Case No. 13-16450

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARAH PEREZ, MICHELLE LACKNEY, RACHEL STEWART, and RACHEL HARDYCK,
Plaintiffs-Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, GEICO GENERAL INSURANCE COMPANY, CERTIFIED AUTOMOTIVE PARTS ASSOCIATION, and LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Defendants-Appellees.

Appeal From an Order and Judgment Entered August 29, 2012
by the United States District Court for the Northern District of California
(San Jose Division), Case No. C 06-01962 JW
The Honorable James Ware

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs are individuals and there is therefore no parent corporation or publicly held corporation that owns 10% or more of any Plaintiff's stock.

The following is based on Appellees-Defendants' Corporate Disclosure Statement filed in the previous appeal of this case. This is the third appeal.

Liberty Mutual Fire Insurance Company is a wholly-owned subsidiary of Liberty Mutual Group, Inc., a publicly traded company. No individual or publicly traded company owns more than 10% of the stock of Liberty Mutual Group, Inc.

No companies or individuals have an ownership interest of more than ten percent in State Farm Mutual Automobile Insurance Company.

Allstate Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Company, which is an Illinois insurance company. Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% of more of The Allstate Corporation.

GEICO General Insurance Company is a subsidiary of Government Employee Insurance Company, which is a wholly-owned subsidiary of GEICO Corporation, which is an indirect wholly-owned subsidiary of Berkshire Hathaway Inc.

Certified Automotive Parts Association ("CAPA") has no parent company and no individual or publicly traded corporation owns 10% or more of the stock of CAPA.

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Rothstein & Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* § III(B) (3d ed. 2010) 34

JURISDICTIONAL STATEMENT

The District Court has original subject matter jurisdiction under 28 U.S.C. § 1332(d)(2) (diversity jurisdiction over class claims) because the matter in controversy exceeds the sum of $5,000,000, exclusive of interest and costs, and members of the California Classes alleged herein are citizens of California, whereas at least one Appellee insurance company is a diverse citizen. *See* 28 U.S.C. § 1332(c)(1), (d)(2). The District Court entered an appealable final judgment and this Court has appellate jurisdiction under 28 U.S.C. §§ 41, 1291, and 1294. The District Court entered Judgment in this case on August 29, 2012 and the Notice of Appeal was filed on July 17, 2013. This appeal is therefore timely under Fed. R. App. P. 4(a)(1); and Fed. R. App. P. 4(a)(4)(A)(ii) and (vi).

ISSUES PRESENTED

(1) Notwithstanding the prior guidance of this Court in twice reversing the District Court, did the District Court continue to "misunderstand" the nature of class antitrust price injury caused by the alleged insurance collusion and thus errs by not certifying the Rule 23(b)(3) damage classes?

(2) Did the District Court abuse its discretion by finding that predominately-common proof of imitation and salvage parts quality, rather than collusive failure to pass on parts savings, is required to show classwide antitrust price

injury?

(3) Did the District Court abuse its discretion by failing to make findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 23(a), 23(b)(3) and 23(b)(2) when denying certifications?

(4) Did the District Court err as a matter of law by requiring predominately-common parts proof to certify Fed. R. Civ. P. 23(b)(2) injunctive classes?

(5) Did the District Court misapprehend Plaintiffs' price-fixing claims in denying Plaintiffs' motion to file the proposed Sixth Amended Complaint? In so doing, did the District Court apply the wrong "futility" and "prejudice" standards?

(6) Did the District Court err by granting summary judgment without a hearing and without discovery under Fed. R. Civ. P. 56(d) (even though it had already found such discovery to be appropriate)?

STATEMENT OF THE CASE

This is Appellants' third petition to this Court. In the first appeal this Court found that the District Court "misunderstood" Plaintiffs' antitrust claims and failed to recognize that the antitrust injury caused by the alleged collusion among California automobile insurance companies was the "artificial inflation" of class members' premiums in violation of California antitrust law.

Prior to that first appeal, the District Court had declined to rule on a second,

then fully-briefed contention that price-fixing collusion alleged was immunized under California law. After remand the District Court found such immunity, necessitating a second appeal. This Court accepted Appellants' contention that California statutory language on its face expressly ruled out such immunity and remanded this case a second time, approximately four years after it was filed.

This third appeal is necessitated by what Appellants respectfully contend are multiple additional errors in part caused by the District Court's failure to accept this Court's guidance as to the nature of the alleged collusion and the price injury inflicted as a result. The Fifth Amended Complaint alleges that the Appellee insurance companies colluded to provide lower quality policy coverage by using less expensive imitation and salvage repair parts, and conspired not to pass on the savings from the use of these cheaper parts to lower premiums for lower quality coverage as they would have to in a free market.

As this Court put it in 2009:

> Plaintiffs allege that [Defendants] violated California antitrust law by conspiring to thwart competition over, and to deceive plaintiffs with respect to, repair coverage quality. Such conspiracy and deception, according to plaintiffs, prevented higher quality coverage from reaching the market and *artificially inflated premiums for lower quality coverage*.

ER 240; *Perez v. State Farm. Mut. Auto. Ins. Co.*, 319 F. App'x 615, 617 (9th Cir. 2009) (emphasis added). Both elements of the collusion alleged are reflected in this

Court's analysis. In a freely-operating market, carriers would offer inexpensive policies that provide only basic coverage, including by covering only cheaper imitation or salvage repair parts, and higher-priced policies that cover more expensive original manufacturer parts. Appellees conspired to subvert the free market in two ways. First, by conspiring to pass off cheaper parts as higher quality than they actually are (in part by creating and funding a sham "quality certification" organization). Appellees were able to charge more for policies that cover these parts, and thereby exclude from the market any would-be competitors seeking to offer higher quality coverage. Second, Appellees agreed not to compete to pass on the cost-savings from offering cheaper parts coverage to their customers to lower premiums. Appellees were thereby able to increase their profits unlawfully by retaining for themselves the savings and thus "artificially inflated" premiums for the lower quality coverage.

Failure to offer competitive premiums by colluding not to pass on parts savings is the only class damage injury alleged. On the merits the conspirators' failure to pass through savings has already been econometrically and extensively shown for multiple years in the class proceeding by Dr. Roger Noll, Emeritus Professor of Stanford University, and Senior Fellow and Co-Director of the Program on Regulatory Policy of the Stanford Institute for Economic Policy Research.

The substitution by the conspiracy of cheaper imitation or salvage parts in repair coverages is not alleged to be class injury, only that this collusion allows the insurance companies to create parts savings (by not competing as to the quality of repair coverages) which they have conspired not to pass through to reduce premiums for the lower quality coverages. *See, Perez*, 319 F. App'x at 617 (noting that Appellants allege that Defendants "artificially inflated premiums for lower quality coverage.") (emphasis added). Consequently, as set out fully below, Dr. Noll does not need to know whether the cheaper parts are, or are not, inferior to show classwide overcharging, only that they create savings. He has shown collusive overcharge without reference to the quality of the cheaper parts.

Appellants do not deny that the inferior or unsafe nature of many of the cheaper imitation and salvage parts *is relevant* to their claims for injunctive relief under Fed. R. Civ. P. 23(b)(2) which seek to enjoin the insurance companies' collusion, deception and injury to class members from the conspiracy's deceptive use of often inferior or unsafe parts. This is why allegations of parts inferiority appear in the class definitions. *Infra* at 7. This should not, and does not, imply that the showing of common proof of part inferiority is somehow required to show classwide proof of *price injury* due to collusive failure to pass through the cost savings.

Appellants contend that the District Court:

- failed to recognize the nature of the antitrust price injury alleged despite this Court's prior guidance and premised its ruling and judgment on the misapprehension that the use of imitation and salvage parts, and not the collusive failure to pass on parts savings, is the antitrust injury alleged;

- erred in finding that predominately-common proof of parts inferiority is required to make out antitrust price injury (while failing to address the real predominance issue: whether classwide proof of anticompetitive pricing can be had at trial);

- erred by imposing improperly a predominance prerequisite on Rule 23(b)(2) injunctive claims;

- failed to articulate the reasons for its denials of the certifications of damage and injunctive classes (as the Court of Appeals mandates) and whether the class prerequisites have been met;

- failed to apply this Court's liberal standards governing amendment of a complaint well before merits discovery and its "futility" and "prejudice" standards; and

- failed to recognize that the claim of price fixing has been in this case from the beginning (as recognized by this Court in 2009) in denying both the amendment of the complaint and granting summary judgment. The District Court also reversed itself in declining to permit Fed. R. Civ. P. 56(d) discovery before granting summary judgment.

