Nos. 15-14160-AA, 15-14162-AA, 15-14178-AA, 15-14179-AA, and 15-14180-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14160-AA

QUALITY AUTO PAINTING CENTER OF ROSELLE, INC.,
Traded as Prestige Auto Body,

Plaintiff - Appellant,

v.

STATE FARM INDEMNITY COMPANY, et al.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRIEF FOR QUALITY AUTO PAINTING CENTER OF ROSELLE, INC., Traded as Prestige Auto Body, AS PLAINTIFF - APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14162-AA

ULTIMATE COLLISION REPAIR, INC.,

Plaintiff - Appellant,

v.

STATE FARM INDEMNITY COMPANY, et al.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14178-AA

CAMPBELL COUNTY AUTO BODY, INC.,

Plaintiff - Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRIEF FOR CAMPBELL COUNTY AUTO BODY, INC. AS PLAINTIFF - APPELLANT

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Nos. 15-14160-AA, 15-14162-AA, 15-14178-AA, 15-14179-AA, and 15-14180-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14179-AA

LEE PAPPAS BODY SHOP, INC., et al.

Plaintiffs - Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRIEF FOR LEE PAPPAS BODY SHOP, INC., et al.
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Nos. 15-14160-AA, 15-14162-AA, 15-14178-AA, 15-14179-AA, and 15-14180-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14180-AA

CONCORD AUTO BODY, INC.,

Plaintiff - Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRIEF FOR CONCORD AUTO BODY, INC. AS PLAINTIFF - APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Eleventh Circuit Rule 26.1-1, Appellants attached hereto their Certificate of Interested Parties. Due to the length of the Certificate, Appellants attach the same as Appendix 1 to this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 28-1(b), Appellants submit the following statement identifying parent corporations and any publicly held corporation that owns ten percent or more of Appellants' stock: None. All Appellants are privately owned businesses.

STATEMENT REGARDING ORAL ARGUMENT

The questions and issues raised by Appellants implicate fundamental issues of civil pleading that substantially impact every civil litigant's protected right of access to the courts. Specifically, the quantity of facts and degree of factual specificity a complaint must include to constitute sufficient pleading under Rule 8(a)(2) of the Federal Rules of Civil Procedure. This is an area of law which has experienced substantial confusion at the district court level and does not appear to have been fully addressed by this Court. As an issue of unsettled impression within this Circuit, Appellants believe oral argument would be helpful to resolution.

Additionally, Appellants raise issues of state law from without this circuit, particularly the issue of a federal court's authority to alter or amend state law. As this requires an in-depth review of state law and the elements of certain causes of action under Virginia law, Appellant submit oral argument would be efficient and helpful to the Court.

Finally, the limitations of briefing and the number of errors committed by the district court in this case require a minimalist approach to each issue. Appellants submit oral argument would be useful in providing additional discussion the word-count limitation on briefing does not permit.

For these reasons, Appellants request oral argument.

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JURISDICTIONAL STATEMENT

These cases originated in the District Court for New Jersey, the Eastern District of Kentucky, Covington Division, the Eastern District of Virginia, and the Eastern District of Missouri, Eastern Division. Federal jurisdiction was asserted based upon federal question jurisdiction under 28 U.S.C. § 1331, with supplemental jurisdiction over state law causes of action pursuant to 28 U.S.C. § 1367(a).

Subsequent thereto, the Clerk of the Judicial Panel on Multidistrict Litigation issued a conditional transfer order transferring the cases to MDL 2557 pending before the Middle District of Florida, a district court within the Eleventh Circuit.

STATEMENT OF THE ISSUES

1. The district court erred by imposing an incorrect pleading standard upon Appellants' complaint.

2. The district court erred by creating new elements of state law causes of action and ignoring extant state law which contradicts its ruling.

STATEMENT OF THE CASE

Each Appellants is a professional repairer of auto physical damage, i.e., body shops. Appellees are auto insurers, all of which sell policies and service claims of insureds and third-party claimants within the States of Missouri and New Jersey and the Commonwealths of Kentucky and Virginia.

Appellants initiated litigation alleging violations of 15 U.S.C. § 1, asserting the insurers had entered into an agreement, combination or conspiracy to fix prices in the body shop industry and an agreement, combination or conspiracy to boycott Appellants after Appellants made clear they would not submissively comply with fixed prices.

Appellants additionally asserted several state law causes of action, including, but not limited to, tortious interference with business expectations, unjust enrichment and quantum meruit.

The facts underlying both federal and state law claims arise from the same set of actions taken by the Appellees. The body shops have posted labor rates, which vary depending upon the type of labor being performed, i.e., body labor, refinish labor, mechanical labor, frame repair labor, paint labor. In performing repairs, body shops use large quantities of replacement parts from three possible sources: original equipment manufacturer parts ("OEM"), which are manufactured by the original vehicle manufacturer and produced to specifically fit the make and model of a vehicle;

aftermarket ("imitation") parts, new parts manufactured by someone other than the original vehicle manufacturer; and salvage parts, parts stripped from totaled vehicles.

The conflict between body shops and insurers over proper repairs and payment is of long standing. In 1963, the Department of Justice brought suit against the three major insurance trade associations in *United States v. Association of Casualty and Surety Companies*, Docket No. 3106, in the Southern District of New York. The suit alleged violations of 15 U.S.C. § 1 for price fixing and boycotting and resulted in entry of a consent degree which enjoined, in perpetuity: (1) directing, advising or otherwise suggesting that any person or firm do business or refuse to do business with any independent or dealer franchised body shop; (2) exercising any control over the activities of any appraiser of damages to automotive vehicles; (3) fixing, establishing, maintaining or otherwise controlling the prices to be charged by independent or dealer franchised body shops or for replacement parts or labor in connection therewith, whether by coercion, boycott or intimidation or by the use of flat rate or parts manuals or otherwise.

Appellants then developed new strategies to achieve the same ends. The professed a "market rate," whether or not that was the rate the Appellants charged. Most Appellees developed "direct repair programs" ("DRPs"). DRPs were touted as a method of ensuring a pool of pre-screened quality shops to which consumers could

be referred. However, DRPs quickly became one of the methods by which Appellees effected their combination or conspiracy, imposing payment limitations, parts purchase requirements, eliminating payment altogether for certain repair procedures, and a variety of other methods. These terms were enforced whether or not a shop associated with a DRP and whether or not an insurer sponsored a DRP.

After several major hurricanes landed in 2004 and 2005, causing substantial property damage, the Appellants then made significant reductions in payment for auto repairs to Appellants. These reductions took many forms, all of which violated the terms of the 1963 Consent Decree.

Appellees instituted an agreement to uniformly enforce a fixed labor rate ceiling, what they termed the "market rate." The "market rate" bears no relation to the actual rates charged by Appellants or the industry at large, but once imposed does not vary. However, the Appellees undertake no steps to accurately determine the state of the body shop industry. No Appellee has ever defined any "market area."

The only Appellee to conduct even a pretense of determining a so-called "market rate" is State Farm. State Farm's methodology is fundamentally flawed, beginning with inputting fabricated labor rates and ending with a calculation method that holds no statistical or mathematical validity. The details of State Farm's "half plus one" method

are set forth in the complaints.[1]

Though State Farm does not publish or otherwise make publicly available its survey, the other Appellees claim the same "market rate" as State Farm, despite conducting no market condition inquiry of their own and despite the "market rate" having no correlation whatsoever to the actual rates.

The Appellees refuse to pay for certain processes and procedure necessary to return a vehicle to pre-accident condition. Appellants identified over sixty such processes and procedures for which the Appellees refuse to pay when they are required. Not all wrecks are the same, thus repair needs are not identical from car to car. When a repair does call for one or more of the identified processes or procedures, the Appellees refuse to pay for them. Not because they are unnecessary or were not performed, they simply refuse to pay for them.

Appellees selectively disregard repair industry databases. Three databases are used by both the body shops and the Appellees. The databases set out industry accepted standards for repairs: necessary processes and procedures, estimated labor times and materials needs, whether an operation is included in another procedure and

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[1]Appeal No. 15-14178 Doc. No. 1, ¶¶ 58-64;
Appeal No. 15-14180 Doc. No. 1, ¶¶ 52-59;
Appeal No. 15-14160 Doc. No. 1, ¶¶ 41-47;
Appeal No. 15-14162 Doc. No. 1, ¶¶ 40-46; and
Appeal No. 15-14179 Doc. No. 1, ¶¶ 65-71.

billed as a block, or not included and billed as a separate line item. Although sold by three different companies, the contents of each are essentially identical. End users choose among the three based primarily upon price and personal preference.

Though using the databases themselves, the Appellees refuse to abide by them consistently. They refuse to acknowledge the databases when it comes to "blackballed" procedures, but insist they are authoritative if a particular repair exceeds a database estimate. All of the Appellees employ this practice.

Appellees compel use of salvaged or aftermarket parts. Professional repairers generally prefer OEM parts as the safest, highest quality replacement part. Aftermarket parts usually do not fit correctly and must be modified before installation, constructed of poor quality materials and compromise the safety of a vehicle in a subsequent collision. Salvage parts are, of course, parts salvaged from totaled vehicles. Body shops have no way to determine the provenance of such parts, quality, prior history or any other factor directly impacting the integrity of the part and thus the safety of the vehicle.

Despite these known safety risks, Appellees insist on their use. If a body shop (or vehicle owner) balks at using them, the Appellees refuse to pay for the new, safe part. Instead, the Appellees will only pay the amount for which a junkyard or aftermarket part could have been purchased, leaving the Appellants to absorb the cost

or render an incomplete or unsafe repair. All of the Appellees employ this practice.

Because junkyard parts are often damaged and aftermarket parts do not fit correctly, they must be fixed or modified before installation. However, Appellees refuse to pay the labor time required to fix or modify the parts before they can even be used, again leaving Appellants to absorb the cost. All of the Appellee insurers employ this practice.

Body shops which "buck the system," including Appellants, are labeled problem shops. The identity of "problem" shops are shared by the Appellees with each other and once identified, the Appellees commence a group boycotting of the problem shop. This boycotting is effected through a practice known as "steering."

Steering is the insurer practice of enlisting consumers as unwitting accomplices in a boycott of problem shops. It begins immediately upon notice by a consumer that a problem shop is their choice of repair facility. The Appellee engages a "script" which contains false and misleading statements and misrepresentations about the quality, cost and integrity of the boycotted shop's work.

Appellees also exert economic coercion upon consumers, most often in tandem with making false and misleading statements about the Appellants. For instance, consumers are threatened with delay or withholding of a rental vehicle if they patronize Appellants' shops, or since the shop takes too long, the consumer will run out of rental

car time and have to bear that cost themselves, or because the shop "overcharges," the consumer will have to pay any amount above what the Appellees decide to pay.

The price fixing and boycotting reached a critical mass in early 2014, when Appellants decided to fight back legally. This litigation was thereafter commenced.

PROCEDURAL BACKGROUND

Appeal No. 15-14160

Appellants filed their complaint on November 7, 2014, in the District of New Jersey. The cause was transferred to the Middle District of Florida as part of MDL 2557 and assigned Cause No. 6:14-cv-06012. On February 19 and 20, 2015, Appellees filed multiple motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Appeal No. 15-14162

Appellants filed their complaint on November 7, 2014, in the District of New Jersey. The cause was transferred to the Middle District of Florida as part of MDL 2557 and assigned Cause No. 6:14-cv-06013. On February 19 and 20, 2015, Appellees filed multiple motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Appeal No. 15-14178

Appellants filed their complaint on November 5, 2014, in the Eastern District of Kentucky, Covington Division. The cause was transferred to the Middle District of Florida as part of MDL 2557 and assigned Cause No. 6:14-cv-06018. On February 19 and 20, 2015, Appellees filed multiple motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Appeal No. 15-14179

Appellants filed their complaint on November 7, 2014, in the Eastern District of

Virginia. The cause was transferred to the Middle District of Florida as part of MDL 2557 and assigned Cause No. 6:14-cv-06019. On February 20, 2015, Appellees filed multiple motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Appeal No. 15-14180

Appellants filed their complaint on November 3, 2014, in the Eastern District of Missouri, Eastern Division. The cause was transferred to the Middle District of Florida as part of MDL 2557 and assigned Cause No. 6:15-cv-06022. On February 19 and 20, 2015, Appellees filed multiple motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

All Appeals

Appellants filed their Omnibus Response to these motions on March 10, 2015.

On June 3, 2015, the Magistrate issued a report and recommendation recommending the complaint be dismissed without prejudice on a variety of grounds. Appellants filed an objection to this recommendation on June 29, 2015. The district court adopted the report and recommendation on August 17, 2015. This appeal was subsequently timely noticed.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint pursuant to F.R.C.P. 12(b)(6). Review is limited to the four corners of the complaint and any exhibits attached thereto. *Allen v. Hous. Auth.*, 2015 U.S. App. LEXIS 20278, 11-12 (11th Cir. Nov. 23, 2015).

SUMMARY OF THE ARGUMENTS

The district court employed an improper and heightened pleading standard in dismissing Appellants' complaint, a standard substantially higher than that set forth by the Federal Rules of Civil Procedure and explained by the United States Supreme Court. The district court improperly breached its obligations and duties by adopting the arguments of Appellees set out in their various motions to dismiss, disregarding or discrediting facts alleged in the complaint, mischaracterizing factual allegations as conclusory statements, applying affirmative defenses to causes of action, and requiring Appellants to plead specific facts beyond that required by Rule 8 of the Federal Rules of Civil Procedure.

The district court further erred by creating new elements for state law causes of action, ignoring or modifying elements of state law causes of action which do exist, ignoring state authority which contradicts the court's ruling, making dispositive conclusions which are specifically reserved to the jury, making conclusions which nullify corollary state law, and drawing dispositive factual conclusions contradicted by the facts of the complaints.

The district court's dismissal on all asserted grounds is in error and, respectfully, must be reversed.

ARGUMENT

Because the district court made the same errors in analyzing different claims, Appellants do not repeat extensive citations to authority so as to avoid unnecessarily extending this brief. Where duplication of citation to authority and argument would occur, Appellants refer the Court to sections of the brief that thoroughly set forth applicable concepts and authority as noted within the brief.

Additionally, the dismissal orders are not "of a piece." The federal magistrate issued a report and recommendation, which was accepted with additional discussion on some issues and was filed as an order in the MDL cause number, 6:14-md-2557. The federal claims were dismissed via adoption of a prior order entered in January, 2015, in a companion case. The report and recommendation is identified by document number for each individual cause. The order adopting the report and recommendation is identified by its MDL document number and the January, 2015, order is referenced by its Westlaw citation.

I. FEDERAL CLAIMS

The complaints assert two federal causes of action, both arising under 15 U.S.C. § 1, the Sherman Antitrust Act, price fixing and boycotting.

With two cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) the Supreme Court caused substantial confusion, leading some courts to believe a heightened pleading standard applies to antitrust cases. However, the significance of *Twombly* was not creation of a heightened antitrust pleading standard, but to finally retire the "no set of facts" language utilized in *Conley v. Gibson*, 355 U.S. 41 (1957).

As the Court made clear, a complaint need only set out sufficient facts to plausibly suggest the existence of an agreement so as to raise the right to relief beyond the merely speculative level. *Id.* at 555. This, as the Court clearly pointed out, has *always* been the Rule 8 standard. *Iqbal*, too, unequivocally reminded that Rule 8 governs the pleading standard in all civil actions and proceedings in United States district courts. *Iqbal*, 556 U.S. at 1953.

Circuits which have addressed the question directly, including this one, have unequivocally stated neither *Twombly* nor *Iqbal* create a heightened pleading standard, either generally or specific to antitrust claims. *Nettles v. City of Leesburg - Police Dep't*, 415 Fed. Appx. 116, 121 (11th Cir. 2010)

Thus, all that is required of a plaintiff is to comply with Rule 8(a)(2). This rule requires only that a complaint set forth a short and plain statement of the facts underlying the plaintiff's claim[s] for legal relief. Detailed factual allegations are not required as the complaint is meant only to give a defendant fair notice of the plaintiff's claims and the grounds upon which those claims rest. *Twombly*, 550 U.S. at 555, *Erickson v. Pardus*, 551 U.S. 89, 93 (U.S. 2007), *Nettles,* 415 Fed. Appx. at 120.

