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) **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION[1]

Plaintiffs Safelite Group, Inc. and Safelite Solutions LLC (collectively "Safelite") engage in protected commercial speech when communicating with insureds about their choices for auto-glass repair. Yet Defendant Michael Rothman, the Commissioner of the Minnesota Department of Commerce (the "DOC"), seeks to restrict Safelite's protected speech in two ways. *First*, the DOC has interpreted Minnesota Statute § 72A.201 as prohibiting Safelite from "advis[ing] that insureds may be balance billed by non-preferred glass vendors" for charges not covered by their insurer—even though that statement is true. *Second*, under the same statute, the DOC requires Safelite to tell policyholders 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"—even

[1] All emphasis has been added and all internal quotation marks and citations omitted unless otherwise noted. All references to exhibits refer to the exhibits annexed to the Declaration of Christian Reigstad filed simultaneously herewith.

though that compelled statement serves no purpose because policyholders are already informed of their rights.

The Supreme Court has recognized that such speech restrictions violate the First Amendment unless they are narrowly tailored to directly and materially advance a substantial state interest. *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). The DOC's restrictions cannot satisfy those standards.

The DOC has claimed that its prohibition on Safelite's balance billing speech is justified to prevent consumer deception. But as the DOC's Assistant Commissioner for the Enforcement Division admitted, "under Minnesota law if an insurance company doesn't pay a shop in full for a job . . . that shop has the right to try to seek the balance from the customer."[2] Discovery revealed that many Minnesota shops explicitly reserve the right to balance bill on their invoices, a fact that the DOC initially denied in its discovery responses, but the DOC's witnesses conceded during their depositions. Not only that, discovery also demonstrated that some Minnesota shops have balance billed customers for amounts unpaid by their insurer. Accordingly, Safelite's warning that policyholders "*may*" be balance billed by non-Network shops is truthful.

The DOC similarly sought to justify the compelled statutory advisory as "reasonably related to the State's interest in preventing deception of consumers." (Dkt. 31 at 18.) But the facts do not support that justification either. Safelite's scripts *already* inform policyholders of their right to choose even absent the advisory. And

[2] Ex. 1 at 70:7-13.

Safelite's survey expert, Dr. Bruce Isaacson, demonstrated that the order, length, or presence of the DOC's advisory makes no difference—either way, policyholders understand that they can use any glass repair shop they want.

Most tellingly, though the DOC has attempted to justify its speech restrictions on consumer protection grounds, the DOC admitted that it had (and has) no evidence that consumers have been misled. The DOC has received no consumer complaints concerning Safelite's speech, and the DOC's witnesses could not point to a single instance in which a consumer reported being misled or deceived by what Safelite says.

In short, discovery has made clear that the DOC cannot justify its restrictions on Safelite's commercial speech. Discovery has also clarified that the DOC's justifications are *post-hoc* rationalizations—the DOC's true purpose for restricting Safelite's speech was economic protectionism for in-state businesses that compete with Safelite. The only "complaints" against Safelite which led to the DOC's speech restrictions came from Minnesota glass shops objecting to economic competition from a large out-of-state vendor. Discovery revealed that the DOC embraced the objective of restricting interstate competition, and worked in tandem with the Minnesota shops by repeatedly and improperly sharing confidential information about its investigation of Safelite. The DOC's purpose to insulate in-state businesses from competition with an interstate business such as Safelite renders its speech restrictions independently unconstitutional under the dormant Commerce Clause.

Accordingly, Safelite is entitled to prevail on the merits on both claims it is advancing: the First Amendment claim and the dormant Commerce Clause claim. And

absent a permanent injunction, Safelite will suffer irreparable harm to its constitutional rights while the DOC will only be prevented from enforcing unconstitutional restrictions on speech. The Court should therefore grant summary judgment in Safelite's favor and enjoin and declare invalid the DOC's unconstitutional enforcement of § 72A.201.

