "produces lower aggregate prices in the market, and consumer welfare is enhanced." *Brooke Group*, 509 U.S. at 224.

Defendants question Felder's' allegation that All Star will be able to set supracompetitive prices to recoup the losses associated with the pricing program once aftermarket competitors have been driven out of business. Defendants contend that All Star has nothing to recoup because prices are not below cost, as required to establish liability for a predatory pricing scheme.[23] Alternatively, Defendants assert that Felder's allegations are not sufficient to show that recoupment is plausible, because Felder's has provided insufficient factual support regarding market definition and the potential for future barriers to entry. Finally, Defendants contend that because All Star has not raised prices in the last four years, this undercuts the notion that the firm has the ability to recover profits in the future.

The Court first addresses Defendants' argument regarding market definition. 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

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23. Below cost pricing is addressed *infra.*

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.

Related to the issue of market definition is the issue of whether future barriers to entry would enable recoupment. One key market factor to consider whether the alleged predator will be able to "raise prices to consumers long enough to recoup his costs without drawing new entrants to the market." *FMC Corp.*, 170 F.3d at 528-29 (citing *Brooke Group*). "If barriers to entry in an industry are low, new entrants into the industry will appear when the monopolist raises its prices, and the net effect of the campaign will be a loss to the predator. . . ." *Id.* at 530.

For a predatory pricing claim, a court "should focus on whether significant entry barriers would exist *after* the [defendant] had eliminated some of its rivals." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986). It is only "at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant." *Id.*

As referenced above, the Complaint states "barriers to entry into the automotive parts industry are high and difficult...." (Doc. 1 at 10). Defendants argue that this is a "naked assertion" that is insufficient to withstand a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Further, Defendants argue that existing barriers to entry are not the question. In this regard, the Court agrees that, in the context of recoupment, the question is "whether significant entry barriers would exist *after* the [defendant] had eliminated some of its rivals." *Cargill*, 479 U.S. at 119 n.15. It is only "at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant." *Id.*

Defendants additionally rely on *FMC Corp.* for the point that Felder's' allegations regarding barriers to entry are insufficient. In *FMC Corp.*, the plaintiff argued that the defendant would be able to raise prices after driving the plaintiff out of business, because of alleged barriers to entry in the marketplace including "transportation costs, manufacturing costs, and the demonstrated ability of the dominant firm to charge supracompetitive prices." *FMC Corp.*, 170 F.3d at 530 (internal quotations omitted). The Fifth Circuit rejected the plaintiff's argument, noting that "[t]he question is what will stop foreign firms from appearing on the scene, pointing out to municipalities the supracompetitive prices, and providing an alternative." *Id.* While the Court recognizes Defendants' position, the Fifth Circuit was reviewing a motion for summary judgment, not a motion to dismiss. Although Felder's' allegations are thin, at this point in the litigation, they are sufficient to withstand the motion to dismiss. However, Felder's will have to adduce evidence that future entry into the market is difficult beyond Defendants' ability to charge supracompetitive prices. Felder's will have to show that the future barriers to entry in the relevant market(s) are significant enough to trigger the Court's concern.[24]

Turning back to the extent and nature of the pricing program, Defendants contend that while the program has existed for several years, pricing is still competitive, and therefore, it is unlikely that All Star could ever recoup its investment. Defendants point out that one of the reasons that courts are skeptical of predatory schemes because it is nearly impossible to successfully achieve the end goal of recouping lost profits. *FMC Corp.*, 170 F.3d at 527-28 ("[T]he consensus among economists [is] that such schemes are difficult if not impossible to successfully complete and thus unlikely to be attempted by rational businessmen."). In response, Felder's argues that this is a factual issue inappropriate for consideration at this stage. Significantly, neither party cites any authority that imposes a time period for how long a program must exist to support plausibility of recoupment. The Supreme Court has noted the extended length of a program may undercut the plausibility of recoupment. *Matsushita*, 475 U.S. at 591 ("Two decades after their conspiracy is alleged to have commenced, petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith,

24. To reiterate, here the analysis is unlike the analysis of barriers to entry above, which asks about existing barriers to entry. *See supra* note 15 and accompanying text. The inquiry with respect to recoupment is whether future barriers to entry will exist that could influence a defendant's ability to charge supracompetitive prices.

not by any of petitioners."). Although the alleged pricing scheme here has not been in existence for nearly as long as the program in *Matsushita*, the Court finds that this fact is not dispositive of whether there is a dangerous probability of recoupment in the future.

