SAM MIKHAIL ON BEHALF OF QUALITY AUTO PAINTING CENTER OF ROSELLE, INC. d/b/a PRESTIGE AUTO BODY and BMR AUTOMOTIVE SERVICE, INC., on behalf of itself and others similarly situated, Plaintiffs, v. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO.: UNN-L-1992-19 Civil Action

BRIEF OF NEW JERSEY MANUFACTURERS INSURANCE COMPANY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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PRELIMINARY STATEMENT

Defendant, New Jersey Manufacturers Insurance Company ("NJM"), respectfully submits this Brief in support of its Motion to Dismiss all Counts of Plaintiffs' Complaint pursuant to Rule 4:6-2(e).

When distilled to its essence, the Plaintiffs' Complaint alleges that NJM violated a New Jersey Administrative Code regulation that guides the process of automobile repairs within the State subject to overarching principles of ensuring that the repair is conducted by a licensed facility, in a timely matter, and for a reasonable price. The regulation requires NJM, as well as every other insurer in the State, to have a list of licensed, qualified, conveniently-located repair facilities capable of repairing damage to covered motor vehicles at the insurer's estimated cost of repairs. NJM fully complies with the regulation, and has assembled a group of automobile repair shops available to insureds that will perform the necessary repair work at NJM's estimated rates as part of NJM's Direct Repair Program ("DRP"). The Plaintiffs are not on NJM's list of DRP shops because they do not conform to the guidelines that are acceptable for the repair facilities on NJM's approved list of shops. Rather than changing their practices to better compete with other shops, Plaintiffs elected to file this baseless and unfounded lawsuit against NJM.

NJM has done exactly what is required by N.J.A.C. 11:3-10.3 – the regulation that undergirds the allegations advanced in Plaintiffs' Complaint. N.J.A.C. 11:3-10.3(e) provides, in relevant part, that:

> the insured may use any repair facility of his or her own choice. . . . The insurer shall make all reasonable efforts to obtain an agreed price with the facility selected by the insured. The insurer may recommend, and if the insured requests, shall recommend a qualified repair facility at a location reasonably convenient to the insured motor vehicle who will repair the damaged motor vehicle at the insurer's estimated cost of repairs . . . .

Plaintiffs rely almost exclusively upon this regulation in support of their Injurious Falsehood, New Jersey Consumer Fraud Act, New Jersey Antitrust Act, New Jersey Civil RICO, and Injunctive Relief claims. However, glaringly omitted from Plaintiffs' Complaint is any reference to N.J.S.A. 17:33B-36.1, a statute entitled "Right to choose auto body repair facility; terms; conditions" (the "Right to Choose" statute). The Right to Choose statute provides, in relevant part, that:

> [i]f an insurer has a financial arrangement with one or more auto body repair shops or other repair facilities or a network of facilities for the purpose of repairing vehicles covered under physical damage, collision, or comprehensive coverages, the insurer shall not deny a person the right to select an auto body repair shop or other repair facility of his choice for repair of a covered vehicle, provided that such auto body repair shop or other repair facility elected by the person accepts the same terms and conditions from the insurer, including, but not limited to, price, as the shop, facility, or network with which the insurer has the most generous arrangement. . . .
>
> [N.J.S.A. 17:33B-36.1 (emphasis added).]

N.J.S.A. 17:33B-36.1 permits New Jersey insurers to have "a financial arrangement" with automobile repair shops, and establishes that any repair shop selected by an insured that is not part of the "financial arrangement" must "accept[] the same terms and conditions from the insurer, including, but not limited to, price, as the shop . . . with which the insurer has the most generous arrangement." Plaintiffs chose not to even mention N.J.S.A. 17:33B-36.1 in their Complaint because it completely undermines the allegations in the Complaint and supports the precise way in which NJM serves its insureds. The statute brings definition and clarity to the Administrative Code provision by setting the price for a non-"list" facility. Accordingly, Plaintiffs' primary reliance on the New Jersey Administrative Code without reference to the companion governing statute is misplaced. Administrative Code provisions "cannot alter the

terms of a statute or frustrate the legislative policy." Med. Soc. of New Jersey v. New Jersey Dep't of Law & Pub. Safety, Div. of Consumer Affairs, 120 N.J. 18, 25-26 (1990) (quoting New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n., 82 N.J. 57, 82, (1980)).

When read together, the plain meaning of the regulation referenced in the Complaint, and the statute excluded from the Complaint, is to ensure that New Jersey insureds have access to a number of licensed body shops that will perform the requisite repair work within the established estimates of New Jersey insurance carriers. Both the statute and regulation therefore strike the appropriate balance between allowing claimants to have their vehicles repaired at the shop of their choice and preserving an insurer's ability to obtain competitive prices that benefit the insured, minimize unnecessary costs, and prevent excessive inflation of insurance premiums in the State. Indeed, as articulated in a decision affirmed by our Appellate Division almost 20 years before the passage of the Right to Choose statute: "[t]he practice of the insurance companies to calculate the reimbursement for its insured based upon the lowest prevailing price in the marketplace (and to insure the integrity of that estimate by having an open list of competing shops which will generally accept it) is the very essence of competition." Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 87 (Law. Div. 1979) (specifically addressing N.J.A.C. 11:3-10.3, and dismissing a claim that insurers violated the New Jersey Antitrust Act in the use of select auto body repair shops), aff'd, 176 N.J. Super. 320 (App. Div. 1980). See also Standard Oil Co. v. Fed. Trade Comm'n, 340 U.S. 231, 248 (1951) ("[t]he heart of our national economic policy long has been faith in the value of competition."). The fact that the Right to Choose statute was not even enacted at the time of the Chick's Auto Body decision only highlights the inherent weaknesses of Plaintiffs' Complaint.

It is important to note at the outset that this action represents just one of at least twenty-two similar lawsuits filed around the country by plaintiff automobile repair shops that are seeking to decrease competition by compelling defendant insurance companies to pay a higher rate for repair services than charged by Plaintiffs' competitors. Although the insurance regulations that serve as the foundation of Plaintiffs' Complaint expressly enable insurance companies to determine reasonable rates for automobile repairs within the State; Plaintiffs essentially contend that NJM is obligated to accept and pay Plaintiffs' inflated costs of repair regardless of the reasonableness of Plaintiffs' prices, and irrespective of the fact that Plaintiffs' competitors will provide the required goods and services at a much lower cost. Plaintiffs are not only attempting to diminish competition within the State, but are striving to do so in a way that is completely antithetical to the Right to Choose statute enacted by the New Jersey Legislature as part of the Fair Automobile Insurance Reform Act of 1990. Stated differently, Plaintiffs are seeking to penalize NJM for conduct that is expressly sanctioned by New Jersey law, and entirely consistent with the Legislative intent that breathes life into the law.