STATEMENT OF FACTS

Class Proceeding

On behalf of themselves and California residents who are similarly situated, Appellants propose four separate damage and injunctive classes (one for each

Appellee insurance company) comprised of:

> persons residing in California . . . paying premiums to [designated Defendant] for automobile liability, casualty and collision damage insurance at any time between March 14, 2002 and the present where for an insured automobile [Defendant] uses repair parts other than those provided by the original equipment manufacturer or its authorized parts supplier. The repair parts at issue are parts where the substitution of inferior parts significantly lessens the quality of the automobile's safety, fit, structural integrity or mechanical functioning than would be experienced over the life of a high-quality OEM repair part. . . .

ER 200, 202, 204, 206 ¶¶59, 65, 71, 77.

The Fifth Amended Complaint alleges that the four insurance companies have conspired not to compete to provide high quality repair coverage by substituting cheaper imitation and salvage parts as well as agreeing not to pass on the considerable savings from the use of these parts, thereby anticompetitively inflating premiums. ER 188, 190-191 ¶¶12, 27; *infra* at 17-18 nn. 3-5. While the conspiracy not to compete as to the quality of parts coverage allows the conspiracy to generate parts savings, the injury actually inflicted on the classes is above-competitive pricing due to the second element of the collusion, the agreement not to pass on parts savings. As Dr. Noll demonstrates, it is not necessary to show inferiority of the parts used by the conspiracy to show classwide overcharge merely that the savings created by use of these much cheaper parts are not passed on by the conspirators. *Discussion infra* at 26-29.

In seven expert reports submitted over ten months and after the processing of millions of observations of insurance pricing data, Dr. Noll has demonstrated that the key Rule 23(b)(3) predominance prerequisite for certification of price fixing damage classes has been satisfied in a fashion consistent with the most rigorous standards of this Circuit: that is, he has shown the availability of classwide proof of antitrust price injury. He demonstrates formulaic proof of premium overcharging can be shown at trial by econometric modeling of the collusive failure of the insurance companies to pass through the savings they realize by allegedly agreeing to use cheaper imitation and salvage parts instead of those provided by the original equipment manufacturer. *Id.*

Dr. Noll is quite clear that his methodology (which Judge Ware found to be relevant and reliable, *infra* at 9) does not require proof whether the substitute parts are inferior to the parts made by the original equipment manufacturers, only that they are less expensive overall and generate company savings collusively retained to inflate premiums for the lower quality coverage. Discussion *infra* at 26-29.

Using millions of observations of actual insurance data, Dr. Noll has actually run class overcharge calculations for multiple years within the damage period thereby confirming the reliability and availability of his methodology. ER 223-234. In fact, on the merits, he shows in these years that the insurance companies have *not* passed

through parts savings, a result fully consistent with the allegation of collusion not to pass on these savings. *Id.* Dr. Noll documents the rigor of his methodology with over 1600 pages of expert analysis and in seven hours of deposition testimony.

Under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), Judge Ware determined that Dr. Noll is *qualified* to offer this expert testimony "whether Defendants passed on their alleged [imitation and salvage part] cost savings to consumers though lower premiums," and his calculations were *relevant* and *reliable.* ER 60-63 (emphasis added). Nonetheless, even though Dr. Noll's "reliable" methodology does not require any showing of parts quality, the District Court found (in one sentence appended to a *Daubert* evidentiary ruling as to Appellants' parts expert) that no damage classes could be certified because Appellants had failed to show the availability of predominantly-common proof of *parts quality* (as opposed to classwide proof of parts savings and antitrust price injury). Because he did not write a class opinion, Judge Ware did not explain why such parts proof is necessary to show overcharging due to collusion not to pass through parts savings and why Dr. Noll's methodology suddenly became unreliable and irrelevant. He also failed to address any of Dr. Noll's careful and rigorous analysis demonstrating that classwide price injury can be shown by fully-explained econometric means (without reference to determinations of parts quality) or why the other Rule 23(b)(3) prerequisites had

not been met.

Also, in one sentence the District Court also denied certification of the Rule 23(b)(2) injunctive classes. Certainly, the allegations of parts inferiority in the class definitions *are relevant here* for Appellants seek to end the deceptive insurance collusion which often has given Californians unsafe and inferior repair parts for over a decade. These claims attack deception, collusion and the possibility of substandard or unsafe repairs by the conspirators. ER 186 ¶¶2-3, 187 ¶6, 190-92 ¶¶26-32, 196 ¶47. In the District Court's view, the absence of predominately-common proof as to parts quality dooms this relief as well. ER 48; *see also* ER 34-35. Once again, however, the District Court declined to explain its reasoning.

Leave to Amend

The District Court also declined to allow the filing of the proposed Sixth Amended Complaint (ER 28-33) which seeks to subtract the injunctive claims to focus on the damage claims alone, without the parts allegations that apparently induced the District Court's Rule 23(b)(3) error. ER 109-129. The Court found the amendment to be futile and prejudicial because it would add what the Court deemed to be a *new* price fixing claim (ER 28-33), even though it is precisely the same claim Appellants have pressed since the inception of this case, and the same claim this Court recognized and described during the first appeal in 2009.

Entry of Summary Judgment

Finally, two days before he resigned, Judge Ware granted summary judgment without a hearing. He ruled that Appellants' failure to show predominately-common proof of parts quality not only were dispositive as to class certifications, but also as to the merits of all of Appellants' class and individual claims, which had not yet been subject to discovery. ER 24, 34-35. Apparently he finds such proof was necessary to show the price fixing damages claimed and the deceptive and collusive practices targeted by the injunctive claims.[1]

STANDARD OF REVIEW

The overall standard of review for denial of class certification is abuse of discretion. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1018 (9th Cir. 2011) (en banc). A district court abuses its discretion if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors. *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d

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[1] On Judge Ware's resignation, this matter was reassigned to Judge Koh to hear Plaintiffs' motions to set aside Judge Ware's findings under Fed. R. Civ. P. 60 and 52. She found ". . . The Ninth Circuit has underscored that '[t]he correction of legal errors committed by the district court is a function of the Court of Appeals and can usually be reconsidered on appeal.'" ER 8, citing *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291 (9th Cir. 1982). *See also* ER 11 ("the Court finds that the Plaintiffs fail to meet the heightened standards of Rule 60 and 52 to warrant reconsidering . . . Judge Ware's August 29, 2012 Order."). Appellants do not appeal Judge Koh's Order.

953, 957 (9th Cir. 2009). An error of law, however, is a per se abuse of discretion. *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("[W]e accord the decisions of district courts no deference when reviewing their determinations of questions of law."). Moreover, '[w]hen reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010) (*quoting In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008)) (internal quotation marks omitted).

The standard of review for the denial of a motion for leave to amend is abuse of discretion. *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009). The standard of review for a grant of summary judgment is *de novo* review. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). This Court "must . . . determine viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

ARGUMENT

Appellants respectfully contend that Judge Ware erred by denying certification of the damage and injunctive classes, by denying leave to amend the complaint, and by granting summary judgment. In so doing he failed to accept this Court's guidance

in 2009 during the first appeal of this action. This is the third appeal.

This Court summarized the class damage and injunctive claims as follows:

> [Defendants] violated California antitrust law by conspiring to thwart competition over, and to deceive plaintiffs with respect, to repair coverage quality. Such conspiracy and deception, according to [Plaintiffs], prevented higher quality coverage from reaching the market and *artificially inflated premiums for lower quality coverage.*

ER 240; Perez., 319 F. App'x at 617(emphasis added). As noted, *supra* at 3-4, both elements of the collusion alleged are reflected in this Court's analysis. In a freely-operating market, insurance carriers would offer inexpensive policies that provide only basic coverage, including policies covering cheaper imitation or salvage repair parts, and higher-priced policies that cover more expensive original manufacturer parts. The collusion subverting the market is twofold. First, by conspiring to pass off cheaper parts as higher quality than they actually are (in part by creating and funding a sham "quality certification" organization), Appellees were able to charge more for policies that only over these parts, and thereby exclude from the market any would-be competitors seeking to offer higher quality coverage. Second, Appellee insurance companies agreed not to compete to pass on the cost-savings from offering cheaper parts coverage to their customers to lower premiums. Thus they were able to increase their profits unlawfully by retaining for themselves the savings from covering only cheaper repairs, and "artificially inflated" premiums for the lower

quality coverage.

