No. 16-15467-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15467-AA

ALPINE STRAIGHTENING SYSTEMS., et al.

Plaintiffs - Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Defendants - Appellees.

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

BRIEF FOR ALPINE STRAIGHTENING SYSTEMS., et al. AS PLAINTIFFS - APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

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

CORPORATE DISCLOSURE STATEMENT

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

STATEMENT REGARDING ORAL ARGUMENT

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

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

For these reasons, Appellants request oral argument.

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JURISDICTIONAL STATEMENT

This case originated in the District Court for the District of Utah, Central Division. Federal jurisdiction was asserted based upon federal question jurisdiction under 28 U.S.C. § 1331, with supplemental jurisdiction over state law causes of action pursuant to 28 U.S.C. § 1367(a).

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

STATEMENT OF THE ISSUES

1. The district court erred by imposing an incorrect pleading standard upon Appellants' complaint, issuing contradictory orders effectively leaving Appellants no way to plead, and disregarding all nondiscretionary obligations in passing on a motion to dismiss.

2. The district court erred by altering, amending or refusing to apply extant state law to state law causes of action.

3. The district court abused its discretion in denying Appellants' Motion to Reconsider and granting Appellees' Motion to Strike Appellants' Objections to the Magistrate's Report and Recommendation.

STATEMENT OF THE CASE

Each Appellant is a professional repairer of auto physical damage, i.e., body shops. Appellees are auto insurers which sell and service policies within the State of Utah.

Appellants initiated litigation alleging price fixing and boycotting in violation of 15 U.S.C. § 1, and state law claims, including tortious interference with business relations ("tortious interference" or "TI") and quantum meruit.

As set out in the complaint, body shops have different points of cost and revenue within the repair process. Labor rates, which vary depending upon the type of labor, and which vary across the state. Body shops use large quantities of replacement parts, paint and other materials to perform their work, which are ordered as needed. There also administrative costs which accrue for indirect repair activities, such as transporting a vehicle, ordering parts and complying with insurers' documentation demands.

The Appellees have engaged in a combination or agreement to fix the prices of all these aspects of auto repair, and boycott those who protest or refuse to comply.

This is not the first time insurers have engaged in this illegal conduct. In 1963, the Department of Justice obtained a consent decree against the three major insurance trade associations and their members, enjoining them in perpetuity from (1)

directing, advising or otherwise suggesting that any person or firm do business or refuse to do business with any independent or dealer franchised body shop; (2) exercising any control over the activities of any appraiser of damages to automotive vehicles; (3) fixing, establishing, maintaining or otherwise controlling the prices to be charged by independent or dealer franchised body shops or for replacement parts or labor in connection therewith, whether by coercion, boycott or intimidation or by the use of flat rate or parts manuals or otherwise.[1]

This decree applies to the associations, their members and anyone in active concert or participation with anyone to whom the decree directly applies. *Id.*

Despite this, Appellees recommenced their illegal activities. They agreed to uniformly enforce a fixed labor rate ceiling, what they termed the "market rate," which bears no relation to the actual rates charged by Appellants or the industry at large.[2] No Appellee conducts any form of market analysis to superficially justify the imposition of price ceilings, save one.[3]

State Farm conducts what it terms a survey, a method by which it supposedly inputs local rate data and determines a "market rate." However, State Farm's data is

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[1] *United States v. Association of Casualty and Surety Companies*, Docket No. 3106, in the Southern District of New York.

[2] Doc. No. 102, ¶¶ 102, 112, 131, 133, 134, 135, 144, 195, 386-87.

[3] *Id.*, ¶¶ 113, 114, 131, 134, 143, 144, 199, 200, 387.

fabricated, the labor rates are manipulated and its calculation methodology lacks any statistical or mathematical validity.[4] A State Farm representative has admitted the "market rate" is a sham, State Farm simply decides what the rate is going to be and labels it "market rate."[5]

Though State Farm does not make its survey results available to the general public,[6] the other Appellees pay the same "market rate" as State Farm, despite conducting no market inquiry of their own.

The Appellees uniformly refuse to pay for certain necessary repair elements, over sixty of which were identified in the complaint. Although necessary when performed, as reflected in the industry-accepted database references the insurers utilize themselves, the insurers uniformly refuse payment, and just as uniformly use the same false reasons for doing so.[7]

Appellees' reliance on the databases is selective, however. They refuse to acknowledge the databases when it comes to "blackballed" procedures, but insist they are authoritative if an individual repair exceeds a database estimate. All of the

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[4] *Id.*, ¶¶ 119-124.

[5] *Id.,* ¶¶ 125.

[6] *Id.*, ¶¶ 127, 128-29, 130, 131, 197, 387.

[7] *Id.,* ¶¶ 81, 94, 159-77, 186-88, 194, 223, 224, 373 390.

Appellees employ this practice.[8]

Appellees uniformly compel use of salvaged parts stripped from totaled vehicles, or aftermarket parts, also known as counterfeit parts. Overall, professional repairers prefer original equipment manufacturer ("OEM") parts as the safest, highest quality replacement part. Both aftermarket and salvage parts have known safety and quality issues.[9]

Despite these known safety risks, Appellees insist on their use. If a body shop (or consumer) balks, the Appellees refuse to pay for the new, safe part. Instead, the Appellees will only pay the amount for which a junkyard or aftermarket part could have been purchased, leaving the Appellants to either absorb the cost or render an incomplete or unsafe repair. All of the Appellees employ this practice.[10]

Body shops which buck the system, including Appellants, are labeled problem shops. The identity of problem shops are shared by the Appellees with each other and once identified, become the target of a group boycott. In the industry, this boycotting is called "steering." When a consumer notifies an insurer a problem shop has been selected for repairs, the insurers steer the customers away to an insurer-preferred

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[8] *Id.*, ¶¶ 159-77, 186-88, 190-94, 223-24, 373, 390.

[9] *Id.,* ¶¶ 67-68, 75-76, 146-49, 192, 203-12, 390.

[10] *Id.*

shop. This is accomplished by conveying false and misleading statements and misrepresentations about the quality, cost and integrity of the boycotted shop's work, and/or falsely telling the consumer they are not permitted to utilize the selected shop, and/or exerting economic coercion on consumers threatening substantial financial impact if they persist in using a Plaintiff's shop.[11]

A detailed description of the false, misleading and coercive statements the insurers utilize is included in the complaint.[12]

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

[11] *Id.*, ¶¶ 37, 97, 229-30, 234-41, 243, 244, 257, 272, 288, 324, 373, 400-01.

[12] *Id.*

PROCEDURAL BACKGROUND

The original complaint was filed on April 10, 2014, in the United States District Court for the District of Utah, Central Division. The cause was transferred to the Middle District of Florida as part of MDL No. 2557 and assigned Cause No. 6:14-cv-6003.

The complaint was amended once to add parties. After filing motions to dismiss, the magistrate entered a Report and Recommendation ("Report"), recommending dismissal of the state law claims without prejudice. The district court adopted this recommendation and adopted its prior ruling on federal claims issued in a companion MDL case on April 27, 2015.

The complaint was thereafter amended on May 21, 2015, to comply with the Report and order. The defendant insurers filed a second round of motions to dismiss. The district court entered an order dismissing the federal law claims with prejudice on March 16, 2016, as amended on March 23, 2016.

The magistrate entered another Report recommending dismissal of the state law claims on March 25, 2016.

On April 4, 2016, the body shops filed a motion to reconsider dismissal of the federal claim. On April 9, 2016, the body shops filed objections to the magistrate's Report. This motion was denied on May 12, 2016.

On April 27, 2015, the district court ordered dismissal with leave to amend.

On July 28, 2016, the district court adopted the Report and Recommendation with the exception of ordering repleading of the specified tortious interference claims.

Appeal to the Eleventh Circuit of Appeals was noticed on August 13, 2016.

STANDARD OF REVIEW

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

The Court reviews denials of a motion to reconsider for abuse of discretion.

SUMMARY OF THE ARGUMENTS

The district court employed an improper, heightened pleading standard to dismiss the complaint, one substantially higher than required by the Federal Rules of Civil Procedure.

The district court breached its nondiscretionary obligations by adopting the motion arguments of Appellees, improperly disregarding or discrediting facts alleged in the complaint, mischaracterizing factual allegations, making dispositive factual and credibility determinations, and applying unsupported affirmative defenses.

The district court further erred by creating new elements for state law causes of action, ignoring or modifying state law which contradicts the court's ruling, and drawing dispositive conclusions which nullify corollary state law.

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

ARGUMENT

I. STANDARD FOR DISREGARDING FACTS ALLEGED IN THE COMPLAINT

The district court candidly admitted to dismissing claims because it chose not to believe substantive facts alleged in the complaint. It repeatedly chose alternative facts and explanations proffered in motions to dismiss, both explicitly and implicitly. As this occurs repeatedly for all causes, this point is discussed separately to avoid unnecessary repetition.

In passing on a motion to dismiss, the court is required to accept the allegations of the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Renfroe v. Nationstar Mortgage, LLC*, 822 F.3d 1241, 1243 (11th Cir. 2016). This is a mandatory, not discretionary, standard.