In a March 4, 2019, decision rendered by the United States Court of Appeals for the Eleventh Circuit, the Court notes that of the "twenty-two similar lawsuits" filed in federal district courts throughout the country, two have been dismissed with prejudice, four were dismissed and are currently on appeal, two were dismissed by the district court with their appeals subsequently dismissed for lack of prosecution, and of the fourteen remaining matters, five were the subject of the Eleventh Circuit's decision, which affirms dismissal of all but one cause of action in each of the five complaints. Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1276 (11th Cir. 2019). As can be gleaned from the caption; Plaintiff, Quality Auto Painting Center of Roselle, Inc., is also named as a plaintiff in the above-referenced Eleventh

Circuit decision, and was similarly represented by the Ansell Grimm & Aaron, P.C., firm that filed the instant lawsuit. See id. at 1259. Indeed, just like many of the other lawsuits filed by the plaintiff auto repair shops, each and every Count advanced in Plaintiffs' instant Complaint is subject to immediate dismissal by this Court pursuant to Rule 4:6-2(e) for failure to state claims upon which relief can be granted.

As alluded to above, the allegations that comprise Plaintiffs' Complaint are not only belied by the very regulations identified in the Complaint, but also by New Jersey statutes and case law that are markedly omitted from the Complaint. Chick's Auto Body is directly on point, as the court analyzes N.J.A.C. 11:3-10.3 and dismisses New Jersey Antitrust Act claims identical to those alleged in Plaintiffs' Complaint even before the Right to Choose statute was enacted. The Chick's Auto Body court held that because the Commissioner of Insurance regulates the insurance industry and the practice of auto body repairs, the Department of Banking and Insurance had exclusive jurisdiction over the issues raised in the Chick's Auto Body complaint. The Chick's Auto Body decision – which was affirmed by the Appellate Division in 1980 and remains good law almost 40 years later – recognizes that "the Commissioner of Insurance adopted an expansive automobile physical damage claims procedure" codified at N.J.A.C. 11:3-10.1 et seq., "[b]y virtue of authority conferred by N.J.S.A. 17:1-8.1 and N.J.S.A. 17:29B-1 et seq." 168 N.J. Super. at 76. The statutory scheme referenced in Chick's Auto Body is the Insurance Trade Practices Act ("ITPA"), which was enacted to "regulate trade practices in the business of insurance in accordance with the intent of Congress . . . by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." N.J.S.A. 17:29B-1 (emphasis added). By way of just a few examples,

the ITPA: facially prohibits unfair acts and methods of competition in the insurance industry, including any and all "[u]nfair claim settlement practices," see N.J.S.A. 17:29B-3, N.J.S.A. 17:29B-4(9); affords the Commissioner of Banking and Insurance the power to examine and investigate whether any New Jersey insurance company is engaged in any unfair practices, acts, or methods of competition, see N.J.S.A. 17:29B-5; enables the Commissioner to hold formal hearings in response to any potentially unfair practices, acts, or methods of competition, see N.J.S.A. 17:29B-6; and, among many other powers, permits the Commissioner to issue penalties, modifications, and cease and desist orders for any conduct the Commissioner deems to violate the ITPA's provisions. See N.J.S.A. 17:29B-7. Significantly, the "Remedies" section of the ITPA confirms that there is no private Superior Court right of action for an allegedly improper practice, act, or method of competition in the claims handling context. Rather, the ITPA unambiguously declares that "[a] person aggrieved by a violation of this act may file a complaint with the Commissioner of Banking and Insurance." N.J.S.A. 17:29B-18. Simply stated, the New Jersey Legislature has entrusted the Department of Banking and Insurance with exclusive jurisdictional authority to regulate the insurance industry that the Department is statutorily charged with overseeing – a fact that renders Plaintiffs' entire Complaint unsustainable as a matter of law. As such, NJM respectfully submits that all Counts of Plaintiffs' Complaint should be dismissed with prejudice.

Finally, even in the absence of the ITPA and the Chick's Auto Body decision, each individual Count of Plaintiffs' Complaint should be dismissed by this Court for all of the reasons discussed in detail below. NJM therefore respectfully requests that this Court dismiss all Causes of Action asserted in Plaintiffs' Complaint with prejudice.

LEGAL ARGUMENT

POINT I

MOTION TO DISMISS STANDARD

R. 4:6-2 states, in pertinent part, that:

> [e]very defense . . . to a claim for relief . . . shall be asserted in the answer thereto, except that the following defenses . . . may . . . be made by motion, with briefs: . . . (e) failure to state a claim upon which relief can be granted.

The governing decision on a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) states that the Complaint must be searched in depth, and with liberality, in order to determine if a cause of action may be gleaned. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). When assessing the appropriateness of dismissal under R. 4:6-2(e), the inquiry is limited to examination of the legal sufficiency of the facts alleged on the face of the Complaint. Rieder v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). When making this determination, plaintiffs are entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). Dismissal is appropriate in the event that the complaint states no basis for relief, and discovery would not provide one. Energy Rec. v. Dept of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999).

As set forth in far greater detail below, each and every cause of action advanced in Plaintiffs' Complaint fails to state a claim upon which relief can be granted. Accordingly, NJM respectfully requests that this Court grant the instant Motion, and dismiss all claims asserted in Plaintiffs' Complaint with prejudice pursuant to R. 4:6-2(e).

POINT II

ALL SIX CAUSES OF ACTION ADVANCED IN PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED, AS THE DEPARTMENT OF BANKING AND INSURANCE HAS EXCLUSIVE PRIMARY JURISDICTION OVER THE CLAIMS HANDLING PROCEDURES OF NEW JERSEY INSURANCE COMPANIES

It is axiomatic that "when the legislature provides an agency with 'exclusive primary jurisdiction,' it preempts the courts' original jurisdiction over the subject matter." Greate Bay Hotel & Casino v. Tose, 34 F.3d 1227, 1230 (3d Cir. 1994) (citing Abbott v. Burke, 100 N.J. 269, 297 (1985) (which supports the proposition that a plaintiff may not seek relief in New Jersey trial courts "where the legislature vests exclusive primary jurisdiction in an agency.")). In this action, the doctrine of exclusive primary jurisdiction compels dismissal of all claims asserted in Plaintiffs' Complaint, particularly when analyzed in conjunction with the relevant New Jersey statutes, regulations, and case law. As a means of introducing the regulatory and statutory schemes that render Plaintiffs' claims unsustainable as a matter of law, we begin with a discussion of the Law Division's reported decision in Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., which was later affirmed by the Appellate Division, and remains good law today four decades after the decision was rendered. 168 N.J. Super. 68 (Law. Div. 1979), aff'd, 176 N.J. Super. 320 (App. Div. 1980). Chick's Auto Body not only undermines the New Jersey Antitrust Act, N.J.S.A. 56:9-3 et seq. ("NJAA"), claims advanced in Plaintiffs' Fourth Cause of Action, but also supports NJM's position that Plaintiffs' entire Complaint is barred as a matter of law.