The District Court continued to "misunderstand" the nature these claims and the class antitrust price injury alleged over the last several years when it denied certification of the damage classes. It abused its discretion by finding that predominately-common proof of imitation and salvage parts quality, rather than collusive failure to pass on parts savings, is required to show classwide antitrust price injury. The error is compounded by its failure to make findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 23(a), 23(b)(3) and 23(b)(2) as required by this Court en banc.

Consequently Judge Ware failed to explain why the comprehensive econometric modelling by Dr. Roger Noll, Professor Emeritus of Stanford University and Senior Fellow and Co-Director of the Program on Regulatory Policy of the Stanford Institute for Economic Policy Research, which Judge Ware found unequivocally to be relevant and reliable, was in error when it demonstrated classwide overcharging by *all* the alleged conspirators without reference to parts quality. ER 223-234. (Dr. Noll demonstrated that he only needed know how much cheaper the imitation and salvage parts were than those provided by the automobile manufacturers to see if these savings were passed through to lower premiums.) Discussion *infra* at 26-29.

As to its denial of the certifications of the injunctive classes, the District Court also erred, this time as a matter of law, by requiring predominately-common proof of parts quality to allow injunctive claims. Here the proposed class representatives seek to end the insurance companies' deception, collusion, and provision of often inferior or unsafe repair parts to the citizens of California. Certification of Fed. R. Civ. P. 23(b)(2) classes only requires *some* common proof of violation or actual or threatened injury.

Further, Judge Ware's misunderstanding of the claims led him as well not to permit the filing of the proposed Sixth Amended Complaint. He found that its price fixing or price inflation claims, which this Court has acknowledged have been in this case for years, were a radical shift in the claims and therefore prejudicial to the insurance companies even before merits discovery had begun. In so doing, he also applied the wrong "futility" and "prejudice" standards.

Finally, by misunderstanding the collusion alleged the District Court also errs by granting summary judgment without a hearing and without discovery under Fed. R. Civ. P. 56(d) (even though it had previously found such discovery to be appropriate).

I. This Court Has Found That The Antitrust Injury Alleged Is Derived From Collusion "Artificially Inflating Premiums" Because Savings Are Not Passed Through From The Use Of Imitation And Salvage Parts

A. Prior Two Appeals

The District Court dismissed the Second Amended Complaint in October of 2006, on the ground that the proposed class representatives did not have standing to bring their claims because their vehicles had not been repaired using inferior parts. ER 88-94 (ECF No. 112). Judge Ware accepted the insurance companies' argument that this case was not about an anticompetitive conspiracy to inflate premiums, but rather the quality of the salvage and imitation parts used to repair policyholders' automobiles. Those arguments were flatly rejected by this Court. Judges McKeown, Ikuta, Block[2] found

> The district court held that plaintiffs' claim 'is based solely on the anticipated use of inferior crash parts such that [p]laintiffs' injuries are speculative and insufficient to confer standing under Article III.' *The district court misunderstood plaintiffs' claim.* Plaintiffs allege that defendants violated California antitrust law by conspiring to thwart competition over, and to deceive Appellants with respect to, repair coverage quality. *Such conspiracy and deception, according to plaintiffs, prevented higher quality coverage from reaching the market and artificially inflated premiums for lower quality coverage.* Plaintiffs have standing to pursue such a claim. *The injury alleged — anticompetitive prices charged to all policyholders* regardless of whether any particular insured ever has a repair need — is sufficient to confer constitutional standing: the alleged overcharges are a concrete,

[2] Sitting by designation from the Eastern District of New York.

> particularized, and actual injury-in-fact that is fairly traceable to the conduct complained of, and is likely to be redressed by a favorable decision.

ER 240-241; *Perez*, 319 F. App'x at 617. By driving out competition in the form of high quality repair coverages, the collusion as alleged in the Fifth Amended Complaint allowed the insurance companies to overcharge for lower quality coverages using imitation and salvage parts.[3] Use of these parts produced savings which the companies in turn colluded not to pass on to lower premiums and increase their profits unlawfully for the lower quality coverages.[4] (If there had been pass

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[3] ER 186 ¶4 ("Thus the policyholders are overcharged because they pay for high quality coverage but receive inferior lottery coverage from the conspirators, where they run a very substantial chance of receiving markedly inferior repair parts."); ER 188 ¶12 ("The conspiracy has had the effect of raising and maintaining premiums for inferior 'lottery' automobile insurance coverages above the competitive levels that would have prevailed for these coverages had full competition prevailed."); ER 190 ¶27 ("Defendants' conduct has substantially discouraged higher quality coverage from reaching the market for over a quarter of century and artificially inflated premiums for lower quality coverages.").

[4] ER 198 ¶53 ("In fact, Defendants have not passed on the savings to their customers and the pattern of conduct described above makes no sense if all Insurers are doing is saving money for customers, ..."); ER 198 ¶51("By colluding to provide low-quality parts coverages to save money and inflate prices and profits, Defendants have deprived consumers of the right to choose what they want and to get what they pay for. . . . In a competitive market, Defendant would not be able to sell low-quality policies at high-quality prices."); ER 186 ¶2 ("To create illegal profits, Defendants conspire to substitute low-cost repair parts, which are often markedly inferior to the parts originally placed on the automobile by its manufacturer."); ER 199 ¶57 ("As a result of the conspiracy, Defendants have reaped the benefits of both lower costs and higher profits and have been able to charge higher premiums to policyholders for

through by the conspirators, there would not be "artificially inflated premiums" or increased profits.) This caused premiums to be above competitive levels for these lower quality coverages and caused antitrust price injury.[5]

On remand Judge Ware dismissed the proposed class representatives' claims a second time, this time on the ground that the alleged conspiracy was immunized by the California Insurance Code, even though Section 1861.03(a) of the Insurance Code expressly states that "the business of insurance" is subject to the Cartwright Act and Unfair Competition Law. This immunity argument had been raised in the insurance companies' first motion to dismiss and fully briefed was but not addressed by the District Court at that time, thereby requiring a second two-year visit to this Court. Through Judges Schroeder, Bybee, Stotler[6] this Court reversed once again, holding that "*antitrust claims that produce overcharges* do not fall under the Insurance

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inferior policies than they would have been able to do in an unrestrained market.").

[5] ER 186 ¶4 ("Thus the policyholders are overcharged because they pay for high quality coverage but receive inferior lottery coverage from the conspirators, where they run a very substantial chance of receiving markedly inferior repair parts."); ER 188 ¶12 ("The conspiracy has had the effect of raising and maintaining premiums for inferior 'lottery' automobile insurance coverages above the competitive levels that would have prevailed for these coverages had full competition prevailed."); ER 190 ¶27 ("Defendants' conduct has substantially discouraged higher quality coverage from reaching the market for over a quarter of century and artificially inflated premiums for lower quality coverages.").

[6] Sitting by designation from the Central District of California.

Commissioner's exclusive rate-making authority." ER 237-238; *Perez v. State Farm Auto. Ins. Co.*, 391 F.App'x 653, 655 (9th Cir. 2010) (emphasis added).