Despite all of the readily available authority, the district court in the present case nonetheless imposed a substantially heightened pleading standard.

A. Price Fixing

The Sherman Act makes illegal any combination or conspiracy in restraint of trade. 15 U.S.C. § 1. This prohibition includes agreements to fix the prices of goods or services.

Such agreements between ostensible competitors are referred to as horizontal price fixing and are *per se* illegal. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

These agreements are automatically deemed so pernicious to free-market

competition that no additional analysis is required–once a horizontal price fixing agreement has been found, it is per se a violation of the Sherman Act. *State Oil Co. v. Khan*, 522 U.S. 3, 11 (1997). *See also*, *Ariz. v. Maricopa County Medical Soc.*, 457 U.S. 332, 344 (1982).

Under the Sherman Act it is irrelevant whether the agreement is to fix maximum prices (as in the present cases) or minimum prices. Both "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)(overruled on other grounds). See also, *Maricopa County Medical Soc.*, 457 U.S. at 347.

A horizontal price-fixing agreement has but two essential elements: (1) an agreement to fix prices; and (2) injury to Plaintiffs as a result. *Godix Equip. Export Corp. v. Caterpillar, Inc.*, 948 F. Supp. 1570, 1576 (S.D. Fla. 1996)(citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-343 (1990); *Business Electronics Corp. v. Sharp*, 485 U.S. 717, 723-725 (1988)).

In its order dismissing the Complaint, the district court adopted the reasoning set forth in a companion case, *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co., et al*, 6:14-cv-310 for its ruling on the federal antitrust claims. This order is available to the Court at *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, No. 6-14-

CV-2257-GAP-TBS, 2015 WL 304048, (M.D. Fla. Jan. 21, 2015)

The district court relied primarily upon the conclusion that no facts had been pled which suggested anything more than independent businesses acting in parallel out of their own economic self interest. *Id.* at *10. The district court further noted the Complaint did nothing to place Appellees' conduct in a context suggesting the existence of an agreement. *Id.* at *11.

Respectfully, the only manner in which the district court could have reached the these conclusions is to disregard the relevant pleading standard and disregard or disbelieve the facts asserted in the complaints.

The complaints included the following facts:

- None of the Defendants save State Farm perform any review of "the market" at all and have no independent knowledge of "the market" or a "market rate".
- The "survey" conducted by State Farm does not reflect the labor rates actually charged by body shops.
- The "survey" conducted by State Farm uses falsified data, specifically but not limited to ordering body shops to lower the labor rates entered into the "survey" or altering the labor rates entered into the "survey" by body shops.
- The "survey" conducted by State Farm utilizes a method of analysis which has no mathematical or statistical validity.
- The results of State Farm's "survey" are fabricated.

- State Farm does not publicly share the results of their "survey".
- The Defendants all pay the same "market" labor rate which is identical to the fabricated State Farm "market rate".
- Representatives of the Defendants have specifically linked their "market rate" to that of State Farm, asserting they are restrained from altering their rate unless and until State Farm permits.
- All the Defendants utilize the same false reasons for refusing to honor posted labor rates, i.e., "you're the only one who wants a higher labor rate" when it is known multiple body shops have increased labor rates.
- The Defendants routinely compel or attempt to compel use of salvage or imitation parts which are unsafe or inappropriate.
- When Plaintiffs refuse to use unsafe or inappropriate salvage or imitation parts, the Defendants refuse to pay for appropriate parts but only pay the amount for which the unsafe or inappropriate part could have been purchased.
- Defendants routinely refuse to pay or pay in full for the same processes and procedures required to return a vehicle to its pre-accident condition.
- Defendants refuse to pay or pay in full for the same processes and procedures in contravention of body shop industry labor databases which the Defendants themselves use.
- Defendants all use the same false reasons for refusing to honor the database estimates, i.e., "you're the only one charging for that" when it is known multiple body shops charge for a particular process or procedure.[2]

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[2]Appeal No. 15-14178 Doc. No. 1 ¶¶ 58-65, 74-91, 93;
Appeal No. 15-14180 Doc. No. 1 ¶¶ 52-59, 68-86, 88-89;
Appeal No. 15-14160 Doc. No. 1 ¶¶ 40-47, 56-70, 72;
Appeal No. 15-14162 Doc. No. 1 ¶¶ 39-46, 57-71, 73; and

The Appellees argued the facts allege nothing more than independent business conduct that just happens to be identical. The district court found the argument persuasive.

The context, or suggestion of agreement, the district court said was lacking is clearly present when the facts alleged are viewed in their entirety, rather than individually.

Appellants understand that something more than parallel conduct alone is required to adequately plead this antitrust claim. *Twombly*, 550 U.S. at 556-57. Courts generally refer to these as plus factors.

There is no finite list of plus factors, as the "something extra" varies with the facts of a case, though several have been identified by various courts. The Supreme Court identified parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties, and conduct that indicates the sort of restricted freedom of action and sense of obligation one generally associates with agreement. *Id.* at 557, FN 4.

Other courts have identified as plus factors: (1) whether the defendants' actions,

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Appeal No. 15-14179 Doc. No. 1 ¶¶ 64-71, 80-94, 96.

if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether the defendants have a common motive to conspire. *Re/Max Int'l, Inc. v. Realty One, Inc.,* 173 F.3d 995, 1009 (6th Cir. 1999).

In fact, one of these plus factors, the sharing of information by competitors, has been characterized as a "super plus factor" one to be weighted most heavily in favor of finding collusion. William E. Kovacic, PLUS FACTORS AND AGREEMENT IN ANTITRUST LAW, Vol. 110:393, Mich. Law Rev. (December 2011).

There is no set number of plus factors a complaint must include to be considered adequate. Parallel conduct in conjunction with a single plus factor may be sufficient. Although the complaints does not label them as such, they do include facts supportive of several plus factors:

- Conduct that probably does not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties:
  - All of the Appellees reaching the same, identical "market rate" which conflicts with actual market rates, where none of them save one even purports to review body shop market conditions and that one, State Farm, simply fabricates its result, which State Farm refuses to public. It is far more likely State Farm is sharing this information privately with the other Appellees than it is the product of chance or coincidence that all the Appellees came to identical

conclusions in the face of contradictory reality and with no market information whatsoever to inform their conclusions.

    - All Appellees devising the same set of processes and procedures they will not pay for and devising the exact same excuses for refusing to pay though having possession of contradictory information from body shops and all in contradiction of the industry databases the Appellants use themselves. It is far more likely this is the result of a pre-existing agreement than it is the product of chance or coincidence that all Appellees created identical operating practices, using identical "scripts" to justify those practices in the face of contradictory reality, as well as industry-accepted repair guidelines.

- conduct that indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement:

    - Representatives of various Appellees have stated on multiple occasions they are restricted from altering the purported "market rate" unless and until authorized by State Farm. Requiring "permission" from a competitor to set your own company procedures is behavior indicative of restricted freedom and obligation to a pre-existing agreement.

- whether the defendants have been uniform in their actions:

    - The Appellees adhere to the artificial State Farm-created "market rate" over the course of years, adhere to the same set of "no pay" processes and procedures, for identical articulated reasons, in contradiction of the databases used by the Appellees themselves.

- whether the defendants have a common motive to conspire:

    - The Appellees are driven by the shared motive of greed–the desire to maximize profits .

- whether the defendants have exchanged or have had the opportunity to

exchange information relative to the alleged conspiracy:

- The identical labor rates, identical refusal to compensate for the same processes and procedures, identical false excuses for such refusal, uniform adherence to the refusal to alter labor rates until State Farm does is indicative of shared information and agreement overall and agreement on the language to be used in refusing payment for repair services (a "script").[3]

The district court ignored all of these facts. individually, each fact is insufficient to create a context plausibly suggesting a pre-existing agreement. However, the district court was obligated to view not individual facts, but the entirety of the complaint. "[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)(abrogated by statute on other grounds)(internal punctuation retained).

Appellants set forth facts supporting behaviors that are considered the hallmarks of price fixing by the federal authorities tasked with prosecuting such activity.

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[3]Appeal No. 15-14178 Doc. No. 1 ¶¶ 58-65, 74-91, 93;
Appeal No. 15-14180 Doc. No. 1 ¶¶ 52-59, 68-86, 88-89;
Appeal No. 15-14160 Doc. No. 1 ¶¶ 40-47, 56-70, 72;
Appeal No. 15-14162 Doc. No. 1 ¶¶ 39-46, 57-71, 73; and
Appeal No. 15-14179 Doc. No. 1 ¶¶ 64-71, 80-94, 96.

According to the Department of Justice, price fixing takes many forms, and any agreement that restricts price competition violates the law. Specific examples of behavior indicating price-fixing agreements include holding prices firm, and adopting a standard formula for computing prices.[4]

The allegations of the complaints set out facts which meet these price fixing hallmarks. Not only do the complaints allege the Appellees have held body shop labor rates at a fixed ceiling, despite having actual knowledge labor rates have changed, the complaints allege tacit admissions of agreement to keep the fixed ceiling in place–no insurer will alter its purported "market rate" unless and until State Farm gives permission.

The complaints further set out the factual indicators of an agreed-upon standard formula for fixing prices on parts, paint and materials. While the cost of repairs varies from one repair to another, the Appellees nonetheless utilize a standard formula for determining what each will pay for and what they will not pay for. The Appellees uniformly refuse to pay for more than salvage or aftermarket parts, even when that is not the part used; the appellees refuse to pay more than the fixed ceiling for paint and materials. The Appellees uniformly refuse to pay for identical processes and

[4] http://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes

procedures, for the same articulated reasons, though those same processes and procedures are required to safely complete repairs.

In the absence of an agreement, there should be variability. At least some of the Appellees should find a pinch weld necessary following a frame repair every now and again, for instance.[5] No two vehicles wreck the same. Every wreck is different. The estimates written by the Appellees, however, are astonishingly uniform. Given the individuality of each repair, the district court should have given the uniformity of estimates prepared by the Appellees some consideration in analyzing context. However, based upon the ruling, the district court gave this no consideration at all.

The Department of Justice has further warned collusion may occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are "fringe" sellers who control only a small fraction of the market.[6] That is precisely the setting of the current complaints. Though multiple defendants are named, in reality, only a handful of companies are represented; the vast majority of named defendants are subsidiaries or affiliates of each other.

For example, in the Virginia complaint, nearly seventy percent (70%) of the defendants are subsidiaries or affiliates of only eight insurers, State Farm, USAA,

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[5]See Exhibit “3" to the complaints.

[6]*Id.*

GEICO, Allstate, Nationwide, Travelers, Farmers[7] and Liberty Mutual. These same eight insurers hold well over seventy percent (70%) of the private passenger auto insurance market in the Commonwealth of Virginia[8]. The economic realities of the parties and the economic power the Appellees hold over body shops should have contributed to the district court's analysis of context. However, based upon the ruling, the district court gave this no consideration at all.

Additionally, insurer agreements to fix body shop rates has happened before. As described above in the Statement of the Case section of this brief, a consent decree was entered which prohibits the members of the three major insurance industry trade associations from engaging in the same conduct in which they are now engaging because it constituted illegal price fixing and boycotting.[9] Those prohibitions are binding upon the trade associations and their member companies in perpetuity. That identical antitrust violations have occurred before, in the very same industries and involving the very same practices the consent decree prohibited should have contributed to the district court's analysis of context. However, it appears the district court gave this fact no heed at all.

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[7]The 21st Century insurance companies are "Farmers Family" of companies. https://www.farmers.com/companies/state/

[8]Appeal No. 15-14179 Doc. No. 1, Exhibit "1."

[9]See, e.g., Appeal No. 15-14179 Doc. No. 1, ¶¶ 110-114 and Exhibit "4."

The district court ignored vast quantities of facts and the reasonable inferences to be drawn from them which, when viewed holistically, create a context plausibly suggesting the existence of an agreement to fix prices. The complaints alleged facts meeting numerous plus factors, including facts alleging a "super plus factor." The complaints allege facts considered the hallmarks of price fixing by the companies which control a vast percentage of the private passenger auto insurance market, and, to be blunt, they have done it before.

Appellants are not required to present an argument better or more persuasive than the Appellees present in their motions to dismiss.

> The Supreme Court requires only a plausible inference of the existence of an agreement. It does not require the Plaintiffs to present a *more* compelling or convincing theory than any other. As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.

Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. Ill. 2010)(emphasis in original). See also, *Gage v. New Jersey*, 408 Fed. Appx. 622, 623 (3d Cir. 2010).

The trial court should not have been swayed by the alternative suggestions offered within the motions to dismiss. Appellants are not required to win on the

complaint, merely allege sufficient facts to support a plausible suggestion of the existence of an agreement by the Appellees. Appellants respectfully submit the trial court erred in ruling the complaints failed to sufficiently allege an agreement to fix prices in violation of the Sherman Antitrust Act.

B. Boycotting

The District Court disregarded nearly all of the facts asserted within the Complaint relevant to Appellants' claim for boycotting and imposed an incorrect pleading standard

In addition to price fixing, the Sherman Act prohibits group boycotting. 15 U.S.C. § 1. Also like price fixing, horizontal group boycotting is a *per se* violation of the Sherman Act. *Nynex Corp. v. Discon*, 525 U.S. 128, 135 (1998)(defining a horizontal boycott as an agreement among direct competitors).

Group boycotting, like price fixing, is deemed so detrimental to competition and free enterprise that anticompetitive effect is presumed and a party need not adduce evidence to prove such an effect. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290 (1985).

Boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). See also *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258, 1263 (11th Cir.

Fla. 1998).

All a plaintiff need show to prevail on a claim of group boycott is the existence of a horizontal arrangement between the defendants to jointly participate in the boycott. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998).

The district court's analysis of Appellants' boycotting claim was even slimmer than that for price fixing. The district court noted all the Appellants asserted was that Appellees allegedly "badmouthed" the Appellants, producing no "evidence" of a concerted refusal to deal. *A & E Auto Body, Inc.*, 2015 U.S. Dist. LEXIS 1615.

Again, this conclusion could only be reached if the district court ignored all of the facts asserted in the complaints and the reasonable inferences to be drawn from those facts. The complaints included the following facts:

- The choice of body shop belongs solely to the consumer; Defendants are not permitted to make policy payments contingent upon use of preferred body shops which are compliant with Defendants fixed prices.

- Body shops, including Plaintiffs, are targeted by Defendants as punishment for refusing to comply with Defendants' fixed prices.

- Defendants effect punishment of noncompliant shops, including Plaintiffs, by steering away customers who have verbalized the intention of conducting business with the Plaintiffs.

- Defendants steer away customers who have verbalized the intention of conducting business with the Plaintiffs by conveying knowingly false and misleading statements impugning the quality, cost and integrity of Plaintiffs' work as well as exerting economic coercion upon the

customers.

- All of the Defendants utilize the same script containing identical false and misleading steering statements.