A. Chick's Auto Body

Similar to the allegations of this case, the plaintiff auto body shops in Chick's Auto Body filed New Jersey Antitrust Act claims alleging that multiple insurance companies were engaged

in an intentional and organized scheme to fix prices for automobile repair work and boycott automobile repair shops that failed to submit to the price fixing scheme. Id. at 73. The court noted that the "body repair shops invoke[d] the [NJAA] to [d]ecrease competition by compelling defendant insurance companies to pay a higher rate for their repair services than defendants pay to plaintiffs competitors. If successful, the end result would increase the ever-spiralling [sic] insurance rates." Ibid. Before commencing its analysis of the NJAA claim, the court noted that "payment of automobile physical damage claims comprises the largest single cost element in its premium structure for physical damage coverage within the State of New Jersey[,]" and that "[i]n 1976, payments of automobile physical damage claims in New Jersey represented approximately 60% of the total earned premiums allocable to automobile physical damage coverage within the State of New Jersey." Id. at 73. The court acknowledged "a direct relationship between payments made by defendant insurance companies to settle automobile physical damage claims and the premium rate structure for automobile physical damage insurance. . . . The facts as to [the] relationship between repair costs and premiums have been also judicially recognized." Id. at 74 (numerous citations omitted). Thus, the court astutely reasoned that "[i]n effect, plaintiffs seek to force the insurance companies to increase their service rates, and, in turn, the automobile owners insurance premiums." Id. at 75.

The court proceeded by conducting an analysis of the NJAA, the purpose of which "is to prevent trade-restraining practices which ordinarily deprive the public of benefits derived from the competitive market." E Z Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc., 307 N.J. Super. 546, 551-52 (Ch. Div. 1996), aff'd, 307 N.J. Super. 438 (App. Div. 1997). Notably, the NJAA contains an insurance exemption for "[t]he activities . . . of any insurer . . . to the extent that such activities are subject to regulation by the Commissioner of Insurance of this State, or

are permitted or are authorized by, the Department of Banking and Insurance Act of 1948 . . . ." N.J.S.A. 56:9-5b(4). As noted by the court in Chick's Auto Body, "[t]he purpose of the insurance exemption under N.J.S.A. 56:9-5(b)(4) has been described as 'designed to avoid the situation whereby a state regulatory agency acting pursuant to one statute (the insurance laws) requires conduct which might be held to violate another statute (the Anti-Trust Act).'" 168 N.J. Super. at 75 (citations omitted). The court added that "[t]he qualifying words of the statute are 'subject to regulation by the Commissioner of Insurance.'" Id. at 76 (citations omitted). Applying the insurance exemption to the facts of the case, the court found that:

> [t]he requirement of state regulation to qualify for exemption is abundantly satisfied. The activities alleged in the complaint are regulated by the Commissioner of Insurance in at least three ways, i.e., (1) regulation of the claims adjustment activities of the defendants, (2) regulation of auto damage insurance rates and (3) regulation of unfair and anticompetitive trade practices of insurance companies.
>
> [Ibid.]

The decision continues with a discussion of the "Regulation of the Claims Adjustment Activities of Insurance Companies," and begins by recognizing that "the Commissioner of Insurance adopted an expansive automobile physical damage claims procedure" codified at N.J.A.C. 11:3-10.1 et seq., "[b]y virtue of authority conferred by N.J.S.A. 17:1-8.1 and N.J.S.A. 17:29B-1 et seq." Id. at 76. Following an extensive analysis of the relevant regulations subsumed by N.J.A.C. 11:3-10.1 et seq., the court declared, inter alia, that an:

> insurer is not obligated to assume the cost [of repair] regardless of the reasonableness thereof. The insurer's decision as to what is a reasonable labor rate is well within the scope of the regulations. Plaintiffs would deny defendants their right, as granted by the regulations, to become actively involved in the process of claims adjusting and to figure their own estimate of the necessary repairs.
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> [Id. at 76-77.]

The court went on to state that "[i]f, as plaintiffs contend, defendants authorize incomplete or shoddy repairs such a complaint is properly made to the Commissioner of Insurance." Id. at 77. The same rationale applies to this action. Additionally, just like in this case, the Chick's Auto Body plaintiffs alleged that the defendant insurance companies were engaged in a complete failure to negotiate with the plaintiff repair shops. Ibid. In response, the court again found that "[e]ven this is regulated by the Department because all negotiations are required to be conducted in 'good faith.'" Ibid. (quoting N.J.A.C. 11:3-10:3(b)). While the insurer is required to make "all reasonable efforts to obtain an agreed price" with the shop of the customer's choice, the court clarified that "the negotiations must center on the 'agreed price,' i.e., the 'reasonable cost' of repairs, not the particular hourly rates of the plaintiffs." Ibid. (citing N.J.A.C. 11:3-10:3(d)) (emphasis added). Based on all of the above, the court concluded that:

> plaintiffs' complaints of the impropriety of the conduct of the defendants are in reality not assertions of antitrust violations, but rather complaints about the negotiation process in the claims settlement procedures. That process is extensively and properly regulated by the Department of Insurance and therefore within the exemption of the New Jersey Antitrust Act.
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> [Id. at 78 (emphasis added).]

The court dismissed all claims asserted in the plaintiff auto body shops' complaints. Id. at 88. In further support of its decision, the court conducted a comprehensive examination of the Department of Insurance's expansive regulation of auto damage insurance rates and the general operation of insurance companies within the State, and determined that "[t]he prevailing authority is clear that any of the activities of defendants with regard to determining repair costs for physical damage loss under an automobile policy is within the business of insurance subject to regulation by the Commissioner of Insurance." Id. at 78-81. The court reiterated that in addition to "the review and regulation of insurance rates and the operation of insurance

companies in general, the Commissioner of Insurance is specifically empowered to regulate the trade practices of insurance companies." Id. at 81.

In sum, the Chick's Auto Body decision confirms that all of the alleged conduct that purportedly supports Plaintiffs' NJAA allegations falls squarely within the exemption to the NJAA codified at N.J.S.A. 56:9-5b(4), as the underlying activity is expressly subject to a widespread and all-inclusive regulatory scheme adopted, implemented, and enforced by the Commissioner of Insurance. Id. at 78. Thus, Chick's Auto Body undeniably supports dismissal of the NJAA claims advanced in the Fourth Count of Plaintiffs' Complaint, particularly when read in conjunction with the statutory exemption codified at N.J.S.A. 56:9-5b(4).

B. No Private Right of Action Exists for any of Plaintiffs' Claims

The reasoning applied by the court in Chick's Auto Body is not limited to Plaintiffs' NJAA allegations, but also extends to all remaining Causes of Action enumerated in Plaintiffs' Complaint. An analysis of the statutory schemes referenced in Chick's Auto Body helps illustrate the fact that the Department of Banking and Insurance has exclusive authority to address the claims advanced in this litigation, investigate NJM's alleged conduct, and if necessary, determine the appropriate remedy for any purported statutory/regulatory violations.

As referenced above, the Chick's Auto Body decision recognizes that "the Commissioner of Insurance adopted an expansive automobile physical damage claims procedure" codified at N.J.A.C. 11:3-10.1 et seq., "[b]y virtue of authority conferred by N.J.S.A. 17:1-8.1 and N.J.S.A. 17:29B-1 et seq." Id. at 76. N.J.S.A. 17:29B-1 et seq., is colloquially known as the Insurance Trade Practices Act ("ITPA"). The stated purpose of the ITPA is:

> to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [United States Code insurance regulations] by defining, or providing for the determination of, all such practices in this State which

> constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.
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> [N.J.S.A. 17:29B-1 (emphasis added).]