STATEMENT OF UNDISPUTED FACTS

A. Safelite's Business.

Safelite is a nationwide business that provides auto-glass replacement services through Safelite AutoGlass, and claims-processing services for insurance companies through Safelite Solutions.[3]

As a service to insurers and policyholders, Safelite maintains a network of auto-glass repair shops (the "Network").[4] The only requirement for joining Safelite's Network is signing a "Network Participation Agreement," by which signatory glass shops ("Network shops") agree to adopt Safelite's insurance company clients' pricing terms.[5] Glass shops that are outside of Safelite's Network ("non-Network shops") are not bound to the insurers' pricing terms and may charge whatever price they wish.[6] If the price they charge is more than the insurance company is willing to pay, such non-Network shops can bill policyholders for the difference—a practice sometimes called "balance billing."[7]

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[3] *See* Dkt. 15 ¶¶ 2-4.

[4] *Id*. ¶ 7.

[5] *Id*.

[6] *See, e.g.*, Ex. 2 at 58:14-18; Ex. 3 at 40:21-41:2.

Many non-Network glass shops in Minnesota expressly reserve the right to balance bill on their invoices.[8]

When policyholders report a claim, Safelite customer service representatives ("CSRs") communicate with the policyholders through scripted language developed in conjunction with each insurance company.[9] On these calls, Safelite honors each policyholder's preference for a particular shop and informs policyholders of their right to use any shop they choose.[10] If the policyholder indicates a preference for a non-Network shop, and that shop does not accept the pricing of Safelite's clients, Safelite's CSRs inform the policyholder that they may be responsible for any charges above what the insurance company will cover.[11] If the policyholder does not have a preference, Safelite recommends a shop, but only after communicating, as required by statute, 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."[12]

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[7] Ex. 1 at 70:7-13. *See also* Ex. 4 at 135:19-22 ("I do not believe it is against the law [to balance bill] in Minnesota.").

[8] *See, e.g.*, Ex. 5, Ex. 6; Ex. 7; Ex. 8; Ex. 9; Ex. 10; Ex. 11; Ex. 12; Ex. 13; Ex. 14; Ex. 15; Ex. 16; Ex. 17.

[9] Dkt. 43 ¶ 2.

[10] Ex. 18 at 23:23-24:10, 31:20-32:13; Dkt. 43 ¶ 2.

[11] *See, e.g.*, Ex. 19 at SafeliteMN0000027 ("if you still wish to use the shop, you may be responsible for any additional charges.").

[12] *See id*. at SafeliteMN0000020 (communicating statutory advisory). *See also* MINN. STAT. § 72A.201, subdiv. 6(14).

B. The DOC Launches an Investigation of Safelite at the Behest of Minnesota Glass Shops.

Alpine Glass, Inc. ("Alpine") and BuyRite Auto Glass, Inc. d/b/a Rapid Glass ("Rapid") are Minnesota glass shops owned and operated by Michael Reid and Rick Rosar, respectively.[13] Neither shop is a member of any Network,[14] and both shops charge exorbitant rates for their services.[15] Together with their attorney, Charles ("Chuck") Lloyd, and Michael Schmaltz, formerly of the Minnesota Glass Association, Rapid and Alpine (collectively, the "Minnesota Shops") engage in significant lobbying activity directed at both the Minnesota Legislature and the DOC to further their business interests.[16]

The DOC admitted that it "has not received *any* complaints directly from consumers regarding Safelite's auto-glass claims administration practices."[17] But the Minnesota Shops have long believed that Safelite is responsible for "taking [their] business" and "driving down the price" for auto-glass repair in Minnesota.[18] Since at

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[13] Ex. 2 at 10:12-14; Ex. 3 at 11:21-12:1.

[14] Ex. 2 at 51:14-16; Ex. 3 at 29:12-14.

[15] *See, e.g.*, Ex. 20 at 21 (arbitration finding: "Rosar admits that in some cases he will charge as much as he possibly can on a particular glass job if he can get away with it.").

[16] *See* Ex. 2 at 134:21-135:15; Ex. 3. at 13:7-15; Ex. 21 at 71:19-72:17.

[17] Ex. 22 at 4.

