No. 16-13596-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13596-AA

AUTOMOTIVE ALIGNMENT & BODY SERVICE, INC., et al.

Plaintiffs - Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Defendants - Appellees.

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

BRIEF FOR AUTOMOTIVE ALIGNMENT & BODY SERVICE, INC., 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 Southern District of Mississippi, Jackson 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, and issued contradictory orders effectively leaving Appellants no way to plead.

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

3. The district court abused its discretion in denying Appellants' Motion to Reconsider.

STATEMENT OF THE CASE

Each Appellant is a professional repairer of auto physical damage, i.e., body shops. Appellees are auto insurers, all of which sell policies and service claims of insureds and third-party claimants within the State of Mississippi.

Appellants initiated litigation alleging price fixing and boycotting in violation of 15 U.S.C. § 1. Appellants additionally asserted several state law causes of action, including tortious interference with business relations ("tortious interference"), quantum meruit and violation of Mississippi Code § 83-11-501.

The federal and state law claims arise from the same set of underlying facts. The body shops have posted labor rates, which vary depending upon the type of labor being performed, i.e., body labor, refinish labor, and so forth. In performing repairs, body shops use large quantities of replacement parts as well as paint and materials.

The current litigation is not the first in which insurers have fixed prices and conducted retaliatory boycotts against body shops. In 1963, the Department of Justice brought suit against the three major insurance trade associations in *United States v. Association of Casualty and Surety Companies*,[1] alleging price fixing and boycotting violations of 15 U.S.C. § 1. This resulted in entry of a consent degree which enjoined, in perpetuity: (1) directing, advising or otherwise suggesting that any

[1]Docket No. 3106, in the Southern District of New York.

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.

Despite this, after a period of apparent dormancy, Appellees formed an agreement to uniformly enforce a fixed labor rate ceiling, what they termed the "market rate" for a "market area." The "market rate" bears no relation to the actual rates charged by Appellants or the industry at large, but once imposed it does not vary. No Appellee has ever defined a "market area" nor do they conduct any form of market analysis to superficially justify the imposition of price ceilings, save one.

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 fabricated, the labor rates are manipulated and its calculation methodology, what it calls "half plus one," lacks any statistical or mathematical validity. Further, a State Farm representative has admitted the "market rate" is a sham, that State Farm simply decides what the rate is going to be and labels it "market rate." The details of State

Farm's "half plus one" method are set forth in the complaint.[2]

Though State Farm does not publish or otherwise make publicly available its survey, the other Appellees claim the same "market rate" as State Farm, despite conducting no market inquiry of their own. Various insurer representatives have admitted their labor rate is determined by State Farm and only alters when State Farm permits it.[3]

The Appellees uniformly refuse to pay for certain necessary repair elements. Appellants identified over sixty such processes and procedures for which the Appellees refuse to pay when they are required. Although necessary when performed, and such necessity is reflected in the industry-accepted database references which the insurers rely upon themselves, the insurers uniformly refuse and just as uniformly use the same false reasons for doing so.[4]

Though using the databases themselves, the Appellees refuse to abide by them consistently. They refuse to acknowledge the databases when it comes to "blackballed" procedures, but insist they are authoritative if a particular repair

[2]SAC, Doc. No. 87, ¶¶ 186-98.

[3]*Id.* at ¶¶ 137, 163, 164-86, 200-02, 207, 208.

[4]*Id.* at ¶¶ 227-259.

exceeds a database estimate. All of the Appellees employ this practice.[5]

Appellees compel use of salvaged or aftermarket parts. Professional repairers generally prefer OEM parts as the safest, highest quality replacement part. Aftermarket parts usually do not fit correctly, are constructed of inferior materials and compromise the safety of a vehicle in a subsequent collision. Salvage parts are stripped from totaled vehicles. Body shops have no way to determine the provenance of such parts, their quality, prior history or any other factor directly impacting the integrity of the part and thus the safety of the vehicle.[6]

Despite these known safety risks, Appellees insist on their use. If a body shop (or vehicle owner) 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 absorb the cost or render an incomplete or unsafe repair. All of the Appellees employ this practice.[7]

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, the Appellees commence a group boycotting of the

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[5] *Id.*

[6] *Id.* at ¶¶ 143, 161, 162, 278-286, 295, 296, 423.

[7] *Id.*

problem shop. In the industry, this boycotting is called "steering." When a consumer notifies an insurer that a "problem" shop has been selected for repair, the insurers steer the customers away to an insurer-preferred shop. This is accomplished by conveying false and misleading statements and misrepresentations about the quality, cost and integrity of the boycotted shop's work, or falsely telling the consumer they are not permitted to utilize the selected shop, and exerting economic coercion on consumers threatening substantial financial impact if they persist in using a Plaintiff's shop.

A detailed description of the false, misleading and coercive statements the insurers convey is included in the complaint.[8]

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

[8] *Id.* at ¶¶ 298-302.

PROCEDURAL BACKGROUND

Appellants filed their complaint on January 7, 2014, in the United States District Court for the Southern District of Mississippi, Northern Division–Jackson. The cause was transferred to the Middle District of Florida as part of MDL No. 2557 and assigned Cause No. 6:14-cv-6000.

Over the next two years, Appellees filed multiple motions to dismiss. The complaint was amended once for content per order of the district court issued January 21, 2015. The complaint was amended once to add and delete parties as authorized by order issued by the Middle District of Florida following the initial MDL conference held Sept. 11, 2014.

The Second Amended Complaint ("SAC") was filed March 21, 2015. Following multiple motions to dismiss, the Magistrate issued a Report and Recommendation of dismissal of all claims on February 17, 2016. The district court adopted the recommendation as to the federal claims on February 22, 2016.

A Motion to Reconsider dismissal of the federal antitrust claims which was denied by the district court on May 12, 2016.

Appellants filed an objection to the Report and Recommendation as to the state law claims. The cause was dismissed by order of the district court on May 27, 2016, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Appeal to the Eleventh Circuit of Appeals was subsequently perfected.

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 and heightened pleading standard in dismissing Appellants' complaint, a standard substantially higher than that set forth by the Federal Rules of Civil Procedure and explained by the United States Supreme Court. The district court improperly breached its obligations and duties by adopting the arguments of Appellees set out in their various motions to dismiss, disregarding or discrediting facts alleged in the complaint, mischaracterizing factual allegations as conclusory statements, applying affirmative defenses to causes of action, and requiring Appellants to plead specific facts beyond that required by Rule 8 of the Federal Rules of Civil Procedure.

The district court further erred by creating new elements for state law causes of action, ignoring or modifying elements of state law causes of action which do exist, ignoring state authority which contradicts the court's ruling, making dispositive conclusions which are specifically reserved to the jury, making conclusions which nullify corollary state law, and drawing dispositive factual conclusions contradicted by the facts of the complaints.

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

Throughout the Report and Recommendation("Report"), the dismissal order ("Order") and the order denying reconsideration, the court below candidly admitted it was disregarding facts alleged in the complaint because it did not believe them. It also repeatedly chose alternative facts and explanations proffered in motions to dismiss, doing so both explicitly and by necessary inference. Because this occurs repeatedly for all causes, Appellant body shops separate this matter into a single argument so as 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).

The district court is not permitted to weigh the persuasiveness of the facts alleged, nor dismiss a complaint if it does not present a more compelling set of facts than that argued by defendants. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010). Doing so is reversible error as it"turns the standard for considering a Federal Rule of Civil Procedure 12(b)(6) motion on its head." *Renfroe,* 822 F.3d at 1245.

The court may only disregard facts when they are facially delusory or so fantastical as to be detached from reality. The bar to qualify for this is set extremely 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). See also, *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").

Examples of alleged facts fitting this description include bizarre government conspiracy theories, allegations of government manipulations of plaintiff's will or mind, or supernatural intervention. *Guthrie v. U.S. Gov't*, 618 F. App'x 612, 617 (11th Cir. 2015), or claims of implantation of devices by unknown government agents or similar bodily manipulation (*Williams v. Karf*, 2010 WL 5624650 (S.D. Ga. Dec. 20, 2010), report and recommendation adopted sub nom. *Williams v. Karpf*, 2011 WL 201770 (S.D. Ga. Jan. 19, 2011).

Thus, it is insufficient for a district court to not be "persuaded" by the facts alleged, *Neitzke,* 490 U.S. at 327; they must be so devoid of reality as to make them facially irrational. This is the difference between a fact not being believed, and a fact not being believable.

Given the repeated findings a particular fact or facts were "not plausible" or the court was "not persuaded" by them, the district court appears to have proceeded on the assumption it may subjectively decide whether individual facts were "plausible," instead of whether the cause of action was plausibly alleged assuming all facts to be true.

By the same token, it was error for the court to implicitly reject non-delusory facts by ignoring them, refusing or omitting to draw favorable inferences from them or adopting contradictory facts alleged by Appellees.

