UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Safelite Group, Inc. and Safelite Solutions, LLC, Plaintiffs, vs. Michael Rothman, in his official capacity as Commissioner of the Minnesota Department of Commerce, Defendants.	Case No.: 15-cv-1878 (SRN/SER) Defendant's Memorandum In Opposition to Plaintiffs' Motion for a Preliminary Injunction

INTRODUCTION

With their motion for a preliminary injunction, Plaintiffs Safelite Group, Inc. ("Safelite Group") and Safelite Solutions, LLC ("Safelite Solutions") allege they have been improperly targeted by the Minnesota Department of Commerce ("the Department") for engaging in commercial speech that is protected by the First Amendment. Plaintiffs' motion fails to address a host of issues, both with their non-speech related conduct and with the deceptive and misleading nature of the commercial speech they claim is protected.

Plaintiffs fail to address Safelite Solution's unlicensed and improper adjusting of insurance claims. State law requires that parties who negotiate on behalf of an insurer to settle an insurance claim must register with the Department as insurance adjusters, obtain training and education, and follow required standards

on the adjustment of claims. *See* Minn. Stat. § 72B.01-72B.08 and 72A.201, subd. 6 (2014). Safelite Solutions has repeatedly violated these laws while working for the Auto Club Group ("AAA") and other insurers, both by adjusting claims without a license and by adjusting claims in a manner that falls short of the required standards. This issue was, and remains, a sufficient basis for the Department to take action against insurers that used Safelite Solutions as an adjuster – by among other things, entering into agreed consent orders with the insurers requiring them to stop using Safelite Solutions to unlawfully adjust claims. As a result, Plaintiffs' motion for preliminary injunction fails, irrespective of the merits of the Plaintiffs' First Amendment claims.

Moreover, even if the issues in this case were limited to Plaintiffs' free speech rights, Plaintiffs would lose. Plaintiff Safelite Solutions misleads insureds about the risks of selecting a non-preferred vendor. Deceptive and misleading commercial speech is not protected by the First Amendment. Plaintiffs also fail to make legally required disclosures to insureds that are reasonable in scope. Plaintiffs due process and Commerce Clause claims are similarly misplaced.

FACT SUMMARY

In January of 2015, the Department and AAA entered into an agreed consent order to resolve violations of Minnesota law relating to AAA's handling of automobile glass and accident claims ("the Consent Order"). (Ex. A. to

Fleischhacker Aff.) Among these violations, the Department determined that AAA, though its claims handling agent Safelite Solutions:

- failed to provide a statutorily mandated disclosure to claimants before recommending preferred vendors that "Minnesota law gives you the right to go to any glass vendor you choose, and prohibits me from pressuring you to choose a particular vendor";
- advised claimants that they might be balance billed[1] by a non-preferred glass vendor if the vendor charged more than AAA deemed appropriate, even though balance billing does not actually occur;
- advised claimants that they might be balance billed by a specific vendor even when that vendor had specifically notified Safelite Solutions that the vendor never balance billed claimants;
- failed to offer fair and reasonable rates for auto glass services when adjusting claims.

(*Id.*) Each of these violations was, in and of itself, sufficient for the Department to take action against AAA, and enter into a consent order to end these illegal practices. (*Id.*)[2]

AAA did not contest any of the violations found by the Commissioner. AAA instead agreed to informal disposition by entering into the Consent Order, which required AAA to pay a civil penalty of $150,000 and implement a variety of changes to its claims handling practices. (*Id.*) During the negotiations leading to

[1] Balance billing is a practice in which a vendor bills a client for amounts charged by the vendor exceeding beyond those that the insurance company agrees to pay.
[2] AAA also agreed to stop making representations concerning warranties offered for work performed by affiliated auto glass service providers. (Ex. A. to Fleischhacker Aff.)

the Consent Order, AAA also *offered* to terminate its relationship with Safelite Solutions as its claim handler as an inducement to lower the penalties the Department might otherwise impose. (Fleischhacker Aff. ¶ 15.) The Department accepted this offer and included AAA's offer to terminate Safelite Solutions as its claim handler in the consent order with AAA. (*Id.* ¶¶ 15-17.)

ARGUMENT

A preliminary injunction "is an extraordinary remedy never awarded as a matter of right." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 9, 129 S.Ct. 365 (2008); *1-800-411-Pain Referral Serv., LLC v. Tollefson*, 915 F.Supp.2d 1032, 1047 (D. Minn. 2012).

Issuance of preliminary injunctive relief depends upon a "flexible" consideration of four factors: (1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest. *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 729 (8th Cir. 2008); *see also Pain Referral*, 915 F.Supp.2d at 1047.

