

No. 14-1299

---

---

IN THE  
**Supreme Court of the United States**

---

FELDER'S COLLISION PARTS, INC.,

*Petitioner,*

*v.*

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

*Respondents.*

---

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

---

---

**BRIEF OF *AMICUS CURIAE* AUTOMOTIVE  
BODY PARTS ASSOCIATION IN SUPPORT  
OF PETITIONER**

---

---

ROBERT G. OAKE, JR.  
*Counsel of Record*  
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*

---

---

259635



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

**TABLE OF CONTENTS**

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES .....	ii
INTERESTS OF THE <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	3
CONCLUSION .....	7

**TABLE OF CITED AUTHORITIES**

	<i>Page</i>
<b>CASES</b>	
<i>Automotive Body Parts Association v. Ford Global Technologies, LLC, Dkt#48 (E.D. Tex., filed October 3, 2014)</i> . . . . .	5
<i>Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)</i> . . . . .	3
<i>Ford Global Technologies, LLC v. New World International, Inc., Case No. 2:15-cv-10394 Dkt#15 (E.D. Michigan, filed March 13, 2015)</i> . . . . .	5
<b>STATUTES AND OTHER AUTHORITIES</b>	
Sup. Ct. R. 37.6 . . . . .	1

The Automotive Body Parts Association (ABPA) respectfully submits this amicus curiae brief in support of Petitioner.<sup>1</sup>

### **INTERESTS OF THE *AMICUS CURIAE***

ABPA agrees with Petitioner’s argument in its Petition for a Writ of Certiorari and offers the following additional reasons why it is important for the Court to hear this case. Like Petitioner, amicus’ members nationwide stand to suffer from the Fifth Circuit’s ruling that creates an open-ended and unclear rule of when to capture a predatory competitor’s costs in a predatory pricing claim and that allows a competitor and its supplier to conspire to eliminate competition without consequence. Amicus has an interest in this case to provide the Court further insight into the automotive aftermarket body parts industry and how General Motors’ (GM’s) “Bump the Competition” program, if allowed to continue, will eliminate *competition* and not just competitors. Specifically, ABPA offers this amicus brief in support of Petitioner’s assertion on page ten of its Petition that “[u]ltimately, the continued existence of the “Bump the Competition” Program will have long ranging effects on competition, [Amended Complaint] at ¶ 58, [and] [i]f allowed to continue unchecked, sellers of after-market parts will be forced to close their business. *Id.*”

---

1. Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae’s intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

ABPA is a non-profit corporation organized and existing under the laws of the State of Texas with a principal office in Houston, Texas. There are more than 140 members of the ABPA who occupy more than 400 separate collision parts distribution, bumper sales, recycling facilities and manufacturing plants. Collectively, ABPA members are responsible for distributing more than 75 percent of independently produced aftermarket collision replacement parts sold to the collision repair trade in the United States.

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.”

Like Petitioner, ABPA members are suffering from the effects of OEM and OEM dealer price programs such as GM’S “Bump the Competition” program.

## SUMMARY OF ARGUMENT

It is not merely competitors that are being eliminated by GM's "Bump the Competition" program. Rather, due to the nature of the automotive repair part industry, the customer perceived relationship between the vehicles being repaired and the OEM and non-OEM repair parts, and the nature of GM's pricing program, it is *competition* that is being eliminated. The economic harm Petitioner is suffering is not limited to its specific geographical market. Rather, the harm is occurring nationwide.

## ARGUMENT

The Fifth Circuit begins its opinion by emphasizing that "the antitrust laws were designed for 'the protection of competition, not competitors.' [citing] *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). Appx. at 1a, 2a. ABPA agrees with Petitioner that the continued existence of GM's "Bump the Competition" program will have a long ranging adverse effect on competition and that sellers of after-market parts will be forced to close their business if the program continues unchecked.

