SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
	:	Index: 606797/2017
Plaintiff,	:	
-against-	:	
M.V.B. COLLISION, INC., d/b/a MID ISLAND COLLISION	:	

POST-HEARING MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S REQUEST FOR LIEN-INVALIDATION

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INTRODUCTION

Mid Island Collision is a first-class collision center that spends millions of dollars per year on training and equipment. To maintain this high-end option for Nassau County consumers, it charges prices high enough to recoup its expenses and to turn a profit on its investments. Every customer who hires Mid Island Collision, including the one in this case, Courtney Pope, agrees to these rates.

However, the market dynamics in the collision center industry extend beyond company and customer. A separate dynamic exists between customer and insurance company. And rather than being bound by service contracts, this separate relationship is instead governed by an insurance policy. Thus in the gap between these two relationships, customers can wind up owing more money to a collision center than an insurance company is willing to cover—not altogether different from, for example, the market for healthcare.

The difference is that, in this case, the insurance company is not limiting itself to fighting about the coverage it will offer its insured. Instead, the insurance company, State Farm, wants to limit the prices that the service-provider and the customer can agree upon among each other. In that sense, while the monetary amounts in this case are perhaps small, the insurance company's request is radical: No case in state history has enabled an insurance company this degree of market power—to contest not its own coverage, but the prices agreed upon by others in a private transaction.

To be clear, this case is not brought by the insured against the insurer, nor is it by the customer against the service-provider. Instead it crisscrosses these relationships, and is brought by the insurer against the service-provider—seeking to invalidate a lien. This awkward factual basis runs into an immediate legal problem: the only way to invalidate a lien, as relevant, is to

show both that there was no agreed upon price and that the charge to the customer was unreasonable. Yet neither showing is possible here. State Farm challenges the labor rates, but those labor rates were agreed upon in a free market by Mid Island and its customer. Those rates were also reasonable. Two experts testified as much during the hearing. No experts testified to the contrary. Even though the work performed at dealerships is less complicated than the work performed at Mid Island Collision, State Farm itself has paid rates this high—and substantially higher—to non-Nissan dealerships and to Nissan-dealerships alike. And in fact, the hearing evidence showed that State Farm has paid rates directly to Mid Island that nearly double or even nearly triple the rates offered here, which instead was the same one-price-fits-all rate—$49-51 per hour—that State Farm generally offers to every standard body shop on the island regardless of its skill. During the hearing, State Farm offered no evidence to address how this rate was even determined.

These are not just theoretical problems. Mid Island's skill played out in real time in this case. Based on its expertise, Mid Island knew that the car in question was a total loss as early as April 2017. Contrary to its own financial interests, it told State Farm to declare the car a total loss immediately—to save everybody the time and money that otherwise Mid Island would charge. But State Farm insisted—across forty days—that it knew better, and that repairs should continue, before finally realizing in June that Mid Island's request for a total loss determination had been correct from the very beginning. So if there were any doubt about whether Mid Island's rates were deserved, one point is incontrovertible: Mid Island's expertise allowed an opportunity for savings worth tens of thousands of dollars to its customer and to State Farm as her insurer—and State Farm turned that opportunity down. Even superficially, then, having refused these savings, State Farm should not be heard to complain about the costs that Mid

Island urged it to avoid.

The bottom line in this case is that upholding the lien to the extent of the unpaid bill—approximately $21,000[1]—will not force State Farm to pay a dime. It will simply recognize that high-end collision centers like Mid Island are allowed to exist, to enter into private agreements with its customers, and to use the tool specifically created to protect parties in its position: a mechanic's lien. Because Mid Island's labor rates were agreed upon with its customer, and because its prices were in any event reasonable under the circumstances, State Farm's request to invalidate the lien should now be denied.

[1] Since the commencement of the hearing, the parties have entered into further agreements concerning the scope of their disagreements in this matter. State Farm is foregoing its contest as to two entries for $490 each—one for towing and one for sublet work—and Mid Island is foregoing $1,280 it paid to secure a rental car for its customer. Thus, reducing the disputed sum by $1,280 (plus 8.625% tax), the amount in dispute is $19,652.28.

BACKGROUND

State Farm and Mid Island's Business Models Come into Conflict.

Mid Island Collision is in the business of repairing automobiles (Hearing Exhibit I). It has been under the same ownership for more than thirty years (Tr. III, at 75[2]), but its business model is unusual for collision centers. Unlike other players in the industry, it does not get customers by being on a list of shops with whom insurance companies have pre-existing agreements for repair work (Tr. I, at 28). Those auto body shops are part of a Direct Repair Program—or "DRPs"—and, in general, get business automatically at prices that insurance companies direct and discount (Tr. I, at 28-29; Tr. II, at 54-56). Instead, Mid Island Collision gets customers who have not received insurance company prodding, and it sets its own prices (*id*; *see also* Tr. I, at 89; Tr. II, at 54).

Using this business model, Mid Island offers a level of service that is uncommon in the industry (Tr. I, at 22-23). Its technicians get certified directly by the manufacturers of the cars on which they operate (*id.*). It sends the technicians out for training "in every aspect from start to finish[:] customer service training, structural training, body training, prep training, paint training, even our service reps are trained, and our detailers, our mechanics.... This training is continuous, ongoing for the rest of your time as a technician" (Tr. I, at 23).

One consequence of all this training is an extremely high level of service. According to testifying expert Lawrence Montanez—who *taught* the two primary State Farm estimators in this case (Tr. II, at 35-36)[3]—the overall level of quality provided to Mid Island's customers is "in the top five percent [in] the country of ... collision repair"—a level "far superior to the average work

[2] A transcript accompanies each hearing date, referenced throughout this memorandum as either "Tr. I," "Tr. II," or "Tr. III."

[3] He taught Estimators Thiele and Rice among thousands more at the Inter-Industry Conference on Auto Collision Repair ("ICAR") (Tr. II, at 36-37).

at other shops" (Tr. II, at 52). Or in the words of the manager of a dealership of the exact manufacturer in question—Nissan—"They do excellent work. They do it right. ... [The best shop in Nassau County is] Mid Island Collision," and it is "[s]o superior it's unbelievable" (Tr. III, at 19-20).

This level of service is not just helpful for customers. It promotes the safety of roadways in general. When leases end and motorists return cars to their dealerships, for example, sub-par auto body work could mean that for future users the car "might not operate correctly" (Tr. III, at 11). That is ultimately a liability born by auto dealerships (*id.*).

The corollary to this level of service and safety, however, is that running the collision center is "very expensive" (Tr. I, at 23). "[I]n the last years we spent well over a million dollars between training and equipment" (*id.*). After all, the training is required separately "for every manufacturer, and each manufacturer has their own standards, their own equipment, their own welders" (*id.*) (*see also* Hearing Exhibit H) (showing separate manufacturer certifications for Mid Island). To simply "break even," in fact—to not make or lose a dime—Mid Island would need to charge a base labor rate of about "$86.75" per hour (Tr. II, at 50).