Only when alleged facts are facially delusory or so fantastical as to be detached from reality may a district court disregard them. The bar for this is set exceptionally high: "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009), *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992)(facts that are "fanciful," "fantastic,"and "delusional"), *Neitzke v. Williams*, 490 U.S. 319, 328 (1989)("claims describing fantastic or delusional scenarios").

This standard is generally only met by the truly irrational, such as claims of bizarre government conspiracy theories, allegations of government manipulations of plaintiff's will, mind, or body (as by implantation of devices) or supernatural intervention, *Guthrie v. U.S. Gov't*, 618 F. App'x 612, 617 (11th Cir. 2015), *Gobin v. Holder*, 2013 WL 24086, at *2 (N.D. Ala. Jan. 2, 2013).

Both the Supreme Court and this Court have recognized a district court is prohibited from dismissing a complaint because the judge does not believe the facts alleged absent a showing of delusory content. *Bell Atlantic Corp. v. Twombly*, 550 U.S.544, 556 (2007), *Neitzke,* 490 U.S. at 327, *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1380 (11th Cir. 2010).

This is the difference between a fact not being believed, and a fact not being believable. Only the latter may be disregarded.

Impermissible credibility determinations are entwined with this standard. As the Eighth Circuit explained, a district judge's findings that alleged facts "fail[] to convince the court" and finding facts "difficult to believe" constitute the very credibility determinations the lower court is not permitted to make. *Stephens v. Associated Dry Goods Corp.*, 805 F.2d 812, 814 (8th Cir. 1986).

This is also well-established law within the Eleventh Circuit. *Singleton v. Department of Corr.*, 277 F.App'x 921, 922 (11th Cir. 2008)(it was reversible error for district court to "indulge[] in . . . deciding disputed issues of fact and making credibility determinations.").

Thus, the district court is not permitted to weigh the persuasiveness of facts, nor dismiss a complaint because the defendant proffered a more compelling version of events. As this Court recently reminded, doing so is reversible error as it "turns the standard for considering a . . . 12(b)(6) motion on its head." *Renfroe,* 822 F.3d at 1245. See also, *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

Here, the district court repeatedly based dismissal on its subjective determination the facts alleged were "not plausible" or the court was "not persuaded" by them.[13] The court also implicitly made a number of conclusions that necessarily rely upon ignoring facts alleged, as with the court's statement the complaint rests solely upon allegations of parallel conduct, and the conclusion the body shops can negotiate better prices before commencing repairs. These are demonstrably

[13]See, e.g., Doc. No. 127, pp.8, 15, Doc. No. 126, pp.9, 14, Doc. No. 101, pp. 1,

inaccurate statements, directly contradicted by the complaint, as was pointed out in the body shops' Objections[14] and the motion to reconsider.[15]

There was no finding of delusory or fantastical content; the district court simply chose not to believe the complaint's contents and repeatedly predicated dismissal upon that disbelief.

The district court's implausibility conclusions were often explicitly based upon a comparison with arguments set forth in insurers' motion briefs. The court was prohibited from making this side-by-side comparison and selecting which set of facts it preferred. *Renfroe*, 822 F.3d at 1245.

Motions to dismiss under Rule 12(b)(6) test the legal sufficiency of a complaint; they do not evaluate the relative value or weight of the facts alleged. *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1168 (11th Cir. 2014).

The facts alleged in the Complaint do not even arguably meet the exceptionally high standard required for the district court to permissibly disregard them. The district court committed reversible error in refusing to accept the facts alleged in the complaint, adopting the alternative facts suggested by Appellants' motion arguments, and making impermissible fact and credibility determinations.

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[14]Doc. No. 131, pp. 21-25

[15]Doc. No. 128.

II. FEDERAL CLAIMS

The Complaint asserts two antitrust claims arising under 15 U.S.C. § 1, the Sherman Antitrust Act, price fixing and boycotting.

In. *Twombly*, the Supreme Court clarified that Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555(internal punctuation omitted).

Detailed facts are not required, merely sufficient facts to raise the right to relief above the speculative level, i.e., plausible on its face. *Id.* A claim has facial plausibility when the factual content allows the court to draw the reasonable inference the defendant is liable for the misconduct alleged. *Id.* at 556.

As *Twombly* was an antitrust case, the Court defined the requirement as "a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. "Plausible" does not require probability, merely enough substance to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.*

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

A. Price Fixing

The 12(b)(6) motion to dismiss context is one of the few instances in which one party stands with a legally recognized advantage. The district court is required to accept the allegations of the complaint as true unless those allegations rise to the level of delusory content. The district court is also prohibited from accepting the motion arguments of defendants which contradict the factual allegations of the complaint. See Section I.

The district court's order shows it took the opposite position–the allegations of the complaint were disregarded unless the body shops convinced it otherwise. This is shown by the district court's repeated references to the shops' "failure" to persuade the court to believe the facts alleged, and its repeated adoption of insurers' motion arguments which contradict the allegations of the complaint.

However, Rule 8 does not require the court be personally persuaded. Binding and persuasive authority holds contrary. A complaint which provides a short and plain statement of the claims and grounds supporting the elements of the claims sufficient to provide fair notice to the defendant may not be dismissed because the district court is skeptical of its viability. *Neitzke,* 490 U.S. at 327.

Requiring more than Rule 8 requires is a violation of the mandatory pleading standard and constitutes reversible error.

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

The complaint alleges the following facts relevant to those elements:

- A State Farm representative directly admitted State Farm engages in intentional price fixing and price suppression of body shop labor rates, that the survey State Farm purportedly conducts to determine a "market rate" is a sham, the "market rate" is "whatever State Farm wants it to be, and that State Farm is guilty of "every iota" of the allegations set forth in the Louisiana Attorney General action, *Louisiana v. State Farm.*[16]

- The allegations in the Louisiana Attorney General action are essentially identical to those set forth in the current complaint, including intentional suppression and manipulation of body shop labor rates, paint, materials and parts procurement, and insistence upon incomplete or unsafe repairs.[17]

- All of the Defendants claim to pay the "market rate" which is identical to State Farm's fabricated rate.[18]

- None of the Defendants save State Farm undertake even a pro forma determination of "the market."[19]

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[16] *Id.,* ¶ 125.

[17] *Id.,* ¶ 126, and *Louisiana v. State Farm* complaint, Appellants' Appendix Vol. II.

[18] Complaint, Doc. No. 102, ¶¶ 102, 112, 131, 133, 134, 135, 144, 195, 386-87

[19] *Id.,* ¶¶ 113, 114, 131, 134, 143, 144, 199, 200, 387.

- Consistent with the State Farm informant's statement, the survey conducted by State Farm does not reflect rates actually charged by body shops, produces a "market rate" consistently lower than actual rates, and shows no variability across the entire state, though geographic variability exists.[20]

- Consistent with the State Farm informant's statement, State Farm's survey uses falsified data and a calculation method devoid of mathematical or statistical validity to produce a fabricated result.[21]

- State Farm claims it does not share the results of its "survey."[22]

- When State Farm alters its "market rate," all other Defendants alter their market rate to State Farm's within days of State Farm announcing its new "market rate," and does so by an identical amount.[23]

- All the insurers give identical reasons for refusing to honor posted labor rates, knowing those reasons are false, accompanied by threats of legal retaliation if the body shops discuss their own publicly posted rates with each other.[24]

- The insurers routinely compel or attempt to compel use of unsafe or inappropriate salvage or imitation parts despite public acknowledgment of known safety risks.[25]

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[20] *Id.*, ¶¶ 135-38, 137, 142, 196, 198.

[21] *Id.*, ¶¶ 115-24, 143, 196, 199.

[22] *Id.*, ¶¶ 127, 128-29, 130, 131, 197, 387.

[23] *Id.*, ¶¶ 131-35, 144, 388.

[24] *Id.*, ¶¶ 146-49, 192, 390.

[25] *Id.*, ¶¶ 75-76, 203-12.

- Upon refusal to use unsafe or inappropriate salvage or imitation parts, insurers uniformly refuse to pay for appropriate parts but only pay the amount for which the unsafe or inappropriate part could have been purchased.[26]

- Insurers routinely refuse to pay or pay in full for the same repair elements required to return a vehicle to its pre-accident condition.[27]

- Insurers refuse to pay or pay in full for the same repair elements in contravention of industry accepted databases which the insurers themselves use.[28]

- Insurers uniformly use identical reasons for refusing to honor the database estimates, knowing those reasons are false.[29]

- The body shops have incurred substantial damages resulting from the insurers price fixing conduct.[30]

Several months after filing the amended complaint, the body shops obtained a second direct admission of price fixing from a Progressive defendant representative. This representative stated body shops have no say in the setting of their own labor rates, that the insurance companies "get together at big meetings" to set body shop

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[26] *Id.,* ¶¶ 67-68, 212, 226.

[27] *Id.,* ¶¶ 81, 94, 159-77, 186, 390

[28] *Id.,* ¶¶ 159-77, 187, 188, 194, 223, 224, 373, 390

[29] *Id.*, ¶¶ *Id.*, 186, 190, 191, 192, 390,

[30] *Id.* Multiple paragraphs provide examples of economic damages incurred by the body shops, including being required to work at a loss when the insurers refuse to pay even the amount required to purchase paint and materials to perform a repair. A general statement of damage occurs at ¶ 393.

labor rates, and that the insurance companies uniformly apply the labor rates agreed upon at these meetings. This representative even identified when the next such meeting was going to occur.[31] This after-acquired information was provided to the district court in a motion to reconsider.