- Defendants withhold or threaten to withhold rental car availability unless the consumer agrees to remove their car from an Appellee's shop or refrain from patronizing an Appellee; threaten the consumer they will be responsible for any charges the insurers chooses not pay unless the consumer agrees to remove their car from an Appellee's shop or refrain from patronizing an Appellee; telling consumers they won't be able to inspect the vehicle for up to a week unless the consumer agrees to remove their car from an Appellee's shop or refrain from patronizing an Appellee and the delay will result in rental car charges the insurer will refuse to pay.[10]

The district court decided all of these facts merely constitute "badmouthing" and shrugged that away, concluding the Appellants did not even allege the Appellees had ever refused to allow a consumer to do business with Appellants or refused to pay for repairs performed by an Appellant. Appellants were not required to allege these things. It is the agreement to restrain trade that constitutes a violation of the Sherman Act, not whether or not the agreement is successful. See *Brooke Group v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 251 (1993). The district court apparently did not consider whether the actions taken were indicative of a group boycott, only whether the

[10]Appeal No. 15-14178 Doc. No. 1 ¶¶ 104-109, 124-135;
Appeal No. 15-14180 Doc. No. 1 ¶¶ 100-105, 120-131;
Appeal No. 15-14160 Doc. No. 1 ¶¶ 82-86, 106-109, 121-128;
Appeal No. 15-14162 Doc. No. 1 ¶¶ 83-87, 109-112, 124-130; and
Appeal No. 15-14179 Doc. No. 1 ¶¶ 105-109, 127-130, 145-152.

contents of the "badmouthing" was sufficiently outrageous.

It is irrelevant whether or not Defendants are successful in each and every attempt to boycott, or whether or not each such event requires use of the full panoply of Appellees' boycotting arsenal. As noted above, it is not the success or failure of the goal of an agreement that violates the Sherman Act, it is the agreement itself.
Federal jury instructions incorporate this principle: "The agreement itself is a crime. Whether the agreement is ever carried out or whether it succeeds or fails does not matter. Indeed the agreement need not be consistently followed. Conspirators may cheat on each other and still be conspirators. It is the agreement to do something that violates the law. That is the essence of a conspiracy." *United States v. Stora Enso North America Corporation*, 03:06cr323 (CFD) United States District Court for the District of Connecticut (July 2007).

But the district court's reliance upon instances of the purported failure of the boycott strongly indicates the facts actually alleged were simply not credited as true. The district court clearly believed some other set of facts would be more plausible. However, the district court was not free to make that sort of judgment. *Swanson,* 614 F.3d at 404.

The facts of the Complaint plausibly suggest the existence of an agreement to boycott the Appellants by the Appellees. The facts, viewed holistically, create the

context the district court found missing. In order to punish Appellants for non-compliance with fixed prices, the Appellees utilize third parties as unwitting accomplices to drive business away from Appellants' shops. They do so by making identical intentionally false and misleading statements to consumers who have identified an Appellant as the chosen repair shop and employing the same methods of economic coercion and financial threat.

Use of identical false and misleading statements is particularly telling. This, by itself, satisfies multiple plus factors. It is unlikely the Appellees' creation of an identical script is the result of mere chance, coincidence or independent judgment. The only manner such a conclusion may be reached is if the district court decided the statements were not false or misleading, which, again, the district court was not permitted to do.

Utilizing the same script is also indicative of information sharing, an agreement on formulating the most effective set of statements to utilize, and unity of action by the Appellees.

The Appellees further utilize the same set of economic pressure and threats against consumers to compel or attempt to compel them away from Appellants' businesses.

The Complaint further alleges a common goal, punishment for noncompliance. It also appears the district court read the boycotting allegations not only as discrete

facts but in isolation from the remaining complaint. The Appellees' actions in fixing prices is part and parcel of the boycotting environment, even if not technically an element of the claim. Again, the only manner in which the district court could find context lacking is if it simply chose to disbelieve the facts asserted and thereafter refused to draw inferences favorable to the Appellants.

The facts set out in the complaints more than sufficiently set forth a plausible basis that Appellees have entered an agreement and acted in furtherance of a common goal or plan.

II. STATE LAW CAUSES OF ACTION

Though the district court's discussion of the state law claims are lengthy, there are actually only a handful of sentences setting forth the grounds of the dismissal for each.

In ruling on a 12(b)(6) motion to dismiss, a trial court's duty is narrow in focus. The court reviews the complaint to determine whether it adequately pleads facts relative to the elements of an asserted cause of action and whether those facts, taken collectively, suggest a plausible basis for liability. *Twombly*, 550 U.S. at 555.

In executing this duty, the trial court has a number of affirmative obligations: it is required to accept the factual allegations of the complaint as true and to draw all reasonable inferences in favor of the plaintiff. *Id.* When a case involves a state law

claim, the district court is required to faithfully apply state law, even where the district court believes state law is lacking or insufficient. *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, 819 (11th Cir. 1985).

The trial court also has "negative" obligations. The trial court is prohibited from making credibility determinations of the facts asserted in the complaint. *Cohan v. Bonita Resort & Club Ass'n, Inc.*, No. 2:15-CV-61-FTM-38DNF, 2015 WL 2093565, at *5 (M.D. Fla. May 5, 2015). The trial court may not disregard facts asserted in the complaint unless they are of such fantastical quality as to defy reality as we know it, such as claims of time travel or encounters with space aliens. *Iqbal*, 556 U.S. at 696.

As the trial court is required to accept the factual allegations as true, it is prohibited from favoring the alternative facts or hypotheticals suggested by defendants. *Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1368 (M.D. Fla. 2005). See also, *Grande Village LLC v. CIBC Inc.*, 2015 U.S. Dist. LEXIS 27384, 17-18 (D.N.J. Mar. 6, 2015).

The district court is not free to select amongst plausible versions of events for the one its finds most plausible. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). The privilege of selecting between or among plausible versions of events belongs to jury, not the court. *Id*. (citing *Monsanto Company v. Spray-Rite Service Corp.*, 465 U.S. 752, 766 and FN 11 (1984).

Plaintiffs are not required to present a set of facts that is *more* compelling than the alternatives presented in motions to dismiss. A plaintiff need only present allegations which, taken as true, present a plausible basis for liability, even if those allegations strike a court as unlikely to ultimately prevail. *Twombly*, 550 U.S. at 556.

For each and every cause of action asserted in the complaint, the district court erred by disregarding its positive obligations and failed to refrain from its negative ones.

A. Unjust Enrichment

In analyzing the unjust enrichment claim, the district court did not distinguish between the law of any state to make its ruling. The reasons given were applicable to all states represented in this appeal. The district court concluded it is not unjust for the Appellees to retain the benefits conferred by the Appellants without making full payment for those benefits. These reasons given were:

- Plaintiffs failed to allege facts showing repair services were performed at the request of the Defendants, nor performed as the result of a good faith mistake;[11]
- Plaintiffs failed to allege facts to support a conclusion that their failure to

[11]Pages 24-26 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

bargain with Defendant was justified under the circumstances;[12]

- Plaintiffs failed to allege facts to show that bargaining was either impractical or impossible;[13]

- Plaintiffs failed to allege facts that performing any particular repairs without first bargaining was necessary to discharge a legal duty of their own or to protect their own interests;[14]

- The fact that Plaintiffs rendered services at the request of consumers did not justify their failure to bargain with the Defendants.[15]

The ruling represents a host of both legal and factual errors. Each holding contains incorrect premises which are then utilized to substantiate additional incorrect conclusions and are internally dependent upon each other for the result. For example, the court found, "There is no allegation in any of these complaints that Defendants (rather than their insureds or claimants) asked any of the Plaintiffs to perform repairs. Plaintiffs must therefore plead facts sufficient to support a conclusion that their failure to bargain with Defendants before performing repairs was justified under the circumstances."

In these two sentences, the district court created three new elements of state law,

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[12] *Id.* at pg. 26.

[13] *Id.*

[14] *Id.*

[15] *Id.* at pg. 27.

modified existing state law, violated corollary state law and public policy, applied affirmative defenses not pled by the Appellees, and applied an incorrect pleading standard.

As each of the district court's rulings are internally dependent upon multiple errors, Appellants separate them into discrete discussions. Individually, each error requires reversal. Collectively, the errors are overwhelming.

1. The district court erred by creating new elements for unjust enrichment

The vast majority of the district court's ruling was predicated upon the purported failure of the Appellants to bargain their prices with Appellees.[16] Numerous errors cascaded from this erroneous predicate with one of the most important being the improper creation of new elements for a state law claim.

In ruling on matters of state law, federal courts are not free to alter or amend state law but must faithfully apply it as it exists. *Provau,* 772 F.2d at 819. This is so even if the district court disagrees with the outcome following state authority would require or the reasoning employed. *Id.* This is a long recognized and respected principle of law. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-237 (U.S. 1940)(emphasis added).

[16] *Id.* at pp. 24-27.

Thus, a district court may not create new elements for a state law cause of action, alter existing ones or create authority which would negatively affect execution under corollary law or state regulation.

2. No state law at issue includes bargaining as an element of the claim of unjust enrichment

a. State law elements of unjust enrichment claim

The elements of each affected state's unjust enrichment cause of action are:

Virginia

(1) conferral of a benefit upon the defendant by the plaintiff; (2) defendant's knowledge of the benefit for which it should reasonably have expected to pay; and (3) defendant's acceptance or retention of the benefit without paying for its value. *Schmidt v. Household Fin. Corp., II*, 661 S.E.2d 834 (Va. 2008).

New Jersey

(1) defendant received a benefit; and (2) that retention of that benefit without payment would be unjust. The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights. *Cameco, Inc. v. Gedicke*, 299 N.J. Super. 203, 218 (App. Div. 1997).

Missouri

(1) a benefit conferred by a plaintiff on a defendant; (2) the defendant's appreciation of the fact of the benefit; and (3) the acceptance and retention of the benefit by the defendant in circumstances that would render that retention inequitable. *Hertz Corp. v. RAKS Hosp., Inc.,* 196 S.W.3d 536, 543 (Mo. Ct. App. 2006).

Kentucky

(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. Ct. App. 2009).

b. Bargaining prices is not an element of an unjust enrichment claim

The district court *sua sponte* added the requirement of bargaining to the essential elements of an unjust enrichment claim. However, bargaining is not an element of any states' established law of unjust enrichment. A claim cannot be dismissed for failing to allege facts in support of a legal element which does not exist. See, e.g., *ISystems v. Spark Networks, Ltd.*, 428 F. App'x 368, 372, FN 4 (5th Cir. 2011)("Contrary to Spark defendants' argument, establishing irreparable injury or inadequacy of remedies at law is not an element of a claim under § 1114(2)(D)(v), and thus ISystems' failure to allege facts sufficient to satisfy the requirements for an injunction is irrelevant.") and

Waters v. Int'l Precious Metals Corp., 172 F.R.D. 479, 495-96 (S.D. Fla. 1996).[17]

As noted, a number of erroneous conclusions flowed from the purported failure to bargain. However, as bargaining is not an element of the claim, Appellants were not required to bargain before seeking relief under an unjust enrichment claim, nor were they required to allege facts justifying failure to bargain under the circumstances, or that bargaining was impractical or impossible. If an act is not legally required, its absence need not be justified, either.

In their objections to the report and recommendation, the Appellants pointed out bargaining was not an element of an unjust enrichment claim and specifically requested the district court provide state-specific authority that it was.[18] The district court did not so do.

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[17]This is, of course, recognized across the judiciary: *Lange v. The Univ. of Chicago*, No. 15-C-7303, 2015 WL 7293588, at *2 (N.D. Ill. Nov. 19, 2015), *Ward v. TheLadders.com, Inc.*, 3 F. Supp. 3d 151, 169, FN 10 (S.D.N.Y. 2014), *Coleman v. Schwarzenegger*, No. C01-1351-THE, 2008 WL 4813371, at *3 (E.D. Cal. Nov. 3, 2008), *Shaw v. Doherty Employment Grp.*, No. IP00-0139-C-T/G, 2001 WL 290376, at *1 (S.D. Ind. Feb. 7, 2001).

[18]Pages 3-4 of Doc. No. 125 (Appeal No. 15-14178); Doc. No. 73 (Appeal No. 15-14180); Doc. No. 47 (Appeal No. 15-14160); Doc. No. 49 (Appeal No. 15-14162); Doc. No. 52 (Appeal No. 15-14179).

c. There is no generalized duty to bargain, discount or negotiate prices

In adopting the report and recommendation, the district judge superficially acknowledged there was no duty upon the Appellants to bargain then immediately contradicted itself: "So while it is true that the Plaintiffs are under no obligation to negotiate with the Defendants (Objection 1), they must demonstrate that they should be paid even where they did not do so." and "Plaintiffs have not pled they could not negotiate, merely that they did not believe such negotiations would be fruitful[.]"[19]

The district court cited no state authority to support its conclusion nor identified any other source of the non-duty to bargain that must nevertheless be justified. The district court did cite authority but none bore any reference, however tenuous, to a purported duty to bargain.

Even outside the context of an unjust enrichment claim, there exists no generalized duty upon a seller of goods or services to bargain, ever. The national judiciary has recognized for over a century the inherent authority of a private business to set its own prices:

> The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but

[19]MDL 6:14-md-2557, Doc. No. 222, pg. 12.

destroyed.

Whitwell v. Continental Tobacco Co., 125 F. 454, 459-460 (8th Cir. Minn. 1903). See also, *Brosious v. Pepsi-Cola Co*., 59 F. Supp. 429, 431 (D. Pa. 1945), *Rolley, Inc. v. Merle Norman Cosmetics, Inc*., 129 Cal. App. 2d 844, 849 (Cal. App. 1954), *First Nat'l Bank v. Missouri Glass Co.*, 169 Mo. App. 374, 397-398 (Mo. Ct. App. 1912).

What Appellants could, theoretically, have done differently, such as bargaining, does not transmute into a compulsory element, nor to dismissal due to its absence. The Plaintiffs are legally permitted to set their own prices. They are not required to bargain or discount their prices, nor justify a failure or refusal to do so. The district court nonetheless created the element of a duty to bargain, even after acknowledging no such duty existed, which it is not permitted to do under longstanding authority.

As bargaining is not an element of the claim, nor is providing justification for not bargaining, Appellants submit each of the conclusions reached by the district court based upon bargaining (or lack thereof) is erroneous and must be reversed.

d. The district court's ruling the Appellants failed to allege facts that bargaining was impossible or impractical is erroneous

Though Appellants are not required to bargain, negotiate or discount their prices, the conclusion drawn by the district court that Appellants failed to allege facts that bargaining was either impossible or impractical is erroneous.

The Appellants averred that payment made by Appellees was proffered on a take-it-or-leave-it basis, that protests regarding omission of particular processes and procedures by Appellees was ignored, even when they were safety related, that Appellees were provided with invoices showing itemized costs for paint and materials which exceed the amount "allowed" by the Appellees and the Appellants were in fact working at a loss but these, too, were ignored,[20] that refusing to simply accept what was proffered led directly to punishment, economic coercion and tortious conduct by the Appellees.[21]

The complaints also set out that insureds and claimants for whom the Appellees were responsible to pay repair costs make up such a substantial majority of repair business that it was not economically feasible to refuse the trade. Turning away insurance-paying customers would result in Appellants' very quickly closing their

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[20]The New Jersey Department of Banking and Insurance was sufficiently troubled by the underpayment of paint and materials by auto insurers that it issued Insurance Bulletin No. 07-20 in October, 2007, which recognized body shops were working at a loss due to insurers' failure to write estimates sufficient to restore vehicles to pre-accident condition. Auto insurers were directed to address the problem.

[21]Appeal No. 15-14178 Doc. No. 1, ¶¶ 48, 52, 56, 63-65, 74-81, 82-84, 87, 89, 91-93, 98-103, 109;

Appeal No. 15-14180 Doc. No. 1, ¶¶ 40-41, 45-46, 50, 53, 58, 69-76, 77-79, 82, 84, 86-89, 98-99;

Appeal No. 15-14162 Doc. No. 1, ¶¶ 37, 40, 44-46, 57-63, 64-66, 68-73, 78-82, 94-95;

Appeal No. 15-14160 Doc. No. ¶¶ 31-32, 36, 38, 41, 45-47, 56-62, 63-65, 67, 69-72, 77-80, 81, 92-93, 97-98; and

Appeal No. 15-14179 Doc. No. 1, ¶¶ 53, 54, 58, 60, 62, 70-71, 80-86, 87-89, 91, 93-96, 101-104, 116-17, 121-22.

doors. They simply cannot afford to turn away sixty to ninety-five percent (60-95%) of their revenue. In sum, if body shops wish to stay in business, they must accept the trade of insurance-paying customers.[22]

Thus, even if Appellants had wanted to negotiate, the Appellees were not interested in doing so, preferring instead to proceed on economic coercion such that attempts at price and payment discussion were not only futile, but actively quelled under threat of retaliation.

