U.S. COURT OF APPEALS
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FIFTH CIRCUIT

No. 14-30410

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FELDER'S COLLISION PARTS, INCORPORATED
Plaintiff-Appellant,

v.

ALL STAR ADVERTISING AGENCY, INCORPORATED;
ALL STAR CHEVROLET NORTH, L.L.C.; ALL STAR CHEVROLET,
INCORPORATED; GENERAL MOTORS LLC
Defendants-Appellees,

On Appeal from the Judgment of the
United States District Court for the Middle District of Louisiana
Civil Action No. 3:12-cv-00646
The Honorable James J. Brady, Presiding

AMICUS CURIAE BRIEF ON BEHALF OF AUTOMOTIVE BODY PARTS ASSOCIATION IN SUPPORT OF APPELLANTS

Filed: July 7, 2014

Robert G. Oake, Jr.
Texas State Bar No. 15154300
OAKE LAW OFFICE
825 Market Street, Suite 250
Allen, Texas 75013
(214) 207-9066
rgo@oake.com

Counsel for Amicus Curiae
Automotive Body Parts Association

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 14-30410

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FELDER'S COLLISION PARTS, INCORPORATED
Plaintiff-Appellant,

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ALL STAR ADVERTISING AGENCY, INCORPORATED;
ALL STAR CHEVROLET NORTH, L.L.C.; ALL STAR CHEVROLET,
INCORPORATED; GENERAL MOTORS LLC
Defendants-Appellees,

Pursuant to this Court's Rule 29.2 and Rule 28.2.1, the undersigned counsel of record for Amicus Curiae certifies that the following listed persons and entities have an interest of the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

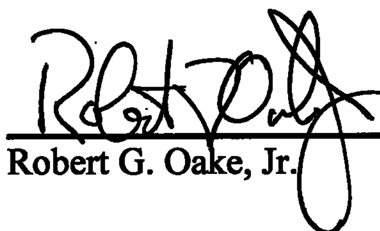
Amicus Curiae Filing This Brief:

Automotive Body Parts Association, which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Counsel for Amicus Curiae

Robert G. Oake, Jr.,
OAKE LAW OFFICE

Dated: **July 7, 2014**



Robert G. Oake, Jr.

Counsel for Amicus Curiae
Automotive Body Parts Association

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OTHER AUTHORITIES:

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5 Hous. Bus. and Tax Law J. 424 (2005) 7, 12

Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*,
88 Harv. L. Rev. 697 (1975) 4, 12

IDENTITY AND INTEREST OF AMICUS CURIAE

Plaintiff Automotive Body Parts Association (hereinafter "ABPA") is a non-profit corporation organized and existing under the laws of the State of Texas with a principal office in Houston, Texas. The ABPA has over 140 members that distribute aftermarket repair parts in the automotive collision repair trade. The ABPA bylaws provide in relevant part that objectives of the ABPA are "[t]o promote fair and honorable trade practices between the membership and the customers of the membership of the Association," "[t]o discourage unfair competition and violation of business customs and usages of the trade," "[t]o creatively expand the role to the Distributor and to open up new business opportunities and services to the independent autobody shops and dealers," and "[t]o foster good will between the industry, its factory suppliers, customers, and other industries influencing industry growth (i.e., the insurance industry)."

The ABPA website provides in relevant part that "members of ABPA are dedicated to serving the collision repair industry with Quality Replacement Parts, backed by Dependable Service and Fair Prices" and "ABPA members are pledged to supporting the multifaceted collision repair industry by not only delivering quality products where and when needed, but also by making the entire parts delivery system more expedient and economically viable." *See* http://www.autobpa.com/assn-about.html.

The ABPA has an interest in this case because ABPA members sell aftermarket automotive parts in the United States that attempt to compete with the OEM automotive parts sold by General Motors Company and the dealerships associated with General Motors Company. The ABPA has a specific interest in this case because the issues involve whether the pricing practices of General Motors Company and its dealerships violate the antitrust laws of the United States and are harmful to fair competition in the markets for automotive body collision parts. The ABPA has an interest in proper application of antitrust rules and principles to the facts of this case and submits this amicus brief toward that end.