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). Thus the mandatory requirement that facts alleged be accepted as true and an extremely high bar to clear to disregard them.

As discussed below, the facts alleged in the SAC do not even arguably meet the exceptionally high standard required for the district court was permitted to disbelieve or disregard them. Doing so constitutes reversible error.

II. FEDERAL CLAIMS

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

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) 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.*

Unfortunately, this caused some courts to believe a heightened pleading standard applies to antitrust cases. Circuits which have addressed the issue directly, including this one, recognize no such heightened pleading standard exists, either generally or specific to antitrust claims. *Nettles,* 415 Fed. Appx. at 121.

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

A. Price Fixing

The Sherman Act makes illegal any combination or conspiracy in restraint of trade. 15 U.S.C. § 1. This prohibition includes agreements to fix the prices of goods or services. Agreements between ostensible competitors are referred to as horizontal price fixing. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Price fixing agreements are deemed so pernicious that no additional analysis is required–once a horizontal price fixing agreement has been found, it is per se a violation of the Sherman Act. *State Oil Co. v. Khan*, 522 U.S. 3, 11 (1997).

It is irrelevant whether the agreement is to fix maximum or minimum prices. Both "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)(overruled on other grounds).

A horizontal price-fixing agreement 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).

In dismissing the antitrust claims, the district court adopted the reasoning set forth in a companion case, *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co., et al*, 2015 WL 304048, (M.D. Fla. Jan. 21, 2015).

In that order, the district court ruled no facts had been pled which suggested anything more than independent businesses acting in parallel out of their own economic self interest. *Id.* at *10. Per the district court, the complaint failed to create a context suggesting the existence of an agreement, merely described businesses exercising their right to do business, or not, with whomever they please and were doing so in a manner that just happens to be identical. *Id.* at *11.

Respectfully, the only manner in which the district court could have reached these conclusions was to disregard the relevant pleading standard, the SAC's facts and substantive state law which conditions the defendant insurers' business activities.

The context in this case is unique. It is not a traditional buyer-seller transaction. While the body shops are the sellers, the defendant insurers are not the buyers, consumers are. The insurers' role is that of payor only.

Mississippi Code § 83-11-501 reserves to consumers the right of choice of repairer. An insurer is affirmatively prohibited from conditioning payment of repair

costs upon use of an insurer-preferred repairer. *Id.* Thus, when a consumer selects a plaintiff's body shop to perform repairs, the defendant insurers may not refuse to perform their payment obligations. They do not, as the district court held, have the right to refuse to do business with the body shops.

While state law does not alter federal law, it does necessarily alter the context in which the insurers' conduct must be viewed. The ordinary rules upon which the district court relied do not apply. The district court commenced its contextual landscape analysis looking in the wrong direction.

The SAC included the following facts:

- All of the Defendants claim to pay the "market rate." SAC, Doc. No. 87, ¶¶ 137, 163.
- None of the Defendants save State Farm perform any review of "the market." *Id.* at ¶¶ 164-74, 202, 207, 208.
- The "survey" conducted by State Farm does not reflect the labor rates actually charged by body shops, is consistently lower than the labor rates actually charged by body shops, and is identical throughout the State of Mississippi, though body shop rates show expected variability. *Id.* at ¶¶ 203-206.
- The "survey" conducted by State Farm uses falsified data, an analysis methodology devoid of mathematical or statistical validity and produces a fabricated result. *Id.* at ¶¶ 175-97, 220-21.
- State Farm claims it does not share the results of its "survey." *Id.* at ¶¶ 174-75, 186, 200-201.

- The Defendants all pay the same "market rate," which is identical to the fabricated State Farm "market rate," without ever performing any rate analysis. *Id.* at ¶¶ 164-74, 202, 207.

- A USAA representative has admitted State Farm actually does circulate its survey results to other insurers which then apply the State Farm-determined "market rate." *Id.* at ¶¶ 182, 186.

- Representatives of the Defendants have specifically linked their "market rate" to that of State Farm, asserting they are restrained from altering their rate unless and until State Farm permits, regardless of what body shop rates actually are. *Id*. at ¶¶ 176-185.

- When State Farm alters its "market rate," all other Defendants alter their market rate to State Farm's, including downward adjustments even though body shops have not lowered their rates. *Id.* at ¶¶ 199, 213-216.

- All the Defendants utilize the same false reasons for refusing to honor posted labor rates, i.e., "you're the only one who wants a higher labor rate" when it is known multiple body shops have increased labor rates. This is accompanied by threats of legal problems if the body shops discuss their own publicly posted rates with each other.
Id. at ¶¶ 223-24.

- The Defendants routinely compel or attempt to compel use of salvage or imitation parts which are unsafe or inappropriate though insurance representatives have publicly acknowledged the safety issues these raise. *Id.* at ¶¶ 143, 161, 162, 278-286, 295, 296.

- The majority of named defendants are known investors of equity group, BlackRock, which owns a substantial amount of stock in LKQ, Inc., and its subsidiary, Keystone, vendors of aftermarket and salvage parts. *Id.* at ¶ 420.

- The Defendants compel or attempt to compel body shops to purchase replacement parts from or through LKQ and/or Keystone. *Id.* at ¶¶ 421.

- When Plaintiffs refuse to use unsafe or inappropriate salvage or imitation parts, the Defendants refuse to pay for appropriate parts but only pay the amount for which the unsafe or inappropriate part could have been purchased. *Id.* at ¶¶ 162, 423.

- Defendants routinely refuse to pay or pay in full for the same processes and procedures required to return a vehicle to its pre-accident condition. *Id.* at ¶¶ 227-28, 249-50,

- Defendants refuse to pay or pay in full for the same processes and procedures in contravention of body shop industry labor databases which the Defendants themselves use and State Farm has promised to abide by but does not. *Id.* at ¶¶ 227-259.

- Defendants all use the same false reasons for refusing to honor the database estimates, i.e., "you're the only one charging for that" when it is known multiple body shops charge for a particular process or procedure. *Id.*

Several months after filing the SAC, the body shops developed direct evidence of price fixing. A Progressive representative admitted insurance companies fix body shop labor rates; that body shops have no affect on their own labor rates; that insurance companies get together at big meetings to decide what body shop labor rates will be, and even identified when the next meeting was scheduled to occur. See Motion to Reconsider, Doc. No. 120, pg. 2-3.

Also, a State Farm representative admitted State Farm intentionally fixes and suppresses labor rates, that the survey is a sham and merely used to publicly justify its intentional price fixing. *Id.*

After the district court ordered dismissal of the SAC, the body shops filed a motion to reconsider, providing the direct admissions of price fixing that did not exist at the time the SAC was filed. The district court decided these admissions were vague and conclusory and denied the motion (see below).

While the timing could have been more convenient, in the end the district court had before it two direct admissions of price fixing from two different defendants and substantial circumstantial facts supporting those admissions.

Despite this, the district court continued to rely upon its finding the body shops had failed to plausibly suggest the existence of an agreement to fix prices. See Order, Doc. No. 129.

Where there exists direct evidence of price fixing, a plaintiff need not offer circumstantial evidence of parallel conduct to defeat summary judgment. *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3rd Cir. 2010)(citing *Twombly*, 550 U.S. at 564)). The requirements to defeat a 12(b)(6) motion to dismiss are substantially lower than summary judgment.

In this case, the body shops provided not only direct admissions of price fixing, but substantial facts supportive of "plus factors," facts suggesting the existence of an agreement where defendants display parallel conduct.

There is no finite list of plus factors, as this varies with the facts of a case. The Supreme Court identified as a plus factor parallel 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. *Twombly,* 550 U.S. at 557, FN 4.

Other courts have identified as plus factors: (1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether the defendants have a common motive to conspire. *Re/Max Int'l, Inc. v. Realty One, Inc.,* 173 F.3d 995, 1009 (6th Cir. 1999).

The sharing of information by competitors has been characterized as a "super plus factor" to be weighted most heavily in favor of finding collusion. William E. Kovacic, PLUS FACTORS AND AGREEMENT IN ANTITRUST LAW, Vol. 110:393, Mich. Law Rev. (December 2011).

There is no set number of plus factors a complaint must include to be considered adequate. A single plus factor may be sufficient. The district court

concluded the SAC did not contain any plus factors. However, this is demonstrably inaccurate.

It is unlikely all of the named defendants independently and by coincidence created an identical "market rate" which conflicts with and is consistently lower than actual body shop rates, even though none save State Farm even conduct a pro form determination of the market. State Farm's "survey" is fabricated and a witness has confirmed it is a sham, intended to publicly justify the fixing of body shop prices, while another witness has confirmed State Farm circulates its survey to the other insurers. Given these facts, it is unlikely the insurers' conduct is the result of coincidence or lack of agreement.

It is unlikely all of the insurers coincidentally and independently devised an identical list of repair processes and procedures they will not pay for, the same false excuses for refusing payment, while knowing those excuses contradict repair standards and industry-accepted references. It is far more likely the uniformity of action and justification for action was the result of sharing information and agreement.