[18] *See* Ex. 3 at 82:2-5 (agreeing that "Safelite Solutions is responsible for driving down the price of auto glass repair or replacement in Minnesota"), 113:23-114:12 (Safelite engages in "steering" by "telling the customer they have to pay the difference"); Ex. 2 at 21:17-22:10 (Safelite is "taking business" from Alpine by "mak[ing] statements

least the early 2000s, the Minnesota Shops have complained about Safelite's business practices to the DOC, including that Safelite allegedly (1) steers jobs away from Alpine and Rapid through its speech on calls with policyholders, and (2) declines to pay the inflated prices Alpine and Rapid demand.[19] Until recently, the DOC never took any action against Safelite in response to these complaints.[20]

The Minnesota Shops' luck changed when, in July 2013, Reid replaced the windshield of the DOC's then-Director of Investigations, Martin Fleischhacker.[21] Shortly thereafter, Reid wrote to Fleischhacker, thanking him for his business, and repeating the same complaints that the Minnesota Shops had previously made to the DOC for over a decade.[22] This time, Fleischhacker agreed to meet with Reid and Lloyd.[23] During that

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about [Alpine]" during calls, including that "the insured . . . may be responsible");; Ex. 21 at 80:20-81:15 ("[I]n exchange for huge business volume [Safelite] guarantee[s] low prices for insurers," which do not "reflect local market considerations . . . my understanding is that the price was set nationally").

[19] *See* note 18, *supra*. *See also* Ex. 3 at 124:3-12 (Rapid complained "going back to the . . . early 2000s, . . . maybe before that."); Ex. 21 at 126:4-20 (Schmaltz first complained in "roughly 2002."); Ex. 1 at 31:17-21 ("I've received glass complaints since I started at Commerce.").

[20] Ex. 1 at 60:13-17 (DOC never took action against Safelite until 2015); Ex. 3 at 137:17-23 (Rosar was "frustrated" with the DOC because "we would send in complaints and they'd take no action on it."); Ex. 21 at 75:18-76:17 (prior DOC Commissioner Wilson "did not see a violation" following a presentation by the Minnesota Shops).

[21] Ex. 1 at 145:13-19; Ex. 23.

[22] Ex. 23; Ex. 2 at 97:20-98:2 (Reid's complaints were "[w]hatever we've had in the - - in the previous complaints").

[23] Ex. 23.

meeting—according to Reid—Fleischhacker announced that he wanted to "slap" Safelite with a cease-and-desist order and "*get Safelite out of Minnesota*."[24] Fleischhacker also made a "deal" with Reid and Lloyd whereby those two would collect information about Safelite from competing local shops and select the information to be forwarded to the DOC.[25]

Soon thereafter, Reid, Rosar, and Schmaltz held a conference call during which Rosar noted that the Minnesota Shops now had a "fresh ear" with the DOC.[26] The three resolved to send the DOC only "extra special" call recordings, and focus the DOC's investigation on Safelite.[27] When the investigation began, the Minnesota Shops made clear that they expected the DOC's regulatory involvement to benefit them financially, asking the DOC's lead investigator on the matter, T.J Patton, to help "make [insurance companies] pay" and explicitly requesting "some benefit to the glass industry" from the investigation.[28] The DOC indicated its intent to advance the interests of the Minnesota

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[24] Fleischhacker now appears to deny this, Ex. 1 at 159:23-160:2, but shortly following this meeting Reid reported to Rosar and Schmaltz that Fleischhacker had made those statements, Ex. 24 at 7; Ex. 2 at 102:25-103:7.

[25] Ex. 2 at 96:2-7; Ex. 1 at 172:11-21; Ex. 25 at 75:14-77:7.

[26] Ex. 24 at 5 (transcript of call); Ex. 3 at 197:14-198:2.

[27] Ex. 24 at 6-7; Ex. 2 at 112:2-10 (Reid only wanted to focus on Safelite or "the [insurers doing business] with Safelite"); Ex. 3 at 201:15-203:2 (Rosar filtered recordings down "to a couple . . . extra special calls" for the DOC).

[28] *See* Ex. 26; Ex. 27.

