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/KMM) **REPLY IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

ARGUMENT

I. SAFELITE'S BALANCE-BILLING SPEECH IS CONSTITUTIONALLY PROTECTED.

Defendant does not deny (and its witnesses admitted) that non-Network shops have the right to seek unreimbursed amounts directly from the policyholder.[1] In contrast, balance-billing is not possible with Network shops because they contractually agree to pay the insurance companies' prices. (Br. 4.) Accordingly, when Safelite informs policyholders that they "may be" responsible for charges from non-Network shops, it communicates the undisputed truth that non-Network shops may charge policyholders for unpaid balances while Network shops cannot. These facts alone render Safelite's speech truthful and entitle Safelite to summary judgment.

[1] *E.g.*, Reigstad Ex. 1 at 70:7-13, Reigstad Ex. 4 at 135:19-22. All emphasis has been added and all internal quotation marks and citations omitted.

Defendant attempts to avoid summary judgment by citing to a handful of scripts and three call transcripts where CSRs tell policyholders they "will" or "would" be responsible for balances. (Opp. 6-9.)[2] Even these statements truthfully inform policyholders that if the amount charged is higher than what the insurer will reimburse, that amount will be the policyholder's responsibility. But most importantly, Defendant's argument is a red herring. This case has nothing to do with whether statements that policyholders "*will be* responsible" are protected because Defendant has not imposed penalties on Safelite for such statements. As Safelite previously explained, (Docket No. 41 at 4-5), Safelite has made a *facial* challenge to Defendant's regulatory requirement, spelled out in the Consent Order, which prohibits claims processors from "advis[ing] that insureds *may be* balance-billed by non-preferred glass vendors."[3] *That* prohibition is unconstitutional and must be enjoined. Whether Defendant can identify other statements Safelite has made—that may or may not be permissibly regulated—does nothing to address the merits of Safelite's claim.

Defendant tries to justify its prohibition by pointing to Alpine's and Rapid's statements to Safelite professing that they will not exercise their right to balance-bill. Nothing stops these shops from changing their minds on that topic. Nor is Safelite

[2] The other three transcripts say that the policyholder "*may*" be responsible. Larson Exs. 9E-G.

[3] Reigstad Ex. 37 at 2.

required to take some shop at its word. Alpine's CEO agreed with this.[4] So did the courts in *Glass Service* and *Diamond*. The shops in those cases likewise represented that they would not balance-bill customers; both courts found these representations beside the point and held speech just like Safelite's to be truthful. *Glass Serv.*, 530 N.W.2d at 872; *Diamond*, 441 F. Supp. 2d at 707 n.7.[5]

Defendant does not dispute that many shop invoices in Minnesota reserve the right to balance-bill; instead Defendant says it found some different invoices that do not explicitly reserve that right. (Opp. 11.) These invoices support Safelite, not Defendant. None purport to disclaim the shops' ability to charge customers for balances.[6] In fact, two of them establish an "express mechanic's lien" for the amount of the repairs; another two provide that the policyholder "will pay" if he does not have coverage for the work.[7]

Defendant acknowledges that it received balance-billing collection letters provided to it by an insurer. Nowhere does Defendant claim that these letters are not what they

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[4] Larson Ex. 6 at 68:18-20 ("Q. Do you think Safelite is required to trust the statements that you make to them? A. No.").

[5] Defendant claims the insurer in *Diamond* did not warn customers of balance-billing, since it said only that a shop "may charge more than what [the insurer] is willing to pay." (Opp. 17) Defendant's argument is based on a misquote; the insurer actually warned customers that shops "may charge *you* more than what [the insurer] is willing to pay." *Diamond*, 441 F. Supp. 2d at 707.

[6] Elsewhere Defendant asserts Rapid and Alpine "have specifically disclaimed any right to balance bill." (Opp. 17.) But the citations provided by Defendant assert only that in practice those shops do not balance-bill customers. (Larson Ex. 10 ¶ 6, Larson Ex. 7 at 42:5-43:10.) Both shops' invoices contain language reserving the right to balance-bill customers if they lack insurance coverage for the work. (Larson Ex. 7 at 63:6-64:2, Larson Ex. 6 at 78:5-22.)

[7] Larson Ex. 15 at DOC008682, DOC010263, DOC010561, DOC010744.

purport to be. Instead, Defendant complains that they cannot be properly authenticated. That is wrong. Authentication requires only "a *rational basis* for [the] claim that the evidence is what the proponent asserts it to be." *United States v. Coohey*, 11 F.3d 97, 99 (8th Cir.1993). The affidavit from American Auto Glass does not deny that the balance-billing letter was sent, and confirms both that (1) the recipient was "a customer of my company"; and (2) the sender was hired by the shop "to handle collections." Larson Ex. 14. That is enough. *Coohey*, 11 F.3d at 99.[8]

