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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 UNION COUNTY- LAW DIVISION DOCKET NO. UNN-L-1992-19 Civil Action

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiffs, 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 themselves and others similarly situated (collectively, "Plaintiffs"), submit this memorandum of law in opposition to Defendant New Jersey Manufacturers Insurance Company's ("NJM" or "Defendant") Motion to Dismiss the Complaint (the "Motion").

PRELIMINARY STATEMENT

In moving to dismiss the claims set forth in the Complaint before discovery, Defendant would have this Court prematurely adjudicate factual disputes concerning whether Defendant engaged in an unlawful pattern and practice of refusing to negotiate with Plaintiffs and other body shops in New Jersey in good faith, providing "take it or leave it" price terms for all repair work performed by Plaintiffs and putative class members refusing to negotiate in good faith, and unlawfully steering insureds away from certain body shops through patent misrepresentations. Defendant seeks to short-circuit this litigation by preventing the Court from scrutinizing its deceptive conduct intended to mislead customers into believing that they could not have their vehicles repaired at certain body shops -- stifling competition in the marketplace, reducing consumer choice, and returning vehicles to the public roadways that underwent improper and substandard repairs creating a safety hazard to the public at large.

For example, the Complaint alleges the following patently unlawful activity which Defendant cannot dispute on a pleading's motion:

- Defendant unlawfully steers Plaintiffs' customers to other body shops including those on Defendant's "preferred list of shops" in violation of N.J.A.C. § 11:3-10.3(e), Certification of Michael J. Marone, Esq. ("Marone Cert."), dated August 15, 2019, as **Exhibit A**, ¶¶ 93, 99, 102, 104, 122, 125-26, and 130;
- Defendant falsely instructs Plaintiffs' customers that Plaintiffs charge high prices for which the insured will be responsible, *see* Marone Cert., **Exhibit A** ¶¶ 96, 103, 112-13, 121, and 127;

- Defendant falsely instructs Plaintiffs' customers that Plaintiffs refuse to negotiate in good faith, *see* Marone Cert., **Exhibit A** ¶¶ 123 and 129;
- Defendant fails to negotiate with Plaintiffs in good faith in violation of N.J.A.C. § 11:3-10.3(b), by among other things, advising Plaintiffs' customers that Plaintiffs' rates are too high before even undertaking a good faith negotiation as to price, *see* Marone Cert., **Exhibit A** ¶¶ 40-44, 47-53, 70, 74, 91, 109, 123, and 128-29; and
- Defendant falsely instructs Plaintiffs' customers that Plaintiffs charge "administrative fees" which Plaintiffs simply do not charge, *see* Marone Cert., **Exhibit A** ¶¶ 116-17 and 119.

The legal standards and allegations detailed herein raise substantial issues of fact requiring discovery and an adjudication on the merits. Every single claim set forth in the Complaint has been sufficiently pled and Defendant's ***factual*** arguments all miss the mark.

At the risk of substantial prejudice to Plaintiffs, as well as a steep motion to dismiss standard that Defendant cannot meet, the Court must deny Defendant's Motion to Dismiss.

STATEMENT OF FACTS

For the sake of brevity, Plaintiffs incorporate by reference the allegations in the Complaint, annexed to the Marone Cert. as **Exhibit A**.

STANDARD OF REVIEW

A motion to dismiss under Rule 4:6-2(e) should be "approach[ed] with great caution" and should only be granted in "the rarest of instances." *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989). "[Courts] must view the allegations with great liberality and without concern for the plaintiff's ability to prove the facts alleged in the complaint." *Sickles v. Cabot Corp.*, 371 N.J. Super. 100, 106 (App. Div. 2005) *(*citing *Printing Mart-Morristown,* 116 N.J. at 746. "A motion to dismiss a complaint under Rule 4:6-2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." *Donato v. Moldow*, 374 N.J. Super. 475, 482 (App. Div. 2005). In reviewing

a motion to dismiss, the Court must search the Complaint in depth and with liberality to determine if a cause of action can be gleaned even under an obscure statement, particularly, if further discovery is taken. *See Printing Mart*, 116 N.J. at 746.

With regard to a motion to dismiss, every reasonable inference must be accorded the plaintiff and the motion is granted only in rare instances and ordinarily without prejudice. *See In re Contest of November 8, 2005*, 388 N.J. Super. 663, 666 (App. Div. 2006), *aff'd*, 192 N.J. 546 (2007); *see also, NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353, 365 (2006); *Banco Popular N. America v. Gandi*, 184 N.J. 161, 165-166 (1997). The plaintiff's obligation on a motion to dismiss is "not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action." *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 472 (App. Div. 2001).

"In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183 (2005) (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 221 n. 3 (3d Cir.), *cert. denied*, 543 U.S. 918 (2004)).

LEGAL ARGUMENT

I. Department Of Banking And Insurance Jurisdiction Over Regulatory Matters Does Not Preclude Litigation On The Issues Raised In The Complaint.

Defendant seeks to cloud the issues before the Court by stating that "all six causes of action advanced in Plaintiffs' Complaint should be dismissed, as the Department of Banking and Insurance ("DBI") has exclusive primary jurisdiction over the claims handling procedures of New Jersey Insurance Companies" pursuant to the New Jersey Insurance Trade Practices Act ("ITPA"). Defendant's Memorandum of Law in support of the Motion ("MOL") at pg. 14. However, the allegations in the Complaint do not concern Defendant's "claims handling procedures" with its

insureds, but instead concern its unlawful, institutionalized practice of refusing to negotiate with Plaintiffs and other body shops in New Jersey, misleading insureds into believing that they could not have their vehicles repaired at certain body shops, and actively steering insureds away from particular body shops. *See* Marone Cert., **Exhibit A** ¶¶ 1-4. These issues are wholly outside of Defendant's "claims handling procedures" and instead concern Plaintiffs' statutory and common law rights the enforcement of which ***have never been expressly foreclosed*** by the New Jersey Legislature.

Defendant cites federal case law for the proposition 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). However, Defendant does not -- because it cannot -- identify a single case finding that the New Jersey Legislature afforded DBI exclusive jurisdiction over the claims asserted *sub judice*.