The district court failed to abide by the necessary standard of pleading and the standard for analysis of Rule 12(b)(6) motion to dismiss. The district court did not analyze whether the allegations of the complaint pled the elements of the claim. The court did not even acknowledge what the elements of a price fixing claim are.

Instead, the court commenced its price fixing analysis upon a factually incorrect premise, that the complaint proceeds solely upon a claim of parallel conduct.[32] The complaint does not rest solely on a parallel conduct claim. See above.

From there, the district court compounded this error by engaging in multiple forms of prohibited analysis, all of which resulted in the district court repeatedly demanding far more than notice pleading. These errors include disregarding relevant law which contradicts its conclusions, manufacturing pre-requisites to application of plus factors, disregarding the facts alleged, engaging in weighing the facts alleged and making credibility determinations, analyzing facts in isolation, and affirmatively

[31]Doc. No. 128, pp. 1-2.

[32]Doc. No. 126 pg. 6.

adopting motion arguments of the insurers which contradict the allegations of the complaint.

Plus Factors

In cases based solely upon allegations of parallel conduct, a plaintiff is required to set out facts supportive of "plus factors," facts which, when present, tend toward making an agreement more likely than mere coincidental conduct. Once a complaint alleges parallel pricing, supplemented by facts supporting plus factors, a rebuttable presumption of conspiracy arises. *In re Baby Food Antitrust Litig*., 166 F.3d 112, 122 (3d Cir. 1999)(citing *Todorov v. DCH Healthcare Auth*., 921 F.2d 1438, 1455 (11th Cir. 1991)).[33]

The present case does not rest solely upon allegations of parallel conduct. Technically, the body shops were thus not required to assert any plus factors. However, the complaint does include facts supporting multiple plus factors which support the direct admissions of price fixing.

[33]Both of these cases presented in the procedural posture of motions for summary judgment.

A. Actions which, if taken individually, would be against the defendant's self interest

Conduct which, if taken individually, would be contrary to the defendant's self interest is a recognized plus factor. *Re/Max Int'l, Inc. v. Realty One, Inc.,* 173 F.3d 995, 1009 (6th Cir. 1999).

The complaint alleged this plus factor, pointing out that if only one insurer regularly and routinely refused to make full payment for complete and safe repairs, it would lose a substantial amount of its customers.[34] The body shops thus met the pleading requirements of Rule 8 and the pleading requirements for this plus factors.

The district court, however, dismissed the plus factor because it found it "not plausible" and "speculative."[35] However, this constitutes a credibility determination the district court was prohibited from making. See Section I.

Appellants submit it is generally understood and accepted that businesses which regularly fail to perform as they have promised are at substantive risk of failure. Such a contention does not rise to the level of delusory content that would allow the district court to make a plausibility determination, it fits well within the province of common knowledge and prudent business conduct.

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[34]Doc. No. 102, ¶¶ 333-35.

[35]Doc. No. 126, pp. 7-8.

Having alleged a rational and plausible basis for this plus factor, the court should have concluded its analysis of this plus factor. It did not. It hypothesized an alternative explanation on behalf of the insurers.[36] For a variety of reasons, that hypothetical alternative explanation does not apply to the present complaint.[37]

However, even if it did, the body shops are not required to exclude the possibility of non-collusory alternative explanations for the defendants' identical conduct at the pleading stage. Such an obligation arises only at the summary judgment stage, if it arises at all. *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) (citing *Twombly*, 550 U.S. at 554).

As the body shops are not required to exclude alternatives in the complaint, the district court's reliance upon this theory is de facto application of summary judgment standard. District courts have repeatedly been warned against applying a summary judgment standard to motions to dismiss. Neither *Twombly* nor *Iqbal* dismantled the analytical distinction between Rule 12(b)(6) and Rule 56. *SD3, LLC v. Black & Decker (U.S.) Inc*., 801 F.3d 412, 425–26 (4th Cir. 2015).

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[36]Doc. No. 126, pg. 9.

[37]For example, the district court hypothesized the existence of an oligopoly. However, the economic context set out in the complaint does not support this conclusion. The insurers are not setting their own prices to maximize profits, they are fixing body shop prices. This does not fit within this Court's recognized economic definition of an oligopoly. See, e.g., *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1291 -95(11th Cir. 2003).

However, summary judgment standard is what the district court here applied. This constitutes reversible error.

B. Market Share

Both the judiciary and law enforcement have recognized defendants' market share is a valuable consideration in price fixing claims.

In *Starr,* 592 F.3d at 324, the Second Circuit noted empirical studies have found price agreements likely to appear in industries where the leading few firms account for fifty to eighty percent of the market. This is consistent with the U.S. Department of Justice's ("DOJ") position, which has found price fixing likely to occur when there is a small group of major players and the rest are "fringe" players with a small market share.[38]

The complaint sets out that nearly seventy percent (70%) of Utah private passenger insurance market share is held by only seven named defendant companies–seven out of 150.[39] The body shops thus sufficiently alleged facts which are recognized as fostering collusive agreement.

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

[39] State Farm, Allstate, USAA, Liberty Mutual, Farmers, Progressive and GEICO. Bristol West and Mid-Century are subsidiary/affiliates of Farmers. Safeco is subsidiary of Liberty Mutual.

The district court ruled the market share allegations were meaningless because "standing alone" they were not indicative of collusive agreement.[40] However, this was an impermissible conclusion.

The Supreme Court has directed courts to analyze price fixing complaints holistically, "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 699 (1962)(abrogated by statute on other grounds). Actions that might seem otherwise neutral in isolation can take on a different shape when considered in conjunction with other surrounding circumstances. *SD3, LLC v. Black & Decker (U.S.) Inc*., 801 F.3d 412, 425 (4th Cir. 2015).

The complaint more than adequately pled this plus factor. Disregarding it breaches well recognized authority, and compels the body shops to plead more than is required under Rule 8. It also violates the applicable standard for Rule 23(b)(6) analysis.

C. Motive

Common motive to conspire is an established plus factor. *In re Publ'n Paper Antitrust Litig*., 690 F.3d 51, 62 (2d Cir. 2012). The complaint alleged a common

[40]Doc. No. 126, pg. 10.

motive to conspire, profit, substantial profit rising into the billions of dollars.[41] The complaint thus satisfactorily pled this plus factor.

The district court dismissed the profit motive out of hand, noting nearly all price fixing conspiracies are motivated by profit, and that such a motive standing alone would eliminate the need to plead agreement.[42] Again, the district court candidly admitted to compartmentalizing its analysis, which it is not permitted to do. See above.

Further, this plus factor is not "common motive to conspire except profit," which is the effect of the district court's ruling. As the court itself noted the motive was common, and thus plausible. The court's ruling required the body shops to plead some other motive it liked better, which is inconsistent with both Rule 8 notice pleading and the conscriptures of Rule 12(b)(6) analysis.

D. Opportunity to conspire

Opportunity to conspire is a recognized plus factor. *Re/Max,* 173 F.3d at 1009. It is satisfied by, among other things, alleging the named defendants had the opportunity to exchange information or make agreements. *In re Pool Prod. Distribution Mkt. Antitrust Litig*., 988 F. Supp. 2d 696, 714 (E.D. La. 2013).

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[41]Doc. No. 102, ¶¶ 324-31.

[42]*Id.*

Both the judiciary and law enforcement have recognized that participation in trade association and similar organizations greatly increase the likelihood of collusion. *In re Auto. Refinishing Paint Antitrust Litig*., 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004)("It is widely understood that trade associations can be used to facilitate the creation and maintenance of price-fixing conspiracies[.]"), United States Department of Justice, Price Fixing, Bid Rigging and Market Allocation Schemes.[43]

The complaint identifies the three trade associations to which the insurers are known to belong and which frequently meet at joint conferences.[44] It also set out the additional organizations for which defendant insurers sit on the board of directors, and which were formed for the specific purpose of reducing insurers' liability costs, CAPA and IIHS.[45]

The complaint also pointed out the three major trade associations identified in the complaint have already been used to facilitate price fixing by the insurers, which resulted in the 1963 Consent Decree.[46]

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

[44] Doc. No. 102, ¶¶ 301-318.

[45] Doc. No. 102, ¶¶ 301-318.

[46] *Id.*, ¶¶ 346-350.

The complaint therefore alleged facts which satisfactorily plead this plus factor.

The district court, however, disregarded this plus for three reasons. Trade association membership is not indicative of collusion per se and therefore irrelevant, and the complaint failed to identify either the trade associations or the insurers who are members of them.[47] Both of these contentions are demonstrably incorrect as shown above.[48]

The district court also held the complaint failed to allege that all of the defendant insurers belong to the same trade association.[49] However, the district court cited no authority for this conclusion, which does not appear in any authority undersigned counsel has been able to locate after diligent search.

As it is apparently not a requirement of this plus factor, the district court's conclusion imposes a heightened pleading burden upon the body shops to plead and prove a prerequisite which does not exist. Creating barriers which do not exist also exceeds the boundaries of 12(b)(6) analysis.

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[47]Doc. No. 126, pp. 10-11.

