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

EN BANC BRIEF
FOR QUALITY AUTO PAINTING CENTER OF ROSELLE, INC.,
(Traded as Prestige Auto Body)

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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

EN BANC BRIEF
FOR ULTIMATE COLLISION REPAIR, INC.

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Nos. 15-14160-AA, 15-14162-AA, 15-14178-AA, 15-14179-AA, and15-14180-AA

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

EN BANC BRIEF
FOR CAMPBELL COUNTY AUTO BODY, INC.

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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

EN BANC 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, and15-14180-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

EN BANC BRIEF
FOR CONCORD AUTO BODY, INC.

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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 file concurrently herewith 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 CONCERNING EN BANC ORAL ARGUMENT

The April 12, 2018 Memorandum to Counsel and Parties from the Clerk of the United States Court of Appeals for the Eleventh Circuit states that: "Oral argument will be conducted the week of October 22, 2018 in Atlanta, Georgia. Each party will be allotted 20 minutes per side for oral argument." Appellants are grateful for, and look forward to, oral argument before the en banc panel.

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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.

On August 17, 2015, the District Court granted Defendant's Rule 12(b)(6) Motions to Dismiss, as recommended in the Magistrates' Report and Recommendation. Plaintiffs timely filed notices of appeal to the Eleventh Circuit.

STATEMENT OF THE ISSUES FOR EN BANC REVIEW

The April 20, 2018 Memorandum to Counsel states: "For the purposes of the upcoming en banc rehearing in the above referenced case, the court desires for counsel to focus their briefs on the following issues:

1) Can a per se illegal price fixing agreement or conspiracy between and among the several defendant insurance companies plausibly be inferred from the allegations of the complaints in the several cases before this Court. If so, identify the allegations from which such an agreement or conspiracy can plausibly be inferred,

and discuss whether any asserted inference of agreement or conspiracy is "just as much in line with a wide swath of rational competitive business strategy prompted by common perceptions of the market," *Bell Atlantic Corp. V. Twombly*, 550 U.S. 544, 554, 127 S.Ct. 1955, 1964 (2007), or whether such inference is supported by allegations tending "to rule out the possibility that the defendants were acting independently." Id.

2) Can a per se illegal agreement or conspiracy between and among the several defendant-insurance companies to boycott the plaintiffs' body shops plausibly be inferred from the allegations of the complaints in the several cases before this Court. If so, identify the allegations from which such an agreement or conspiracy can plausibly be inferred, and discuss whether any asserted inference of agreement or conspiracy is "just as much in line with a wide swath of rational competitive business strategy prompted by common perceptions of the market," *Bell Atlantic Corp. V. Twombly*, 550 U.S. 544, 554, 127 S.Ct. 1955, 1964 (2007), or whether such inference is supported by allegations tending "to rule out the possibility that the defendants were acting independently." Id.

3) The general issues on appeal as stated in the Appellants' Opening Briefs were that the District Court erred:

a. by imposing an incorrect pleading standard upon Appellants' complaint; and

b. by creating new elements of state law causes of action and ignoring extant state law which contradicts its ruling.

STATEMENT OF THE CASE

I. BACKGROUND AND NATURE OF THE CASE

Each Appellant is a professional repairer of physical damage to automobiles, i.e., body shops. Appellees are automobile insurance companies, 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.

The body shops initiated litigation alleging *per se* violations of the Sherman Act, (15 U.S.C. § 1), asserting first that the insurers had violated antitrust laws by entering into an agreement, combination or conspiracy to set a "market rate," based on not free market forces but on artificial rates created by, and would benefit only, the insurance companies. The insurance companies next agreed or conspired to put pressure on the body shops into accepting their artificial, uniform, market rate by steering insureds away from the non-compliant shops that charged more than the rate.

The body shops argue that the insurance companies' concurrent lines of tactics violated both federal antitrust laws and state tort laws, namely that by their price-fixing and boycotting actions, the insurance companies were unjustly enriched, deprived the shops of quantum meruit, and tortiously interfered with the

potential business of the shops.

The conflict between body shops and insurers over proper repairs and payment is long standing. In 1963, the United States Department of Justice sued 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. Those associations were made up of many of the Appellee insurance companies or earlier incorporations thereof and relations thereto. The suit (not dissimilar to the case at bar), alleged violations of 15 U.S.C. § 1 for price fixing and boycotting and resulted in entry of a Consent Decree 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.

In a clear violation of the Consent Decree, the insurance companies did not for long change their practice of fixing prices and boycotting non-compliant body shops, but this time they were highly motivated to conceal the evidence of their conspiracy, developing new strategies to achieve the same ends. They professed a

"market rate," whether that was the rate the body shops charged. Most Appellee insurance companies 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 insurance companies carried out 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 without regard to whether a shop associated with a DRP, and whether or not an insurer sponsored a DRP.

