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 REPLY BRIEF (CORRECTED) FOR QUALITY AUTO PAINTING CENTER OF ROSELLE, INC., Traded as Prestige Auto Body, 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. 15-14162-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 REPLY BRIEF (CORRECTED) FOR ULTIMATE COLLISION REPAIR, 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. 15-14178-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 REPLY BRIEF (CORRECTED) 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

EN BANC REPLY BRIEF (CORRECTED) FOR LEE PAPPAS BODY SHOP, INC., et al. AS PLAINTIFFS - APPELLANTS

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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

EN BANC REPLY BRIEF (CORRECTED) FOR CONCORD AUTO BODY, INC. AS PLAINTIFF - APPELLANT

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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 Body Shops' 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.

ARGUMENT

I. INTRODUCTION

United States Court of Appeals Senior Judge Ruggero J. Aldisert once complained, "someone, somewhere at some time, who didn't know a thing about how appellate judges decide cases, had preached a gospel to many appellants' lawyers to file a reply brief in every case: 'Have the last word, kid. Always."[1]

1 Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 254 **(NITA** rev. ed. 1996).

Judge Aldisert then noted, "As a result, since 1968, I have been reading reply briefs by the thousands in appellate courts all over the country, and maybe five hundred genuinely qualified as reply briefs."[2]

There are no new arguments presented in the Appellee insurance companies' (hereafter "Insurance Companies") briefs that argue a point not raised in the Appellants' body shops' (hereafter "Body Shops") opening brief. No new relevant authorities are presented which have been handed down since the filing of the opening brief.

Reading the Response briefs filed by various Insurance Companies, it appears as if they are referring to different complaints than those at issue in these consolidate appeals. There is not a significant difference in the case law cited in Appellants' and Insurance Companies' Briefs, but the application of the law to the facts is as different as night and day. Appellants will not here waste the judges precious time with more "he said, she said" argument.

In fact, Body Shops' opening brief detail with specificity 29 plus-factors establishing the plausibility of per-se price fixing by the Insurance Companies. Appellants' En Banc Brief ("E.B.Br.") at 23-28. Body Shops also point out several specific allegations in the Complaints that alleged with specific facts upon

2 *Id.*

which the court can reasonably infer that allegations tending to rule out the possibility that the defendants were acting independently. Whereas, the various briefs of Insurance Companies claim that "NO" plus-factors are alleged in the Complaints and NO allegations upon which a reasonable inference of illegal price-fixing could be inferred that tend to rule out the possibility of independent action creating the appearance of price-fixing.

Notwithstanding the forgoing, in addition to calling white black and black white, the three Response briefs raise a number of arguments which are not properly before this Court as the Insurance Companies failed to file any notice of cross-appeal, or they argue decisions never made by the district court. These are noted below.

Substantively, the Insurance Companies argue in a circular fashion that because the district court ruled a particular way, the ruling must be correct. Indeed, the majority of the arguments rely and cite only to the orders as substantiation, rather than applicable state or federal authority. Particularly with respect to the state law causes of action, this is because extant state law holds diametrically opposed to the district court's decisions.

While arguing the district court's findings were correct, Insurance Companies fail to recognize a dispositive issue– whether the district court had

authority or discretion to make those findings at all. Binding authority holds it did not. However, Insurance Companies' briefs do highlight the erroneous analysis of the district court– it approached the various motions to dismiss backwards.

Defending against a motion to dismiss is likely the one instance where a plaintiff holds a significant advantage. The court is required, in essence, to start off on the "plaintiff's side." The trial court here started from the opposite position, assuming defendants' motions arguments were true, looking to the complaints only to see if they defeated those arguments, whether or not those arguments actually reflected existing law. The result is a dismissal order predicated not upon failure to adequately plead, but upon purported failure to negate the defendants' arguments.

Analysis of 12(b)(6) motions is narrow and well-defined. After ascertaining the asserted claim elements, the complaint is reviewed to determine whether it adequately alleges those elements. The court must assume the facts are true and, drawing all reasonable inferences in favor of the plaintiff, determine whether those facts plausibly suggest a right to relief. "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, FN 8 (2007).

Absent exception not present here, the court is limited to the contents of the complaint and its exhibits in passing on a motion to dismiss. *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).

The court is prohibited from accepting defendants' motion arguments or justifications, as the court is prohibited from weighing facts or drawing inference favorable to the defendants instead of the Body Shops. *Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1368 (M.D. Fla. 2005).