B. Continuity of Rule 23(b)(3) Price Fixing or "Premium Inflation" Claims

The Fifth Amended Complaint ("5AC") tracks closely the Second Amended Complaint construed by this Court during the first appeal. It alleges that the Appellee insurance companies have conspired not to compete as to coverage quality, allowing them to substitute imitation and salvage repair parts. They have also colluded not to pass through parts savings. This has resulted in the charging of higher-than-competitive prices for lower quality policies, specifically, prices consistent with higher quality coverages using more expensive parts by the original equipment manufacturers. In a competitive marketplace, the savings the insurance conspirators realized from covering the less expensive parts would have been passed onto their customers in the form of lower premiums. *See* ER 188, 198-99 ¶¶12, 53, 57. In particular the Fifth Amended Complaint alleges that:

- Appellee insurance companies have conspired to avoid competition among themselves to provide high quality repair with only parts provided by original equipment manufacturers ("OEM"). *See* ER 186-188, 190 ¶¶ 2-5, 8-9, 26;

- The conspiracy not to compete has had the effect of raising premiums for coverages using imitation and salvage parts to above the competitive levels that would have prevailed with full competition, levels consistent

with the use of only OEM parts. *See* ER 188, 190-191, 208, 210 ¶¶12, 27, 83-84, 93. That is, the conspiracy has allowed Appellee insurance companies to conspire as well not to pass on the savings from the use of aftermarket and salvage parts and continue to charge as if for OEM coverages. *See* ER 198-200 ¶¶51, 53, 57; see also ER 186 ¶¶1-2 (conspired to increase profits); and

- As result of the conspiracy, Appellee insurance companies have reaped the benefits of both lower costs and higher profits and have been able to charge higher premiums to policyholders for policies using imitation and salvage parts than they "would have been able to do in an unrestrained market." *See* ER 186, 188, 190, 199, 208 ¶¶1-2, 12, 27, 57, 83-84.

The only damages sought are the overcharges made possible by the insurance companies' conspiracy not to compete as to coverage quality and not to compete to pass on the parts savings: "[s]uch overcharges constitute unlawful antitrust injury in fact and have caused actual damages for members of the California Classes." ER 211 ¶99.

C. Price Fixing Precedent

These allegations make out the *per se* violation of price fixing. Under decades of clear Supreme Court and other federal precedent, collusion among competitors having the effect of raising, lowering, stabilizing, or otherwise determining prices is *per se* unlawful.[7] For over eight decades courts have held that price fixing

[7] The Supreme Court has emphasized that the "[p]rotection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws," *United States v. General Motors Corp.*, 384 U.S. 127, 148 (1966), because restrictions on free and open price competition pose an actual or potential threat to

encompasses not only agreements among competitors setting the precise pricing to be charged, but also a wider variety of arrangements among competitors that *affect* pricing and drive it to above-competitive levels.[8]

Since *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), courts have applied the *per se* rule not only to agreements as to the actual prices to be charged but also to a wide variety of arrangements among competitors that *affect price.* In *Socony-Vacuum*, a joint program among gasoline companies to purchase surplus gasoline on the spot market to prevent prices from sharply falling was outlawed under the price fixing doctrine. "Under the Sherman Act 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."[9] Further, simple economics teaches that a conspiracy not to compete with the effect of limiting

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the central nervous system of the economy. *See FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 421-23 (1990) (holding *per se* unlawful a refusal of group of lawyers to represent indigent plaintiffs unless compensation for such cases was increased); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342 (1982) (holding competitors' fixing of "maximum" prices is *per se* unlawful); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (holding agreement among competitors to stabilize gasoline prices by buying excess supply on the spot market *per se* unlawful).

[8] *Socony-Vacuum*, 310 U.S. at 224 n.59.

[9] *Id.* at 223.

output (here of high quality repair coverages) is effectively the same thing as an agreement to fix price by reducing supply. Therefore, courts also have applied the *per se* rule to agreements to limit production.[10] Certainly, a conspiracy by competitors not to compete by manipulating the costs passed on into price, and resulting in above-competitive premiums, "affects price." Thus, under well-established precedent, "price fixing" injuring the damage classes and giving rise to injunctive relief to stop insurance collusion has been alleged for years in this matter.

II. Classwide Proof Of Price Fixing Injury Does Not Require Common Proof Of The Quality Of Imitation And Salvage Parts Used By The Conspirators, Merely Classwide Proof Of Collusion Not To Pass On The Savings From The Use Of These Cheaper Parts

After the second remand the parties made their respective class records over ten months, with multiple reports submitted by the economic experts on both sides. As is usually the case with class price fixing allegations, most of the submissions, briefing, and econometric calculations went to whether classwide proof of antitrust price injury would be available at trial under the predominance prerequisite of Fed. R. Civ. P. 23(b)(3). By actually implementing a methodology found reliable by Judge Ware for multiple years in the damage period, Dr. Noll has demonstrated (using millions of observations of Appellee data) that classwide proof of the insurance

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[10] *See, e.g., Hartford-Empire Co. v. United States*, 323 U.S. 386, 406-07, *clarified*, 324 U.S. 570 (1945).

companies' failure to pass on savings from the use of imitation and salvage parts. ER 223-234. All this has been accomplished without any need to show the inferiority of the cheaper parts. Discussion *infra* at 26-29.

Judge Ware denied the insurance companies' joint motions to exclude these calculations. He found that Dr. Noll was qualified to offer expert testimony on methodologies for calculating classwide overcharge damages, and that these calculations were relevant and *reliable*. ER 60-63 (emphasis added).

Relying on this evidentiary ruling, Appellants filed a renewed[11] motion for class certification. The Court convened a class hearing and then denied Appellants' Motion for Class Certification without prejudice, holding that Appellants have *"not produced a methodology for determining which categories of parts should qualify as inferior*," and therefore had "not yet met their burden for establishing predominance" under the standards of *Ellis v. Costco Wholesale Corporation*, 657 F.3d 970 (9th Cir. 2011). ER 53 (emphasis added). Oddly, the Order voiced no second thoughts about the relevance and reliability of Dr. Noll's methodology showing predominantly-common proof of classwide price injury due to the collusive failure to pass on parts savings without any reference to parts inferiority.

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[11] Previously, the District Court had found that class discovery needed to be completed before the class motion was heard.

The District Court directed plaintiffs to submit a supplemental parts report (ER 53-54). Notwithstanding Appellants' position that proving their claims at trial would not require "a methodology for determining which categories of parts are inferior," Plaintiffs submitted a supplemental report by Allen Wood, whom the District Court previously had found, in denying a *Daubert* motion to exclude his testimony, to be well-qualified and reliable as an expert about parts quality (ER 64-66). The District Court properly based that finding on the fact that Mr. Wood is "qualified as an expert on the quality of automotive parts in part because of his thirty years of work with the California Bureau of Automotive Repair." ER 64; *see also* ER 65-66 (expert testimony may be based "on specialized or technical knowledge *as distinguished from scientific knowledge*, it is not necessary to rigidly adhere to the *Daubert* factors") (emphasis added); 66 ("[Mr. Wood's] opinions are based on the results of several studies conducted in automobile repair parts, as well as his expertise in the collision repair and insurance industries" and is qualified to interpret these studies). The insurance companies moved again to exclude Mr. Wood's testimony. ER 40. Judge Ware granted that motion, abandoning his prior finding that Mr. Wood was well-qualified based on his years of experience in the field, and instead holding Mr. Wood to the standard applicable to academic expert testimony -- namely, that Mr. Wood must present a "replicable" "scientific or statistically grounded methodology to

formulate his opinion." Judge Ware held that Mr. Woods did not meet this standard, which Mr. Wood never claimed or aspired to meet, and excluded his testimony on that basis.

In the same Order, with one sentence, the District Court denied class certification with prejudice as to both the damage and injunctive classes. ER 48. *See also* ER 53. There is no class opinion explaining or examining why the parts-predominance finding doomed these classes under the relevant prerequisites or prevented the showing of antitrust price injury from collusive failure to pass on savings from cheaper parts. In particular, Judge Ware did not specify why Mr. Wood's exclusion prevented certification of the proposed damage classes where economic experts from *both sides* conceded that proof of overcharging *does not* require common proof of parts quality (and Dr. Noll had already implemented a merits methodology showing this is not to be the case for some years as the damage period), as opposed to predominately-common proof of classwide antitrust price injury due to failure to pass on cheaper parts' savings. All that is required is a showing collusive failure to pass through these savings whatever the quality of those parts. Discussion *infra* at 26-29.

Nor did the District Court specify why the Rule 23(b)(2) injunction sought against the deception, collusion, and actual or threatened injury requires

predominately-common proof of parts quality rather than just some common proof of the violations alleged. ER 48.