Appellee insurance companies 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 the insurance companies or the industry at large, but once imposed does not vary. However, the insurance companies undertake no steps to accurately determine the state of the body shop industry. No Appellee insurance company has ever defined any geographical or business "market area."

Appellee State Farm falsely claims that it establishes a "market rate." However, State Farm's methodology is fundamentally flawed, beginning with inputting fabricated labor rates and ending with a calculation method that holds no geographical, statistical or mathematical validity. The details of State Farm's

fraudulent "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.

In the 50's and 60's, the federal defendant auto insurers were careless enough to create written records of their agreement and this carelessness provided substantial direct evidence the Department of Justice was able to subpoena. The insurance companies learned from their mistakes and became better at concealing their agreements. Appellant body shops believe that discovery will divulge those antitrust agreements, but at this stage, the body shops exhaustively plead facts supporting circumstantial evidence or "plus factors" which are sufficient to make the existence of such agreements plausible — such as parallel conduct, adoption of a uniform price despite variables that would ordinarily result in divergent prices, and uniform practices.

---

[1]V1:D1:pp.43-45. For purposes of brevity and judicial economy, unless otherwise stated, all citations to the record in this Appellants' En Banc Brief are to the Complaints in the Appendices filed previously with the Court. Inasmuch as all five actions consolidated for purposes of this appeal are nearly identical in language and allegations, Body Shops will refer to the pages of the Complaint in the lead case, *Quality Auto Painting Center v. State Farm Indemnity Company*, Appeal No. 15-14160 as follows V1-Volume1 of the Appendices; D1 – Document 1 of Volume 1; Page Number of Volume 1 (here pages 43-45.)

Body shops which "buck the system," including Appellants, are labeled problem shops. The identity of "problem" shops are shared by the Insurance companies with each other and once identified, the Insurance companies commence a group boycotting of the problem shop. This boycotting is effected through a practice known as "steering," in which insurance companies steered insureds away from the non-compliant shops with misleading or false statements about the shops' business integrity and quality.

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 their choice of repair facility is considered by the insurance company to be a problem shop. 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.

Insurance companies also "boycott" body shops by exerting economic coercion upon consumers, most often in tandem with making false and misleading statements about them. 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 insurance companies decide to pay.

The price fixing and boycotting reached a critical mass in early 2014, when Appellant body shops decided to fight back legally, and this litigation began.

II. PROCEDURAL BACKGROUND

Appellant body shops filed their complaints between November 3 and November 7, 2014, in the federal district courts in their states. All five cases were transferred to the Middle District of Florida as part of MDL 2557 and assigned separate case numbers under the MDL umbrella. On February 19 and 20, 2015, Appellee Insurance Companies filed multiple motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Body shops 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. These appeals were subsequently timely noticed.

On September 27, 2017 an Eleventh Circuit Panel of Judges, having heard oral argument, ruled in favor of the Appellants and reversed and remanded the District Court's dismissals of the Complaints.

On April 26, 2018, the Court of Appeals Ordered that this case would be reheard en banc.

III. STANDARD OF REVIEW

A. De Novo

The Court of Appeals reviews de novo a dismissal for failure to state a claim. In doing so, it must accept the factual allegations as true and draw all reasonable inferences in favor of the claimant, *Spanish Broad. Sys.*, 376 F.3d at 1070. This Court must reverse the dismissal if the complaint "state[s] a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)).

B. Body Shops' Right of Access to the Courts

The Appellants in these five consolidated appeals are a small sampling of generally family-owned auto body and collision repair shops throughout the country who's ability to stay in business has been severely impaired by the insurance companies which are for the most part powerful companies which have unlawfully inserted themselves into the business of collision repair by controlling and fixing prices, refusing to pay for required repairs, refusing to cover insured repairs, boycotting the body shops and steering customers away, and putting customers (and their insureds) at risk by mandating installation of unsafe "after-market" parts.

The standard at this point in the litigation is not whether these alarming allegations are true, but whether the body shops will be given the fair opportunity

mandated by the American justice system to prove to an impartial trier of fact that they are true.

This nation has long viewed a person's (or company's) ability to gain access to the courts as a fundamental element of our democracy. Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803) described the right to obtain civil redress as the "very essence of civil liberty." Citing Blackstone, the Court emphasized this point stating:

> "In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law. 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.'"

Id.

The Third Circuit Court of Appeals further emphasized this right when it stated that "[f]ew issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts." *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

Appellant body shops were denied that fundamental due process right when their complaints were dismissed for failure to state a claim by the MDL Trial Court. Those dismissals were plainly erroneous because they denied the opportunity for civil redress by requiring them to meet a heightened pleading standard greater than what Congress established in Rule 8 of the Federal Rules of Civil Procedure; and what this Court, and the Supreme Court, have required.