In sum, the central flaw with respect to the entire recoupment analysis relates back to Felder's' need to amend the Complaint with respect to market definition and market power. The Court agrees with Defendants to this extent. *Cf. Brooke Group*, 509 U.S. at 226 ("In certain situations—for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity—summary disposition of the case is appropriate."). Nevertheless, the Court also recognizes that, due to the nature of predatory pricing claims, the "prerequisites to recovery are not easy to establish." *Id.* For that reason and those stated above, the Court concludes that Felder's' allegations with regard to recoupment are sufficient to trigger antitrust concern at this stage of the litigation.

### iii. Below Cost Pricing

The Court now addresses the issue of below-cost pricing. Felder's' Complaint states that All Star and Doe Defendants sold OEM parts below cost.[25] The parties

25. Felder's does not allege that GM sold parts below cost in the course of transacting with the Defendant-dealers.

dispute the appropriate measure of cost for the purposes of this analysis. The fundamental disagreement between the parties is temporal in nature and, as such, the question before the Court is whether below-cost pricing should be adjudged at the time of sale, as Felder's contends, or after the dealers are reimbursed by GM, as Defendants assert.

Felder's alleges that—at the time of the sale—the Defendant-dealers sell the OEM parts at a price below the dealers' cost. Felder's argues that this allegation is sufficient to establish below-cost pricing under the Fifth Circuit's standards. Defendants recognize that the point-of-sale price is below dealer cost. However, Defendants contend that the sales were not below-cost because dealers are made whole under the pricing program and, in fact, make a profit. As the exhibits illustrate, GM compensates participating dealers who sell at the bottom line price by refunding claims for the difference between the sale price and the dealer's cost, plus a 14% profit. Thus, Defendants contend that it is appropriate to view the entire transaction when determining whether the sales are below-cost.

Defendants further contend that Felder's' arguments fail to account for how the parts are sold to collision centers and body shops. Defendants point to a footnote in *FMC Corp.*, which provides that the entire transaction, rather than its individual components, must be below cost for a predatory pricing claim. *See FMC Corp.*, 170 F.3d at 533 n.15. Felder's, however, argues that Defendants' focus *FMC Corp.* is inapposite. After reviewing *FMC Corp.*, the Court agrees with Defendants' interpretation of the case.

In *FMC Corp.*, the plaintiff argued that a part of the defendant's project would "run at a negative operating margin." *Id.* at 533. This, according to the plaintiff, was evidence of a below cost price. However, as the Fifth Circuit noted, the plaintiff's allegation was flawed because even if a particular part of the project were below cost, the plaintiff failed to allege that the "project *as a whole* was unprofitable." *Id.* at 533 n.15 (emphasis added). Having previously confronted a similar argument, the court further explained that it has rejected a plaintiff's contention that price cuts should be examined in isolation. *Id.* The Fifth Circuit concluded that this would be akin to looking at a "buy one get one free" deal and only looking at the price of the free product to conclude that there was predation. *Id.*

Based on *FMC Corp.*, this Court concludes that considering the transaction 'as a whole' is appropriate. Felder's' contention that the analytical focus of below-cost pricing should be limited to the time of sale is difficult to square with the logic espoused in *FMC Corp.* 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. Additionally, the Court is persuaded by the authority cited by Defendants, suggesting that, in the context of an RPA claim, price is measured after considering any discounts or rebates. *See A.A. Poultry Farms*, 881 F.2d at 1407 ("Selling a chain 100% of its requirements at 80¢/dozen is the same as furnishing 80% of the requirements at $1.00/dozen and giving it the other 20% for 'free.' Whether price discrimination has occurred depends, therefore, on the price *after* all discounts, specials, and so on."). 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 claim system, which allows for collection of the difference between the sales price and dealer cost, plus a 14 percent profit.