III. The Parties' Expert Economists Agree That Proof Of Classwide Price Injury Does Not Require Common Proof Of Price Inferiority, And Judge Ware Fails To Explain Why It Does

There is no basis in this record to find that predominately-common proof of parts quality is a *sine qua non* for the finding of the availability of classwide antitrust price injury. It is enough that, as Dr. Noll has shown and as alleged,[12] that the insurance companies colluded not to pass on savings from use of the cheaper imitation and salvage parts and as a consequence raised or fixed premiums above competitive levels.

During the class hearing, class counsel made Appellants' position – and the nature of class expert submissions – quite clear to Judge Ware.

> . . . [A]lthough Defendants once again in their briefing have tried to make this case about individual parts, an issue that they lost on before the Ninth Circuit. This is an antitrust case; it's not a products liability case.
>
> *Even if it were shown hypothetically that every single imitation and salvaged part were exactly as good as the equivalent new [original equipment manufacturer] part made by or for the auto manufacturer, the fact the Defendants conspired not to pass on the savings would still be illegal, and the fact they did not pass on those savings would still be a classwide injury.*

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[12] *See* ER 198 ¶¶51, 53; *see also* ER 186, 199 ¶¶2, 57); *supra* at 17-18 nn.3-5.

> Now, it is true we allege as well as conspiring on price, Defendants also conspired on quality. In other words, we allege that there are sufficient number of inferior parts in certain categories of repair parts such that the quality of repairs covered by Defendants are essentially a [quality] lottery and a lottery, who odds being much crueler for the owners of inexpensive automobiles because those are the cars for which these parts are not commonly available.
>
> *But this allegation concerning the conspiracy on quality goes to the mechanics of the conspiracy. That is not the injury alleged in this case. The injury alleged in this case is price injury.*
>
> * * *
>
> If [Defendants] competed on quality, it would all fall apart, because as they started to compete on quality, they would have to bring the price down and pass on these savings. So, the conspiracy essentially wouldn't work. *But that's where the quality of parts comes in. It makes the conspiracy work, but the injury here is one of price, your Honor."* ER 139-140, 150 (emphasis added).

Further, the economic experts for *both* sides agree that proof of classwide overcharging does not require showings of parts quality. By actually performing the regression calculations based on actual conspirator data for multiple damage years, Dr. Noll has rigorously demonstrated that all that is necessary to show classwide antitrust price injury here is that the collusive savings from the use of the cheaper imitation and salvage parts are not passed on to class members. ER 223-234. If the conspirators competed as to price and quality they would have had to do so.

The insurance companies' expert, Dr. Daniel Rubinfeld, agrees. It is "clear that

the alleged [class] harm is about incomplete pass-through of parts savings, and *has nothing to do with whether the non-OEM [aftermarket or salvage] parts were actually inferior*." ER 222 ¶ 42.

Dr. Noll confirms:

> Could the parties [here] form a joint venture [conspiracy], whether it's a parts certification joint venture, or any other kind of joint venture that could be used as a device for colluding with respect to price [?] *Of course they could do so without the product of that venture being inferior*. . . . [T]he recording industry antitrust case . . . RIAA is often used as an example of an organization where the major distribution companies engaged in collusive activities. *And that doesn't have anything to do with the quality of sound recordings*.

ER 214 at 97:11-24 (emphasis supplied).

To model overcharging all that Dr. Noll requires is a determination of the *savings* generated for the conspirators by their use of cheaper imitation and salvage parts (whatever those parts' quality in contrast to those of the parts of original equipment manufacturers). ER 223-234. Through regression analysis, he determines whether these savings were passed through to lower premiums to competitive levels for the lower quality coverages offered. *Id.*

Importantly, he does not need to know which parts are "inferior" or less safe than the comparable parts of the original equipment manufacturer. He has testified that the collusive overcharging he is modeling is the savings from *all* imitation and

salvage parts used by the conspirators regardless of whether they are being "fraudulently passed off as equivalent in quality" to the parts of original equipment manufacturer. ER 218 at 115:4-16.

Nevertheless, Appellees point out that Dr. Noll testified (in a discussion of what he knows about parts quality) that he would need some other expert to tell him what parts were inferior. From this they seek to leave the impression that proof of parts' inferiority somehow must be factored into his overcharge model.[13] He unequivocally testified, however, and demonstrates in his reports, that this is not the case. ER 214 at 97:11-24 (a conspiracy to collude as to price does not require that the conspirators' products be inferior); ER 224-225, 228-229, 232-233. *See also* ER 218 at 115:17-21) ("I am not the one to evaluate the quality of the parts. All I have done is estimate the extent of which there's pass-through.").

Therefore Judge Ware's unexplained finding that predominately-common proof of parts quality at trial was necessary to show classwide price injury has no basis in the class record.

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[13] Appellees' counsel asked him how it would be determined which parts were of lower quality, not whether he needed to do so to estimate class overcharging. ER 215 (105:23-106:13). Dr. Noll was careful to point out that his "analysis is purely of parts savings." ER 216 (108:6-13). Although there may need to be some showing at trial of parts inferiority as to *liability* (as defined by the complaint) this does not factor into his damage overcharge analysis. *Id.*

IV. The District Court's Failure To Determine Whether Classwide Price Injury Is Available Makes A Dead Letter Of This Court's En Banc Direction Requiring Heightened And Careful Class Findings

A. Failure to Address Whether There Is Classwide Proof of Price Injury

Because the District Court was misled by Appellees into focusing once again on parts quality, it failed to address what is typically the central predominance question as to price fixing injury -- whether classwide proof of price injury will be available at trial. Its one-sentence determination rejecting all classes the District Court completely overlooked Appellants' massive and careful submissions in a ten-month class proceeding as to this core issue. Fully presented has been "rigorous analysis" (overlapping with the merits as necessary) making a "plausible" classwide showing of price injury. *See Dukes v. Wal-Mart Store, Inc.*, 603 F.3d 571, 581 (9th Cir. 2010) (en banc), *rev'd on other grounds*, 131 S. Ct. 2541 (2011); *accord*, 131 S. Ct. at 2551. The heightened standards for certification of damage classes have been met here.

By failing to articulate fully its class findings and relying on its irrelevant finding as to parts inferiority, the District Court leaves all in the dark as to whether the other class prerequisites have been met as well. Thus over ten years of alleged overcharging of millions of Californians caused by an insurance cartel are

extinguished "with prejudice" *ipse dixit*, with extreme brevity, and with no reasons.

B. Failure To Articulate Reasons For Denial Of Class Certifications

Fed. R. Civ. P. 52(a)(3) (findings and conclusions by the District Court) does not require findings of fact and conclusions of law on a class or other motion "unless these rules provide otherwise." Rule 23(a) and (b) so require. Under Rule 23(a), persons may represent a class "only if" four prerequisites are met and one of three requirements of subsection (b) are "satisfied." Under subsection Rule 23(c)(3) certain findings must be made for any class certified. *See also Dukes*, 603 F.3d at 580 (in addition to Rule 23(a) findings, district court "must also find" one of three conditions are met under subsection (b).

This Court has found en banc that a failure to provide reasons for a denial of class certification is a ground for reversal and remand. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1018 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1970 (2012). In its review this Court asks:

> whether the district court correctly selected and applied Rule 23 criteria. An abuse of discretion occurs when the district court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them.

Id. (internal quotation marks omitted). In *Consolidated Edison Co. of N.Y. v. Richardson*, 233 F.3d 1376, 1384 (Fed. Cir. 2000) the Federal Circuit remanded the

issue of certification because no basis for denial was provided, noting "[p]laintiffs present an argument for certification that is at least facially plausible. We are reluctant to affirm without knowing the district court's grounds for denial . . . . [W]hen the district court is presented with conflicting positions as to how to exercise its discretion . . . , sound practice strongly suggests giving the litigants and a reviewing court *at least a minimum explanation of the reasons for its decision.*" (emphasis added); *see also Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) ("a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision"); *cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) (as to a denial of an amendment of a complaint, "[o]f course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules").