Shops by feeding them confidential information concerning the investigation[29] and relying heavily on the information they provided.[30]

C. The DOC Takes Unlawful Enforcement Actions in an Effort to Drive Safelite Out of Minnesota.

In April 2014 the DOC issued two sets of administrative subpoenas to Safelite.[31] Safelite timely objected to the subpoenas,[32] and the DOC never sought a district court order to enforce compliance, (Dkt. 45 at ¶ 2). Instead, at Fleischhacker's direction, Patton threatened Safelite with a cease-and-desist order banning Safelite from operating in Minnesota.[33] Apparently recognizing there was no legal basis for this threat, the DOC never followed through with it. As Patton explained in an internal DOC email, rather than pursuing direct action against "the elephant in the room," the DOC decided to "[go]

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[29] *See, e.g.*, Ex. 28 ("The attorney general continues to mull over the appropriate action to initiate against Safelite . . . I am pushing for a C&D"); Ex. 29 ("My findings have been submitted. Another investigator is finishing files involving other AAA conduct."); Ex. 30 ("the Department is preparing to take action against Safelite . . . we are looking into whether Safelite falls within the confines of Minnesota's TPA licensing statute"); Ex. 31 (sending a copy of a DOC Consent Order with AAA and promising to "keep [Reid] apprised of developments relating to your complaints against American Family and USAA.").

[30] Ex. 4 at 84:9-19 (Patton did not have any conversations with, nor seek information from, any glass shops other than Alpine and Rapid); Ex. 3 at 229:20-230:4 ("it appeared that the [DOC] was focusing on [Alpine and Rapid] for information on their . . . investigations.").

[31] Ex. 32; Ex. 33.

[32] *See* Ex. 34.

[33] *See* Ex. 35.

after companies using Safelite as a TPA one by one."[34] To that end, the DOC opened investigations into certain of Safelite's insurance company clients, including Auto Club Group, Inc. ("AAA").[35]

The DOC and AAA ultimately entered into a consent order on January 8, 2015 (the "Consent Order").[36] In the Consent Order, the DOC alleged that Safelite—as claims processor for AAA—violated Minnesota law by (1) "advis[ing] that insureds may be balance billed by non-preferred glass vendors"; and (2) "fail[ing] to provide the required advisory to insureds before recommending the use of [AAA's] network of preferred glass vendors."[37] The Consent Order further provided that AAA "shall cease and desist from using Safelite . . . as [AAA's] administrator of automobile glass claims."[38]

The DOC neither provided notice to Safelite nor involved Safelite in negotiations over the Consent Order.[39] Safelite learned about the Consent Order only when the DOC provided Safelite with a fully executed copy during a January 20, 2015 meeting.[40] Later that day, Safelite offered to modify its scripts to conform entirely to the DOC's views—

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[34] Ex. 36.

[35] Ex. 1 at 53:6-10.

[36] Ex. 37.

[37] *Id*.

[38] *Id*.

[39] Ex. 38 at 85:23-86:7.

[40] *Id*. at 41:5-42:4.

despite its substantive disagreement with those views— in an effort to resolve the matter informally.[41] The DOC never responded.

D. Safelite Files Suit Against the DOC; the DOC Files an Administrative Action Against Safelite.

Safelite filed this action on April 7, 2015, asserting claims under the First Amendment, Due Process Clause, and dormant Commerce Clause against the DOC. (Dkt 1.) Safelite's complaint was accompanied by a motion for a preliminary injunction, which Safelite withdrew after the parties resolved certain of Safelite's claims. (Dkt. 11 at 52.) Safelite now moves for summary judgment on the two remaining claims: Safelite's First Amendment and dormant Commerce Clause claims.

The DOC filed an administrative action against Safelite on April 27, 2015, alleging various legal violations.[42] On February 5, 2016, the ALJ presiding over the matter recommended that every one of the DOC's charges be dismissed.[43] On June 17, 2016, however, the DOC disregarded this recommendation and ordered that the matter proceed to a hearing.[44]

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[41] Ex. 39.

[42] Ex. 40 at 3.

[43] *Id*. at 11.

[44] Ex. 57.