STATEMENT OF AUTHORITY AND CONSENT TO FILE

Pursuant to this Court's Rule 27.4, ABPA, through counsel, emailed counsel to the parties to this appeal requesting consent to file. Counsel for Plaintiff-Appellant indicated its consent to the filing of the attached Amicus Curiae Brief. Counsel for Defendants-Appellees have not yet responded, and therefore this Motion is being filed as opposed.

DISCLOSURE OF AUTHORSHIP AND CONTRIBUTIONS

Pursuant to Fed. R. App. Proc. 29(c)(5), the undersigned avers that the instant Amicus Curiae Brief was not authored, in whole or in part, by counsel for any party to this litigation identified by Plaintiff-Appellant in its brief, in support of which Amicus Curiae file the instant brief. Amicus Curiae retained undersigned counsel to prepare and submit the Amicus Curiae Brief. No party identified by Plaintiff-Appellant in its brief, no such party's counsel, nor any person—other than Amicus Curiae, its members, or their counsel—have contributed any money that was intended to fund preparing or submitting this brief. Felder's is a member of Automotive Body Parts Association, but Felder's made no contribution to the special legal fund that funded the preparation of this brief.

INTRODUCTION

This case presents a unique set of facts. General Motors LLC ("GM") manufactures automobiles that are sold through dealerships. When these automobiles are damaged in collisions, they often require repair parts. According to the amended complaint, after-market collision parts (as opposed to original equipment manufacturer, or OEM, parts) make up approximately 20% of the automobile collision part market. ROA.446 at ¶ 12. The remaining 80% "is already subject to a monopoly by each manufacturer as to collision parts for the cars it produces and its dealer networks sell." ROA.446 at ¶ 12. Aftermarket parts typically have lower prices than OEM parts. ROA.446 at ¶ 12.

Sellers in the monopolized portion of the repair parts market can charge supracompetitive prices due to monopoly power. Profits from these sales then can be used to subsidize sales in the competitive portion of the market to eliminate competition from aftermarket sellers. A reasonable inference from the facts alleged in the amended complaint is that GM and the dealerships are using the high profits on the parts sold in the 80% monopolized market to unfairly subsidize their low "bottom line prices" on parts sold in the competitive 20% of the market, all in an effort to eliminate competition and ultimately keep prices high on all parts.

SUMMARY OF ARGUMENT

The District Court erred in holding that "average variable cost" is the proper cost standard in this case and that cost should be determined after rebates. The proper cost standard is "appropriate measure" of costs. The appropriate measure of costs should be determined in light of all the facts, circumstances, and reasonable inferences in this case.

One important fact and reasonable inference to be considered is that GM is using profits from a monopolized portion of the automobile repair parts market to leverage and subsidize low pricing in the competitive portion of the automobile repair parts market. Using profits from a monopolized portion of a market to subsidize low pricing in a competitive portion of a market has at least two effects on the pricing issue.

First, as explained below, monopoly leveraging converts fixed costs to variable costs over time. At a minimum, a fact issue exists concerning whether monopoly leveraging is occurring in this case, and therefore, at a minimum, fact issues exist concerning whether various costs should be considered as variable or fixed in the "appropriate measure" of cost determination. Second, although case law generally focuses on whether costs are fixed or variable and what percentage of total cost is appropriate, another factor that should be included in the "appropriate measure" of cost calculus is at what point in time the costs should be

measured. The "appropriate measure" standard is flexible and adaptable to different fact patterns. The facts in this case indicate that the damage to competition is being done at point of sale and the later recoupment through rebate is, by reasonable inference, simply a subsidy with monopoly profit. For that reason the after-sales rebates should not be considered in the cost analysis. At a minimum, the temporal issue should be considered an issue of fact for the jury. The presence of the fact issues above indicates that the District Court erred in dismissing the claims of Felder's Collision Parts, Inc. ("Felder's").

ARGUMENT AND AUTHORITIES

I. The Proper Cost Standard for a Predatory Pricing Claim under Section 2 of the Sherman Act is "Appropriate Measure" of Costs and not "Average Variable Cost."

