UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FELDER'S COLLISION PARTS, INC.	)	**CIVIL ACTION**
	)	
	)	**CASE NO. 3:12-cv-00646**
VERSUS	)	
	)	**JUDGE BRADY**
	)	
GENERAL MOTORS COMPANY, ALL STAR ADVERTISING AGENCY, INC., ALL STAR CHEVROLET NORTH, L.L.C., ALL STAR CHEVROLET, INC., & JOHN DOE DEFENDANTS 1-25	)	**MAGISTRATE RIEDLINGER**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

MAY IT PLEASE THE COURT:

Plaintiff, Felder's Collision Parts, Inc. ("Felder's"), through undersigned counsel, respectfully submit this memorandum in opposition to the Defendants' motion to dismiss the First Amended and Supplemental Complaint ("Amended Complaint") filed by Felder's. For the following reasons, the Defendants' motion should be denied:

- Federal anti-trust laws are concerned with the protection of competition, and the appropriate analysis of a predatory pricing scheme must be at the point of sale injurious to competition;
- The All Star Defendants' sale of collision parts for which an aftermarket alternative is available at a price below the cost of the part is predatory pricing because it harms competition from Felder's and other aftermarket dealers, which cannot compete at the below-cost prices of the All Star Defendants;

- Felder's has adequately alleged an appropriate geographic market;
- Felder's has adequately alleged the Defendants' market power;
- Felder's has adequately alleged state law claims against the Defendants; and
- Felder's has adequately alleged that the Defendants' conspiratorial actions warrant joint and solidary liability.

I. Facts and Procedural History

This matter is before the Court on the Defendants' re-urged motion to dismiss the claims by Felder's that Defendants General Motors LLC ("GM"), All Star Advertising Agency, Inc., All Star Chevrolet North, L.L.C., and All Star Chevrolet, Inc. (collectively, "the All Star Defendants") are engaged in an illegal predatory pricing scheme designed to eliminate or "bump" competition from the market. In its April 17, 2013 Ruling on Defendants' Motion to Dismiss, this Court denied the Defendants' initial motion to dismiss the Complaint, but ordered Felder's to file an amended complaint to address certain issues. *See* Record Doc. No. 32. The Court also permitted Felder's to conduct limited discovery regarding the "Bump the Competition Program" and whether the All Star Defendants were selling aftermarket automobile parts for which there is an aftermarket alternative at a price below the All Star Defendants' average variable costs. Upon completion of such discovery, Felder's filed its Amended Complaint on October 14, 2012. *See* Record Doc. No. 50. To assist the Court, Felder's briefly sets forth the key allegations pertinent to Defendants' motion to dismiss.

Felder's is a seller of aftermarket collision parts. *Id.* at ¶ 14. Such parts are manufactured by entities other than automobile manufactures and sold by Felder's and other aftermarket parts sellers to collision centers and body shops. *Id.* at ¶ 12. The All Star Defendants sell original equipment-manufactured ("OEM") parts manufactured by GM. *Id.* at ¶

11. These parts are sold to the same collision centers and body shops to which Felder's sells its aftermarket parts. *Id.*

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 a lower price than the alternative OEM parts. *Id.* Prices of OEM parts are, on average, 25 to 50% higher than equivalent aftermarket parts. *Id.* These parts 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 aftermarket 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.* Upon information and belief, All Star also sells collision parts for which there is an aftermarket 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."

The purchase of collision parts is dominated 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 initially expressed a preference for aftermarket parts given their lower

price structure. *Id.* at ¶ 17. Faced with a decline in sales of OEM parts for which there was an aftermarket part available, GM and the All Star Defendants began looking for a manner to cut costs. *Id.* at ¶ 18. Those efforts led to the creation of the "Bump the Competition Program." *Id.* at ¶¶ 18, 20.

The All Star Defendants, in particular, enjoy a substantial share of the Geographic Market for automobile collision parts for which there is an aftermarket alternative and that are compatible with GM vehicles because they operate the largest OEM distribution center in the state of Louisiana. *Id.* at ¶ 19. With the commencement of the illegal predatory pricing described herein, the All Star Defendants have positioned themselves as the leader providing automobile collision parts compatible with GM automobiles in the Geographic Market. *Id.*

In an effort to monopolize the market for such collision parts, GM and the All Star Defendants created a price incentive program for the All Star Defendants that enabled the All Star Defendants to "bump" any competition from the marketplace. *Id.* at ¶ 20. The "Bump the Competition" Program made it easy for collision centers and body shops to obtain OEM parts at prices well below the price of comparable aftermarket parts, though those prices were below the All Star Defendants' average variable cost. *Id.* at ¶ 21.