Nor may the court resolve factual disputes, determine the merits of the claims, or applicability of defenses. *Brooks v. Blue Cross & Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). The court does not determine if the facts alleged actually did happen, only if they could. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. Ill. 2010).

The district court was therefore limited to determining whether the complaints adequately pled the elements of the claims. It was not permitted to decide the merits or decide defendants' motion argument alternatives were preferable or more plausible. However, that is exactly what the court did. Insurance Companies arguments actually highlight these errors rather than contradicting them.

II. FEDERAL CLAIMS

A. Insurance Companies are precluded from raising group pleading argument

In their En Banc Briefs, Insurance Companies criticize what they characterize as impermissible group pleading, concluding the district court correctly dismissed the federal claims for this flaw. However, that is not exactly what the court ruled.

The magistrate judge recommended dismissing all claims for purported group pleading deficiencies. However, he also recommended dismissing the federal claims on the grounds set forth by the district judge in the separate order now available at *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, 2015 WL 304048, (M.D. Fla. Jan. 21, 2015). This recommendation was adopted, and the January 21, 2015, order became the order regarding federal claims for all appeals presently before the Court.

In that order, the district court referenced group pleading and, after discussion of prior attempts to plead in a manner agreeable to the court, concluded the matter by directing, "The Body Shops insure that their references to "the Defendants" are, in fact, intended to encompass every single Defendant." *Id.* at 4.

The district court therefore did not prohibit Body Shops from utilizing group pleading for the federal antitrust claims; it directed Body Shops do so "appropriately." Parties are permitted to rely upon a court's orders; to hold

otherwise would be to permit parties the option of deciding which orders to obey, or conversely to condemn parties to the instability of guessing which orders to abide and which to ignore. *In re Demos*, 57 F.3d 1037, 1039 (11th Cir. 1995).

If Insurance Companies were aggrieved by this, they should have filed an appropriate notice of cross-appeal. They did not and are now prohibited from raising an argument not noticed and which is outside the scope of Body Shops' original and en briefs:

> As we have previously explained, a party who has not appealed may not bring an argument in opposition to a judgment or attack the judgment in any respect, or hitch a ride on his adversary's notice of appeal to enlarge his rights under the judgment or diminish those of the opposing party.

Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1255 (11th Cir. 2014).

The Body Shops' En Banc Brief did not address "group pleading" of federal claims as it was not a dispositive ground for dismissal, though Insurance Companies suggest otherwise in their En Banc briefs. Without filing any notice, the Insurance Companies "hitch a ride" upon Body Shops' notice, ask this Court approve its arguments and thereby restrict the rights afforded to the body shops. The Supreme Court has specifically disapproved of such. *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

It should also be noted the complaints now on appeal were filed the first

week of November, 2014. The order in *A & E Auto Body* was not issued until January 15, 2015, some two months after the complaints were filed. Insurance Companies' argument that Body Shops have willfully failed to abide by the court's directions regarding group pleading are therefore untenable. The Body Shops cannot be held to have failed to comply with an order that did not exist when the complaints were filed. Therefore, Insurance Companies' group pleading argument should be wholly disregarded.

B. Insurance Companies are precluded from raising "shotgun pleading" argument

Insurance Companies complain of improper shotgun pleading. However, the district court did not dismiss the complaints for shotgun pleading. As the court did not enter such an order, Body Shops respectfully submit the Court is without jurisdiction to consider the argument.[3]

Alternatively, Insurance Companies' complaint is without merit. Shotgun pleading is defined as incorporating by reference the allegations of preceding counts. *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002). No such incorporation exists within any present

3 The only discussion of shotgun pleading in the Report and Recommendation adopted by the district court referred to a single case not before this Court on appeal, *Haurys Auto Body, Inc., et al, v. State Farm Mutual Auto. Ins. Co., et al*, 6:14-cv-6015.

complaint.

Insurance Companies also argue improper shotgun pleading due to the absence of incorporation. Insurance Companies provide no authority that shotgun pleading may exist in the absence of incorporation. Insurance Companies' shotgun pleading argument should be wholly disregarded.

C. Insurance Companies Arguments that the Consent Decree is Irrelevant are without Merit

As articulated in the Body Shops' En Banc Brief, the need for great caution to conceal their agreement is particularly evident in these cases, as there exists a federal consent decree prohibiting the actions in which the defendants are engaged. Body Shops attached to their complaints as Exhibit "4" the consent decree entered in *United States v. Association of Casualty and Surety Companies*, *et al*, Docket No. 3106, Southern District of New York. 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. Undoubtedly this is why that case was filed and concluded within mere days.