In *Greate Bay*, the Third Circuit addressed a lawsuit seeking to recover gambling debts, and the issue reviewed was whether the state Casino Control Commission was vested with exclusive jurisdiction over the repayment of gambling losses. The *Greate Bay* Court issued an opinion with an exhaustive examination of New Jersey state precedent on vesting exclusive primary jurisdiction in an agency, citing *De Fazio v. New Haven Sav. & Loan Ass'n*, 22 N.J. 511 (1956), for its test of statutory construction:

> In affirming [the lower court's] decision, the New Jersey Supreme Court recognized the following principles of statutory construction: (1) statutory construction requires a court "to determine the purpose and intent of the Legislature"; (2) ***courts should presume that a statute does not intend to change the common law or a common law right***; and (3) ***to overcome this presumption, "the legislative intent to do so must be clearly and plainly expressed***."
>
> The court then held that "the history and substance of the act in question constitute a complete administrative remedy intended by the Legislature to provide expert

> administrative service to members, associations and the public, and it is self-sufficient unto itself to a degree where it supplants and by inference repeals the common law relating to such associations."

Greate Bay, 34 F.3d at 1231 (citing *De Fazio*, 22 N.J. at 518-19) (emphasis added) (internal citations omitted). As it is clear that the Legislature has not passed a statute intended to give DBI exclusive jurisdiction over the causes of action in this litigation -- and Defendant has cited no such statute explicitly conferring exclusive jurisdiction -- Defendant's argument on this point simply fails.

In *Lally v. Copygraphics*, the New Jersey Supreme Court reached the same conclusion finding that absent an express statutory bar, a plaintiff's claims could proceed: "If the Legislature had wanted to foreclose a judicial cause of action, it would have done so expressly." 85 N.J. 558, 672 (1981). Notably, the Third Circuit in *Greate Bay* commented on the Lally holding, stating that "ultimately, in *Lally* the Supreme Court held that inasmuch as the legislature did not specify that the administrative agency's jurisdiction was 'exclusive,' the legislature vested the Supreme Court and the administrative agency with ***concurrent jurisdiction***." *Greate Bay Hotel & Casino v. Tose*, 34 F.3d at 1232 (emphasis added). That precedent controls here.

A. <u>DBI Does Not Have Exclusive Jurisdiction</u>.

As Defendant concedes, the ITPA nowhere provides for exclusive jurisdiction before DBI permitting concurrent jurisdiction before this Court. The statute simply provides:

> Complaints, penalties for violations. 4. a. A person aggrieved by a violation of this act ***may*** file a complaint with the Commissioner of Banking and Insurance. Upon receipt of the complaint, the commissioner shall investigate an insurer to determine whether the insurer has violated any provision of this act.

N.J.S.A. 17:29B-18 (emphasis added); *see* MOL at pgs. 12-13. Indeed, Defendant is compelled to rely on introductory text detailing the purpose of ITPA which too fails to endow DBI with exclusive jurisdiction:

> Declaration of purpose. The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th 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; *see also* MOL at pgs. 12-13 (citing statute). The mere fact that DBI ***may*** regulate insurance practices in the State does not divest this Court of concurrent jurisdiction absent express direction from the State Legislature. *See Lally*, 85 N.J. at 672 ("If the Legislature had wanted to foreclose a judicial cause of action, it would have done so expressly.").

Importantly, Plaintiffs are not attempting to assert a private cause of action pursuant to the ITPA, but are merely asserting claims under different statutes or common law theories while pointing to the ITPA violations as ***examples*** of the unlawful conduct. *See, e.g., Pickett v. Lloyd's*, 131 N.J. 457, 467 (1993) (holding that while N.J.S.A. 17:29B-4 does not create a private cause of action, violations of the statute can be evidence of a violation of the duty of good faith and fair dealing); *see also R.J. Gaydos Ins. Agency, Inc. v. National Consumer Ins. Co.*, 168 N.J. 255 (holding that while the Fair Automobile Insurance Reform Act did not provide a private cause of action, the plaintiff could assert common law claims influenced by the Act).[1]

[1] Defendant's reliance on *Heumann v. Selective Ins. Co. of America* is misplaced. 2006 WL 2417286 (D.N.J. Aug. 21, 2006). Preliminarily, Defendant failed to annex a copy of the unreported decision to its papers in violation of Rule 1:36-3. Moreover, *Heumann* dealt with first party claims of the insured rather than claims by a third-party. *Id.* at * 1. Furthermore, recognizing that the ITPA does not bar all claims, the Court only dismissed one of plaintiff's claims the Court found to be in direct conflict with the ITPA. *Id.* *4-5. A true and correct copy of the unpublished decision is annexed to the Certification of Joshua S. Bauchner as **Exhibit A**.

Indeed, the New Jersey Supreme Court in *Lemelledo v. Beneficial Management Corp. of America*, squarely addressed this issue in the context of a New Jersey Consumer Fraud Act Claim ("CFA"), as that asserted here. 150 N.J. 255 (1997). The *Lemelledo* Court explicitly held that the CFA ***did not conflict*** with the ITPA, permitting a claim to proceed even though the alleged conduct was ***also*** subject to regulation by the DBI. *Id.* at 272-73. The Court took particular note that the ITPA "states its remedies are cumulative" and the "CFA simply complements [the ITPA]" permits the CFA claims to proceed. *Id.*; *see also Alpizar-Fallas v. Favero*, 908 F.3d 910, 916-17 (3d Cir. 2018) ("the fact that a private right of action exists under the CFA but not the ITPA does not create a direct and unavoidable conflict that would preclude application of the CFA…"); *Perez v. Rent-A-Center*, 186 N.J. 188, 218-220 (2006) (rejecting an argument that a CFA claim could not be brought based on conduct regulated by the Retail Installment Sales Act).