Having disposed of the parties' temporal debate, the question remains whether the sales are below-cost under the Fifth Circuit's standards. Predatory pricing claims require a showing that pricing is below some "appropriate measure" of cost. *Brooke Group*, 509 U.S. at 223.[26] Although circuits are split on what constitutes the appropriate measure of cost, *see id.* at n.1 (explaining this split), the Fifth Circuit has "long embraced" the standard that average variable cost ("AVC") is an appropriate measure of cost. *FMC Corp.*, 170 F.3d at 528 (5th Cir. 1999) (reaffirming this standard after *Brooke Group*). Accordingly, this Court must consider prices below AVC as "below-cost" for the purposes of a predatory pricing claim. *Id.*

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26. Where the challenged prices are above cost, recovery is rare because such claims could set a precedent that may have a chilling affect on the type of legitimate price cuts that directly benefit consumers. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 319, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007).

All costs can be lumped into one of two categories—fixed or variable. *FMC Corp.*, 170 F.3d at 532. Fixed costs are those that remain substantially unaffected due to changes in short-term output—for example, the costs associated with acquiring land. *Id.* Variable costs are those which are affected by changes in output — for example, hourly wages, cost of materials, or other costs associated with production. *Id.* AVC is measured by dividing variable costs by output. *Taylor Pub.*, 216 F.3d at 478 n.6.[27] AVC is not, as Felder's suggests, "cost of the part plus the variable costs of selling the part." (Doc. 1 at 5). Notably, the Fifth Circuit "has found that judgment as a matter of law is appropriate when a plaintiff fails to adequately specify how the challenged pricing undercuts the defendant's variable costs." *Id.*

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's standard. *See FMC Corp.*, 170 F.3d at 532 (observing that failure to "explor[e] the relationship between variable costs, fixed costs, and profits" is legal error). Perhaps the lack of exploration is due, in whole or in part, to the circumstances—namely, that Felder's may not have access to certain information about Defendants' costs and profits. Alternatively, the failure could be attributable to the fact that Felder's used the incorrect formula to calculate AVC. Regardless, Felder's must address these deficiencies by amendment.

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27. For further explanation of costs, *see FMC Corp.*, 170 F.3d at 532.

**b. Specific Intent to Achieve Monopoly Power**

Specific intent to monopolize is an essential element of an attempted monopolization claim. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984). "The intent must be to do more than compete vigorously; vigorous competition is precisely what the antitrust laws are designed to foster." *Id.* Rather, the plaintiff asserting attempted monopolization must show a defendant's specific intent to acquire and exercise the power to fix price or exclude competition. *Id.* (citations omitted). Felder's alleges that Defendants entered into the pricing program with GM for the "specific purpose of eliminating competition and making GM the only seller of collision parts for repairs of GM vehicles in southern Louisiana and Southern Mississippi." (Doc. 1 at 5). Defendants' Motion to Dismiss does not directly argue this issue. Thus, the Court declines to delve into whether Felder's' allegations provide sufficient factual support regarding the specific intent element.

**c. Dangerous Probability of Obtaining Monopoly Power**

Under the third element for an attempted monopolization claim, Felder's must show that Defendants have a dangerous probability of obtaining monopoly power due to the program. As previously stated, the recoupment analysis for predatory pricing directly relates to this final element for attempted monopolization. Thus, the Court finds that the analysis of the former, *supra*, applies equally here. Accordingly, in an amended complaint permitted, Felder's must provide further factual support regarding the issues discussed in the recoupment analysis, including Defendants' market power and Defendants' potential ability to dominate the market to the exclusion of others for a time period long enough to recover money lost as due to the alleged predatory program.

**C. Standing under Federal Antitrust Law**

In Defendants' Motion to Dismiss, the issue of antitrust standing is raised in a footnote (Doc. 16 at n.12). Private party standing in antitrust litigation is governed under the Clayton Act.[28] Antitrust standing only exists where "a plaintiff shows: 1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Doctor's Hosp.*, 123 F.3d at 305. The third prong is not argued by Defendants. The core contention of Defendants' argument is that the Complaint does not support an inference that the complained-of injury flows from the alleged predatory conduct. Felder's does not counter this argument in opposition. The Complaint simply asserts that the alleged violations of federal antitrust law give rise to a private right of action for damages under §4 of the Clayton Act, 15 U.S.C. § 15(a), and for injunctive relief under § 16 of the Clayton Act. 15 U.S.C. § 26. Nevertheless, because

28. 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor"); 15 U.S.C. § 26 (providing that private parties "threatened [with] loss or damage by a violation of the antitrust laws" may seek injunctive relief).

neither party has sufficiently briefed the law with respect to the issue of antitrust standing, the Court declines to resolve the issue at this time.