[48]The district court's reliance upon *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010) for the proposition that trade association membership is irrelevant to this plus factor is misplaced. *American Dental* was a RICO case, which has its own unique considerations and generally fall within the purview of Rule 9(b) particularity pleading requirements. The body shops have not alleged a RICO claim, nor are any of their claims subject to Rule 9(b).

[49]*Id.*

Standing alone, opportunity to conspire is insufficient to suggest agreement. *Id.* However, opportunity to conspire was not asserted alone; it was among several others alleged in the complaint, including multiple points of uniform conduct and motive to conspire.

This is sufficient. *Brown v. Cameron Brown Co.*, 1980 WL 1856, *6 (E.D. Va. 1980)(denial of motion to dismiss affirmed, reversed on other grounds, 652 F.2d 375 (4th Cir. 1981)). See also, *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010)(opportunity to conspire through trade associations, with other alleged plus factors, sufficient to defeat motion to dismiss.)

The district court's conclusions were therefore clearly erroneous.

E. Uniformity of Conduct

Uniform conduct is a recognized plus factor. *Re/Max,* 173 F.3d at 1009. The DOJ has also set out examples of uniform conduct indicative of collusion, holding prices firm and adopting a standard formula for computing prices.[50]

The complaint alleged multiple instances of uniform conduct by the defendant insurers, and detailed the common formula uniformly used for calculating

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

compensation of parts, paint and material. See Section II.A., above. The complaint therefore sufficiently alleged this plus factor.

The district court disregarded all points of uniform conduct by the insurers because the body shops failed to explain how uniform conduct was indicative of collusion.[51] This demonstrates a fatal flaw in the district court's analysis. Uniform conduct is itself the plus factor indicative of collusion. *Re/Max Int'l*, 173 F.3d at 1009. The body shops were thus not required to "explain why" uniform conduct was indicative of collusion; its existence is the explanation.

Requiring more of the body shops than is required by the plus factor itself imposes a heightened and unsubstantiated pleading burden upon the body shops. It also breaches the requirements of Rule 12(b)(6) analysis, as it demonstrates the district court failed to accept the allegations of the complaint as true, and engaged in making prohibited credibility determinations. See Section I.

Further, the district court limited its consideration of uniform conduct to those examples provided in the body shops' response to motions to dismiss.[52] However, a 12(b)(6) motion does not challenge the sufficiency of motions, it challenges the

[51]Doc. No. 126, pp. 11-12.

[52]Doc. No. 126, pg. 13. The court refers only to Doc. No. 111 in listing uniform conduct alleged, which is the body shops' omnibus response to the motions to dismiss.

sufficiency of the complaint. *Adinolfe,* 768 F.3d at 1168. Doing otherwise leads to omission of facts and incorrect conclusions, as occurred here.

Whether by accident or design, the district court cherry picked the allegations it wished to address and ignored the rest. This, too, constitutes an obvious failure of the district court to analyze the entirety of the complaint and accept the facts alleged as true.

F. Chance, coincidence or independent action

Behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties, and conduct that indicates the sort of restricted freedom of action and sense of obligation one generally associates with agreement is a recognized plus factor. *Twombly,* 550 U.S. at 557.

The complaint sets out in detail numerous points of uniform conduct and other plus factors that are unlikely to have occurred as a result of coincidentally identical but independent decisions.

It is extremely unlikely each defendant insurer independently arrived at an identical "market rate" to that of State Farm, **and** did so without any independent market study at all, **and** the rate is always lower than rates actually charged by body shops, **and** shows no variability across the entire state, while actual rates do vary, **and**

when the "market rate" changes, it changes contemporaneously **and** by exactly the same amount across the entire state.

It is extremely unlikely each insurer independently created an identical list of no pay/under pay repair elements, **and** that list is contradicted by the accepted industry authorities used by the insurers themselves, **and** utilize identical false excuses for refusing to make any or full payment, **and** employ the same formula to decide the amount of compensation when compensation is actually made.

And the conduct described falls squarely within the types of behavior both law enforcement and the judiciary have recognized as indicators of antitrust collusion.

The court's only analysis of this plus factor was to hypothesize the insures could have learned (and thus presumably imposed) State Farm's sham market rate from the body shops themselves.[53] That was all.

The district court ignored all the "ands," to rule based upon a hypothetical alternative, which only addressed one of the many "ands." However, the district court was not permitted to do that. "The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion. Fact-specific questions cannot be resolved on the pleadings. A court ruling on such a motion may not properly dismiss a complaint that states a plausible

[53]Doc. No. 126, pg. 14.

version of the events merely because the court finds a different version more plausible." *Anderson News, LLC v. American Media Inc.,* 680 F.3d 162, 185 (2nd Cir. 2012).[54]

Nor may the district court require the body shops to exclude alternative hypotheticals at the pleading stage. Doing so imposes an improper pleading requirement upon the body shops far in excess of Rule 8's notice pleading boundaries.

The district court committed reversible error from beginning to end of its price fixing analysis. It disregarded large amounts of the complaint, failed to accept the facts alleged as true, formulated an alternative version it found more plausible, ruled contrary to accepted authority on plus factors, and analyzed facts in isolation from the remaining complaint. Appellants respectfully submit these collective errors necessitates reversal.

B. Boycotting

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

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[54]As the complaint also alleges the insurers do not attend to the most basic functions of claim handling for up to a month (See Complaint, e.g., ¶ 260), Appellants submit that a sea change in "market rate" can be accomplished within only days of receiving notice from a body shop is not actually a plausible alternative.

The complaint alleges the following facts relevant to the boycotting claim:

- The Plaintiff body shops are targeted by the insurers for refusing to quietly comply with fixed prices.[55]

- Insurers effect the boycott by steering or attempting to steer away customers who have verbalized the intention of doing business with a Plaintiff by knowingly conveying false and misleading statements impugning the quality, cost and integrity of Plaintiffs' work and/or exerting economic coercion upon the customers.[56]

- All of the insurers utilize the same script containing identical false and misleading steering statements and threats of economic consequences.[57]

- Insurers withhold known information their preferred, compliant shops perform poor repairs while actively defaming plaintiffs.[58]

- Commencement of boycotting is linked to identifiable events, such as refusal to comply with fixed prices or disassociation from an insurer's direct repair program ("DRP"). After leaving a DRP or being designated a "problem" shop for complaining about fixed prices, the plaintiff body shops experience a sudden, across-the-board drop in customers for whom the defendants are responsible for making repair cost payment.[59]

- As the insurers refuse to pay any more than their unilaterally determined fixed amount regardless of where repairs are performed, steering

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[55]Doc. No. 102, ¶¶ 97, 230, 257, 272, 288, 324, 373, 400.

[56]*Id.*, ¶¶ 37, 229-30, 234-41, 243, 244, 401.

[57]*Id.*, ¶¶ 231, 297-98.

[58]*Id.*, ¶¶ 290-94.

[59]*Id.*, ¶¶ 279-85.

> customers to insurer-preferred shops serves no purpose but to harm the non-compliant plaintiff shops.[60]

Although not included in the complaint, the district court had at its disposal an affidavit from a former long-term management level employee of Progressive which stated Progressive does intentionally steer customers away from "problem" shops by, among other things, conveying false and defamatory statements about the shop to consumers. The district court was permitted to take judicial notice of this affidavit, as it was in the record of companion cases in this MDL.[61]

The complaint alleges conduct indicative of group boycotting, as well as numerous plus factors, including a common motive to conspire, uniform conduct and information sharing.

Use of identical false and misleading statements is particularly telling of agreement. This, by itself, satisfies multiple plus factors. It is unlikely the insurers independently created an identical set of false statements by mere chance or coincidence. The only manner such a conclusion may be reached is if the district court decided the statements were not false or misleading, which the district court was

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[60] *Id.*, ¶¶ 255-57.

[61] A copy of this affidavit is also available to this Court as an Exhibit to the Complaint, Doc. No. 151 in *Indiana Autobody Association v. State Farm Mut. Auto. Ins. Co.,* 16-13596, Appellants' Appendix, Vol.I.

not permitted to do. It is far more illustrative of information sharing and uniform conduct in formulating the most effective set of statements to use.

The Appellees further utilize an identical set of economic pressure and threats against consumers to compel or attempt to compel them away from Appellants' businesses, which satisfies uniform conduct and information sharing plus factors.

It appears the district court read the boycotting allegations not only as discrete facts but in isolation from the remaining complaint. It failed to give effect to the totality of facts alleged in the complaint, the likelihood of **all** these things occurring simultaneously from coincidence or chance.

The district court's analysis of the boycotting claim can be summarized as: the body shops failed to show any defendant refused to deal with them, but even if they did, the insurers are permitted to do so, and the boycotting failed so the claim fails.[62]

The district court omitted several salient points of law and fact. The 1963 Consent Decree prohibits the three trade associations, their members and anyone in active concert with either from directing, advising or otherwise suggesting that any person refuse to do business with a particular body shop.[63] The actions set out in the

[62]Doc. No. 126, pp.15-16.

[63]Doc. No. 102, ¶¶ 346-50.

complaint clearly meet this description, and have already been deemed illegal boycotting under the Sherman Act.

It was plain error for the district court to dismiss the boycotting claim; the conduct described has already been deemed illegal boycotting as per the Consent Decree.

