No. 14-1299

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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole question raised is whether the timing of a manufacturer's rebate should impact the cost calculus in predatory pricing cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Respondents provide the following information:

General Motors LLC, a Delaware limited liability company, states that its only member is General Motors Holdings LLC. General Motors Holdings LLC is a Delaware limited liability company whose only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan. There is no parent or publically held company that owns more than 10% of General Motors Company's stock.

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

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

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

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STATEMENT OF THE CASE[1]

GM created a nationwide program called "Bump the Competition" to incentivize its authorized parts dealers to "offer highly competitive pricing" on Genuine GM parts. The incentive came in the form of a rebate that GM offered dealers on certain transactions. The rebate reimbursed the dealer for the price reduction and provided an additional 14% profit.

Petitioner Felder's Collision Parts, Inc. ("Felder's") "does not allege that [GM] is selling its parts below average variable cost, whether the rebate is considered or not." (App. A p. 16a).[2] Instead, Felder's alleged that

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[1] In its Statement of the Case, Felder's omitted several critical allegations and mischaracterized several other allegations. *See* First Amended and Supplemental Complaint. (M.D. La. Case No. 12-646, Rec. Doc. 50). For example, citing paragraph 21, Felder's states that the "Program coerced the consumer body shops…" (Pet. 6). Paragraph 21 makes no such allegations. Similarly, relying on paragraphs 22-24, Felder's argues that "All Star records a loss on the part at the moment of sale to the body shop," (Pet. 6-7), suggesting that All Star actually makes a bookkeeping record to that effect. However, paragraphs 22-24 allege only that All Star sells parts below its average variable cost. Nothing in those paragraphs supports the conclusion that All Star "records a loss" at the "moment of sale."

[2] Felder's devotes a substantial portion of its Statement of the Case to describing competition within the alleged relevant market, allegations which are not germane to the limited Question Presented. (Pet. 2-13). Felder's, however, fails to relate many important allegations, such as the allegation that Keystone Automotive, the "country's largest aftermarket parts distributor," remains active in the proposed geographic market and has been able to "withstand" competition from All Star under GM's

resellers of GM parts, including All Star, were selling below their costs once they reduced their prices in response to the rebate program. Felder's concedes that this allegation holds only if rebates paid by GM are disregarded for purposes of determining the dealer's costs.[3] Felder's alleges that the rebates should be ignored because GM only paid the rebates post-transaction (i.e., after the dealer resold parts to its customer).

Felder's readily admits that the GM Program incentivized dealers to lower their resale prices[4] and that the dealers "would not have agreed to participate in the Program but for the suggestion of GM and the promise of a partial recoupment or kickback of 14% of the cost of the good sold." (First Amended and Supplemental Complaint, M.D. La. Case No. 12-646, Rec. Doc. 50, ¶ 82). In the Fifth Circuit, Felder's described the critical role the rebates had in causing dealers to lower their prices as follows: "without such an incentive, All Star likely would not lower its prices below its average variable cost and would not voluntarily assume such a loss." (Orig. Brief of

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Program. (First Amended and Supplemental Complaint, M.D. La. Case No. 12-646, Rec. Doc. 50, ¶ 54).

[3] The Fifth Circuit noted that "[t]here is no allegation that All Star is pricing below average variable cost if the rebate is considered." (App. A p. 12a n.8). Thus, if the rebates are factored into All Star's cost of purchasing the part from GM, All Star's resale price would not have been below its costs.

[4] Felder's reiterates this here: "Undoubtedly, GM's offer of a kickback is the inducement that makes All Star participate in the 'Bump the Competition' Program." (Pet. 19).

Plaintiff-Appellant, USCA5 Case No. 14-30410, Document 00512682171, at 4).

REASONS FOR DENYING THE WRIT

This Court should deny the writ because the decision below does not conflict with the decisions of this Court. Nor does it raise a conflict among the federal courts of appeal or involve an unresolved question of federal law that requires this Court's attention. Rather, as set forth below, this case raised an unremarkable question about whether the timing of the payment of a manufacturer's rebate should impact the cost calculus in predatory pricing cases.