An authoritative Supreme Court case on the issue of below cost pricing is *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Under *Brooke Group*, the two prerequisites to recovery for a predatory pricing claim under Section 2 of the Sherman Act are (1) the defendant's prices are below an "appropriate measure" of its costs, and (2) a dangerous probability that the defendant will recoup its investment in low cost pricing. Significantly, *Brooke Group* does not state that the "appropriate measure" of cost is average variable cost and does not explain when the cost should be determined (at time of sale or thereafter). Average variable cost was used in *Brooke Group* only because the

parties agreed that the relevant measure of cost in the case should be average variable cost. *See id.* at 243, n. 1. The *Brooke Group* Court expressly "decline[d] to resolve the conflict among the lower courts over the appropriate measure of cost. *Id.*

As noted by the District Court in its opinion on Defendants' first motion to dismiss, this Court has "long embraced" average variable cost as *an* (as opposed to *the*) appropriate measure of cost. ROA.244. *See Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999). The two cases cited in *FMC Corp.* in support of this proposition are *Adjuster Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 889-91 (5th Cir. 1984) (pricing below cost is pricing below average variable cost) and *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975) (embracing commentator's proposal of average variable costs).

In *Agency Rent-A-Car*, this Court explained that it had adopted the average variable cost rule based on an influential article by Phillip Areeda and Donald F. Turner entitled *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). This Court stated:

> Areeda and Turner argue that predatory pricing occurs only when a firm sets its price at a level below its average variable cost. At this price, the firm is suffering a loss on every unit of output it produces and sells, and its behavior is rational only if it hopes by engaging in this conduct to drive its competitors from the market and thereby gain monopoly powers that will enable it to charge a monopoly price in the

> future. This sort of pricing conduct is economically undesirable because the monopoly profits garnered by the monopolist over the long term will more than offset the short term benefit to consumers of the low predatory price. Competitors, of course, are harmed also, either by being driven from the market or by being disciplined into following the price leadership of the monopolist.

This court also explained how it had adopted much of the analysis from the Areeda-Turner article in *American Excelsior Co.,* the second case cited in *FMC Corp*:

> In this court's first major statement on predatory pricing following publication of the Areeda-Turner article, we adopted much of its analysis. *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). We defined "predatory" to mean that the defendant "must have at least sacrificed present revenues for the purpose of driving [plaintiff] out of the market with the hope of recouping the losses through subsequent higher prices." *Id.* at 723. We agreed with Areeda and Turner that "a price above average cost is a fairly competitive price for it is profitable to the monopolist if not to its rivals; in effect, the price excludes only less efficient firms." *Id.* By contrast, "a firm's pricing behavior can be considered anticompetitive when it sells at a price below its average variable cost." *Id.* at 724.

Agency Rent-A-Car, supra, at 889. This Court concluded its section on pricing by stating "[i]n sum, although we follow with interest the continuing debate over theories of predation, the law in this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless the defendant has set his price below his average variable cost." *Id.* at 890, 891. This Court footnoted this summary statement with the following observation:

[fn6] We recognize that a cost which is regarded as fixed in the short-run may become variable in the long-run, as, for example, when durable goods wear out and are either replaced or not. In most cases, however, we think it will be obvious to judges and juries which costs are appropriately viewed as fixed and which as variable over the relevant time period. When a legitimate dispute arises as to the characterization of certain costs, the question is one of fact to be resolved by the jury. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d at 1036-38.

As previously discussed, the facts and reasonable inferences in the case at bar indicate that supracompetitive prices and profits in the monopolized 80% of the automotive repair parts market are subsidizing the pricing and costs of defendants in the remaining 20% competitive portion of the market. This leveraging of monopoly profits to subsidize All Star's[1] "bottom line pricing" in the competitive portion of the market affects (1) how costs should be classified (fixed or variable) and (2) whether prices above average variable cost may still meet the "appropriate measure of cost" standard from *Brooke Group* (to properly distinguish between predatory and competitive pricing).