"'[A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: often a strong impression that, on the basis of evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.'" *Moore's Federal Practice 3d* § 52.02[1] (2007), *quoting, United States v. Forness*, 125 F.2d 928, 942 (2d Cir.

1942).

Further, "[a]s with findings of fact, conclusions of law must carefully enunciate and explain the trial court's resolution of questions of law, so this Court is able to conduct a just and orderly review of the rights of the parties A carefully prepared discussion of legal issues becomes *particularly important in cases that involve complex legal issues*." *Moore's Federal Practice 3d* § 52.15[3] (2012) (emphasis added), *citing inter alia, In re Mazzeo*, 167 F.3d 139, 142 (2d Cir. 1999).

The *Manual for Complex Litigation* makes clear that, after a certification hearing, "the court should enter findings of fact and conclusions of law addressing *each of the applicable criteria of Rule 23*. Failure to make such findings may result in reversal or remand for further proceedings. . ." *Manual for Complex Litigation, Fourth* § 21.21 (2012) (emphasis added), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/MCL40002.pdf/$file/MCL40002.pdf.

While the Federal Judicial Center's *Judicial Writing Manual* does not specifically address class orders, it specifies as to orders generally that "[w]hile brevity is desirable, judges must elaborate their reasoning sufficiently so that the reader can follow. An opinion that omits steps in the reasoning essential to understanding will fail to serve its purposes." *Judicial Writing Manual* 22 (Fed. Judicial Ctr. 1991), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Judicial

WritingManual.pdf/$file/JudicialWritingManual.pdf.

"Determining whether a proposed class meets Rule 23 certification requirements demands a rigorous analysis. [The Court has] discretion to decide on both the extent of discovery and whether or not to hold a hearing to determine whether the requirements have been met. *[It] need[s] to make factual and legal determinations with respect to the requirements of Rule 23*." Rothstein & Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* § III(B) at 9 (3d ed. 2010) (emphasis supplied), available at http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf.

The District Court's failure to articulate sound reasons also arguably fails to respect due process rights. The right to be heard is central to any notion of procedural due process, as is a transparent decision by an impartial decision maker. A judicial process has legitimacy because each side to a controversy has the ability to make its record and receive an impartial, transparent determination, which can be reviewed for impartiality. These due process values are not honored by a court's failure to give reasons for its decision, here extinguishing "with prejudice" millions of class claims created by an automobile insurance cartel active for over more than a decade.

In this regard, this Circuit sitting en banc has carefully set out guidance for the District Courts as to how to apply class prerequisites, with particular attention to the

degree of "rigorous" fact-finding needed as to merits issues (in part to show availability of common damage proof under Rule 23(b)(3)). *Dukes,* 603 F.3d at 586-87, 597-98. This Court can only supervise implementation of these standards by having class findings and conclusions of law entered by the trial court. It is ill-equipped to make its own class findings and conclusions and cannot convene the necessary class hearing. If the important class tool is to be used properly to provide pervasive and important remedy where appropriate, careful and transparent findings and conclusions should be made. The District Court's failure here to make these findings in essence makes the Circuit's en banc guidance in *both Stearns* and *Dukes* a dead letter.

For these reasons, the District Court abuses its discretion (a) by failing to understand or by ignoring -- despite this Court's guidance -- the nature of the price injury caused by the collusion alleged; (b) by imposing upon the certification of the damage classes an irrelevant requirement of predominately-common proof of parts quality; and (c) failing to explain its reasoning for denying the damage certification and in particular declining to rule on the central issue of classwide proof of antitrust price injury. Further, the District Court erred as well as to its treatment of the Rule 23(b)(2) injunctive classes.

V. Proof Of Collusive Use Of Often Unsafe And Inferior Repair Parts Is Relevant To Injunctive Relief, But The District Court Also Erred By Implicitly Finding That Rule 23(b)(2) Requires Predominately-Common Proof Of Parts Quality

Appellants also have sought to certify Rule 23(b)(2) classes (ER 202, 204, 206, 208 ¶¶64, 70, 76, 82) enjoining the Appellee insurance companies' violations, including their alleged deception, collusion to use often inferior or unsafe repair parts for coverages, collusion not pass on savings from use of these cheaper parts, and actual or threatened injury. Proof of the conspirators' use of often inferior or unsafe parts *is relevant* to these issues. ER 186-187 ¶¶2-4, 6. ". . . [T]he California policyholder is akin to one who buys high quality health care insurance but, when it comes for care, the insurance company provides low-cost, untrained personnel using inferior tools, all the while trumpeting that the care is first class." ER 187 ¶7.

These injunctive claims are extinguished as well with prejudice by the District Court's one sentence class ruling. ER 48. This is clear error because Judge Ware implicitly read a Rule 23(b)(3) predominance class requirement into the Rule 23(a) and Rule 23(b)(2) prerequisites, when all that is required for class injunctive relief is at least some common proof as to the injunctive claims, certainly not predominantly-common proof.[14]

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[14] In its opinion denying class reconsideration, the District Court finds that "[c]lass certification under Rule 23(b)(2) is appropriate only where the primary relief sought

VI. The District Court Erred By Not Allowing Amendment Of The Complaint

A. The "Extreme Liberality" Standard Governing Amendment

The District Court compounded its class errors by failing to allow the filing of the proposed Sixth Amended Complaint. After Judge Ware found that predominately-common proof of inferior parts quality was necessary to show overcharging due to collusion, Appellants sought to amend the Fifth Amended Complaint to *remove* the Rule 23(b)(2) injunctive class claims to remove the irrelevant and distracting parts issue from the District Court's reconsideration of Rule 23(b)(3) certification, and to seek to eliminate confusion over whether the allegations of parts quality were relevant beyond the injunctive claims. The proposed Sixth Amended Complaint carries forward the price fixing damage claims (which this Court acknowledged in 2009)

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is declaratory or injunctive." ER 34. Accordingly, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* However, because it failed to provide class findings, Judge Ware has completely failed to address contrary and controlling precedent presented indicating that a Rule 23(b)(2) injunctive class can independently be certified (in addition to damage classes). *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583 (N.D. Cal. 2010) (certifying class under Rule 23(b)(2) for injunctive and declaratory relief and under Rule 23(b)(3) for damages) ("'It is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects.'") *Id.* at 596. The cases relied upon erroneously by Judge Ware go to circumstances not found here, where *damages* are sought under *Rule 23(b)(2)*, not injunctive relief. The damages sought here are under Rule 23(b)(3).

with no material alteration.

Even though the District Court had previously acknowledged that it should exercise "extreme liberality" in granting amendments (following the Circuit's clear direction),[15] it declined to allow the deletion of the injunctive claim (and assorted parts allegations) because it found that the price fixing claims alleged in the stripped-down complaint were new, that is, not in the Fifth Amended Complaint. ER 28-33. The District Court accepted the Appellee insurance companies' contention that the proposed complaint alleging collusion not to pass through parts savings would "dramatically alter the nature of the case" and prejudice them by adding a *new* price fixing claim and "the price-fixing allegations in the Fifth Amended Complaint cannot be separated from Plaintiffs' part-quality allegations, as the Fifth Amended Complaint alleges that Defendants conspired to fix prices by conspiring to limit the output of higher products." ER 32 (ECF No. 687 at 8). In the spirit of Captain Renault in *Casablanca*, the insurance companies professed to be "shocked" to discover that Appellants' had previously alleged price fixing through failure to pass though parts savings, and despite the fact that this Court previously emphasized that this case is about antitrust claims that inflate premiums. *See* ER 198 ¶¶53, 237-238. *See also* ER

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[15] ER 71-73, citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003 ("extreme liberality"); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983).

198-99 ¶¶51, 57 (inflation of conspirators' profits using collusive parts savings rather than passing on to lower premiums); discussion *supra* at 17-18.

B. Misapplication Of "Futility" And "Prejudice" Standards

The District Court also misapplied the futility and prejudice standards.

Futility. '[L]eave to amend 'shall be freely given when justice so requires,' bearing in mind 'the underlying purpose of Rule 15 . . . to facilitate decision on the merits, rather than on the pleadings or technicalities.' *Lopez v. Smith,* 203 F.3d 1122, 1127, 1140 (9th Cir. 2000) (en banc) (internal quotation marks and alterations omitted)." *Sricom, Inc. v. Ebislogic, Inc.,* 2012 WL 4051222 *9 (N.D. Cal. 2012).