The Plaintiff, State Farm, inquired of other lawsuits that have percolated in Nassau County between these parties (Tr. III, at 76). These ongoing disputes generally emerge from one common premise: Mid Island's business model causes friction with State Farm's business model. That is because State Farm offers repair-coverage based upon a blanket labor rate of between $49-51 dollars per hour (*e.g.*, Tr. III, at 63) (describing "the Nassau rates of $49 and 51 depending upon what labor category"). In these cases, as here, State Farm thus offers the same rate to Mid Island as it pays to run-of-the-mill shops and DRPs (*see* Hearing Exhibit Y) (showing labor rates offered throughout the repair process in this case).

Therefore, in a case like this one, the shop and the insurance company can and do agree on the amount of work needed to repair the car to "predamage condition," as required. *See* 15 NYCRR 82.13(a). State Farm's Verified Complaint lobbed allegations like Mid Island's "services were not rendered as claimed" and "some or all of the repairs were unauthorized" (*see* Complaint, at ¶28). But in truth, on a final bill with more than 145 entries of work,[4] "there's actually a court stipulation where the only dispute on the actual repairs done is whether one recycled wheel should have been used or two new alloy wheels" (Tr. II, at 21) (Plaintiff's counsel describing stipulation).[5] Underscoring this point, State Farm welcomed 244.8 hours of paid labor to be performed on this vehicle—and Mid Island charged for fifty hours *less* than that on its final bill (Tr. II, at 113-114) (244.8 hours versus 194.5 hours).

Still, as set forth below, State Farm's one-price-fits-all model on labor rates caused its coverage to fall thousands of dollars short of Mid Island's final bill to its customer in this case. *Compare* Hearing Exhibit E (Mid Island's final bill) *with* Hearing Exhibit Y (State Farm's estimates). Indeed, given its break-even point (Tr. II, at 50), if Mid Island regularly accepted State Farm's standard price of $49-51 per hour it would go out of business.[6]

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[4] See Exhibit E.

[5] Fixing two wheels rather than one was, moreover, utterly appropriate under the circumstances. As expert Montanez explained, the "driver's side was the impact wheel, so this is the left side of the vehicle. This is the right. A vehicle came in this way and hit it, and as you hit it, you're going to push the vehicle somewhat this way and it hit maybe the curb on the opposite side or the roadway, something in the roadway that did damage to the wheel (Tr. II, at 43). There was therefore damage not only to the driver's side wheel but also to the passenger's side wheel (Tr. II, at 41-43). So contrary to the scurrilous allegations in Plaintiff's complaint, and contrary even to the much more limited allegations in the stipulation, expert Montanez found nothing in Mid Island's bill that was unnecessary for fixing the car. "I actually found a few items that they probably could have charged for that they didn't put in there," he said (Tr. II, at 42).

[6] Alternatively, as Montanez explained, it would have to "cut corners" aiming at quantity rather than quality (Tr. II, at 53).

In Light of its Excellence, Expenses, and to Turn a Reasonable Profit, Mid Island Charges between $120-$175 per hour for Labor.

To account for its high expenses and a reasonable profit, Mid Island charges labor rates of $120 per hour on standard cars and $175 per hour on specialty cases (*e.g.,* Tr. II, at 57). In this case, in Mr. Montanez's view, "120 an hour for that vehicle [was] a reasonable amount...." (Tr. II, at 47). In the words of Joseph Maruca, a manager of a Nissan dealership, and someone with forty years of experience in the automotive industry:[7] he actually "thought they would get a little more ... a little more than 120 for body repairs" (Tr. III, at 20). In contrast to Montanez and Maruca, third-party experts with a combined (approximately) 60 years' experience in the automotive industry on Long Island,[8] State Farm did not call any non-State Farm witnesses to challenge these views on price-reasonableness.[9] Nor, contrary to Mid Island, did State Farm produce any record of how it calculated its blanket labor rates in the first place.

Overall, Mid Island's prices reflect its level of service. But to put its prices into context, work performed *at Nissan* on the very vehicle in question here—Courtney Pope's Nissan Armada—was billed at $125 per hour (*see* Hearing Exhibit L). Mr. Maruca's own Nissan dealership gets paid "$150 an hour" (Tr. III, at 14). Yet Mid Island charges rates lower than these dealerships. And this is even though, as Mr. Maruca admitted, Mid Island's "body work is definitely more complicated" than the work performed at a Nissan dealership (Tr. III, at 17), where in contrast to body work and welding the dealership's work is more along the lines of "plug and play" (Tr. III, at 18).

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[7] Tr. III, at 8-9.

[8] Tr. II, at 51; Tr. III, at 9.

[9] Even though it claimed (through questions) that various other auto body shops accepted State Farm's labor rates (Tr. III, at 22-29), in fact, these questions to Mr. Maruca were not accompanied by any actual evidence of these labor rates, and "questions are not evidence." *See, e.g., People v. Pollock*, 21 N.Y.2d 206, 210 (1967).

This range of payment is not just what Nissan dealerships charge. State Farm has paid rates in substantial excess of $49-51 per hour in a variety of contexts (*see* Hearing Exhibits AA-UU). Starting outside the context of Nissans, for example, consider rates that State Farm approved as recently as last summer for sublet work at an Audi dealership:

Q ...[W]hat was the labor rate that Audi charged?

A Looks like 145.

Q And that was approved by State Farm, correct?

A Yes.

Q Who was the estimator who approved that?

A I was.

...

Q What was the actual mechanical operation?

A Looks like a wheel alignment and electrical resets and aiming headlamps.

Q Could you say that again, please?

A Electrical resets, aiming headlamps, and a wheel alignment.

Q Aim the headlamps, is that what you said?

A Correct.

Q What's involved in aiming the headlamps?

A The vehicle has to be sitting on a flat surface, it has to be—tire pressures, checked, it has to be aligned at a certain angle.

Q Just aiming it?

A Aiming headlamps, yes.

(Tr. II, at 117-19) (reviewing Exhibits AA-BB) (*see also* Exhibits CC-DD). For similar work, State Farm approved $174 per hour at BMW (Tr. II, at 120) (reviewing Exhibits II-JJ).

These rates of pay are not limited German manufacturers. As Estimator Thiele admitted, he had also approved $125 per hour at Nissan—more than *double* the rate paid to Mid Island, and to the exact manufacturer in issue here (Tr. II, at 121; *see also* Hearing Exhibits OO-PP). This is "regular practice," he admitted (Tr. II, at 121.). His reasoning: work performed at dealerships is inherently more complicated than the work performed at Mid Island—including "aiming the headlamps" (Tr. II, at 121-22)—a view contradicted by the testifying Nissan manager himself (Tr. III, at 17) (Mid Island's "body work is definitely more complicated").

Indeed, State Farm has even paid rates in this higher range to Mid Island. Back in 2012, when prices were comparatively down (Tr. II, at 125) (now, "everything is up"), for repairing a Mercedes-Benz it paid $95 per hour—nearly double what it offered for repairs here half a decade later (*id.*) (reviewing Hearing Exhibit TT). More recently, in November 2018, it paid $125 per hour—nearly triple what it offered here (Tr. II, at 124) (Hearing Exhibit RR). And State Farm was not alone. Addressing a total loss, as here, Insurance Auto Auctions paid $120 per hour directly to Mid Island as recently as September 2018 (*see* Hearing Exhibits VV-WW).