Representatives of various insurers have repeatedly stated they are restricted from altering the purported "market rate" unless and until authorized by State Farm.

Requiring permission from a competitor to set company procedures is behavior indicative of restricted freedom and fidelity to a pre-existing agreement.

The insurers adhere to the artificial State Farm-created "market rate" over the course of years, change in uniformity with each other, adhere to the same set of "no pay" processes and procedures, for identical articulated reasons, though those reasons are contradicted by reality.

The Appellees are motivated by the shared motive to maximize profits, which rise into the billions of dollars.

The identical labor rates, identical refusal to compensate for the same processes and procedures, identical false excuses for such refusal, uniform adherence to the refusal to alter labor rates until State Farm does is indicative of shared information and agreement overall, including the identical language used in refusing payment for repair services (a "script"). Additionally, industry representatives have admitted to exchanging information relative to price fixing and that this occurs at regular meetings of the insurance industry.

The Defendants belong to multiple trade associations and organization which meet regularly, both internally and with each other, providing substantial opportunity to conspire. A Progressive representative has stated this is actually what occurs.

The district court ignored all of these facts, which fit squarely within several identified categories of plus factors. Individually, each fact is arguably insufficient to carry the day. However, the district court was obligated to view not individual facts, but the entirety of the complaint. "[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 699 (1962)(abrogated by statute on other grounds).

The SAC describes conduct considered the hallmarks of price fixing by the U.S. Department of Justice ("DOJ"). Per the DOJ, examples of behavior indicating price-fixing agreements include holding prices firm, and adopting a standard formula for computing prices.[9]

The allegations of the SAC set out facts meeting these hallmarks. Not only does the SAC allege insurers have held body shop labor rates at a fixed ceiling, the SAC alleges tacit admissions of agreement to keep the fixed ceiling in place,

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

requiring State Farm's permission. This indirect evidence is substantiated by the direct admissions of price fixing.

The SAC further sets out the factual indicators of an agreed-upon standard formula for fixing prices on parts, paint and materials. While the cost of repairs varies from one repair to another, the defendant insurers nonetheless utilize a standard common formula for determining what will and will not be compensated. The defendant insurers uniformly refuse to pay for more than salvage or aftermarket parts, even when that is not the part used; the appellees refuse to pay more than the fixed ceiling for paint and materials. The defendant insurers uniformly refuse to pay for identical processes and procedures, for the same articulated reasons, though necessary.

In the absence of an agreement, there should be variability. No two vehicles wreck the same. At least some of the Appellees should find a pinch weld necessary following a frame repair every now and again, for instance.[10] The estimates written by the Appellees, however, are astonishingly uniform. Given the individuality of each repair, the district court should have given the uniformity of estimates some consideration in analyzing context. However, based upon the ruling, the district court gave this no consideration at all.

[10]See Exhibit "2" to the SAC, Doc. No. 87.

The DOJ has further warned collusion may occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are "fringe" sellers with a small market share.[11] That is precisely the current setting. The vast majority of named defendants are subsidiaries or affiliates of each other, not independent companies. This minority controls seventy-five percent of the private passenger market in the state of Mississippi.[12]

The economic realities of the parties and the economic power the Appellees hold over body shops should have contributed to the district court's analysis of context. However, based upon the ruling, the district court gave this no consideration at all.

Additionally, insurers fixing body shop rates has happened before. As described above, insurers are subject to a consent decree which prohibits them from engaging in conduct described in the SAC.[13] The decree is binding upon the three major trade associations and their member companies in perpetuity, and the defendant insurers are members of one or more of those trade associations.[14]

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

[12]See Exhibit "1" to the SAC, Doc. No. 87.

[13]See, Exhibit "3" to the SAC, Doc. No. 87.

[14]SAC, Doc. No. 87, ¶¶ 373-78.

That identical antitrust violations have occurred before, in the very same industries and involving the very same prohibited practices should have contributed to the district court's analysis of context. However, the district court specifically stated it found the consent decree irrelevant. *A & E Auto Body, Inc*., 2015 WL 304048, at *2.

Viewed holistically, the facts plausibly suggest the existence of an agreement to fix prices. It is difficult to imagine what facts the district court would deem sufficient if direct admissions of price fixing, plus factors (including a "super plus factor"), conduct considered the hallmarks of price fixing and a prior history is considered not enough.

It is apparent the district court has applied an incorrect pleading standard far in excess of Rule 8's notice pleading and more akin to that of criminal law's beyond a reasonable doubt. Appellants respectfully submit the trial court erred in dismissing the price fixing claim.

B. Boycotting

The District Court disregarded nearly all of the facts asserted within the SAC relevant to Appellants' claim for boycotting and imposed an incorrect pleading standard

In addition to price fixing, the Sherman Act prohibits group boycotting. 15 U.S.C. § 1. Like price fixing, horizontal group boycotting is a *per se* violation of the

Sherman Act. *Nynex Corp. v. Discon*, 525 U.S. 128, 135 (1998)(defining a horizontal boycott as an agreement among direct competitors). It is deemed so detrimental to competition and free enterprise that anticompetitive effect is presumed. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290 (1985).

"Boycott" refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978).

All a plaintiff need show to prevail on the claim is the existence of a horizontal arrangement between the defendants to jointly participate in the boycott. *NYNEX Corp,* 525 U.S. at 136.

The district court's analysis of Appellants' boycotting claim was very slim. It found all the body shops really asserted was the insurers "badmouthed" them, producing no evidence of a concerted refusal to deal. *A & E Auto Body, Inc*., 2015 WL 304048, at *12 .

Again, this conclusion could only be reached if the district court ignored the facts asserted in the SAC and the reasonable inferences to be drawn from them. The SAC included the following facts:

- The choice of body shop belongs solely to the consumer; Defendants are not permitted to make repair payments contingent upon use of insurer-preferred body shops. SAC, Doc. No. 87, ¶¶ 486, 505-06.

- The Plaintiff body shops are targeted by the insurers as punishment for refusing to quietly comply with Defendants' fixed prices. *Id*. at ¶¶ 298-99.

- As the insurers refuse to pay any more than their unilaterally determined fixed amount regardless of where repairs are performed, steering customers to insurer-preferred shops serves no purpose but to harm the non-compliant plaintiff shops. *Id*. at ¶¶ 324-26.

- Defendants effect punishment by steering away customers who have verbalized the intention of conducting business with the Plaintiffs by knowingly conveying false and misleading statements impugning the quality, cost and integrity of Plaintiffs' work as well as exerting economic coercion upon the customers. *Id*. at ¶¶ 298, 299, 303-321, 507.

- All of the Defendants utilize the same script containing identical false and misleading steering statements and threats of economic consequences. *Id.*

- Defendants withhold known information their preferred shops perform poor repairs while actively defaming plaintiffs. *Id.* at ¶¶ 362-66.

- Commencement of boycotting is linked to identifiable events, such as refusal to comply with fixed prices or disassociation from an insurer's 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. This is not limited to the insurer the "problem" shop has presumably angered but all named insurers. *Id.* at ¶¶ 353-361.

The district court decided all of these facts merely constitute "badmouthing" and dismissed the claim, concluding the shops did not even allege the insurers had

ever refused to allow a consumer to do business with Appellants or refused to pay for repairs performed by an Appellant. However, the SAC alleges the opposite.

Further, the body shops are not required to allege these things. It is the agreement itself to restrain trade that constitutes a violation of the Sherman Act, not whether or not the agreement is successful. See *Brooke Group v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 251 (1993).

Federal jury instructions incorporate this principle: "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 irrelevant whether the insurers are successful in every attempt to boycott, or whether each such event requires use of the full panoply of Appellees' boycotting arsenal. This is necessarily dependent upon the subjective fortitude of a given consumer to withstand the pressure.

But the district court's reliance upon instances of failed boycotting indicates strongly the facts alleged were not credited with truth, and that the court believed

success a necessary element of a boycotting claim. The district court clearly believed some other set of facts plausibly explained insurers' conduct. However, the district court was not free to make that sort of judgment. *Swanson,* 614 F.3d at 404.

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

Utilizing the same script is also indicative of information sharing, an agreement on formulating the most effective set of statements to utilize, and unity of action by the Appellees.

The Appellees further utilize the same set of economic pressure and threats against consumers to compel or attempt to compel them away from Appellants' businesses. The SAC further alleges a common goal, punishment for noncompliance.

It also appears the district court read the boycotting allegations not only as discrete facts but in isolation from the remaining complaint. The Appellees' actions in fixing prices is part and parcel of the boycotting environment, as it supports the motive for boycotting. Again, the only manner in which the district court could find

context lacking is if it simply chose to disbelieve the facts asserted and thereafter refused to draw inferences favorable to the body shops.

The facts set out in the SAC more than sufficiently set forth a plausible basis that Appellees have entered an agreement and acted in furtherance of a common goal or plan. The district court's dismissal of this claim was error.