Plaintiffs are thus plainly permitted to pursue the claims asserted in the Complaint relying on the ITPA as ***mere evidence*** of Defendant's unlawful conduct because Plaintiffs do not seek to assert a private cause of action directly under the ITPA. *North State Autobahn, Inc. v. Progressive Ins. Group Cop.*, is particularly instructive on this point. A.D.3d 5 (2d Dep't 2012). There, the New York Supreme Court, Appellate Division, Second Department reviewed a matter concerning New York General Business Law § 349 -- an analog to the CFA -- which declares unlawful all "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The *North State* plaintiff similarly alleged that the defendant's steering conduct evidenced a violation of New York General Business Law § 349. In upholding identical claims to those alleged here, the *North State* court reasoned:

> that an insurer's misrepresentations to its insureds as part of a broad DRP may be sufficiently consumer-oriented to state a cause of action under § 349, that the alleged loss of business resulting therefrom is direct injury and that Plaintiff's cause

> of action is not merely a disguised claim for steering in violation of Insurance Law § 2610.

North State Autobahn, Inc. v. Progressive Ins. Group, 32 Misc. 3d 798, 928 N.Y.S.2d 199, 2011 N.Y. Slip Op. 21220 (2011). The court relied on *M.V.B. Collision, Inc. v. Allstate, Ins. Co.*, 728 F. Supp. 2d 205, 212 (E.D.N.Y. 2010), in which the federal district court also permitted a § 349 claim predicated on similar facts as those alleged here:

> Mid Island alleges that, as a result of this dispute, Allstate agents engaged in deceptive practices designed to dissuade Allstate customers from having their cars repaired at Mid Island and to prevent Mid Island from repairing Allstate customers' cars.

Id. at 207. In upholding the § 349 claim, the court explained:

> When, for example, Allstate allegedly ... steered a car away from Mid Island [by misrepresentations], ***not only was the customer the victim of a deceptive practice, but Mid Island also suffered a loss of business or other injury***....
>
> In sum, given that Mid Island's alleged injuries [loss of business] occurred as a direct result of the alleged deceptive practices directed at consumers, its injuries were not solely as a result of injuries sustained by another party.

Id. at 217 (emphasis added).

Here, too, Plaintiffs rely on Defendant's violations of the IPTA as ***evidence*** of their viable causes of action; in addition to, *inter alia*, allegations of a boycott, retaliation, threats, misrepresentations, and other deceptive conduct. *See* Marone Cert., **Exhibit A** at ¶¶ 12-36, 38-74, and 84-131. Plaintiffs are not seeking to enforce the anti-steering and other IPTA regulations *per se*, N.J.A.C. § 11:3-10.3, but are permissibly relying on Defendants' unlawful steering activity as evidence in support of their claims.

B. The Department Of Banking And Insurance Does Not Have Exclusive Jurisdiction Over Plaintiffs' Cause Of Action For Injunctive Relief.

Defendant also imprudently asserts that DBI has exclusive jurisdiction over Plaintiffs' cause of action for injunctive relief -- thus somehow rendering "Plaintiffs' entire Complaint unsustainable as a matter of law." MOL at pg.12. For the reasons set forth in Section I, *supra*, DBI does not have exclusive jurisdiction over Plaintiffs' claims which do not seek to enforce DBI regulations.

Defendant further contends that certain New Jersey statutes prohibit the conduct at issue in this litigation, and that the Commissioner of Banking and Insurance is afforded "the power to examine and investigate whether any New Jersey insurance company is engaged in any unfair practices acts, or methods of competition." Defendant then concedes that the ITPA merely "***permits*** the Commissioner to issue penalties, modifications, and cease and desist orders for any conduct the Commissioner deems to violate the ITPA's provisions." *Id.* (emphasis added). Defendant then further concedes that the ITPA provides an aggrieved consumer the choice to pursue relief through DBI, but does not compel it: "A person aggrieved by a violation of this act ***may*** file a complaint with the Commissioner of Banking and Insurance." *Id.* (emphasis added). Merely because a statute "permits" a regulator to act and states that an aggrieved consumer "may" file a complaint with a regulator, does not confer exclusive jurisdiction with DBI. Indeed, it confirms just the opposite.

Moreover, and for the avoidance of any doubt, Defendant still fails to identify any provision in the IPTA which provides exclusive jurisdiction to DBI thereby divesting this Court of concurrent jurisdiction, in the absence of which, Defendant's argument fails as a matter of law. *See Greate Bay Hotel & Casino v. Tose*, 34 F.3d at 1232 ("ultimately, in *Lally* the Supreme Court

held that inasmuch as the legislature did not specify that the administrative agency's jurisdiction was 'exclusive,' the legislature vested the Supreme Court and the administrative agency with **concurrent jurisdiction**.") (emphasis added); *see also supra*, § I.

C. *Chick's* Is Wholly Inapposite To The Claims At Issue.

Defendant's reliance on *Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 401 A.2d 722 (Ch. Div. 1979), *aff'd sub nom. Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 176 N.J. Super. 320, 423 A.2d 311 (App. Div. 1980), is equally misguided as it fully supports Plaintiffs' claims. Remarkably, while Defendant on the one hand concedes that *Chick's* would arguably apply to Plaintiffs' antitrust claims ***only***, Defendant imprudently attempts to stretch *Chick's* to apply to all of Plaintiffs' claims undermining its credibility before this tribunal.

In *Chick's*, the plaintiffs challenged provider agreements (also known as "direct repair programs") wherein insurance companies enter into contractual arrangements with certain body shops setting the terms of repair. Unlike the undisputed facts *sub judice*, the insurance companies ***did not*** steer insureds to a particular shop in violation of State Law, N.J.A.C. § 11:3-10.3, or exclude any shop willing to accept the insurance company's rates.[2] Accordingly, the *Chick's* court

[2] The Choice of Shop Rule ***requires*** insurers to negotiate in good faith with their insured's preferred body shop precluding an insurer from steering customers to another body shop it favors to the detriment of consumer choice:

> (e) Subject to the requirements of (d) above, ***the insured may use any repair facility of his or her own choice. … The insurer must 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, must recommend*** a qualified repair facility at a location reasonably convenient to the insured's motor vehicle who will repair the damaged motor vehicle at the insurer's estimated cost of repairs, but in either event the provisions of (g) below apply.

found that the plaintiffs' claim that insurance companies were unwilling to pay a ***higher price*** than the insurance companies could otherwise obtain was not a restraint on trade:

> the alleged 'price-fixing' referred to is the carrier's refusal to pay more than the prevailing service rates … Under the guise of a 'price-fixing' claim, plaintiffs seek not to further price competition, but to avoid it. In effect, plaintiffs assert they should not have to compete with other shops on price. They contend, instead, that defendants should be required to pay their insureds whatever price plaintiffs decide to charge them.

