UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SAFELITE GROUP, INC. AND SAFELITE SOLUTIONS LLC, Plaintiffs, v. MICHAEL ROTHMAN, in his official capacity as the Commissioner of the Minnesota Department of Commerce, Defendant.	Civil Action No. 15-cv-1878 (SRN/SER) **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

ARGUMENT

I. LICENSING REQUIREMENTS HAVE NOTHING TO DO WITH THIS CASE.

The Commissioner ("Defendant") attempts to distract attention from the unconstitutional speech restrictions here by asserting that Safelite is "engaged in the unlicensed adjusting of insurance claims." This is a complete red herring. The Consent Order that triggered this action spells out exactly why Defendant insisted that AAA cease doing business with Safelite, and each of the three reasons is about speech. The Consent Order demonstrates the baselessness of Defendant's argument because it leaves Safelite free to perform claims-processing services for insurers besides AAA, and it affirmatively allows Safelite to serve AAA for "storm-related events." Defendant could never have authorized Safelite to do that if he believed Safelite was impermissibly operating without a license. It is beyond dispute that Defendant has sought to punish Safelite because of its

speech, and the permissibility of that action and threatened future action turns on the constitutionality of the speech restrictions.

Defendant implies the speech restrictions are justified as a means of imposing licensing requirements on Safelite. But the Supreme Court has held a state may not "achieve its policy objectives through the indirect means of restraining certain speech by certain speakers." *IMS Health*, 131 S. Ct. at 2670. If Defendant believes Safelite requires an adjuster's license to operate, he can seek to enforce that requirement directly—before a neutral forum that would allow Safelite to show why it is not engaged in insurance adjusting. Safelite would then be able to demonstrate that it does nothing that comes within the statutory definition of an "insurance adjuster." An adjuster is one who "on behalf of an insurer … negotiates the settlement of [insurance] claims." Minn. Stat. § 72B.02. Safelite has no authority to negotiate the settlement of claims and does not do so. Kipker Decl. ¶¶ 4-6. Rather, the insurer sets the compensation to be paid, and Safelite communicates that figure to repairers and policyholders. *Id.* Safelite has no discretion to adjust the amount or otherwise "negotiate." *Id.* The transcripts submitted by Defendant establish this. In every transcript, a Safelite representative informs the shop of the amount the insurer will pay, and when the shop declines that amount, the representative engages in no discussion about paying some higher amount. It is significant, moreover, that (until Defendant's newfound licensing claim) not one of the 50 states in which Safelite provides these same claims-processing services requires an insurance-adjuster license. *Id.* ¶ 3.

Even if Defendant were correct about licensing, that would not obviate the need to resolve Safelite's constitutional claims. Defendant agrees that, license or not, Safelite may act on behalf of insurers to help policyholders locate appropriate repair shops. Yet Defendant contends that in doing so Safelite must comply with the speech restrictions challenged here. In sum, Defendant's action against Safelite has never been about licensing, and the attempt to introduce this new issue underscores Defendant's inability to justify that action.

II. SAFELITE WILL LIKELY PREVAIL ON ITS FIRST-AMENDMENT CLAIM.

Significantly, Defendant has not offered any argument in response to Safelite's claim that it is unconstitutional to prevent Safelite from providing the truthful, nonmisleading information that policyholders may not receive a warranty for work performed by non-preferred shops. Compl. ¶ 50. Thus, independent of whether the Court concludes Safelite will likely prevail on its other two claims (the balance-billing restriction and the "pressuring" advisory), there is no doubt Safelite will likely prevail in its attack on the warranty-related restriction. An injunction should issue on that claim immediately.

Regarding the balance-billing restriction, Defendant mischaracterizes Safelite's claim. Safelite has made a facial challenge to the regulatory requirement that prohibits claims processors from "advis[ing] that insureds may be balance-billed by non-preferred glass vendors." The challenge is not limited to the Consent Order because Safelite seeks a prospective injunction preventing Defendant from enforcing the prohibition against

Safelite and Safelite's clients. Therefore the question is whether *the prohibition* satisfies *Central Hudson*.

Defendant avoids this question by citing instances in which customer-service representatives told policyholders they "would be required to pay" balances. Def's Br. 13. These statements depart from Safelite's scripting. O'Mara Decl. ¶ 6. Even these statements truthfully inform policyholders that if the amount charged is higher than what the insurer will reimburse, that will be the policyholder's responsibility. But this action has nothing to do with whether these statements that strayed from the script are protected because Defendant has not imposed penalties on Safelite for these statements. The Consent Order penalizes Safelite for saying policyholders "may" be balance-billed, and Defendant has threatened future enforcement on this basis. *That* enforcement is unconstitutional and must be enjoined.