The scheme works as follows: when a body shop or collision center requests from the All Star Defendants a particular GM part for which there is an aftermarket alternative and the body shop or collision center has a quote from a seller of aftermarket parts, the All Star Defendants agree to sell the part to the body shop or collision center at a price 33% below the price charged by the aftermarket seller. *Id.* at ¶¶ 22-24. That discounted price is below the price the All Star Defendants paid to obtain the part from GM. *Id.* In other words, the All Star Defendants take a loss on the part at the moment of sale to the body shop or collision center. *Id.*

In an effort to induce the All Star Defendants to take this loss, GM then agrees to reimburse the All Star Defendants for the cost of the part and then adds a 14% recoupment or kickback that is given to the All Star Defendants. *Id.*

The "Bump the Competition Program" is further illustrated by considering the GM Collision Conquest Calculator attached as Exhibit 2 to the Amended Complaint. *Id.* at ¶ 27. As reflected in that document, the dealer pays GM $135.01 for a particular part. *Id.* That part is normally listed for sale by the dealer to the collision center for $228.83. A comparable after-market part is listed for sale for $179.00. *Id.* Although the dealer's cost of the part is $135.01, GM instructs the dealer to sell the part to a collision center or body shop at a "bottom line price" that is 33% ***below*** the cost of the comparable aftermarket equivalent part, or $119.93, which is approximately $15.00 less than the cost the dealer paid GM for the part. *Id.* ***After*** sale of the part for $119.93, the dealership then recoups from GM at a later date the difference between the sale price of $119.93 and the part cost of $135.01, plus an alleged back-end "profit" of 14%. *Id.*at ¶ 30.

The All Star Defendants only lower the price of parts for which there is an aftermarket alternative when the body shop, collision center, or individual consumer identifies an alternative aftermarket part and shows the All Star Defendants a quote obtained from a seller of aftermarket collision parts, such as Felder's. *Id.* at ¶ 31. The All Star Defendants can only afford to engage in this below-cost pricing because they are induced by GM's promise of after-the-fact recoupment. In other words, the lower price is offered only when there is an opportunity to beat or "bump" the aftermarket price. The lower price is not offered where the body shop or collision center cannot demonstrate a competing aftermarket price.

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

Second, GM makes no effort to sell below cost or reduce prices in any way for those parts that do not have an aftermarket alternative because GM and its dealers already enjoy a monopoly on those parts, thus making no incentive to reduce prices for their customers. *Id.* at ¶ 41. Once the defendants successfully "bump" all of the competition, they likewise will have no incentive to reduce prices for customers on those parts that do currently have aftermarket alternatives. *Id.*

This scheme shows that the dealers recoup their losses through the much higher OEM prices achieved on parts for which there is either no aftermarket alternative or no qualifying estimate from an aftermarket supplier. *Id.* Further, the exhibits attached to the Amended Complaint reflect the supra-competitive prices already in place in the absence of an aftermarket supplier. *Id.* These supra-competitive prices then reflect the enormous margins through which

the dealers will recoup losses in the future; hence, the dealers achieve recoupment in two time-frames, both immediately and on a grander scale in the future. *Id.*

Since 2007, the All Star Defendants have 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 aftermarket alternative. *Id.* Such trends also reflect the All Star Defendants' recoupment of any loss of revenue from the sale of automobile collision parts for which there is an aftermarket alternative by increasing the prices for automobile collision parts for which there is no aftermarket alternative to the detriment of the consumer. *Id.*

Barriers to entry into the market for collision parts that have an aftermarket equivalent are high and difficult and the All Star Defendants enjoy substantial dominance in the Geographic Market. *Id.* at ¶ 46. Given the monopolistic practices of GM and the All Star Defendants, after they drive the after-market collision parts sellers from business, they will be able to raise prices on OEM parts to supra-competitive prices, thus giving them a reasonable prospect and/or dangerous probability of further recouping any global losses. *Id.* at ¶ 47.