The ITPA declares that "[n]o person shall engage in this State in any trade practice which is defined in this act as or determined pursuant to this act to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." N.J.S.A. 17:29B-3. Notably, the ITPA delineates a non-exhaustive list of "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance," including, but certainly not limited to, fifteen separate and distinct examples of "[u]nfair claim settlement procedures." N.J.S.A. 17:29B-4. As such, even a cursory review of the above-cited statutes establishes that the conduct at issue in this action is undoubtedly within the purview of the ITPA.

Significantly, the ITPA not only governs and subsumes the claims settlement procedures at issue in Plaintiffs' Complaint, but also grants the Commissioner of Banking and Insurance the sole and exclusive authority to examine, investigate, adjudicate, and enforce compliance with the ITPA's provisions. N.J.S.A. 17:29B-5 states that "[t]he commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this State in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section three of this act." Moreover, "[w]henever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this State in any unfair method of competition or any unfair or deceptive act or practice defined in section four," and concludes that a proceeding by the Commissioner to address the issue "would be to the interest of the public," the Commissioner "shall issue and serve upon such person a statement of the charges . . . and a notice of a hearing .

. . .” N.J.S.A. 17:29B-6(a). In fact, the Commissioner’s power to investigate unfair practices, acts, and/or competition, and subsequent authority to issue charges and conduct a formal hearing, is not limited to the “unfair” conduct specifically identified in N.J.S.A. 17:29B-4 (i.e., “section four”), but extends further to “any method of competition or [] any act or practice in the conduct of such business which is not defined in section four . . . .” N.J.S.A. 17:29B-9. See also N.J.S.A. 17:29B-12 (declaring that “[t]he powers vested in the commissioner by this act shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.”). Thus, a plain reading of the ITPA confirms that the Commissioner has broad authority to probe, scrutinize, and adjudicate alleged violations of New Jersey’s statutory/regulatory claims settlement procedures and requirements.

When conducting a formal hearing, the Commissioner has the power to “administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, . . . subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry.” N.J.S.A. 17:29B-6(b). Any violations discovered by the Commissioner during the hearing must be documented in writing, and must be served on the party responsible for the violation. N.J.S.A. 17:29B-7. The Commissioner is then authorized to issue cease and desist orders to the party, and may also order payment of a penalty not to exceed one thousand dollars for each violation, and not to exceed five thousand dollars for each violation of which the party knew, or should have known. N.J.S.A. 17:29B-7. Finally, the ITPA does not enable a private right of action in Superior Court, but instead declares that any “person aggrieved by a violation of [the ITPA] may file a complaint with the Commissioner of Banking and Insurance. N.J.S.A. 17:29B-18. See also

Heumann v. Selective Ins. Co. of Am., 2006 WL 2417286, at *5 (D.N.J. Aug. 21, 2006) (granting defendant's motion for summary judgment on a bad faith claim on the basis that "there is no private right of action for violations of the ITPA . . . ."). Following receipt, examination, and adjudication of a complaint, the Commissioner may: (1) issue an order requiring the payment of a "monetary penalty"; (2) order the insurer to pay "restitution" to the aggrieved party; or among other remedies, (3) "obtain equitable relief in a State or federal court." N.J.S.A. 17:29B-18.

In light of all of the above, Plaintiffs simply do not have the ability to maintain a private right of action for conduct (auto body repair) that undoubtedly falls within the ambit of the ITPA (and NJAA), and is therefore subject to the exclusive regulatory jurisdiction of the Commissioner of Banking and Insurance. The Department of Banking and Insurance is statutorily compelled to "adopt rules and regulations . . . necessary to effectuate the purposes of [the ITPA]," N.J.S.A. 17:29B-19; has implemented an expansive regulatory scheme governing automobile damages claims within the State; and holds exclusive jurisdictional authority over the insurance industry that it is expressly charged with overseeing. Indeed, as clearly and unambiguously articulated by our Appellate Division: "the insurance industry is already heavily regulated by the Department of Insurance. It thus appears that exclusive regulatory jurisdiction of insurance companies, at least with respect to the payment of claims, is within the Department of Insurance." Pierzga v. Ohio Cas. Grp. of Ins. Companies, 208 N.J. Super. 40, 47 (App. Div.), certif. denied, 104 N.J. 399 (1986). The State of New Jersey has authorized the Commissioner of Banking and Insurance (rather than the Superior Court) as the entity that determines whether NJM has engaged in any conduct that violates the relevant statutory and regulatory policies, and whether curtailment of and/or amendment to NJM's claims handling procedures is warranted. As

such, NJM respectfully submits that all of Plaintiffs' claims are improperly asserted in the context of this litigation, and should therefore be dismissed with prejudice.

POINT III

PLAINTIFFS' THIRD CAUSE OF ACTION SHOULD BE DISMISSED, AS PLAINTIFFS CANNOT MAINTAIN A CONSUMER FRAUD ACT CLAIM IN THE CONTEXT OF THIS LITIGATION

Even in the absence of the ITPA, the NJAA, the doctrine of exclusive primary jurisdiction, and the above-cited decisional law, Plaintiffs' Complaint still fails to state any claims upon which relief can be granted. The Third Cause of Action advanced in the Complaint alleges that NJM violated New Jersey's Consumer Fraud Act, N.J.S.A. 56:8–1 et seq. (the "CFA"). As detailed below, Plaintiffs' CFA claims are simply untenable as a matter of law insofar as: (1) New Jersey case law establishes that the CFA is inapplicable to the payment of insurance benefits; (2) the Plaintiffs do not qualify as "consumers" under the CFA; and (3) the subject activity at issue in this litigation does not involve the sale or advertisement of any merchandise or real estate. For all of these reasons, Plaintiffs' CFA claims should be dismissed with prejudice.

A. The CFA is Inapplicable to the Payment of Insurance Benefits

In Daaleman v. Elizabethtown Gas Co., 77 N.J. 267 (1978), the New Jersey Supreme Court held that the CFA was inapplicable to a privately owned public utility company that was alleged to have overstated and overbilled the actual cost of its gas. The Court reasoned that the Legislature's desire to protect public consumers from "sharp practices and dealings in the marketing of merchandise and real estate" was an unnecessary protection in the context of a suit against a public utility because the company was already subject to the regulatory jurisdiction of the Board of Public Utility Commissioners, which was authorized to assess the need for billing

adjustments. Id. at 271. Additionally, because the CFA is administered by the Division of Consumer Protection, the Daaleman Court was cognizant of the fact that if the CFA applied to the privately owned public utility, then two separate and distinct State agencies would have concurrent jurisdiction over the billing issue – a situation that gives rise to "a real possibility of conflicting determinations, rulings and regulations affecting the identical subject matter." Id. at 272. Finally, the Court held that an award of treble damages against a utility would be inappropriate because "in the long run, it is the public users of the utility service on whom the punitive award will fall." Ibid. The Court therefore concluded that "the subject matter of plaintiff's complaint is within the exclusive jurisdiction of [the Board of Public Utility Commissioners] and is not cognizable under the Consumer Fraud Act." Id. at 273.

