UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FELDER'S COLLISION PARTS, INC.	:	CIVIL ACTION
	:	
VERSUS	:	NO. 3:12-cv-00646
	:	
GENERAL MOTORS COMPANY,	:	JUDGE JAMES J. BRADY
ALL STAR ADVERTISING AGENCY	:	
INC., ALL STAR CHEVROLET NORTH, LLC,	:	MAGISTRATE JUDGE
ALL STAR CHEVROLET, INC., and	:	STEPHEN C. RIEDLINGER
DOE DEFENDANTS 1-25	:	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

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Defendant General Motors LLC ("GM") and the All Star Defendants submit this reply memorandum in support of their Motion to Dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6).

As set forth below, Plaintiff submitted an opposition memorandum in which it: (1) concedes that the First Amended Complaint can survive only if this Court ignores Fifth Circuit law and its prior ruling, and (2) offers no explanation for its failure to allege facts in support of its claims about average variable costs, the unprofitability of the transactions as a whole, a relevant geographic market, and market power. These deficiencies are unsurprising because the First Amended Complaint demonstrates that the GM rebate program is profitable for the All Star Defendants, makes them more competitive against "highly diversified" national aftermarket parts sellers, and benefits consumers in the form of lower prices. As such, each of the following arguments represents an independent basis for dismissing the claims.

A. ***Plaintiff concedes that it cannot allege facts to support a finding of below-cost pricing by the All Star Defendants or GM.*** Plaintiff bears the burden of alleging below-cost pricing and admits that it cannot meet this burden unless the Court "reconsiders" its legal holding that rebates that GM pays to the All Star Defendants must be taken into account in deciding whether the All Star Defendants engaged in below-cost pricing. Rec. Doc. 56 at 13 ("The essential inquiry for the 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 this issue deserves reconsideration.").

This Court has previously held that motions for reconsideration "based on the same arguments only serve to waste the valuable resources of the court." *Georgia Pacific, LLC v.*

Heavy Machines, Inc., 2010 WL 2026670, *1 (M.D. La. May 20, 2010) (Brady, J.); *Horne v. Pfizer*, 2007 WL 4292767 *1 (M.D. La. Dec. 6, 2007) (Brady, J.) ("A Motion for Reconsideration is not the proper vehicle for rehashing evidence, legal theories, or arguments."). In this case, Plaintiff does not raise new arguments or identify intervening case law. Instead, it rehashes the same legal arguments rejected by this Court in the first instance. As such, there is no reason to waste resources revisiting the Court's holding on this controlling legal issue.

B. ***This Court's holding that "price is measured after considering any discounts or rebates" is the law in the Fifth Circuit.*** *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999). Plaintiff dedicates much of its brief to arguing that the Court's initial ruling on the law was wrong—in particular, Plaintiff argues that *FMC Corp.* does not apply to this case because below-cost pricing calculations should be measured at the time of sale. The Court addressed this argument in its original order finding that the "more reasonable inference drawn from *FMC Corp.* is that the cost and revenue associated with a particular sale should not be dissected into pieces, but rather treated as a whole, regardless of the time associated with any discount or rebate programs." Rec. Doc. 32 at 24. This conclusion is consistent with how other courts have approached predatory pricing cases involving rebates, and Plaintiff points to no divergent case law. *American Academic Suppliers v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1322 (7th Cir. 1991) ("[P]romotional discounts raise no antitrust problems . . . though often they are below incremental cost in a superficial sense (Superficial because they may be above that cost when the promotional value of the discounts is added to the discounted price, as it should be to construct the full price with which to compare incremental cost.)"); *A.A. Poultry Farms. Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989) ("Whether price discrimination has

occurred depends, therefore, on the price after all discounts, specials, and so on."). Plaintiff is just wrong on the law, making this case suitable for dismissal under Fed. R. Civ. P. 12(b)(6).