See id. at 84. For these reasons, the *Chick's* court concluded that the activities complained of did not violate the New Jersey Antitrust Act ("NJAA").

Indeed, the *Chick's* court's conclusions confirm Defendant's violation of the NJAA here. As the court explained, evidencing the patent applicability of the NJAA to the instant case:

> The thrust of the antitrust laws is the prevention of trade restraining practices "which, by unwarranted interference with free competition among the suppliers of products or services, have a tendency to deprive the public of the benefits ordinarily derived from the rivalry of a number of sellers" and "prevent unreasonably high prices to the purchasers and users" of the goods or services in question.

Id. at 88. With that guidance in mind, the *Chick's* court concluded that: "There [wa]s no contention that anyone willing to work at competitive rates has been excluded from any list." *Id*. at 84.

Here, by contrast, the Complaint alleges that Plaintiffs ***were excluded*** by Defendant as Plaintiffs' customers and others affirmatively were directed away from having their vehicles repaired by Plaintiffs, (i.e., a boycott). *See* Marone Cert., **Exhibit A** ¶¶ 84-85, 96, 102, 104 116, 123, and 130. Indeed, Plaintiffs plead that Defendant misrepresented to Plaintiffs' customers that Plaintiffs charged excessive rates to dissuade them from using Plaintiffs' shops while ultimately

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N.J.A.C. § 11:3-10.3 (emphasis added).

conceding the rates were not excessive and paying Plaintiffs' rates without any chargeback to the insured. *See* Marone Cert., **Exhibit A** ¶¶ 95-100 and 111-14.

The *Chick's* Court reasoned that: "[a]n unlawful boycott will not result from a buyer's refusal to pay a higher price for goods or services where it can buy them at a lower price" and rejecting that an "indirect" boycott occurred because there was "no concerted refusal to deal." *Id.* at 86. However, the opposite is true here because there was no refusal to pay a higher price; Plaintiffs accepted payments from Defendant without any additional costs to insureds, thus establishing *prima facie* evidence of an unlawful boycott contemplated in *Chick's*. *See* Marone Cert., **Exhibit A** ¶¶ 99 and 112-13. Indeed, the allegations in the Complaint -- which must be accepted as true herein -- allege that Defendant never even attempted to negotiate in good faith with Plaintiffs in the first place, *see* Marone Cert., **Exhibit A** ¶¶ 91, 109, and 128-29, instead levying a host of misrepresentations concerning Plaintiffs to unlawfully steer their customers away. *See* Marone Cert., **Exhibit A** ¶¶ 96, 103, 109, 112, 116-17, 121-22, 126-29.

The *Chick's* court also concluded that the NJAA did not apply to "claims adjustment practices and procedures" regulated by the Commissioner of Insurance. *See id*. at 83. However, as above, the allegations in *Chick's* were limited to insurance companies' refusal to pay a higher price than dictated by the market since that practice was not, in the first instance, anticompetitive and second, was subject to regulations concerning the claims settlement process. The *Chick's* Court notably ***did not*** address allegations ***external*** to that process; namely, that insurance companies were: (i) illegally steering customers away from certain body shops; (ii) denigrating certain body shops by falsely asserting their prices were too high; and (iii) threatening insureds that their repairs would not be covered if they permitted the subject body shop to perform repairs. As such, *Chick's* serves as no bar here.

II. Plaintiffs' Consumer Fraud Act Claim Is Proper In The Context Of This Litigation.

Defendant mistakenly asserts that Plaintiffs' third cause of action for violations of the CFA cannot be sustained because a CFA claim cannot be maintained in an insurance litigation. However, this is indisputably ***not*** insurance litigation. Thus, even assuming *arguendo* that Defendant is correct that the CFA is inapplicable to the payment of insurance benefits -- which it is not (*see Lemelledo*, 150 N.J. at 272-72) -- this litigation concerns deceptive and unlawful practices undertaken by Defendant, ***not*** the payment of insurance benefits. *See* Marone Cert., **Exhibit A** ¶¶ 1-4.

A. The Consumer Fraud Act Claim Is Properly Plead.

The CFA prohibits any "act, use or employment by any person of any unconscionable commercial practice … false promise, [or] misrepresentation … in connection with the sale or advertisement of any [service]." N.J.S.A. 56:8-2; N.J.S.A. 56:8-1(c) (defining "merchandise" to include "service"). Defendant's Motion ignores both the inclusion of "service" in the definition of "merchandise," as well as the precise, sufficiently pleaded allegations in the Complaint supporting the claim. *See* Marone Cert., **Exhibit A** ¶¶ 12-36, 38-74, and 84-131. Defendant not only fails to articulate a legally sufficient basis for the assertion that the Complaint fails to state a claim for which relief can be granted, but also fundamentally misconstrues the nature of this litigation. Put simply, Defendant attempts to misdirect the Court's attention away from the concrete allegations in the Complaint concerning its own misconduct. *See id.*

The New Jersey Supreme Court has noted that "[t]he Consumer Fraud Act affords broad protections to New Jersey consumers" and that "the history of the Act demonstrates a strong and consistent pattern of expanding the rights of consumers and protecting them from a wide variety of marketplace tactics and practices deemed to be unconscionable." *Bosland v. Warnock Dodge*,

Inc., 197 N.J. 543, 547 (2019); *see also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 604 (1997) ("The history of [the CFA] is one of constant expansion of consumer protection"). The CFA was intended to give New Jersey "one of the strongest consumer protection laws in the nation." *Belmont Condo. Ass'n, Inc. v. Geibel*, 432 N.J. Super. 52, 75 (App. Div. July 9, 2013) (internal quotation omitted). To that end, the New Jersey Courts have been instructed to "interpret the CFA, and its prima facie proof requirements, so as to be faithful to the Act's broad remedial purposes" and to "construe the [CFA] broadly, not in a crabbed fashion." *Gennari*, 148 N.J. at 555-56 (internal citations and quotations omitted); *see also Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994) ("Courts have emphasized that like most remedial legislation, the [CFA] should be construed liberally in favor of consumers"). The CFA's provisions authorizing consumers to bring private actions is "integral to fulfilling the [CFA's] legislative purposes." *Id.* at 16.