To the extent Plaintiffs bring a facial challenge to any Minnesota statutes, the Court must "make a threshold finding that [Plaintiffs are] likely to prevail on the merits" before moving on to consideration of other factors. *Id.* at 732–33. This

"likely to prevail" standard requires the movant to make a "more rigorous threshold showing" than required under the "fair chance" test, which is applicable to a motion for preliminary injunction seeking to enjoin something other than a state or federal statute. *Id.* at 730, 733 n. 6. A higher standard to enjoin legislation is warranted, as such a standard "'reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id.* at 732 (quoting *Able v. United States,* 44 F.3d 128, 131 (2d Cir.1995)).

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. The Consent Order Is Fully Supported By Violations of Minnesota Law by Safelite Solutions that Plaintiffs Cannot Contest.

Safelite Solutions has been adjusting claims for Minnesota insurers without a license to do so, and has additionally violated Minnesota statutes setting forth standards of conduct for adjusters. The Court should therefore decline to grant any motion by Plaintiffs to preliminarily enjoin the Commissioner from taking action to curb these illegal practices.

Minnesota law provides that individuals and entities engaged in insurance adjusting must obtain a license from the Department, meet certain training and education standards, engage in adjusting in a manner that is trustworthy and free of

any unfair trade practices, and comply with Minnesota statutory requirements for claims handling when negotiating the resolution of claims. *See* Minn. Stat. § 72B.01-72B.08 and 72A.201, subd. 6 (2014). An "adjuster" is defined to include "a person who on behalf of an insurer . . . for compensation as an independent contractor . . . or for a fee or commission, investigates and evaluates claims arising under insurance contracts and negotiates the settlement of such claims." Minn. Stat. § 72B.02, subd. 4 (2014).

Safelite Solutions has illegally worked as an adjuster on insurance claims in Minnesota, including claims for AAA. (*See* Fleischhacker Aff. ¶¶ 5-7, 9, 11, 13; Patton Aff. ¶¶ 6, 7, 11-13.) Among other things, Safelite Solutions negotiates on behalf of insurers to resolve insurance claims. Evidence of this is present in recordings of three-way phone calls between Safelite Solutions, Minnesota insureds, and auto glass shops retained by Minnesota insureds to perform glass work. (Patton Aff. ¶¶ 6, 7; Exs. B-I.) These calls reflect a commonly occurring fact pattern, in which an insured with glass damage calls or travels to a local auto glass shop to have repairs performed, and the insured and a representative of the glass shop then call the claims handling number for the insurer, and are connected to Safelite Solutions. (*Id.*)

In these situations, Safelite Solutions directly negotiates with the auto glass provider and insured concerning the price to be paid for the work. (Patton Aff. –

Ex. B, pp. 11-12; Ex. C, pp. 11-12; Ex. D, p. 5; Ex. E pp. 10-11; Ex. F, pp. 8-9; Ex. G, pp. 19-20; Ex. H, pp. 9-10.) As an example, AAA customer K.B. took her car to Rapid Glass to have a windshield replacement performed. (Ex. B to Patton Aff.) K.B. and Rapid Glass representative Lisa Rosar then called AAA's claims number, and were connected to a Safelite employee with the initials B.C. (*Id.*) During the course of that call, B.C. attempted to negotiate a resolution of the claim, as follows (*id.* at pp. 11-12):

> B.C. [Safelite]: And, Lisa, I just wanted to know if you'd be willing to accept the job price at NAGS List minus zero percent. Labor's $40 flat, plus an additional $30 per hour and $15 per kit.
>
> Lisa R: No, we do not agree to those rates, but we do guarantee to the client that if there are any pricing differences, she would not be getting a bill from Rapid Glass. We would work directly with the insurance company.
>
> ***
>
> B.C. [Safelite]: Okay. And so, [K.B.], since the shop has disagreed to our pricing, I must inform you that AAA is willing to pay no more than $337 and 30 — or, excuse me, 30 cents to have the work completed. And that price does not include sales tax or the cost of molding, if required. Therefore, if you still wish to use this shop, just confirm with them what the price will be and make sure it does not exceed the $337.30.
>
> [crosstalk]
>
> Lisa R: — there's any differences, she will not be getting a bill from Rapid Glass.
>
> B.C. [Safelite]: I have to inform her of this since you're disagreeing to our rates, ma'am. So, [K.B.], just make sure it doesn't exceed that

> cost, because if it does exceed that, you would be required to pay the difference out-of-pocket. Okay, [K.B.]?