**LOUISIANA'S ANTITRUST LAWS**

The Court next addresses the state law claims, starting with the claimed violations of Louisiana's antitrust statutes. Felder's alleges that Defendants have violated La. R.S. 51:122 and La. R.S. 51:123, which are the functional equivalents to § 1 and § 2 of the Sherman Act, respectively. Because the state statutes track the Sherman Act almost verbatim, "Louisiana courts have turned to the federal jurisprudence analyzing those parallel federal provisions for guidance." *Southern Tool & Supply, Inc. v. Beerman Precision, Inc.*, 862 So. 2d 271, 278 (La. App. 4 Cir. 11/26/03); 862 So.2d 271, 278. Thus, the analysis of the alleged § 2 violation, *supra*, is relevant, and Felder's must amend with respect to La. R.S. 51:123 for the same reasons articulated in the foregoing discussion of § 2.

As for La. R.S. 51:122, the Complaint is also deficient because it states that Defendants are liable for "conspiracy in restraint of trade," which is simply a recitation of La. R.S. 51:122 and its federal counterpart, § 1. (Doc. 1 at 16). Both require proof of an agreement that unreasonably restrains trade. *Southern Tool*, 862 So.2d at 278. However, Felder's never alleged a § 1 violation. As such, Felder's' naked assertion that Defendants violated the equivalent state statute is insufficient as stated.

As for the other revised statutes cited to in Count Four of the Complaint, §§ 51:124(A), 51:137, and 51:422, the Court reaches a similar conclusion. Felder's' position is that the federal antitrust allegations are sufficient support these claims. However, having found that the federal antitrust allegations are insufficient as pled, the Court must also find that the alleged violations of state law are insufficient.

In sum, it is true that violations of federal antitrust law can support a claim that Louisiana's antitrust law has been violated, *provided that the federal antitrust violations are sufficiently pled.* Because Felder's' allegations are currently insufficient to support the federal antitrust claims, it follows that the state law claims are deficient, as Felder's merely restates each revised statute in its Complaint. Felder's may amend to cure such deficiency. Regarding La. R.S. 51:123, the Court will hold Felder's to standards similar to those stated in the § 2 analysis. However, since neither parties has sufficiently briefed the issues presented under § 1 and La. R.S. 51:122, the Court declines delve into further detail regarding what will be required in the amendment. The Court reaches the same conclusion with respect to §§ 51:124(A), 51:137, and 51:422. Felder's may attempt to cure these deficiencies in an amended complaint.

**LUTPA**

Defendants contend that Felder's fails to allege facts sufficient to establish a violation of the Louisiana Unfair Trade Practices Act ("LUTPA"). Defendants argue the LUTPA claim fails because Felder's fails to allege conduct that falls within the range of fraudulent or deceptive practices prohibited by LUTPA, and also because Felder's has not, in Defendants' view, sufficiently alleged the antitrust violation upon which the LUTPA claim is premised.

Private parties have a right of action under LUTPA. *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.* 2009-1633 (La. 4/23/10), 35 So.3d 1053, 1060, *construing* La. R.S. 51:1409(A). The Supreme Court of Louisiana recently held that this right of action extends to all persons, including business competitors, who assert loss of money or property as a result of another's unfair or deceptive trade practices. *Id.* LUTPA prohibits ?"[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." La. R.S. 51:1405(A). Businesses are prohibited from engaging in "fraud, misrepresentation, deception, and other oppressive and unscrupulous conduct." *Tubos de Acero de Mexico, S.A. v. Am. Intern. Invest. Corp.*, 292 F.3d 471, 480 (5th Cir. 2002). "[O]nly egregious actions involving elements of fraud, misrepresentation, deception, or other unethical conduct will be sanctioned based on LUTPA." *Cheramie*, 35 So.3d at 1060. The "range of prohibited practices under LUTPA is extremely narrow," *id.*, and "sound business practice or the exercise of permissible business judgment" are not prohibited. *High Tech Communications v. Panasonic Co.*, 1995 U.S. Dist. LEXIS 1903, 1995 WL 65133, at *3 (E.D. La. 1995).

A party "alleging fraud or mistake...must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) further requires a plaintiff complaining of fraud to allege "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992) (internal quotations and citations omitted). In Louisiana, fraud requires a showing of "(1) a misrepresentation of a material fact, (2) made with the intent to deceive, and (3) causing justifiable reliance with resultant injury." *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1068 (5th Cir. 1993).