Nevertheless, in this case, for work performed in 2017 on a badly damaged Nissan by one of the best collision centers in the country, State Farm offered rates between $49-51 per hour.

After Courtney Pope's Nissan is in a Collision, She Brings it in for Repairs, Triggering a Clash between the Parties' Competing Business Models and Obligations.

The parties' competing business models were in place at 12:30pm on March 27, 2017, when Courtney Pope was driving her fully-loaded 2015 pearl white Nissan Armada, which she had financed for $62,000 (Hearing Exhibit U). She reached the corner of Van Wyck Expressway and Rockaway Boulevard and came to a stop in the far-right of three lanes of cars (Tr. I, at 8).

At this point, a motorist traveling perpendicular to Ms. Pope's direction emerged on scene and smashed into the far-left vehicle in Ms. Pope's row. The collision had such force that the far-left vehicle dominoed into the middle vehicle which then dominoed into Ms. Pope's Nissan (*id.*).

Ms. Pope's Nissan suffered tremendous damage. This included damage to the "upper body," "structural damage to the left rear quarter panel, the door assembly, the attaching floor panel in the rear, the outer wheel house, the inner wheel house, suspension components, ... the wheel ..., ... the wheel in the opposite side as secondary damage, and there was [also] some structural damage to the frame...." (Tr. II, at 48).

In response, the next day, Ms. Pope arrived at Mid Island Collision and entered into a series of agreements with the collision company. These included an agreement for Mid Island Collision to handle any necessary towing; for storage; for the use of new Original Equipment Manufacturer ("OEM") parts during the repairs; and for the performance of repairs at $120 per hour, with $175 per hour on specialty work (*see* Hearing Exhibits A-D).

But to be clear: these were not agreements between an auto body shop and an insurance company. They were between an auto body shop and its customer (Tr. I, at 43) ("Courtney Pope owed us the balance"). As acknowledged by a State Farm agent at the hearing himself, "there is a difference between the relationship between a customer and the auto body shop and that person and their insurance company" (*e.g.,* Tr. II, at 136) (affirming, "Yeah"). That is why, for example, just like in the health insurance context, an insured can wind up owing more money to an auto body shop directly than an insurance company will ultimately cover for its insured (Tr. II, at 135-36). It is also why, as between "State Farm [and] its insured," the party who "owed the money to Mid Island" was not State Farm; as State Farm acknowledged at the hearing, that person was, instead, "I think Ms. Pope" (Tr. II, at 111) (State Farm Estimator Thiele).

These varying relationships are also why the insurance company and the collision center have different obligations during the repair process. While the collision center attempts to repair the car to predamage condition, and while the insurance company provides coverage as per the terms of its policy, the insurance company is ultimately the "only party" that can declare the car a total loss (Tr. II, at 107), and "until the insurance company declares the car [a] total, ... Mid Island's obligation ... [is] [t]o repair the car ... for the consumer" (Tr. II, at 28) (*see also* 15 NYCRR 82.13(a)).

Here, these mechanics started to cause a problem almost immediately. For one thing, given its expertise, Mid Island knew the car would cost more money to repair than it was worth from nearly the very beginning (Tr. II, at 107) (*see also* Hearing Exhibit M, showing a request for a total loss declaration back in April). Nevertheless, State Farm refused to declare the car a total loss (Tr. II, at 108), thus requiring Mid Island to expend tremendous resources on the vehicle in order simply to comply with its obligations to repair the car to "predamage"[10] condition. Indeed, State Farm did not declare the car a total loss until June 14th (*see, e.g.,* Hearing Exhibits Q and S). In the process, it dragged Mid Island through forty days of work—spanning from March to June (Tr. II, at 106). This time period included *nine* supplemental inspections of the vehicle, during which time State Farm had to revise its estimate of damage upward on *every single occassion* (Tr. II, at 105) (*see also* Hearing Exhibit Y).

State Farm has a system of incentives in place that aligns with this type of protraction. In particular, at State Farm, estimators' salaries can hinge in part upon avoiding "overwrites."[11] In Estimator Thiele's words, his "salary increase at the end of the year is determined by my ...

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[10] *See* 15 NYCRR 82.13(a).

[11] In the insurance industry an "overwrite" is "when an estimator ... writes for more parts or more labor than what a supervisor later deems to have been necessary" (Tr. II, at 132) (answering, "Yes").

performance throughout the year and the overwrites are a part of that performance" (Tr. II, at 134) (reading from his deposition testimony). "[A]nything over 10 percent is not good" (Tr. II, at 135). This played out on Ms. Pope's Nissan, where between April and June State Farm stood far away from the overwrite line: it offered erroneously low estimates on nine consecutive occasions (*see* Hearing Exhibit Y) (*see also* Tr. 101-07, examining the revisions), and "refused" to negotiate off its $49-51 per hour labor rate (Tr. I, at 81).

More broadly, these business mechanics led to a sharp difference between Mid Island's final bill to its customer and the final amount for which State Farm would offer coverage. That amount—$21,042.68 (Tr. I, at 11; Tr. II, at 5)[12]—is what forms the basis of this litigation. And this difference emerges almost entirely from the parties' competing visions of whether Mid Island's labor rates were reasonable. To do the math, simply replace the standard rates on State Farm's final estimate (Hearing Exhibit Y9) with Mid Island's posted rates of $120 per hour: doing this, the dispute shrinks down from above twenty-one thousand dollars to below thirty-seven hundred.[13]

[12] As set forth below, this figure has been reduced from the time of the hearing. It is now $19,652.28.

[13] Replacing State Farm's labor rates with $120 per hour would have yielded $29,376 in labor payments on State Farm's final estimate. This would have represented an increase in estimated costs of $17,348.40. Given that this entire case rests upon a dispute of $21,042.68, a bridge of $17,348.40 leaves only $3,694.28 left in dispute. And now that the disputed amount is $19,652.28, the remaining dispute, after adjusting for labor rates, is $2,303.88.

As a Consequence of the Gap between What Mid Island Charged and what It was Paid, it Placed a Mechanic's Lien on the Nissan; the Present Litigation then Commenced—but before State Farm Acquired the Nissan.

On June 30, 2017, with a substantial portion of its bills unpaid, Mid Island served a notice of lien and sale upon Courtney Pope and her financing company, TD Bank (*see* Hearing Exhibit G). The notice of lien incorrectly referred to the full amount that Mid Island had charged rather than the outstanding portion of that bill, but the parties stipulated to the actual amount that was paid, which had been clear to the Court from the beginning (Tr. III, at 108) ("Let's move on. I've understood that throughout"). On July 12, 2017, State Farm initiated the present lawsuit, seeking to invalidate the lien. But then in a "Salvage Certificate," State Farm admitted that it acquired the vehicle on "08/02/2017" (*see* Hearing Exhibit M; Tr. III, at 110)—three weeks *after* it filed suit:

Q So State Farm, if those documents are correct, did not have title when it filed this action, correct?