In this call between K.B., Lisa Rosar of Rapid Glass, and B.C. of Safelite Solutions, the Safelite Solutions employee is clearly negotiating with Rapid Glass and K.B. to settle the claim at a specific price. This is adjusting. It is undisputed that Safelite Solutions and its employees have no Minnesota license to engage in such adjusting. (Fleischhacker Aff. ¶¶ 7.)

The interchange between K.B., Rapid Glass, and Safelite Solutions was typical of the exchanges the Department observed in its investigation of various insurers whose claim were handled by Safelite Solutions. (Fleischhacker Aff. ¶ 13; Patton Aff. ¶¶ 4-7; Patton Aff. – Ex. B, pp. 11-12; Ex. C, pp. 11-12; Ex. D, p. 5; Ex. E pp. 10-11; Ex. F, pp. 8-9; Ex. G, pp. 19-20; Ex. H, pp. 9-10.) On calls in which an insured contacted their insurer with a representative of an already selected auto glass shop on the line, or in cases in which the service provider was brought on the line by Safelite Solutions, Safelite Solutions attempted to negotiate a resolution of the claim. (*Id.*)

The Department's investigation revealed an effort by Safelite Solutions to get the auto glass shop to agree to a particular price for the service, and if the glass shop refused, to use that refusal in a scripted effort to make insureds believe that they will be balance billed by their chosen shop and should instead choose a Safelite affiliated provider. (Patton Aff. ¶ 9.) This scripted effort by Safelite

Solutions occurred even in cases, like K.B.'s, where the glass shop clearly and unambiguously instructed the insured and Safelite Solutions on the call that the insured would not be balance billed. (Patton Aff Ex. B, pp. 11-12.)

The Department's investigation also revealed that Safelite Solutions does not follow Minnesota law concerning adjustment of claims when negotiating with auto glass shops and insureds. Minn. Stat. § 72A.201 sets forth required standards for automobile insurance claims handling, settlement offers, and agreements with insureds. Minn Stat. § 72A.201, subd. 6 (2014). These required standards apply both to the insurer and to any adjuster working on the insurer's behalf. *Id.*

In relevant part, Minn. Stat. 72A.201, subd. 6(14) specifies that an adjuster engages in an "unfair settlement practice" if, in negotiating a claim, the adjuster fails "to provide [for] payment to the insured's chosen vendor based on a competitive price that is fair and reasonable within the local industry at large. Where facts establish that a different rate in a specific geographic area actually served by the vendor is required by that market, that geographic area must be considered."

The Department's investigation revealed that Safelite Solutions used flawed survey information that did not reflect fair and reasonable rates in the relevant area when adjusting claims. (Fleischhacker Aff. ¶ 9; Patton Aff. ¶¶ 11-13.) This was evidenced in arbitration awards and associated materials the Department obtained

during its investigations. In these arbitrations, auto glass shops repeatedly won substantial awards against insurers on the basis that the data relied upon by Safelite Solutions to determine fair and reasonable rates in the adjustment of claims did not accurately reflect pricing in the market for auto glass services. (*Id.*; Patton Aff. Ex. A, pp. 2-3.)

In sum, the record plainly shows that Plaintiff Safelite Solutions is engaged in the unlicensed adjusting of insurance claims. The record is equally plain that Safelite Solutions engages in practices barred by Minnesota law when attempting to negotiate settlements of insurance claims. Plaintiffs have no likelihood of success in defending against these clear violations of law, which are set forth in the Consent Order and were a sufficient basis in and of themselves for the Commissioner to agree to the Consent Order's provision barring Plaintiffs from operating as AAA's handler of glass claims. On these bases, the Plaintiffs' motion for a preliminary injunction should be denied.

B. Plaintiffs Have No Likelihood of Success on Their First Amendment Claims.

Plaintiffs' First Amendment claims fail as a matter of law. The State is permitted to take action against insurers, like AAA, whose agents make deceptive and misleading statements. Here, Safelite Solutions' statements that policy holders risk being balance billed if they use an unaffiliated shop are deceptive commercial statements not entitled to First Amendment protection.

The State can also require that insurance companies, and their agents, provide the affirmative representation required by Minn. Stat. § 72A.201, subd. 6(14) ("Subdivision 6(14)") that "Minnesota law gives you the right to go to any glass vendor you choose, and prohibits me from pressuring you to choose a particular vendor." This representation is an accurate statement of the law, and a reasonable disclosure for the State to require.

1. Safelite's Statements Concerning Balance Billing Are Not Entitled to First Amendment Protection.

Plaintiffs argue that they have a First Amendment right to inform insureds that if they select a non-preferred vendor they may be balance billed for costs beyond those agreed to by the insurer. This speech is not protected by the First Amendment because it is inherently misleading.