At bottom, Defendant's argument that Safelite's speech is "inherently misleading" relies on anecdotes about how frequently non-Network shops exercise their right to balance-bill. Defendant refers vaguely to "industry" evidence it collected (*e.g.*, Opp. 17), but in truth Alpine and Rapid are the only two shops Defendant asked about balance-billing.[9] The principals of both those shops admitted they have no knowledge about balance-billing practices in Minnesota beyond their own shops and a handful of others.[10]

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[8] Moreover, "[t]he act of production" by Defendant "is an implicit authentication of documents produced." *Indianapolis Minority Contractors Ass'n v. Wiley*, 1998 WL 1988826, at *6 (S.D. Ind. May 13, 1998), *aff'd*, 187 F.3d 743 (7th Cir. 1999). Elsewhere in its Opposition Defendant relies on invoices it produced and which were likewise provided by insurers. (Opp. 11.) "Defendant[] cannot have it both ways. [It] cannot voluntarily produce documents and implicitly represent their authenticity and then contend they cannot be used by the Plaintiffs because the authenticity is lacking." *Id.* *Hoffman v. Applicators Sales & Service., Inc.*, cited by Defendant, is not to the contrary. That case involved a document created and produced by the Plaintiff—the same party seeking to introduce it into evidence. 439 F.3d 9, 15-16 (1st Cir. 2006).

[9] Larson Ex. 4 at 134:11-14 ("Q. So over a thousand glass shops in Minnesota and you spoke to two of those shops about their balance billing practices, right? A. Yes.").

[10] Larson Ex. 6 at 69: 9-15; Larson Ex. 7 at 47:19-23, 49:21-50:12.

Safelite likewise cannot be expected to monitor all 1,300 non-Network shops in Minnesota to determine which are exercising their right to balance-bill. If no shop in Minnesota wishes to balance-bill customers (despite the documentary evidence showing some have done so), 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.

Moreover, even if Safelite's speech were somehow misleading by omission (*see* Opp. 15), *Central Hudson* requires that Defendant more directly and less restrictively address that concern through disclosure of the omitted information 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.").

II. THE MANDATORY ADVISORY IS UNCONSTITUTIONAL.

Citing to cases from the Second and D.C. Circuits, Defendant claims that "the *Zauderer* standard is not limited . . . to cases in which the government is attempting to remedy deceptive speech." (Opp. 22.) To the contrary, the Eighth Circuit has only applied *Zauderer* to disclosure requirements "directed at *misleading* commercial speech." *1-800-411-Pain Referral*, 744 F.3d at 1061. For that reason, the compelled speech of the mandatory advisory cannot be justified under the *Zauderer* standard absent evidence that it cures deceptive speech.

Even so, Defendant's Opposition makes clear that the mandatory advisory cannot even satisfy *Zauderer*, let alone the proper *Central Hudson* standard. Defendant first tries to justify the mandatory advisory as "informing insureds of their right to select an

auto glass vendor of their choice." (Opp. 23.) Defendant asserts that "most insureds are likely to be unaware" (*id.*) of this right, but offers *zero* evidence to support this speculation, and fails to rebut Dr. Isaacson's contrary conclusion that 92.7% of Minnesota policyholders are informed of their right to choose even absent the mandatory advisory. (Br. 24-25.) Next, Defendant asserts that the statutory advisory somehow remedies deception of consumers about "the risks and advantages of balance billing." (Opp. 25.) This argument fails because Safelite's speech concerning balance-billing is truthful, a fact confirmed by Defendant's admission that it has no evidence that consumers have been misled. Nor has Defendant explained how the mandatory advisory—which says nothing whatsoever about balance-billing—is "reasonably related" to remedying supposed consumer deception about balance- billing.

Moreover, none of Defendant's asserted interests can save the mandatory advisory because it duplicates a separate disclosure of customers' rights, and therefore serves no function other than to burden Safelite's speech. As Safelite has shown, the Choice Clause in Minnesota Statute § 72A.201, subdivision 6(14) *already* requires the insurer to inform the insured of his/her prerogative to choose a shop, even without the mandatory advisory. (Br. 22-25.) Defendant fails to respond to this argument, offering no explanation for why its asserted interests are not satisfied by the Choice Clause alone. That omission is fatal.

At a minimum, the DOC has failed to justify the second half of the mandatory advisory ("... prohibits me from pressuring you to choose a particular vendor"). Defendant claims Safelite has not identified any "adverse consequence" from reading this

language. (Opp. 24.) But it is Defendant's burden to justify its speech restriction.[11] *Edenfield*, 507 U.S. at 770. Defendant asserts that the second half of the advisory is permissible because it is "more favorable" than other language in the statute. (Opp. 24.) Specifically, Defendant claims that it could force Safelite to recite even more demeaning language to its customers ("Minnesota law prohibits me from intimidating, coercing, threatening, incentivizing, or inducing you to choose a particular vendor") because "this is an accurate statement of a valid law." (*Id*.) Defendant cites no authority for this troubling assertion and it is wrong; forcing Safelite to make these self-demeaning statements would likewise violate the First Amendment. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (finding regulation that would "requir[e] a company to publicly condemn itself" invalid even under *Zauderer* review).