A prima facie case under the CFA consists of only three elements: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." *Bosland*, 197 N.J. at 557. Each element originates in the language of the CFA. The CFA defines an "unlawful practice" to be any "act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation ... in connection with the sale or advertisement of any merchandise." N.J.S.A. 56:8-2. The CFA applies both to misrepresentations about a product as well as to "subsequent performance" of the product or service itself. *Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co.*, 226 N.J. Super. 200, 209 (App. Div. 1988), *affd*, 118 N.J. 249 (1990). The CFA grants a private right of action to "[a]ny person who suffers any ascertainable loss of moneys or property" as a result of practices made unlawful by the Act. N.J.S.A. 56:8-19. Indeed, the CFA applies to both

Plaintiffs and Defendant who are "persons" under the CFA. Section 56:8-1(d) defines "person" to include:

> any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof.

N.J.S.A. 56:8-1(d).

Where, as here, an offense arises from an affirmative act, "an intent to deceive is not a prerequisite to the imposition of liability." *Gennari,* 148 N.J. at 605. "One who makes an affirmative misrepresentation is liable even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive." *Id.* "Thus, the Act is designed to protect the public even when a merchant acts in good faith." *Cox,* 138 N.J. at 16. Finally, a plaintiff need not demonstrate reasonable reliance on the misrepresentation, and "[a] practice can be unlawful even if no person was in fact misled or deceived thereby." *Cox,* 138 N.J. at 17 (citing *Kleinman v. Merck & Co.,* 417 N.J. Super. 166, 180 (Law. Div. 2009)).

Thus, in order to survive a motion to dismiss, the Complaint needs merely to allege that the Defendant made misrepresentations in connection with the offer or provision of services, that Plaintiffs suffered an ascertainable loss, and that the ascertainable loss resulted from Defendant's misrepresentations. *See Belmont,* 432 N.J. Super. at 75 ("in order to prevail [under the CFA], a plaintiff need only demonstrate a causal connection between the unlawful practice and ascertainable loss."). As the Complaint unequivocally and repeatedly alleges all three elements, it states a claim under the CFA and Defendant's motion should be denied. *See* Marone Cert., **Exhibit A** ¶¶ 158-67.

B. Defendant's Flagrant Violations of the Consumer Fraud Act.

The central allegation of this action is that Defendant engages in a "pattern and practice of refusing to negotiate" in good faith with Plaintiffs and other body shops in New Jersey, "instead providing 'take it or leave it' price terms for all repair work performed by Plaintiffs and putative class members," and engaging "in a pattern and practice of deceptive conduct to mislead customers into believing that they could not have their vehicles repaired at certain body shops." *See* Marone Cert., **Exhibit A** ¶¶ 1-2.

Defendant's wrongful actions in violation of the CFA are amply detailed in the Complaint:

> The Holandez Claim: In this instance, Prestige expended 1.7 hours to color, sand, and buff the Vehicle yet Defendant only paid 0.8 hours for that activity. Defendant also underpaid Prestige's materials cost for the Holandez Claim. Indeed, Defendant itself submitted differing estimates for the purported "true cost" of labor and materials, including one on March 20, 2017 for $459.55 which purported that Prestige should use exactly 22.59 ounces of base coat, 26.95 ounces of clear coat, 11.095 ounces of pre-paint solvent, 6.28 ounces of adhesion promoter, 14.23 ounces of sealer, 1.45 pieces of coarse sand paper, 4.25 pieces of finesse sand paper, a 0.32 piece of foam polishing pad, 0.22 ounces of hardener, a 0.16 piece of a wool buff pad, and exactly 18.7 feet of 1 ½ to 2 inch wide tape. Additionally, Defendant inordinately delayed payment for the Vehicle because Prestige pointed out the unfair charges, intentionally harming Prestige by requiring multiple supplements just to recoup amounts approaching fair value. Specifically, the repairs were completed in or around April, 2016, yet Defendant waited approximately one year to remit its insufficient payment to Prestige.

Marone Cert., **Exhibit A** ¶¶ 38-44.

> The Orchard Claim: This claim involved replacement of the rear bumper cover. Prestige replaced the rear bumper cover at a cost of approximately $344.70. Defendant paid Prestige only $290.00 for the replacement rear bumper cover. Upon information and belief, $290.00 was the cost for an aftermarket rear bumper cover. Although Prestige estimated that cost for labor and materials to paint the stripes was $125.00, Defendant paid only $10.00 for this work without any negotiation. Defendant paid Prestige only $10.00 for labor and materials to replace the e-coat even though sufficient epoxy primer materials alone cost more than $10.00 before even accounting for the labor involved with the replacement. Furthermore, Defendant paid for paint materials sufficient only to cover a single stage paint even though the car required a three stage paint. Prestige attempted to obtain further

payment for the above noted issues and others from Defendant, however, approximately two years after the repairs, Defendant continued to dispute, without basis, the extent and cost of Plaintiff's repairs for the Orchard Claim.

Marone Cert., **Exhibit A ¶¶** 45-53.

The Nowak Claim: On or about May 8, 2017, Margaret Nowak suffered a loss on her Chrysler 300 necessitating submission to Defendant of a claim for payment and repair. The Nowak Claim involved replacement of the rear bumper cover. Although Prestige paid approximately $452.00.00, Defendant contended without basis that the rear bumper cover should cost only $373.00 and paid that amount to Prestige.

Marone Cert., **Exhibit A ¶¶** 72-74.