Some defendants argue there is no evidence any of them are members of the trade associations bound by the consent decree and therefore the district court correctly ignored it. However, discovering facts in support of claims is

exactly what discovery is for. See, e.g., *Thompson v. Williams*, 2007 WL 1655428, at *2 (W.D. Wash. June 7, 2007). Body Shops are not required to produce evidence in a complaint.

Further, courts are permitted to take judicial notice of records publicly filed with government agencies. See, e.g., *Thompson v. Relation Serve Media, Inc.*, 610 F.3d 628, 642 (11th Cir. 2010). Each of the three insurance trade associations presently bound by the Consent Decree shelter beneath a 501(c)(3) tax-exempt status and are therefore required to publicly disclose their respective Form 990s filed with the Internal Revenue Service. Those Form 990s identify the corporate officers and board members. Each of the associations routinely identify as board members corporate officers of the handful of insurers which control the lion's share of the private passenger insurance market, including State Farm, Allstate, GEICO, USAA, Liberty Mutual, Farmers, and Travelers.[4]

However, per the terms of the Decree, its prohibitions are not binding

4 See, e.g., Form 990s filed by Property Casualty Insurers Association of America (PCI), one of the trade associations bound by the consent decree, https://www.citizenaudit.org/organization/200487810/property-casualty-insurers-association-of-america/ PCI stopped listing the insurer employers of its board members in recent years, listing only their names. However, the information is listed on the older filed tax records and the individual=s names can be followed through to current forms. PCI=s 2005 form 990 lists executives from Allstate, GEICO, Farmers, Liberty Mutual, Harleysville Insurance (a Nationwide subsidiary), among others. Form 990s are also available for the two other trade associations bound by the consent decree, National Association of Mutual Insurance Companies (NAMIC) and American Insurance Association (AIA).

merely upon the associations, but their members and anyone in active concert with any members. Therefore, the terms are binding upon any insurer in active concert with any member, whether or not a member of any association themselves. It is thus unnecessary for Body Shops to plead and prove each named defendant is a member of any trade association for the terms of the consent decree bind them.

Insurance Companies also neglect to mention a complaint may not be dismissed for failing to allege specific facts when those facts are within the possession and control of the defendants. *Dubyk v. RLF Pizza, Inc.*, 2014 WL 1153044, at *2 (S.D. Fla. Mar. 17, 2014). Only the defendants currently know the details of the price fixing agreement formation. This does not prevent a complaint from moving forward to discovery. Even when Rule 9(b) particularity pleading applies, a complaint may not be dismissed for failing to include factual details only the defendants know. *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008).

Dismissal of claims lacking such details prior to discovery results only in allowing sophisticated defendants to successfully hide the evidence of their crimes. *Christidis v. First Pennsylvania Mortgage Trust*, 717 F.2d 96, 100 (3d Cir. 1983).

As the body shops will never be required to prove the details Insurance

Companies demand, they are not required to plead them to move forward to discovery.

As noted above, there is a notable lack of argument about dispositive matters. Insurance Companies do not allege they cannot understand the nature or grounds for the price fixing claim, nor do they allege the complaints failed to allege facts supportive of each element of the claim. They merely argue the facts asserted are too few in number and non-specific, reciting purported failures argued in motions to dismiss that Body Shops allegedly failed to rebut.

However, these arguments (aside from urging this Court to apply Rule 9(b) to a Rule 8 claim) encourage this Court to commit the same errors as the district court. That is, analyze the motion to dismiss backward– start from the position defendants' arguments are correct and determine whether the complaint adequately defeats those arguments.

Again, this is a backward approach. Group boycotting does not depend upon successful outcome to be illegal; it is the agreement itself that constitutes a violation of the Sherman Act, not whether the agreement is successful. See *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993). Insurance Companies failed to substantively acknowledge this binding authority.

III. CONCLUSION

Body Shops 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 13th day of July 2018.

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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 2,867 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 13th day of July 2018.

/s/Mark L. Shurtleff
MARK L. SHURTLEFF

CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of July, 2018, I electronically filed the Plaintiffs/Appellants **CORRECTED En Banc Reply Brief** with the Clerk of the Court. In addition, the original and required number of paper copies of the foregoing will be 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