ARGUMENT

I. SAFELITE IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF ITS FIRST AMENDMENT CLAIMS.

A. The DOC's Prohibition on Safelite's Balance Billing Speech Violates Safelite's First Amendment Rights.

Minnesota Statute § 72A.201, subdivision 6(16) prohibits an insurance company from "engaging in any act or practice of intimidation, coercion, threat, incentive, or inducement for or against an insured to use a particular company or location to provide the motor vehicle glass repair or replacement services or products." After receiving complaints from the Minnesota Shops, the DOC began interpreting this provision to prohibit Safelite from "advis[ing] that insureds *may be* balance billed by non-preferred glass vendors."[45]

Safelite's statements to policyholders concerning the possibility of balance billing are constitutionally protected as commercial speech. *See, e.g.*, *Safelite Group v. Jepsen*, 764 F.3d 258, 259 (2d Cir. 2014) (Safelite's recommendations of glass repair shops are constitutionally protected speech). The DOC's prohibition of that speech is both speaker- and content-based because it targets a particular class of speakers (insurance companies) and prohibits speech on a particular topic (the possibility of balance billing). *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055-56 (8th Cir. 2014) (statute was a content- and speaker-based restriction where it disfavored speech referencing insurance benefits by licensed health care providers).

[45] *See* Ex. 37 at 2 (AAA Consent Order); Ex. 1 at 118:22-119:2 (DOC never interpreted provision as barring balance billing warnings until 2014).

To survive judicial scrutiny, such speaker- and content-based restrictions on commercial speech must satisfy the *Central Hudson* test. *Id*. at 1055. That test requires the Court to determine whether (1) the speech at issue is not false or misleading; (2) the government's interest in regulating the speech is substantial; (3) the regulation directly and materially advances that interest; and (4) the regulation restricts no more speech than necessary to serve the government's interest. *Cent. Hudson*, 447 U.S. at 566. "[I]t is the [DOC's] burden" to satisfy the requirements of this test. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). The DOC cannot meet its burden.

1. Safelite's Speech Is Truthful and Not Misleading.

Safelite's speech is truthful. There is no dispute that, because non-Network shops do not have a pricing agreement with insurers, they may charge whatever they wish for their services.[46] It is equally undisputed that, if such a shop charges ***more*** than what the insurer is willing to pay, "under Minnesota law . . . that shop has the right to try to seek the balance from the customer."[47] It is therefore undisputed that policyholders in Minnesota "*may be responsible*" for amounts not covered by their insurer, just as Safelite says.

In response, the DOC claims that the risk of balance billing is "purely hypothetical," (Dkt. 31 at 15), because, according to the DOC, Minnesota glass shops

[46] *See* note 6, *supra*.

[47] *See* note 7, *supra*.

never reserve the right to balance bill on their invoices,[48] and Minnesota glass shops *never* balance bill customers, (Dkt. 31 at 15). These arguments miss the point because non-Network shops "may" balance bill customers *even if* they have not yet exercised their right to do so. But even so, discovery has proved that both of the DOC's arguments are wrong on the facts.

Specifically, discovery revealed that many Minnesota glass shops expressly reserve the right to balance bill on their invoices to customers.[49] For example, one Minnesota shop requires customers to agree that: "In the event the above-named Insurance Company does not make timely and/or full payment of this Invoice according to its terms, I hereby accept responsibility for such payment and agree to pay all charges reflected on this Invoice."[50] The DOC initially denied the existence of such invoices in sworn discovery responses,[51] but DOC representatives disclaimed that position during their depositions when confronted with examples of invoices reserving the right to balance bill.[52]

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[48] Ex. 22 at 9 (denying that "some" Minnesota shops reserve the right to balance bill).

[49] *See* note 8, *supra* (listing invoices).

[50] Ex. 5.

[51] *See* note 48, *supra*.

[52] Ex. 1 at 97:12-20 ("Q. So this is an example of a Minnesota glass shop invoice reserving the right to balance bill, correct? A. . . . It says they will pay all charges reflected on here, yes.").