The district court's factual conclusions do not flow inevitably from the allegations of the complaint, they contradict them. The district court was not permitted to substitute its own conclusions of fact for those asserted in the complaint. *Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 F. App'x 972, 978 (11th Cir. 2015).

3. No state law includes "request" as an element for a claim of unjust enrichment and requiring "request" contradicts other established state authority

The district court also ruled that because the complaints do not allege any facts showing request for repair services was made by the Appellees themselves, instead of

[22]Appeal No. 15-14178 Doc. No. 1, ¶ 56;
Appeal No. 15-14180 Doc. No. 1, ¶ 50;
Appeal No. 15-14162 Doc. No. 1, ¶ 37;
Appeal No. 15-14160 Doc. No. 1, ¶ 38; and
Appeal No. 15-14179 Doc. No. 1, ¶ 62.

consumers, it would not be unjust for Appellees to retain the benefit they received without making full payment.[23]

No state law at issue includes a "request" element. Some states do include such an element; it is not a novel or unknown concept. Should a state wish to create a "request" element, they are free to do so. However, the district court was not free to create it on behalf of states which have chosen to forgo this additional requirement. Not only is there an absence of a "request" element, the district court's ruling effectively negates the existing elements in several instances.

Virginia, Missouri and Kentucky unjust enrichment law requires only the defendant's knowledge of the conferred benefit, with Missouri and Kentucky using "appreciation" to express the requirement of knowledge or awareness.[24] The New Jersey unjust enrichment elements technically do not even require knowledge.

"Knowledge" and "request" are not synonymous. "Knowledge" is defined as acquaintance with facts, truths, or principles, as from study or investigation; general erudition. Random House Dictionary, 2015 Ed. "Request" is defined as the act of asking for something to be given or done, especially as a favor or courtesy; solicitation

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[23]Page 26 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

[24]See, e.g., *Woods v. Hobson*, 980 S.W.2d 614, 618 (Mo. Ct. App. 1998),

or petition. *Id.*

The district court quite literally redefined unambiguous words to reach its conclusion and went on to improperly redefine unambiguous established state law, supplanting its newly redefined language for the well-established law of each of those states.

Transforming a passive element (knowledge) into an active one (request) cannot be construed as anything other than disregard of extant state law and creation of new law. Though Appellants requested the court identify the state law source of authority for this reconceptualization, the district court did not do so.

Additionally, extant authority precludes a finding that unjust enrichment requires an affirmative request from the defendant. The law of each state unambiguously holds it is not necessary that a defendant consent or even agree to the services rendered. A defendant may have never subjectively intended to pay (or pay in full) for the benefit received but unjust enrichment looks beyond intent, to the equities.[25]

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[25]Virginia: *Po River Water & Sewer Co. v. Indian Acres Club*, 255 Va. 108, 114 (Va. 1998)("The liability to pay for the services is based on an implication of law that arises from the facts and circumstances presented, independent of agreement or presumed intention.")

New Jersey: *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 334 (App. Div. 1966)("In cases based on quasi-contract liability, the intention of the parties is entirely disregarded . .")

Missouri: "[A] contract implied in law is imposed, or created, without regard to the promise of the party to be bound." *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. Ct. App. 1984).

The district court's creation of a "request" element cannot harmonize with extant authority holding neither defendant's consent, agreement nor intent to pay is required. If intentions of the defendant are to be disregarded, the claim cannot be made contingent upon the defendant's affirmative request. As such, the district court's incorporation of a "request" element finds no purchase on the notion it is implied, much less explicit, and contradicts established state law. The district court is required to yield to a state's interpretation of its own law. In creating new state law which contradicts existing authority, the district court erred.

The district court's ruling effectively nullifies state law or regulation which reserves choice of body shop to the consumer

Virginia, Kentucky and New Jersey have enacted specific and unambiguous statutes or binding regulations which prohibit an insurer from making payment of covered repairs contingent upon choice of body shop.

Virginia law explicitly prohibits insurers from choosing repair facilities for insureds and claimants or conditioning payment of a claim upon selection of an approved repair shop. Virginia Code § 38.2-517.

Kentucky: *Fayette Tobacco Warehouse Co. v. Lexington Tobacco Bd. of Trade*, 299 S.W.2d 640, 643 (Ky. 1956)("A right is created not by any promise or mutual assent of the parties but is imposed by law on the party irrespective of, and sometimes in violation of, his intention.")

New Jersey Administrative Code 11:3-103.(e) explicitly reserves the choice of body shop to the consumer and prohibits an insurer from conditioning payment of covered repairs upon choice of body shop .

Kentucky statute not only reserves the choice of body shop to the consumer, it requires the insurer to notify an insured or claimant of this upon notice of a claim. Ky. Rev. Stat. Ann. § 304.12-275.

Missouri provides broad rather than specific protection to consumers, prohibiting insurers from requiring a claimant to travel unreasonably either to inspect a replacement automobile, to obtain a repair estimate or to have the automobile repaired at a specific repair shop. Missouri Insurance Regulation 20 CSR 100.1050 2(B).

Consumers therefore have the choice of repair facility, even over the objections of an insurer and the insurer may not refuse to pay covered repairs. The district court's ruling that an unjust enrichment claim is contingent upon the Appellees requesting repairs instead of consumers directly contravenes these duly enacted statutes and regulations. Neither the insurer's consent nor agreement is required before the insurer's obligation to pay for repairs is triggered.

Additionally, the court's ruling destroys the spirit of the intended protection provided to consumers. All of these states felt a consumer's choice of repair facility was sufficiently worthy of protection that each enacted authority to prohibit an insurer

from making payment of covered repairs contingent upon the insurer's approval of the repair facility.

The potential for abuse under the district court's ruling is obvious–if request for services must originate from the insurer, the insurer may defeat the consumer's choice of body shop simply by remaining silent until the consumer capitulates and moves to a body shop of which the insurer approves.

Such economic coercion of consumers is not an unreasonable possibility. It is an existing reality as set forth in the complaints. The Appellees already exert economic coercion upon consumers for their choice of body shops, including the Appellants' shops.[26]

The district court therefore doubly erred–it created a new element for unjust enrichment, and created an element which directly contravenes corollary state authority.

4. No state law includes as an element of unjust enrichment that a plaintiff has been executing an independent duty

As part of its rationale for dismissal based upon the purported failure to bargain, the district court ruled Appellants failed to allege facts to show they were executing an

[26] Appeal No. 15-14178 Doc. No. 1 ¶¶ 104-109 and 132-135;
Appeal No. 15-14180 Doc. No. 1 ¶¶ 100-105 and 128-131;
Appeal No. 15-14160 Doc. No. 1 ¶¶ 82-86 and 106-109;
Appeal No. 15-14162 Doc. No. 1 ¶¶ 83-87 and 109-112; and
Appeal No. 15-14179 Doc. No. 1 ¶¶ 105-109 and 127-130.

independent duty to protect their own interests.[27] This was plain error.

As discussed, there is neither a legal duty nor general obligation requiring a plaintiff to bargain. All authority is directly contrary to the proposition that such duty or obligation exists. As there is no duty, the Appellants are not required to justify "failing" to do so.

With or without a duty to bargain, no state law includes as an element of an unjust enrichment claim that a plaintiff must be in pursuit of an independent duty before the claim may lie. Such a requirement simply does not exist. As there is no such element for an unjust enrichment claim, the district court erred by creating it and dismissing the claim based upon a failure to justify that creation.

The district court erred in finding the complaints failed to allege facts Appellants performed repairs to protect their own interests

Although not an element of the claim, the district court's finding the Appellants alleged no facts to show they performed repairs to protect their own interests or a third parties' is erroneous.

The complaints state repeatedly the Appellants were, in fact, protecting both their own interests and their customers'. The complaint avers that full and complete

[27]Page 26 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

repairs are required to ensure the safety of the traveling public and to protect the Appellants from liability resulting from insufficient, incomplete or unsafe repairs.[28]

While Appellants need not allege facts they were executing an independent legal duty or protecting their own interests by performing complete and safe repairs, the district court's conclusion the Appellants made no such showing is demonstrably erroneous.

5. The district court erred by equating reasonable expectation of payment with reasonable amount of payment in violation of extant law

The district court ruled that because the Appellees had consistently refused to make full payment for services rendered in the past, the Appellees had no reasonable expectation of full payment now and Appellees therefore had not been unjustly enriched.[29]

Pursuant to their respective state law, the elements of this claim look to whether or not the circumstances were such that (1) the plaintiff was reasonable in expecting

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[28]Appeal No. 15-14178 Doc. No. 1 ¶¶ 83-88, 91, 93-96, 99, 120, 137, 146-147;
Appeal No. 15-14180 Doc. No. 1 ¶¶ 78-83, 86, 89-92, 95, 116, 133, 138-139;
Appeal No. 15-14160 Doc. No. 1 ¶¶ 64-68, 70, 72-74, 77, 97, 100-101, 115, 117-118;
Appeal No. 15-14162 Doc. No. 1 ¶¶ 65-69, 71, 73-75, 78, 99, 102-103, 118, 120-121; and
Appeal No. 15-14179 Doc. No. 1 ¶¶ 88-92, 93, 96-98, 101, 121, 124-125, 141.

[29]Pages 26-27 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

payment at all for services performed, and, if so, (2) whether the plaintiff was reasonable in expecting payment from the party sought to be held liable (See above, Section II.A.1., state law elements of unjust enrichment claim).

That some payment has been made does not end the inquiry. Unjust enrichment requires payment of the reasonable value of the benefit conferred, not merely the amount a defendant decides to pay.

Virginia and Kentucky both articulate as element hat it would be unjust for the defendant to retain the benefit conferred without payment of its value.

Neither New Jersey nor Missouri articulate value in the elements of unjust enrichment. However, applicable authority in both states firmly establish the dividing line between unjust enrichment and just enrichment is reasonable value of the benefit conferred. See, e.g., *Macedos Const. Co. of New Jersey v. Tomae Const. Co.*, No. HNT-L-135-05, 2006 WL 2193607, at *3 (N.J. Super. Ct. App. Div. July 21, 2006) and *Farese v. McGarry*, 568 A.2d 89, 93 (App. Div. 1989).

Missouri authority expressly includes reasonable value in the definition of unjust enrichment, if not the elements. *S & J, Inc. v. McLoud & Co.*, 108 S.W.3d 765, 768 (Mo. Ct. App. 2003).

Therefore under applicable state law, whether or not a defendant's enrichment is unjust is directly linked to a determination of reasonable value of the benefit

conferred, not the amount the party liable has decided to pay.

Where reasonable value is disputed, as in these cases, determination of reasonable value is a question of fact reserved for the jury.[30] It is the province of the jury to determine the weight of the evidence and the credibility of the witnesses; the privilege to select between competing versions of events is reserved solely to the fact finder. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (U.S. 1984)(affirming denial of directed verdict motion), *Dimick v. Schiedt*, 293 U.S. 474, 486, (1935)(liability and damages are questions of fact). See also, *Coffee v. Permian Corp.*, 474 F.2d 1040, 1044 (5th Cir. 1973).

The Appellants are entitled to have the reasonable value of the benefit conferred determined by a jury. The district court's ruling does nothing at all to establish reasonable value.

The district court's ruling has no basis in the contents of the complaints, or as this Court describes, "no mooring in the bare face of the complaint." *Twin City Fire Ins.*, 609 Fed. Appx. at 978. The leap from the facts asserted to the court's conclusion omits essential factual determinations.

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[30]Virginia: *Kritselis v. Petty*, 105 S.E. 536, 538 (Va. 1921);
New Jersey: *Kopin v. Orange Products, Inc.*, 688 A.2d 130, 138 (N.J. App. Div. 1997);
Kentucky: *Estes v. Grissom*, 490 S.W.2d 492, 493 (Ky. 1972); and
Missouri: *Hart v. Wood*, 392 S.W.2d 20, 24 (Mo. Ct. App. 1965).

Even were it permissible for the court to make that factual determination, it could not do so on the present record as the district court had no evidence of the value of the benefit conferred before it, merely argument of defense counsel. Diligent research of state law has not disclosed any authority which holds "Because I said so" to be an irrefutable defense to a claim for unjust enrichment.

The district court was required to accept the averments of the complaint as true but improperly adopted the Appellees' version of events instead. Although incorrect in its entirety, the dispositive factual conclusion drawn by the district court lacked all evidentiary basis–there has been no evidence of the value of the benefit conferred presented. Respectfully, the district court substantially erred and this decision must be reversed.

6. The district court committed reversible error by basing dismissal upon affirmative defenses the appellees have not asserted

Here, the district court concluded Appellees were permitted to avoid liability on the unpaid balance. As no facts appear on the face of the complaint to establish unequivocally the Appellees cannot be liable for amounts still due, the district court perforce decided the issue upon reference to matters outside the four corners of the complaints.

An affirmative defense is any matter that serves to excuse the defendant's

conduct or otherwise avoid the plaintiff's claim, but which is proven by facts extrinsic to the plaintiff's complaint. *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007). See also, *Green v. Amjak Enterprises, Inc.,* No. 2:06CV264FTM29SPC, 2006 WL 2265455, at *2 (M.D. Fla. Aug. 8, 2006)

Defendants unquestionably bear the burden of proof for affirmative defenses they may choose to assert. *Meacham v. Knolls Atomic Power Lab.,* 554 U.S. 84, 93 (2008) and *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1550-51 (11th Cir. 1990).

Here, the district court dismissed the complaint based upon the arguments forwarded in the Appellees' motions to dismiss that they need not make full payment because they have successfully refused to pay in the past. The district court therefore decided the issue upon an avoidance of liability, an affirmative defense.

Ordinarily, a motion to dismiss may not be decided upon an affirmative defense, specifically because the trial court is required to accept the factual allegations of the complaint as true; a plaintiff is not required to negate an anticipated affirmative defense in a complaint. *Twin City Fire Ins. Co.*, 609 F. App'x at 976-77. Only if the existence of an affirmative defense plainly and conclusively appears on the face of the complaint may a 12(b)(6) dismissal even be considered. *Id.*

The trial court may not, however, draw inferences or make factual conclusions in order to apply an affirmative defense as grounds for a 12(b)(6) dismissal. *Id.* The

district court did both of these prohibited things and used the conclusions reached to justify other applications of affirmative defenses.

a. The district court erred by finding the Appellants were volunteers and/or officious intermeddlers

In creating the element of "request" for unjust enrichment, the district court found the Appellants were volunteers or officious intermeddlers. Though not using the specific terms, the district court quoted the definition of an officious intermeddler set forth in the *Restatement of Restitution* and held that because Appellants' services were not requested by the Appellees, the Appellants were acting without any reasonable expectation of payment and it was not, therefore, unjust for Appellees to refuse full payment. The district court discussed at length authority holding volunteers or officious intermeddlers were not entitled to compensation.[31]

Because the language used by the district court applies to both, it is not entirely clear whether it ruled the Appellants were volunteers, or officious intermeddlers. It is clear the district court found the Appellants to be at least one, if not both. This was error.

A volunteer is a person who gives his services without any express or implied

[31]Pages 24-27 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

promise of remuneration. Black's Law Dictionary. An officious intermeddler is a person who without mistake, coercion or request has unconditionally conferred a benefit upon another and is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other person or of third persons. *Restatement of the Law of Restitution*, §112. See also, *Skytruck Co. LLC v. Sikorsky Aircraft Corp*., 501 Fed. Appx. 879, 882 (11th Cir. 2012).

Thus, in order to qualify as a volunteer, the provider must have so provided without intending to be paid for services when rendered. Volunteer status is not determined by a defendant's intent to pay or how much–the definition is not "one who receives services without intent to pay for them."