The Department's investigation did not reveal any auto glass service provider that actually engages in balance billing. (Fleischhacker Aff. ¶ 12; Patton Aff. ¶ 10; R. Rosar Aff.; Reid Aff; Schmaltz Aff.; Ex. A to Lloyd Aff.) As set forth in the Department's supporting declarations, members of the auto glass service industry and the insurance industry consistently attest or testify that balance billing is not a practice employed by Minnesota auto glass vendors. (*Id.*) Instead, these vendors either write off the amounts they are short paid by insurers, or take an assignment of the policy and sue the insurers for the difference. (*Id.*) On the insurer side, representatives of insurers have testified under oath at arbitrations that

they are not aware of any Minnesota auto glass service providers that balance bill. (Ex. A to Lloyd Aff.) By declarations offered in this case, auto glass service providers Rick Rosar, Michael Reid, and Michael Schmaltz, similarly attest that they do not balance bill clients, and are not aware of any other providers in the industry who do so. (R. Rosar Aff.; M. Reid Aff.; Schmaltz Aff.) These witnesses have many years of experience in the industry, and participate in trade associations and other forums in which they come into contact with many vendors. (*Id.*) Informing claimants of a risk that is, at best, purely hypothetical, while providing no information sufficient to enable an insured to gauge that risk, is misleading. *1-800-411 Pain Referral Services, LLC v. Otto*, 744 F.3d 1045, 1061-1063 (8th Cir. 2014).

Moreover, it is clear that Safelite Solutions goes far further than simply asserting that if a non-preferred vendor is used then balance billing *might* occur. In many cases, Safelite Solutions affirmatively represents that if a non-preferred vendor is used then the insured *will* be balance billed. Notably, Plaintiffs did not support their motion for a preliminary injunction with Safelite Solutions' scripts, or any recordings of its calls with its customers, or even a declaration from any employee or officer concerning what Safelite Solutions actually tells insurance claimants who are connected to Safelite Solutions by their insurer.

The recorded calls the Department obtained in its investigation are particularly damning for Safelite Solutions. As cited above, when Minnesota insured K.B. was connected to Safelite Solutions she was told by its employee:

> make sure [the cost charged by Rapid Glass] doesn't exceed [$337.30] because if it does exceed that you *would be required* to pay the difference out of pocket.

(Patton Aff., Ex. B p. 12 (emphasis added).) Similarly, when R.A. was connected to SafeLite Solutions with an Alpine Glass representative on the phone, Safelite Solutions employed the same misleading statements concerning balance billing in an effort to convince R.A. to switch to a Safelite Solutions affiliated provider:

> M.M. [Safelite]: USAA has established pricing which is fair and reasonable to perform these services in your geographic area. *This means that you'll incur the cost of any charges that this shop may charge above that pricing.* Would you like to continue with the shop you selected, or can I assist you with a shop in your area that has already agreed to the established pricing and is available to secure an appointment for you right now?

(Patton Aff., Ex. F, p. 9 (emphasis added).) As these recordings make plain, Safelite Solutions is not warning claimants of risks that may or may not occur. In at least some cases, Safelite Solutions is affirmatively telling claimants that if they use an auto glass shop that competes with Plaintiffs they *will* have to pay any amounts in excess of what Safelite Solutions deems appropriate.[3]

[3] As set forth above, Safelite Solutions handles adjusting of claims for the insurers, and sets the rates the insurer is willing to pay.

Not only are Safelite Solutions' statements concerning the risks of balance billing misleading, Safelite Solutions knows they are misleading. In the case of Alpine Glass, for example, Alpine Glass has repeatedly informed Safelite Solutions that it does not balance bill its clients. (Reid Aff. ¶ 6.) Safelite Solutions has disregarded these notices, and continues to inform Alpine Glass clients that they will be balance billed if they use Alpine Glass. *Id.* This happens even in calls in which Alpine Glass participates and expressly states during the call that the insured will not be balance billed. Indeed, in the case of R.A., the Alpine Glass representative stated on the call that R.A. would not be balance billed, and the Safelite Solutions employee nonetheless immediately thereafter told R.A. "you'll incur the cost of any charges that this shop may charge above" the price Safelite Solutions deemed appropriate if he elected to remain with Alpine Glass. (Patton Aff., Ex. F, p. 9.)

Given the misleading nature of Safelite Solutions' representations concerning the possibility of balance billing, all of the *Central Hudson* factors favor the Commissioner.