Discovery also demonstrated that Minnesota glass shops have exercised their right to balance bill customers.[53] As a letter from a collection agency hired by a Minnesota glass shop explained to a customer, "Most insurance companies indemnify their insureds . . . . However we have exhausted all avenues in dealing with your claim and are forced to collect the balance from you."[54] These letters and invoices confirm that Safelite's speech is truthful: plainly, Minnesota policyholders "*may be responsible*" for charges over and above what their insurers will pay.

The Minnesota Court of Appeals has already held speech just like Safelite's to be truthful, even where (unlike here) no evidence was presented that balance billing actually occurs. *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867 (Minn. Ct. App. 1995). The plaintiff in *Glass Service* brought a tortious interference claim against an insurer, State Farm, based on State Farm's practice of informing insureds that they could be responsible for any price difference between what the plaintiff's shop charged and State Farm would cover. *Id*. at 871. The Court granted summary judgment to State Farm, concluding that "State Farm's representations to its insureds of potential liability for repair costs if [the plaintiff's shop] was used were not improper because they were not false." *Id*. The Court so held, even though the plaintiff's glass shop represented that it would not make customers pay any price difference. *Id*. at 871-72. Because it remained

[53] Ex. 41; Ex. 42.

[54] Ex. 41.

"possible that customers might be liable for some repair costs," the Court ruled that informing insureds of "that potential liability" was truthful and not actionable. *Id*. at 872.

The court reached the same conclusion in *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695 (M.D. Pa. 2006). There, a non-Network shop brought false advertising claims against Safelite based on scripted statements that the shop "may charge [the policyholder] more than what [the insurance company] is willing to pay." *Id*. at 707. The court held that this statement was truthful and nonmisleading, and granted summary judgment for Safelite. *Id*. In so holding, the court reasoned that Safelite's statement was truthful because the glass shop in question "had no contractual arrangement with Safelite or the insurance companies" and therefore could charge whatever it wished. *Id*. While the shop represented that it never actually balance billed policyholders, the court found this representation "beside the point." *Id*. at 707 n.7. Because the glass shop was "free to enforce" its right to balance bill, the statement that it "may" charge the policyholder more than was covered was truthful. *Id*.

Just as in *Diamond* and *Glass Service*, Safelite's speech informs policyholders that non-Network shops may charge them more than what their insurance will cover. Whether any particular shop ultimately chooses to enforce this right is "beside the point." *Id*. Because it is "possible that customers might be liable for some repair costs" when choosing non-Network shops, Safelite's speech informing policyholders of that possibility is truthful. *Glass Serv.*, 530 N.W.2d at 872. The truthfulness of Safelite's speech is all the more apparent in this case because (unlike in *Diamond* or *Glass Service*)

Safelite has presented evidence that some Minnesota shops have actually exercised their right to balance bill customers.

2. No Substantial Interest Justifies the DOC's Prohibition.

The DOC claims that its speech restrictions protect consumers from "deceptive and misleading statements." (Dkt. 31 at 10.) But Safelite's speech is truthful. The Supreme Court has made clear that states have no legitimate interest—let alone a substantial interest—in "protecting" consumers by restricting their access to truthful commercial speech. *Ibanez v. Fla. Dep't of Bus. & Reg.*, 512 U.S. 136, 142 (1993) ("Because disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking . . . only false, deceptive, or misleading commercial speech may be banned."). Even when the State seeks to prevent individuals "from making bad decisions with the information," the Court has "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002).[55]

In short, discovery has confirmed that the DOC's asserted interests cannot sustain its restriction of Safelite's speech. But discovery also revealed that those interests are not even genuine. The DOC admitted that it has not received any complaints from consumers about Safelite, and neither Fleischhacker nor Patton could recall a single instance in which a consumer reported being misled or deceived by Safelite's speech.[56]

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[55] Dr. Isaacson addresses consumer interest in hearing information concerning balance billing in his report. *See* Ex. 43 at ¶¶ 83-93.

[56] Ex. 22 at 4; Ex. 1 at 75:22-76:2; Ex. 4 at 54:20-23.