Appellant body shops are asking this en banc panel in considering the allegations stated in their complaints de novo, to reverse the dismissals by the District Court, and give "Mom and Pop Body Shops" their day in court.

C. Defendants' Right to Fair Notice

Of course the body shops understand that the great symbolic "Scale of Justice" requires that the Courts balance the fundamental right to access on one side - with the right of the accused insurance companies to fair notice of the allegations and claims against them so that they might defend against them. Congress created that balance by enactment of the Rule 8 pleading standard, and in *Twombly, Iqbal* and their progeny, the judicial system has further defined and articulated – not heightened - as the Appellee insurance companies argue. The pleading standard set that balance between ACCESS and NOTICE.

D. The Pleading Standard

(1) Rule 8 requires a "short and plaint statement of the facts underlying the claims. In *Nettles v. City of Leesburg - Police Dep't,* 415 Fed. Appx. 116, 121 (11th Cir. 2010) this Court articulated that "[a]fter Iqbal it is clear that there is no `heightened pleading standard' as it relates to cases governed by Rule 8(a)(2).

(2) Rule 12(b)(6). The Supreme Court in *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), and this Court in *Speaker v. CDC*, 623 F.3d 1371, 1379 (11th Cir. 2010): held that "In ruling on a 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable

to the plaintiff." In *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) the Supreme Court further clarified that "[w]hat Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support."

(3) In *Twombly* the Supreme Court considered the Rule 8 pleading standard in light of a complaint alleging antitrust violations of the Sherman Act, stating the rule which Appellant body shops urge this Court sitting en banc to follow in reviewing the 12(b)(6) dismissals by the District Court:

> Stating such a claim requires a complaint with enough factual matter (taken as true) to **suggest that an agreement was made**. **Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.**"

Twombly, 550 U.S. at 557, 127 S. Ct. at 1966) [emphasis added.] See also *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1332 (11th Cir. 2010).

Contrary to the argument of the insurance company Appellees, Iqbal/Twombly did not articulate a higher or enhanced pleading standard. As stated by the Court in *Twombly,* the plausibility requirement "reflects" but does not exceed "the threshold requirement of Rule 8(a)(2) that the [complaint's] plain statement [of a claim] possess enough heft to show that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966 (internal quotation marks omitted).

SUMMARY OF THE ARGUMENTS

I. INTRODUCTION

The district court employed an improper and heightened pleading standard in dismissing insurance companies' complaints, a standard substantially higher than that set forth by the Federal Rules of Civil Procedure and interpreted and explained by the United States Supreme Court and this Court. The district court improperly breached its obligations and duties by adopting the arguments of the insurance companies 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 the body shops 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.

II. FACTUAL ALLEGATIONS

A. The insurance companies have a financial stake and a vested interest in controlling body shops.

The body shops operate in Kentucky, Missouri, New Jersey, and Virginia. They offer policies in these states and collectively control approximately 65% of the private passenger automobile insurance market in Kentucky, 85% in Missouri, 72% in New Jersey[2], and 100% in Virginia. Of the insurance companies, the State Farm companies have the largest market share: they control approximately 22.3% of the private passenger automobile insurance market in Kentucky, 22.88% in Missouri, and 14.85% in Virginia. The insurance companies' insureds generate 60% of the Kentucky body shop's revenue and between 70% and 95% of the revenue of each of the remaining body shops. Most of the insurance companies are subsidiaries, affiliates, or are otherwise related.

B. The insurance companies create the "market rate" at which they reimburse the body shops.

The insurance companies refuse to reimburse the body shops at more than the "market rate," which is a term that appears in direct repair program (DRP) agreements between the companies and certain body shops. Under a DRP agreement, an insurance company lists a body shop as a "preferred provider" in exchange for the company's paying the shop no more than the "going rate in the

[2] V1:D1:p.42

market area." However, even if a body shop does not participate in an insurance company's DRP, the company refuses to reimburse the shop at more than the market rate. None of the plaintiff body shops participates in a defendant insurance company's DRP.[3]

The market rate comprises the market labor rate and the market materials costs, both of which the insurance companies select. The insurance companies use the market labor rate that one company, State Farm, determines by using a method that is unverified and the results of which State Farm manipulates. Also, the insurance companies depress the market material costs by pressuring body shops into using inferior parts and into offering discounts and concessions.

1. The insurance companies use the market labor rate that one company sets and determines and manipulates the auto repair market.

In determining the market labor rate that all of the insurance companies use, Appellee State Farm uses an unverified "half plus one" method of calculation and manipulates the result.[4] The half plus one method (1) calculates half plus one—an amount we designate as "n"—of the total number of employees or work bays (whichever is fewer in each body shop) in the market area; (2) lists the shops in a market area from the shop with the fewest employees or work bays to the shop

[3] V1:D1:pp.41-43

[4] In addition to using the market labor rate, the other insurance companies have specifically advised the body shops that the companies "will pay no more than State Farm pays for labor."

with the most; and (3) declares the market labor rate as the labor rate of the shop that employs the n-th employee or work bay. It is unclear how the method designates a market area. No insurance company other than State Farm has attempted to independently verify the results of this method.