III. STATE LAW CLAIMS

A. Quantum Meruit

1. Reasonable expectation of payment

The district court dismissed the quantum meruit claim entirely upon the finding that because the body shops knew the defendant insurers would default on their obligation to pay, the shops had no reasonable expectation of payment. This conclusion breaches multiple points of state law and the court's nondiscretionary analysis obligations.

Quantum meruit is an equitable remedy protecting the interests of persons performing service or providing materials, ensuring proper payment of value. *Reed v. Weathers Refrigeration & Air Conditioning, Inc*., 759 So. 2d 521, 525 (Miss. Ct. App. 2000).

"Reasonable expectation of payment," however, is not one of the four elements of a quantum meruit claim under Mississippi law; instead, it has been described as a

pre-requisite to successful recovery. *Tupelo Redevelopment Agency,* 972 So. 2d at 514.

However, taking the statement at face value, statute provides the answer. Mississippi Code § 83-11-501 prohibits an insurer from making payment for repairs contingent upon a consumer's use of an insurer-designated shop. The consumer gets to choose which shop performs repairs and the insurer may not refuse payment. As the SAC alleges the plaintiff body shops were the consumers' chosen repairer, it seems self-evident the body shops had a reasonable expectation of payment from the insurers–state law says they are required to make payment.

Though included in the SAC, the district court gave no consideration to this statute in determining whether the body shops had a reasonable expectation of payment. Even under analysis without reference to statute, the district court still erred.

The district court treated "reasonable expectation of payment" as an independent basis for dismissal separate from the articulated elements of the claim. However, diligent research has not disclosed a single reported case of any state court dismissing a quantum meruit claim that satisfactorily alleged the essential elements but was nonetheless defeated for lack of reasonable expectation of payment. By default, Mississippi courts treat sufficiently establishing the elements of the claim as

establishing a reasonable expectation of payment. See, e.g. *Tupelo Redevelopment Agency,* 972 So. 2d at 514-15, and *Williams v. Ellis*, 176 So. 3d 133, 138 (Miss. Ct. App. 2015).

Stated inversely, state courts find a plaintiff has failed to establish a reasonable expectation of payment when he fails to establish one or more essential elements of the claim. See, e.g., *Redd v. L &A Contracting Co.*, 151 So. 2d 205 (Miss. 1963). The court identified no such failure in the SAC.

The district court conditioned the body shops' expectation of payment upon the insurers' intent to pay. This, however, is backward. Compensation must be "expected" only in the sense the services rendered were not intended to be gratuitous. This has been the rule of law for over a century. *Gulf & S.I.R. Co. v. Magee Warehouse Co.*, 67 So. 648, 649 (1915). Thus, whether the plaintiff intended to work for fee or for free is the pivotal consideration.

A plaintiff's expectation of payment is rendered reasonable by showing (a) the defendant knew the work was being performed, and (b) circumstances reasonably notified the defendant sought to be charged that plaintiff expected to be paid by that person. *McLane Servs., Inc. v. Alstom Power, Inc.*, 2006 WL 1547364, at *5 (S.D. Miss. June 5, 2006).

Mississippi law is very clear in its allocation of intent and knowledge. The plaintiff must intend to charge for work performed; the defendant must know the work is being performed and know the plaintiff expects the defendant to pay for that work.

The SAC more than adequately alleged facts to meet these elements. The SAC alleged the body shops performed professional repairs, at the request of customers, and expected to be paid for their work (did not work gratuitously). It further alleged the defendant insurers were fully aware of the work being performed, were fully aware the body shops expected them to pay for the work, acknowledged that expectation was reasonable by making partial payment but failed and refused to make full payment. The SAC further alleged Mississippi statute prohibits the insurers from refusing to make payment. SAC, Doc. No. 87, ¶¶ 62-63, 65-66, 498-501, 505-06.

Instead of applying Mississippi law as established, the district court reversed I, concluding it was the defendants' lack of intent to pay and the plaintiffs knowledge the defendants would default which controls. Under the district court's interpretation, the plaintiff's intent and circumstances under which work was performed are meaningless as a matter of Mississippi law, a conclusion which directly contradicts well-established authority.

This error was compounded by the district court's violation of another well-established point of state law: Whether or not a plaintiff's expectation of compensation is reasonable is ordinarily a question of fact for the jury. This, too, has been the Mississippi rule of law for over a century. *Gulf & S.I.R. Co.*, 67 So. at 649.

More explicitly, when a plaintiff alleges he reasonably expected payment while the defendant alleges that expectation was not reasonable, a classic conflict of material fact has arisen which must be decided by a jury. *Glob. Mfg. & Eng'g, Inc. v. Duo-Dent Dental Implant Sys., Inc.,* 2006 WL 839539, at *2 (S.D. Miss. Mar. 28, 2006).

Additionally, whether or not the defendant insurers ever intended to make full payment or even notified a plaintiff of this intent is immaterial. Like other jurisdictions, Mississippi law analyzes whether a defendant should pay, not whether they intended to do so. Being told in advance of intent to default does not extinguish a quantum meruit claim. At most, it is one fact for a jury to consider in determining the equities. *Fourth Davis Island Land Co. v. Parker*, 469 So. 2d 516 (Miss. 1985).

This was exactly the case in *Fourth Davis Island Land Co.*, supra, and *Koval v. Koval*, 576 So. 2d 134, 137 (Miss. 1991). The Mississippi Supreme Court implicitly rejected the "I told you I wouldn't" justification, specifically stating quantum meruit is an obligation imposed by law, not the agreement of the parties.

See also, *Magnolia Fed. Sav. & Loan Ass'n v. Randal Craft Realty Co.*, 342 So. 2d 1308, 1312 (Miss. 1977)(restitution implied by law, not agreement of the parties).

Thus, a defendants' intentions, known or unknown, are irrelevant. Quantum meruit imposes the obligation to pay value, not merely what the defendant chooses. While a jury may ultimately decide an expectation was unreasonable, it is not something a plaintiff must establish conclusively in a complaint. *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1386 (11th Cir. 2010).

Foreknowledge of intent to default was the only point upon which the district court cited any Mississippi authority to substantiate its dismissal.[15] However, the case cited does not hold to the effect stated. *Lauderdale Cty. Sch. Dist. By & Through Bd. of Educ. v. Enter. Consol. Sch. Dist. By & Through Bd. of Educ*., 24 F.3d 671, 688 (5th Cir. 1994). First, the case was an appeal from entry of judgment; it was not a dismissal pursuant to Rule 12(b)(6). Second, the Fifth Circuit affirmed the trial court's factual finding the two separate quantum meruit claims did not warrant relief because common law relief had been displaced by statute for one, and the claiming party had slept on its known rights for fourteen years for the other. *Id*. at 688 and

[15]The Report did cite two other cases, one applying Georgia law, one applying Ohio law, neither of which apply to a claim under Mississippi law.

697. There was no ruling that knowledge of intent to default extinguished the claim as a matter of law as the district court indicated in its order.

Although *Lauderdale County* does not stand for the proposition purposed, it is not without value. It confirms that statute can and does inform the reasonableness of a party's expectation of payment. Where statute can eliminate the reasonable expectation, it can also provide it.

In passing on matters of state law, a district court is required to apply state law as the state has defined it. It is not free to create, alter, amend or otherwise modify it, even when the district court disagrees with the result. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-237 (U.S. 1940). Only when there is an absence of state authority, or recent holdings have signaled the state's highest court is departing from prior holdings may a district court do otherwise. *Id.* at 237.

The district court's holding substantially alters Mississippi quantum meruit law without authority. There is no void of authority, nor any basis for finding a likely departure from law well-established. The district court simply changed state law, from redefining allocation of intent and knowledge to eliminating jury determination of questions of fact. It is this last which leads to the next reversible error committed by the trial court.

In passing on a motion to dismiss, the district court was limited to a determination of whether the elements of the claim were adequately pled such that the defendants received fair notice of the claim and the grounds therefore. *Hunt v. Aimco Properties, L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016).

The district court was required to accept the factual allegations of the SAC as true and draw all inferences favorable to the plaintiffs. It was not permitted to ignore facts alleged in the complaint or draw inferences favorable to the defendants. *Nunez v. J.P. Morgan Chase Bank, N.A.*,2016 WL 1612832, at *3 (11th Cir. Apr. 22, 2016). Nor may the district court move beyond to weigh the facts, resolve factual questions, determine the merits of the claim, or the application of affirmative defenses. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (1990).

The district court determined the body shops' expectation of payment was unreasonable based solely upon the defendant insurers' motion arguments. It did so in spite of contradictory facts in the SAC. As this Court recently reminded, this constitutes reversible error; it does significant violence to the requirements of 12(b)(6) motion analysis. *Renfroe,* 822 F.3d at 1245.