A I'm not—so you're asking me if we actually had a title that was issued in State Farm's name prior to this lawsuit?

Q Correct.

A I'd say no.

Q In fact, it doesn't even claim to have, quote-unquote, acquired the vehicle until weeks after filing this lawsuit, correct?

A I would say yes.

(Tr. III, at 113-14).

Nevertheless, at the hearing in this case, State Farm requested that Mid Island's lien be invalidated in its entirety. Respectfully, this request should be denied.

STANDARD

"A person keeping a garage ... or place for the storage, maintenance, keeping or repair of motor vehicles ..., and who in connection therewith tows, stores, maintains, keeps or repairs any motor vehicle, ... or furnishes ... supplies therefor at the request or with the consent of the owner ..., has a lien upon such motor vehicle ... for the sum due for such towing, storing, maintaining, keeping or repairing of such motor vehicle ... or for furnishing ... other supplies therefor and may detain such motor vehicle ... at any time it may be lawfully in his possession until such sum is paid...." *See* Lien Law §184(1).

Owners and certain interested parties in liened property have rights to challenge a lien, seeking cancellation of the lien altogether where the lienor lacked authority to claim the lien, or a reduction of the lien where it overstated the appropriate sum of money owed. In the statute's words, if the challenger "shall show that the lienor is not entitled to claim a lien in the property, or that all or part of the amount claimed by the lienor has not been properly charged to the account of such owner or such person, or, as the case may be, that all or part of such amount exceeds the fair and reasonable value of the services performed by the lienor, the court shall direct the entry of judgment cancelling the lien or reducing the amount claimed thereunder accordingly." *See* Lien Law § 201-a.

ARGUMENT

I. STATE FARM'S REQUEST TO INVALIDATE THE LIEN SHOULD BE DENIED, BECAUSE THE AMOUNT IN CONTROVERSY IS GOVERNED BY AN AGREED-UPON PRICE.

New York's Lien Law "clearly inures to the benefit of a garage owner who can establish the following elements: (1) the garage is the bailee of a motor vehicle ...; (2) it has performed garage services or stored the vehicle with the owner's consent ...; (3) there wan an agreed-upon price or, if no agreement on price had been reached, the charges are reasonable for the services supplied ...; and (4) the garage is a duly registered motor vehicle repair shop...." *Matter of Nat'l Union Fire Ins. Co. of Pitt., Pa. v. Eland Motor Co.*, 85 N.Y.2d 725, 730 (1995).

As the parties to this action have stipulated, Mid Island Collision was a bailee of the motor vehicle, performed services and storage with the vehicle-owner's consent, and is a duly registered repair shop. *See* Hearing Stipulation. *See also* Hearing Exhibits A-D and I. The only element in dispute in this case, then, is whether "there was an agreed-upon price or, if no agreement on price had been reached, the charges are reasonable...." *Matter of Nat'l Union*, 85 N.Y.2d at 730. The first reason the lien should be sustained is because "there was an agreed-upon price."

New York law is lamentably unsettled about whether an authorization that identifies the price of labor, without identifying the amount of labor, constitutes an "agreed-upon price" for the sake of the Lien Law. Complicating matters further, the court coming closest to addressing the issue, the Third Department, has offered conflicting signals. In *Matter of Hall v. Barnes*, for example, the Third Department ruled against a garageman in a lien dispute on several grounds. One was that the garageman failed to prove he had a "registered repair shop," which is not in

issue here. But the other ground, more applicable, was that the agreement for services was limited to a labor rate rather than an overall cost. Pinning the analysis on contract law, the court found that since the garageman offered only the labor rates, and "failed to give an estimate of work hours involved ... there was no agreement as to the cost of repairs, a condition precedent to a binding contract." 225 A.D.2d 837, 838 (3d Dept. 1996).

This focus on whether there was an enforceable contract between shop and customer has been followed elsewhere, including in an older case involving Mid Island Collision itself. *See, e.g., Mid Island Collision, Inc. v. Rovt*, 101 A.D.3d 830, 830 (2d Dept. 2012) (dismissing against Mid Island because, there, "the subject agreement did not constitute a binding contract," since, unlike here, it neither "set forth the cost of the services ... [n]or specif[ied] any method by which such cost would be determined").

Fifteen years after Hall, however, the Third Department pulled back. Now in the context of a garageman's request to lift a default judgment, the car's owner, citing Hall, and seeking to invalidate the lien, highlighted that once again there was no agreed-upon final cost of repairs. But this argument was now unavailing: "Contrary to petitioner's claim," the court held, "our prior decision in Matter of Hall v. Barnes ... does not indicate that a statement of the amount of the agreed-upon cost of repairs is a prerequisite to the validity of a lien." *Matter of Toyota Motor Credit Corp. v. Impressive Auto Ctr., Inc.*, 80 A.D.3d 861, 863, fn. 1 (3d Dept. 2011). After all, Hall's force was limited because the estimate "failed to reveal that the vehicle owner had agreed to any amount of repair costs." Id. (emphasis in original).

In light of this legal background, several forces warrant the determination that prices were "agreed-upon" under the facts of this case.

First, prices were agreed upon even if *Hall*'s framing of the issue were accurate. *Hall* pinned the analysis on whether the shop and its customer entered into a "binding contract," 225 A.D.2d at 838, and here, in a signed and dated Repair Authorization, with the labor and storage rates identified and checked immediately above her signature, Courtney Pope acknowledged the possibility that her insurance carrier would offer less coverage than her final bill and authorized repairs to proceed anyway: "In the event of deficiencies in labor rate, amount of labor hours or necessary procedures not covered in my insurance settlement, I authorized Mid Island to use its professional judgment as to the parts replacement and or labor charges to produce the highest quality repair at Mid Island's posted labor rates." *See* Hearing Exhibit A. To that end, State Farm has not even claimed that Pope's agreement with Mid Island was non-binding. It never lobbed this claim in its pleadings, in its application for a lien-validity hearing, or at the hearing itself. And this was with good reason: "The conclusion that a party's promise should be ignored as meaningless is at best a last resort." *See Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475 (1989) (internal reference omitted).

State Farm's argument, never made, would have had to be that since the repair authorization identified labor price without identifying labor hours, it was legally "indefinite"—yet, as a matter of state law, "New York courts do not rigidly apply the doctrine of definiteness." *McElroy v. Klein*, 2007 WL 1821699, at *11 (S.D.N.Y. 2007) ("New York courts do not rigidly apply the doctrine of definiteness"). Indeed, Mid Island's agreement with Ms. Pope set out Mid Island's labor rates rather than the final bill much the same way that attorneys' retainer agreements can set out hourly rates rather than a final bill. *Compare Feder Kazovitz v. Roseh*, 2018 WL 3708662, at *6 (S.D.N.Y. 2018) ("disagree[ing] with Defendant that the Retainer Agreement [was] 'incomplete' because it d[id] not set out a cap [to] Plaintiff's fees;" the "law

imposes no such requirement") *with Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 841 (2d Cir. 1993) (agreement unenforceable where, instead of setting out an explicit labor rate, the fee agreement stated that the "hourly rate would be agreed upon at a later date," which was, thus, simply an "agreement to agree").