Historically, the market for automotive body repair parts existed as a monopoly for the original equipment manufacturers (OEM's) and their dealers because there were no practical marketplace alternatives except for salvaged parts. Automotive repair part prices were high as a result. Beginning in the 1970s and 1980s, advances in technology allowed for the manufacture and sale of quality non-OEM repair parts and these parts began to successfully compete with the OEM parts. This broke the

OEM repair part monopoly and as a result the prices for repair parts dropped.

In an effort to regain their lost monopoly, OEMs and their dealers began developing price programs such as GM's "Bump the Competition" program. Petitioner is correct that if the "Bump the Competition" program is allowed to continue, then the non-OEM parts distributors such as Petitioner and ABPA members will not be able to compete and competition will be eliminated. That is because an OEM part typically has a perception advantage over a non-OEM part, particularly in the mind of a parts consumer who, for example, may prefer to purchase a repair part from the company that built the vehicle being repaired, or who may have a perception that the OEM part is of higher quality than the non-OEM part. These perceptions about non-OEM repair parts may be created and increased in the mind of the consumer through influences such as auto repair shops and advertising even though non-OEM parts are in many cases quality certified by national certifying organizations and are of like, kind, and quality to the OEM parts. In such a case, the only sales advantage a non-OEM part may have over an OEM part in the mind of the consumer is a lower price. If the lower price advantage is taken away through a predatory "Bump the Competition" program, then the advantage for non-OEM parts disappears, the perception that may exist concerning non-OEM parts cannot be overcome because there is little incentive for a consumer to even consider that their perception may be wrong, and effective competition is eliminated. The economic harm Petitioner is suffering is not limited to its specific geographical market. Rather, the harm occurs nationwide because the above described perceptions and resulting preferences for OEM parts

occurs nationwide, and the elimination of the lower non-OEM price advantage occurs nationwide.

Insurance companies, which pay approximately 85% of all automotive repair bills, have an interest in keeping repair part prices low through part competition. In an effort to maintain this competition, insurance companies often promote the use of non-OEM part prices on the repair estimates. This has the effect of keeping repair part prices low because non-OEM part prices are usually lower than OEM prices. However, when a “Bump the Competition” program is used by a GM dealer, OEM parts can be provided at the non-OEM prices (or lower), which results in the non-OEM part not being ordered by the body repair shop. If the “Bump the Competition” program continues and the body repair shops order only OEM Parts, the non-OEM suppliers eventually will go out of business. Once this occurs and competition is eliminated, there is no longer any non-OEM lower part prices for the insurance companies to use as alternative competitive quotes and parts prices will return to monopolistic levels.

It should be noted that OEMs also are attempting to use threatened and actual enforcement of design patents to regain their monopoly position over automotive repair parts and pricing. *See, e.g., Ford Global Technologies, LLC v. New World International, Inc.*, Case No. 2:15-cv-10394 Dkt#15 (E.D. Michigan filed March 13, 2015). ABPA currently is challenging the validity and enforceability of these design patents based on the doctrines of functionality and patent exhaustion. *See Automotive Body Parts Association v. Ford Global Technologies, LLC*, Dkt#48 (E.D. Tex., filed October 3, 2014). Nonetheless, the enforcement and threat of enforcement by OEMs are



substantially shrinking the available market for non-OEM automotive repair parts. This shrinking market for repair parts exacerbates the effect of programs such as GM's "Bump the Competition" because it allows OEMs to effectively focus their below cost price reductions on the remaining parts that are not covered by design patents. Finally, even if design patents over automotive repair parts are ultimately held invalid and unenforceable by the courts, pricing programs such as "Bump the Competition" still will be able to eliminate competition because they eliminate the advantage (lower price) that non-OEM parts have over OEM parts.

In sum, it is not merely competitors that are being eliminated by GM's "Bump the Competition" program. Rather, due to the nature of the automotive repair part industry, the customer perceived relationship between the vehicles being repaired and the OEM and non-OEM repair parts, and the nature of GM's pricing program, it is nationwide *competition* that is being eliminated.

**CONCLUSION**

ABPA supports Petitioner's request for a writ of certiorari and believe a writ should issue.

Respectfully Submitted,

ROBERT G. OAKE, JR.

*Counsel of Record*

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*