The first *Central Hudson* factor is whether the speech is misleading or concerns illegal activity. Here, Safelite Solutions' statements informing insured that they are at risk of being balance billed if they use a non-preferred vendor are clearly misleading. *Cf. 1-800-411 Pain Referral Services, LLC v. Otto*, 744 F.3d

1045, 1061-1063 (8th Cir. 2014) (holding that, without context, statements that insurance benefits of $40,000 were available to people involved in a car accident were misleading by omission).

The second *Central Hudson* factor is whether the governmental interest is substantial. Here, the State's interest is substantial. The State has a substantial interest in ensuring that commercial information in the marketplace is accurate. *See e.g. Edenfield v. Fane*, 507 U.S. 761, 769 (1993). Insurance claimants are parties to insurance contracts that, as a matter of Minnesota law, entitle them to use any vendor they choose and have the claim paid as long as the rates are fair and reasonable. Industry practice also means that, irrespective of where an insured goes for auto glass work, the insured never pays anything more than their deductible – because auto glass service providers do not balance bill and instead take on the risk of underpayment by insurers. The State has a strong interest in preserving an insured's statutory and contractual right to select a vendor of their choice. The State also has a strong interest in preventing an insured from being deceived by a competing vendor into the mistaken belief the insured may pay out-of-pocket if they use a non-preferred vendor.

The third *Central Hudson* factor is whether the statute directly advances the asserted governmental interest. Here, the issue is not whether the statutes in question advance the governmental interest, but rather whether the Consent Order

advances the governmental interest.[4] It does. Through the consent order, AAA agreed not to use a claims handler that was making false and misleading statements to AAA's insureds. This directly advances the Department's goal of preventing false and misleading statements to insureds.

The fourth *Central Hudson* factor is whether the statute is narrowly drawn. Again, the issue here is whether the Consent Order, not a statute, is narrowly drawn. It is. The Consent Order merely prevents AAA from using Plaintiffs as a claims handler. Plaintiffs remain free to provide glass service, and to advertise the advantages of those services, in any forum other than on a phone call with an AAA insured while handling their claim for AAA.

On this issue, it is important to note that insurance claimants are a captive audience when they call to report a claim. Claimants cannot hang up on Safelite Solutions when confronted with deceptive statements and instead seek service from another claims handler. Court have consistently held that a state may impose more significant restrictions on commercial speech when it occurs in a captive forum. *See e.g. Lehman v. City of Shaker Heights,* 418 U.S. 298, 302 (1974) ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of

[4] Plaintiffs do appear to be making a facial challenge to the affirmative disclosures required by Minnesota law. That issue is discussed in the next section of this memorandum.

choice. In such situations,'(t)he legislature may recognize degrees of evil and adapt its legislation accordingly.'" (citations omitted)).

Unlike the cases cited by Plaintiffs, the Department has taken no broad, blunt action against Plaintiffs. It merely entered into a Consent Order with an insurer who did not contest Safelite Solutions' violations of the law, and agreed to stop using Plaintiffs for auto glass claims handling. Given the deceptive nature of Safelite Solutions' statements concerning balance billing, it is clear the State could directly regulate and prohibit such statements without offending the First Amendment. It is therefore equally clear that the State can take the lesser step of entering into a Consent Order with an insurer who voluntarily offers to stop using a claims handler engaged in deceptive acts (and unlicensed adjusting).

2. The First Amendment Does Not Prohibit the State From Requiring the Affirmative Disclosure Set Forth in Subdivision 6(14)

Subdivision 6(14) requires an affirmative disclosure by any insurer making an auto glass vendor recommendation that "Minnesota law gives you the right to go to any glass vendor you choose, and prohibits me from pressuring you to choose a particular vendor." This is an accurate statement of law, reasonably calculated to

inform insureds of their statutory right to select a vendor. As such, the State is permitted to require it. Plaintiffs fail to make it.[5]

As this Court held in *1-800-411-Pain Referral Serv., LLC v. Tollefson*, 915 F. Supp. 2d 1032, 1049 (D. Minn. 2012):

> All manner of disclosure requirements designed to protect consumers from misleading commercial speech, or misleading omissions, are found in countless areas of federal and state law . . .

The Supreme Court has specifically held that "in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) *citing In re R.M.J.,* 455 U.S. 191, 201 (1982).

As a result, a rule of reason applies in which "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651 (1985); *see also 1-800-411 Pain Referral Services, LLC v. Otto*, 744 F.3d 1045, 1061-1063 (8th Cir. 2014).

[5] Safelite Solutions failed to offer the Subdivision 6(14) disclosure in any of the seven calls attached as transcripts in support of this response. (Patton Aff., Exs. B-H.)