The district court also failed to give effect to the definition of boycotting. It encompasses not merely claims of direct refusals to deal, but also the enlistment of third parties to boycott. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). As the *St. Paul* court noted, the enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott. *St. Paul,* 438 U.S. at 544-45.

That is exactly what the complaint alleges. See above. Pursuant to Supreme Court authority, boycotting does not require the boycotters directly refuse to deal. It is still an illegal boycott if the insurers work through third parties. The district court's ruling imposed a heightened pleading burden upon the body shops to plead something they will never have to prove, even at trial.

The district court further based dismissal upon the purported failure of boycotting efforts. It totaled up the number of examples which showed successful

boycotting, compared it to the number of unsuccessful examples and decided the complaint failed to state a claim.[64]

However, success is not an element of boycotting. It is the agreement itself to restrain trade that constitutes a violation of the Sherman Act, not the agreement's success. See *Brooke Group v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 251 (1993).

Federal jury instructions reflect this: "The agreement itself is a crime. Whether the agreement is ever carried out or whether it succeeds or fails does not matter. Indeed the agreement need not be consistently followed. Conspirators may cheat on each other and still be conspirators. It is the agreement to do something that violates the law. That is the essence of a conspiracy." *United States v. Stora Enso North America Corporation*, 03:06cr323 (CFD) United States District Court for the District of Connecticut (July 2007).

It is therefore irrelevant whether the insurers are successful in every, or any, attempt to boycott, or if they never take steps beyond agreement. Requiring the body shops to allege success imposes an impermissible pleading burden, one which the body shops will never have to prove, even at trial.

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[64]Doc. No. 126, pg. 16.

Additionally, by ruling upon this basis, the district court failed to heed Supreme Court pleading authority. Plaintiffs are permitted to support their clearly stated cause of action with any set of facts consistent with the allegations of the complaint. *Twombly*, 550 U.S. at 563. That is precisely what the body shops here have done.

Inexplicably, the district court also ruled the boycott claim failed because the complaint failed to allege more than one insurer was involved in each example provided in the complaint.[65] No authority for this legal conclusion was provided. It is not an element of the claim. It is the agreement to boycott which violates the law. Thus, it is irrelevant to the claim whether or not all of the defendant insurers participated in each attempt to steer. The district court again imposed an incorrect pleading standard by requiring the body shops to plead something which is not an not legally required nor will they ever have to prove.

The facts set out in the complaint more than sufficiently set forth a plausible basis that Appellees have entered an agreement to boycott the Appellant body shops. The district court's dismissal of this claim was error.

III. MOTION TO RECONSIDER

[65] *Id.*

The body shops filed a motion to reconsider dismissal of the federal claims, notifying the district court of direct admissions of price fixing made by a Progressive representative obtained after the complaint was amended, and reminded the court of the State Farm admissions, which were in the complaint but were not acknowledged by the court. The body shops also pointed out the district court based dismissal upon several purportedly absent allegations that actually are present in the complaint.[66]

The district court denied the motion, finding the direct admissions of price fixing vague and unsupported by evidence, to wit, the body shops should have included not merely the inculpatory statements, but also a transcript of the admissions or an affidavit.[67] Appellants respectfully submit the court's ruling constitutes a significant abuse of discretion.

There are generally three grounds to reconsider an order, two of which are the availability of new evidence, and the need to correct clear error or manifest injustice. *Lamar Advert. of Mobile, Inc. v. City of Lakeland, Fla.,* 189 F.R.D. 480, 489 (M.D. Fla. 1999).

Respectfully, the district court's ruling the direct admissions of price fixing are vague is incomprehensible. The Progressive representative stated, "shops have no say

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[66]Doc. No. 128.

[67]*Id.,* pp. 3-4.

in the setting of their own labor rates, that the insurance companies "get together at big meetings" to set body shop labor rates, and that the insurance companies uniformly apply the labor rates agreed upon at these meetings. This representative even identified when the next such meeting was going to occur."[68]

The State Farm representative stated, "State Farm intentionally suppresses and fixes body shop labor rates, that State Farm's labor rate survey is a sham to justify its intentional fixing of labor rates" and that State Farm is guilty of "every iota" of the allegation in the essentially identical Louisiana Attorney General action.[69]

Both these statements clearly express intentional price fixing. They are not ambiguous nor require interpretation. They are unequivocal admissions of wrongdoing. Such statements have been held "the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price." *In re Text Messaging Antitrust Litig*., 630 F.3d at 628.

However, even if the statements could arguably be considered ambiguous, the district court was required to interpret them favorably to the body shops. It may not

[68] *Id.,* pp. 1-2.

[69] *Id.*, pp. 7-8.

select an alternative meaning that is fatal to the claim. *Mann v. Adams Realty Co., Inc*., 556 F.2d 288, 294 (5th Cir. 1977).

The district court also improperly required documentary evidence of the statements to give them effect. The body shops are not required to plead evidence in the complaint. *SD3*, 01 F.3d at 431. The district court is required to accept as true the allegations of the complaint, which is only required to set out a short and plain statement so as to provide notice of the claim and the grounds upon which it rests. *Twombly*, 550 U.S. at 555.

The body shops also brought to the court's attention that allegations it said were absent from the complaint, and predicated dismissal upon those purported absences, actually were contained in the complaint.[70] Despite this being stated grounds for dismissal, the district court ruled the presence of the allegations made no difference because the body shops failed to actually prove the truth of the allegations, and reiterated its prior erroneous ruling that trade association membership is irrelevant per se and the complaint fails to allege all insurers are members of the same trade association.[71]

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[70] *Id.*, pp. 3-7.

[71] Doc. No. 139, pp. 5-6.

A plaintiff is not required to prove its case in the complaint. As also discussed above, the trial court's finding regarding trade association membership is legally incorrect. Both these grounds given to deny the motion to dismiss are erroneous.

The district court also suggested the motion had to be denied because the Progressive admissions of price fixing were not presented earlier. However, this directly contradicts a prior ruling. In March, 2015, the body shops filed a motion to stay all complaint amendment until the motions to dismiss then pending in companion cases had been decided to clarify what was required of parties going forward.[72] The district court denied the motion, ruling the cases were sufficiently dissimilar, each and the body shops should await those decisions.[73]

Being told each decision was unique and told to await individual action, the body shops took the court at its word and did not seek to amend when the new information came to light. This obedience was then used in the motion to reconsider as grounds to deny the requested relief.

For the forgoing reasons, Appellant body shops respectfully submit the district court abused its discretion in denying the motion to reconsider.

IV. STATE LAW CLAIMS

[72]Doc. No. 166, MDL 2557, Appellants' Appendix, Vol. II.

[73] Doc. No. 175, MDL 2557, Appellants' Appendix, Vol II.

For both quantum meruit and tortious interference, the district court ruled the claims failed for shotgun pleading and group pleading. These conclusions are erroneous under law, and impose conflicting and incorrect pleading requirements.

A. Shotgun Pleading

Shotgun pleadings are those which incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense. *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006).

No such incorporation exists anywhere within the complaint. The district court nonetheless dismissed the tortious interference claim as shotgun pleading.[74] The district court provided no authority whatsoever that not incorporating preceding paragraphs constitutes shotgun pleading.

Inexplicably, the district court also ruled incorporation of preceding paragraphs was necessary so the absence of incorporation was fatal to the complaint. Thus, the district court ruled the complaint inadequate for shotgun pleading and the absence of shotgun pleading.[75]

The district court created a pleading standard impossible to meet. A party cannot comply with an order to both omit and include incorporation.

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[74]Doc. No. 127, pg. 9.

[75]*Id.*

B. Group Pleading

The district court concluded the complaint's use of "the Defendants" rendered the claim too vague to satisfy Rule 8 fair notice requirements.[76] This was incorrect. It also placed the body shops in the position of having to choose which order of the court to obey.

This Court has repeatedly authorized use of "the Defendants" where the plaintiff intends to assert each named defendant engaged in the conduct described. *Crespo v. Coldwell Banker Mortgage*, 599 F. App'x 868, 872 (11th Cir. 2014), *Jackson v. Bank of Am., NA*, 578 F. App'x 856, 860 (11th Cir. 2014), *Crowe v. Coleman*, 113 F.3d 536, 1539 (11th Cir. 1997).

The complaint alleges this. The district court dismissed anyway because it candidly admitted it chose not to believe the allegations. It found the facts "implausible," and the defendants had therefore not received fair notice of the claim.[77]

Absent facially delusory content, it is not within the district court's discretion to determine facts are "implausible." See Section I. One need only read the complaint to see the allegations do not meet the "little green men" level of delusory content. The complaint described the conduct in which the insurers engaged and

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[76] *Id.*

[77] *Id.*, pp. 9, 15.

provided numerous specific examples. The district court was required to accept the allegations of the complaint as true, even if personally skeptical of the claim's viability. *Neitzke,* 490 U.S. at 327. That it chose not to do so, and candidly admitted it was choosing not to do so, is clear error.

The problem group pleading creates has been well-defined: the inability of each defendant to discern the nature of the claim made against it and the grounds for the claim. *Sprint Sols., Inc. v. Fils-Amie*, 44 F. Supp. 3d 1224, 1227 (S.D. Fla. 2014).