The district court impermissibly disregarded and altered state law, and breached its nondiscretionary obligations in analyzing a 12(b)(6) motion to dismiss.

2. Amount of Payment

The court ruled that because the body shops knew the defendant insurers did not agree to make full payment, the shops had no reasonable expectation of "additional" payment and therefore no claim for quantum meruit. Report, Doc. No. 115, pg. 11-13. This conclusion violates multiple principles of established state law and federal pleading analysis.

The body shops asserted the defendant insurers refused all payment for multiple repair elements, the most common of which were set out in an exhibit to the SAC, and made only partial payment for others. The court's conclusion the body shops simply want more contradicts these allegations; it cannot reasonably be inferred the body shops just want more when the SAC states they have not received payment at all for a substantial portion of their work.

The district court further necessarily made the factual finding the body shops are not entitled to seek compensation above what the defendant insurers unilaterally "agreed" to pay. The district court cited no Mississippi authority for its conclusion. Indeed, no such authority exists for at least two reasons. The district court's reasoning necessarily concludes a party's unilateral decisions constitute an

agreement. This is incorrect. An agreement requires the willing consent of both parties.[16]

The SAC's contents belie any suggestion of willing agreement; the defendant's conduct was performed over protest and under threat and coercion. The court improperly drew negative inferences from the facts to reach this conclusion.

The conclusion violates Mississippi law, which holds the absence of agreement to pay a particular amount is required for a quantum meruit claim. *Giles v. Roadway Exp., Inc*., 529 F. Supp. 37, 39 (S.D. Miss. 1981). Had there been a payment agreement prior to commencement of work, the claim would be for breach of contract. *Matheney v. McClain*, 161 So. 2d 516, 520 (1964).[17]

In sum, the district court wholly ignored both specific state law, the equitable principles upon which restitution is founded and breached its obligations in passing on a motion to dismiss. Appellant body shops submit this was reversible error.

3. Alternatives

The district court supported its dismissal of the quantum meruit claim by finding the body shops had alternatives available but did not utilize, i.e., they could

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[16] A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. *Black's Law Dictionary* (10th ed. 2014).

[17] Indeed, the district court's ruling effectively eliminates quantum meruit as a cause of action under Mississippi law.

have negotiated better terms with the defendant insurers, or they could have refused the work if they didn't like the terms the insurers unilaterally determined to pay. The district court cited no authority for this premise. Report, Doc. No. 115, pg. 14.

This Court has already spoken to the issue. It is reversible error for a court to dismiss a claim based upon what a party theoretically should have or could have done differently. Doing so requires reliance upon hypothetical facts absent from the SAC and drawing inferences favorable to the defendants instead of the plaintiffs. The district court is prohibited from doing either of these in passing on a 12(b)(6) motion to dismiss. *Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 F. App'x 972, 977 (11th Cir. 2015).

The elements of quantum meruit do not require a plaintiff have exhausted all potential alternative options. Nor has diligent research located any authority that Mississippi law limits quantum meruit claims only to plaintiffs who lack alternatives.

In the present case, the error is unmistakable as the court did not merely hypothesize alternative facts where the SAC was silent, it hypothesized alternatives which are contradicted by the SAC and created an element of law unrecognized in the state.

The alternatives the court suggested were open to the body shops, bargaining and turning away the work, were neither legally required nor reasonable. With

respect to the former, quantum meruit does not require a plaintiff to have bargained or attempted to bargain before he may pursue any legal remedy, including quantum meruit. It is simply not an element of the claim any more than an exhaustion requirement is.

Factually, the SAC contradicts the court's conclusion bargaining was even possible. The SAC avers the insurers made payment on a take-it-or-leave-it basis, that protests regarding non-payment or under-payment produced nothing but economic coercion, duress, threats and retaliatory measures that the insurers were not interested in nor agreeable to paying anything but their own unilaterally determined amount. SAC, Doc. No. 87, ¶ 149. Mississippi law does not require a party pursue a futile act simply for the sake of form. *Knight v. McCain*, 531 So. 2d 590, 597 (Miss. 1988).

The SAC also does not support the court's conclusion the body shops could have simply refused the work. All of the named defendants engage in the described behavior. They control over seventy five percent (75%) of the private passenger auto insurance market within the state and exert considerable influence over where consumers have their cars repaired. The SAC further sets out the vast majority (75-90%) of body shop customers are insurance-paying customers. SAC, Doc. No. 87, ¶¶ 74, 77, 148.

The "reasonable" alternative the district court found to exist meant the body shops would have to turn away at least three-quarters of their business, an action which would very quickly lead to the shop's closure. SAC, Doc. No. 87, ¶ 148. Appellant body shops respectfully submit bankruptcy is not a reasonable alternative.

The errors committed by the district court are many. Collectively, they are overwhelming. The district court abandoned its nondiscretionary obligations by ignoring or actively refusing the facts alleged in the SAC, adopting defendant insurers' justifications in whole, and creating hypothetical facts to support inferences which favor the defendant insurers. The district court ignored, altered or amended well-settled state law to justify its dismissal. Appellant body shops respectfully submit the dismissal with prejudice of the quantum meruit claim should be reversed.

B. AFFIRMATIVE DEFENSES

The Report concluded the defendant insurers' consistent course of conduct in refusing to make full payment for repairs was sufficient to defeat the quantum meruit claim. Report, Doc. No. 115, pg. 11-13.

In response to body shops' objection Report improperly applied affirmative defenses, either waiver or estoppel, the district court denied application of any affirmative defenses occurred, the shops had simply failed to prove their expectation

of payment reasonable. That was all the discussion the district court afforded the subject. Order, Doc. No. 130, pg. 5-6.

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).

The SAC alleges the body shops performed work for which the defendants are obligated to make payment but failed to properly do so. Mississippi statute affirmatively requires insurers to pay for repairs at the shop of the consumer's choice. The proposition that defendants' course of conduct excuses them from liability is clearly a justification for their conduct. It is contrary to the allegations of the SAC and state law and appears only in the defendant insurers' motion arguments as justification for their actions. By definition, that justification constitutes an affirmative defense.

Thus, the district court's conclusion no affirmative defense was applied is clearly incorrect. What remains is the question of whether application of affirmative defenses was justified. The SAC's contents and Mississippi law show it was not. That Appellees have acted consistently over time is wholly insufficient for a

conclusion their conduct is legally excused. It merely shows the Appellants have considerable damages.

Mississippi substantive law of equity precludes a defendant from relying upon his own misconduct to avoid liability. *Delta Const. Co. of Jackson v. City of Jackson*, 198 So. 2d 592, 600 (Miss. 1967). *See also, Lancaster v. City of Columbus*, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971).

Ordinarily, a motion to dismiss may not be decided upon an affirmative defense, specifically because the trial court is required to accept the factual allegations of the complaint as true; a plaintiff is not required to negate an anticipated affirmative defense in a complaint. *Twin City Fire Ins. Co,* 609 Fed. Appx. at 976-77. Only if the existence of an affirmative defense plainly and conclusively appears on the face of the complaint may dismissal even be considered. *Id.*

The trial court may not, however, draw negative inferences, assume facts or hypothesize scenarios to justify application of an affirmative defense. *Id*. at 977-78.

Nor may a court analyze the complaint without reference to applicable law. Appellants submit if state law forbids legal justification for an act, the court abuses its discretion by dismissing on that basis anyway.

The body shops argued the court de facto applied an affirmative defense of either waiver or estoppel to allow the defendant insurers to avoid liability based upon

course of conduct. Which of these affirmative defenses or some other affirmative defense is unknown but it is clear the court avoided liability on behalf of the defendants in direct contradiction of the SAC's contents and in direct violation of state law. As a defendant bears the burden of pleading and proving affirmative defenses, *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), it was reversible error for the district court to dismiss the claim on this basis.

TORTIOUS INTERFERENCE

The body shops asserted a claim for tortious interference with business relations. The SAC alleged the defendants engaged in malicious conduct to steer customers away from plaintiffs' shops. When a consumer notifies a defendant insurer of intent to do business with a plaintiff body shop, the defendant insurers convey false and defamatory statements impugning the integrity, quality and professional nature of the body shops' work, exert economic coercion upon consumers, convey misrepresentations about coverage availability if a plaintiff shop is used for repairs, as well as misrepresent the insurers' obligations and availability of quality warranties if a plaintiffs' shop was used. Detailed examples of these false statements, misrepresentations and methods of coercive conduct appear in the SAC, Doc. No. 87, ¶¶ 298-302.

The Report identified four instances in which plaintiffs successfully pled a tortious interference claim. Otherwise, the Report found the allegations of tortious interference were generally implausible, conclusory, failed to assert enough facts to make individual claims plausible and improperly relied upon group pleading. Report, Doc. No. 115, pp. 7-11.

Without substantive discussion, the district court generally agreed. For the four instances of tortious interference the magistrate found adequately pled, the district court disagreed. Contrary to the Report, the order found the SAC failed to adequately allege any instances of tortious interference. Order, Doc. No. 130, pp. 2-5. In dismissing the claim, the district court made abundantly clear errors.