Here, the disclosure requirement of Subdivision 6(14) is reasonably related to the State's goal of informing insureds of their right to select an auto glass vendor of their choice when an insurer makes a vendor recommendation. Most insureds are likely to be unaware of the provisions of Minnesota's insurance regulations generally, and the rights afforded by Minn. Stat. § 72A.201 specifically. Thus, when making a call to their insurer, most insureds will not be aware that Minn. Stat. § 72A.201, subd. 6(7) and Subdivision 6(14) together prohibit an insurer from:

> requiring as a condition of payment of a claim that repairs to any damaged vehicle must be made by a particular contractor or repair shop . . . or engaging in any act or practice of intimidation, coercion, threat, incentive, or inducement for or against an insured to use a particular contractor or repair shop. . . .
>
> [or]
>
> failing to provide payment to the insured's chosen vendor based on a competitive price that is fair and reasonable within the local industry at large

Subdivision 6(14)'s mandated disclosure is nothing more than a permissible, plain language disclosure summarizing these statutory rights.

Plaintiffs assert that the mandatory disclosure of Subdivision 6(14) is impermissible because:

> The policyholder may well conclude that the legal requirement in question ("prohibits me from pressuring you") is unique to Safelite based on some prior misconduct that has triggered governmental scrutiny. Or the policyholder might conclude that the State has deemed the entire industry

> as one prone to unfairly pressuring policyholders and thus requiring unusually tight regulation. Either way, Safelite and others are being forced—without any legitimate justification—to convey a self-demeaning message they strongly oppose.

Plaintiffs adduce no evidence to support this speculation. Moreover, the key term identified by Plaintiffs as impermissible, the word "pressuring," is more favorable to insurers and their claims handlers than the relevant terms of the applicable substantive statutes.

Minn. Stat. § 72A.201, subd. 6(7), for example, prohibits "any act or practice of intimidation, coercion, threat, incentive, or inducement" to use a particular vendor. The State could therefore require an insurer or Safelite Solutions to inform the claimant that "Minnesota law prohibits me from intimidating, coercing, threatening, incentivizing, or inducing you to choose a particular vendor" without offending the First Amendment, as this is an accurate statement of a valid law. Instead, the State requires only the far more anodyne but accurate statement that insurers and their claims handlers are prohibited from "pressuring" the insured into using a particular vendor.

The limited scope and reasonable nature of Subdivision 6(14)'s mandatory disclosure makes it permissible under the reasonableness standard of *Zauderer*. But even if the Court applied the more rigorous *Central Hudson* standard, the result would be the same. As set forth above, Safelite Solutions is clearly engaged

in conduct that misleads insureds as to the risks and advantages of balance billing, thus satisfying the first two factors of the *Central Hudson* test.

The third factor, whether the statute directly advances the governmental interest, is met. By requiring the Subdivision 6(14) disclosure, the State provides information that is useful to insureds in disclosing their right to choose a vendor free of any intimidation, coercion, threat, incentive, or inducement when the insurance company makes a referral to a preferred provider.

The fourth factor, whether the statute is narrowly drawn, is also satisfied. Here, the State has not actually barred any speech, but has simply required that a disclosure be made to the insured informing the insured that they cannot be pressured into using any particular vendor, a disclosure which must be read only if the insurer is making a referral. This makes Subdivision 6(14) distinguishable from cases cited by Plaintiffs like *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258 (2d Cir. 2014), where the statute at issue barred speech rather than requiring a disclosure. Indeed, the *Jepsen* court specifically blessed a preexisting law to the one challenged that required a disclosure of the insured's right to choose a vendor, precisely because it was a narrowly drawn way to deal with the issue of steering. *Id.* at 266.

C. Plaintiffs Are Likely to Fail with their Due Process Claim.

In order to establish a procedural due process violation, Plaintiffs must establish that they were deprived of property without notice or an opportunity to be heard. *See, e.g., Howard v. Columbia Public School District*, 363 F.3d 797, 804 (8th Cir. 2004).

Plaintiffs' claim that their procedural due process rights were violated fails as a matter of law because the Department did not deprive Plaintiffs of any constitutionally cognizable property interest. Contrary to Plaintiffs' assertions, AAA freely offered to terminate its at-will business relationship with Safelite Solutions, and the Department accepted the offer in agreeing to the Consent Order. AAA, not the Department, terminated the relationship.