The parties dispute the issue of whether a LUTPA claim may be based solely upon a violation of federal antitrust laws. The parties' dispute boils down to differing interpretations of a recent decision by the Louisiana Court of Appeal for the First Circuit, *Van Hoose v. Gravois*, 2011-0976 (La. App. 1 Cir. 7/7/11), 70 So.3d 1017, 1024. In *Van Hoose*, the court concluded that the allegations were insufficient to establish "injury to competition," and that the plaintiff therefore failed to "state a claim for unfair trade practices under the LUTPA." *Id.* at 1024. Felder's maintains that, under *Van Hoose*, a sufficiently pled a federal antitrust violation also suffices to state a cause of action under LUTPA. In reply, Defendants contend that Felder's has misread *Van Hoose* and, according to Defendants, the case is properly understood as standing for the proposition that a plaintiff's failure to sufficiently allege an antitrust violation supports a finding that the plaintiff has also failed to state a claim under LUTPA. The converse of this proposition, Defendants argue, is not necessarily true. The Court agrees. For this reason, as well as those in the paragraph that follows, Felder's has failed to specifically allege sufficient facts to support a claim under LUTPA.

Here, as a business competitor of All Star, Felder's would fit within the class of plaintiffs who have standing to bring a claim under LUTPA. However, a claim based on Felder's' lost profits is only actionable if the lost profits were a result of "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Cheramie*, 35 So.3d at 1057. Felder's does not specifically allege that Defendants committed fraud, misrepresentation, deception, or unethical conduct. Instead, the Complaint asserts that Defendants engaged in an effort to sell repair parts below cost, thereby committing an unfair or deceptive practice as contemplated by LUTPA. (Doc. 1 at 15, ¶ 51). This allegation is nothing more than a naked assertion followed by a recitation of the applicable law. Thus, the Court finds that the Complaint is insufficient to state a claim under LUTPA, but will grant Felder's' request for leave to amend to cure the deficiency.

## SOLIDARY LIABILITY UNDER La. Civ. Code art. 2324

La. Civ. Code art. 2324 provides the basis for solidary liability under Louisiana law. The article 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 that act." *Id.* Courts have clarified that Art. 2324 "does not recognize an independent cause of action for civil conspiracy." *Rhyce v. Martin*, 173 F. Supp. 2d 521, 535 (E.D. La. 2001). Rather, the actionable element is the wrong perpetrated by the actors involved in the conspiracy. *Id.* Stated differently, the conspiracy is the mechanism that must exist for a plaintiff to recover under Art. 2324. The mere existence of a conspiracy, however, is not a basis for liability.

Here, Felder's repeatedly asserts that Defendants engaged in a conspiracy throughout the Complaint. Yet, as Defendants correctly point out, nowhere in the Complaint does Felder's specifically allege an antitrust conspiracy claim. (Doc. 22-1 at 18). Defendants further argue that because the antitrust and other state law claims should be dismissed, the dismissal of those claims mandates dismissal of Felder's' claim for solidary liability.

As it stands, Felder's merely alleges that Defendants have conspired to commit violations of the law. (Doc. 1 at 17). Significantly, the Complaint (1) never mentions § 1 of the Sherman Act, which condemns unlawful conspiracies in restraint of trade, is never mentioned in the Complaint; (2) fails to specifically allege facts in support of the elements for a conspiracy to monopolize claim under § 2; and (3) fails to specifically plead a cognizable conspiracy claim under Louisiana antitrust law. Therefore, Felder's' argument skips the critical step of specifically pleading the existence of a conspiracy. In the absence of specific allegations supporting the existence of a conspiracy, Count 5 is deficient as pled.

**ALL STAR AS SINGLE DEFENDANT**

Defendants assert that Felder's' reference to the three All Star entities as the "All Star Defendants" is impermissible. According to Defendants, Felder's has failed to allege specific facts related to each individual entity for its claims against the All Star entities to be actionable, and such failure mandates dismissal. Felder's argues that the issue of whether the parent company should be dismissed is a matter for further discovery.