Insured #1: The insured sought to utilize BMR Automotive Service, Inc. ("BMR") to repair a vehicle after a covered loss. The insured brought his vehicle to BMR, at which point he contacted Defendant from BMR's location. Defendant advised the insured that it would not pay BMR's labor rates. Although the insured was prepared to leave his vehicle at BMR, Defendant demanded that the insured take the vehicle back to his home for an "inspection" by the adjuster.

Marone Cert., **Exhibit A ¶¶** 107-110.

Insured #2: The insured sought to utilize BMR to repair a vehicle after a covered loss. While the insured was in BMR's facility, Defendant attempted to steer the insured to another auto body facility by falsely claiming that my client charges a $250.00 administration fee directly to insureds. BMR spoke with Defendant at that time, who admitted that a supervisor, Kathleen McDermott, provided a list of fictitious charges to agents to provide to potential insureds. This conversation was captured on a voice recording. These fictitious charges are not BMR's charges and are utilized by Defendant to attempt to steer insureds to other auto repair facilities.

Marone Cert., **Exhibit A ¶¶** 115-119.

Insured #3: The insured sought to utilize BMR to repair a vehicle after a covered loss. On May 17, 2019, Matt McElgunn ("McElgunn"), an employee of Defendant, advised the insured that BMR charges "excessive labor rates" and that the insured would need to pay the difference out of pocket. McElgunn alleged that BMR removed itself from Defendant's auto body shop "network." McElgunn advised that if BMR would accept Defendant's "take it or leave it" pricing then the insured could utilize BMR, otherwise Defendant would recommend another shop.

Marone Cert., **Exhibit A** ¶¶ 120-123.

> Insured #4: The insured sought to utilize BMR for repairs after a covered loss. Defendant's representative Kimberly Early ("Early") indicated that BMR is not one of Defendant's "direct repair shops." Early stated that BMR used to be a "direct repair shop" but no longer maintained that status. Early further informed the insured that BMR charges "a higher labor rate" and that the insured could be held responsible. Early stated – without first negotiating with BMR – that it would not obtain an agreed price with BMR because BMR does not always accept Defendant's unilateral price. Early further stated that "other insureds" informed Defendant that BMR does not make repairs at the price Defendant demands. Early twice offered to provide the insured with a list of "direct repair shops" if the Insured no longer wanted to work with BMR in light of these representations. Early's representations to the insured were captured on a voice recording.

Marone Cert., **Exhibit A** ¶¶ 124-131. These allegations are ***more than*** sufficient to sustain a CFA claim at the pleading's stage, the ultimate merits of which present a question of fact precluding dismissal.

Contrary to Defendant's assertion that insurance companies do not fall within the ambit of the CFA, insurance transactions regularly are subject to the statute. *See, e.g., Lemelledo,* 150 N.J. at 265. The Third Circuit Court of Appeals in *Weiss* squarely addressed this issue, predicting how the New Jersey Supreme Court would rule if the issue were brought before it:

> . . . The [NJ]CFA covers fraud both in the initial sale (where the seller never intends to pay), and fraud in the subsequent performance (where the seller at some point elects not to fulfill its obligations). We conclude that while the New Jersey Supreme Court has been silent as to this specific application of [the NJ] CFA, its sweeping statements regarding the application of the [NJ]CFA to deter and punish deceptive insurance practices makes us question why it would not conclude ***that the performance in the providing of benefits, not just sales, is covered...***

Weiss v. First Unum Life Ins. Co., 482 F.3d 254, 266 (3d Cir. 2007) (emphasis added).

There is thus no question that the CFA grants a private right of action to Plaintiffs and the putative class, all of whom have suffered an ascertainable loss as a result of Defendant's unconscionable commercial practices. Despite the statutory definition of "person" in N.J.S.A.

56:8-1(d) set forth above, Defendant ignores the CFA's wide breath instead focusing on the term "consumer," which is ***nowhere used*** in Section 56:8-2 upon which Plaintiffs base their claim. Rather, the Section expressly prohibits one "person" from engaging in an "unconscionable commercial practice" to the detriment of a second "person" "whether or not any person has in fact been misled, deceived or damaged." N.J.S.A. 56:8-2.

Defendant's reliance on *City Check Cashing* and similar cases for the contention that Plaintiffs are not protected by the CFA is thus wholly misplaced. 244 N.J. Super. 304 (App. Div. 1990).[3] In *City Check,* the Court found that a wholesaler delivering goods or services to a retailer does not fall within the ambit of the CFA. *Id.* at 309. This is irrelevant to the present dispute because New Jersey Courts consistently hold that insurance products offered to the public at large do fall within the ambit of the CFA. *See Khan v. Conventus Inter-Ins. Exchange,* 440 N.J. Super. 372, 375-76 (Law. Div. 2013). Defendant's unlawful conduct seeking to prevent Plaintiffs from servicing their customers through "unconscionable commercial practices" -- *see* Marone Cert., **Exhibit A ¶¶** 158-66 -- in connection with the provision of a service causing ascertainable loss to Plaintiffs squarely falls within the ambit of the CFA. *See Belmont,* 432 N.J. Super. at 75 ("in order to prevail [under the CFA], a plaintiff need only demonstrate a causal connection between the unlawful practice and ascertainable loss.").

[3] In *BOC Group,Inc. v. Lummus Crest, Inc..*, the Court found that no CFA claim was viable because the transaction at issue involved "large corporations who negotiated for years before entering into a multi-million dollar contract for the sale of a design…" 251 N.J. Super. 271, 280-81 (Law. Div. 1990). Here, the Plaintiffs are significantly smaller corporations than the Defendant -- a veritable behemoth in the insurance field -- who possess unequal bargaining power to compel Plaintiffs to accept "take it or leave" pricing rather than negotiating in good faith as required by New Jersey law. N.J.A.C. § 11:3-10.3(b).