However, when the record demonstrates the opposing parties do understand the claim and the grounds therefore, the notice requirement of Rule 8 has been satisfied and dismissal should not be granted. *Toback v. GNC Holdings, Inc*., 2013 WL 5206103, at *2 (S.D. Fla. Sept. 13, 2013), *F.T.C. v. Sterling Precious Metals, LLC*, 2013 WL 595713, at *4 (S.D. Fla. Feb. 15, 2013).

Dismissal under these circumstances constitutes reversible error. *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1326 (11th Cir. 2015).

The record makes very clear everyone understood completely the claim being made. The Report dissected the claims in detail, discussed the facts alleged at length, decided whether each did or did not support the claim, drew multiple conclusions and in every respect displayed a full and complete understanding of the claims. The Report also quoted extensively from the various motions arguing against the claims,

the facts alleged supporting the claims and why they should be dismissed, showing the insurers themselves also had a complete understanding.[78]

As the record establishes, no one was confused about the claims, or the supporting facts. *Weiland* holds dismissal was reversible error.

This decision produces another substantive pleading conflict. In an earlier order in this MDL, *A & E Auto Body*, the district court ordered those plaintiffs to amend the complaint so as to individually identify each defendant in relation to each fact and cause of action asserted. After doing so, the court complained the complaint was unnecessarily long, and threatened plaintiffs with sanctions if it was done again. *A & E Auto Body, Inc.,* 2015 WL 304048, at *3.

In their objections to the Report, the body shops pointed this out, noting it created an impossible pleading standard. [79] The district court did not acknowledge the problem it had created and dismissed anyway for group pleading.

Thus, the body shops were left with no manner of pleading acceptable to the district court. They either identify each defendant by name in relation to each factual allegation and face sanctions, or they utilize "the Defendants" and face dismissal for

[78]Doc. No. 127, pp. 5-16

[79]Doc. No. 131, pg. 33.

group pleading. The body shops submit it is impermissible for the district court to place any party in the position of having all avenues of pleading foreclosed.

C. Quantum Meruit

The district court dismissed the quantum meruit claim for several reasons stemming from the conclusion the body shops conferred no benefit upon the insurers.[80] This conclusion is erroneous.

1. Benefit

In *Emergency Physicians Integrated Care v. Salt Lake Cty.*, ("*EPIC*") 167 P.3d 1080, 1085 (Utah 2007) the Utah Supreme Court ruled that actions which permit a defendant to execute a duty owed a third party constitutes a benefit to the defendant.

More specifically, a vendor of repair services confers a benefit upon an insurer obligated to pay for repairs. *Benchmark Const. LLC v. Auto-Owners Ins. Co.*, 2013 WL 3479682 (D.Utah July 10, 2013)("Auto–Owners still had a duty, to its unidentified insured, to pay for the repair work. Benchmark's performance of the repairs satisfied the duty owed by Auto–Owners and relieved it of its obligation to its insured.")

The district court's ruling no benefit was conferred directly violates unambiguous established state law. The district court is required to apply established

[80]Doc. No. 127, pp. 5-6.

state law to state law claims; it is not free to alter, amend or disregard it, regardless of what it may believe as to the wisdom of state law. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940).

This error was compounded by the district court's application of Florida law instead, which conflicts with Utah authority.[81]

These errors are made more egregious as they violate the law of the case.

2. Law of the Case

In the first magistrate's Report, the district court recognized the body shops' services constituted a benefit conferred upon the insurers, in accordance with the rule of *EPIC*. *Alpine Straightening Sys. v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 1911635, *5(M.D. Fla. Apr. 27, 2015).

The district court also previously recognized the body shops are entitled to seek the reasonable value of their services, not merely what the insurers chose to pay, also consistent with the ruling in *EPIC*. *Id.*

Following a second round of motions to dismiss, the district court ruled in the completely opposite manner on the issue of benefit.[82] It did so without even acknowledging it had previously ruled on the question directly contrary to its new

[81]Doc. No. 127, pp. 6-7.

[82]Doc. No. 127, pg. 5.

conclusion.

The district court omitted completely the issue of reasonable value. "Reasonable value" do not even appear in the Report.[83]

The law of the case doctrine provides an issue decided at one stage of a case is binding at later stages of the same case. *Royal Ins. Co. v. Latin Aviation Servs., Inc.,* 210 F.3d 1348, 1350 (11th Cir. 2000). An issue is not decided solely by explicit order, but also by necessary implication from the disposition. *Original Brooklyn Water Bagel Co. v. Bersin Bagel Grp., LLC*, 817 F.3d 719, 728 (11th Cir. 2016), *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991).

Parties are entitled to rely upon orders of the court. "To hold otherwise would be to permit parties the option of deciding which orders to obey, or conversely to condemn parties to the instability of guessing which orders to abide and which to ignore. This will not do." *In re Demos*, 57 F.3d 1037, 1039 (11th Cir. 1995.) As stated by the Eighth Circuit, "For the integrity of the courts . . . it is imperative that parties be able to rely on orders of the court."

The body shops took the district court at its word. Having been specifically told the benefit element was adequately pled, and recognizing quantum meruit requires payment of reasonable value, they did not amend to address either. They

[83] *Id.*

were then blind sided by a contradictory subsequent ruling on issues they reasonably believed settled.

The body shops were therefor substantially prejudiced by the district court's failure to adhere to the law of the case which constitutes an abuse of discretion. The district court's actions cast a significant shadow upon the propriety of the order and the appearance of its integrity. The error of the court's about-face is highlighted by the lack of substance to the ruling as discussed above and below.

3. Disregard of Factual Allegations

As part of its reasoning why no benefit was conferred, the district court asserted several purported pleading failures. Each such conclusion is demonstrably inaccurate:

- The district court concluded the complaint failed to allege the insurers have a duty to pay for repairs.[84] The complaint does allege this at ¶¶ 35, 43, 222, 313, 360 and 361.
- The district court concluded the complaint failed to allege the body shops' services discharge the insurers' obligations to third parties.[85] The complaint does allege this at ¶¶ 360-61.
- The district court found the complaint failed to allege the insurers have a duty to perform repairs. Facially, this is a correct statement. The

[84]Doc. No. 127 pg. 6.

[85]*Id.*

> court's statement is nonetheless misleading, as it implies the body shops were required to allege the insurers had a duty to perform the repairs, while no such requirement exists.

The court's conclusion no benefit has been conferred because these allegations are missing is erroneous or irrelevant. They are also baffling, as the district court previously recognized these very allegations within the complaint. *Alpine Straightening Sys*., 2015 WL 1911635, at *5.

4. Utah Administrative Code R590

The district court ruled no benefit was conferred because the body shops' services were not requested by the insurers. This conclusion violates Utah authority.

Utah Administrative Code R590-190-12(5) prohibits auto insurers from requiring a claimant to use only the insurer's claim service in order to perfect a claim. Per the Utah Insurance Department, this subsection prohibits an insurer from making payment of a claim contingent upon use of an insurer specified or approved body shop.

Thus, Utah authority makes request from an insurer irrelevant. Worse, the district court created a claim element which abrogates Administrative Code R590, imposing a condition upon the insurers' duty to pay for repairs that Utah does not

permit. The district court's creation of such directly abrogates the rule and renders the consumers' choice illusory.

The ruling also directly contravenes Utah common law of quantum meruit. Utah strictly adheres to the distinction between contracts implied in law and contracts implied in fact, each having their own essential elements. Contracts implied in fact do include a request for services from the defendant as an element of the claim. *Uhrhahn Const. & Design, Inc. v. Hopkins*, 179 P.3d 808, 815 (Utah Ct. App. 2008).

A contract implied in law, however, does not, it only requires the defendant have knowledge the services are being performed. *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct. App. 1987).

This is the cause of action alleged by the body shops.[86] The district court inferentially acknowledged this, correctly reciting the elements of this claim under Utah law.[87]

After doing so, however, the district court nonetheless affirmatively dismissed for failing to support an element which does not exist for the claim asserted. The district court thus created an additional element for this state law claim, in violation of clear Utah law.

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[86]Doc. No. 102, pg. 78.

[87]Doc. No. 127, pg. 5.

5. Amount of payment

In contravention of state law, the district court dismissed the quantum meruit claim because it subjectively decided the body shops are not entitled to receive anything more than what the insurers have decided to pay.[88]

The district court's subjective belief is evident in its choice to recast the allegations of the complaint. The court asserts the quantum meruit claim is predicated not upon the insurers' failure to make payment, but a desire to receive payment of what the body shops believe their services are worth, rather than the price they agreed to receive for those services.[89]

This is inaccurate. The complaint alleges in detail that insurers are not paying at all for identified repair elements, set forth in Exhibit "C" to the complaint, or are substantially underpaying others. The complaint thus does not allege a claim for subjective "worth," but a claim for not being paid at all or being substantially underpaid. The court's recharacterization of what the body shops seek is a breach of its obligation to accept the non-delusory facts alleged as true. See Section I.

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[88] *Id.,* pg. 8.

[89] *Id.*

The court also recharacterized the complaint's contents by asserting the shops just want more than they agreed to.[90] The complaint asserts the opposite of an agreement: the insurers acted unilaterally, over protest by the body shops, utilizing overwhelming economic power to coercively impose their will and retaliate when the body shops protest or refuse.[91] There was therefore no agreement alleged in the complaint.