Moreover, irrespective of who terminated the relationship, the contract between AAA and Safelite Solutions was terminable at will, and thus did not confer a sufficient property interest to trigger due process claims.[6] Safelite Solutions' contract with AAA reached its term on August 7, 2012, and was

[6] To the extent Plaintiffs are arguing a theory of interference with contract, the Department is immune from liability from interference with contract. *See Midway Manor Convalescent and Nursing Home, Inc. v. Adcock*, 386 N.W.2d 782 (Minn. Ct. App. 1986). Accordingly, Plaintiffs had no cognizable property right subject to a due process claim. *See Caesar's Massachusetts Management Company, LLC. v. Crosby*, 778 F.3d 327 (1st Cir. 2015) (casino operators' business relationship with potential licensee subject to regulatory authority could not constitute property for procedural due process purposes).

operating as a month to month arrangement that could be terminated by either party for any reason. Accordingly, the contract did not constitute property for procedural due process purposes. *See, e.g., Crews v. Monarch Fire Protection District*, 771 F.3d 1085, 1091 (8th Cir. 2014) (at-will employment contract could not constitute property for procedural due process purposes); *Howard*, 363 F.3d at 804 (principal whose contract expired was not renewed had no property interest and thus no due process claim); *Omni Behavioral Health v. Miller*, 285 F.3d 646 (8th Cir. 2002) (at will contract to provide foster care services not a property interest for due process purposes); *Reierson v. City of Hibbing*, 628 N.W.2d 201, 204-05 (Minn. Ct. App. 2001) (termination of at will contract was not a due process violation).

Plaintiffs also maintain that their liberty to engage in a particular occupation was infringed. This argument fails because AAA simply terminated one at-will contract in one state, which does not constitute putting Safelite Solutions out of an entire business or occupation. *See Habhab v. Hon*, 536 F.3d 963, 968 (8th Cir. 2008) ("State actions that exclude a person from one particular job are not actionable in [due process] suits"). Plaintiffs own cases support this point. *See Bernard v. United Township High School District Number 30*, 5 F.3d 1090, 1092-93 (7th Cir. 1993) (Plaintiff had neither liberty nor property interest in sale of one drawing for due process purposes); *Piecknick v. Commonwealth of Pennsylvania*,

36 F.3d 1250, 1256-57 (3rd Cir. 1994) (towing operator had no cognizable property right in conducting towing business in a particular zone near his headquarters).

Safelite Solutions further contends that its substantive due process rights were unconstitutionally deprived. In order to constitute a substantive due process violation, the governments conduct must "shock the conscience or interfere with rights implicit in the concept of ordered liberty." *Weiler v. Purkett*, 137 F.3d 1047 (8th Cir. 1998); *see also Habhab*, 536 F.3d at 968 ("Before official conduct or inaction rises to the level of a substantive due process violation, it must be so egregious or outrageous that it is conscience-shocking"). Here, the Department's decision to accept AAA's offer to terminate its at-will relationship with Safelite Solutions was well within the public interest and directly related to the protection of Minnesota insurance consumers from deceptive representations and improper adjusting. The advancement of these interest in no way shocks the conscience. Accordingly, the Department did not violate Plaintiffs' substantive due process rights. *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998) (confiscation of a prisoners' mail package did not shock the conscience and thus was not a substantive due process violation.)

In sum, it would be extraordinary to conclude that a State agency lacks the ability to enter into an informal, agreed upon Consent Order with a regulated insurer who did not contest that violations of the law had occurred, barring that

insurer from continuing to do business with a claims handler who created many of the violations. Neither procedural nor substantive due process concerns compel such a result.

D. Plaintiffs Are Not Likely To Succeed With Their Dormant Commerce Clause Claim.

Plaintiffs' dormant Commerce Clause claim fails as a matter of law. The McCarran-Ferguson Act, 15 U.S.C. § 1011, exempts state regulation of insurance from Commerce Clause review. Moreover, even if the dormant Commerce Clause applied, Plaintiffs cannot show the type of discrimination in favor of domestic Minnesota entities that would give rise to a Commerce Clause concern.

Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act. *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652-54 (1981); *see also State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962); *Group Life & Health Ins. Co., v. Royal Drug Co.*, 440 U.S. 205, 219, n. 18 (1979); *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*, 348 U.S. 310, 319 (1955).