Defendant's reliance on *Pierzga v. Ohio Cas. Group of Ins. Companies* is equally misplaced. There, the Court precluded IPTA and CFA claims of an insured against an insurer reasoning that the insured could not use those statutes to recover damages for the wrongful denial of personal injury protection benefits ("PIP") in excess of what plaintiff otherwise would have been entitled to under the New Jersey Automobile Reparation Reform Act, N.J.S.A. 39:6A-1 ("NJARRA"), which is administered by DBI. 208 N.J. Super. 40, 41-42 (App. Div. 1986) (rejecting the CFA claim while noting that "it would be unwise to allow plaintiff a recovery beyond the her substantial remedies under the No Fault Act"). Not only is the instant litigation not one between an insurer and insured, not subject to the NJARRA, and not concerning personal injury claims, but it is also readily distinguishable from *Pierzga* because Plaintiffs are not already afforded "substantial remedies" through another statute. Indeed, unlike the plaintiff in *Pierzga* who was seeking to enforce the State's regulatory insurance scheme, all of Plaintiffs' and the putative classes' claims fall squarely outside of it. Thus, while DBI may have exclusive ***regulatory*** jurisdiction of insurance companies with respect to the payment of claims, this matter concerns parties being "victimized by unscrupulous" and unconscionable commercial conduct wholly beyond DBI's regulatory purview or, at least, not exclusive to it in the absence of express statutory language to the contrary. *See id*. at 47.

As detailed above, the Complaint needs merely to allege that the Defendant made misrepresentations in connection with the offer or provision of services to the public, that the Plaintiffs suffered an ascertainable loss, and that the ascertainable loss resulted from the Defendant's misrepresentations. *See Belmont*, 432 N.J. Super. at 75 ("in order to prevail [under the CFA], a plaintiff need only demonstrate a causal connection between the unlawful practice and ascertainable loss"). As the Complaint unequivocally and repeatedly alleges all three elements,

Plaintiffs have more than satisfied the applicable standard precluding dismissal. *See* Marone Cert., **Exhibit A** ¶¶ 158-67.

III. Plaintiffs Satisfy The "Distinctiveness" Requirement Of The Racketeer Influenced And Corrupt Organizations Act.

Defendant expends great effort in its moving papers to assert that the New Jersey Racketeer Influenced and Corrupt Organizations Act ("RICO") is construed in the same manner as the federal RICO Act. Despite these efforts, Defendant is clearly mistaken as it ignores the liberality of the New Jersey RICO Act when compared to its federal cousin.

In *State v. Ball,* the New Jersey Supreme Court held that the state RICO statute contains no express or implied requirement for a distinct ascertainable structure. Rather, the Supreme Court held, the statute was "framed broadly to include any group of persons 'associated in fact.' " *State v. Ball*, 141 N.J. 142, 160 (1995). The Supreme Court continued by noting that "the legislative history shows that the term 'enterprise' was meant to be construed broadly" and that the Legislature "intended the statute to reach less organized and non-traditional criminal elements as well," including businesses and other entities. *Id.* Notably, Defendant has not cited any New Jersey authority interpreting the New Jersey Act for its position that NJM and its employees cannot collectively constitute an enterprise and that NJM and its employees are not all persons under the state RICO statute.

Rather, Defendant wrongly asserts that "a claim simply against one corporation as both 'person' and 'enterprise' is not sufficient," but wholly ignores the allegations in the Complaint whereby Plaintiffs' allege that the "persons" violating RICO include Defendant's employees, and that Defendant itself is the benefitting enterprise. Indeed, the United States Supreme Court explicitly held that an "enterprise" for RICO purposes could consist solely of a corporation and an

individual who is the sole owner and shareholder of the corporation. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself…[a]nd we can find nothing in the [federal RICO] statute requiring more separateness than that"). The Court went on to note that an employee "who conducts the affairs of a corporation through illegal acts comes within the term of a statute that forbids any person unlawfully to conduct an enterprise…" *Id.* Thus, Defendant is simply incorrect that as a matter of law individuals acting through a corporation cannot collectively represent an "enterprise" to establish a RICO violation.

Indeed, the New Jersey Supreme Court held in *State v. Ball* that "evidence showing an ascertainable structure will support the inference that the group engaged in carefully planned and highly coordinated criminal activity, and therefore will support the conclusion that an "enterprise" existed." *State v. Ball*, 141 N.J. at 162. The Supreme Court continued explaining that apart from an organization's structure, the Court should consider: (i) the number of people involved and their knowledge of the objectives of their association; (ii) how the participants associated with each other; (iii) whether the participants each performed discrete roles in carrying out the scheme; (iv) the level of planning involved; (v) how decisions were made; (vi) the coordination involved in implementing decisions; and (vii) how frequently the group engaged in incidents or committed acts of racketeering activity, and the length of time between them. *See id.*

Here, Plaintiffs amply allege that Defendant and its employees -- including, "Brittany," Kathleen McDermott, Matt McElgunn, and Kimberly Early -- acted in concert to engage in a pattern of racketeering activity. *See* Marone Cert., **Exhibit A** ¶¶ 102-05, 116-17, 121-23, and 135-30. As such, *Ball* dictates that Defendant's motion to dismiss the RICO claim be denied permitting Plaintiffs to engage in discovery as to Defendant's structure and its employees' roles in carrying

out the RICO enterprise, among other issues germane to the distinctiveness requirement, particularly in light of the substantial allegations in the Complaint which must be accepted as true.

IV. Plaintiffs Identified Several False Statements By Defendant.

Contrary to Defendant's remarkable assertion, Plaintiffs have identified numerous false statements made by Defendant in support of Plaintiffs' injurious falsehood claim. Confronted by this reality, Defendant is compelled to challenge the ***factual veracity*** of those statements which is wholly impermissible on a motion to dismiss. *See Printing Mart-Morristown*, 116 N.J. at 746 (on a motion to dismiss, a court is "limited to examining the legal sufficiency of the facts alleged on the face of the complaint); *see also Jersey City Educ. Ass'n v. City of Jersey City*, 316 N.J. Super. 245, 254 (App. Div. 1998) (considering facts beyond the pleadings converts a motion to dismiss to one for summary judgment). Indeed, contrary to Defendant's factual argument, nowhere in the Complaint do Plaintiffs allege that other body shops ***will accept*** Defendant's imposition of pricing before engaging in good faith negotiations; a necessary predicate to Defendant's false assertion that Plaintiffs admit their prices exceed competitors. *See* MOL at pg. 29. Thus, while Defendant is correct that it is permitted to seek the best price, the allegations in the Complaint confirm that Defendant attempts to steer customers away from Plaintiffs by levying falsehoods ***before*** it even contacts Plaintiffs to discuss pricing. *See* Marone Cert., **Exhibit A** ¶¶ 91, 96, 104, 109, 112, 116, 121, 123, and 127-28..