C. ***The prices charged by the All Star Defendants were always profitable and, therefore, always lawful.*** Plaintiff attempts to confuse the below-cost pricing analysis by arguing that the Court effectively held that the GM rebates "excused the All Star Defendants' illegal conduct." Rec. Doc. at 15. If "price is measured after considering any discounts or rebates" (as it must be), the First Amended Complaint firmly establishes that the All Star Defendants always sold at a profit. Thus, it is incorrect and misleading for the Plaintiffs to say that the All Star Defendants or GM acted unlawfully in offering lower prices.[1] To the contrary, the antitrust laws were designed to encourage businesses to lower prices for consumers. *Matsushita Elec. Industrial Co. v Zenith Radio Corp.*, 475 U.S. 574, 594, 106 S.Ct. 1348, 1360 (1986) (holding "mistaken inferences in [predatory pricing] cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

D. ***Plaintiff fails to explain why the First Amended Complaint does not contain variable cost allegations.*** In its order, the Court admonished Plaintiff that it must allege facts to support the conclusion that the All Star Defendants' pricing fell below variable costs. Rec. Doc. 32 at 26 ("Felder's Complaint focuses on (1) the costs that the Defendant-dealers paid to GM and (2) the Defendant-dealers' sale price. More is required under the Fifth Circuit standard."). Despite undertaking extensive discovery, Plaintiff made no effort whatsoever to explore "the relationship between variable costs, fixed costs, and profits" in the First Amended Complaint. *FMC Corp.*, 170 F.3d at 532. Rather, in the First Amended Complaint, Plaintiff continues to

[1] Felder's does not allege—nor could it--that GM sold parts to the All Star Defendants at prices below GM's average variable cost ("AVC"). GM's ability to lower its net prices and still remain above its AVC represents a competitive efficiency beneficial to consumers.

compare the sales price of a particular part with how much the All Star Defendants paid for that part. The Fifth Circuit has been clear "that judgment as a matter of law is appropriate when the plaintiff fails to adequately specify how the challenged pricing undercuts the defendant's variable costs." *Id.* Thus, even without Plaintiffs' admission that the All Star Defendants sell OEM parts at a higher price than they pay for them, the First Amended Complaint cannot survive "as a matter of law."

E. ***Plaintiff also has not alleged that any transaction as a whole was unprofitable.*** *FMC Corp.* teaches that any below-cost pricing analysis must look at an entire transaction rather than at individual subparts. *Id.* at 533 n. 15 ("When a company has a 'buy one, get one free' promotion, it would be incorrect to look at the nominal price of the 'free' product—zero—and infer predation from this fact"). Transactions between the All Star Defendants and a collision center routinely involve multiple parts. Rec. Doc. 50 Ex. 1 (explaining that the collision center must provide a copy of the "complete insurance repair estimate" to the GM dealer to "take advantage of savings."). Nonetheless, in the First Amended Complaint, Plaintiff focuses only on a comparison of the price paid for a particular part and the sales price for that part and does not offer a single example of an actual transaction involving multiple parts between the All Star Defendants and a collision center. In its opposition memorandum, Plaintiff mistakenly conflates this issue with its argument that GM rebates should be disregarded in the below-cost pricing analysis. Rec. Doc. 56 at 15-16 ("[T]here is nothing in conflict between the *FMC* holding that the 'transaction' included all parts of a contract with the consumer and Felder's argument here that the 'transaction does not include economic activity that occurs after the consumer's participation in the transaction is complete."). The two points are unrelated. Failing to allege that a particular transaction as a whole priced below variable cost represents a fatal "threshold

problem" under *FMC Corp.* that is distinct from the question of whether "price is measured after considering any discounts or rebates." Plaintiff has fallen short on both counts.

F. ***The proposed geographic market is inconsistent with Plaintiffs' factual allegations.*** In its original order, the Court held that Plaintiff did "not address whether consumers could practicably turn to other geographic areas for parts, nor does Felder's specify whether competing dealers from outside areas could come into the market." Rec. Doc. 32 at 11. The Court instructed Felder's to "allege further detail regarding . . . the area of effective competition, whether buyers can practicably turn to other sellers for supplies, and whether other dealers can reasonably move into the market to compete." *Id.* at 12. In its opposition memorandum, Plaintiff concedes that it did none of what the Court asked. Instead, Plaintiff argues that the Court should infer that its market definition is adequate based on its allegations that Felder's and the All Star Defendants sold in certain counties and parishes and that "no new aftermarket sellers have begun direct competition." Rec. Doc. 56 at 19. No such inference is permissible. Plaintiff alleges that the All Star Defendants and Felder's compete in cities hundreds of miles away from their Baton Rouge distribution centers. If the All Star Defendants and Felder's can compete from Baton Rouge in far off locations, aftermarket parts sellers in Houston, Dallas, and Memphis can do the same. Plaintiff confirms this inference by alleging that a national distributor, Keystone, operates in its proposed market. Since the First Amended Complaint establishes that buyers can practicably turn to sellers in areas besides the counties and parishes in which the parties operate, the proposed geographic market is implausible as a matter of law. *Wampler v. Southwestern Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010) (A geographic market is the area "in which the seller operates and to which buyers can practicably turn for

supplies" and must "correspond to the commercial realities of the industry and be economically significant").