Defendants cite to two district court cases in support of their proposition. *In re California Title Ins. Antitrust Litig.*, C 08-01341 JSW, 2009 U.S. Dist. LEXIS 43323, 2009 WL 1458025, at *7 (N.D. Cal. May 21, 2009); *McCray v. Fid. Nat. Title Ins. Co.*, 636 F. Supp. 2d 322, 335 (D. Del. 2009). In *McCray* and *California Title*, the issue was whether a plaintiff could recover from a parent company based on an agency or alter ego theory when the parent's subsidiary engaged in a "conspiracy" under § 1 of the Sherman Act. In both cases, the courts held that the plaintiffs' complaints insufficiently pled that the parent was involved in the conspiracy. *McCray*, 636 F. Supp. 2d at 335 ("Without some averment that the corporate parent defendants directly entered into agreements, or the [subsidiary defendants] are the corporate parent defendants' alter egos, the plaintiffs have not alleged enough to establish that the corporate parent defendants entered into a conspiracy"); *California Title*, 2009 U.S. Dist. LEXIS 43323, 2009 WL 1458025, at *8 (rejecting argument based on agency theory since plaintiffs did "not attempt to allege any facts to show that the parent corporations knew what their subsidiaries were doing").

Here, Felder's has affirmatively alleged that the multiple All Star entities do business under a single trade name—All Star Automotive Group—and that the name is owned by All Star Advertising Agency, Inc. ("All Star Advertising"). Although the Complaint asserts that "All Star Defendants" engaged in a conspiracy with GM, Felder's does not specifically state the degree to which All Star Advertising was involved with or had knowledge of the alleged conspiracy. In this regard, the instant case runs parallel with *McCray* and *California Title.* However, it is also true that *McCray* and *California Title* are immediately distinguishable from the instant case, since Felder's has not alleged a violation of § 1 of the Sherman Act. Thus, while the facts alleged would not warrant § 1 liability for All Star Advertising, the Court rejects Defendants' proposition that the tactic of using a single name in reference to a group of entities is impermissible (Doc. 22-1 at 21). Nevertheless, the Court finds that the amended complaint must provide more specific factual support with regard to All Star Advertising's involvement (or lack thereof) with GM, particularly if Felder's wishes to pursue the Louisiana antitrust law claim under La. R.S. 51:122.

**FELDER'S' REQUEST FOR LEAVE TO AMEND**

Felder's HAS requested leave to file an amended complaint to cure any deficiencies that the Court may find. Defendants, in reply, argue that Felder's' request should be denied because it offers no insight on the grounds on which amendment is sought or how an amendment would cure any deficiencies. According to Defendants, Felder's' request for leave is a "bare request" and, therefore, it should be denied.

According to the Fifth Circuit, "a bare request in an opposition to a motion to dismiss— without any indication of the particular grounds on which the amendment is sought- does not constitute a motion [for leave to amend]." *Pension Fund v. Integrated Electrical Services, Inc.*, 497 F.3d 546, 555-56 (5th Cir. 2007) (quotation and citation omitted). However, it is also true that "district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002). The permissible reasons for denying a request to amend include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Pension Fund*, 497 F.3d at 556.

Here, Felder's is willing to amend and it does not appear that such a request would be futile. Given the sudden and drastic difference between standard OEM prices and the prices offered under the challenged pricing program, there is reason for suspicion. For instance, one particular auto part mentioned in the Complaint is normally sold by an OEM dealer, like All Star, for $228.83, but under the pricing program, dealers may offer the same part for a "bottom line price" of $119.93. This demonstrates that the program allows OEM dealers to cut pricing by nearly half for an OEM part with an aftermarket counterpart. Given the nature of antitrust suits, in which the plaintiff's access to information is often limited, the Court is inclined to grant Felder's' request for leave to amend. Cf. *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.").

IV.

Accordingly, Defendants' Motion to Dismiss (Doc. 22) is DENIED, and Plaintiff's request for leave to amend (Doc. 25 at 22-23) is GRANTED.

Signed in Baton Rouge, Louisiana, on April 16th, 2013.

/s/ James J. Brady
**JAMES J. BRADY, DISTRICT JUDGE**
**MIDDLE DISTRICT OF LOUISIANA**

## APPENDIX D — RELEVANT STATUTES

15 U.S.C.A. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Effective: June 22, 2004

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*Appendix D*

15 U.S.C.A. § 2

§ 2. Monopolizing trade a felony; penalty

Effective: June 22, 2004

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.