In truth, the DOC's restrictions do not aim to protect consumers; they seek to protect Minnesota repair shops from competition by Safelite and affiliated shops. But a desire to protect local business from competition is not a substantial governmental interest. *Allstate Ins. Co. v. South Dakota*, 871 F. Supp. 355, 358 (D.S.D. 1994) ("preventing local businesses from closing" cannot justify restriction on speech). Indeed, as shown in Sec. II, *infra*, the DOC's protectionist purpose is so far from being a substantial interest, it is unconstitutional.

3. The DOC's Prohibition Does Not Materially Advance Any Substantial Interest.

Even if the DOC *could* identify a substantial governmental interest its speech prohibition serves, it still must carry its burden of showing that the prohibition "*directly* and *materially*" advances that interest. *Ibanez*, 512 U.S. at 142. This prong of the *Central Hudson* test is "critical; otherwise, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

Simply put, the information that Safelite provides to consumers is not misleading, and so the DOC cannot argue that it advances an interest in protecting consumers to prevent them from hearing that information. "Consumers benefit from more, rather than less, information. Attempting to control the outcome of the consumer decisions . . . by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 167 (5th Cir. 2007).

Nor can the DOC satisfy its burden by labeling Safelite's speech as "potentially" misleading. *Compare* Ex. 1 at 87:10-14 (speculating that Safelite's speech "*could be* misleading."), *with Ibanez*, 512 U.S. at 146 ("rote invocation of the words 'potentially misleading' [cannot] supplant the [State's] burden"). Rather, the DOC must show that "the harms it recites are *real* and that its restriction will in fact alleviate them to a *material degree*." *Edenfeld v. Fane*, 507 U.S. 761, 770-71 (1993).

The DOC cannot make that showing. It "presents no studies that suggest [Safelite's speech] creates the dangers of fraud . . . [t]hat the [DOC] claims to fear." *Id.* at 771. The record does not even "disclose any anecdotal evidence . . . that validates the [DOC's] suppositions." *Id.* "Given the complete absence of any evidence of deception the [DOC's] concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Ibanez*, 512 U.S. at 145.

4. The DOC's Prohibition Is Not Narrowly Tailored.

A restriction on commercial speech may "extend only as far as the interest it serves." *Cent. Hudson*, 447 U.S. at 565. "[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government *must* do so." *Thompson*, 535 U.S. at 371.

Here, Minnesota law already prohibits an insurer from requiring the use of a particular repair shop. MINN. STAT. § 72A.201, subdiv. 6(14). Courts have held such provisions adequately promote consumer protection in this context, rendering further speech restrictions gratuitous and therefore unconstitutional. *See, e.g.*, *South Dakota*, 871

F. Supp. at 358 (holding "[t]he State has failed to meet its burden" to show narrow tailoring because it has "legislation in place preventing an insurer from requiring the use of a particular auto glass repair or replacement business"); *Allstate Ins. Co. v. Serio*, 2000 WL 554221, at *25 (S.D.N.Y. May 5, 2000) ("[I]t is clear that [the State's] interests are sufficiently served by Section 2610(a), which prohibits an insurer from requiring the use of a particular repair shop.").

If the DOC were truly concerned about consumer deception, there are many more ways to achieve that interest other than banning Safelite's truthful speech. For example, if the DOC desires to clarify the risk of balance billing, it could outlaw balance billing by non-Network shops. *See, e.g.*, 35 PA. STAT. ANN. § 449.34 (Pennsylvania law forbidding balance billing in healthcare). Or the DOC could engage in its own speech by educating the public about balance billing. *44 Liquormart*, 517 U.S. at 507 ("educational campaigns . . . might prove to be more effective"). And if the DOC wishes to reform the glass-repair industry, it can do so through direct regulation rather than censorship of truthful commercial speech. *Id*. ("higher prices can be maintained either by direct regulation or by increased taxation.").

But the DOC has done none of these things. Far from narrowly tailoring a speech regulation to a substantial interest, the DOC has impermissibly adopted a blanket ban on Safelite's speech.