In Pierzga v. Ohio Cas. Grp. of Ins. Companies, 208 N.J. Super. 40 (App. Div.), certif. denied, 104 N.J. 399 (1986), the New Jersey Appellate Division extended the holding of Daaleman to the insurance industry, and held that the CFA is inapplicable as a matter of law to the payment of insurance benefits. The Appellate Division found that the Pierzga case, much like the Daaleman case, did "not involve a case of a consumer being victimized by unscrupulous or fraudulent marketing practices." Id. at 47. As will be discussed below, the same rationale applies in this instant action. The Pierzga court added that "the insurance industry is already heavily regulated by the Department of Insurance. It thus appears that exclusive regulatory jurisdiction of insurance companies, at least with respect to the payment of claims, is within the Department of Insurance." Ibid. Finally, the court concluded that "Daaleman is germane here because if treble damages are awarded against insurance companies, the cost will be passed on to the public." Ibid. The court ultimately determined that plaintiff "had no cause for action on the [CFA] claim as a matter of law." Id. at 47 n.1. A petition for certification was subsequently denied by our

Supreme Court. See Pierzga v. Ohio Cas. Grp. of Ins. Companies, 104 N.J. 399 (1986). As such, the Pierzga decision, and the undergirding rationale on which it is premised, warrants the dismissal of Plaintiffs' CFA claims in this action.

Plaintiffs may attempt to improperly rely upon the New Jersey Supreme Court's decision in Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 265 (1997), in an effort to defeat NJM's argument. While the Lemelledo decision authorizes a limited CFA action against an insurer with respect to the sale of an insurance policy, it also expressly recognizes and does not overturn several lower court decisions holding that "the payment of insurance benefits is not subject to the CFA." Ibid. (citations omitted). Since this case does not involve the sale of an insurance policy, and instead constitutes an unfounded attack on NJM's claims handling and benefits payment procedures, the Lemelledo decision is devoid of any legal or factual applicability to his matter.

B. Plaintiffs are not CFA "Consumers," and NJM is not Involved in the Sale or Advertisement of any Merchandise or Real Estate

In the interest of completeness, Plaintiffs' CFA claims would be subject to immediate dismissal as a matter of law even in the absence of the Pierzga decision because: (1) Plaintiffs do not qualify as "consumers" under the CFA; and (2) this litigation does not involve the sale or advertisement of any merchandise or real estate. In order to lay the groundwork for these related arguments, we begin by defining the term "Merchandise" under the CFA, proceed with a discussion of the CFA's overarching purpose of protecting "consumers," continue by explaining when a business entity qualifies as a CFA "consumer," and conclude with an analysis of these associated concepts when applied to the facts and circumstances of this case.

First, the CFA declares, in relevant part, that an "unlawful practice" is:

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby . . . .
>
> [N.J.S.A. 56:8-2 (emphasis added).]

The term "merchandise" is defined by the CFA as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1.

Second, the CFA was enacted for the purpose of protecting consumers, and specifically, "to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer." Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994) (citing Senate Committee, Statement to the Senate Bill No. 199 (1960)); see also Daaleman, 77 N.J. at 270 (noting that the CFA "is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate."); Hundred E. Credit Corp. v. Eric Shuster Corp., 212 N.J. Super. 350, 355 (App. Div. 1986) (the CFA "unquestionably was designed to protect consumers.").

Third, although the term "consumer" is not defined in the CFA, New Jersey courts consistently define a "consumer" as "one who uses (economic) goods, and so diminishes or destroys their utilities." City Check Cashing, Inc. v. Nat'l State Bank, 244 N.J. Super. 304, 309 (App. Div. 1990) (quoting Hundred E., 212 N.J. Super. at 355 (quoting Webster's New International Dictionary, 2d edition)). Thus, while it is well-established that "a business entity can be, and frequently is, a consumer in the ordinary meaning of that term[,]" Hundred E., 212 N.J. Super. at 355, "it is the character of the transaction rather than the identity of the purchaser

which determines if the Consumer Fraud Act is applicable." J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1273 (3d Cir. 1994) (citing Daaleman, 77 N.J. at 273). New Jersey case law confirms that a business entity may qualify as a consumer subject to the protections of the CFA when the entity finds itself in a "consumer oriented situation." See BOC Grp., Inc. v. Lummus Crest, Inc., 251 N.J. Super. 271, 277 (Law. Div. 1990) ("a corporation may qualify as a person under the [CFA] when it finds itself in a consumer oriented situation.") (citations omitted); Papergraphics Int'l, Inc. v. Correa, 389 N.J. Super. 8, 12 (App. Div. 2006) ("protections under the CFA [are] extended to corporate plaintiffs 'in a consumer oriented situation.'"); J & R, 31 F.3d at 1273. A brief review of the relevant decisional law is useful in demonstrating when businesses are in "consumer oriented situations" and why the Plaintiffs of this case simply do not qualify as CFA consumers.

New Jersey courts have held that businesses are consumers in consumer-oriented situations when acting as the purchaser of a tow truck, D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 23-24 (App. Div. 1985); the purchaser of a yacht, Perth Amboy Iron Works, Inc. v. Am. Home Assur. Co., 226 N.J. Super. 200, 209-210 (App. Div. 1988), aff'd, 118 N.J. 249 (1990); the purchaser of electronic equipment, Hundred E., 212 N.J. Super. at 355; or the purchaser of exterior wall panels. Coastal Grp., Inc. v. Dryvit Sys., Inc., 274 N.J. Super. 171, 174, 179-180 (App. Div. 1994). Conversely, New Jersey courts have held that business entities are not consumers in consumer-oriented situations when operating a check cashing service through which the business borrows money from a bank, as the business does not diminish the value of the funds before passing them on to the actual consumer, City Check Cashing, 244 N.J. Super. at 309; when purchasing an experimental petroleum refining concept, BOC Grp., 251 N.J. Super. at 281; when purchasing a restaurant franchise, J & R, 31 F.3d at 1273; when acting as a

party to an insurance agency agreement, A.H. Meyers & Co. v. CNA Ins. Co., 88 Fed. Appx. 495, 500 (3d Cir. 2004); or when selling services that are not generally sold to the public at large. Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d 557, 560-62 (D.N.J. 2002).

In light of the above, the Plaintiff auto body shops named in this litigation simply do not, and cannot qualify as CFA "consumers" in consumer-oriented situations given the nature of the transactions at the heart of this case. The subject matter of the Complaint does not involve the Plaintiff auto body shops' purchase of any goods or services from NJM or its insureds. To be very clear, Plaintiffs are not purchasing anything from NJM or its insureds. Rather, Plaintiffs are competing with other automobile repair shops for an opportunity to perform the repair work at issue in this action. This means that NJM and its insureds (not the Plaintiffs) are the parties actually purchasing the goods and services at the crux of this matter. As such, Plaintiffs are not in "consumer oriented situations," and do not even arguably satisfy the definition of "consumer," as they cannot be classified as "one[s] who use[] (economic) goods, and so diminish[] or destroy[] their utilities." City Check Cashing, 244 N.J. Super. at 309 (quoting Hundred E., 212 N.J. Super. at 355 (quoting Webster's New International Dictionary, 2d edition)).