Safelite's speech is truthful. Defendant does not deny that non-preferred shops retain the right to seek unreimbursed amounts directly from the policyholder. O'Mara Decl. ¶ 5. That much is plain from the language of shop invoices. *Id.* Exhibits A-E; Compl. ¶ 23. Defendant even admits that balance-billing is "hypothetical[ly]" possible (though he contends that, as far as he knows, shops currently choose to "write off" the unpaid amounts). Def's Br. 11-12. When policyholders use preferred shops, by contrast, balance-billing is not even hypothetically possible because the Network agreements guarantee that no balance-billing will occur. O'Mara Decl. ¶ 4. Accordingly, when Safelite informs policyholders that non-preferred shops "may" balance-bill, it

communicates the indisputable truth that non-preferred shops are able to balance-bill policyholders while preferred shops cannot.

The transcripts on which Defendant relies reinforce this point. All of them include statements by Safelite representatives advising policyholders to inquire with the non-preferred shop whether the policyholder might be responsible for out-of-pocket amounts. In six of the seven discussions, the representative tells the policyholder, "If you still wish to use this shop, you may want to discuss the cost with them in advance." *Id.* ¶ 6. Plainly, no one was telling policyholders they would need to pay more—policyholders were being told the insurer would only pay *x*, so policyholders should make sure the non-preferred shop would not bill them for more. One can imagine the anger a customer would have toward her insurer if she were forced to pay a balance but had not been warned of this possibility in advance. If Defendant wants to protect consumers, he should insist on this disclosure—not punish Safelite for making it.

Defendant's argument that such statements are "inherently misleading" relies on anecdotes about how frequently non-preferred shops currently exercise their right to balance-bill. Safelite cannot be expected to monitor all 1,300 non-preferred shops to determine which are exercising their legal right to collect balances from policyholders. *Id.* ¶ 5. Safelite is likewise not compelled to take some shop's word for what it is doing, or to hire investigators to verify third-party practices. If no shop in Minnesota ever balance-bills (and Safelite has no way to know whether that is true), the industry should lobby the legislature to bar balance-billing. Only then would it be proper to prevent

Safelite from informing policyholders that they may be responsible for balances and should check with the individual shops.

Moreover, even if there were merit in Defendant's position that Safelite's speech is somehow misleading "by omission," *Central Hudson* requires that Defendant more directly and less restrictively address that concern through disclosure rather than censorship. *R.M.J.*, 455 U.S. at 203 ("[T]he remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation."). Thus, Defendant necessarily fails the last two prongs of *Central Hudson*.

Defendant fails to explain why the disclosure that "Minnesota law gives you the right to go to any glass vendor you choose" does not sufficiently inform policyholders of their rights. Defendant cannot explain why the gratuitous statutory requirement that Safelite tell policyholders that state law "prohibits me from pressuring you" is necessary to inform policyholders of their right to choose. Safelite has shown it is unduly burdensome: It forces Safelite to convey a self-demeaning message and injects unnecessary suspicion into its relationship with customers, suggesting that Safelite is some disfavored company, perhaps on probation of some sort. And there is certainly no justification for Defendant to further interfere with speech by micromanaging whether the statement is recited before or after any mention of Network shops.

In addition, Defendant fails to defend the legitimacy of the Consent Order by addressing Safelite's argument that the speech restrictions are unconstitutional because there was no "fair notice" of what speech is permitted or required. Pls' Br. 25-26. Safelite will likely prevail because it is uncontested that Defendant provided no advance

notice that he (a) interpreted Subdivision 6(16) to prohibit speech about warranties and balance-billing and (b) interpreted Subdivision 6(14) to require that the advisory be read before any mention of Network shops. The statute does not provide notice of these requirements, which Defendant imposed without notice.

III. SAFELITE WILL LIKELY PREVAIL ON ITS DUE-PROCESS CLAIM.

Defendant's assertion that AAA "freely offered" to terminate its relationship with Safelite is transparently disingenuous. Defendant coerced AAA into severing ties with Safelite by threatening penalties. Defendant has promised to target other Safelite clients to stop them from doing business with Safelite. Obviously, this effort is not based on a hope and prayer that each insurer will spontaneously propose cutting ties with Safelite to appease Defendant.

Defendant mischaracterizes Safelite's claim as relating only to "one at-will contract." Safelite's claim is not limited to the Consent Order. Rather, Safelite seeks a prospective injunction preventing Defendant from targeting Safelite's other clients and coercing them into severing ties with Safelite. Defendant does not dispute that he intends to prevent Safelite from operating its claims-processing business in Minnesota through further consent orders. Compl. ¶ 65. In fact, he specifically asks this Court to allow further "settlement of investigations" resulting in more "consent orders." Def's Br. 29. These orders will target Safelite. While consent orders typically articulate required rules of conduct, Defendant's Consent Order specifically blacklists Safelite as an impermissible business partner.

The right to pursue one's trade is a protected interest. Pls' Br. 27-28. Defendant does not dispute this. Defendant also does not dispute that he seeks to deprive Safelite of this interest without offering Safelite an opportunity to be heard—the minimal requirement of procedural due process. Defendant does not contest Safelite's allegations that he seeks to terminate Safelite's relationships with all insurers in Minnesota and thereby deprive Safelite of the right to conduct its claims-processing business. And Defendant does not contest that he intends to do so through direct negotiations with insurers, affording Safelite no opportunity to answer the charges against it. This amounts to the deprivation of a protected interest without procedural due process.