Nothing in any complaint can reasonably be inferred to assert the Appellants ever acted gratuitously. The complaints clearly aver the Appellants performed professional services with full expectation of payment.[32]

Absent clear intent on the face of the complaint, status as a volunteer can only be determined by facts extrinsic to the complaint and therefore constitutes an

[32]Appeal No. 15-14178 Doc. No. 1 ¶¶ 47, 56, 137-138, 142-143, 149;
Appeal No. 15-14180 Doc. No. 1 ¶¶ 40, 50, 133-134, 141;
Appeal No. 15-14160 Doc. No. 1 ¶¶ 31, 38, 92-93, 97-98;
Appeal No. 15-14162 Doc. No. 1 ¶¶ 30, 37, 94-95, 99-100; and
Appeal No. 15-14179 Doc. No. 1 ¶¶ 53, 62, 116-117, 121-122.

affirmative defense. Courts directly ruling on the issue have universally found that when a defendant seeks to avoid liability on the ground the plaintiff acted as a volunteer, this presents an affirmative defense.[33]

The same is true for status as an officious intermeddler. By definition, an officious intermeddler is one who acts without request, coercion or mistake. Therefore, again by definition, if services are rendered upon request, a plaintiff cannot be deemed an officious intermeddler.

The complaints assert Appellants performed services upon direct request of consumers. Since the complaints do aver this fact, the district court was required to accept it as true and any basis for asserting there was no valid request can only be established through facts and evidence extrinsic to the complaint, thereby rendering officious intermeddler status an affirmative defense. The court, however, ruled that request from the vehicle owners was somehow ineffective, though in doing so, the district court violated corollary state law (see above) and provided no authority for this conclusion.

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[33]See, e.g., *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 437 (Mo. 2002), *Clorer v. Blessington*, 18 A.2d 712 (N.J. Dept. of Labor 1941); see also, *Thalheim v. Eberheim*, 124 F.R.D. 34, 36 (D. Conn. 1988), *Commercial Union Ins. Co. v. Ford Motor Co.*, 599 F. Supp. 1271, 1273 FN1 (N.D. Cal. 1984), *Radin v. Gromann,* 295 A.2d 516, 517 (D.C. 1972), *Indiana Ins. Co. v. Sentry Ins. Co.*, 437 N.E.2d 1381, 1387 (Ind. Ct. App. 1982), *Gillette v. Storm Circle Ranch,* 619 P.2d 1116, 1128 (Idaho 1980), *Missouri Pac. Transp. Co. v. Baxter*, 76 S.W.2d 958, 959 (Ark. 1934).

The only facts the district court was permitted to consider were those set forth in the complaint and they directly contradict the district court's ruling of both gratuitous intent and lack of request for services. Whether volunteer or officious intermeddler or both, the Appellees have not asserted either of these affirmative defenses.

The district court simply decided this issue of fact adversely to the Appellants, in direct contradiction of the facts asserted in the complaints and without Appellants having an opportunity to submit evidence. The district court created an affirmative defense that does not appear on the face of the complaints, deemed it worthy without any discovery or evidence, excused the Appellees from their burden of proof and dismissed the claim.

It is reversible error for a district court to "collapse discovery, summary judgment[,] and trial into the pleading stages of a case." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 434 (4th Cir. 2015), as amended on reh'g in part (Oct. 29, 2015)(citing *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 71 (2009). See also, *Bell/Heery v. United States*, 739 F.3d 1324, 1338 (Fed. Cir. 2014)("At the pleading stage, the salient inquiry is not whether Bell/Heery is likely to prevail on the merits, but instead whether it is entitled to offer evidence in support of its claims.")

The Appellants were precluded from offering evidence to support their claim. Instead, the district court omitted discovery, rendered summary judgment unnecessary

and proceeded to rule on the merits with no evidence ever being produced. Appellants respectfully submit the district court committed reversible error in doing so.

b. The district court erred by ruling Appellant's unilateral course of conduct defeated the unjust enrichment claim

The district court ruled the Appellees' own course of conduct avoided and excused them from liability in contradiction of the complaints' averments.[34]

Again, the district court erroneously transformed the reasonable expectation of payment at all into a de facto determination of subjective intent to pay in the absence of any and all evidence to establish reasonable value. Also, again, though without using the specific words, the district court de facto employed affirmative defenses to dismiss the claim. More than one affirmative defense utilizes course of conduct as an indicator of an avoidance of liability for a claim, most usually waiver and estoppel.

That Appellees have acted consistently over time is wholly insufficient for a conclusion that either waiver or estoppel (or some other affirmative defense) plainly appears on the face of the complaint. It merely shows the Appellants have considerable damages.

There must be a clear, unequivocal and decisive act of a party showing intent

[34]Page 26 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

to waive a legal right, not mere silence or acquiescence.[35] To create an estoppel, a party must have a duty to speak and evidence the defendant changed its position to its detriment in reliance upon the plaintiff's silence.[36] These defenses rely upon the conduct of the plaintiff, not the unilateral conduct of the defendant, to determine whether a waiver or estoppel has been created.

The complaints repeatedly aver facts contradicting any suggestion the Appellants waived any legal rights. Appellants efforts to collect full payment were met with threats, economic coercion and boycotting. The district court is required to accept these facts as true, instead of disregarding them to draw the negative inference an avoidance of liability was justified.

While facts expressly asserted negate application of a waiver affirmative defense, the complete absence of facts relative to estoppel fully negate its application, as well. There is nothing in the complaints from which the court could reasonably

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[35]New Jersey: *W. Jersey Title & Guar. Co. v. Indus. Trust Co.*, 141 A.2d 782, 786-87 (1958);
Virginia: *Baumann v. Capozio*, 611 S.E.2d 597, 599 (2005);
Missouri: *Bartleman v. Humphrey*, 441 S.W.2d 335, 343 (Mo. 1969); and
Kentucky: *Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003).

[36]Missouri: *Wilkinson v. Lieberman*, 37 S.W.2d 533, 536 (1931);
Virginia: *Schulze v. Kwik-Chek Realty Co.*,181 S.E.2d 629, 630 (1971);
Kentucky: *Embry v. Long*, 75 S.W.2d 1036, 1038 (1934); and
New Jersey: *Minton v. Sutton*, 135 A. 693, 696 (Ch.) aff'd, 102 N.J. Eq. 61, 139 A. 600 (1927).

conclude the Appellees changed their position through detrimental reliance upon the conduct of the Appellants and suffered harm as a result. The complaint alleges there has been no change in Appellees conduct at all; they have continued to refuse to make full payment, backed up with threats, economic coercion and boycotting for failing to quietly submit to Appellees' wrongful conduct.

The law does not permit a defendant to benefit from submission gained through wrongful means of duress or coercion, the existence of which is a question of fact for the jury.[37] The district court was therefore not permitted to decide the Appellants had voluntarily and willingly engaged in any conduct that barred their right to seek legal redress in contradiction of asserted facts.

No affirmative defenses have been pled. There have been no answers filed, no defenses asserted, no discovery conducted, no evidence presented to the court. The district court simply created an affirmative defense on behalf of the Appellees, deemed it worthy without any evidence, excused the Appellees from their burden of proof and dismissed the claim on the merits.

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[37]Virginia: *Chaplain v. Chaplain*, No. 1301-10-1, 2011 WL 134104, at *5 (Va. Ct. App. Jan. 18, 2011);
New Jersey: *Gervolino v. Gervolino*, No. A-6722-04T3, 2006 WL 1510059, at *6-7 (N.J. Super. Ct. App. Div. June 2, 2006);
Missouri: *State ex rel. State Highway Comm'n v. City of St. Louis*, 575 S.W.2d 712, 717-18 (Mo. Ct. App. 1978); and
Kentucky: *Hollis v. Fisk*, 242 S.W.2d 1012 (Ky. 1951).

Appellants submit this constitutes a fundamental error of law which, respectfully, must be reversed as it is reversible error for a district court to "collapse discovery, summary judgment[,] and trial into the pleading stages of a case." *SD3, LLC,* 801 F.3d at 434.

7. The district court erred by imposing a heightened and incorrect pleading standard and failing to apply mandatory rules of analysis for a motion to dismiss

In ruling on a 12(b)(6) motion to dismiss, the trial court's burden is limited in scope. The analysis is well-established and non-discretionary. The result of the district court's treatment of the complaints was a full abandonment of federal pleading standards and imposition of an impossible one–doing everything that is prohibited and nothing that is required.

a. The district court erred by failing to accord the facts asserted in the complaint acceptance as true, drawing negative inferences contrary to asserted facts and accepting motion arguments of Appellees

As shown by the written conclusions, the district court both failed to perform positive obligations and engaged in prohibited analysis which it is prohibited. As set out in detail above, it is clear the court simply chose not to believe the facts asserted in the complaints and drew negative inferences as a result of accepting Appellees' arguments excusing them from liability.

As the facts alleged in the complaints directly contradict the factual conclusions drawn by the court, the court could not have reached the conclusions it did unless it discredited or ignored the contents of the complaints., which it did, through explicit rejection, omission or affirmative adoption of contrary facts.

However, that is not within the district court's discretion. "Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327, (1989). See also, *Ashcroft v. Iqbal*, 556 U.S. 662, 696, (2009), *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 428 (4th Cir. 2015), as amended on reh'g in part (Oct. 29, 2015).

Certainly there are instances where the allegations of a complaint are not frankly not credible. Those circumstances, though, are very narrow and well-defined: "The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Iqbal,* 556 U.S. at 696.

That is clearly not the case in the present instances. The facts asserted do not defy reality as we know it. The Appellants may dispute them but that disagreement does not permit the district court to discredit them. The one viable ground for the district court's active rejection of the facts alleged in the complaints, defying reality, simply does not apply.

The district court repeatedly adopted, in whole or in part, and occasionally verbatim, the arguments asserted in the motions to dismiss. For example, Appellees argued the body shop's knowledge they would not make full payment for repairs extinguished the reasonable expectation of payment completely[38] and the district court adopted this argument in direct contradiction of the complaints' factual allegations. That the argument incorporated application of affirmative defenses not pled and for which Appellees bear the burden of proof was not addressed by the district court, even after objection was made.

In another instance, the Appellees seized on a dicta comment from another case, quoted it as authoritative, and *sua sponte*, the "element" of duty to bargain was born, though no such element exists in state law.[39]

In adopting the Appellees' arguments instead of accepting factual allegations of the complaint as true, the district court erroneously applied an incorrect pleading standard. As the Fourth Circuit held:

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[38]Appeal No. 15-14178 Doc. No. 75, pgs. 21-22; Doc. No. 117, pg. 6;
Appeal No. 15-14180 Doc. No. 61, pgs. 21-22; Doc. No. 62, pg. 10; Doc. No. 65, pgs. 4-5, Doc. No. 66, pgs. 4-5;
Appeal No. 15-14160 Doc. No. 37, pgs. 4-5; Doc. No. 40, pgs. 2-3;
Appeal No. 15-14162 Doc. No. 39, pgs. 4-5; Doc. No. 43, pgs. 4-5; and
Appeal No. 15-14179 Doc. No. 38, pg. 19; Doc. No. 39, pgs. 2, 6-7; Doc. No. 45, pg. 5; Doc. No. 46, pgs. 2-3.

[39]Appeal No. 15-14180 Doc. No. 62, pg. 10.

> [T]he district court applied a standard much closer to probability than plausibility. For instance, the district court's opinion adopts defendants' characterizations of the licensing negotiations and then draws unsurprisingly adverse inferences against SawStop based on them. ... In short, the district court imposed a heightened pleading requirement–but such a standard does not apply on a Rule 12(b)(6) motion, even in an antitrust case. . . . This heightened pleading standard was error.

SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 426 (4th Cir. 2015), as amended on reh'g in part (Oct. 29, 2015)(emphasis added). See also *Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1368 (M.D. Fla. 2005).

This Court has recognized *Twombly* did not create a heightened pleading standard, but does not appear to have spoken directly on this point. Appellants submit the reasoning of persuasive authority cited above should be equally applicable here. Applying a standard that permits the district court to accept a defendant's version of disputed facts necessarily breaches the district court's duty to accept the factual allegations of the complaint as true and to draw all reasonable inferences from those facts in favor of the plaintiffs.

The district court was required to accept the factual allegations of the complaint as true and ignore contrary facts or arguments asserted by Appellees in their motions to dismiss. The district court was required to faithfully apply the law of the states as those states have defined it and refrain from substituting its judgment for that state law. The district court was required to draw all reasonable inferences in favor of the

Appellants and refrain from finding Appellees' argument preferable.

The district court did not perform any of these obligations. The Appellants alleged more than sufficient facts to sufficiently plead unjust enrichment, had the proper standard of pleading been applied by the district court.

b. The district court erroneously applied a summary judgment standard to the complaint

A review of the dismissal orders as a whole indicate the district court took a summary judgment approach to deciding 12(b)(6) motions to dismiss. The district court looked not to whether the factual allegations of the complaint sufficiently pled the causes of action asserted but whether the complaints pled facts that sufficiently rebutted the Appellees' motions to dismiss.

This macro view is supported by individual findings and the district court's repeated reliance on what the Appellants' purportedly failed to show, prove or demonstrate, or alternative explanations the Appellants failed to exclude. That a plaintiff is not required to show, prove, demonstrate or exclude anything via a complaint, only allege sufficient facts to state the elements of a claim, was wholly disregarded.

Rule 8 requires only a short and plain statement of the claims asserted and the factual grounds for those claims. The purpose is to provide notice to the defendants of

what they stand accused. Detailed factual allegations are not required, merely sufficient facts to plausibly suggest the plaintiff is entitled to relief.

A complaint is not required to set forth evidence, prove the case or otherwise provide proof of the plaintiff's right to recovery, as this Court has previously recognized in *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1386 (11th Cir. 2010). A "complaint need not 'make a case' against a defendant or 'forecast evidence sufficient to prove an element' of the claim. It need only 'allege facts sufficient to state elements' of the claim." *Robertson v. Sea Pines Real Estate Cos*., 679 F.3d 278, 291 (4th Cir. 2012).

Courts have been repeatedly warned against applying summary-judgment style analysis to motions to dismiss. *Twombly* and *Iqbal* impose only a plausibility standard and courts must scrupulously avoid applying the "preponderance of the evidence standard" to a motion to dismiss. *SD3, LLC,* 801 F.3d at 425. The vast difference between Rule 12 and Rule 56 analysis remains intact. *Id*.

The district court was urged by Appellees, both explicitly and implicitly, to apply a higher pleading standard to the complaints as they contain an antitrust claim. Appellants objected on the grounds that Rule 8 notice pleading applies regardless. The district court rejected Appellants' argument, and outright rejected notice pleading itself. Specifically, the court ruled the Appellants were relying upon "a pre-*Iqbal* case ...

which applied an outdated notice pleading standard that is no longer applicable." [MDL 6:14-md-2557, Doc. No. 222, pg. 24.] While this statement was made in reference to tortious interference claim, it is the theme by which the entire complaint was analyzed.

The district court cited no authority for its holding that notice pleading no longer applies to Rule 8 complaints. *Iqbal* did not supercede notice pleading as the district court seems to have ruled. *Twombly*, which is itself a pre-*Iqbal* case, repeatedly re-emphasized the continuing application of notice pleading under Rule 8 of the Rules of Civil Procedure. *Twombly,* 550 U.S. at 555.

The Eleventh Circuit has repeatedly recognized that notice pleading is, in fact, the proper standard post-*Iqbal*. *King v. Butts County*, 576 Fed. Appx. 923, 930 (11th Cir. 2014), *Cleveland v. Sec'y of the Treasury*, 407 Fed. Appx. 386, 388 (11th Cir. 2011), *Bell v. Fla. Highway Patrol*, 325 Fed. Appx. 758, 761 (11th Cir. 2009).

The district court's outright rejection of notice pleading is further supported by the contents of the orders and the reports and recommendations which were accepted and adopted in total. In its dismissal rulings, the district court adopted in full the analytical framework urged by the Appellees, including the requirement Appellants meet a standard requiring what amounts to irrefutable proof within the complaints.