Plaintiffs' CFA claim is rendered untenable not only by the fact that Plaintiffs are not "consumers" under the CFA, but also by the related fact that NJM's alleged conduct was not committed "in connection with the sale or advertisement of any merchandise or real estate" as defined and required by the CFA. See N.J.S.A. 56:8-2. Indeed, NJM was neither selling nor advertising any merchandise or real estate at the time of its purportedly tortious conduct. Rather, NJM and its insureds are actually the purchasers of Plaintiffs' services under the facts of this case. Accordingly, Plaintiffs' CFA claims would still be legally barred even if Plaintiffs qualified

as CFA "consumers," as the conduct identified in Plaintiffs' Complaint does not involve NJM's sale or advertisement of any merchandise or real estate. For all of these reasons, NJM respectfully submits that Plaintiffs' CFA claim should be dismissed with prejudice.

POINT IV

PLAINTIFFS' FIFTH CAUSE OF ACTION SHOULD BE DISMISSED IN LIGHT OF PLAINTIFFS' INABILITY TO SATISFY THE "DISTINCTIVENESS" REQUIREMENT OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

The Fifth Cause of Action alleged in the Complaint asserts violations of the New Jersey Civil Racketeer Influenced and Corrupt Organizations Act, N.J.S.A. 2C:41-1, et seq. ("NJRICO"). However, as detailed below, in order to maintain a NJRICO claim, Plaintiffs must allege the existence of a distinct "person" and "enterprise" that is not simply the same "person" referred to by a different name. Plaintiffs have not and cannot satisfy the "distinctiveness" requirement in the context of this action, as their Complaint declares that NJM and its employees "collectively constitute an enterprise" and that NJM and its employees "are all persons" under the NJRICO statute. Because NJM cannot be both the defendant who is alleged to have engaged in predicate acts of racketeering activity and the "enterprise" for whose benefit those predicates acts were committed, Plaintiffs' Fifth Cause of Action fails to state a claim upon which relief can be granted, and must therefore be dismissed.

N.J.S.A. 2C:41-2(b) makes it unlawful for "any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in or activities of which affect trade or commerce." To prevail on a civil cause of action under NJRICO, a plaintiff must demonstrate: (1) the existence of an enterprise; (2) that the enterprise engaged in or its activities affected trade or commerce; (3) that defendant was employed by, or associated with the enterprise; (4) that

defendant participated in the conduct of the affairs of the enterprise; and (5) that defendant participated through a pattern of racketeering activity. State v. Ball, 141 N.J. 142, 181-187 (1995). By design, NJRICO parallels 18 U.S.C. § 1961, et seq., the federal RICO Act ("RICO"), and accordingly, New Jersey courts "heed federal legislative history and case law in construing [the NJRICO] statute." See Ball, 141 N.J. at 156. The Third Circuit notes that "the New Jersey Supreme Court believes the New Jersey RICO statute was and should be consistent with the federal RICO statute." Cetel v. Kirwan Fin. Group, Inc., 460 F.3d 494, 510 (3d Cir. 2006). See also Prudential Ins. Co. of Am. v. Bank of Am., Nat. Ass'n, 14 F. Supp. 3d 591, 614 (D.N.J. 2014) ("the Third Circuit and the New Jersey Supreme Court have both held consistently that the NJRICO statute should be interpreted in conformity with the federal RICO statute . . . ."); In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 245 (3d Cir. 2012) (analyzing RICO and NJRICO claims concurrently in light of the fact that "the two RICO statutes are intended to be coextensive . . . ."); State v. Cagno, 211 N.J. 488, 508 (2012) ("because our New Jersey RICO statute is modeled upon its federal counterpart, it is appropriate to accept guidance from the federal RICO cases.") (citations and internal quotations omitted).

In this case, Plaintiffs' NJRICO claim fails as a matter of law because Plaintiffs cannot satisfy the distinctiveness requirement. The New Jersey Supreme Court has expressly recognized that the existence of a distinct enterprise – one that is separate from the RICO defendant – is a necessary element of a civil RICO claim. Ball, 141 N.J. at 161-62 ("we hold . . . that under the RICO Act 'enterprise' is an element separate from the 'pattern of racketeering activity.'"). Thus, the NJRICO defendant cannot also be the enterprise benefiting from the alleged racketeering activity. Federal and United States Supreme Court case law sheds additional light on the distinctiveness requirement. See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001)

("[o]ne must allege and prove the existence of two distinct entities: (1) a 'person;' and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name."); Prudential, 14 F. Supp. at 611 (stating that "distinctiveness" requires a "RICO 'person' who is distinct from the 'enterprise,'" and adding that "the New Jersey Supreme Court would follow federal jurisprudence on the issue of a distinctiveness requirement under NJRICO."); Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995) (finding that a corporation can be liable for a RICO violation "only if it engages in racketeering activity as a 'person' in another distinct 'enterprise[,]'" and expressly declaring that "a claim simply against one corporation as both 'person' and 'enterprise' is not sufficient.").

The above-cited case law illuminates the undeniable fact that Plaintiffs have not and cannot maintain an NJRICO claim on the facts of this case. Paragraph 177 of the Complaint alleges that "[NJM] and its employees collectively constitute an enterprise within the meaning of N.J.S.A. 2C:41-1(c)[,]" and Paragraph 178 states that "[NJM] and its employees are all persons within the meaning of N.J.S.A.2C:41-2(b)." See Marone Cert., Exhibit A, p. 26. Since NJM cannot be both the "person" who is alleged to have engaged in predicate acts of racketeering activity, and simultaneously, the "enterprise" for whose benefit those predicates acts were committed, Plaintiffs' Complaint contains a fatal pleading error that renders the NJRICO claim unsustainable as a matter of law. See, e.g., Jaguar Cars, 46 F.3d at 268 ("a claim simply against one corporation as both 'person' and 'enterprise' is not sufficient."); Varughese v. Robert Wood Johnson Medical School, 2017 WL 4270523, at *10 (D.N.J. 2017) (citing the United States Supreme Court's decision in Cedric Kushner Promotions, 533 U.S. at 164, for the proposition that "[a] claim that the corporation is the 'person' and the corporation together with its employees and agents is the 'enterprise,' will not withstand a motion to dismiss."); Zavala v.

Wal-Mart Stores, Inc., 447 F. Supp. 2d 379, 383 (D.N.J. 2006), aff'd sub nom., Zavala v. Wal Mart Stores Inc., 691 F.3d 527 (3d Cir. 2012) ("[i]f the members of the enterprise are the same as the persons, the distinctness requirement has not been met, as the 'person' and the 'enterprise' must not be identical."). Since NJM and its employees can never be both the "person" and the "enterprise," Plaintiffs have not and cannot satisfy the distinctiveness requirement to maintaining an NJRICO claim, and the Fifth Cause of Action should be dismissed with prejudice.