Finally, Defendant's opposition confirms that it has no justification for requiring that the mandatory advisory be read *before* describing the features and benefits of Network shops. Defendant's only defense of this requirement is that the "Court has no jurisdiction to consider whether a state official has misinterpreted state law." (Opp. 21 n.9.) This misses the point. The Court need not interpret state law to hold that Defendant's timing restriction violates the First Amendment; Defendant's admission that it misread the statute simply confirms that the timing restriction is arbitrary and serves no

[11] This argument also ignores the evidence showing that the second half of the advisory *does* have an adverse impact on Safelite. *See, e.g.*, Reigstad Ex. 18 at 17:2-18:12, 20:14-22:3.

purpose. Because the DOC has failed to offer any justification for the timing restriction, it is invalid *whether or not* it represents an accurate interpretation of state law.

III. DEFENDANT VIOLATED THE DORMANT COMMERCE CLAUSE.

"[O]nly when [insurance companies] are engaged in the 'business of insurance' does the [McCarran-Ferguson Act] apply." *SEC v. Nat'l Secs. Inc.*, 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).

Referrals by claims processors to glass-repair shops do not meet these criteria. *See Allstate v. Abbott*, 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. Second, the referral 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 balance-billing, or provides the advisory in a particular way, will not alter the policyholder-insurer relationship. Third, referrals "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 compel the conclusion that McCarran-Ferguson does not protect Defendant's speech restrictions from commerce-clause review. 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 & Health Insurance Co. v. Royal Drug Co.*, the Court held that McCarran-Ferguson did not apply to an insurer's preferred-provider agreements with retail pharmacists—similar to the Network agreements involved here. 440 U.S. at 232. Mere referrals to Network shops are even further removed from the "business of insurance" and therefore from McCarran-Ferguson's scope.

On the merits, Defendant acknowledges that it "acted in response to complaints from local glass shops" but claims that this does not evince discriminatory purpose. (Opp. 29.) Numerous courts have held otherwise. *Whitehead*, 19 F. Supp. 2d at 1015 (discriminatory purpose where "a lobbyist for [an in-state producer] . . . proposed the statute."); *McNeilus Truck*, 226 F.3d at 443 ("letters written by in-state dealers" to the State seeking legislation evinced discriminatory purpose). Defendant also claims that one of the Minnesota Shops—Alpine—was not a "local" shop because it has offices in Washington. (Opp. 29.) Defendant fails to acknowledge that (1) Alpine is incorporated in Minnesota, (2) "[n]inety-five percent or higher" of its business is in Minnesota, and (3)

the DOC's internal documents show that it viewed Alpine as a "Minnesota glass shop[]."[12]

Next, Defendant declares that Safelite has "adduced no *direct* evidence of an intent to favor in-state entities over out-of-state entities." (Opp. 29.) This Court may consider "direct *and* indirect evidence" to infer discriminatory purpose. *Smithfield*, 367 F.3d at 1065. Nevertheless, Defendant ignores the direct evidence of discriminatory purpose cited by Safelite, including that (1) the DOC's "Memorandum of Violations" underlying the Consent Order called Safelite a "*direct competitor of Alpine, Rapid Glass and other Minnesota glass shops*"; (2) Fleischhacker told Reid he wanted to "*slap [Safelite] with a cease and desist order*" and "*get Safelite out of Minnesota*"; and (3) in an internal DOC email Fleischhacker expressed "concern[] that Safelite . . . [is] *expanding their presence in our state.*" (Br. 30, 34-35.)

The overwhelming evidence of discriminatory intent presented by Safelite distinguishes this case from *Allstate*, 495 F.3d at 160-162, the sole case Defendant cites. There, Allstate relied on "stray protectionist remarks" by legislators (which were contradicted by statements from other legislators); "failed to establish a history of hostility towards Allstate singularly"; and failed to demonstrate any procedural irregularity in the consideration or enactment of the bill. *Id.* Here, Safelite has shown (1) the absence of consumer complaints; (2) the DOC's (and admittedly) improper sharing of

[12] Larson Ex. 6 at 10:12-22; Reigstad Ex. 45; Alpine Glass Record Details, *available at* https://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=186806f9-b1d4-e011-a886-001ec94ffe7f.

confidential information with the Minnesota Shops; (3) internal communications demonstrating the DOC sought to ban Safelite (and only Safelite) from doing business in Minnesota; (4) the procedural irregularity of the Consent Order; and (5) the fact that an independent ALJ found the DOC's charges against Safelite to be wholly without merit. (Br. 29-37.) Defendant's failure to respond to this evidence demonstrates its inability to rebut the discriminatory purpose behind its speech restrictions.

CONCLUSION

Safelite's motion for summary judgment should be granted.

DATED: July 29, 2016

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I certify that this brief conforms to the requirements of LR 7.1(f) for a brief produced with a proportional font. The length of this reply brief is 2,649 words and the total number of words for both the opening brief and the reply is 11,980 words. This brief was prepared using Microsoft Word 2010 and the word processing program has been applied specifically to include all text, including headings, footnotes, and quotations for word count purposes.

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