Having found collusive failure to pass on parts savings and price fixing to constitute a new claim, Judge Ware found that it was futile to add them toa Sixth Amended Complaint. ER 30-31. Because the premise is invalid, so is the futility finding. Further, without any textual analysis of the proposed Sixth Amended Complaint, the Court found the proposed complaint "virtually devoid of factual allegations in support of its allegations regarding a putative antitrust price fixing conspiracy among [Appellee insurance companies], which means that the proposed Complaint *would likely be dismissed* pursuant to a 12(b)(6) motion" and is not "plausible." ER 30-31 (emphasis added).

This is further error. It employs the wrong standard ("plausibility") in the

wrong context (an amendment determination) to make in effect Rule 12(b)(6) findings on the fly and without briefing and hearing. This is particularly ironic since at least two prior iterations of the complaint also alleging price fixing had survived motions to dismiss with the aid of the Court of Appeals.

The futility standard is not the "likely to be dismissed" or "implausibility" standards of Rule 12(b)(6). For an amendment to be found futile it must "appear[] *beyond doubt*" that the claim "could not survive a motion to dismiss." *Greer v. Lockheed Martin*, No. CV 10-1704 JF (HRL), 2011 WL 1793379 at *3 (N.D. Cal. May 11, 2011) (internal quotation marks omitted) (emphasis supplied); *Low v. Linkedin Corporation*, 900 F. Supp. 2d 1010, 1033 (N.D. Cal. 2012)("facts consistent with the challenged pleading *could not possibly cure the deficiency*"), *citing, Telesaurus VPC, LLC v. Power,* 623 F.3d 998, 1003 (9th Cir. 2010) (emphasis supplied). *See also Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995) (claims "futile" if "patently frivolous" or "duplicative of existing claims"); *Moore's Federal Practice 3d* § 15.15[3] (2012) (courts should not deny leave to amend unless "it is beyond a doubt that there are no facts to support relief."). It is abuse of discretion to conflate Rule 15(a)(2) impossibility and Rule 12(b)(6) plausibility standards.

Under the correct standard, the conspiracy claims cannot be said to be futile. Even before merits discovery, there is already ample circumstantial evidence that the

insurance companies engaged in precisely the collusion alleged (apart from the fact that Dr. Noll has shown they have not – consistent with the collusion alleged – passed through parts savings for tested years in the damage period). Discussion *supra* at ___. For example, these supposed price competitors freely discuss in email exchanged their joint parts savings, the status their policies substituting parts to generate these savings, as well as the $240 million Appellee State Farm has saved from the use of these parts. ER 264. True price competitors do not, and cannot, lawfully exchange such competitively-sensitive cost information bearing directly on premiums charged to class members. Indeed, co-conspirator and collusive enabler Appellee CAPA (the faux-certification body founded and financed by the insurance companies) estimates that its efforts *enhanced the profits* of the insurance conspirators by hundreds of millions of dollars. *See.* ER 270-271 (first full para. 270). This cannot and does not happen if the alleged conspirators *are* truly competing to pass on parts savings to class members. The cost savings would flow through to class members to reduce premiums and the Appellees' bottom lines would not be improved.

Further, even if the futility standard were "implausibility" under Rule 12(b)(6), the proposed Sixth Amended Complaint properly alleges the elements of a conspiracy. This is much more than a " 'naked assertion of conspiracy.' " Particularly

before merits discovery, Appellants more than meet the requirements here. "The Ninth Circuit . . . held that, to survive a motion to dismiss, a Section 1 claim should 'answer the basic questions: who, did what, to whom (or with whom), where, and when?'" *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1116 (N.D. Cal. 2012) (citation omitted). The amendment alleges who (Prop. 6AC ¶¶ 1, 10-14, 20-23); did what (*id.* ¶¶ 1, 19-24, 54-55); to whom (*id.* ¶¶ 54-55); where (*id.* ¶¶ 30, 36, 42, 48 (California classes); *id.* ¶¶ 20, 23 (insurance organizations including Defendant CAPA)); and when (*id.* ¶¶ 30, 36, 42, 48 (March 14, 2002 to present)).[16]

Prejudice. Further, no prejudice would be visited on the insurance companies, since the amendment seeks to *subtract* the injunctive claim of a conspiracy not to compete as to parts quality and adds no new claims (price fixing or otherwise). The amendment would reduce discovery. Nonetheless, based upon its erroneous belief

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[16] Appellee insurance companies rely on *Kendall v. Visa U.S.A. Inc.*, 518 F.3d 1042 (9th Cir. 2008), to support their argument that Appellants failed to allege sufficient facts supporting a conspiracy. The *High-Tech* Court distinguished *Kendall*, however, noting that "[e]ven after conducting depositions, the Appellants in *Kendall* did 'not allege *any* facts to support their theory that the [Appellee insurance companies] conspired or agreed with each other . . . to restrain trade.'" 856 F. Supp. 2d 1103, 1116 (quoting *Kendall*, 518 F.3d at 1048) (emphasis added). Further, it is "particularly true" that motions to dismiss for failure to state a claim "rarely" will be granted in an antitrust suit where the proof and details of the alleged conspiracy are largely in the hands of the co-conspirators. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 995-96 (11th Cir. 1983). Here, Appellants have had no discovery as to the conspiracy.

that the price fixing conspiracy had not been previously alleged, the Court denied the amendment because it was a new claim and continued six years of litigation. It would therefore "prejudice" Appellee insurance companies. ER 29-30.

First, the price fixing claim ("artificial price inflation") is not new and has been the case for years and through multiple complaints, as this Court has found as to the Second Amended Complaint. Second, it is not prejudicial because the litigation had been pending six years to this point. This is akin to arguing "I killed my parents, but spare me because I am an orphan." The insurance companies have twice persuaded Judge Ware to commit manifest errors requiring two journeys to this Court. This has added four unnecessary years to this case, two-thirds of the time this matter has been pending.

The age of this matter, and the diligence that Appellants have had to apply to petition this Court once again to argue for, not against, amendment. It would be exceptionally inequitable to suppress Appellants' amendment rights (and their simplified case for class certification of the price fixing claims alone) because this matter has been pending for six years.

Third, litigation always continues after *any* amendment. This is not the kind of prejudice of concern under Rule 15(a)(2), which is the failure to give a defendant adequate notice of claims before trial (and the ability to prepare defenses fairly by

discovery or otherwise). The merits phase of this case has not even begun. Indeed, to adopt the District Court's novel definition of prejudice would mean *no* amendment in any matter could be granted because by definition it facilitates continued litigation.

Fourth, Judge Ware effectively reverses himself again on amendment standards. The Appellee insurance companies tried this "sky is falling" argument (because here come new price-fixing claims) in their failed opposition to the Fourth Amended Complaint. Judge Ware rejected the argument, finding that this complaint "merely clarified" the prior pleading and did not require Appellee insurance companies "to undertake an entirely new course of defense." ECF No. 675 at 9 n.2. He therefore rejected their contention that they were prejudiced, relying in part on *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (no prejudice because Appellee insurance companies were not required to "undertake[], at a late hour, an entirely new course of defense.").

With the proposed Sixth Amended Complaint this Court was confronted with an easier case. Not only are no new claims added, a claim is subtracted. Since this case is well before the merits phase, there is no "eleventh hour" preparation prejudice. Certainly, allowing amendment to allow consideration of modified class definitions (possibly creating greater exposure for Appellee insurance companies) is not cognizable prejudice under Rule 15(a)(2). *See, e.g., Ward Elecs. Serv., Inc. v. First*

Commercial Bank, 819 F.2d 496 (4th Cir. 1987).