Ms. Pope's agreements with Mid Island are thus enforceable because they were not the proverbial "agreements to agree," or agreements to set labor rates on some "later date." *Mar Oil, S.A.*, 982 F.2d at 841. On a specified date in advance of any work, among a series of other agreements pertaining to towing, parts, and storage, Pope agreed to an explicit rate of labor while acknowledging that this rate could exceed the rate covered by her insurance carrier. *See* Hearing Exhibits A-D.[14]

Second, the two central factors that determined Mid Island's bill were its labor rate and its labor quantity. But labor quantity is not in dispute here. State Farm welcomed 244.8 hours of labor, and, indeed, Mid Island charged for fifty hours *less* than that (Tr. II, at 113-114). Instead, the price-lever being challenged in this case is Mid Island's labor rate. This rate-dispute was the central focus of the hearing in this case, and it explains the difference between a gap of twenty-one thousand dollars and a gap of less than thirty-seven hundred.[15] Yet this labor rate was explicitly "agreed upon" between Mid Island and its customer. *See* Hearing Exhibits A-D. Courtney Pope agreed to pay between $120-175 per hour on labor (Hearing Exhibit A), was charged at the *lower* of those two prices, and, unlike any case like it, she the customer never

[14] This is explicitly contemplated by New York State regulations: when customers want more than labor rates, they are specifically entitled to request and receive a full-blown estimate of the overall costs. *See* 15 NYCRR 82.5. If these overall cost-estimates were already prerequisites to obliging customers to their signed authorizations, then Rule 82.5 would be superfluous.

[15] Replacing State Farm's labor rates with $120 per hour would have yielded $29,376 in labor payments on State Farm's final estimate. This would have represented an increase in estimated costs of $17,348.40. Given that this entire case rests upon a dispute of $21,042.68, a bridge of $17,348.40 leaves only $3,694.28 left in dispute.

challenged this rate at all. So in a contest over labor rates, her agreement to those labor rates should resolve the case.

Third, blocking Mid Island from a lien at its agreed-upon rate would infuse the lien with a legally awkward limitation. The whole point of the Lien Law is to protect the ability of laborers to recoup the money they are owed, because garagemen typically offer their services in advance of payment. An outgrowth of the "artisan's lien" at common law, its very roots "endowed the artisan with the exclusive right to possession of the repaired article until his ***charges*** were satisfied." *Nat'l Union Fire*, 85 N.Y.2d at 730 (emphasis added). Yet here, these "charges" included labor rates that were specifically authorized by Mid Island's customer. Thus, where rates are challenged, looking past signed agreements on rates could reduce liens *beneath* the full amount of charges. For collision centers seeking full recoveries, then, the benefits of (efficient) liens would need to be replaced with (inefficient) lawsuits. By requiring a reasonableness-of-fees analysis only if "no agreement on price had been reached," *Matter of Nat'l Union Fire Ins. Co. of Pitt., Pa. v. Eland Motor Co.*, 85 N.Y.2d 725, 730 (1995), our highest court has expressly discouraged this type of inefficiency.

Fourth, enforcing liens to the extent of agreed-upon labor rates is not just more efficient for litigants. It is also more workable for courts. The mechanics are simple: the lien becomes enforceable to the extent that courts find the existence of a binding agreement, addressed above, short of which they engage in a (quantum-meruit-type) reasonableness-of-fees analysis. *See Matter of Nat'l Union Fire Ins. Co. of Pitt., Pa. v. Eland Motor Co.*, 85 N.Y.2d 725, 730 (1995) (requiring "an agreed-upon price or, if no agreement on price had been reached, ... reasonable[ness]"). This is far more practical than the converse: if companies like State Farm could require courts to conduct a reasonableness analysis in the face of an agreed-upon labor

rate, regrettable results could follow. Suppose an auto body shop offered, say, a special 50% discount to Veterans on Memorial Day. Then suppose the bill went unpaid. If reasonableness could circumvent an agreed-upon rate, then that lien could be enforced at an amount *higher* than the charges.[16] Fortunately, courts can avoid this situation, because reasonableness only enters the equation to fill gaps in parties' agreements—not to replace those agreements altogether.

Fifth, enforcing liens to the extent of agreed upon rates does not put car insurance companies in an exposed position. They are not at risk of insureds binding them to coverage at astronomical rates. If an insured were to agree to pay an auto body shop an unreasonable amount of money, then the insurance company could simply refuse the coverage beyond whatever fee was reasonable. *See, e.g., Rizzo v. Merchants and Businessmen's Mut. Ins. Co.*, 188 Misc.2d 180, 183 (2d Dept. 2001). In that scenario, whatever excess remained owed to the auto body shop would remain the responsibility of the insured to pay (or resolve) with the shop—as State Farm acknowledged at the hearing: "if work continues beyond the authorization from the insurance company, ... the insured person ... might face out-of-pocket expenses." *See, e.g.,* Tr. III, at 70 (responding, "Yes"). Thus, upholding free market agreements comes with inherent protections: motorists have a built-in incentive not to agree to unreasonable labor rates, since their insurance companies might not cover those expenses, and thus they risk owing the money themselves or losing their cars to liens and auctions.

Ultimately, the hearing in this case focused the majority of its attention on the reasonableness of labor rates. But that is only because reasonableness is such a fact-intensive question in comparison to the first question in issue here. Mid Island's lien was enforceable to

[16] Assuming baseline rates are reasonable, a 50% discount would be 50% less than the reasonable rate. In this scenario, overlooking the agreement to instead target reasonableness would result in a doubling of the lien.

the extent that it had an agreed upon price. And since it had an agreed upon price with Ms. Pope, the lien should be enforced to the extent of her unpaid bill.

II. STATE FARM'S REQUEST TO INVALIDATE THE LIEN SHOULD BE DENIED, BECAUSE THE PRICES CHARGED ARE REASONABLE.

In the event the Court finds that "no agreement on price had been reached," the lien should be sustained to the extent of Mid Island's unpaid bill because "the charges are reasonable for the services supplied...." *Matter of Nat'l Union Fire Ins. Co. of Pitt., Pa. v. Eland Motor Co.*, 85 N.Y.2d 725, 730 (1995).[17] The hearing evidence supports this determination of reasonableness on several grounds.