POINT V

PLAINTIFFS' SIXTH CAUSE OF ACTION SHOULD BE DISMISSED AS THE DEPARTMENT OF BANKING AND INSURANCE HAS EXCLUSIVE JURISDICTION OVER PLAINTIFFS' REQUESTS FOR INJUNCTIVE RELIEF

The Sixth Cause of Action advanced in Plaintiffs' Complaint seeks injunctive relief from this Court, even though the New Jersey Legislature has deliberately determined that only the Commissioner of Banking and Insurance can "obtain equitable relief in a State or federal court of competent jurisdiction against an insurer . . . ." N.J.S.A. 17:29B-18b(3). If and only if the "the commissioner does not charge a violation of [the ITPA], then any intervenor in the proceedings before him may, within thirty days after the service of such determination, institute an action, notwithstanding the determination, in the Superior Court to enjoin and restrain any method of competition, act or practice." N.J.S.A. 17:29B-10.

In the context of this matter; the Commissioner of Banking and Insurance has not even received notice of Plaintiffs' claims, and as such, has yet to investigate, reach any conclusions, or issue any rulings in respect of Plaintiffs' claims. Therefore, it logically follows that Plaintiffs have no right to seek injunctive relief in the Superior Court. Plaintiffs' request for injunctive relief is improperly asserted in the context of this litigation, and should be directed towards the Department of Banking and Insurance, which is vested with the sole authority to determine

whether NJM has engaged in any conduct that violates the relevant statutory and regulatory schemes, and whether modification of NJM's automobile repair procedures is warranted. Unless and until the Commissioner has had an opportunity to receive, scrutinize, and adjudicate Plaintiffs' complaints, the instant claims for injunctive relief should be dismissed.

POINT VI

PLAINTIFFS' FIRST CAUSE OF ACTION FOR INJURIOUS FALSEHOOD SHOULD BE DISMISSED, AS PLAINTIFFS HAVE FAILED TO IDENTIFY EVEN ONE FALSE STATEMENT THAT WAS ALLEGEDLY PUBLISHED BY NJM

With respect to Plaintiffs' First Cause of Action, the New Jersey Appellate Division recently defined an "injurious falsehood" as "any false statement that causes pecuniary loss[,]" and added that "an injurious falsehood creates liability for one who publishes it with knowledge or reckless disregard of its falsity and with intent 'to result in harm to interests of the other having a pecuniary value.'"). Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C., 450 N.J. Super. 1, 52 (App. Div. 2017) (quoting Restatement (Second) of Torts § 623A (1976)). Indeed, the Restatement declares that:

> [o]ne who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
>
> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.
>
> [Restatement (Second) of Torts § 623A (1976).]

Accordingly, it logically follows that the publication of a "false statement" is an indispensable prerequisite to maintaining a cause of action for "injurious falsehood" under New Jersey law.

The First Cause of Action alleged in Plaintiffs' Complaint broadly and arbitrarily declares that NJM "knowingly and intentionally made false, misleading, and injurious statements concerning the integrity of Plaintiffs[,]" but the Count fails to identify even one specific statement that was purportedly false, misleading, or injurious. See Certification of Michael J. Marone ("Marone Cert."), Exhibit A, p. 20, ¶¶ 147-150. Presumably, the allegedly false and/or misleading statements to which this Count refers are contained in Paragraphs 90, 91, and 93 of Plaintiffs' Complaint, which declare that NJM "knowingly and intentionally misrepresents to Insureds" that: (1) Plaintiffs' "prices are unreasonably high;" (2) NJM insureds "will be forced to pay the difference between what [NJM] is willing to pay . . . and the cost of repair;" and (3) that Plaintiffs are "are not on [NJM's] 'preferred list of shops' -- even though [NJM is] not permitted to have such a list . . . ." See Marone Cert., Exhibit A, p. 14, ¶¶ 90, 91, 93. Notwithstanding these contentions, the very factual allegations that form the foundation of Plaintiffs' Complaint confirm that none of these statements are false, misleading, or actionable under New Jersey law.

First, it should be noted that NJM is permitted to maintain a list of body shops that can be expected to perform repairs within the carrier's estimates. New Jersey case law confirms that "[s]uch lists are expressly sanctioned by insurance regulations." Chick's Auto Body, 168 N.J. Super. at 84 n.4 (citing N.J.A.C. 11:3-10.3(d)). Furthermore, as part of the Fair Automobile Insurance Reform Act of 1990, the New Jersey Legislature enacted a statute governing an insured's "right to choose" an auto body repair facility. N.J.S.A. 17:33B-36.1 (the "Right to Choose" statute). The Right to Choose statute was enacted in 1998, almost 20 years after the Chick's Auto Body decision, and only serves to strengthen and reinforce the legal and factual reasoning at the core of the decision. The statute declares, in relevant part, that:

> [i]f an insurer has a financial arrangement with one or more auto body repair shops or other repair facilities or a network of facilities

> for the purpose of repairing vehicles covered under physical damage, collision, or comprehensive coverages, the insurer shall not deny a person the right to select an auto body repair shop or other repair facility of his choice for repair of a covered vehicle, provided that such auto body repair shop or other repair facility elected by the person accepts the same terms and conditions from the insurer, including, but not limited to, price, as the shop, facility, or network with which the insurer has the most generous arrangement.
>
> [N.J.S.A. 17:33B-36.1 (emphasis added).]

The significance of this statute cannot be overstated. Not only does it authorize New Jersey insurance companies to enter into "a financial arrangement with one or more auto body repair shops," but it continues by declaring that an insurance company shall not deny an insured's right to select a repair shop of his/her choosing "provided that" the repair shop selected by the insured "accepts the same terms and conditions from the insurer, including, but not limited to, price, as the shop . . . with which the insurer has the most generous arrangement." Thus, N.J.S.A. 17:33B-36.1 overtly enables New Jersey insurance companies to reject any repair shop selected by an insured that refuses to accept the same terms and conditions that are the subject of the insurance companies' "most generous arrangement." Therefore, Plaintiffs' claim that they are not on NJM's "preferred list of shops" simply does not and cannot amount to an actionable false statement, particularly in light of the fact that the very regulations on which Plaintiffs' Complaint is based, and the above-referenced Right to Choose statute, both empower New Jersey insurance carriers, like NJM, to maintain a list of automobile repair facilities that perform repairs within the carriers' established estimates.

Second, the first ten-and-a-half pages of Plaintiffs' own Complaint are replete with a slew of factual contentions confirming that Plaintiffs' prices are unreasonably high when compared to the prices commonly charged in the industry, and that Plaintiffs' prices exceed that which NJM

is able to pay for equivalent services that can be obtained from a host of Plaintiffs' competitors at a much lower price. See Marone Cert., Exhibit A, pp. 1-11. Any contention that NJM misrepresented the fact that Plaintiffs' prices are unreasonably high is belied by Plaintiffs' own admissions that their prices do, in fact, exceed NJM's established estimates, and therefore surpass that which NJM is able to pay Plaintiffs' competitors. When distilled to their essence, Plaintiffs' grievances amount to no more than an objection to a natural consumer-oriented competitive process designed to ensure that NJM and its insureds receive the necessary repair work for the lowest competitive price. There is simply no reason why NJM should be forced to pay Plaintiffs more than Plaintiffs' competitors for indistinguishable work – particularly in light of the text of the Right to Choose statute – only to pass the needlessly elevated cost of that work onto the general public (i.e., NJM's insureds).