By example, Plaintiffs' allege Defendant made the following misrepresentations during the "claims intake process":

- Defendant attempted to dissuade Insured #1 from utilizing Robbies, advising Insured #1 that Robbies charges more than Defendant pays for claim settlements and that Insured #1 would be responsible for any difference. *See* Marone Cert., **Exhibit A** ¶ 96;

- Defendant further claimed that Robbies charges more than Defendant pays for claim settlements and that Insured #2 would be responsible for any difference. *See* Marone Cert., **Exhibit A** ¶ 103;
- Defendant advised Insured #3 that it would not pay Robbies' labor rates. *See* Marone Cert., **Exhibit A** ¶ 109;
- While Insured #5 was in Robbies' facility, Defendant attempted to steer Insured #5 to another auto body facility by falsely claiming that Body Shop #1 charges a $250.00 administration fee directly to insureds. *See* Marone Cert., **Exhibit A** ¶ 116;
- Robbies spoke with Defendant at that time, who admitted that a supervisor, Kathleen McDermott, provided a list of fictitious charges to agents to provide to potential Insureds. *See* Marone Cert., **Exhibit A** ¶ 117;
- On May 17, 2019, Matt McElgunn ("McElgunn"), an employee of Defendant, advised Insured #6 that Robbies charges "excessive labor rates" and that Insured #6 would need to pay the difference out of pocket. *See* Marone Cert., **Exhibit A** ¶ 121;
- Early further informed Insured #7 that Robbies charges "a higher labor rate" and that Insured #7 could be responsible. *See* Marone Cert., **Exhibit A** ¶ 127; and
- Early stated -- without first negotiating with Robbies -- that it would not obtain an agreed price with Robbies because Robbies does not always accept Defendant's unilateral price. *See* Marone Cert., **Exhibit A** ¶ 128.

Query: How could Defendant know any of the this was true before even attempting to negotiate with Plaintiffs in good faith?

In a desperate attempt to secure an unwarranted dismissal, Defendant raises the Fair Automobile Insurance Reform Act of 1990 ("FAIR"), and an insured's "right to choose" an auto body repair facility. Indeed, FAIR declares that an insurance company shall not deny an insured's right to select a repair shop of his or 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." Again, however, Defendant does not -- because it cannot -- deny that it never requested Plaintiffs accept the same

terms and conditions from the insurer, as the statute requires. And, even if Defendant did levy this argument, it only serves to raise a factual issue further precluding dismissal.

V. Plaintiffs' Cause Of Action For Tortious Interference With Prospective Business Advantage Clearly States A Claim Upon Which Relief Can Be Granted.

Defendant argues that it is well-settled in New Jersey that a complaint based on tortious interference must allege facts that support four elements. Plaintiffs do not contest this as they allege that they and the putative class members: (i) had and have a prospective economic or contractual relationship with Defendant's insureds; (ii) suffered interference that was done intentionally and maliciously (which need only be alleged generally); (iii) that said interference caused the loss of the prospective gain (*i.e.*, business from Defendant's insureds a/k/a Plaintiffs' customers); and (iv) that damages were suffered as a result. *See* Marone Cert., **Exhibit A** ¶¶ 152-56.

Defendant levies three arguments in response to these well-pleaded allegations. First, Defendant imposes the non-existent requirement that the victims of its tortious interference must have known of Defendant's unlawful conduct at the time it made the misrepresentations. *See* Motion at 30-31. Thus, in Defendant's illogical world, any time it successfully steers away one of Plaintiffs' prospective customers causing Plaintiffs harm, it escapes liability because Plaintiffs may only have discovered it after the fact. This is not the law. *See Printing Mart-Morristown*, 116 N.J. at 751-52.

Defendant again ignores controlling precedent arguing that Plaintiffs somehow do not have a "protectable right." MOL at pgs. 31-32. This too defies logic. Plaintiffs are not suing merely because insureds went to other body shops, they are suing because Defendants' unlawfully steered

Plaintiffs "prospective" and current customers to other body shops by asserting falsehoods about Plaintiffs. That is the essence of a tortious interference claim.

Defendant next argues that its misrepresentations where "justified" -- squarely raising factual issues inappropriate for disposition on a pleadings motion. *See* MOL at pg. 32. Indeed, in doing so, Defendant is forced to impermissibly assert that Plaintiffs failed to accept its offered price -- a statement nowhere alleged in the Complaint. Not only is this false and a factual issue, but the Complaint alleges that Defendant never even sought to negotiate price instead immediately and falsely advising Plaintiffs' customers as to their pricing, non-existent administrative fees, and negotiating strategy. *See* Marone Cert., **Exhibit A** ¶¶ 91, 96, 104, 109, 112, 116, 121, 123, and 127-28.

Finally, and rather desperately, Defendant argues that it is a party to the transaction between Plaintiffs and their customers. *See* MOL at pgs. 32-33. Not surprisingly, Defendant fails to identify a single case in support of this proposition. Indeed, the crux of a cause of action for tortious interference with ***prospective*** economic advantage -- particularly where, as here Defendant goes to great lengths to justify steering customers away from Plaintiffs -- is that the insured has not yet selected Plaintiffs to conduct the repairs. As a result, Defendant is in no way part of an inchoate commercial relationship and, indeed, it's unlawful conduct seeks to assure it will not be.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motions to Dismiss in its entirety, and grant such, other, further, and additional relief as the Court deems just and proper, including reasonable attorneys' fees and costs.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: Woodland Park, New Jersey
September 26, 2019

By: *s/Joshua S. Bauchner*
Joshua S. Bauchner, Esq.
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