First, the only experts who testified at the hearing concluded that Mid Island's prices to Courtney Pope were reasonable under the circumstances. *See* Tr. II, at 47 (Montanez) and Tr. III, at 20 (Maruca). Indeed, for Mid Island's primary expert, Lawrence Montanez, there was no dispute as to him qualifying to give expert testimony at all. *See* Tr. II, at 38. His determinations on rate-reasonableness were, in addition, almost totally unchallenged on cross-examination. *See* Tr. II, at 56-60. So given how sharply these rates were in dispute, the Court can now take note of the "remarkable—and perhaps telling—absence of any serious challenge to his credibility or expertise ... at the evidentiary hearing.... [State Farm] did not challenge [Montanez] as an expert ... and did not call its own expert ... to offer competing testimony." *Rivas v. Fischer*, 687 F.3d

[17] Of course, as made clear during the hearing, Mid Island is not pursuing the full figure identified in the lien, as that figure accounted for the full extent of billing rather than the unpaid extent of billing. The Court also has authority to identify a labor rate it deems reasonable even if it falls in between the figures identified by the parties. That is because owners and interested-parties can seek two different options in the face of a lien—cancellation of the lien, where the lienor lacked authority to claim a lien in the first place (*see* lien elements 1 and 4 in *Matter of Nat'l Union*, for example); or reduction of the lien, where the lien overstated the appropriate sum of money owed (*see* lien element 3). In the statute's words, if the challenger "shall show that the lienor is not entitled to claim a lien in the property, or that all or part of the amount claimed by the lienor has not been properly charged to the account of such owner or such person, or, as the case may be, that all or part of such amount exceeds the fair and reasonable value of the services performed by the lienor, the court shall direct the entry of judgment cancelling the lien or reducing the amount claimed thereunder accordingly." *See* Lien Law § 201-a.

514, 544 (2d Cir. 2012). Instead, the only other (quasi) expert to testify was Joe Maruca.[18] And he, too, simply corroborated the reasonableness of $120 per hour. *See* Tr. III, at 20.

Between Montanez and Maruca, they had nearly sixty years' experience in the automotive industry on Long Island. *See* Tr. II, at 51; Tr. III, at 9. Among thousands of other students, Montanez had *taught* the two estimators who testified for State Farm. *See* Tr. II, at 35-36. And together, they testified that the level of service that Mid Island provides to the Nassau County community is extraordinary—"in the top five percent [in] the country of ... collision repair" (Tr. II, at 52), "excellent work," and "[s]o superior it's unbelievable." *See* Tr. III, at 19-20. So while the testimony of third-party experts will perhaps not control the outcome of this case unilaterally, it is at least instructive that, according to hearing testimony from third-party experts, and with no third-party experts challenging this view, the best shop in Nassau County is "Mid Island Collision." *Id.*

Second, regardless of the natural range of quality across the market for auto body work, in Nassau County State Farm offers a default labor rate of between $49-51 per hour (Tr. III, at 63) (describing the "Nassau rates of $49 and 51"). This one-price-fits-all is a poor standard in a free market. The facts here show why. Some auto body shops get business automatically, because they are on a list of preferred companies held by insurance companies. These shops, DRPs, thus accept default insurance company prices as part of their business model. *See, e.g.*, Tr. I, at 28-29; Tr. II, at 54-56. But Mid Island Collision is not a DRP, and instead elects to offer the "superior" and "excellent" level of service touted by Maruca and Montanez. If this level of service were cheap to offer, everybody would.

[18] Given the more limited nature of his testimony, it was not clear whether expert-qualification was necessary. Tr. III, at 13. Yet when Maruca ultimately testified that indeed $120 per hour was not just reasonable, but perhaps unreasonably *low*, Plaintiff interposed no objection (Tr. III, at 20).

But in reality, running a shop this excellent is "very expensive." *See* Tr. I, at 23. "[I]n the last years we spent well over a million dollars between training and equipment" (*id.*), explained Mid Island's manager. To just "break even" with these expenses would require a base labor rate of about "$86.75" per hour. *See* Tr. II, at 50 (Montanez). This creates an inherent problem with State Farm's use of its default rates for work performed at a company like Mid Island: it divorces prices from expenses. If $49-51 per hour were all a collision center could ever expect to receive, it would have no incentive to invest in providing extraordinary service. These investments make sense only *because* the company expects to earn customers at higher prices. Blocking State Farm from imposing its standard price ceiling here is, thus, not just warranted, but in the long run it benefits consumers across the Nassau County community who would otherwise lack an option this high-end.

Third, State Farm actually pays $120 per hour, and above, in a variety of other contexts (*see* Hearing Exhibits AA-UU). In non-Nissan cases, for example, State Farm has approved rates of $145 and even $174 per hour to Audi and BMW dealerships, respectively. *See* Tr. II, at 117-19) (reviewing Exhibits AA-BB); Tr. II, at 120 (reviewing Exhibits II-JJ). Audis and BMWs might be considered to be in a higher class of car from Nissan. But State Farm has offered $120 per hour and $125 per hour to Nissan dealerships, too. *See* Tr. II, at 121 (reviewing Hearing Exhibits OO-PP). Indeed, the Nissan dealership that worked on the very car in issue in this case—Pope's Armada—charged rates at that altitude. *See* Hearing Exhibit L. And these rates were for services like "aiming headlamps," and, in the court's words, "plug and play"[19]—work that Mr. Maruca, a manager of a Nissan dealership himself, admitted to be "definitely" less complicated than the body worked performed at Mid Island Collision. *See* Tr. III, at 17. So the question of reasonableness virtually answers itself: for work that is less complicated, State Farm

[19] *See* Tr. II, at 117-19; Tr. III, at 18.

offers dealers double or even triple what it offered to one of the premier body shops on the market.

One objection has superficial appeal: that State Farm's standard rates are appropriate because Nissan is a standard car. It explains why State Farm has, say, offered more money to Mid Island directly for the repair of other types of cars. *See* Hearing Exhibits RR and TT. But at the hearing not even State Farm claimed that, say, a Mercedes-Benz is ***200%*** as difficult to repair as Ms. Pope's Nissan. Yet that is what would have been necessary to explain its history of payments. Half a decade before the repairs in issue, when overall prices were lower, State Farm paid Mid Island to repair a Mercedes-Benz at nearly 200% of the rate it offered here in 2017. *See* Tr. II, at 125; Hearing Exhibit TT ($95 per hour). On more recent cases, it has offered $125 per hour—about ***255%*** of what it offered here. *See* Tr. II, at 124 (reviewing Hearing Exhibit RR). So even if different cars warranted different rates, this still does not explain the present underpayment's extent. Nor does it explain payments in the $120 per hour range by non-State Farm payors—which have nevertheless been issued. *See* Hearing Exhibits VV-WW (Insurance Auto Auctions paying full bill of totaled vehicle at $120 per hour).

Fourth, Mid Island explained its rates' reasonableness by, in part, comparing those rates to its expenses and what it needs to break even. *See* Tr. II, at 50. *See also* Tr. I, at 23. Yet State Farm has not offered any commensurate documentation for how its own $49-51 rate was calculated. In the landmark and recent decision in *Nick's Garage v. Progressive Casualty Ins. Co.*, 875 F.3d 107, 120 (2d Cir. 2017), for example, this type of evidence was specifically highlighted as having been offered by the insurance company to address reasonableness. To that end, the insurance company "presented evidence that it determines the prevailing labor rates using its Labor Rate Reference Guide ..., which was finalized in January 2007," and which

explained that its rates were determined by the insurer's "ability to reach agreed prices for repair with shops in the marketplace." *Id.* (emphasis eliminated). Yet there, ***even that*** was not enough. Because the insurer offered its approach to rates, the court was able to locate a "fundamental flaw" in its process:

> An insurer such as Progressive [or, as here, State Farm] may command a very large volume of business. The fact that repair shops may accept a labor rate paid by a particular insurer that may bring the shop a large volume of business does not demonstrate that the shop, or shops generally, would accept the same rate in dealing with another insurer or a customer who has only one car to be repaired.