Finding otherwise is a breach of the district court's obligation to accept the non-delusory facts alleged as true. It also violates Utah law, which requires both parties' assent and intent to contract for a valid agreement to exist. *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368, 373 (Utah 1996). An express agreement cannot be formed unilaterally.

That the insurers never intended to make full payment is irrelevant under Utah law. Principles of restitution do not heed the intention of the defendant to default on payment, whether in whole or in part. It is specifically intended to bring about justice, regardless of the intentions of the defendant. *Jeffs v. Stubbs*, 970 P.2d 1234, 1245 (Utah 1998).

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[90] *Id.*

[91] Doc. No. 102, ¶¶ 37, 99, 367, 386, 400.

The district court's insistence the body shops' knowledge the insurers habitually default on full payment extinguishes the claim is contradicted by Utah authority. The factual context in *EPIC* is identical to the present case–over the course of years, the plaintiffs received only partial payment for services rendered, the defendant refused repeated demands for full payment and only paid what it decided to pay. A defendant's unilateral choice as to the amount of payment does not extinguish the plaintiff's legal rights. That defendants refused full payment for a number of years made no difference. The Utah Supreme Court stated the plaintiffs were permitted to pursue their quantum meruit claim. *EPIC*, 167 P.3d 1080.

Further, Utah law of implied in law contracts imputes a promise to pay the reasonable value of goods and services. *Express Recovery Servs. Inc. v. Reuling*, 364 P.3d 766, 770 (Utah 2015).

Under Utah law, paying only what you choose simply isn't good enough; the law entitles a plaintiff to the reasonable value of services. However, the district court ignored this point.

Both federal and state supreme courts have consistently ruled for over a century that determination of reasonable value is an issue of fact. *The Poznan*, 274 U.S. 117 (1927), *Hatch v. Sugarhouse Fin. Co.*, 434 P.2d 758, 759 (Utah 1967), *Salt Lake City v. Smith*, 104 F. 457, 468 (8th Cir. 1900). Indeed, the Utah Supreme Court recently

discussed at length how reasonable value jury instructions should be crafted. *Jones v. Mackey Price Thompson & Ostler*, 355 P.3d 1000, 1017 (Utah 2015).

Even if the district court were permitted to make a determination of reasonable value, it could not legitimately do so in the absence of any evidence on the subject. All the court had before it was insurers' arguments they paid as much as they ever intended to, leading to the necessary conclusion the district court deemed any amount paid was reasonable, even when that amount was nothing.

However, the district court is not permitted to accept defendants' arguments contrary to the allegations of the complaint. See Section I. Nor is it permitted to collapse discovery, summary judgment and trial into the pleading stages of a case. *SD3,* 801 F.3d at 434, *Bell/Heery v. United States*, 739 F.3d 1324, 1338 (Fed. Cir. 2014).

The district court's dismissal based upon the insurers' course of conduct and the body shops' knowledge of that conduct constitutes reversible error.

6. Affirmative Defenses

The district court erroneously applied a number of affirmative defenses to justify dismissal of the quantum meruit claim, including the conclusion the claim was barred due to the existence of express contracts between the parties. The district court explicitly adopted the arguments of the defendant insurers to reach this

conclusion.[92] This violates multiple points of law (See Section I), including improper application of an affirmative defense.

An affirmative defense is one that admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters. *VP Properties & Developments, LLP v. Seneca Specialty Ins. Co.* 2016 WL 945230, at *3 (11th Cir. Mar. 14, 2016).

Because the non-delusory facts alleged are required to be accepted as true, a district court ordinarily may not dismiss a complaint upon an affirmative defense. The trial court may not draw negative inferences, assume facts or hypothesize scenarios to justify application of an affirmative defense. *Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 F. App'x 972, 976-78 (11th Cir. 2015).

Only if the existence of an affirmative defense plainly and conclusively appears on the face of the complaint may dismissal even be considered. *Id.* at 976-77.

The complaint does not allege the existence of any contracts between body shops and the insurers. The district court just accepted the insurers' arguments that such existed. As the allegation exists only within the insurers' motion arguments, the court explicitly looked outside the complaint's contents to avoid liability for the defendant insurers, which constitutes an affirmative defense by definition.

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[92]Doc. No. 127, pp. 8-9.

Further, the district court accepted the insurers' argument without any evidence. The insurers did not produce any contracts or even disclose any purported contract terms.

This violates Utah contract law, as well as the parameters of Rule 12(b)(6) analysis. A valid contract only exists where there has been mutual assent by the parties manifesting their intention to be bound by its terms. *Bunnell v. Bills*, 368 P.2d 597, 600 (Utah 1962).

The insurers are therefore required to show not only the existence of contracts, but that the contracts are valid, executed by willing agreement of the body shops. The complaints' contents cannot be construed to reasonably infer willing assent to any still hypothetical contracts. The complaint repeatedly states insurers have unilaterally enforced their economic will upon the body shops, over protest, through coercion, duress, threats of legal retribution, threats of and actual economic retaliation. How such facts can, by any level of reasonableness, be considered mutual assent and therefore valid contracts is left without explanation by the court.

The district court erroneously relies upon the absence of argument refuting the contract argument in response to insurers' motions. Whether or not the body shops responded to the argument does not relieve the district court of its nondiscretionary

duty to apply the law. The court was required to analyze the complaint, and apply state law, both of which contradict the conclusion any valid contracts exist.

The body shops are not required to negate an affirmative defense in the complaint. *Twin City,* 609 Fed. Appx. at 976. If the insurers wish to assert the existence of express contracts, they are required to plead this as an affirmative defense, and bear the burden of proof and production for same. *Meacham v. Knolls Atomic Power Lab.,* 554 U.S. 84, 93(2008), *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1550-51 (11th Cir. 1990).

The district court also relied upon the insurers' course of conduct generally to excuse them from liability. The proposition that insurers' repeated conduct in defaulting on payment excuses them is clearly a justification for their conduct. It is contrary to the allegations of the complaint and state law, and appears only in the insurers' motion arguments. By definition, this constitutes an affirmative defense.

The district court's conclusion violates the well-entrenched rule of law that a party may not rely upon his own misconduct to avoid liability. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234 (1959), *Prudential Fed. Sav. & Loan Ass'n v. William L. Pereira & Associates*, 401 P.2d 439, 441 (Utah 1965).

While the district court did not identify which course of conduct affirmative defense it was applying, it clearly applied one to excuse the insurers from current or future liability for their conduct. Doing so was reversible error.

D. Tortious Interference

The district court's dismissal of the body shops' tortious interference claim is notable primarily not for what it concludes, but for what it fails to address, for misrepresenting the allegations of the complaint and abandoning its duties by affirmatively adopting the motion arguments of defendant insurers.

The Utah Supreme Court recently amended the essential elements of a tortious interference with prospective business claim in *Eldridge v. Johndrow*, 345 P.3d 553 (Utah 2015).

Eldridge overruled an earlier case, *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982), to the extent *Leigh* permitted a plaintiff to establish tortious interference through either improper purpose or improper means. Only improper means is now recognized. *Eldridge*, 345 P.3d at 565. As the Utah Supreme *Eldridge* court noted, *Leigh* otherwise still remains the seminal case of Utah tortious interference authority. *Id.* at 559.

The district court erroneously concluded the body shops' claim for tortious interference rested upon allegations of the now unavailable improper purpose

element.[93] The court then went on to dismiss for failing to sufficiently allege improper means because the statutory and regulatory authority the insurers violated do not permit a private right of action.[94]

This conclusion is erroneous for multiple reasons.

1. Law of the Case

The only basis given by the district court in previously dismissing Plaintiffs' tortious interference claim was Plaintiffs' purported failure to sufficiently identify which Defendants interfered with which Plaintiffs' business prospects. *Alpine*., 2015 WL 1911635, at *1 (M.D. Fla. Apr. 27, 2015). Though many defense arguments were discussed, no other basis for dismissal was provided.

The body shops were specifically told all other allegations were sufficient to set forth a claim for tortious interference: "Plaintiffs have alleged conduct-including disparagement of their businesses-that, if proven, would constitute improper means of interference." *Id.* at *7.

Because the court had ruled improper means had been adequately pled, the body shops did not amend further for this element. The district then ruled on the very same point in the opposite manner, after the body shops had amended the complaint

[93]Doc. No. 127, pg. 12.

[94]*Id.*, pp. 11-12.

and thus after the opportunity to correct any deficiencies in the improper means element had passed. The body shops were thus punished for believing the court's written order.

The district court also acknowledged it was unnecessary for the body shops to specifically identify the state statutes, regulations or other authority the insurers violated as part of their tortious interference claim. Despite this, the court also directed that authority be identified or the allegation omitted on amendment. *Id.* at *7.

In contravention of mandatory pleading standards, the court thus ordered the body shops to plead something the court acknowledged they were not required to plead, leaving the body shops to guess which conclusion to follow. The body shops did guess. After having already ruled the allegations sufficient to state a cause of action without this information, the district court then ruled the authority identified by the shops as a result of the conflicting order was insufficient to state a claim for tortious interference (see below).

The district court's previous ruling constitutes the law of the case. As noted above, parties are entitled to rely upon orders of the court, including their necessary implications. Doing otherwise impugns the integrity of the court and condemns the parties to guessing whether the court really meant what it said. See Section IV.C.2.