Areeda and Turner state "[w]hich costs are fixed and which are variable (and hence marginal) is a function of both (1) the magnitude of the contemplated change in output, and (2) time," and "more costs become variable as the time period increases." (page 701) They continue: "The variable costs described above are those incurred in what is usually termed the 'short run,' namely, the period in which

[1] All Star Advertising Agency, Incorporated, All Star Chevrolet North, L.L.C., and All Star Chevrolet, Incorporated are collectively referred to as "All Star."

the firm cannot replace or increase plant or equipment. Conversely, in the 'long run' the firm can vary quantities of all inputs (plant and equipment as well as short run variable inputs); thus, all costs are variable over the long run." *Id.*

Another commentator explains and provides an example of the relationship between monopoly leveraging, time, and fixed and variable costs. In a law review article entitled *Getting Past Summary Judgment in Predatory Pricing Cases After American Airlines: Will Post-Chicago Analysis Ever Prevail?*, 5 Hous. Bus. and Tax Law J. 424 (2005), author David M. Magness states "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." *Id.* at 449. The author continues "[t]his suggestion is no far leap from the Areeda and Turner suggestion of marginal or average variable cost as the appropriate measure of cost, because in the long run, there are no fixed costs." *Id.* The following example is offered:

> Assume, for instance, two companies: Predator Inc. and Prey Inc., both competing in a single geographic and product market, and both with the same fixed costs. Assume Prey Inc.'s marginal costs are lower than Predator Inc.'s, so Prey Inc. may afford to charge a lower price than Predator Inc. and is therefore more efficient. [footnote omitted] Finally, assume Predator Inc. also has a monopoly in another nearby market. A price war ensues between Predator Inc. and Prey Inc. in which Predator Inc. and Prey Inc. both charge prices at Prey Inc.'s marginal cost. While Predator Inc. does this at a loss (it is below its marginal cost), it is able to afford the loss by using extra profit from its nearby monopoly. [footnote omitted]

> As the price competition continues, Predator Inc. can also recoup its fixed costs in the competitive market by paying them off with the profits from the nearby monopoly. However, due to the long term nature of the conflict with Predator Inc., more of Prey Inc.'s fixed costs look like marginal costs, and due to this, the formerly affordable price war with Predator Inc. becomes unaffordable, solely because Predator Inc. used its monopoly to assuage the fixed costs that both it and its more efficient competitor Prey Inc. had to deal with.

Id. The article continues the explanation in the context of the Areeda and Turner article, as follows:

> Indeed, the whole question posed by the Areeda and Turner article, from which the modern predatory pricing standard was derived, was what "appropriate measure of cost" separates predatory pricing from competitive pricing. [footnote omitted] Areeda and Turner proposed marginal cost because prices below marginal cost both cause the predator to lose money and waste social resources. [footnote omitted] However, pricing above marginal cost or average variable cost might also meet this standard where it is proved the long term pricing is financed by a monopoly in another market. [footnote omitted] One would suppose there would be an absolute lower limit on the cost to which the price is compared of the competitive price, or average total cost. [footnote omitted] Arguably a manufacturer charging no lower than the highest possible variable price cannot be charged with harming competition. [footnote omitted].

Id. at 450. The above cases and articles indicate that the District Court's determination concerning average variable cost is too simplistic in the context of the facts of this case. The District Court determined that the standard for determining potential liability for predatory pricing is average variable cost. However, as discussed above, the correct standard is "appropriate measure" of cost. This flexible standard gives a court the ability to analyze the entire facts and

circumstances of a case to determine whether the potential for antitrust liability is present. And when disputes exist over whether costs are fixed or variable, or when in time they should be determined, these disputes are questions of fact that should be resolved by a jury - and not on a motion to dismiss.

Under the facts and circumstances of this case, the pricing program is anticompetitive. When an after-market competitor attempts to make a non-OEM part sale, the dealership reduces the OEM price so low that the after-market dealer can no longer compete for the sale. And once the after-market competitors are eliminated (the complaint states that four competitors have gone bankrupt), there is no longer any incentive for the dealerships to reduce the price from the original OEM part list price.