G. ***Plaintiff cannot rely on conclusory allegations to support an inference of market power.*** In its opposition memorandum, Plaintiff complains that Defendants demand too much when they fault the First Amended Complaint for not providing any information about the number, size, or location of competing distribution centers. Rec. Doc. 56 at 21. Plaintiff also argues that it should not be required to address "hypothetical facts." *Id.* at 22. Both arguments illustrate how little attention the Plaintiff gave to this Court's instructions to provide "specific allegations supporting that Defendants' market share is significant" and to "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." Rec. Doc. 32 at 15.

As discussed in the memorandum filed by Defendants in support of their motion, Plaintiff has alleged few facts relevant to market power and those facts suggest, if anything, the absence of market power. In short, according to Plaintiff, the nationwide GM rebate program responded to an "insurance industry [that] demands low prices and initially expressed a preference for aftermarket parts given their lower price structure." Rec. Doc. 56 at 4. Plaintiff also concedes that the largest national aftermarket parts distributor (Keystone) continues to compete effectively "based on its size and diversification beyond the market." Rec. Doc. 50 ¶ 54. Despite this backdrop, Plaintiff asserts that an inference of market power is still appropriate because it also has alleged that collision parts sales is a relationships-based business, that three competing companies have gone out of business, and that Felder's is on the verge of going of business.

In drawing inferences, the Court must look at the allegations as a whole. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 2509 (2007) (when ruling on a

Rule 12(b)(6) motion, the court should "consider the complaint in its entirety . . . . [and] not whether any individual allegation, scrutinized in isolation, meets the standard."). In this case, although Plaintiff asserts that collision parts sales is a relationship-based business, it contradictorily concedes that insurance companies make purchasing decisions based primarily, if not solely, on price. Similarly, while Plaintiff claims that it and three smaller competitors have suffered financially in recent years, it offers no facts to support the conclusion that their losses are primarily attributable to diminishing sales of GM replacement parts.[2] More significantly, Plaintiff also admits that the largest national distributor of aftermarket parts continues to compete effectively despite the implementation of the GM rebate program several years ago. The picture painted by these allegations does not in any way suggest that the All Star Defendants and GM can exclude competitors or raise prices even when giving every favorable inference to Plaintiff.

H. ***Plaintiff asks for reconsideration of the Court's conclusions regarding the LUTPA claim without offering new arguments or reasons.*** In its opposition memorandum, Plaintiff ignores the Court's directive to Plaintiff to allege specific acts of "fraud, misrepresentation, deception, or unethical conduct" in support of its LUTPA claim Indeed, Plaintiffs' allegations on the LUTPA claim are completely unchanged from the original Complaint. Instead, Plaintiff relies on *Van Hoose v. Gravois*, 70 So.3d 1017 (La. App. 1st Cir.

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[2] Plaintiff argues that it has seen its profits and demand for its aftermarket bumpers decline since 2008. Plaintiff, however, provides no factual information about its own business to support the conclusion that this general decline was attributable to lost sales of parts compatible with GM vehicles as opposed, for example, to sales of parts compatible with vehicles manufactured by others, such as Ford, Chrysler, and Toyota. Rec. Doc. 50 ¶ 56. In order to support an inference that the GM rebate program has impacted its profitability, Felder's needed to include factual allegations about its sales of parts compatible with GM vehicles and how they have changed over time as opposed to allegations about its sales generally. Similarly, no inference may be drawn from the scant allegations concerning the three failed competitors. Plaintiff offered no factual allegations linking the competitors' financial collapse to a loss in replacement parts business for GM vehicles.

2011) for the proposition that "antitrust allegations, if sufficiently pled, would also state a cause of action under LUTPA." Rec. Doc. at 24. The Court specifically rejected this interpretation of the *Gravois* decision in its ruling on the motion to dismiss the original complaint. Rec. Doc. 32 at 31. Plaintiff has offered no new allegations or case law to support its position and, in so doing, effectively concedes that the claim should be dismissed.