The body shops took the district court at its word and amended the complaint accordingly. They were then blind sided by a subsequent ruling on issues the shops reasonably believed settled. The body shops were therefor substantially prejudiced by the district court's failure to adhere to the law of the case which constitutes an abuse of discretion. The error of the court's about-face is highlighted by the lack of substance to the rulings, as discussed fully above.

2. Private Right of Action

After guessing which of the conflicting orders to obey regarding identifying state authority, the district court dismissed the tortious interference claim because the authority so identified does not afford a private right of action. The district court adopted the insurers' motion argument this constituted a backdoor attempt to pursue a claim for which the law does not allow them a remedy.[95]

This conclusion violates state law. Utah law has repeatedly recognized that violation of statute, regulation or other state authority, among other avenues, provide grounds for the improper means element of a tortious interference claim. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 201 (Utah 1991). See also, *Rowe v. DPI Specialty Foods, Inc.*, 2015 WL 3533844, at *7 (D. Utah June 4, 2015).

[95]Doc. No. 127, pp. 11-12.

Unambiguous authority permits a plaintiff to allege violation of statute or regulation to show a defendant's improper means of interference. Nothing in Utah law has limited this to statutes or regulations which provide a private right of action. The authority cited by the district court is wholly unrelated to tortious interference claims.[96] Those cases stand solely for the proposition a party may not sue for breach of statute or regulation which does not provide a private right of action.

The body shops have not asserted breach of any statute or regulation as a cause of action. They have asserted a claim for tortious interference and supported it with allegations the insurers violated specific authority in support of the improper means element of the claim. This is exactly what Utah law allows the body shops to do.

The district court thus dismissed the state law claim for doing exactly what state law authorizes them to do, and for following its own order. Appellants submit this constitutes clear error. It was further clear error for the district court to adopt the defendants' motion arguments.

V. REASSIGNMENT

[96]It is noteworthy that for this conclusion, the district court not only adopted in whole the arguments of defense counsel, it adopted defense counsel's inapplicable authority, as well.

If the Court remands this case, the body shops respectfully request reassignment to a different judge. Appellants understand reassignment is an extraordinary measure. However, the history of this and related cases warrants it.

Three factors inform the decision to reassign a case on remand: (1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to the gains realized from reassignment. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997). "The first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge[.]" *Juicy Whip, Inc. v. Orange Bang, Inc.*, 382 F.3d 1367, 1371 (Fed. Cir. 2004).

The district court has repeatedly shown it is unwilling to set aside its previous rulings, except when doing so provides support for a new dismissal order, though doing so violates the law of the case.

It has refused to retreat from its position that success is an element of group boycotting. It has dismissed multiple direct admissions of price fixing as merely vague and complained the body shops did not include evidentiary support.

It has repeatedly created conflicting, impossible pleading requirements and threatened sanctions in the process.

It has repeatedly created new elements of state law or altered existing ones, or simply ignored state law altogether. It has supplanted state law completely for Florida law it favors.

It has consistently disregarded facts set forth in the complaint, recharacterized facts to suit its dismissal findings, made prohibited factual and credibility determinations and accepted the motion arguments and alternative facts proffered by insurers over the facts alleged in the complaint. It has applied affirmative defenses which contradict the allegations of the complaint.

It has done all of these things repeatedly.

A district judge's adamance in making erroneous rulings may justify reassignment. *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986). The body shops have repeatedly brought to the district court's attention the errors and pleading conflicts it created, complete with binding authority prohibiting the rulings it has made. However, the district court has refused to even acknowledge problems, despite multiple opportunities to do so, and continues to make the exact same errors.

The sheer tenacity with which the district court clings to its rulings, even in the face of contradictory authority, including its own prior orders, casts significant doubt upon the district court's ability to impartially adjudicate this case. That it also refuses

to even acknowledge the problems it has created emphasizes the appearance of partiality.

This history establishes that no matter what the body shops put in a complaint, the district court intends to dismiss. Where a reasonable person would question the trial judge's impartiality, reassignment is appropriate. *United States v. White*, 846 F.2d 678, 695 (11th Cir. 1988).

The body shops submit the court's repeated and ongoing indifference to the problems and errors meets the first and second factors for reassignment.

Despite the passage of over two years, this case is no further forward than the day it was assigned to the district court. It is, in the words of this Court, stalemated, due to the district court's intransigence. *Id.*

Given the above, the Appellants respectfully submit reassignment to another judge in the event of remand is necessary.

CONCLUSION

The district court erred repeatedly in imposing a heightened pleading standard and abandoning the mandatory requirements and parameters of Rule 12(b)(6) analysis. Had the proper analysis been conducted, the dismissals would not have

been granted. Appellants respectfully request this Court reverse the dismissal and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by local rule. The brief was prepared using Corel WordPerfect 7 and contains 13,998 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Allison P. Fry

ALLISON P. FRY

11 October 2016

CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of October, 2016, I electronically filed the Plaintiffs-Appellants brief with the Clerk of the Court. In addition, the original and six copies of the foregoing was filed with the Clerk of the Court via first class mail and an electronic version of the foregoing was sent via the Court's filing system or email to counsel of record.

/s/ Allison P. Fry

ALLISON P. FRY

APPENDIX

CERTIFICATE OF INTERESTED PERSONS

A.F. Collision Repair, Inc.

Allstate Fire & Casualty Insurance Company

Allstate Corporation (NYSE: ALL)

Allstate Insurance Company

Allstate Property and Casualty Insurance Company

American Family Mutual Insurance Company

Alpine Straightening Systems, d/b/a Alpine Body Shop

Alston & Bird, LLP

Anderson, Mark L.

B&B Auto Body & Paint, Inc.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Baker & Hostetler, LLP

Ballard Spahr LLP (UT)

Bear River Mutual Insurance Company

Belnap, Paul M.

Berkshire Hathaway Group (NYSE: BRK-A AND/OR BRK-B)

Black & Weintraub, PA

Bristol West Insurance Company

Caldwell, Lori J.

Carlton, Fields Jorden Burt, PA

Cashdan, Jeffrey S.

Chris Body & Paint, Inc.

Cole, Scott & Kissane, PA

Clark, Johanna W.

Coddington, Hicks & Danforth

Criser, Mark J.

Dave's Body Shop, Inc.

Dentons US LLP

Diamantas, Kyle A.

Eaves, Jr., John Arthur

Edelstein, Lara Judith

Eimer Stahl, LLP

English, Maralyn M.

Faegre Baker Daniels, LLP

Farm Bureau Property & Casualty Company

Farmers Insurance Exchange

Farmers Insurance Group, Inc.

FBL Financial Group, Inc.

Fenton, Richard L.

Fields, Jared C.

Fischer, Ian Matthew

Fry, Allison P.

GEICO General Insurance Company

Goldfine, Dan W.

Grabel, Joshua

Griffith, Jr., Steven F.

Halavais, Jamie L.

Hall, Matthew F.

Hanover, Mark L.

Helmer, Elizabeth

Hill Ward Henderson, PA

Hochstadt, Eric

Huefner, Carl F.

Hurley, Ryan Michael

J.P.'s Custom Body & Paint, Inc., d/b/a J.P.’s Collision Center

Jenkins, Sarah

Jenson Enterprises, Inc.

John Arthur Eaves, Attorneys at Law

Kaye, Anthony C.

Kenny, Michael P.

King & Spalding, LLP

Kipp & Christian, PC

Kissane, Joseph T.

Koch, Amelia W.

Kochis, Kymberly

Lau, Bonnie

Lewis Roca Rothgerber Christie, LLP

Liberty Mutual Fire Insurance Company

Liberty Mutual Holding Company, Inc.

Lindon Collision Center L.L.C.

Litchford, Hal Kemp

Loveland, Richard Wardell

Mastando, III, John

McCarthy, Michael Sean

McCluggage, Michael L.

Mid-Century Insurance Company

Moscon, D. Matthew

Mumford, Michael E.

Newton, Emily

Nelson, Michael R.

Nolan, Francis X.

Nuffer, David (Honorable)

Osborn, Kathy Lynn

Perks Auto Repair, Inc.

Perkins, Heather Carson

Powers, Tiffany L.

Presnell, Gregory (Honorable)

Progressive Classic Insurance Company

Progressive Corp. (The) (NYSE: PGR)

Progressive Direct Insurance Company

Pruyn, Robert Reed

R. Reed Pruyn, Attorney at Law

Rumberger, Kirk & Caldwell, P.A.

Safeco Insurance Company of America

Sanders, Gregory J.

Shurman, Lauren A.

Shurtleff Law Firm

Shurtleff, Mark L.

Smith, Thomas (Honorable)

Snow, Christensen & Martineau

State Farm Mutual Automobile Insurance Company

Stoel Rives (UT)

Strong & Hanni

Stroud, S. Shane

Sorenson, Amy F.

Snell & Wilmer, LLP

Suitter Axland

Susz, Paul E.

Sutherland, Asbill & Brennan, LLP

Trentadue, Jesse C.

United Automobile Insurance Company

United Insurance Company d/b/a United Insurance Group

United Services Automobile Association

USAA Casualty Insurance Company

Vargo, Ernest E.

Warner, Paul M. (Honorable)

Wegener, Emily L.

Weil, Gotshal & Manges, LLP

Western United Insurance Company d/b/a AAA Insurance

Yohai, David L.