A. The Fifth Circuit's Decision Represents a Straightforward Application of Well-Established Principles of Antitrust Law.

"Felder's conceded at oral argument that if GM had sold the part to All Star at this lower price up front [i.e., before All Star resold the part], then Felder's would have no case." (App. A p. 15a). In view of this concession, the only question was whether GM's rebate payment *after* the resale made a real world difference. Concluding that "timing" does not change the result, the Fifth Circuit stated that "a firm's costs related to a transaction are not set in stone on the day of sale," citing both the Seventh Circuit and the F.T.C. (App. A p. 15a). The Fifth Circuit rejected Felder's approach of "freezing" All Star's costs at the moment of resale because it "ignores the economic realities that govern antitrust analysis." (App. A p. 14a). The Fifth Circuit also found no issue with GM's pricing because "Felder's does not allege that it is selling its parts below average

variable cost, whether the rebate is considered or not." (App. A p. 16a).

Felder's does not identify a single decision from this Court or any other court holding that manufacturer rebates should be excluded from the calculation of a reseller's cost of sale if the rebate is paid after the moment of resale. To the contrary, Felder's theory is at odds with case law holding that the purchase price includes "the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances," *In re Fruitvale Canning Co*., 52 F.T.C. 1504, 1520 (1956) (*cited in A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989)), and the well-established axiom that antitrust analysis focuses on the "economic reality of the relevant transactions." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 209, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

B. The Fifth Circuit's Decision Does Not Create a Circuit Split.

Felder's cannot identify a single decision from a circuit court or any other court that reaches a conclusion inconsistent with the decision of the Fifth Circuit. Instead, in an effort to manufacture a circuit split out of whole cloth, Felder's argues that "consideration of economic activity outside the zone of consumer participation is in conflict with settled principles of antitrust law" (Pet. 14). Although this argument is not at all clear, Felder's appears to be saying that settled antitrust principles dictate that for purposes of determining cost in a predatory pricing case, any cost incurred or revenue received by a reseller (presumably what it means by "economic activity")

after the moment of resale to the "consumer" (presumably what it means by "zone of consumer participation") cannot be factored into the reseller's cost. However, no court has ever reached this conclusion – and thus there is no circuit split to speak of.

Felder's also argues more broadly that the decision below conflicts with decisions of this Court and other circuits "that require courts to focus on the effect on the consumer in predatory pricing cases." (Pet. 22; *accord id.* at 18 ("[t]he crucial point of analysis in predatory pricing cases must focus on the effect on consumer behavior.")). However, this argument is constructed on several infirm legs. First, Felder's acknowledges that a rebate is properly considered to be a refund of a portion of the purchase price, but suggests that this principle only applies to "consumer" rebates (*see* Pet. 13 n. 4). For example, Felder's stated in its briefing with the Fifth Circuit that "[r]ebates, which inure to the benefit of the purchaser, are properly considered in the calculation of the 'price.'" (Reply Brief of Plaintiff-Appellant, USCA5 Case No. 14-30410, Document 00512759078, at 6). Without any supporting authority and ignoring its own allegations in which it characterized All Star as a buyer (First Amended and Supplemental Complaint, M.D. La. Case No. 12-646, Rec. Doc. 50, ¶ 21), Felder's contends that All Star cannot be viewed as a purchaser or consumer, but only as a competitor. Thus, the argument goes, GM's rebate is not really a "consumer" rebate and therefore should not be factored into the purchase price paid by All Star. The Fifth Circuit rejected this distinction for the simple and obvious reason that All Star receives the rebate "as a purchaser of parts from GM" (App. A p. 13a n. 9) and

that "[i]n purchasing parts from GM, All Star is a consumer." (App. A p. 14a). Felder's does not identify any case law that conflicts with this conclusion.