I. ***This case is ripe for dismissal.*** Plaintiff argues throughout its opposition memorandum that the Court should delay any final ruling in this case because it is still in the pleading stages. In support of its position, Plaintiff points out that *FMC Corp.* and several other appellate decisions relied on by Defendants were decided at the summary judgment stage. However, there is nothing extraordinary about dismissing a predatory pricing claim pursuant to Fed. R. Civ. Pro. 12(b)(6). When a plaintiff has not adequately pled requisite facts such as below-cost pricing, a defined relevant market, market power, and the probability of recoupment, Rule 12(b)(6) requires dismissal. *See, e.g., Affinity LLC v. GFK Mediamark Research & Intelligence, LLC*, No. 13-1536, 2013 WL 6284281, at *2 (2nd Cir. Dec. 5, 2013) (dismissing predatory pricing claim under Fed. R. Civ. Rule 12(b)(6)); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 442 (3rd Cir. 1997) (same); *Rheumatology Diagnostics Laboratory, Inc. v. Aetna, Inc.*, No. 12-05847, 2013 WL 5694452, at *15-16 (N.D. Cal. Oct. 18, 2013) (same); *International Equipment Trading, Ltd. v. AB Sciex LLC*, No. 13-1129, 2013 WL 4599903, at *8-9 (N.D. Ill. Aug. 29, 2013) (same); *Affinity LLC v. GfK Mediamark Research & Intelligence, LLC*, No. 12-1728, 2013 WL 1189317, at *5-6 (S.D.N.Y. Mar. 25, 2013) (same); *MiniFrame Ltd. v. Microsoft Corp.*, No. 11-7419, 2013 WL 1385704, at *6 (S.D.N.Y. Mar. 28, 2013) (same); *Midwest Auto Auction, Inc. v. McNeal*, No. 11-14562, 2012 WL 3478647, at *13-14 (E.D. Mich. Aug. 14, 2012) (same); *GMA Cover Corp. v. SAAB Barracuda LLC*, No. 10-

12060, 2012 WL 642739, at *6 (E.D. Mich. Feb. 8, 2012) (same); *Edgenet, Inc. v. GS1 AISBL*, 742 F.Supp.2d 997, 1013-14 (E.D. Wis. 2010) (same); *Reudy v. Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1128-29 (N.D. Cal. 2010) (same); *Synergetics USA, Inc. v. Alcon Labs., Inc.*, No. 08-3669, 2009 WL 1564113, at *3-4 (S.D.N.Y. June 4, 2009) (same); *Echostar Satellite, L.L.C. v. Viewtech, Inc.*, No. 07-1273, 2009 WL 1668712, at *5 (S.D. Cal. May 27, 2009) (same); *Rio Grande Royalty Co., Inc. v. Energy Transfer Partners, L.P.*, 786 F.Supp.2d 1190, 1195-96 (S.D. Tex. 2009) (same); *In re Parcel Tanker Shipping Services Antitrust Litigation*, 541 F.Supp.2d 487, 492 (D. Conn. 2008) (same); *Creative Copier Services, v. Xerox Corp.*, 344 F.Supp.2d 858, 867-68 (D. Conn. 2004) (same); *Masco Contractor Services East, Inc. v. Beals*, 279 F.Supp.2d 699, 707-08 (E.D. Va. 2003) (same).

Further, this Court has given Plaintiff every opportunity to correct the mistakes of its original complaint. Not only did the Court provide detailed instructions about the deficiencies in the original complaint in an extensive ruling and grant Plaintiff leave to amend, it also permitted Plaintiff to conduct discovery over the course of several months before requiring Plaintiff to file its amendment. Nevertheless, in drafting its First Amended Complaint, Plaintiff made no reference to the thousands of pages of documents produced by Defendants. Instead, Plaintiff chose to rely on the same exhibits attached to its original complaint[3] and to urge the Court, without explanation, to reconsider arguments that it previously rejected. Under these circumstances, no further amendments are warranted and, in any event, would be futile. All claims against the All Star Defendants and GM should be dismissed with prejudice.

[3] Those exhibits, as Plaintiff concedes, demonstrate that the All Star Defendants make a profit on all of their OEM parts sales.

CONCLUSION

For the reasons set forth above, GM and All Star respectfully request that the Court dismiss Counts 1-6 of the First Amended Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this motion was electronically filed with the Clerk of Court on December 23, 2013 by using the CM/ECF system which will send an electronic notice of filing to filing users and that each attorney representing plaintiff is a filing user.

/s/ *Mark A. Cunningham*
MARK A. CUNNINGHAM