In addition to using an unverified method of calculating the market labor rate, State Farm manipulates the results of the method by affecting the inputs. First, State Farm affects the labor rate that a body shop submits through an online survey compiling information used in the half plus one method. A body shop that enters a DRP agreement with State Farm can fill out a survey about the shop's labor rate through an electronic forum, State Farm's Business to Business portal.

State Farm can and does manipulate a body shop's survey submission. Second, State Farm affects the inputs used in the half plus one method by removing a body shop that charges a higher labor rate from the DRP. If a DRP body shop tries to charge more than the market labor rate, State Farm first tells the shop that it is the only shop that is attempting to raise its labor rate—when in fact several shops have done the same. If the DRP body shop continues to charge a higher labor rate, State Farm threatens to and does remove the shop from the DRP. Thus the labor rate of the body shop no longer contributes, even facially, to the calculation of the market labor rate.[5]

[5] V1:D1:pp. 43-46.

By using an unverified method of calculating the market labor rate and by manipulating the results, State Farm achieves a wholly artificial market labor rate.

2. The insurance companies lower the market costs of materials by pressuring the body shops into using inferior parts and into offering discounts and concessions.

The insurance companies depress the market material costs. They use tactics such as requiring a body shop to repair a faulty part rather than installing a replacement part, even when the shop strongly recommends against continued use of the faulty part; requiring a shop to install a used or recycled part, even when a new part is available and would be best; and requiring a shop to offer discounts and concessions, even if doing so will force the shop to operate at a loss.

3. The resulting market rate is arbitrary and inconsistent with leading collision repair estimating databases.

The resulting market rate is arbitrary and inconsistent with three leading collision repair estimating databases, ADP, CCC, and Mitchell, on which the insurance companies selectively rely. For example, insurance companies strictly adhere to the labor time estimated by a database, yet they argue that materials costs are included in a repair estimate (the amount that the companies would have to pay) although the databases state that the costs are not included in an estimate.[6]

The Kentucky and Missouri complaints include allegations about an

[6] V1:D1:pp.49-53

employee of Safeco Insurance Company who stated that "the corporate direction given was" for the employee to pay a body shop in accordance with the databases only "when it was financially advantageous to the insurer to do so."[7] This practice of creating arbitrary rates forces a body shop either to perform an incomplete or substandard repair—which prevents the shop from fulfilling an obligation to a customer to return a vehicle to its pre-accident condition—or to accumulate costs without compensation—which jeopardizes the shop's business.[8]

4. The insurance companies force compliance with their artificial market rate.

The insurance companies force the body shops to charge at or less than the market rate with misleading or false statements to insureds about a non-compliant shop's business integrity and quality. For example, the insurance companies tell an insured that the body shop takes longer to repair (and that the company would not pay for a rental car after a certain number of days); that the company cannot guarantee the shop's work as it does for other shops; that the shop offers lower quality services; and that previous customers had complained about the shop. The statement that a body shop takes longer is misleading because any delay by a shop is caused by an insurance company's delay in sending an appraiser to inspect an

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[7] V7:D1:pp.82-83

[8] The body shops attached as exhibit 3 to each complaint a "non-exhaustive list of procedures and processes the [d]efendants refuse to pay and/or pay in full." See for example V1:D1:72-75; V7:D1:pp.78-81.

insured's vehicle. Also, the statement that an insurance company cannot guarantee the body shop's work is misleading because the company does not guarantee the work of any shop. Finally, the insurance companies make the remaining statements without ascertaining the truth of the statements and with the intent to disparage a non-compliant body shop's business integrity and quality.[9]

III. Federal Antitrust Claims

A. Horizontal Price Fixing

1. A per se illegal price fixing agreement or conspiracy between and among the several defendant insurance companies can plausibly be inferred from the allegations of the complaints in the several cases before this Court.

The Sherman Antitrust Act makes any unreasonable contract, combination, or conspiracy in the restraint of interstate trade or commerce illegal. Under 15 U.S.C. § 1, certain classes of conduct are deemed "per se" violations, which are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co*., 472 U.S. 284, 289, 105 S. Ct. 2613, 2617 (1985).

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,

[9] V1:D1:pp.53-55, V7:D1:pp.86-87

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.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54, 127 S.Ct. 1955 (2007), Supreme Court ruled that a *per se* unlawful horizontal agreement in restraint of trade could be "tacit or express," and if the existence of a formal agreement may not be readily obtainable (except perhaps through discovery), the agreement can be "inferred" by circumstantial evidence, often referred to a "Plus Factors." As stated by the Court in *Twombly*, parallel conduct appears in "a wide

swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market"). Therefore, Appellant body shops must show not only "parallel conduct" but also "further factual enhancement." *Id.* at 557, 127 S. Ct. at 1966; *see also Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1069 (11th Cir. 2017).