Felder's then turns to a notion it calls "the coercive effect of predatory pricing practices on a consumer's decision" (Pet. 14). This concept is inconsistent with basic economic theory holding that consumers benefit from lower prices; they are not coerced by them. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223, 113 S. Ct. 2578, 2588 (1993). Nonetheless, in support of this argument, Felder's points to the decision in *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264 (6th Cir. 2015). The decision has nothing to do with predatory pricing claims or the application of rebates to costs and, instead, simply addressed whether a "differential pricing" plan constituted an unlawful tie.

Illegal tying involves the forced purchase of a second (or "tied") product that a consumer does not want or would rather purchase elsewhere. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12, 104 S.Ct. 1551, 1558 (1984). This is the context in which the Sixth Circuit discussed an earlier decision involving bundled discounting. The portion of the discussion quoted by Felder's here simply states that the Sixth Circuit[5] had found "sufficient evidence of economic coercion" where a defendant's sales "made no economic sense, which suggested that the buyer was coerced, or did something that he would not do in

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[5] Felder's mistakenly identified *Collins Inkjet Corp. v Eastman Kodak Co.*, 781 F.3d 264 (6th Cir. 2015) as a Ninth Circuit case. (Pet. 16). *Collins Inkjet Corp.* is in fact a Sixth Circuit decision.

competitive market." *Collins Inkjet Corp.*, 781 F.3d at 273 (*quoting Cascade Health Solutions v. PaceHealth*, 515 F.3d 883, 915 (9th Cir. 2008) (internal quotation marks omitted).

Nothing of the sort happened here. The First Amended and Supplemental Complaint (M.D. La. Case No. 12-646, Rec. Doc. 50) does not allege that body shops were coerced to buy parts or anything else they did not want. Even if Felder's had in fact alleged coercion, the notion that body shops were somehow coerced to pay lower prices is nonsensical and implausible.

Similarly, Felder's attempt to use *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012), to demonstrate a circuit conflict is misplaced. Nothing in that decision discusses how a manufacturer's rebate should be treated when determining cost in a predatory pricing context. Nor does the decision suggest that "consumer choice" is "coerced" by lower prices. (*See* Pet. 18). Rather, the Third Circuit was addressing exclusive dealing contracts where "price itself was not the clearly predominant mechanism of exclusion." *Eaton Corp.*, 696 F.3d at 277. The Third Circuit simply held that "the price-cost test cases are inapposite" in this context. *Id.*

Felder's also discusses *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531 (8th Cir. 1989) (Pet. 17), but does not explain why it believes this case conflicts with the Fifth Circuit. Like the two cases discussed above, this case has nothing to do with the effect of the timing of a manufacturer's rebate on a reseller's cost, the question presented here. The Eighth Circuit simply stated that the plaintiff was not

required to prove that the defendant "was foregoing all profits *as a firm* in order to gain control [of the particular market in question]….Instead, the issue of predatory pricing usually turns upon whether the defendant priced its product below some measure of cost." *H.J., Inc.,* 867 F.2d at 1541. Nothing in this statement – or anywhere else in the decision – conflicts with the Fifth Circuit's decision.

Felder's acknowledges that these three cases do not "involve the same type of claim as at issue here," and admits that "[i]f All Star's lower prices…were caused by a legitimate efficiency and lower price structure…[then] no predatory pricing claim lies." (Pet. 18). Nonetheless, according to Felder's, if the "lower price does not reflect a true lower price structure, then the consumer choice is 'coerced.'" (Pet. 18). Of course, none of the courts reached that conclusion.

In the end, Felder's fails to comprehend the import of its concessions that GM's prices after the rebate are not below GM's average variable costs. GM's ability to lower its price to its dealers (and remain above its average variable costs even after paying the rebate) represents a significant efficiency that is promoted – not condemned – by the antitrust laws:

> 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….As a general rule, 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 the judicial

> tribunal to control without courting intolerable risks of chilling legitimate price-cutting. To hold that the antitrust laws would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.