On substantive due process, Defendant ignores Safelite's showing that its enforcement against Safelite is not rationally related to a legitimate public purpose. Pls' Br. 29-30. Defendant counters that "if the Department was attempting to favor independently owned and unaffiliated auto glass shops over auto glass shops affiliated with an insurance company's claims handler," such purpose would not violate the dormant Commerce Clause. Def's Br. 28. That may or may not be true as a commerce-clause matter, but such action *would* show that Defendant intends "to favor economically certain constituents at the expense of others similarly situated." *Merrifield*, 547 F.3d at 991. That purpose is illegitimate as a matter of substantive due process.

III. SAFELITE WILL LIKELY PREVAIL ON ITS DORMANT-COMMERCE-CLAUSE CLAIM.

The McCarran-Ferguson Act "did not purport to make the States supreme in regulating all the activities of insurance companies…. [O]nly when [insurance

companies] are engaged in the 'business of insurance' does the statute apply." *SEC v. Nat'l Secs.*, 393 U.S. 453, 459-60 (1969). The Supreme Court has identified three criteria for "determining whether a particular practice is part of the 'business of insurance'" under McCarran-Ferguson: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. v. Pireno*, 458 U.S. 119, 129 (1982); *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314, 1323 (8th Cir. 1990).

Referrals by claims processors to glass-repair shops do not meet these criteria. *See Allstate v. Abbott*, No. 3:03-CV-2187-K, 2006 U.S. Dist. LEXIS 9342, at *45-*54 (N.D. Tex. Mar. 9, 2006) (holding McCarran-Ferguson does *not* exempt state regulation of insurers' relationship to repair shops from commerce-clause review). First, the referral occurs *after* the transfer of risk, which the Court has said occurs when the insurance contract is executed. *Pireno*, 458 U.S. at 130 ("[T]ransfer is complete at the time that the contract is entered."). Second, the referral to a glass shop is not an integral part of the *policy relationship* between the insurer and the insured. It "is obviously distinct from [the insurer's] contracts with its policyholders." *Id.* at 131. Whether Safelite informs the policyholder of warranties and balance-billing, or provides the advisory in a particular way, will not alter the relationship between policyholder and insurer. Third, referrals to glass-repair shops "inevitably involve[] third parties wholly outside the insurance industry"—the repair shops. *Id.* at 132. "Arrangements between insurance companies

and parties outside the insurance industry" lie outside McCarran-Ferguson's scope. *Id.* at 133.

Two Supreme Court decisions demonstrate that Defendant's McCarran-Ferguson argument lacks merit. In *Pireno*, the Court held McCarran-Ferguson did not apply to an insurer's peer-review process for determining benefits—precisely because it dealt with the back-end of the claims process. *Id.* at 136. In *Group Life v. Royal Drug*, the Court held that McCarran-Ferguson did not apply to an insurer's preferred-provider agreements with retail pharmacists—similar to the Network agreements at issue here. 440 U.S. 205, 232 (1979). Mere referrals to preferred providers, based on preferred-provider agreements, are even further removed from the "business of insurance" and therefore from McCarran-Ferguson's scope. These cases compel the conclusion that McCarran-Ferguson does not protect Defendant's speech restrictions from commerce-clause review. That result makes sense because Defendant is not attempting to regulate the "business of insurance" but is focused on the market for glass-repair services. Compl. ¶ 74.

On the merits, Defendant complains that Safelite has not made a full evidentiary showing regarding Defendant's discriminatory purpose. Yet "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *U. Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Moreover, "hearsay evidence may be considered by a district court in determining whether to grant a preliminary injunction." *Mullins v. NYC*, 626 F.3d 47, 52 (2d Cir. 2010).

It took this lawsuit to force Defendant to reveal the basis of his enforcement action against Safelite. Even without discovery, Safelite has learned that Defendant had *zero* complaints from consumers about Safelite's services and *zero* evidence that consumers were misled into not understanding their right to choose. Rather, Defendant investigated Safelite at the behest of competing "repair shops and trade associations" within the state. Fleischhacker Decl. ¶ 3. Defendant, along with these competitors, objects to Safelite's promotion of its Network agreements because informing consumers of these benefits leads consumers to prefer Network shops over non-preferred shops. Defendant's purpose is to restrict Safelite's competitive advantages in the glass-repair market so local shops obtain more business. Moreover, Defendant ignores Safelite's argument that Defendant's action has not only a discriminatory purpose but also a discriminatory effect. *See* Pls' Br. 30-34; *Bergmann v. Lake Elmo*, No. CIV-10-2074, 2010 WL 4123355, at *7 (D. Minn. Aug. 19, 2010) ("due to market conditions, law at issue predominantly affected only out-of-staters and was therefore discriminatory in effect").

CONCLUSION

To avoid irreparable harm, Pls' Br. 34-36, a preliminary injunction must issue.

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