As an indicator of high barriers to entry and the dominance of the All Star Defendants, in the past 10 years, no new aftermarket parts sellers have entered the Geographic Market in direct competition with Felder's. *Id.* at ¶ 48. Sellers of aftermarket parts cannot compete with sellers of OEM parts that conspire with the OEM, such as GM, to reduce prices below the seller's AVC. *Id.*

Further highlighting the high barriers to entry in the market for collision parts for which there is an aftermarket alternative and compatible with GM automobiles, three after-market parts

competitors of Felder's, which sell aftermarket parts in the Geographic Market, have already been driven out of business by the illegal, anti-competitive, and conspiratorial actions of GM and the All Star Defendants. *Id.* at ¶ 49. The exit of competitors from the market and lack of new entrants in the market for collision parts for which there is an aftermarket alternative are indicative of the high barriers to entry in the market for aftermarket collision parts for which there is an aftermarket alternative and compatible with GM automobiles. *Id.*

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

Felder's submits that, if the "Bump the Competition Program" is allowed to continue unchecked, body shops will purchase automobile collision parts from the entity that is able to supply the parts at the lowest price and the shortest period of time, in order to satisfy the demands of the automobile insurers. As a result of the illegal and discriminatory pricing practices described herein, body shops now will turn to the All Star Defendants for their automobile collision parts needs, and Felder's cannot compete because it cannot lower its prices to match the All Star Defendants' anti-competitive prices and remain in business. *Id.* at ¶ 55.

Felder's has also seen its once-profitable business slow drastically as a result of the illegal and anti-competitive introduction of the "Bump the Competition" program by GM, such program having been implemented solely for the purpose of driving companies such as Felder's from business. *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, has declined substantially since 2008, due to the conspiracy and collusion between GM and the All Star Defendants to undercut prices. *Id.* Indeed, if GM is allowed to continue "bumping the competition," Felder's may well face a similar fate to the other after-market parts sellers and be forced out of business. *Id.*

Felder's has also observed other competitors leaving the market as they are forced out of business, unable to compete with the Bump the Competition Program. *Id.* at ¶¶ 51-53. For example, Bumper Supply, Eric's Bumper, and United Bumper Sales all did business within the Geographic Market. All three business were recently forced to close as a result of the illegal, anti-competitive, and conspiratorial actions of GM and the All Star Defendants. *Id.*

Felder's avers that the exit of competitors and the lack of new entrants into the market for collision automobile parts for which there is an aftermarket alternative suggests a reasonable prospect and/or a dangerous probability that All Star will raise its prices to supra-competitive levels once it has achieved the desired monopoly on the sales of collision automobile parts. *Id.* at ¶ 57.

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 aftermarket 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 aftermarket hard parts. *Id.*

Sellers of OEM collision parts like All Star will increase their prices of parts that formerly had aftermarket alternatives to supra-competitive prices just as they have done on parts that currently have no aftermarket alternatives. *Id.* at ¶ 59. Body shops that purchase collision

parts from dealerships like All Star will similarly have to increase their prices. *Id.* Their customers, including insurance companies, will then pay more for collision parts, and insurance companies will pass along the cost increases in the form of higher premiums. *Id.* Further, upon information and belief, the dealerships will cease stocking parts for automobiles older than five or seven years old once they acquire the monopoly on collision parts making such automobiles obsolete and requiring purchases of new automobiles. *Id.*

The Amended Complaint filed by Felder's sets forth claims for violation of section 1 of the Sherman Act, attempted monopolization and conspiracy to monopolize in violation of section 2 of the Sherman Act, and state law claims under the Louisiana Unfair Trade Practices Act and the Louisiana anti-trust statutes. The Defendants have re-urged their motion to dismiss and claim that Felder's has not successfully pled claims against them because of their failure to allege a below-cost pricing scheme, an appropriate geographic market, and the defendants' market power. The defendants also challenge the sufficiency of state law claims made by Felder's. Each of these issues is discussed below.

II. LAW & ANALYSIS

A. Standard for Motion to Dismiss Under FRCP 12(b)(6).

Motions to dismiss for failure to state a claim under Rule 12(b)(6) "are disfavored and should rarely be granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). To survive a Rule 12(b)(6) motion to dismiss, the Complaint need only contain factual allegations, ***accepted as true***, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). A claim will be considered facially plausible when the plaintiff has pled facts that allow a court to draw a reasonable inference that the defendant is liable for the

misconduct alleged. *Id.* All reasonable inferences are drawn ***in favor of the plaintiff***. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232–33 (5th Cir. 2009). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