In light of the above authorities, analysis, and the facts of this case, the following fact issues exist that, at a minimum, should not be determined on a motion to dismiss:

(1) What is the "appropriate measure" of costs in terms of fixed and variable costs? As discussed above, monopoly leveraging converts fixed costs to variable costs over time. At a minimum, a fact issue exists concerning whether monopoly leveraging is occurring in this case, and therefore, at a minimum, fact issues exist concerning whether various costs should be considered as variable or fixed. This Court has stated that "[w]hen a legitimate dispute arises as to the

characterization of certain costs, the question is one of fact to be resolved by the jury." *Agency Rent-A-Car, supra,* at footnote 6.

(2) Should the costs be determined at point of sale or thereafter? The proper antitrust standard is "appropriate measure" of costs. While the case law focuses on whether costs are fixed or variable and what percentage of total cost is appropriate, another factor that should be included in the "appropriate measure" of cost calculus is at what point in time the costs should be measured. *Brooke Group* kept the "appropriate measure" standard flexible and adaptable to different fact patterns. The facts in this case indicate that the damage to competition is being done at point of sale and the later recoupment through rebate is, by reasonable inference, simply a subsidy financed through monopoly profits. For that reason, this Court should not consider the after sales rebates in the cost analysis. At a minimum, the temporal issue should be considered an issue of fact for the jury. Since this Court considers the fixed versus variable cost determination an issue of fact in the pricing analysis, this Court should consider the issue of when in time costs are determined to be an issue of fact as well.

II. Monopoly Leveraging is a Relevant Issue in this Case.

The District Court in its discretion denied ABPA's Motion for Leave to File an Amicus Brief in Support of [Felder's] stating "[t]he amicus brief deals primarily with the issue of monopoly leveraging which is not an issue that is before the

Court." ROA.635. ABPA respectfully submits that the issue of monopoly leveraging is a relevant issue in this case. Felder's pled a Sherman Act antitrust violation based in part on alleged predatory pricing. GM and All Star argued in support of their motion to dismiss that a requirement for predatory pricing in the Fifth Circuit is that the price must be below average variable cost, and when post-sale rebates are considered, the sales price is not below average variable cost. Felder's argued that the average variable cost, under the circumstances of this case, should be determined at the time of the sale and that the rebates should not be considered. In short, GM and All Star argue for a simple and static approach that merely calculates the average variable costs in the transaction whereas Felder's argues for a more dynamic approach that considers the timing and context of the cost structure.

The goal of this amicus brief is to offer this Court a more complete legal context within which to analyze this key issue between the parties. The primary point made is that while this Court has long embraced average variable cost as an appropriate measure of cost, the historical context of an average variable cost determination supports the view that it should be flexible and dynamic toward the end of determining whether an antitrust violation has occurred.[2] The United States

[2] Felder's argues for an approach that views average variable costs at time of sale and the amicus brief adds the insight that the determination of whether costs should be considered fixed or variable depends on factors such as time and monopolized leveraging and subsidies. The

Supreme Court considers the standard to be "appropriate measure of cost"[3] and the seminal law review article[4] influencing this Court's standard explains that classification of costs as fixed or variable is in part a dynamic function of time. The second law review article[5] mentioned in the argument above explains the potential effect of monopoly subsidies and leveraging on the conversion of fixed costs to variable costs over time.

This amicus brief raises these points in an effort to show that the pricing and costs issues should be determined in light of the facts and reasonable inferences in this case, and that at a minimum there are disputed issues of fact making dismissal at this time inappropriate. Indeed, if the determination of cost and pricing in an antitrust case were simple and static and did not consider surrounding circumstances, then it would be relatively easy to create an approach (e.g., through use of subsidies) where pricing was technically above a certain view of average variable cost although an antitrust violation in substance was occurring.

To be clear, this amicus brief does not attempt to supplement, amend, or re-characterize any claims that may or may not be included in the First Amended

underlying and unifying principle to these two approaches is that this Court should take a dynamic and flexible approach to determining what the "appropriate measure" of cost is with the ultimate goal being whether an antitrust violation has occurred.