That further factual enhancement, sometimes understood as circumstantial evidence of an agreement, has most often been labeled in the antitrust case as "parallel plus" or "plus factors," *see, i.e. Twombly*, 550 U.S. at 553, 127 S. Ct. at 1963; *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 45 (1st Cir. 2013),which referred to them as "proxies for direct evidence of an agreement," *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004).

Notably the Eleventh Circuit has never set forth a list of accepted factors or a combination thereof that might be sufficient to turn mere parallel conduct into a per se violation of the Sherman Act. Some Circuits have listed which plus factors are most important in evaluating circumstantial evidence of concerted action. Instead, the Eleventh Circuit has concluded that "any showing by [a plaintiff] that tends to exclude the possibility of independent action can qualify as a plus factor." The parallel conduct alleged by the Body shops is that the insurance companies adopted the same labor rate and materials costs and employed the same line of tactics to depress the rate and costs. The allegations here are not dissimilar to those against

tobacco companies in *Williamson Oil Company Inc v. Philip Morris Usa Rj,* 346 F.3d 1287 at 1304 (11th Cir.2003) wherein this Court found that independent action was “evidenced by the repeated, synchronous pricing decisions that occurred within the tobacco industry between 1993 and 2000, appellees plainly priced their products in parallel.”

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

The allegations set forth in the five Complaints before the Court plausibly infer that the alleged price fixing probably did not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties, and therefore tend "to rule out the possibility that the defendants were acting independently." *Twombly.* At the very

least, the allegations are sufficient to infer the existence of an agreement and allow the parties to proceed to discovery and trial to further uncover and establish (or dispute) a *per se* violation of the Sherman Act.

In *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1069 (11th Cir. 2017) this Court held that in addition to showing parallel conduct and "further factual enhancement needed to support a plausible inference of an agreement."

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 do not label them as such, they do include facts supportive of several plus factors:

a. The Complaints include specific allegations of conduct that probably do not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.

In *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 713, 68 S. Ct. 793, 809 (1948) the Court reviewed a group's adoption of a uniform price despite variables that would ordinarily result in divergent prices, and held the "use of the multiple basing point delivered price system by the cement producers has been coincident with a situation whereby for many years, with rare exceptions, cement has been offered for sale in every given locality at identical prices and terms by all producers." Phillip E. Areeda & Herbert Hovenkamp in *Antitrust Law* ¶ 1434b (3d ed. 2012) ¶ 1434b stated that customary indications of traditional conspiracy

are present if rivals place "simultaneous identical bids on a made-to-order product not readily assembled from standard and conventionally priced items."

Body shops alleged the following facts in their respective Complaints as "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 (*Twombly* plus-factors):[10]

- 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".

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[10] V1:D1:pp.43-45, 46-50.

- 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.

b. Specific allegations of conduct that indicate the sort of restricted freedom of action and sense of obligation that one generally associates with agreement (*Twombly* plus-factor):[11]

- 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.

c. Specific allegation of actions by the insurance companies which, if taken independently, would be contrary to their economic self-interest (*Re/max*):[12]

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

d. Specific allegations as to whether the insurance companies have a common motive to conspire:[13]

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[11] V1:D1:pp.47-48, 53
[12] V1:D1:pp.47-48, 53
[13]V1:D1:pp.10

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

e. Specific allegation as to whether the insurance companies have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy:[14]

- 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").

f. Specific allegation that the insurance companies have a common motive to conceal their agreement:[15]

- The Federal Consent Decree prohibiting the very actions alleged in the Complaints. (See Exhibit "4",V1:D1:pp.76-80.) In 1963, the defendant insurers were careless enough to create written records of their agreement and this carelessness provided substantial direct evidence the Department of Justice was able to subpoena. It is reasonable to infer (for pleading purposes) that consent decree did not alter defendant insurers' illegal conduct, they simply became better at concealing their

[14] V1:D1:pp.47-48, 53,62; V7:D1:pp.80
[15] V1:D1:pp.55-56

crime.

g. Specific allegations that meet the DOJ's list of "Tip-Offs to Collusion" which equal Plausible Plus Factors (see discussion below):[16]

- Holding prices firm.
- Standard Formula for Computing Prices.
- Concentration of power in small group of companies.
- Industry-wide or Association Schedules.

h. The complaints also include specific examples of of plausible price-fixing allegation:[17]

- standardized formulas for calculating labor rates, parts purchases and paint and materials compensation;
- identical fixed prices for labor rates which hold firm until State Farm authorizes a change;
- the insurers utilization of identical scripts for refusing to honor labor rates which do not conform to the fixed price;
- identical scripts for limiting payment on paint and material; and
- identical scripts for limiting payment of parts.