The Defendants only pay passing lip service to the standard applicable to their Rule 12(b)(6) motion to dismiss, with one glancing citation to the general standard from *Iqbal*. R. Doc. No. 54-1, at 13. Beyond that, however, the Defendants rely exclusively on non-12(b)(6) cases. Particularly, the Defendants cite repeatedly to *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), both of which arose in the summary judgment context. *FMC* involved the appeal of a grant of summary judgment. 170 F.3d at 520. Accordingly, the Court was able to look to summary judgment evidence that had been developed during the litigation, not just the initial pleadings. *Id*. at 521. Indeed, the *FMC* Court specifically rejected the notion that, in the summary judgment context, the requested relief was disfavored. *Id*. This is a critical distinction from the Rule 12(b)(6) context. *See Lowrey*, 117 F.3d at 247.

Likewise, *Matsushita* involved consideration of "the standard district courts must apply when deciding ***whether to grant summary judgment*** in an antitrust conspiracy case." 475 U.S. at 576 (emphasis added). Therefore, the standard enunciated by the *Matsushita* Court looked to "the factual context," and would allow plaintiffs to "come forward with more persuasive evidence to support their claim," a far cry from the pleadings-restricted 12(b)(6) review. *Id*. at 587. Courts have refused to extend *Matsushita* to the motion-to-dismiss context. *See, e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 383 F. Supp. 2d 686, 702 & n.10 (E.D. Pa. 2004) ("*Matsushita* was decided in the context of a motion for summary judgment, and SmithKline has

not cited us to any case that applied *Matsushita* in the way SmithKline advocates, nor have we found such a case."); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 380300, *4 (S.D.N.Y. June 27, 1995) ("The Court is hesitant to extend the reasoning of these cases to a motion to dismiss on the face of the Complaint. Anti-Monopoly's allegations, if still unsupported following discovery, may not be sufficient to survive a motion for summary judgment, but they are sufficient to state a claim upon which relief can be granted.").

Regardless, *Matsushita* does not support the approach advocated by the Defendants here. As discussed below, the Defendants rely on the tactic of proposing numerous hypothetical alternative fact scenarios and then tasking Felder's with a duty to specifically allege around any and all possible alternatives. The Supreme Court rejected such an expansion of *Matsushita* in its opinion in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Even in the summary judgment context, the *Eastman Kodak* court rejected the approach urged by the Defendants here:

> The [*Matsushita*] Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsishita* demands only that the nonmoving party's inferences be reasonable in order to reach a jury, a requirement that was not invented, but merely articulated, in that decision.

504 U.S. at 468 (emphasis in original).

None of the other cases relied on by the Defendants are in the procedural posture of a motion to dismiss, but, like *FMC* and *Matsushita*, reviewed a lower court's summary judgment or post-trial judgment. *See Surgical Care Center of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 838 (5th Cir. 2002) (appeal of a judgment entered after a bench trial); *Taylor Publishing Co. v. Jostens, Inc.*, 216 F.3d 465, 470 (5th Cir. 2000) (appeal of a judgment as a matter of law entered following a jury verdict); *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Centers, Inc.*, 200 F.3d 307, 311 (5th Cir. 2000) (appeal of the grant of

a summary judgment); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1397 (7th Cir. 1989) (appeal of judgment notwithstanding the verdict, after a full jury trial and verdict). The Defendants here would deny Felder's the chance to develop and try the evidentiary basis for their claims, a chance that the plaintiffs had in every case on which the Defendants rely. There is no legal support for this approach to the Rule 12(b)(6) stage of proceedings; and no legal support, therefore, for the Defendants' requested relief.

B. The defendants' predatory pricing scheme at the point of sale is the appropriate consideration to determine whether GM and the All Star Defendants have acted contrary to law.

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. The essential inquiry for this Court is whether the effect of the anti-trust law must be considered as of the moment that competition is affected (i.e., the point of sale to the consumer) or at a later time when the All Star Defendants receive their inducement from GM. In its initial ruling on the defendants' motion to dismiss, this Court agreed with the defendants that the answer was the latter point in time. Felder's respectfully submits that this issue deserves reconsideration.