[3] See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

[4] Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975).

[5] David M. Magness, *Getting Past Summary Judgment in Predatory Pricing Cases After American Airlines: Will Post-Chicago Analysis Ever Prevail?*, 5 Hous. Bus. and Tax Law J. 424 (2005).

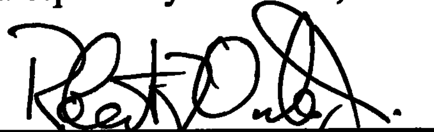
Complaint and does not address the issue of whether a claim of monopoly leveraging can be used to establish a Sherman Act section 2 violation with proof of only competitive advantage (rather than with proof of a threatened or actual monopoly in the leveraged market).[6] This amicus brief is limited to 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 average variable cost.

CONCLUSION

Based on the above arguments and authorities, Amicus ABPA requests that this Court reverse the District Court's ruling that dismissed Felder's claims.

Date: July 7, 2014

Respectfully submitted,



Robert G. Oake, Jr.
Texas State Bar No. 15154300
Oake Law Office
825 Market Street, Suite 250
Allen, Texas 75013
(214) 207-9066
rgo@oake.com

Attorney for Amicus Curiae
Automotive Body Parts Association

[6] In *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 206 n. 16 (5th Cir. 2000), this Court did not rule on the validity of monopoly leveraging as a valid claim under section 2 of the Sherman Act, but rather chose to preserve the issue for a future day.

CERTIFICATE OF SERVICE

I certify that pursuant to Fed. R. Civ. P. 25(c)(1)(C) on July 7, 2014, I served one copy of the foregoing brief, as well as an electronic copy of the brief, via third party commercial carrier for next day delivery on the attorneys listed below:

James M. Garner, T.A. (#19589)
SHER GARNER CAHILL RICHTER
KLEIN & HILBERT, L.L.C.
909 Poydras Street, Suite 2800
New Orleans, Louisiana 70112-4046
Telephone: (504) 299-2100
Facsimile: (504) 299-2300
E-Mail: jgarner@shergarner.com

Counsel for Plaintiff-Appellant
Felder's Collision Parts, Inc.

Michael W. McKay, Esq.
STONE PIGMAN WALTHER
WITTMANN L.L.C.
301 Main Street, Suite 1150
Baton Rouge, LA 70825
Telephone: (225) 490-5800
Facsimile: (225) 490-5860
E-Mail: mmckay@stonepigman.com

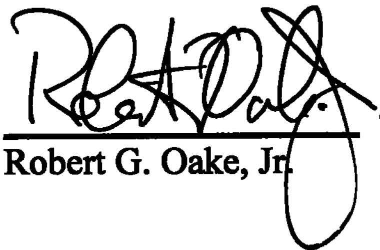
Counsel for Defendants/Appellees,
All Star Advertising Agency,
Incorporated; All Star Chevrolet
North, L.L.C.; and All Star
Chevrolet, Incorporated

David G. Radlauer, Esq.
JONES WALKER L.L.P.
201 St. Charles Avenue, Suite 4900
New Orleans, LA 70170-5100
Telephone: (504) 582-8000

Facsimile: (504) 582-8011
E-Mail: dradlauer@joneswalker.com

Counsel for Defendant/Appellee,
General Motors LLC

I also certify that on July 7, 2014, pursuant to Fed. R. Civ. P. 25(d)(2) and Fed. R. Civ. P. 25(a)(2)(B)(ii), I served upon the Clerk of this Court the original and six copies of the foregoing brief, as well as an electronic copy of the brief, by dispatch to a third-party commercial carrier (Federal Express) for delivery to the Clerk of this Court on July 8, 2014.

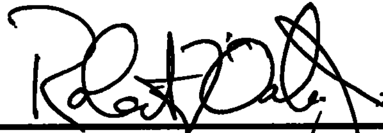


Robert G. Oake, Jr.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B). This brief contains 4,097 words, excluding the parts of the brief exempted by the Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.



Robert G. Oake, Jr.
Attorney for Amicus Curiae
Automotive Body Parts Association
July 7, 2014