Throughout its orders, the district court repeatedly based its rulings upon Plaintiffs "failure to show . . ." or failure to "demonstrate" whatever the district court

deemed needed to be shown or demonstrated (though mostly the failure was demonstration unrelated to an element of a claim).

The language of summary judgment used by the district court, along with the explicit rejection of notice pleading, indicates the district court applied an incorrect pleading standard:

As explained by the Seventh Circuit:

> Furthermore, the district court's findings misstate plaintiff's burden in going forward. As discussed above, to survive a motion to dismiss under Rule 12(b)(6), the plaintiff does not have to "show" anything; he need only allege. . . . Nonetheless, the district court's order, as well as defendants' arguments both in their briefs and at oral argument, are replete with references to what Brown failed to "show" or "establish." . . **At this stage of the litigation, we are concerned not with what plaintiff did or did not show, but rather with what plaintiff did or did not allege.**

Brown v. Budz, 398 F.3d 904, 914 (7th Cir. 2005)(emphasis added). See also, *Chao v. Rivendell Woods, Inc*., 415 F.3d 342, 349 (4th Cir. 2005).

Application of an incorrect pleading standard is further shown by the general absence of findings the Appellants failed to plead facts relative to the actual elements of the claims. None of the grounds for dismissing the claims was predicated upon this; all of the grounds for dismissal were predicated upon a purported failure "to show" facts supporting things which were not elements of the claims.

The district court additionally dismissed the claim upon the ground of

Appellants' failure to negate potential affirmative defenses within the complaint, an obligation the Appellants unequivocally do not have.

For these reasons and the foregoing, Appellants respectfully submit the district court erred, such errors being of substantial nature as to require reversal of the dismissal of the claim of unjust enrichment.

B. Quantum Meruit

For this equitable claim, the district court did rule on a state-by-state basis. Each is discussed below.

New Jersey

In dismissing the New Jersey Appellants' claim for quantum meruit, the report and recommendation grounded its decision on two conclusions: (1) the New Jersey Appellants could not have reasonably expected the insurance companies to pay them what they thought their services were worth, given the persistent refusal to do so in the past; and (2) repair services were not provided at the insurer's request or by mistake, or that doing repairs without first negotiating prices was necessary to protect the interests of the shops, the insurance companies or any third parties.[40]

The district court did not set out how either of these conclusions failed to meet

[40] Pages 30-31 of Appeal No. 15-14160 Doc. No. 43 and Appeal No. 15-14162 Doc. No. 45.

the elements of quantum meruit under New Jersey law. The conclusions are, however, identical to the grounds the district court used to dismiss the unjust enrichment claim and are erroneous for the same reasons.

1. Elements of quantum meruit under New Jersey law.

The elements of quantum meruit under New Jersey law are: (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services. *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 796 A.2d 238, 242-43 (2002).

2. Bargaining is not an element of a quantum meruit claim under New Jersey law

As with unjust enrichment, the district court made quantum meruit claims contingent upon Appellants' bargaining prices, unless Appellants were able to show failing to bargain was in furtherance of an independent duty.

Bargaining or negotiating is not an element of this claim, nor is there a generalized duty for private businesses to ever bargain or negotiate their prices. (See Sections II.A.2.b. and II.A.2.c., above.)

A plaintiff is not required to plead facts to support a non-existent element of the claim, nor may a complaint be dismissed for failing to do so. The district court cited

no New Jersey authority which requires a plaintiff to negotiate or justify failing to negotiate to establish a cognizable quantum meruit claim. As bargaining is not a pre-requisite to maintenance of a quantum meruit claim under New Jersey law, dismissal based in any part upon failing to do so is error.

3. The district court erred by creating a new element of state law by requiring request for services originate from Appellees

Just as a direct request from insurers is not an element of unjust enrichment, it is not an element of a quantum meruit claim. As with unjust enrichment, claims for quantum meruit are not predicated upon the consent or agreement, and thus the request, of the party against whom the claim is made. New Jersey has been quite explicit about this in defining the purpose and application of quantum meruit:

> Quasi-contracts are imposed by law to bring about justice, without reference to the parties' intent. The quasi-contract is not really a contract, but a legal obligation closely akin to a duty to make restitution. A quasi-contract will be recognized in appropriate circumstances, even though no intention of the parties to bind themselves contractually can be discerned. They rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In the case of actual contracts the agreement defines the duty, while in the case of quasi-contracts the duty defines the contract.

Kopin, 688 A.2d at 136 (internal citations and punctuation omitted)(emphasis added).

The district court's ruling thus violates New Jersey law by imposing an element requirement neither recognized nor implied by that state. New Jersey law does not

require active request for a claim of quantum meruit; it does not even require the defendant's consent or agreement. As such is not required to proceed to trial, it cannot be required to proceed to discovery. Appellants respectfully submit the district court's dismissal of this claim must be reversed.

The district court erred by creating a new element of state law which renders corollary state authority a nullity

As noted above, New Jersey has adopted an affirmative regulation which reserves to the consumer the right to choose the body shop to perform repairs. An insurer may not make payment of covered repairs contingent upon their approval of that choice. New Jersey Administrative Code 11:3-103.(e). As the reasons why the court's ruling violates this authority is identical, whether analyzing unjust enrichment or quantum meruit, Appellants adopt and re-assert those arguments and citations to authority set forth in Section II.A.3., above.

4. The district court erred by creating a new element of law requiring proof services were rendered in furtherance of an independent duty or to protect Appellants' own interests

The elements of New Jersey quantum meruit law do not include a requirement that a plaintiff bargain with a defendant or be in pursuit of an independent duty or acting out of self-preservation before a claim for quantum meruit is cognizable. However, the district court ruled that in order to justify a failure to bargain, the

Appellants were required to set forth facts to show they were acting in furtherance of "the interests of the Plaintiffs, Defendants or any third parties."

As no duty to bargain exists, no justification is required to excuse an absence of bargaining. See Sections II.A.2.b. and II.A.2.c., above. The district court erred by creating another new element of state law.

5. The district court committed reversible error by basing dismissal upon affirmative defenses the Appellees have not asserted

Both of the grounds upon which the district court dismissed the quantum meruit claim require de facto application of affirmative defenses. This is reversible error.

a. The district court erred in concluding that Appellees unilateral conduct extinguished liability

As the district court erred in an identical manner in analyzing Appellees' course of conduct creating affirmative defenses for an unjust enrichment claim, Appellants affirmatively adopt those arguments and citations to authority set forth in Section II.A.6.b., above, as they are equally applicable to the claim of quantum meruit.

b. The district court erred by ruling the Appellants were officious intermeddlers

As the district court erred in an identical manner in creating for Appellees the affirmative defense of officious intermeddler to dismiss the unjust enrichment claim, Appellants affirmatively adopt those arguments and citations to authority set forth in Section II.A.6.a., above, as they are equally applicable to the claim of quantum meruit.

6. The district court erroneously substituted the elements of quantum meruit under New Jersey law with its own interpretation

The report and recommendation held Appellees' course of conduct meant Appellants "could not have reasonably expected Defendants to pay them what they thought their services were worth." However, this conclusion does not reflect any element of a claim for quantum meruit nor any legal basis for dismissal of the claim

The district court did not assert any deficiency in the first two elements of a New Jersey quantum meruit claim. Presumably therefore, the court's conclusion was directed towards one or both of the remaining two elements, an expectation of compensation and the reasonable value of the services rendered.

Again, though for a slightly different reason, the district court's ruling redefines the elements, turning "expectation of compensation" into "reasonable expectation of payment of the amount the defendant decides it wants to pay." Only the former is actually an element of the claim, the district court's interpretation improperly transforming it into the latter. The district court's ruling eliminates the fourth element all together, the reasonable value of the services rendered.

As with unjust enrichment, a New Jersey claim for quantum meruit does not predicate a plaintiff's reasonable expectation of payment upon a defendant's subjective intent to pay or how much a defendant intends to pay. The element relates to a

plaintiff's expectation of payment at all, and if such an expectation exists, whether it is reasonable to expect compensation from the named defendant, though this last is not expressly articulated as an element of the claim. Interpretive case law, however, does incorporate the requirement. *Weichert*, 608 A.2d at 285-86,

The fourth element, reasonable value of the services rendered, is applied exactly as it is worded. *Weichert*, 608 A.2d at 285.

"Reasonable value"is an issue of fact reserved to the jury. *GK Realty Servs., LLC v. Stopar*, No. A-2142-06T5, 2008 WL 657126, at *7 (N.J. Super. Ct. App. Div. Mar. 13, 2008). In affirming the recommended dismissal, the district court failed to address reasonable value and its status as a fact question. The district court simply denied there was any distinction between a reasonable expectation of payment and the amount of payment sought. [MDL 6:14-md-2557, Doc. No. 222, pg. 17.]

The two questions cannot be conflated as reasonable value is a question of fact reserved for the finder of fact requiring submission of proofs. Were it otherwise, New Jersey would recognize only three elements for a quantum meruit claim, not four.

Although the district court described the current case as unusual, in that Appellants had been paid something instead of nothing at all, it is not unusual, nor does it affect a party's right to pursue full restitution. Partial payment does not render a quantum meruit claim untenable, it merely leaves open the possibility of a set off of

amounts previously paid. *Strauss v. Fost*, 517 A.2d 143, 145 (App. Div. 1986). See also, *IDT Corp. v. Boosidan*, No. CIV.A.-13-1539 SDW, 2015 WL 5138385, at *6 - 7(D.N.J. Sept. 1, 2015) *Madsco v. Sherwin*, No. A-0716-07T3, 2009 WL 4250844, at *3 (N.J. Super. Ct. App. Div. Nov. 20, 2009), *Don Corson Const. Co. v. Hrebek*, No. A-3463-05T2, 2007 WL 1598655, at *8 (N.J. Super. Ct. App. Div. June 5, 2007), *Farese v. McGarry*, 568 A.2d 89, 93 (App. Div. 1989).

The district court erred in altering the elements of quantum meruit under New Jersey law, particularly in the absence of any evidence establishing the reasonable value of benefits conferred. The Appellants are entitled to a determination of the reasonable value of their services.

Kentucky

The district court dismissed the quantum meruit claim of the Kentucky Appellant on one ground alone, "Plaintiffs [sic] have not shown they furnished services or material to Defendants (as opposed to Defendants' insureds and claimants.)" The district court went on to explain that although the services rendered may be a benefit conferred upon the insurers, benefit was not an element of the claim.

7. Elements of quantum meruit under Kentucky law

The elements of quantum meruit under Kentucky law are: (1.) valuable services were rendered, or materials furnished; (2.) to the person from whom recovery is sought;

(3.) which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and (4.) under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person. *Cherry v. Augustus*, 245 S.W.3d 766, 779 (Ky. Ct. App. 2006).

8. The district court erred in its application of the Kentucky elements of quantum meruit

The trial's court's distinction between the recipient of services rendered is contradicted by applicable Kentucky authority. A case with contextually identical facts has already been decided and holds directly contrary to the district court's holding.

In *Appalachian Reg'l Healthcare v. Coventry Health & Life Ins. Co.*, the Eastern District of Kentucky applied Kentucky state law to a healthcare provider to which the responsible insurer, Coventry, refused reasonable payment for out-of-network care provided to Coventry insureds. Appalachian Regional (ARH) asserted a claim of quantum meruit. In ruling ARH was entitled to quantum meruit, the court specifically held:

> Coventry is paid by the state to make healthcare services available to its members. Accordingly, Coventry should be required to pay providers who fulfill that obligation. The services would be received by the members. Coventry also should know that healthcare services are not free and that providers expect to be paid. If ARH is not reimbursed for the reasonable value of the services it provides, Coventry or any other MCO receiving out-of-network services would be unjustly enriched. Thus, all prongs of the quantum meruit analysis are satisfied.

Appalachian Reg'l Healthcare v. Coventry Health & Life Ins. Co., No. 5:12-CV-114-KSF, 2013 WL 1314154, at *4 (E.D. Ky. Mar. 28, 2013).

The import of this holding and its application to this case is clear. Having collected premiums, if the Appellee are not required to pay the reasonable value of the services provided by Appellants, they have been unjustly enriched. Thus, per applicable authority, all prongs of the Kentucky quantum meruit analysis are satisfied.

The district court acknowledged this authority but decided it was inapplicable because in *Appalachian Regional*, no other entity was responsible for payment. However, having no other avenue of payment is not an element of a quantum meruit claim. The court in *Appalachian Regional* specifically stated the ruling was based upon the plaintiffs alleging facts that met "all prongs of the quantum meruit analysis." As the court ruled on the elements, and "no other avenue of payment" is not an element, the court specifically did not rule on that basis. The district court's distinction is negated by the Kentucky ruling itself. Kentucky law does not make the distinction the district court made.

The district court's second finding, that receipt of benefits is not equivalent to receipt of services and therefore does not meet the elements of the claim, is contradicted by clear Kentucky holdings:

Quantum meruit is an equitable remedy invoked to compensate for an

> unjust act, whether it is harm done to a person after services are rendered, or a benefit is conferred without proper reimbursement. It, therefore, entitles the one who was harmed to be reimbursed the reasonable market value of the services or benefit conferred.

Lofton v. Fairmont Specialty Ins. Managers, Inc., 367 S.W.3d 593, 597 (Ky. 2012)(citing BLACK'S LAW DICTIONARY (9th ed.2009)).

The district court was correct to the extent it recognized that receipt of a benefit is not an express element. The district court erred, however, in failing to apply the explanatory modifications of Kentucky law.

Kentucky has therefore made it clear that quantum meruit applies to claims for conferral of a benefit without proper reimbursement. Kentucky authority also makes clear that services rendered an insured constitute services rendered the insurer. The district court's conclusion on the Kentucky quantum meruit claim contradicts existing authority and, respectfully must be reversed.

Virginia

9. The district court erred by applying a formulation of quantum meruit elements which Virginia state courts have refused to adopt

In ruling on the Virginia Appellants quantum meruit claim, the report and recommendation stated there were two different sets of elements for the claim under Virginia law, in two differing lines of authority. One purported line originated in a

district court decision, *Raymond, Colesar, Glaspy & Huss, P.C. v. Allied Capital Corp.*, 961 F.2d 489, 491 (4th Cir. 1992). This decision includes as element that benefits conferred by the plaintiff be requested and accepted by the defendant. The second line of authority, originating in state court, does not require an affirmative request.

After acknowledging the purported existence of two lines of authority, the district court, without explanation, determined the "request" line of authority was the prevailing one. This was reinforced by the district judge in adopting the report and recommendation, stating the Plaintiffs had failed to provide any Virginia authority which explicitly rejected the "request" element created by *Raymond*. [MDL 6:14-md-2557, Doc. No. 222, pg. 22].

The district judge concluded that even if there is no request element in Virginia law, the claim must nevertheless fail for the reasons set out in the report and recommendation. *[Id.* at pg. 23.] However, there were no other reasons.

Respectfully, the district court's analysis is fundamentally flawed for several reasons. The district court is bound to apply the law of the state as that state has decided the law should be. While the Virginia Supreme Court does not appear to have passed on the question of the elements of a quantum meruit claim, other Virginia courts of record have done so, repeatedly, and none of them include a "request"

element.

To state a claim for quantum meruit recovery under Virginia law, the plaintiff must establish three elements: (1) a benefit received by the defendant from the plaintiff; (2) knowledge of the benefit by the defendant; and (3) the defendant's acceptance and/or retention of the benefit without remuneration to the plaintiff would be inequitable, leading to unjust enrichment. *Gutterman Iron & Metal Corp. v. Figg Bridge Developers, L.L.C.*, 82 Va. Cir. 304, 307 (Va. Cir. Ct. 2011).

The district court acknowledged the existence of *Gutterman* and multiple other state cases which do not include a request element but simply chose to accept the *Raymond* formulation, placing great emphasis upon the fact that *Gutterman* cited to federal cases for quantum meruit elements.