Felder's submits that this Court should focus its inquiry on the price at which parts are sold to body shops and collision centers. It is at this point that the harm to competition occurs. Felder's cannot compete with the All Star Defendants' below-cost pricing, and its competitive advantage in the market for automobile replacement parts compatible with GM vehicles is lost. Felder's understands the admonition that anti-trust laws protect competition not competitors, but it is competition that is threatened when a seller is able to blatantly sell its parts below cost to a consumer and attempt to drive its competitors from business. As discussed below, none of the cases cited in this matter support their premise that the anti-competitive effects of the All Star

Defendants' below-cost pricing should look to the point in time after the sale to the consumer body shops and collision centers when they receive reimbursement or a kick-back from GM.

In *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), the plaintiff challenged whether a proposed bid for the construction of airport boarding bridges violated federal anti-trust law because the bid was submitted at a price below its cost. The bid was submitted in multiple parts, and evidence indicated that one of those parts would operate at a negative operating margin. The Fifth Circuit held this evidence insufficient to state a violation of predatory pricing laws. The court stated in a footnote that the "threshold problem with this allegation is that even if part C was bid below-cost, Stearns has not alleged that the project as a whole was unprofitable." *Id.* at 533 n.15.

This statement is not applicable to the present case. A multi-phase construction project must be evaluated as a whole, without breaking down individual parts of the project. Competition is not harmed if part of the project may be bid below cost where the entire project is not below cost. In contrast, in the present case, Felder's – and competition as a whole – is damaged when the All Star Defendants sell parts below cost to consumer collision centers and body shops. Felder's cannot compete in that environment. It would be grossly unfair to competition to allow the All Star Defendants to sell collision parts below cost, irreparably damage competition, and then be absolved from any fault by virtue of GM's inducement of the collusive kick-back to the All Star Defendants.

In its April 17, 2013 Ruling on Defendants' Motion to Dismiss, this Court stated 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." The Court also noted that "All Star probably would not sell at the suggested 'bottom-line' price

absent GM's claim system, which allows for collection of the difference between the sales price and dealer cost, plus a 14 percent profit." Undoubtedly, GM's offer of a kickback is the inducement that makes the All Star Defendants participate in the "Bump the Competition" Program; but it cannot be the case that a collusive inducement should insulate the All Star Defendants' actions from being illegal.

Assuming that GM's inducement excused the All Star Defendants' 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 the reimbursement or inducement occurs. Anti-trust laws cannot be circumvented in such a manner as to permit such damage. *FMC* is distinguishable because there is no harm to competition simply because a part of the same project may be below cost. In that case, the "point of sale" was the conclusion of all the parts of the contract between the contractor and the project owner, which in that case was the "consumer." Harm does occur in this case, however, where the All Star Defendants are allowed to sell a given collision part at a price well below cost and damage competition from Felder's and other after-market sellers, such that the recovery from the below-cost sale happens *after* the consumer collision centers are done with the transaction.

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

the consumer's participation in the transaction is complete.

The *FMC* court's reliance on *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253 (5th Cir. 1988) is similarly unhelpful to the Defendants' argument. In *Stitt Spark Plug*, the plaintiff, a manufacturer of spark plugs, alleged that the defendant, a competitor, was selling original-equipment spark plugs at a loss in an effort to monopolize the market on replacement spark plugs on the theory that consumers of replacement spark plugs would purchase the same brand as the original spark plug to be replaced. The Fifth Circuit recognized that any consideration of predatory pricing must concern both markets because the theory of the case looked to both markets. *Id.* at 1256. In the present case, however, the concern is not sales between two markets.

There is a single sale at issue in this case, and that sale is clearly below cost and therefore damages competition. The Fifth Circuit has never addressed a case applying facts such as the ones before this Court in which a manufacturer induces and assists its dealer/seller to engage in illegal predatory pricing activities with the inducement of making that dealer/seller whole after the point of sale to the dealer's consumer. Such post-transaction inducement would construct a massive freeway for manufacturer-dealer colluders to circumvent the anti-trust laws. Competition cannot thrive in such an environment, and the anti-trust laws were designed to protect competitors in these circumstances. This Court should reconsider its previous ruling on the temporal argument.

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

> No case of which we are aware holds, however, that fluctuations over time to the same customer are "price discrimination" within the meaning of the Robinson–

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

Id. at 1407.

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

Finally, the defendants' reliance on *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317 (7th Cir. 1991), is misplaced. Defendants seize on the statement that "promotional discounts raise no antitrust problems, though often they are below incremental cost in a superficial sense. (Superficial because they may be above that cost when the promotional value of the discounts is added to the discounted price, as it should be to construct the full price with which to compare the incremental cost.)" *Id.* at 1322. Defendants take this statement out of

context.