2. The inferences drawn from the allegations of price-fixing are supported by allegations tending "to rule out the possibility that the defendants were acting independently."

The District Court ignored all of the above stated factual allegations. It is

[16] V1:D1:pp.42-46

[17] V1:D1:pp.46-53

arguable that each fact is insufficient to create a context plausibly suggesting a pre-existing agreement. However, the District Court was obligated to view not each individual allegation of a plus factor in a vacuum, but the entirety of the plus factors alleged in the Complaint taken together. "[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).

The body shops have set forth facts in the Complaints supporting behaviors that are considered the hallmarks of price fixing by the federal authorities tasked with prosecuting such activity. As stated above, in a chapter on "Tip-Offs to Collusion" in a "how-to" manual for antitrust prosecutors, the Department of Justice, states that price fixing takes many forms, and any agreement that restricts price competition violates the law.[18] Specific examples of behavior indicating price-fixing agreements include holding prices firm, adopting a standard formula for computing prices, concentration of power in small groups of companies and industry-wide or

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

association schedules.[19]

The allegations of the Complaints set out facts which meet these federal price fixing hallmarks. Not only do the complaints allege the insurance companies 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.[20]

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 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

[19] V1:D1:pp.43-48, 53
[20] V1:D1:pp.47-48, 53; V7:D1:80

again, for instance. 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.

This uniformity of practices by the insurance companies vis-à-vis body shops strongly favors finding a plausible allegation of illegal agreement. The body shops allege that the insurance companies all engaged in the practice of requiring a shop to repair a faulty part rather than install a replacement part; to install a used or recycled part; and to offer discounts and concessions, even to the detriment of the shops offering such discounts and concessions. The body shops also plausibly allege that the insurance companies uniformly tried to force the body shops into compliance with the market rate, which resulted in creating an artificial market rate.

As pointed out above, these allegations include the fact, taken as true, that the insurance companies would falsely inform their insured that a body shop (which in their estimation was "non-compliant") takes longer to repair; that the insurance company would not pay for a rental car after a certain number of days; that the company cannot guarantee the shop's work as it does for other shops; that the shop offers lower quality services; and that previous customers had complained about the shop. The fact of these tactics, as alleged in the Complaints, contributes to a plausible

inference of an illegal agreement.

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.

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, but that they 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. To the contrary, the body shops' allegations plausibly establish the existence of parallel conduct including the adoption of uniform prices and practices, even though there are significant variables that would, absent a conspiracy or agreement, ordinarily result in disparate prices and practices.

B. Boycotting

1. A per se illegal agreement or conspiracy between and among the several defendant-insurance companies to boycott the plaintiffs' body shops can plausibly be inferred from the allegations of the Complaints in the several cases before this Court.

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). It is undisputed that the Insurance companies are direct competitors in the auto insurance industry.

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).

Body shops are 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). 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). Furthermore, the "ultimate target" of the agreement can be "a customer of some or all of the [boycotters] who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the [boycotters]." *St. Paul Fire & Marine Ins.*, 438 U.S. at 543, 98 S. Ct. at 2931.

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 plausible allegations of the following facts:[21]

- 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.

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[21] V1:D1:pp53-55.

- 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 choose 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.

The district court decided all of these facts merely constitute "badmouthing" and shrugged that away, concluding the body shops did not even allege the insurance companies had ever refused to allow a consumer to do business with them or refused to pay for repairs performed by a body shop. 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.

It is irrelevant whether 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. The body shops are permitted to support their clearly stated cause of action for boycotting/steering with any set of facts consistent with the allegations of the Complaint. See *Twombly*, 550 U.S. at 563. It goes without saying that the direct evidence of successful boycotting is in the possession and control of the insurance companies. Body shops deserve the opportunity to avail themselves of the discovery process to obtain that evidence. They are entitled to based upon the allegations articulated in the Complaints.

Accepted as true, the facts articulated in the Complaints plausibly allege the existence of an agreement to boycott the body shops by the insurance companies.

As itemized above, the body shops allege that the insurance companies agreed to target non-compliant shops by misleading and deceiving their insureds to stay away until those shops charged either at or less than the market rate. The Complaint further alleges that pursuant to that agreement, the insurance companies used identical tactics to keep insureds away. Specifically, that the insurance companies made false or misleading statements that an offending body shop:

(1) lacked integrity and quality workmanship;

(2) takes longer to repair than those on their "preferred list";

(3) was limited the number of days a rental car would be covered;

(4) repair work could not be guaranteed;

(5) performed lower quality services; and

(6) received complaints from previous customers.

This identical use of false and misleading statements alone satisfies multiple plus factors. In fact, it is not plausible that the insurance companies' creation of an identical steering script is the result of mere chance, coincidence or independent judgment. 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 insurance companies.