Brooke Group, 509 U.S. at 223, 113 S.Ct. at 2588 (internal quotation marks and citations omitted).

Through its rebate program, GM enabled its dealers to lower their costs of purchase and obtain a profit. Thus, GM transferred a portion of its lower cost structure to its dealers. In turn, the dealers lowered their respective prices to body shops. The body shops obviously benefitted from the lower prices. Felder's alleged inability to match those low prices simply means that it and/or its suppliers are a less-efficient competitor than GM and its dealers.

C. Nothing Decided by the Fifth Circuit Raises an Important Issue of Unresolved Federal Law That Needs to be Decided by this Court.

Felder's asserts that the Fifth Circuit "has created an open-ended – and thus unclear – rule to apply in predatory pricing claims." (Pet. 24). To the contrary, the Fifth Circuit has simply followed the long-standing rule that price is "the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances." *Felder's Collision Parts, Inc. v. All Star Advertising Agency, Inc.*, 777 F.3d 756, 763 (5th Cir. 2015) (*quoting Fruitvale Canning Co.*, 52 F.T.C. at 1520, *cited by A.A. Poultry*, 881 F.2d at 1407). This is especially true here, where Felder's concedes that All Star would not have

lowered its resale price but for GM's promise to pay the rebate. (Orig. Brief of Plaintiff-Appellant, USCA5 Case No. 14-30410, Document 00512682171, at 4). The Fifth Circuit sensibly refused to "freeze" costs and fictitiously disaggregate the transaction between GM and All Star as contrary to economic reality. Felder's does not explain how this ruling creates some sort of grey area for determining a reseller's cost. To the contrary, the Fifth Circuit's ruling clearly focuses on the real-world transaction, rather than a fictitious one disaggregated by Felder's.

Attempting to support its proposition that the moment of resale is the "appropriate" and "practical demarcation between the close of 'economic activity' and the beginning of recoupment" (Pet. 14), Felder's argues that "the harm to competition is the coercive effect of predatory pricing practices on a consumer's decision." (Pet. 14). Indeed, according to Felder's, "the point of sale to the end-consumer…is when the anticompetitive harm occurs" (Pet. at i; *accord id*. at 18 ("Harm to competition occurs at the point of sale to the consumer").

Felder's completely misunderstands the competitive harm occasioned by predatory pricing. This Court distinguishes between the harm to a target of predatory pricing and harm to competition. The former occurs when the below-cost sale is made. At that time, however, the low price benefits the consumer. Harm to competition only occurs sometime in the future if there is "a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level" for a sufficient period of time so that the alleged predator might recoup its losses. *Brooke Group*, 509

U.S. at 224-225. The decision below faithfully applied this economic theory in holding that rebates should not be disregarded in determining costs.

Felder's assertion that the moment of resale is the "practical demarcation between the close of 'economic activity' and the beginning of recoupment" (Pet. 14; *accord id*. at 19) also represents a fundamental misunderstanding of the concept of recoupment in predatory pricing cases. Recoupment refers to a predator's ability to recover its losses incurred through below-cost pricing by raising prices above a competitive level at a later date. *Brooke Group*, 509 U.S. at 225-26. This Court explained: "For the investment [in below-cost pricing] to be rational, the [predator] must have a reasonable expectation of recovering, *in the form of later monopoly profits*, more than the losses suffered." *Id*. (*quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 590-91, 106 S.Ct. 1348, 1358 (1986)) (emphasis added). Felder's attempt to equate GM's rebate with "later monopoly profits" is clearly wrong. Its argument that the rebate should be considered to be "the beginning of recoupment" has nothing to do with the ability to raise prices in the future and therefore contradicts decisions of this Court.

In short, the circuit and district courts are not struggling with the legal issue presented by Felder's in its petition. Neither Felder's nor *amicus* have identified a single decision where their argument regarding the timing of rebates has even been raised.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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