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

Such facts are clearly distinguishable from the present case. Here, the allegations to be accepted as true are not that the All Star Defendants are selling below cost so that they can realize a promotional benefit that will allow them to participate in the market at a competitive price level, but that GM is providing an after-the-sale inducement to the All Star Defendants to sell below cost so that they can eliminate competitors and monopolize the market at a supra-competitive level. In this case, a long-term dominant market player has decided to "bump" the competition. Its actions are much different from those described in *American Academic Suppliers*, and this Court should disregard any reliance on this case.

Given the lack of any case law permitting the kind of clearly anti-competitive behavior engaged in by the defendants, Felder's urges this Court to reconsider its previous ruling on the below-cost pricing issue. Felder's should be permitted to pursue this below-cost pricing claim and focus on the sale below cost at the point in time at which competition is harmed.

C. Felder's has alleged a properly defined Geographic Market.

Relying on the summary judgment analysis from *FMC* rather than on any cases addressing the standard applicable to Rule 12(b)(6) dismissals, the Defendants assert that the Amended Complaint "alleges nothing new" regarding definition of the geographic market, and

that "Felder's has not alleged a relevant geographic market." R. Doc. No. 54-1, at 9, 11. In fact, Felder's alleges the specific Louisiana parishes and Mississippi counties within which both it and the All Star Defendants sell collision parts for which there is an aftermarket alternative. R. Doc. No. 50, at 5, ¶ 15. Felder's also specifically alleges that no new aftermarket sellers have begun direct competition (*i.e.*, in the same geographic market) with Felder's. R. Doc. No. 50, at 16, ¶ 48. Coupled with this lack of new entrants into the geographic market, Felder's alleges that, due to the Defendants' actions, "three after-market competitors of Felder's who sell aftermarket parts in the same geographic markets as Felder's and All Star, have already been driven out of business[.]" R. Doc. No. 50, at 16, ¶ 49; *id.* at 17 ¶¶ 51-53. Regarding whether entities outside the geographic market could compete (as supposed by the Defendants outside the context of the appropriate 12(b)(6) standard), Felder's allegations emphasize both that "the sale of collision parts is a relationship-driven business in which sellers and buyers develop long-time histories of sales, making it difficult for newcomers to enter the market," R. Doc. No. 50, at 17, ¶ 50, and that the auto repair industry is driven by a need for repairs to be "completed in the shortest period of time." R. Doc. No. 50, at 5, ¶ 17; *id.* at 18, ¶ 55.

The Defendants ignore these allegations, as well as the reasonable inferences that must be drawn in favor of the Felder's at the Rule 12(b)(6) stage. *See Lormand,* 565 F.3d at 232–33. Instead, the Defendants propose a litany of hypothetical alternatives and fault Felder's for not addressing all possible such hypotheticals. For example, the Defendants assert that Felder's doesn't address "whether body shops in these areas obtain collision parts from vendors operating in Mobile, Birmingham, Memphis, Houston, Dallas, or other parts of the country." R. Doc. No. 54-1, at 11-12; *see also id.* at 12 ("Yet Felder's fails to include Shreveport, Houston, Memphis, Birmingham, and Dallas in its geographic market and provides no explanation for why the

market should not be national in scope[.]"). In fact, Felder's alleges barriers to entry from out-of-area vendors, including the importance of the "relationship-driven business in which sellers and buyers develop long-time histories of sales, making it difficult for newcomers to enter the market," R. Doc. No. 50, at 17, ¶ 50; and the importance of delivering parts "in the shortest period of time," which could necessitate not just overnight shipment but also same-day delivery, R. Doc. No. 50, at 5, ¶ 17; *id*. at 18, ¶ 55.[1]

As discussed above, *Matsushita* "did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." *Eastman Kodak*, 504 U.S. at 468. Regardless, aside from *Matsushita*, a proper Rule 12(b)(6) analysis is not governed even by this summary judgment standard, but requires that all reasonable inferences be drawn in favor of the Felder's at the Rule 12(b)(6) stage. *See Lormand*, 565 F.3d at 232–33.