The court repeatedly misstated the contents of the SAC. Small errors of factual recitation would not ordinarily be sufficiently significant to warrant reversal. In this case, the errors were not small. The entire factual premise upon which the court rule was inaccurate.

The court quoted from the SAC alleging defendants' tortious conduct was motivated by intent to harm the plaintiffs as punishment for complaining about fixed prices and refusing to quietly submit to same. Order, Doc. No. 130, pg. 3.

After quoting the above, the court then inexplicably stated the SAC failed to allege the purpose of defendants' conduct was to punish the body shops for

complaining about fixed prices, and dismissed, in part for this alleged omission. *Id.* at pg. 4. The allegation the court holds to be both present and absent is most assuredly present in the SAC. See SAC, ¶¶ 68, 69, 131, 146, 149, 190, 298, 367 and 493.

Mississippi authority has already decided the question of whether the allegations sufficiently pled a claim a claim for tortious interference. In *Progressive Cas. Ins. v. All Care, Inc.*, 914 So. 2d 214 (Miss. Ct. App. 2005), the Court of Appeals ruled conveying false statements regarding a plaintiffs integrity, business ethics and qualifications was sufficient to support a finding of tortious interference.

In *Gasparrini v. Bredemeier*, 802 So. 2d 1062, 1067-68 (Miss. Ct. App. 2001), the Court of Appeals reversed summary judgment on a tortious interference claim in favor of the defendant where the defendant filed frivolous ethical complaints with licensing and ethics boards, and encouraged and aided others to send letters to the plaintiff's current and potential clients falsely stating the doctor was an unethical practitioner. In reviewing the elements of the claim, the court stated, " It goes without saying that letters sent to Gasparrini's employers, insinuating that he was an unethical psychologist, were intended to bring about one result, namely, to deter individuals and companies from employing Gasparrini." *Gasparrini v. Bredemeier,* 802 So. 2d 1062, 1067–?68 (Miss. Ct. App. 2001).

The facts alleged in the SAC not only mirror those in *All Care* and *Gasparrini,* but are arguably more severe, as the insurer defendants were not content with merely slandering the body shops, they also coerced the customers, threatening substantial economic consequences if the consumer persisted in having work performed by one of the plaintiff body shops. SAC, Doc. No. 87, ¶¶ 300-321.

The conduct described in the SAC clearly fall within the precedence established by *All Care* and *Gasparrini*. The district court's dismissal of the claim was clear error.

The ruling also reflects several other errors of state law. Tortious interference with business relations occurs when one engages in some act with a malicious intent to interfere and injure the business of another, and injury does in fact result. *Cenac v. Murry*, 609 So. 2d 1257, 1271 (Miss. 1992). The essential elements of the claim are (1) The acts were intentional and willful; (2) The acts were calculated to cause damage to the plaintiffs in their lawful business; (3) The acts were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); (4) Actual damage and loss resulted. *MBF Corp. v. Century Bus. Commc'ns, Inc., A Subsidiary of Century Tel. Enterprises, Inc*., 663 So. 2d 595, 598 (Miss. 1995).

The court's ruling implicates the second and third elements, intent to harm and malice, respectively. In the tortious interference context, malice does not mean actual malice or ill will, but the intentional doing of a wrongful act without legal or social justification. *Cranford v. Shelton*, 378 So. 2d 652, 655 (Miss. 1980). See also, *DIJO, Inc. v. Hilton Hotels Corp*., 351 F.3d 679, 684 (5th Cir. 2003).

Acts deemed malicious include any conduct that amounts to a recognized tort that deprives the plaintiff of customers or other prospects, violence, defamation, disparagement, injurious falsehood, misrepresentation, intimidation or harassment of the plaintiff's customers or employees, obstruction of the means of access to the place of business, threats of groundless suits, commercial bribery and inducing employees to commit sabotage. *Cenac*, 609 So. 2d at 1270, 1270-71.

These actions have been defined as textbook examples of malicious interference. *Id* at 1271. Thus, under Mississippi law, when a defendant has engaged in this conduct, one has acted maliciously.

As the existence of malice is determined by the conduct alleged, the court could not permissibly reach a conclusion no malice existed without examining that conduct. The Mississippi Supreme Court has helpfully provided a non-exhaustive list of conduct that is automatically deemed malicious. See *Cenac*, supra. At a minimum, the district court was required to consult this list. The SAC clearly alleges

defamation, injurious falsehoods, intimidation, misrepresentations and harassment, all of which qualify as malicious conduct under clear Mississippi authority. The district court's ruling malice was insufficiently pled is erroneous on its face.

"Motive" arises in the second element, intent to injure the plaintiff. *MBF Corp.*, 663 So. 2d at 599.[18] It is not motive in the popular sense, why a defendant undertook harmful action. It looks only at whether the actions taken were intended to harm the plaintiff. What reason compelled a defendant to intentionally injure a plaintiff is irrelevant for even if a defendant lacks improper purpose, they may still be liable when improper methods are utilized. *Cenac*, 609 So. 2d at 1270, *McBride Consulting Serv., LLC v. Waste Mgmt. of Mississippi, Inc*., 949 So. 2d 52, 57 (Miss. Ct. App. 2006).

A plaintiff need not prove specific intent to harm. This may be inferred from the malicious conduct of the defendant. *Davis v. Allstate Ins. Co.*, 2001 WL 34403082, at *6 (S.D. Miss. Dec. 7, 2001), *AmSouth Bank v. Gupta*, 838 So. 2d 205, 214 (Miss. 2002).

The district court applied the layman's definition of motive and found no motive existed, ruling that because the defendant insurers had no financial incentive

[18]Although they are recognized separate torts, Mississippi does not distinguish between tortious interference with business relations and tortious interference with contract for purposes of defining malice (*McClinton,* 792 So. 2d at 974 (Miss. 2001) or intent to cause harm (*Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 48-49 (Miss. 1998).

for their actions, the SAC failed to sufficiently allege the element of malice.[19] This was an erroneous conclusion for several reasons.

As noted, Mississippi law only requires a plaintiff plead the defendant acted with the intention of harming the plaintiff's lawful business. See *Davis* and *Gupta*, supra. It does not require a plaintiff to plead a reason why the defendant acted maliciously, nor does it permit a tortious interference claim to be dismissed if the court does not find a reason proffered sufficiently compelling. Here, the court not only applied the wrong definition of motive, it predicated its finding of no malice upon the lack of persuasiveness of the incorrectly defined motive, something the body shops are not required to plead.

Why a defendant engaged in malicious conduct is only relevant to their justification or excuse for doing so. *Gasparrini*, 802 So. 2d at 1067. However, a justification or excuse for malicious conduct is not satisfied by a defendant merely articulating a reason. The reason must actually be true to be legally sufficient to justify or excuse malicious conduct; mere belief one had a justifiable reason is insufficient. *McCullough v. Owens Enterprises, Inc.*, 2009 WL 259606, at *5 (S.D. Miss. Feb. 3, 2009).

[19]The court also ruled the body shops failed to allege the defendants interfered with the intent to punish them. This factual error is discussed separately within the tortious interference section and will not be unnecessarily repeated.

Because they generally require subjective credibility determinations, determinations of intent and malice are generally reserved to a jury; disposition on the pleadings is rarely appropriate. *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 459 (5th Cir. 2005), *Davis,* 2001 WL 34403082 at *6. The district court erred by deciding neither intent nor malice existed. Mississippi law reserves these fact determinations to a jury.

Each legal conclusion reached by the district court affirmatively violates state law. Each fact upon which the court relied to reach its erroneous conclusions are affirmatively negated by the SAC's contents. As the district court was required to faithfully apply state law but did not, these errors alone would require reversal. However, these are not the only reversible errors made by the district court.

In dismissing the claim, the district court breached its nondiscretionary analytical duties. The court failed to accept the facts alleged in the SAC as true, ignoring vast quantities of facts and relying upon misstated facts to bolster conclusions. The court also created or assumed the existence of facts to justify dismissal, thereby breaching its duty to draw inferences which favor the plaintiffs, not the defendants. It usurped the jury's privilege and exceeded the scope of 12(b)(6) analysis by determining the merits of the claim. In all respects, the court's ruling was erroneous.

C. Group Pleading

The district court adopted the Report's conclusion the SAC failed to state a claim due to improper group pleading without separate analysis. The Report concluded the SAC's use of "the Defendants" rendered the claim vague and too general to satisfy Rule 8 pleading requirements. In doing so, the district court applied a heightened pleading standard, breached the requirements of 12(b)(6) analysis and binding precedence.