Here, the Department's actions are unquestionably related to the regulation of insurance by the State of Minnesota. The Consent Order targeted AAA's claims handling process, a core function of its insurance business, and was issued under the Department's authority pursuant to Minn. Stat. § 72A.201, which regulates the

insurance claims handling process. Therefore, the McCarran-Ferguson Act exempts both the Consent Order and the statute from a dormant Commerce Clause challenge. *Id.*

Even if the McCarran-Ferguson Act did not apply, the result would be the same, because the type of discrimination implicated by the dormant Commerce Clause is not present here. The dormant Commerce Clause prohibits a state from favoring its citizens and companies at the expense of another state's similarly situated citizens or companies. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). As the party asserting a dormant Commerce Clause claim, Plaintiffs bear the burden of proving that the Consent Order or the statute challenged either intentionally discriminates against out-of-state entities so as to favor similarly situated in-state entities, or that there is a pattern of conduct on the part of the Department evincing an intent to so discriminate. *Id.*

Plaintiffs have failed to make *any* evidentiary showing on this issue. The one declaration tendered by Plaintiffs does not addresses the Commerce Clause issue at all. Plaintiffs instead rely on articles posted on the internet in which individuals who own or are affiliated with auto glass shops in Minnesota state that they assisted the Department in its investigation of AAA. However, in addition to being inadmissible hearsay, such statements merely stand for the proposition that

the Department received assistance from auto glass shops when investigating AAA's claims handling process. This proves nothing.

Indeed, Plaintiffs have fallen far short of what would be required to prove a dormant Commerce Clause claim. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007). In *Allstate*, the Fifth Circuit considered a challenge by Allstate to a Texas law that restricted the ability of insurance companies to own and operate body shops in the State of Texas. *Id.* at 155. Allstate argued that the restriction violated the dormant Commerce Clause by favoring independently owned local auto shops over those owned by Allstate. *Id.* at 160-163. As evidence, Allstate cited to legislative history, which was far more extensive in supporting Allstate's argument than the citations Plaintiffs have proffered in this case. *Id.* The Fifth Circuit rejected the argument, holding that:

> [M]uch of Allstate's evidence of "discrimination" towards out-of-state companies is simply evidence of a legislative desire to treat differently two business forms - independent auto body shops on the one hand and insurance-company-owned auto body shops on the other - a distinction based not on domicile but on business form. . . . [T]he Legislature in this case sought to prevent firms with superior market position (insurance companies) from entering a downstream market (auto body repair) upon the belief that such entry would be harmful to consumers. The dormant Commerce Clause is no obstacle to such regulation.

Id. at 161-62.[7] For the same reasons, even 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, which it is not, the dormant Commerce Clause would be no bar to such favoritism.

As a result, Plaintiffs have no likelihood of success on their dormant Commerce Clause challenge to the Department's actions.

II. THE REMAINING PRELIMINARY INJUNCTION FACTORS ALSO FAVOR THE COMMISSIONER.

Plaintiffs have failed to demonstrate any irreparable harm. To date, the only insurer who has agreed to stop doing business with Safelite Solutions is AAA. There is no evidence that if the Consent Order was modified to permit AAA to retain Safelite Solutions as a claims handler that AAA would do so. Given the civil penalties AAA agreed to pay as a result of Safelite Solutions' improper conduct, it seems unlikely AAA would agree to re-hire Safelite Solutions.

Plaintiffs also remain free to advertise the alleged benefits of their preferred vendor program in many available forums, including newspaper, radio, television, and billboards. The only impact on Plaintiffs, if there is one, is that Safelite Solutions can no longer use claims handling calls to make deceptive pitches to insureds about the risks of being balance billed.

[7] Because the Fifth Circuit found no substantive Dormant Commerce Clause violation, it declined to take up Texas' argument that the McCarran-Ferguson Act applied to exempt the statute in question from Dormant Commerce clause review. *Allstate*, 495 F.3d at 164.

In contrast, the Department will obviously be harmed if it is barred from engaging in the expeditious and efficient settlement of investigations with insurers who wish to voluntarily enter into consent orders to end practices that violate the law. Here, the balance of harms favors the Commissioner.

Finally, the public interest is clearly served by permitting the Commissioner to take action to stop unlicensed and illegal adjusting by Safelite Solutions, and deceptive representations to Minnesota insureds. The public interest also favors resolution of claims between the Department and insurers though voluntary consent orders, and disfavors restricting the ability of insurers to offer concessions such as the termination of a problem claims handler as a condition of such consent orders.

CONCULSION

For the reasons set forth above, the Plaintiffs motion for preliminary injunction should be denied.

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Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

/s/ Oliver J. Larson
OLIVER J. LARSON
Assistant Attorney General
Attorney Reg. No. 0392946
MICHAEL J. TOSTENGARD
Assistant Attorney General
Attorney Reg. No. 0204973

445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 757-1265 (Voice)
(651) 282-2525 (TTY)

ATTORNEYS FOR MICHAEL ROTHMAN IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF COMMERCE