The district court therefore chose a federal interpretation of state law rather than the actual state law as expressed by state courts, which the district court is not permitted to do. In doing so, the district court ignored multiple important points.

First, there is no *Raymond* line of authority in Virginia. Subsequent to *Raymond*, Virginia state courts issued multiple decisions setting forth the elements of quantum meruit, none of which include the *Raymond* "request" element. *Gutterman, Franconia Two, LP v. Omniguru Sys.*, 82 Va. Cir. 256, 261 (Va. Cir. Ct. 2011), *Rockingham Redi Mix, Inc. v. Shifflett*, 80 Va. Cir. 191, 192 (Va. Cir. Ct. 2010) *R. M. Harrison Mech.*

Corp. v. Decker Indus., Inc., 75 Va. Cir. 404, 407 (Va. Cir. Ct. 2008*), T & M Elec. v. Prologis Trust*, 70 Va. Cir. 403, 405 (Va. Cir. Ct. 2006). The *Raymond* case was cited once by a Virginia state court shortly after it was handed down. *Gorman, Inc. v. Trans-World Enterprises*, 28 Va. Cir. 517 (Va. Cir. Ct. 1992). Since then, however, it has apparently never appeared in Virginia state court again.

Second, Virginia courts had the explicit opportunity to adopt a "request" element if such was desired and just as explicitly declined to do so. *City of Norfolk v. Muladhara, L.L.C.*, 79 Va. Cir. 414, 417 (Va. Cir. Ct. 2009). Virginia state courts have therefore made a clear choice, both through explicit declination to adopt a "request" element and repeated rulings on the claim elements which do not include "request. The *Raymond* formulation has not made an appearance in Virginia law in over twenty years. It seems apparent Virginia has rejected the *Raymond* "request" formulation of elements.

Third, it is of no moment Virginia courts frequently reference federal decisions for the elements of quantum meruit. The two cases repetitively cited by Virginia courts are *Centex Constr. v. ACSTAR Ins. Co*., 448 F. Supp. 2d 697, 707 (E.D. Va. 2006) and *Nossen v. Hoy*, 750 F. Supp. 740 (E.D. Va. 1990), neither of which include request as an element of a quantum meruit claim. *Centex*, 448 F. Supp. 2d at 707, *Nossen*, 750 F. Supp. at 744-45.

Fourth, there is no indication the state supreme court would suddenly adopt the *Raymond* formulation of elements. As noted, the state courts regularly cite to federal authority for this issue and have had the opportunity to view *Raymond* and adopt it if that was the position desired. In the nearly quarter century since *Raymond* was penned, however, they have not done so.

Whatever persuasive effect the *Raymond* interpretation may have had was implicitly overruled by the subsequent decisions of the Virginia state courts. As noted above, the Supreme Court has ruled district courts must accept the state's pronouncements of its laws, even when, as here, "the state rule may have departed from prior decisions of the federal courts." *West,* 311 U.S. at 236-237.

Virginia law has clearly departed from the *Raymond* decision. The district court erred in plucking an outlying federal interpretation which has not been followed by Virginia courts and contravenes the element formulation the Virginia courts have repeatedly embraced. It is apparent under the vast weight of authority expressed by the Virginia state courts that it has rejected the *Raymond* formulation of the elements.

10. The district court's adoption of the *Raymond* quantum meruit elements conflicts with corollary Virginia law

As discussed above, Virginia law explicitly prohibits insurers from choosing repair facilities for insureds and claimants or conditioning payment of a claim upon selection of an approved repair shop. Virginia Code § 38.2-517.

As the reasons why the court's ruling violates this authority is identical, whether analyzing unjust enrichment or quantum meruit, Appellants adopt and re-assert those arguments and citations to authority set forth in Section II.A.3., above.

11. The district court erred in finding the Appellants had not sufficiently alleged it would be unjust for Appellee insurers to retain the benefits conferred upon them by Appellants

The district court additionally dismissed the quantum meruit claim on the ground Appellants had failed to show it was unjust to allow Appellee insurers to retain benefits conferred upon them. In reaching that conclusion, the district court specifically disregarded the factual allegations of the Complaint as merely conclusory. Again, there are multiple errors committed within this conclusion.

Admittedly, what constitutes a "conclusory" statement has been the subject of much confusion. Though this Court does not appear to have addressed the matter directly, other courts have done so.

Allegations of discrete factual events are not conclusory in the relevant sense. *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 14 (1st Cir. 2011). The Second

Circuit has noted, "Rule 8(a) 'contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented' and does not authorize a pleader's 'bare averment that he wants relief and is entitled to it.'" *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012).

The factual allegations the district court deemed conclusory were those setting out the nature of Appellants work, the events creating Appellees payment obligation, the Appellants' expectation of payment, that insurers acknowledgment of the obligation through partial payment and how the Appellees have profited from failing to make full payment to the detriment of Appellees.

These statements set forth facts, events and circumstances. They are not "barren recitals of the statutory elements, shorn of factual specificity." *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1384 (11th Cir. 2010). They do not regurgitate the legal elements of the claim, they are not speculative nor ambiguous. Even if one or more facts could be construed as ambiguous, the district court is required at the motion to dismiss stage to resolve any ambiguities in favor of the Appellants' position with final resolution the sole province of the jury. *Anderson News*,680 F.3d at 190.

The only manner in which the district court could have legitimately decided these statements were merely conclusory would be if the general rule held all declarative

statements are deemed conclusory, regardless of content. That, however, is not the law. The district court's mischaracterization of factual statements was error.

Appellees are, of course, free to dispute they are obligated to make payment for the repairs or that they have failed to make full payment. They are free to dispute they have profited by not making full payment. They just may not do so via a motion to dismiss; the proper procedural mechanism for disputing factual allegations is an answer. *Ulbrich,* 2012 WL 3516499.

12. The district court imposed a heightened/incorrect pleading standard

In analyzing the Appellants' quantum meruit claim, the district court erred in the same manners in which it erred in analyzing the unjust enrichment claim

As the district court made the same errors as it made in analyzing the unjust enrichment claim, Appellants here adopt and re-assert the arguments and citations to authority set forth in Section II.A.7., above.

For these reasons and the foregoing, Appellants respectfully submit the district court erred, such errors being of substantial nature as to require reversal of the dismissal of the claim of unjust enrichment.

C. Tortious Interference with Business Prospects

As with unjust enrichment, the district court did not distinguish between the

various states' laws in deciding all Appellants' tortious interference claims. After recognizing the conduct described in the complaints likely does constitute tortious interference, the claim was nonetheless dismissed for purportedly improper group pleading. As the district court described it, "A general allegation some unidentified Defendant–or Defendants–interfered with some unidentified customers of some unnamed Plaintiff does not satisfy the pleading requirements of *Ashcroft v. Iqbal.*"[41]

As the district court's ruling did not implicate the elements of any state's law, a recitation of those elements appears unnecessary. The ruling was wholly predicated upon a purported deficiency of pleading under Rule 8 due to "group pleading."

The vagueness the district court attributed to the claim can only be reached if the district court disregarded the facts alleged in the complaint and adopted the various Appellees' arguments that tortious interference requires particularized pleading. Although the district court recognized Rule 9(b)'s particularity pleading requirement did not apply to the tortious interference claims,[42] the district court nonetheless required more than is required by Rule 8.

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[41]Pages 35 and 39 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

[42]Page 40 of Doc. No. 121 (Appeal No. 15-14178); Doc. No. 69 (Appeal No. 15-14180); Doc. No. 43 (Appeal No. 15-14160); Doc. No. 45 (Appeal No. 15-14162); Doc. No. 48 (Appeal No. 15-14179).

Factually, the district court substantially discredited the allegations of the complaint. The complaints clearly alleged that each named defendant had engaged in tortious conduct with respect to prospective customers of each plaintiff, and that each defendant had tortiously interfered with an identifiable group of people, consumers who identified a plaintiff's shop as the choice of repair facility.[43] The complaints also detailed the manner in which the named defendants interfered, e.g. slandering Appellants' work and integrity and engaging in economic coercion.[44]

Thus, the vagueness the district court complained of does not exist. Only by ignoring the allegations of the complaint and tacitly accepting the arguments of Appellees could the district court have reached its conclusion.

With respect to group pleading in general, this Court has repeatedly and consistently held that where a plaintiff asserts a group of defendants engaged in the same conduct, referring to that group as "the Defendants" is permissible. "No technical

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[43] Appeal No. 15-14178 Doc. No. 1, pgs. 104-109 and 132-135;
Appeal No. 15-14180 Doc. No. 1, pgs. 100-105 and 128-131;
Appeal No. 15-14160 Doc. No. 1, pgs. 82-86 and 106-109;
Appeal No. 15-14162 Doc. No. 1, pgs. 83-87 and 109-112; and
Appeal No. 15-14179 Doc. No. 1, pgs. 105-109 and 127-130.

[44] Appeal No. 15-14178 Doc. No. 1, pgs. 104-109;
Appeal No. 15-14180 Doc. No. 1, pgs. 100-105;
Appeal No. 15-14160 Doc. No. 1, pgs. 82-86;
Appeal No. 15-14162 Doc. No. 1, pgs. 83-87; and
Appeal No. 15-14179 Doc. No. 1, pgs. 105-109.

forms of pleading ... are required." *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997).

In rejecting *Crowe*, the district court rejected notice pleading in its entirety, asserting Appellants' reliance upon *Crowe* was misplaced as *Crowe* is "a pre-Iqbal case . . . which applied an outdated notice pleading standard that is no longer applicable."

Beyond the fact that notice pleading is still the appropriate pleading standard, the district court erroneously asserts the holding in *Crowe* is no longer valid. However, this Court and others within the circuit, continue to apply the holding in *Crowe*, even post *Iqbal.* See, e.g., *Jackson v. Bank of Am., NA*, 578 F. App'x 856, 860 (11th Cir. 2014), *Crespo v. Coldwell Banker Mortgage*, 599 F. App'x 868, 872 (11th Cir. 2014), *Smith v. Pilot Travel Centers,* No. 2:14CV713 MHT, 2015 WL 1457470, at *3, FN 2 (M.D. Ala. Mar. 30, 2015) *Sprint Sols., Inc. v. Fils Amie*, 44 F. Supp. 3d 1224, 1227 (S.D. Fla. 2014).

Additionally, another district applying *Crowe* has recognized that unless pleading fraud, the type of particularized pleading the Appellees and the district court are demanding is unnecessary. "[I]t appears that in the context of a multiple defendant lawsuit, the Eleventh Circuit has only required the pleading of specific allegations as to each defendant's conduct when there are fraud allegations. *See Ambrosia Coal &*

Constr. Co. v. Pages Morales, 482 F.3d 1309, 1317 (11th Cir.2007)." *F.D.I.C. v. Briscoe*, No.-1:11-CV-02303-SCJ, 2012 WL 8302215, at *7 (N.D. Ga. Aug. 14, 2012).

Crowe is clearly viable authority.

The detailed arguments of Appellees in their motions to dismiss establish Appellees understand the claim against them and the grounds upon which those claims rest. This is the purpose, after all, to plead such that a defendant has exactly that fair notice. *Id.* "[U]se of the collective reference "Defendants" does not deprive Defendants of fair notice of the conduct attributed to them; it simply signals that Defendants are each alleged to have participated in the conduct at issue." *Id.*

Affirmative authority permits the Appellants to collectively refer to "the Defendants" under the circumstances and "the Defendants" have confirmed they have a clear and unambiguous understanding of the claim of tortious interference asserted against them. The objection to use of the collective plural reference has no foundation.

Finally, the history of these cases has produced an irresolvable conflict. In a separate action in this MDL, the district court ordered the plaintiffs therein to amend the complaint so as to particularly identify each defendant in relation to the facts and causes of action asserted. After plaintiffs did so, the court expressed its extreme dissatisfaction, complaining that listing each and every defendant for each and every

factual allegation and cause of action made the complaint unnecessarily long and threatened plaintiffs with sanctions if it was done again. See Document No. 291, *A & E Auto Body, Inc. v. 21st Century Centennial Insurance Co.*, Cause No. 6:14-cv-310, entered January 21, 2015.

This district court has, therefore, foreclosed all avenues of pleading. The court has precluded use of "the Defendants" as well as banned particularized identification of each defendant under threat of sanctions.

CONCLUSION

The district court erred repeatedly in failing to abide by the required standard of pleading. It consistently adopted Appellees' arguments contrary to the factual allegations of the complaint, disregarded facts and otherwise failed to cloak the complaints with the acceptance of truth provided by in law on a motion to dismiss. The district court repeatedly amended, altered and otherwise failed to faithfully apply the law of the states. Had the proper analyses been conducted, the dismissals would not have been granted. Appellants respectfully request this Circuit Court reverse the district court and remand to the Middle District of Florida for further proceedings.

Respectfully submitted,

/s/ Allison P. Fry
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by the Order of consolidation issued December 29, 2015. The brief was prepared using Corel WordPerfect 12 and contains 20,917 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Allison P. Fry
ALLISON P. FRY

February 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of February, 2016, I electronically filed the Plaintiffs-Appellants brief with the Clerk of the Court. In addition, the original and six copies of the foregoing was filed with the Clerk of the Court via first class mail and an electronic version of the foregoing was sent via the Court's filing system or email to counsel of record.

/s/ Allison P. Fry
ALLISON P. FRY

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

QUALITY AUTO PAINTING CENTER OF ROSELLE, INC.
TRADED AS PRESTIGE AUTO BODY **PLAINTIFF/APPELLANT**

vs. **COURT OF APPEALS NO. 15-14160**

STATE FARM INDEMNITY CO., et al. **DEFENDANTS/APPELLEES**

AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-2(c), counsel for Plaintiff/Appellant hereby makes the following corrections and/or additions (noted in bold) to persons and entities that have or may have an interest in the outcome of this case:

21st Century Assurance Company

21st Century Centennial Insurance Company

21st Century Pinnacle Insurance Company

Allstate Insurance Group

Allstate New Jersey Insurance Company

Allstate New Jersey Property and Casualty Insurance Company

American Family Home Insurance Company

American Family Mutual Insurance Company

Ansell Grimm & Aaron

Axinn, Veltrop & Harkrider, LLP

Baker & Hostetler, LLP

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Barthel, David John

Bauchner, Joshua S.

Beekhuizen, Michael

Berkshire Hathaway Group

Berkshire Hathaway, Inc. (ticker: BRK.A and BRK.B)

Botti, Mark J.

Caldwell, Lori J.

Carpenter Lipps & Leland, LLP

Carpenter, Michael

Cashdan, Jeffrey S.

Chesler, Stanley R. (United States District Judge)

D'Amico, Brian J.

Dentons US, LLC

Diamantas, Kyle A.

Eaves Law Office

Eaves, Jr., John Arthur

Farmers Insurance Group

Fenton, Richard L.

Fischer, Ian Matthew

Fry, Allison P.

GEICO Advantage Insurance Company

GEICO Casualty Company

GEICO Choice Insurance Company

GEICO County Mutual Insurance Company

GEICO Corporation

GEICO General Insurance Company

GEICO Indemnity Company

GEICO Secure Insurance Company

Goldfine, Dan W.

Government Employees Insurance Company

Grabel, Joshua

Griffith, Jr., Steven F.

Halavais, Jamie L.

Hanover Insurance Company

Hanover, Mark L.

Hartford Fire and Casualty Group

Hartford Fire Insurance Company

Hartford Insurance Company of the Midwest

Hartford Underwriters Insurance Company

Hochstadt, Eric

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Koch, Amelia W.

Kochis, Kymberly

Lau, Bonnie

Liberty Insurance Corporation

Liberty Mutual Fire Insurance Company

Liberty Mutual Group Inc.

Liberty Mutual Insurance Company

Liberty Mutual Mid-Atlantic Insurance Company

Litchford, Hal K.