Finally, NJM's alleged decision to advise its insureds that they "will be forced to pay the difference between what [NJM] is willing to pay . . . and the cost of repair" is not a false or misleading statement, but rather, an accurate and truthful statement that is objectively calculated to provide NJM insureds with the information they need to make informed decisions with respect to the facility each insured ultimately selects to perform the requisite repair. It would actually be disingenuous and misleading for NJM not to advise its insureds of their potential personal financial obligation in the event the insured chooses a repair shop that charges far more than the industry standard, and far more than what NJM can pay Plaintiffs' competitors for equal work. Therefore, the statements referenced in Plaintiffs' Complaint are neither false nor misleading, and as such, do not give rise to a cause of action for an "injurious falsehood" under New Jersey law. The First Cause of Action advanced in the Complaint should be dismissed.

POINT VII

PLAINTIFFS' SECOND CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

It is well-settled in the State of New Jersey that a complaint based on tortious interference must allege facts that support the following four elements: (1) "some protectable right – a prospective economic or contractual relationship" (i.e., "there must be allegations of fact giving rise to some 'reasonable expectation of economic advantage'"); (2) an "interference [that] was done intentionally and with 'malice'" (i.e., "that the harm was inflicted intentionally and without justification or excuse"); (3) an interference that "caused the loss of the prospective gain;" and (4) resulting damages. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52 (1989) (many citations omitted). Moreover, "it is 'fundamental' to a cause of action for tortious interference with a prospective economic relationship that the claim be directed against defendants who are not parties to the relationship." Id. at 752 (citations omitted).

In the context of this action, even accepting all allegations in Plaintiffs' Complaint as true, Plaintiffs' tortious interference claim is belied by the facts that: (1) Plaintiffs' did not have any protectable right or reasonable expectation of economic advantage; (2) NJM's alleged interference, even if intentional, was certainly justified; and (3) even if it could be reasonably argued that Plaintiffs had a protectable right or reasonable expectation of economic advantage, NJM would most certainly be a party to the prospective economic relationship. For all of these reasons, Plaintiffs' allegation of tortious interference fails to state a claim upon which relief can be granted, and should be dismissed.

First, it cannot be rationally maintained that Plaintiffs have a protectable right or reasonable expectation of economic advantage with respect to automobile repair work of which

Plaintiffs were not even aware at the time of NJM's alleged interference. While Plaintiffs' Complaint identifies a total of seven NJM insureds that were purportedly "steered" away from Plaintiffs' shops; only three of the seven insureds (Insured #1, Insured #3, and Insured #5) are expressly alleged to have made contact with Plaintiffs prior to NJM's supposed intervention. See Marone Cert., Exhibit A, pp. 14-17. While Plaintiffs' do not have an actionable tortious interference claim with respect to these three insureds for the reason set forth below; the fact remains that the other four insureds overtly identified in Plaintiffs' Complaint are not expressly alleged to have even made contact with Plaintiffs at the time of NJM's claimed intrusion. In fact, the customer email for "Insured #2" attached as Exhibit B to Plaintiffs' Complaint unambiguously declares that the individual "spoke with NJM on 2 separate occasions prior to having the car towed to your shop." See Marone Cert., Exhibit A, Exhibit B. This means that the Plaintiff shop was completely and totally unaware of the potential business relationship at the time of NJM's allegedly tortious conduct.

The mere fact that NJM insureds require automobile repairs from time-to-time does not mean that the Plaintiff shops have a protectable interest in that work. There are a host of auto body shops in this State, and the very regulations on which Plaintiffs' Complaint is based establish that insureds can have their vehicles repaired at a shop of their choice. See N.J.A.C. 11:3-10.3(e). Any speculative interest the Plaintiffs may have in that repair work is far too remote and tenuous to be afforded legal protection, especially in light of the fact that N.J.S.A. 17:33B-36.1 enables New Jersey insurance companies to reject any repair shop selected by an insured that refuses to accept the same terms and conditions that are the subject of the insurance companies' "most generous arrangement" with one or more other repair shops. As concisely stated by our Supreme Court: "[a] complaint must demonstrate that a plaintiff was in 'pursuit' of

business[;]" Printing Mart, 116 N.J. at 751, and Plaintiffs cannot be said to be in pursuit of business of which they were completely unaware at the time of the supposed interference.

Second, with respect to the insureds that are actually alleged to have made contact with Plaintiffs prior to NJM's alleged interference, the fact remains that NJM's purported interference, even if intentional, was clearly justified. By advising its insureds that Plaintiffs charge more than NJM is willing and statutorily authorized to pay other repair shops for identical automobile repair work, and that the insureds will be responsible for covering the excess, NJM is providing its insureds with the information they need to make informed decisions regarding the shop they chose to perform their automobile repairs. This is certainly a justified course of conduct designed to protect the financial interests of NJM insureds even if it could be deemed an "intentional interference" with the Plaintiffs' businesses. Furthermore, in advising its insureds of Plaintiffs' inflated prices, NJM is not preventing the Plaintiffs from performing the repair work at the prices charged by their competitors in the industry, nor is NJM preventing their insureds from paying extra for the Plaintiffs' work. Rather, all of the Plaintiff shops are free to perform the work at NJM's established rates and either forego the excess profit that is not sought by Plaintiffs' competitors, or attempt to collect it directly from NJM's insureds. Accordingly, NJM's claimed interference, even if intentional, was indubitably justifiable, excusable, and consistent with New Jersey law.

Finally, and significantly, Plaintiffs tortious interference claim must fail even if Plaintiffs had a protectable right or reasonable expectation of economic advantage, and even if NJM's claimed interference was unjustified or inexcusable, as NJM would undoubtedly be a party to the prospective business relationship. As noted above, a "fundamental" precursor to a tortious interference claim is "a requirement that the claim be directed against defendants who are not

parties to the relationship." Van Natta Mech. Corp. v. Di Staulo, 277 N.J. Super. 175, 182 (App. Div. 1994) (citing Printing Mart, 116 N.J. at 752). In the context of this litigation, NJM would not only be a party to the prospective business relationship, but in fact, would be the party responsible for paying the majority (if not all) of the cost of the subject repairs. As such, NJM's status as an indispensable party to the speculative business arrangement undermines Plaintiffs' ability to ever maintain a tortious interference claim on the facts of this case. NJM therefore submits that the Second Cause of Action advanced in the Complaint should also be dismissed.

CONCLUSION

For all of the reasons set forth above, NJM respectfully requests that this Court grant the instant Motion, and dismiss all claims asserted in Plaintiffs' Complaint with prejudice.

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By: *s/ Michael J. Marone*
Michael J. Marone

Dated: August 15, 2019