D. Felder's has set forth sufficient allegations regarding Defendants' market power.

Continuing their standardless approach, the Defendants address the issue of market power. Foremost, the Defendants acknowledge that Felder's has properly alleged "that the All Star Defendants 'operate the largest parts distribution center in Louisiana at more than 50,000 square feet and $5 million in inventory.'" Rec. Doc. No. 54-1, at 11 (quoting Rec. Doc. No. 50, at 6, ¶ 19). The Defendants also acknowledge that this Court has already held that Felder's need not allege a "specific market share percentage to warrant recovery," R. Doc. No. 54-1, at 11 (quoting R. Doc. No. 32, at 15), but then attempt to fault Felder's for not providing allegations

[1] The Defendants also assert that the allegations regarding Keystone's national presence support the inference "that collision parts distributors are capable of competing effectively in geographic areas hundreds of miles away from where they are located." R. Doc. No. 54-1, at 12. This ignores, however, Felder's allegation that Keystone is "in business in the Geographic Market." R. Doc. No. 50, at 17, ¶ 54.

"about the number, size, or location of competing distribution centers," which is information that would only add in a basis for calculating specific market share percentage. R. Doc. No. 54-1, at 11.

The Defendants, however, go beyond these acknowledged areas of sufficiency in the Amended Complaint, and again engage in proposing hypothetical alternatives not addressed in the Amended Complaint. For example, the Defendants suggest a hypothetical "business model with several small distribution centers spread out across a region [that] would arguably provide delivery, customer service, and other market penetration advantages that a single large distribution center does not offer." R. Doc. No. 54-1, at 11-12. The Defendants then repeat their assertions that Felder's failed to address distribution centers outside the defined Geographic Market or that could penetrate the geographic market through overnight shipping. *Id*. at 12. This approach by the Defendants ignores the dictates of *Eastman Kodak* and *Lormand*, as well as the full context of *Iqbal*, that plaintiffs are not required to address every possible alternative fact pattern, and that the facts actually alleged must be read with all reasonable inferences supporting the plaintiffs' claims at the Rule 12(b)(6) stage.

The Defendants repeat this erroneous approach in suggesting alternative hypothetical facts to counter the allegations in the Amended Complaint regarding the fact that specific identified parts distributors in the geographic market had been driven out of business in the time since the inception of the Defendants' anti-competitive actions. R. Doc. No. 54-1, at 13. This, again, flies in the face of the relevant case-law regarding the deference owed to the plaintiff's allegations in such cases. Defendants attempt to work around this through their citation to *Stewart Glass*, but, as discussed above, *Stewart Glass* was in the context of the appeal of a grant of summary judgment, and not in the context of the disfavored remedy of 12(b)(6) dismissal.

The Defendants also misunderstand the allegations of Felder's with respect to the influence of insurance companies and suggest that the insurers' influence keeps the prices for collision parts low, but the facts as pled in the Amended Complaint contradict this assertion. It is the insurers who drive the need for the All Star Defendants and GM to create the "Bump the Competition" Program to provide low prices for sales of OEM parts with aftermarket equivalents. Defendants insist that the involvement of the insurers makes it impossible for the All Star Defendants to raise prices, but this argument ignores the reality of the present market for collision parts.

The All Star Defendants already sell the OEM parts for which there is no aftermarket alternative at high prices. The insurance companies are not in position to demand that those prices fall because there are no aftermarket alternatives. The All Star Defendants already have sufficient market power to keep these prices high. Once the aftermarket competition is "bumped" or eliminated, there is nothing to force the All Star Defendants to lower their prices to competitive levels rather than sticking to the supra-competitive prices already in place on other parts for which there is no after-market alternative. The All Star Defendants will be the only game in town for a GM vehicle, and the insurance companies at that point will have to either pay the higher prices or declare the vehicle a total loss – a result that may well benefit GM if the consumer decides to replace one GM automobile with another GM automobile.

Defendants also challenge the facts alleged by Felder's regarding the aftermarkets parts sellers driven out of business by the "Bump the Competition" Program and the impermissible actions of the All Star Defendants. Felder's has identified the companies and established that it was in competition with the All Star Defendants and Felder's. Felder's further alleges that all three were forced or "bumped" out of business.

In their motion to dismiss, the Defendants ignore these facts and pose their own hypothetical questions about what "may" have caused these businesses to fail. For example, Defendants question whether GM vehicles were only a fraction of their business or whether the companies were in too much debt or did not offer quality parts. In effect, the Defendants would have this Court impose a standard of pleading on Felder's that requires it to sufficiently negate any other possible cause for these companies' demise and effectively prove in an amended complaint the exact reason for their failure. Such level of pleading is not required under the legal standard of Rule 12. The Defendants cannot demand more specific information where there is enough factual allegation in the Amended Complaint to allow this Court to draw a reasonable factual inference that the "Bump the Competition" caused these companies to go out of business.