Id. at 120-21.

In *Nick's Garage*, the Court denied summary judgment to the insurance company despite the offering of this method for determining rates. Yet by contrast, here, State Farm has come forward with no "Guide" at all. A lesser showing than Progressive should not earn State Farm a more favorable outcome.

Fifth, in advance of this memorandum, the Court asked the parties to address how the obligation for good faith negotiations—and how the dynamics between and among shop, customer and insurance company—affect the analysis of Mid Island's lien. *See* Tr. III, at 127. Those obligations and dynamics, too, weigh strongly in favor of Mid Island Collision, because they implicate the corresponding prohibition on "steering." By not negotiating off of its standard rates, State Farm, without saying so explicitly, is simply steering customers to its preferred, cheaper, DRP shops.

As background, in separate litigation involving Mid Island Collision and a major insurance company, the Eastern District of New York set forth a roadmap describing these obligations and dynamics. "The New York State Insurance Department's Regulation 64 governs

the insurers' actions in the auto collision repair process," Judge Bianco explained. *M.V.B. Collision, Inc. v. Allstate Ins. Co.*, 728 F. Supp.2d 205, 210 (E.D.N.Y. 2010) (denying Allstate's motion for summary judgment "in its entirety"). The court went on to offer a description, complete with regulatory citations, that warrants the lengthy block-quotation here:

> When someone's car is involved in an accident and the person makes an insurance claim, the person's insurer may inspect the car. *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(1). When inspecting the car, the insurer must attempt to negotiate with the insured or the insured's "designated representative"—which can include an auto repair shop such as Mid Island—regarding the costs of repair. (*See* Def.'s 56.1 ¶ 28 (citing N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)).) Negotiations must be conducted in good faith, and the insurer must make a "'good faith offer of settlement, sufficient to repair the vehicle to its condition immediately prior to the loss.' " (Def.'s 56.1 ¶¶ 27–28 (quoting N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(1) and citing N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(7)).) If a price cannot be agreed on, then the insurer sends the insured a "Notice of Rights" letter which indicates the insurer's offer and states that, upon request, the insurer can provide a repair shop willing to make the repairs at the insurer's estimate. (*Id.* ¶¶ 32–33 (citing N.Y. Comp. Codes R. & Regs. tit. 11, 216.7(b)(14)(i)).)

Id. at 210. *See also Nick's Garage*, 875 F.3d at 112.

Since this regime attempts to lasso two different commercial relationships—shop and customer, and insurer and insured—the overall aim is the balance of efficiency and choice: "the basic goal [is] promptly arriving at an agreed price," and in cases where no agreement is reached between shop and insurer, the insured is at least reminded that she can "elect to have the damaged [car] repaired at a different repair shop at the insurer's estimated cost of repair." *See Gapud v. Kaur*, 15 Misc.3d 1105(A) (Dist. Ct., Nassau Co. 2007). After all, known as the rule against "steering," New York's Insurance Law "prohibits an insurer from recommending a repair

facility to an insured unless the insured first requests a recommendation." *M.V.B. Collision, Inc. v. Allstate Ins. Co.*, 728 F. Supp.2d 205, 210 (E.D.N.Y. 2010) (citing Insurance Law 2610).

The anti-steering rule shows its teeth when insurers refuse to negotiate on price with the shop of the insured's choosing. After all, insurance companies know that they cannot explicitly tell insureds to avoid Shop A and to go to Shop B. But State Farm tries to tunnel underneath this problem by simply refusing to offer coverage at rates that Shop A would ever accept. Fortunately, the Insurance Law is not susceptible to this type of loophole: "the statutory purpose and intent [may not be] circumvented by maintaining, as [insurer] does ..., that acceptance of the insurer's checks compels the insured to either use the insurer's recommended repair shop, or use her own shop and pay the balance of the repair costs. *Rizzo v. Merchants and Businessmen's Mut. Ins. Co.*, 188 Misc.2d 180 (2d Dept. 2001). The reason is simple: this "position, which in effect would limit the insured's recovery of benefits to the insurer's estimate of repairs, represents precisely the type of 'steering' tactics that the Insurance Law and regulations were designed to proscribe." *Id.*

This is the mechanism that played out between Mid Island and State Farm. Incentivized to err on the side of underpayments rather than overpayments (Tr. II, at 134-35),[20] and offering erroneously low appraisals on Pope's car on nine consecutive estimates (Hearing Exhibit Y; Tr. 101-07), State Farm "refused" to negotiate off of its $49-51 per hour labor rate even though these rates were less than half the size of Mid Island's lowest rate (Tr. I, at 81)—as observable in every single one of State Farm's estimates, where the offered rates never change. *See* Hearing Exhibit Y. *See also* Plaintiff's Hearing Exhibit 13 (showing that on less complicated jobs for the very

[20] Thiele's "salary increase at the end of the year is determined by [his] ... performance ... and the overwrites are a part of that performance," where "anything over 10 percent is not good."

same manufacturer, Mid Island had in good faith negotiated down to rates between $75-95 per hour). By refusing to negotiate, State Farm can thus leverage its market power into one of two outcomes: swaying customers away from high-end collision centers like Mid Island by covering smaller proportions of their final bills; or pressuring high-end companies like Mid Island to either go out of business or accept standard rates and "cut corners"[21] to survive. Either way, the steer from State Farm away from a high end shop like Mid Island is loud and clear. To paraphrase a line from *Animal Farm*: in State Farm's view, all auto body shops are equal, but some are more equal than others. GEORGE ORWELL, ANIMAL FARM (1944), at 40.

Ultimately, the basic facts of this case do show that something unreasonable transpired. There were about $50,000 in repair bills on a car that the lien itself valued at only $36,000. *See* Hearing Exhibit G.[22] But the question in this case is not whether an unreasonable step was made, but who was at fault for that unreasonable step. Who was at fault for allowing Ms. Pope's bill to escalate this high? The evidence in this case answers that question resoundingly: State Farm. "If the car had been declared a total[] when Mid Island first requested it," after all, "... what would the bill have been?" Estimator Thiele was asked. His answer, as recalled and stipulated by Plaintiff's own counsel: "$2,500 or $2,250" (Tr. III, at 3)[23]—or, about 95% less than the total mechanic's fees incurred for this repair.

Under all these circumstances, Mid Island's lien should be sustained to the full extent of its unpaid bill, because that bill reflects prices that were reasonable in the shadow of State Farm's long-term neglect in totaling the vehicle.

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[21] Tr. II, at 53-44.