The Report adopted by the court discusses at length the facts alleged and why they fail to adequately allege the elements of the claim. Although the conclusions are erroneous for multiple reasons, the court's analysis clearly establishes it had a firm grasp of the claim being made and the grounds upon which the claim rested. Similarly, the defendant insurers engaged in detailed argument as to the purported pleading failures and why they cannot possibly be held accountable for their conduct. The record establishes no one was confused or unable to discern the claim or its factual predicate. The requirements and objectives of Rule 8 were fully satisfied. Under these circumstances, dismissal was unwarranted and reversible error. *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1326 (11th Cir. 2015).

Further, this Court has repeatedly authorized use of "the Defendants" where the plaintiff intends and does assert each named defendant engaged in the prohibited

conduct. *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997). See also, *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).

The district court acknowledged this but dismissed anyway, not because the SAC did not specify the allegations were intended to apply to all defendants but because the court chose not believe this, classifying it "implausible." Doc. 115, pg. 11, adopting conclusions of prior order, Doc. 82, pp. 13-14.

The district court, however, was required to believe it. The assertion that all defendants engaged in the described tortious conduct does not fall within the category of frankly delusional allegations permitting the district court to disregard it. See Section I, above. Even if frankly skeptical, the district court was required to accept the allegation as true. *Neitzke,* 490 U.S. at 327.

Further, this Court has recognized that any perceived factual ambiguities or doubts must be resolved in favor of the plaintiff. Resolving ambiguities against the plaintiffs is error. *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246, 1252 (11th Cir. 2003). See also, *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). Affirmative authority permits the Appellants to collectively refer to "the Defendants" under the circumstances and "the Defendants" have confirmed they have a clear and unambiguous understanding of the claim asserted against them. The

objection to use of the collective plural reference serves no purpose but to unnecessarily elevate form over function.

Finally, the history of these cases has produced an irresolvable conflict. In a separate action in this MDL, the district court ordered the plaintiffs therein to amend the complaint so as to particularly identify each defendant in relation to the facts and causes of action asserted. After plaintiffs did so, the court expressed its extreme dissatisfaction, complaining that listing each and every defendant for each and every factual allegation and cause of action made the complaint unnecessarily long and threatened plaintiffs with sanctions if it was done again. See *A & E Auto Body, Inc., et al. v. 21st Century Centennial Ins. Co., et al.*, 2015 U.S. Dist. LEXIS 16153 (M.D. Fla. Jan. 21, 2015).

The lower court then found the current complaint should not use "the Defendants," either, as described above, and had to designate each defendant individually. The body shops pointed out the conflict in their Objections, but the district court did not acknowledge the problem it had created, providing no direction at all.

Thus, the plaintiffs have effectively been left with no acceptable manner of pleading. They either identify each defendant by name in relation to each factual allegation and face sanctions, or they utilize "the Defendants" and face dismissal.

If this Court determines use of "the Defendants" is impermissible in the present case, Appellants respectfully request this Court make a specific ruling as to how defendants may be identified, or prohibit sanctions from being imposed for identifying each individual defendant for each factual allegation.

D. Sufficiency of factual content

Despite its lengthy discussion of the facts alleged, the Report concluded the complaint was vague, it lacked "enough facts to state a claim to relief that is plausible on its face," which the court adopted in whole. (Doc. No. 115, pg. 11.) That is all the explanation given.

In ruling on a motion to dismiss, the court reviews the complaint to determine whether it adequately pleads facts relative to the elements of an asserted cause of action and whether those facts, taken collectively, suggest a plausible basis for liability. *Twombly*, 550 U.S. at 555.

The SAC sets forth substantial facts to more than adequately allege a plausible claim. The SAC alleged each named defendant had engaged in tortious conduct with respect to prospective customers of each respective plaintiff, and that each defendant had tortiously interfered with an identifiable group of people, consumers who identified a plaintiff's shop as the choice of repair facility. The SAC provided highly detailed descriptions of the conduct in which the named defendants interfered. The

SAC provided numerous specific examples of instances of insurers' interference, both successful and unsuccessful.

The district court found all of this insufficient to adequately allege a tortious interference claim. It ignored the examples of unsuccessful interference on the ground that because they did not accrue damages for the body shops, they were irrelevant. This, however, misses the point.

Plaintiffs must accompany their allegations with facts indicating why the charges against

Defendants are not baseless. Or, as the Supreme Court stated, provide factual content allowing the court to draw the reasonable inference the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. See also, *Anderson v. Ward*, 373 F. App'x 968, 969 (11th Cir. 2010). That is precisely what the body shops have done. The failed attempts to interfere support the allegation the insurers engage in the conduct described in the complaint; they show the charges against the insurers have plausible substance. Whether or not a particular example accrues damages is irrelevant; its existence is highly relevant to placing meat on the plausibility bone.

The lack of factual support about which the district court complained simply does not exist. Viewing the SAC as a whole, accounting for all facts alleged, the SAC more than sufficiently alleges a plausible claim for tortious interference.

E. Conclusory Allegations

In reaching the conclusions discussed above, the district court supported its dismissal upon the ground that facts alleged in the SAC were merely conclusory and therefore without value, without identifying the purported offending statements.[20]

The body of facts such a sweeping approach dismisses is essentially everything in the SAC. The allegations the district court deemed conclusory were those identifying and describing the insurers' malicious conduct, that the statements being conveyed to consumers by the insurers were false; those stating the interference was commenced as a result of body shops' refusal to quietly comply with fixed prices and that it was intended to harm the plaintiffs' business.

These statements set forth facts, events and circumstances. They are not "barren recitals of the statutory elements, shorn of factual specificity." *Speaker,* 623 F.3d at 1384. They do not regurgitate the legal elements of the claim. They are not speculative nor ambiguous.

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[20]The only statement the Report specifically identified as conclusory was, "Plaintiffs argue that they have stated a claim for tortious interference against all Defendants by alleging that when one Defendant engaged in a campaign of interference other Defendants also engaged in interference. This assertion is itself conclusory, implausible, and unsupported by sufficient averments of fact." Doc. No. 115, pg. 11. While Appellants disagree the statement is conclusory as it lacks any legal assertions, the Appellants did not say that in regard to tortious interference. Tortious interference is not dependent upon agreement of the defendants to mutually interfere and the body shops never stated that it was. Appellants did make a statement to this effect with regard to boycotting under the Sherman Act, which does require agreement.

The only manner in which the district court could have legitimately decided these statements were conclusory would be if the general rule held all declarative statements are conclusory, regardless of content. That, however, is not the law. The district court's mischaracterization of factual statements as merely conclusory and disregard of them was erroneous.

Mississippi Code Section 83-11-501

The body shops asserted a claim for violation of Mississippi Code § 83-11-501, which reads:

> No insurer may require as a condition of payment of a claim that repairs to a damaged vehicle, including glass repairs or replacements, must be made by a particular contractor or motor vehicle repair shop; provided, however, the most an insurer shall be required to pay for the repair of the vehicle or repair or replacement of the glass is the lowest amount that such vehicle or glass could be properly and fairly repaired or replaced by a contractor or repair shop within a reasonable geographical or trade area of the insured.

The Report made two findings in dismissing the claim for violation of this statute: (1) the statute does not require insurers to pay for a fair and proper repair; and (2) the statute does not allow a private right of action.

With respect to the first, the court decided that, based upon cases claiming violation of the statute, the only thing the statute means is "the sole duty § 83-11-501 imposes on automobile insurance companies is to refrain from requiring as a condition of payment of a claim that repairs to a damaged vehicle must be made by

a particular contractor or motor vehicle repair shop." (Doc. 115, pg. 17)(internal punctuation omitted). It further found the statute does not impose an obligation to pay for a proper and fair repair. (*Id*. at pg. 18).

The body shops respectfully submit the court's error is facially apparent. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001)(internal punctuation omitted).

The district court ruling not only failed to avoid rendering words superfluous, it rendered the entire second half of the statute superfluous. Such a conclusion is error.

The statute contains two independent clauses, separated by a semi-colon, indicating the phrases are related but disjunctive. This is not only the grammatical application utilized by federal courts (see, e.g., *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs*., 718 F.3d 488, 494 (5th Cir. 2013)) but in practice by the Mississippi Supreme Court in interpreting state statutes (See, e.g., *Richardson v. Norfolk S. Ry. Co.*, 923 So. 2d 1002 (Miss. 2006).

The statute thus contains two separate but related provisions. The first prohibits insurers from conditioning payment of repair costs upon a consumer's use

of an insurer-specified repairer. Neither the court nor the parties dispute the meaning of this clause.

The second clause is equally clear. It contains two distinct parts. The first is a requirement that an insurer pay for a proper and fair repair. The second limits the insurers' obligation of payment for a proper and fair repair to the least amount required to effectuate the proper and fair repair within a reasonable geographic area. In other words, an insurer must pay for a proper and fair repair but may not be compelled to pay outrageous charges in doing so.

The plain language of the statute is clearly intended to protect a consumer's right to a fair and proper repair by the repairer of their choice, while also safeguarding an insurer from unreasonable expense. Any other interpretation would lead to the absurd result that insurers are legally permitted to limit payment to unsafe repairs as long as they don't decide which body shop performs them.