Despite the Defendants' flat assertion to the contrary, R. Doc. No. 54-1, at 14, Felder's provides specific allegations about the economic impact of the Defendants' actions on its own business and ability to compete. R. Doc. No. 50, at 18, ¶ 56. Regardless, the Defendants ignore the dictates of *Lormand* and *Iqbal* to read reasonable inferences in a light supporting maintaining the plaintiff's claims, and suggest inferences from Felder's allegations regarding the insurance industry's demand for quick repair times and low repair costs that would go against the Felder's claims. R. Doc. No. 54-1, at 13-14. The Defendants completely strip these allegations of their context, which is in describing the barriers to entry from market distributors outside the geographic market and the market strictness that allows for the below-AVC behavior at the point of sale to the consumer to effectively deprive Felder's of business. These are the reasonable inferences from those allegations, and that this Court must apply to this case in the Rule 12(b)(6) context.

E. Felder's claims under the Louisiana Unfair Trade Practices Act and state antitrust statutes were sufficiently pled.

Counts Four and Five of the Amended Complaint set forth claims for violations of the Louisiana Unfair Trade Practices Act and the Louisiana Antitrust Statutes. Causes of action for violations of both statutes can be established based on allegations of violations of the federal antitrust statutes. *See Van Hoose v. Gravois*, 70 So. 3d 1017, 1024 (La. App. 1st Cir. 2011) (holding that allegations of antitrust violations, if sufficiently pled, would also state a cause of action for violations of LUTPA); *Southern Tool & Supply, Inc. v. Beerman Precision, Inc.*, 862 So. 2d 271, 278 (La. App. 4th Cir. 2003) (holding that state antitrust laws are interpreted by reference to federal antitrust laws). As Defendants correctly note, LUTPA requires allegations of "fraud, misrepresentation, deception, ***or other unethical conduct*** to support a claim." *Cheramie Servs. v. Shell Deepwater Prod.*, 35 So. 3d 1053, 1060 (La. 2010).

LUTPA is concerned with preventing "unfair methods of competition and unfair or deceptive acts or practices." La. R.S. 51:1405(A). Felder's submits that its detailed factual allegations of a scheme devised by GM and in which the All Star Defendants participated constituted unethical conduct designed to unfairly "bump" or eliminate competition from Felder's. As discussed throughout this memorandum, Felder's has set forth sufficient facts to state a claim of unfair methods of competition and unethical conduct under LUTPA and is not resting on bare factual allegations.

F. Felder's has sufficiently pled claims against the several All Star Defendants.

The Amended Complaint affirmatively alleges that All Star Advertising Agency, Inc. is the parent company that owns the trade name under which the other defendants do business as the All Star Automotive Group. All Star Chevrolet North, L.L.C. and All Star Chevrolet, Inc. are owners of GM dealerships and sellers of GM collision replacement parts. The Amended

Complaint further alleges that all of these defendants conspired with GM to participate in the "Bump the Competition" program. Felder's has pled sufficient facts to state a claim for conspiracy to commit antitrust violations and trigger joint and several liability among the Defendants. To the extent the parent company believes it should be dismissed, that is a matter for further discovery, not a motion to dismiss filed before the answer.

III. CONCLUSION

For the foregoing reasons, the Amended Complaint filed by Felder's sets forth sufficient factual allegations to support claims for violations of state and federal antitrust laws. Felder's respectfully requests that this Honorable Court deny the Defendants' motion to dismiss.

RESPECTFULLY SUBMITTED

/s/ James M. Garner
JAMES M. GARNER, T.A. (#19589)
PETER L. HILBERT, JR. (#6875)
DARNELL BLUDWORTH (#18801)
RYAN D. ADAMS (#27931)
KEVIN M. MCGLONE (#28145)
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street, 28th Floor
New Orleans, Louisiana 70112-1033
Telephone: (504) 299-2100
Facsimile: (504) 299-2300

-and-

/s/ Gladstone N. Jones, III

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

ATTORNEYS FOR
FELDER'S COLLISION PARTS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record who have registered to receive electronic service, and I effected service upon all other counsel of record by either facsimile, electronic mail and/or depositing same in the United States Mail, properly addressed and postage prepaid, this 9th day of December 2013.

/s/ James M. Garner
JAMES M. GARNER