This Circuit has consistently held that a substantial showing of prejudice is required to overcome the liberal policy of allowing amendments to pleadings under Rule 15. *See Hurn v. Retirement Fund Trust of the Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981) ("Bald assertions of prejudice cannot overcome the strong policy reflected in Rule 15(a) to 'facilitate a proper disposition on the merits.'"), *quoting, Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The prejudice test is designed to protect a defendant from procedural unfairness by ensuring it is provided adequate and timely notice allowing the defense of claims at trial. The only relevant prejudice is that of a failure to provide a defendant adequate notice so it can adequately and fairly defend a claim without surprise.[17] There is no such prejudice here where a claim is eliminated, not added, and the case is not even within hailing distance of full merits discovery and trial. Appellee

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[17] *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981) (prejudice found when party wanted to add new claim "at the eleventh hour, after discovery was virtually complete, and [a] . . . motion for summary judgment was pending before the court"); *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (prejudice found when amendment brought only five days before close of discovery and amendment would delay proceedings); *Solomon v. North Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (prejudice found where amendment "on the eve of the discovery deadline" and amendment would require re-opening discovery and delaying proceedings); *Walker v. Benter*, 41 F. Supp. 2d 1067, 1072 (C.D. Cal. 1999) (prejudice found denying leave to amend after discovery cut-off because amendment "would unreasonably prejudice the defendants").

insurance companies have been on notice of the pre-existing price overcharge claim for several years.

As to Appellee insurance companies' claims that the Sixth Amended Complaint constitutes a radical shift in the matter, the following allegations are found in *both* the Fifth Amended Complaint as well as the Proposed Sixth Amended Complaint:

- The insurance companies have colluded not to pass on parts savings and increase their profits. *Compare* 5AC ER 186, 198-199 ¶¶2, 51, 53, 57 *with* Prop. 6AC ER 110, 112 ¶¶1, 19;

- "As a result of the conspiracy, the insurance companies have reaped the benefits of both lower costs and higher profits and have been able to charge higher premiums to policyholders for inferior policies than they would have been able to do in an unrestrained market." *Compare* 5AC ER 199 ¶57 *with* Prop. 6AC 112, 124-125 ¶¶19, 54-55;

- [The conspiracy] raises premiums above competitive levels. *Compare* 5AC ER 186, 188, 190 ¶¶4, 12, 27 *with* Prop. 6AC 110, 112 ¶¶1, 19;

- Insurance companies' records show that the insurers are the only ones who benefit financially from illegal practices. *Compare* 5AC ER 194 ¶41 *with* Prop. 6AC 113 ¶22; and

- The conspiracy unlawfully increases Defendant profits. *Compare* 5AC ER 186, 198-199 ¶¶2, 51, 53, 57 *with* Prop. 6AC 112, 115 ¶¶19, 28.

VII. The Summary Judgment Order Is Infected With The Same Error Reflected In The One-Sentence Class Finding

While the District Court acknowledges "the undisputed point that the Fifth Amended Complaint does indeed allege price fixing and collusion by [Appellee

insurance companies] to produce anti-competitive premiums," it nonetheless finds that "the Fifth Amended Complaint clearly alleges only one conspiracy: namely, that [Appellee insurance companies] conspired to fix prices *by* deceiving consumers as to part quality." ER 32. It concludes, this time on the merits, that "the failure of [Appellants] to produce an admissible methodology for determining what categories of non-OEM parts are inferior to OEM parts is as equally fatal to [all] [Appellants'] individual, as well as class, claims." ER 35.

This error is familiar. First, Judge Ware continued to misunderstand the claims in the Fifth Amended Complaint, which manifestly alleges two elements of collusion: not to compete as to provision of high quality coverages by substituting cheaper imitation and salvage and repair parts (*see, e.g.*, ER 186-187, 190-191 ¶¶2, 3-4, 26-29; *supra* at 17 n. 3); and not to compete to pass on these parts savings to allow competitive pricing of premiums. *See* ER 198,199-200 ¶¶51, 52, 57 (increasing profits by failing to pass through parts savings); *supra* at 17 n. 4. Both elements of this collusion are reflected in this Court's characterization of claims in the 2009 appeal. Discussion *supra* at 3-4. Quite simply, if the Appellee insurance companies could not have artificially increased premiums above competitive levels for lower quality coverages unless they colluded not to pass on parts savings.

Second, as in the class context, the District Court fails to enlighten why a

collusion not to compete as to the quality of coverages and to pass through parts savings from use of cheaper imitation or salvage parts requires common proof of part-by-part quality, let alone predominately-common proof. It does not explain why all parties' economic expert testimony is to the contrary is wrong. Nor does it explain why Dr. Noll is able to estimate class overcharging without any reference to the quality of the substitute parts under a methodology that the District Court found "relevant" and "reliable." All that is necessary is to show that they are cheaper than original equipment parts. Discussion *supra* at 27-29.

Further, as noted, predominately-common proof of parts quality is not required for making out the injunctive class claims, *supra* at 36-37, or individual claims. There is no basis in this record, or in fact or law, to determine that predominately-common proof of individual parts' inferiority across the board is necessary to demonstrate that the insurance companies colluded to suppress the quality of policy coverages and not to pass on parts savings to increase profits and artificially inflate premiums. It simply is not necessary to sort through thousands of imitation or salvage parts to make out this pernicious collusion.

VIII. The District Court Does Not Explain Why It Reversed Itself Again, This Time On The Proper Use Of Rule 56(d)

In opposition to the motion for summary judgment, Appellants filed a request

for permission to take discovery under Fed. R. Civ. P. 56(d) to support of their allegations that proof is available, raising issues of fact as to claims correctly understood.

Judge Ware denied this request by changing in mid-course its interpretation of the dictates of Rule 56(d). In December of 2010, Appellees Liberty Mutual Fire Insurance Company ("Liberty Mutual") and State Farm Mutual Automobile Insurance Company ("State Farm") moved for summary judgment as to the Third Amended Complaint. Appellants requested Rule 56(d) discovery. The Court *granted* the Rule 56(d) motion and referred the parties to Magistrate Judge Grewal for Rule 56(d) discovery plan. ER 85-86. Liberty Mutual and State Farm, however, decided not to expose themselves to this discovery, possibly because it would show their motions to be fallacious. When the Third Amended Complaint (which the motions addressed) was supplanted by the closely-related Fourth Amended Complaint, they told the Court (with yet another iteration of their "sky is falling" and "whole new claim" argument) that the motions were mooted because of a radical shift in the case to price fixing claims.

In the last rushed days of this case, however, the District Court found that use of Rule 56(d) to allow the very discovery it previously had ordered (and implemented by the Magistrate Judge) would be denied. It was right the first time.

Here, this Court may detect a pattern. First, the District Court reversed itself on the Appellees' parts expert, Mr. Wood. *Supra* at 24-25. Initially it found his methods sound and reliable as an expert in automotive repair to show the quality of the insurance companies' parts. The District Court then reversed itself a few months later, employed a very different, and inapplicable "scientific proof" standard to reject Mr. Wood's methods because in part he was not an expert in scientific sampling. *Id.*

Second, the District Court first allowed the filing of the Fourth Amended Complaint notwithstanding the insurance companies' claim that it contained wholly-new and prejudicial price fixing claim, but then accepted that same argument to disallow the filing of the simplified Sixth Amended Complaint (which carried forward those same price fixing claims. Finally, the District Court reversed itself again on the proper use of Rule 56(d) as to the same price fixing claims. Appellants are as dizzy as they are perplexed.

Because Appellees' summary judgment motion was filed so early in the litigation, before Appellants had any realistic opportunity to pursue discovery relating to its theory of the case, the Court erred as a matter of law by denying Appellants the opportunity to seek Rule 56(d) discovery. Although Rule [56(d)] facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule

as requiring, rather than merely permitting, discovery, 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v. Wornick,* 264 F.3d832, 846 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 n.5 (1986) (emphasis added); *see also Burlington Northern Santa Fe R.R. Co. v. The Assiniboine*, 323 F.3d 767, 773 (9th Cir. 2003).

CONCLUSION

For the above reasons Appellants request that the judgment be vacated and this Court Order further proceedings consistent with its Opinion and Order.

STATEMENT OF RELATED CASES

Counsel is aware of no related cases pending in this Court. This Court earlier decided another appeals in this same case in *Perez et al. v. State Farm Mutual Automobile Insurance Co. et al.*, Case No. 06-16965 and Case No. 09-16745.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

Dated: October 25, 2013

Respectfully submitted,

By: /s/_____

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2013.

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