LM Insurance Corporation

Lugenbuhl, Wheaton, Peck, Rankin & Hubbard

Mastando, III, John

Mumford, Michael E.

Nationwide Corporation Group

Nationwide Mutual Insurance Company

Nelson, Michael R.

Nolan, Francis X.

Oates, Claire Carothers

Presnell, Gregory A. (United States District Judge)

The Progressive Corporation (ticker: PGR)

Progressive Direct Holdings, Inc.

Progressive Freedom Insurance Company

Progressive Garden State Insurance Company

Progressive Group

Quality Auto Painting Center of Roselle, Inc. traded as Prestige Auto Body

Rohback, Thomas G.

Rumberger, Kirk & Caldwell, PA

Salazar, Marjorie M.

Schmeeckle, Seth A.

Smith, Thomas B. (United States Magistrate Judge)

Snell & Wilmer, LLP

Squire Patton Boggs (US), LLP

State Farm Guaranty Insurance Company

State Farm Indemnity Company

State Farm Mutual Automobile Insurance Company

Sutherland, Asbill & Brennan, LLP

The Opus Investment Management, Inc.

United Services Auto Association

United Services Automobile Association Group

USAA Casualty Insurance Company

USAA General Indemnity Company

Vargo, Ernest E.

Waldor, Cathy L. (United States Magistrate Judge)

Weil, Gotshal & Manges, LLP

Yohai, David L.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ULTIMATE COLLISION REPAIR, INC. **PLAINTIFF/APPELLANT**

vs. **COURT OF APPEALS NO. 15-14162**

STATE FARM INDEMNITY CO., et al. **DEFENDANTS/APPELLEES**

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State Farm Indemnity Company

State Farm Mutual Automobile Insurance Company

Sutherland Asbill & Brennan LLP

The Opus Investment Management, Inc.

Ultimate Collision Repair, Inc.

United Services Auto Association

United Services Automobile Association Group

USAA Casualty Insurance Company

USAA General Indemnity Company

Waldor, Cathy L. (United States Magistrate Judge)

Weil, Gotshal & Manges, LLP

Yohai, David L.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CAMPBELL COUNTY AUTO BODY, INC. PLAINTIFF/APPELLANT

vs. COURT OF APPEALS NO. 15-14178

**STATE FARM MUTUAL AUTOMOBILE
INS. CO., et al. DEFENDANTS/APPELLEES**

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The Allstate Corporation (ticker: ALL)

Allstate Fire and Casualty Insurance Company

Allstate Indemnity Company

Allstate Insurance Company

Allstate Insurance Group

Allstate Insurance Holdings, LLC

Allstate Property and Casualty Insurance Company

Alston & Bird LLP

Arnzen, Molloy & Storm, PSC

Arrnzen, Mark G.

Auto Club Group

Auto-Owners Insurance Company

Baker & Hostetler, LLP

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Botti, Mark J.

Bunch, Van

Bunning, David L. (United States District Judge)

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Carlton Fields Jorden Burt

Carpenter Lipps & Leland LLP

Carpenter, Michael

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Cincinnati Financial Corporation (ticker: CINF)

The Cincinnati Insurance Company

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Dentons US LLP

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Dinsmore & Shohl, LLP

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Dykema Gossett, PLLC

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Grabel, Joshua

Grange Mutual Casualty Company

Grange Property and Casualty Insurance Company

Greeley, Theodore Joseph

Griffith, Jr., Steven F.

Gwin Steinmetz & Baird PLLC

Halavais, Jamie L.

Hamilton, Joseph L.

Helmer, Elizabeth

Holcomb, Dunbar, Watts, Best, Masters & Golmon, PA

Kenny, Michael P.

King & Spalding LLP

Klapheke, David T.

Koch, Amelia W.

Kochis, Kymberly

Kruppa, Andrew R.

Liberty Insurance Holdings, Inc.

Liberty Mutual Agency Corporation

Liberty Mutual Fire Insurance Company

Liberty Mutual Group Inc.

Liberty Mutual Holding Company Inc.

Liberty Mutual Insurance Company

Litchford, Hal K.

LM General Insurance Company

LMHC Massachusetts Holdings Inc.

Mando, Jeffrey C.

McAllister, Lori

McCluggage, Michael L.

McIntyre, M. Scott

MetLife, Inc. (ticker: MET)

Metropolitan Casualty Insurance Company

Metropolitan Direct Property and Casualty Insurance Company

Metropolitan Group

Metropolitan Property and Casualty Insurance Company

Mumford, Michael E.

Nationwide Affinity Insurance Company of America

Nationwide Corporation Group

Nationwide Insurance Company of America

Nationwide Mutual Insurance Company

Nelson, Michael R.

Nitardy, Michael E.

Nolan, Francis X.

Oates, Claire Carothers

Parry Deering Futscher & Sparks PSC

Powers, Tiffany L.

Presnell, Gregory A. (United States District Judge)

Progressive Advanced Insurance Company

The Progressive Corporation (ticker: PGR)

Progressive Casualty Insurance Company

Progressive Direct Holdings, Inc.

Progressive Direct Insurance Company

Progressive Group

Progressive Preferred Insurance Company

Robinson, III, William T.

Rooney, Timothy J.

Safe Auto Group

Safe Auto Insurance Company

Safe Auto Insurance Group, Inc.

Safeco Corporation

Safeco Insurance Company of America

Shelter General Insurance Company

Shelter Insurance Companies

Shelter Mutual Insurance Company

Sites & Harbison, PLLC

Smith, Candace J. (United States Magistrate Judge)

Smith, Thomas B. (United States Magistrate Judge)

Snell & Wilmer, LLP

Squire Patton Boggs (US), LLP

State Auto Financial Corporation (ticker: STFC)

State Auto Mutual Group

State Auto Property and Casualty Insurance Company

State Automobile Mutual Insurance Company

State Farm Fire and Casualty Company

State Farm Mutual Automobile Insurance Company

Steinmetz, Robert L.

Steptoe & Johnson, LLP

Stroock & Stroock & Lavan, LLP

Sutherland Asbill & Brennan LLP

The Travelers Companies, Inc. (ticker: TRV)

Travelers Casualty and Surety Company

Travelers Casualty and Surety Company of America

Travelers Casualty Insurance Company of America

Travelers Group Inc.

The Travelers Home and Marine Insurance Company

The Travelers Indemnity Company of Connecticut

Travelers Property Casualty Company of America

United Services Automobile Association

United Services Automobile Association Group

USAA

USAA Casualty Insurance Company

USAA General Indemnity Company

Vargo, Ernest E.

Wallace, Chad E.

Walters, John W.

Winston & Strawn, LLP

Zard, Eric David

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEE PAPPAS BODY SHOP, INC., et al. PLAINTIFFS/APPELLANTS

vs. COURT OF APPEALS NO. 15-14179

STATE FARM MUTUAL AUTOMOBILE INS. CO., et al. DEFENDANTS/APPELLEES

AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-2(c), counsel for Plaintiffs/Appellants hereby make the following corrections and/or additions (noted in bold) to persons and entities that have or may have an interest in the outcome of this case:

21st Century Assurance Company

21st Century Centennial Insurance Company

AIG Property Casualty Company

Alfa Corporation

Alfa Specialty Insurance Corporation

Alfa Mutual Insurance Company

Alfa Mutual Fire Insurance Company

Alfa Vision Insurance Corporation

Allstate Fire and Casualty Insurance Company

Allstate Indemnity Company

Allstate Insurance Company

Allstate Insurance Group

Allstate Property and Casualty Insurance Company

Alston & Bird LLP

American National Group

Art Walker Auto Service, Inc.

Axinn, Veltrop & Harkrider, LLP

Bailey, Anderson T.

Baker & Hostetler, LLP

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Barthel, David John

Beekhuizen, Michael

Berkshire Hathaway Group

Berkshire Hathaway, Inc. (ticker: BRK.A and BRK.B)

Besvinick, Laura E.

Bonk, Jason B.

Botti, Mark J.

Caldwell, Lori J.

Carlton Fields Jorden Burt

Carpenter Lipps & Leland LLP

Carpenter, Michael

Clark, Johanna W.

Coburn, Joseph R.

Coffee, Gordon A.

Cottrell, Edward Keenan

Cozen O'Connor

Crawford, Cynthia Fleming

Dairyland Insurance Company

David C. Brosius d/b/a Martins Auto Body Works, Inc.

de Leeuw, Michael B.

Dentons US LLP

Diamantas, Kyle A.

Donegal Mutual Insurance Company

Donovan, Kimberly J.

Eaves Law Office

Eaves, Jr., John Arthur

Eimer Stahl LLP

Elephant Insurance Company

Erie Family Life Insurance Company

Erie Indemnity Company (ticker: ERIE)

Erie Insurance Company

Erie Insurance Company of New York

Erie Insurance Exchange, a reciprocal insurance exchange

Erie Insurance Group

Erie Insurance Property & Casualty Company

Esurance Insurance Company

Esurance Property and Casualty Insurance Company

Farmers Insurance Group

Fenton, Richard L.

Fischer, Ian Matthew

Flagship City Insurance Company

Francis, Maurice

French, Thomas A.

Fry, Allison P.

GEICO Advantage Insurance Company

GEICO Casualty Company

GEICO Choice Insurance Company

GEICO County Mutual Insurance Company

GEICO Corporation

GEICO General Insurance Company

GEICO Indemnity

GEICO Secure Insurance Company

General Insurance Company of America

Goldfine, Dan W.

Government Employees Insurance Company

Grabel, Joshua

Griffith, Jr., Steven F.

Gwin Seinmetz & Baird, PLLC

Halavais, Jamie L.

Hanover, Mark L.

Hardt, Kenneth

Harleysville Preferred Insurance

Harman Claytor Corigan Wellman, PC

Hartford Fire and Casualty Group

Helmer, Elizabeth

Hochstadt, Eric

Hudson, Henry E. (United States District Judge)

Jones Day

Jones, James Michael

Kenny, Michael P.

Koch, Amelia W.

Kruppa, Andrew R.

Lau, Bonnie

Leader, Leader & Landau, PL

LeClairRyan

Lee Pappas Body Shop, Inc.

Liberty Mutual Insurance Company

Litchford, Hal K.

LM General Insurance Company

LM Insurance Corporation

Logan, Kevin V.

Mastando, III, John

McCluggage, Michael L.

Miller Legal, LLC

Miller, Peter Andrew

Mills, Laurin H.

Mumford, Michael E.

Nationwide Corporation Group

Nationwide General Insurance Company

Nationwide Mutual Fire Insurance Company

Nationwide Mutual Insurance Company

Nationwide Property and Casualty Insurance Company

Powers, Tiffany L.

Presnell, Gregory A. (United States District Judge)

Property and Casualty Insurance Company of Hartford

QRS Realty Corp.

Reklaitis, Robert Francis

Rhoads & Sinon, LLP

Rohback, Thomas G.

Rooney, Timothy J.

Rumberger, Kirk & Caldwell, PA

Safe Auto Group

Safe Auto Insurance Company

Sentry Insurance Group

Sims, Charles M

Sinnott, Nuckols & Logan, PC

Skilling, Elizabeth

Smith, Gambrell & Russell, LLP

Smith, Thomas B. (United States Magistrate Judge)

Snell & Wilmer, LLP

Spotts Fain PC

Squire Patton Boggs (US), LLP

State Farm Fire and Casualty Company

State Farm Mutual Automobile Insurance Company

Steinmetz, Robert L.

Stroock & Stroock & Lavan, LLP

Sullivan, John J.

Travco Insurance Company

The Travelers Companies, Inc. (ticker: TRV)

Travelers Group Inc.

The Travelers Home and Marine Insurance Company

Travelers Commercial Insurance Company

Travelers Property Casualty Insurance Company

Travelers Property Casualty Company of America

Ubersax, Jeffery D.

United Services Automobile Association

United Services Automobile Association Group

USAA Casualty Insurance Company

USAA General Indemnity Company

Vargo, Ernest E.

Virginia Farm Bureau

Virginia Farm Bureau Town and Country Insurance Company

Weil, Gotshal & Manges, LLP

Whiteford Collision and Refinishing, Inc.

Winston & Strawn, LLP

Yohai, David L.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONCORD AUTO BODY, INC. **PLAINTIFF/APPELLANT**

vs. **COURT OF APPEALS NO. 15-14180**

STATE FARM MUTUAL AUTOMOBILE
INS. CO., et al. **DEFENDANTS/APPELLEES**

AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-2(c), counsel for Plaintiff/Appellant hereby makes the following corrections and/or additions (noted in bold) to persons and entities that have or may have an interest in the outcome of this case:

Allied Property & Casualty Insurance Company

Allstate Fire and Casualty Insurance Company

Allstate Insurance Company

Allstate Insurance Group

Allstate Property and Casualty Insurance Company

Alston & Bird LLP

American Family Insurance Company

American Family Mutual Insurance Company

American Standard Insurance Company of Wisconsin

AmFam, Inc.

Automobile Club Inter-Insurance Exchange

Baker & Hostetler, LLP

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Barthel, David John

Beekhuizen, Michael

Berkshire Hathaway Group

Berkshire Hathaway, Inc. (ticker: BRK.A and BRK.B)

Best, R. Bradley

Besvinick, Laura E.

Bonnett and Fairbourn, PC

Botti, Mark J.

Brown & James, PC

Caldwell, Lori J.

Carlton Fields Jorden Burt

Carpenter Lipps & Leland LLP

Carpenter, Michael

Cashdan, Jeffrey S.

Clark, Johanna W.

Concord Auto Body, Inc.

Cornerstone National Insurance Company

Dentons US LLP

Diamantas, Kyle A.

Druley, Deborah C.

Eaves, Jr., John Arthur

Eimer Stahl LLP

Esurance Property and Casualty Insurance Company

Faegre Baker Daniels, LLP

Farm Bureau Town & Country Insurance Company of Missouri

Farmers Insurance Company

Farrar, Tonna K.

Fenton, Richard L.

Fezzi, Katherine Baber

Fischer, Ian Matthew

Fry, Allison P.

GEICO Advantage Insurance Company

GEICO Casualty Company

GEICO Choice Insurance Company

GEICO County Mutual Insurance Company

GEICO Corporation

GEICO General Insurance Company

GEICO Indemnity Company

GEICO Secure Insurance Company

Goldfine, Dan W.

Government Employees Insurance Company

Grabel, Joshua

Griffith, Jr., Steven F.

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Halavais, Jamie L.

Hanover, Mark L.

Hochstadt, Eric S.

Holcomb, Dunbar, Watts, Best, Masters & Golmon, PA

Hurley, Ryan Michael

Jenkins, Sarah

Kenny, Michael P.

King & Spalding LLP

Koch, Amelia W.

Kochis, Kymberly

Liberty Mutual Fire Insurance Company

Liberty Mutual Group Inc.

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Mastando, III, John P.

McCarthy, Michael Sean

McCluggage, Michael L.

Mumford, Michael E.

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Nationwide Corporation Group

Nationwide Insurance Company of America

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Nolan, Francis X.

Oates, Claire Carothers

Osborn, Kathy Lynn

Perkins, Heather Carson

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Progressive Casualty Insurance Company

Progressive Direct Insurance Company

Progressive Group

Progressive Northwestern Insurance Company

Progressive Preferred Insurance Company

Rooney, Timothy J.

Ross, John A. (United States District Judge)

Rumberger, Kirk & Caldwell, PA

Safe Auto Group

Safe Auto Insurance Company

Safeco Insurance Company of Illinois

Schwartz, Steven Howard

Shelter Insurance Companies

Shelter Mutual Insurance Company

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Squire Patton Boggs (US), LLP

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State Farm Mutual Automobile Insurance Company

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Stroock & Stroock & Lavan, LLP

Sutherland Asbill & Brennan LLP

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The Travelers Home and Marine Insurance Company

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United Services Automobile Association Group

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USAA General Indemnity Company

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Wilke and Wilke, PC

Wilke, Daniel E.

Winston & Strawn, LLP

Yohai, David L.