[22] This was the estimated value of the car at the moment of the lien. *See* Tr. I, at 119.

[23] This amount was corroborated by Mid Island. *See* Tr. I, at 29 (estimating between $2,000 and $2,500).

III. BEYOND LABOR RATES, THE DISPUTED ITEMS ON MID ISLAND'S FINAL BILL WERE REASONABLE.

The parties have stipulated to the universe of disputed items on Mid Island's final bill. *See* Hearing Stipulation (enclosed). Moreover, the parties have narrowed the areas of dispute further: State Farm has advised defense counsel that it is no longer disputing the two $490 charges representing the bill's final line-items. *See* Exhibit E (final bill), at lines 147-48; Hearing Stipulation, at ¶¶3-4.[23] In addition, Mid Island agrees to forego that portion of its lien stemming from the payment of Courtney Pope's rental overages and their relevant sales taxes. *Id.* at ¶2. Thus, beyond labor rates and sales taxes, the only remaining contests in this case concern paying for (A) two new wheels rather than one recycled wheel; and (B) mark ups. *See* Hearing Stipulation, at ¶¶5-6. These bills should be sustained as reasonable.

A. The Bill Reasonably Charged for the Replacement of two Wheels rather than One, and for the Use of OEM Parts rather than Recycled Parts.

Mid Island Collision replaced two wheels on Ms. Pope's Nissan Armada, because two wheels were damaged in the collision that led to her repairs. *See* Hearing Exhibit F, at line 23. As expert Montanez explained, the "impact wheel" was on the "driver's side," but, as he understood the nature of the collision, the "applied impact forces and the angle in which the bullet vehicle impacted [Pope's] vehicle would induce the vehicle forward and towards the right." *See* Tr. II, at 42. In other words, as Ms. Pope's car was hit, her vehicle was "pushed ... somewhat this [rightward] way and it hit maybe the curb or the opposite side of the roadway, something in the roadway that did damage to the [passenger side] wheel." *See* Tr. II, at 43. It

[23] One of these final bills was for towing. *See* Exhibit E, at line 148. The other item was meant to be for work performed at Rockaway Nissan, where the bill was for $2,899.02, but due to a data-entry error the value of line 147 was simply a duplicate of the line immediately following it. *See* Tr. I, at 85-86. Thus, this item in the final bill is erroneously low by $2,409.02. Mid Island is not seeking the difference.

sustained a "gauge and a ... semi longitudinal scrape" (*id.* at 44) whose freshness indicated it was "related to this incident in question" (*id.* at 43). But since "[y]ou can't repair a wheel" it had to be replaced with parts. *Id.* at 44. Mr. Montanez was not cross-examined with regard to this testimony.

Once two replacement wheels became necessary, Mid Island acted reasonably in using new parts rather than recycled parts. This is as a matter of Nissan's own requirements. Nissan "**does not** approve of the use of aftermarket ... parts" (Hearing Exhibit K) (emphasis in original). *See also* Tr. I, at 32. While Nissan recognizes "the importance of recycling," after all, "... the use of salvaged recycled parts to repair collision damaged vehicles raises serious concerns about quality, suitability, safety and warranty." *See* Hearing Exhibit K; Tr. II, at 127.

Thus, while State Farm objects to Mid Island's use of new parts, Estimator Thiele's testimony helps resolve this question in Mid Island's favor:

> **Q** ... In your experience, is it unreasonable for an auto body shop to comply with a manufacturer's recommendation for the use of OEM parts?
>
> ...
>
> **A** No, the shop can do that. Yes, the shop can do that.
>
> **Q** The question was, is it reasonable for them to do that?
>
> **A** Sure, it's reasonable."

See Tr. I, at 131-132.

Because Mid Island acted reasonably in replacing these wheels with new wheels, which was in accordance with Nissan's own requirements, the final bill should be sustained to the extent of this $1,823.76 line-item in the Auto Haus sublet.

B. The Mark Up Charge on the Final Bill was Reasonable.

State Farm objects to Mid Island's markup for work performed at Auto Haus, which is a company that has the same owner as Mid Island Collision. After all "when you include the $5,601 and the two other charges and multiply it by point 33 ..., it does come up to the exact parts amount [on page 5 of the final bill]." *See* Tr. II, at 15. *See also id.* at 16.

However, this objection is overstated. As Mr. Montanez testified, markups are "[o]n every sublet bill I've ever seen." *See* Tr. II, at 45. In his vast experience, he has "seen anywhere between 15 to 40 percent markup." *Id.* at 46. And these markups make sense: while certain work gets performed by the sublet company, Mid Island Collision ultimately takes ownership over—and liability for—the full scope of the repairs done. *See* Tr. I, at 83-84. Thus, the "markup covers the insurance and warranty of the repairs sublet out." *Id.* at 83.

At the hearing, State Farm was incredulous that Mid Island would charge a markup on work performed by Auto Haus, given that the two companies share the same owner. *See* Tr. II, at 15-17. But as a matter of law, "[g]enerally, corporations have an existence separate and distinct from that of their shareholders." *New Castle Siding Co. v. Wolfson*, 97 A.D.2d 501, 501 (2d Dept. 1983) (internal citation omitted). This is true even when it may be "undisputed that [a party] is [a company's] sole officer and shareholder." *Baccash v. Sayegh*, 53 A.D.3d 636, 639 (2d Dept. 2008). The evidence at this hearing, after all, did not show any special favors conferred by Mid Island upon Auto Haus. To the contrary, upon cross-examination, Mid Island's manager described that the same markup applied to Auto Haus as applied for other sublets. *See* Tr. II, at 17 ("**Q**. Rockaway Towing is not owned by Ms. Jesberger, correct? **A**. Correct. **Q**. So the same thing is done where the amount is marked up 33 percent? **A**.

Correct"). If there were ever a company that could understand these dynamics, it is State Farm, which according to its own website runs at least thirteen different entities. *See* State Farm Companies, Company Overview, available at: https://www.statefarm.com/about-us/company-overview/company-profile/state-farm-companies.

Mid Island was not unreasonable for marking up work done by Auto Haus, and the markups in this case were firmly within the range described by the only expert to address the issue at the hearing. These components of the bill—for $2,171,77 (Hearing Exhibit E, at 5)—should be sustained as reasonable.

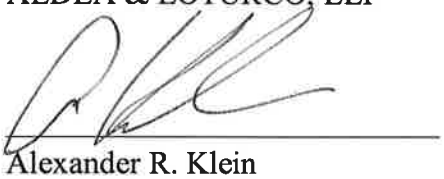
CONCLUSION

For these reasons, the Defendant respectfully requests that Plaintiff's application to invalidate the mechanic's lien in its entirety be DENIED. Limited to the amounts in controversy at the hearing, and further reduced by $1,280 (plus 8.625% tax) for rental overages no longer sought, Mid Island respectfully requests that the Court sustain its lien in the amount of **$19,652.28**.

Dated: Garden City, New York
March 22, 2019

Respectfully,

BARKET EPSTEIN KEARON
ALDEA & LOTURCO, LLP



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