The Complaints further plausibly allege the common goal of punishing a noncompliant body shop, and contrary to the insurance companies' arguments below,

victims of boycotts do not have to show, or even allege, an economic retaliatory motive. See, e.g., *Evans v. City of Browning, Mont.*, 953 F.2d 1386 (9th Cir. 1992), *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053 (5th Cir. 1985). By definition, a boycott is a retaliatory act, originating from failure to pay. This was alleged in the Complaints and the Court is required to accept it as true and draw all reasonable inferences therefrom in favor of the body shops.

The insurance companies' actions in fixing prices is part and parcel of the boycotting environment, even if not technically an element of the claim. Again, the only way the district court could find context lacking is if it committed error by simply choosing to disbelieve the facts asserted and refusing to draw inferences favorable to the body shops.

The facts set out in the complaints more than sufficiently set forth a plausible basis that the insurance companies agreed and acted in furtherance of a common goal or plan to boycott body shops and steering the shops customers away from targeted shops.

III. State Tort Claims

In addition to claiming antitrust violations, the body shops claim that the insurance companies committed state torts, three of which are on appeal: unjust enrichment, quantum meruit, and tortious interference. 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).

In reviewing and applying state law, 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. See e.g. *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 among 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. It committed reversible error when it concluded it is not unjust for the insurance companies to retain the monetary benefits conferred on them by the body shops without fully covering damages and making payments to the shops for those benefits.

Generally, for purposes of an unjust enrichment cause of action, the Complaint must plausibly allege that a plaintiff conferred a benefit on a defendant, that the defendant knew about it, and that allowing the defendant to retain the benefit without payment would be unjust. *See Jones v.Sparks*, 297 S.W.3d 73, 78 (Ky. Ct. App. 2009); *JB Contracting, Inc. v. Bierman*, 147 S.W.3d 814, 819 (Mo. Ct. App. 2004); *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 110 (2007); *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008). The allegations articulated in the Complaint by the body shops clearly establish plausible claims of unjust enrichment.

The body shops state the plausible allegation that they conferred financial benefits on the insurance companies by providing repair services at the low price that the insurance companies collaboratively set without market surveys or input from the body shops. The Complaints also state that the insurance companies not only knew about the benefits but also forced the shops to confer the benefits back on them by (1) arbitrarily selecting a low market rate and (2) pressuring the shops into accepting the market rate. The Complaints also allege that the refusal by body shops to simply accept what was proffered led directly to punishment, economic coercion and tortious conduct by the insurance companies.[22]

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. 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.[23]

Thus, even if the body shops had wanted to negotiate, the insurance companies were not interested in doing so, preferring instead to proceed on economic coercion such that attempts at price and payment discussion were not

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[22] V1:D1:pp.42-45, 47-53, 57-58.
[23] V1:D1:p.42

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. It was error to substitute its own conclusions of fact for those asserted in the Complaints. *Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 F. App'x 972, 978 (11th Cir. 2015).

The District Court dismissed the claims for unjust enrichment claiming that because the body shops knew how much they were going to be paid before repairing cars, these claims for unjust enrichment are based on buyer's remorse because the shops didn't effectively bargain their reimbursement for car repairs. This incorrect holding is based on a mistaken assumption that any dealing between the body shops and the insurance companies was based on a valid contract. However, assuming the truth of the allegations and drawing inferences in favor of the body shops, as required by federal law, this Court would have to conclude that the insurance companies forced the shops to perform repairs, and any dealing between the shops and the companies was based on an invalid, unenforceable contract. Restatement (Third) of Restitution and Unjust Enrichment § 33 cmt. d (2011) instructs that "a liability in respect of benefits already received [should not] be imposed (or measured) by the terms of an invalid contract."; *see also id.* ("Liability in contract [is] distinguished from liability in restitution." (emphasis omitted)).

As additional grounds for dismissing the unjust enrichment cause of action, the District Court ruled that the body shops neglected an opportunity to contract with the insurance companies. In doing so the District Court improperly rejected the fact that the body shops consistently allege in the Complaints that the insurance companies forced the shops to confer benefits and that that the shops *involuntarily* performed repairs at the low market rate. The insurance companies provided no opportunity to the body shops to bargain or negotiate a contract.

Based on the forgoing, it is that the body shops fully alleged facts that taken as true make it plausible that the insurance companies unjustly enriched themselves at the expense of the body shops. The District Court erred in dismissing that state cause of action.

B. Quantum Meruit

Generally speaking, to establish a claim for quantum meruit, a plaintiff must show that it had a reasonable expectation of compensation for valuable services and rendered those services to a defendant who knew about the services but thereafter refused to pay reasonable value for the them. *See Quadrille Bus. Sys. v. Ky. Cattlemen's Ass'n, Inc.*, 242 S.W.3d 359, 366 (Ky. Ct. App. 2007); *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 172 N.J. 60, 68 (2002); *Raymond, Colesar, Glaspy & Huss, P.C. v. Allied Capital Corp.*, 961 F.2d 489, 491 (4th Cir. 1992) (applying Virginia law).