Mississippi has long recognized vehicles as dangerous instrumentalities. *Davis v. Waterman*, 420 So. 2d 1063, 1066 (Miss. 1982), *McGee v. Bolen*, 369 So. 2d 486, 492 (Miss. 1979). Mississippi has enacted an entire statutory chapter dedicated to ensuring safe vehicles travel the roads. See Miss. Code Ann. §63-7-1, et seq. Like the vast majority of states, Mississippi has enacted mandatory liability insurance law. Miss. Code Ann. § 63-15-4.

Given the plain language of the statute and Mississippi's recognition of the need for safe vehicles, the district court's interpretation of this statute is untenable. Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary Erie guesses and to offer the state court the opportunity to interpret or change existing law. *Tobin v. Michigan Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005).

As the district court's interpretation eliminates half the statute and implicates significant issues of public safety, Appellants respectfully submit this Court should certify the question to the Mississippi Supreme Court pursuant to Mississippi Rule of Appellate Procedure 20(a) if is has reasonable doubts as to the statute's meaning.

With regard to the second conclusion, that no private right of action exists for violation of the statute, Appellants agree the statute is silent on the issue. However, so are many other statutes for which a private right of action is unquestionably permitted. The Mississippi Supreme Court has indicated that statutes enacted for public health and safety do create a private right of action. See, e.g., *Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979)(private right of action exists for violation of alcoholic beverage statutes).

The Mississippi Legislature does not publish its history. Where the statute itself is silent on the issue and legislative history is not available, the court may look

to other sources to answer the question of private right of action. *Tunica Cty. v. Gray*, 13 So. 3d 826, 829 (Miss. 2009). In this instance, the courts in Mississippi provide the answer.

Numerous cases have already proceeded upon a private claim for violation of this statute, stretching back over twenty two years. The Report cited a host of such cases, though for a different purpose. The Mississippi legislature has had over two decades to "correct" the courts' impression a private right of action exists for violation of § 83-11-501. It has not done so. In this context, Appellants submit the legislature's silence speaks volumes and the district court erred in foreclosing a legal right courts in Mississippi have allowed for many years.

THE MOTION TO RECONSIDER

After the SAC was dismissed, the body shops filed a motion to reconsider that decision. Doc. No. 120. The motion provided to the district court the direct admission of price fixing by Progressive and State Farm, neither of which were available when the SAC was filed as they did not then exist.

The motion also pointed out the dismissal order was issued a mere three days after the Report recommended dismissal of the antitrust claims, long before the body shops had an opportunity to object.

The district court denied the motion, finding the direct admissions of price fixing were vague and conclusory. With respect, the district court abused its discretion in denying the motion.

The grounds for granting a motion to reconsider are limited, as they are not intended to be vehicles for re-litigating decided issues. They are: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) 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).

When new evidence would alter a complaint so as to adequately allege a cause of action, motions to reconsider should generally be granted. See, e.g., Mann v. Adams Realty Co., 556 F.2d 288, 297 (5th Cir. 1977).

Respectfully, the district court's ruling the new information was vague and conclusory is incomprehensible. It is difficult to objectively define a defendant's direct admission of price fixing as vague. The Progressive representative stated, "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 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."

The State Farm representative stated, "State Farm intentionally suppresses and fixes body shop labor rates, and that State Farm's labor rate survey is a sham to justify its intentional fixing of labor rates."

"Vague" does not appear to be defined with the law. Random House Dictionary defines it as not clearly or explicitly stated or expressed. The body shops assert there is noting unclear about the new information. They both clearly express intentional price fixing. 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 622, 628 (7th Cir. 2010)."

Appellant body shops respectfully submit the district court abused its discretion in denying the motion to dismiss as direct evidence of price fixing does adequately allege the claim asserted.

CONCLUSION

The district court erred repeatedly in failing to abide by the required standard of pleading. It consistently adopted Appellees' arguments contrary to the factual allegations of the complaint, disregarded facts and otherwise failed to cloak the complaints with the acceptance of truth provided by in law on a motion to dismiss.

The district court repeatedly amended, altered and otherwise failed to faithfully apply the law of the states. Had the proper analyses been conducted, the dismissals would not have been granted. Appellants respectfully request this Circuit Court reverse the district court and remand to the Middle District of Florida for further proceedings.

Respectfully submitted,

/s/ Allison P. Fry

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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 12 and contains 13, 817 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Allison P. Fry

ALLISON P. FRY

February 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this the 25 DAY OF JULY, 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 PARTIES

Abels, III, Jackson H.
Adams and Reese LLP
Alexander Body Shop, LLC
Allstate Corporation (NYSE: ALL)
Allstate Insurance Company
Allstate Property and Casualty Insurance Company
Alston & Bird, LLP
Automotive Alignment & Body Service, Inc., d/b/a Pitalo Auto Paint & Body
AutoWorks Collision Specialist, LLP
B & W Body Shop, Inc.
Bailey, III, Clifford (Ford) K.
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
Baker & Hostetler, LLP
Ball, Franklin Keith (Honorable)
Barthel, David John
Beekhuizen, Michael
Berkshire Hathaway Group (NYSE: BRK-A AND/OR BRK-B)
Best, Robert Bradley
Bill Fowler's Bodyworks, Inc.
Bolden Body Shop, LLC
Boschert, Neville H.
Botti, Mark J.
Butler Snow, LLP
Canton Collision, LLC
Carlton Fields Jorden Burt, PA
Carpenter Lipps & Leland LLP
Cashdan, Jeffrey S.
Clark, Johanna W.
Clinton Body Shop, Inc.
Clinton Body Shop of Richland, Inc.
Cole, Scott & Kissane, PA
Cook, Mark
Copeland, Cook, Taylor & Bush, PA
Crystal Car Care, Inc.

Currie, Johnson, Griffin & Myers, PA*
Daniel, Coker, Horton & Bell, PA
Dentons US LLP
Diamantas, Kyle A.
Direct General Insurance Company
Dockins, Jr., Halbert Edwin
Dockins Turnage & Banks PLLC
East McComb Body Shop, Inc.
Eaves Law Office
Eaves, Jr., John Arthur
Eimer Stahl LLP
Fenton, Richard L.
Fischer, Ian Matthew
Fry, Allison P.
George Carr Buick Pontiac Cadillac GMC, Inc.
Gibson, Walker Reece
Grabel, Joshua
Halavais, Jamie L.
Hardin's, Inc., d/b/a Hardin's Body Shop
Helmer, Elizabeth
Hopkinson, Christine A.
Holcomb Dunbar Watts Best Masters & Golman, PA
Hypercolor Automotive Reconditioning, LLP
GEICO General Insurance Company
GEICO Indemnity Company
Goldfine, Dan W.
Griffin, William C.*
Griffith, Jr., Steven F.
Kenny, Michael P.
King & Spalding, LLP
Koch, Amelia W.
Jones Walker LLP
Kissane, Joseph T.
Kymberly Kochis
Lakeshore Body Shop, Inc.
Lau, Bonnie
Lewis, Barry
Lewis Roca Rothgerber Christie

Liberty Mutual Holding Company, Inc.
Litchford, Hal K.
Maron, David Friederich
Masters, Jonathan Stuart
McCluggage, Michael
Mississippi Farm Bureau Casualty Insurance Company
Moore, James R.
Morgan, Benjamin B.
Mumford, Michael E.
Nationwide Corporation Group
Nationwide Mutual Insurance Company
Nationwide Property and Casualty Insurance Company
Nelson, Michael R.
Nolan, Francis X.
Patriot Auto Body, LLC
Porter's Body Shop, Inc.
Powers, Tiffany L.
Presnell, Gregory (Honorable)
Progressive Casualty Insurance Company
Progressive Corp. (NYSE: PGR)
Progressive Group
Progressive Gulf Insurance Company
ProTouch Collision, LLC
Quality Body Shop, Inc.
Raulston, Keith R.
Reeves, Carlton (Honorable)
Richie's Collision Center, LLC
Robinson, III, Emerson Barney
Safeco Insurance Company of Illinois
Shelter General Insurance Company
Shelter Mutual Insurance Company
Smith Brothers Body Shop, Inc.
Smith Brothers Collision Center, Inc.
Smith, Thomas G. (Honorable)
Squire Patton Boggs (US) LLP
State Farm Fire and Casualty Company
State Farm Mutual Automobile Insurance Company
Sutherland, Asbill & Brennan, LLP

Turnage, Ellie F.
United Services Automobile Association
USAA Casualty Insurance Company
USAA General Indemnity Company
Vargo, Ernest E.
Walkers Collision Center, Inc.

*Although no motion to withdraw as counsel has yet been filed, counsel for Plaintiff-Appellants has personal knowledge Mr. Griffin is no longer associated with the law firm of Currie, Johnson & Myers, P.A., nor does he represent the Allstate Defendants in this matter.