The allegations stated in the Complaints fully plead plausible claims for

quantum meruit.[24] The body shops allege that:

1. they performed repair services, expecting compensation;

2. the services were performed on automobiles covered by the insurance companies and therefore were in fact performed for the insurance companies;

3. the insurance companies were obligated to pay the body shops for repairs pursuant to the companies' contractual relationship with their insureds;

3. the insurance companies paid an artificially lowered price, well below the reasonable value for the services; and

4. the insurance companies demanded discounts and concessions for the companies' insureds and such additional services were provided to the companies, who refused to pay any compensation for those services.

The Court is required to assume the truth of these allegations, and therefore rule that the body shops have adequately stated state law claims for quantum meruit.

C. Tortious Interference

To adequately plead a cause of action for tortious interference, a plaintiff must allege facts that make it plausible that a valid business relationship existed with a customer or client, or that there was at least an expectancy that a business relationship would have occurred but for the defendant's improper or malicious

[24] V1:D1:pp. 46-53, 56-57

interference, which resulted in damages. *See Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 6 (Ky. Ct. App. 2012); *Clinch v.Heartland Health*, 187 S.W.3d 10, 14 (Mo. Ct. App. 2006); *Lamorte Burns & Co.v. Walters*, 167 N.J. 285, 305–06 (2001); *Dunlap v. Cottman Transmission Sys.,LC*, 287 Va. 207, 216 (2014).

The allegations stated in the Complaints, taken as true, easily establish the plausibility that the insurance companies tortiously interfered with the body shops business relationships with their customers. 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.[25]The complaints also detailed the manner in which the named defendants interfered, e.g. slandering Appellants' work and integrity and engaging in economic coercion.[26]

CONCLUSION

In conclusion, Appellant body shops, urge this Court to reject the findings and conclusions of the District Court, and the misleading arguments of the insurance companies. A final word on pleading the existence of an agreement. The insurance

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[25] V1:D1:pp.53-55,59-60

[26] V1:D1:pp.53-55

companies – State Farm in particular - assert that the District Court properly dismissed because the Complaints failed to exclude all possibility the insurers unanimously arrived at an identical "market rate" by independent unilateral conduct. The argument is without merit and is as mythical as their market rates.

The body shops are not required to exclude all alternatives in their pleadings, and in fact, not even at trial. Arguments identical to this, requiring pleading which excludes all possibility of innocent alternatives, has been held to be "absurd." *In re Cardizem CD Antitrust Litig*., 105 F. Supp. 2d 618, 650 (E.D. Mich. 2000)(citing *Brand Name Prescription Drugs Antitrust Litig.,* 186 F.3d 781, 787 (7th Cir.1999).

In these cases, the District Court erred in misstating and misapplying the required standard of pleading under Rule 8 as interpreted and applied in the *Iqbal/Twombly* line of cases. Appellant body shops respectfully request that in this de novo review, the honorable Court siting en banc will find that they have met those pleading standards and have articulated sufficient allegations in their Complaints to raise such a reasonable expectation that discovery will reveal evidence of illegal agreements." *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965.

Here the scales of justice are appropriately balanced. Appellee insurance companies are clearly on notice as to the unlawful conduct alleged by the body shops to adequately defend against those claims. The body shops have adequately alleged

the existence of parallel conduct and plus factors which create a plausible inference of illegal agreements to injuriously fix prices and boycott the shops. Finally, the allegations articulated in the Complaints have sufficiently established the body shops' state tort claims of unjust enrichment, quantum meruit, and tortious interference.

Appellants respectfully request this en banc panel of the Eleventh Circuit Court reverse the District Court and remand to the Middle District of Florida so that the body shops can exercise the fundamental right of access to the courts to present and establish their grievances against the insurance companies.

Respectfully submitted this 30th Day of May, 2018.

<u>/s/ Mark L. Shurtleff</u>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by the Federal Rules of Civil Procedure and the Eleventh Circuit Court of Appeals' local rules. The brief was prepared using Word DocX and contains 10,533 words of proportionally spaced text for all sections that are required to be counted by the Rules. The type face is 14-point font Times New Roman.

Dated this 30th Day of May, 2018.

/s/Mark L. Shurtleff
MARK L. SHURTLEFF

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of May, 2018, I electronically filed the Plaintiffs/Appellants En Banc Brief with the Clerk of the Court. In addition, the original and twenty copies of the foregoing are being filed with the Clerk of the Court via overnight express delivery and an electronic version of the foregoing was sent via the Court's filing system or email to counsel of record for all parties.

/s/Mark L. Shurtleff
MARK L. SHURTLEFF