B. The Statutory Advisory Violates Safelite's First Amendment Rights.

Pursuant to Minnesota Statute § 72A.201, subdivision 6(14), Safelite is required to read the following advisory to policyholders: "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." The DOC has sought to justify this compelled statement as "reasonably related to the State's interest in preventing deception of consumers." (Dkt. 31 at 18 (quoting *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).)

But in this Circuit, courts distinguish between the scrutiny applicable to commercial disclosures genuinely targeted at customer deception and those that are not. "[I]f challenged disclosure requirements are directed at *misleading* commercial speech, and if they impose a disclosure requirement rather than an affirmative limitation on speech, the less exacting scrutiny described in *Zauderer* governs a court's review of the disclosure rules." *1-800-411-Pain Referral*, 744 F.3d at 1061. The DOC has not and cannot show that the mandatory advisory regulates deceptive speech. Absent such a showing, *Central Hudson* review applies. *Id.*

Regardless, the mandatory advisory cannot survive any standard, whether it is *Zauderer* or *Central Hudson*. That is because the DOC cannot make even the barest showing that the mandatory advisory's burden on Safelite's speech is reasonably related to preventing consumer deception. And any substantial interest the DOC has in informing consumers of their right to choose is not advanced here because the advisory is entirely duplicative of other, less restrictive measures already in place.

1. The Mandatory Advisory Does Not Advance a Substantial or Legitimate State Interest.

The DOC has described the purpose of the mandatory advisory as protecting consumers from being misled by informing them of their statutory right to utilize any glass vendor they choose.[57] As with the DOC's restriction on Safelite's speech about balance billing, however, the DOC cannot point to any risk of consumer deception sufficient to justify its infringement on Safelite's commercial speech.[58] Moreover, Minnesota law already ensures that policyholders are adequately informed of their statutory rights even without the mandatory advisory. Minnesota Statute § 72A.201, subdivision 6(14) provides in relevant part:

> [T]he insurer shall offer its insured the opportunity to choose the vendor. If the insurer recommends a vendor, the insurer *must also* provide the following advisory: "Minnesota law gives you the right to go to any glass vendor you choose, and prohibits me from pressing you to choose a particular vendor."

Thus, in addition to the mandatory advisory, subdivision 6(14) mandates that an insurer "shall offer its insured the opportunity to choose the vendor" before recommending any vendor. *Id*. This less intrusive provision (hereinafter the "Choice Clause") requires the insurer to inform the insured of his/her prerogative to choose a glass shop, without putting the exact words in the mouth of the insurer.

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[57] *See* Ex. 1 at 126:11-21.

[58] *See supra* at 17 & note 56 (DOC has no consumer complaints or evidence consumers were misled); *see also* Ex. 4 at 287:14-288:12 (Patton has "no knowledge" whether absent the advisory insureds "don't know of their right to choose a repair shop").

If the purpose of the mandatory advisory, as Patton put it, is to "mak[e] sure that consumers are aware of their right to choose a repair shop,"[59] the DOC has offered no explanation why that purpose is not satisfied by the Choice Clause alone and why therefore the insurer "*must also* provide" the advisory. MINN. STAT. § 72A.201, subdiv. 6(14). The mandatory advisory only duplicates the *very* same message as the Choice Clause, but in a more onerous fashion by telling the insurer *exactly* what it must say.

Insurers' efforts to comply with the statute, as reflected in the scripts that Safelite CSRs follow for Minnesota policyholders, illustrate the sheer repetition of these statutory constraints. For example, before asking policyholders whether they have a preference for a particular shop, the CSR informs them that: "you have the right to choose any glass repair facility that you want to use to complete the repairs of your vehicle."[60] Over and above that compliance with the Choice Clause, the CSR *then* reads the mandatory advisory, telling the insureds *again* of their right to choose any shop they want.[61]

The DOC's witnesses had no explanation for why these duplicative speech restrictions are necessary, other than the *ipse dixit* that "[i]t appears to be [necessary] in the opinion of the Minnesota Legislature."[62] That is not enough to justify forcing Safelite

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[59] Ex. 4 at 287:13-17.

[60] *See* Ex. 44 at SafeliteMN0000006.

[61] *See id.* at SafeliteMN0000008; *see also, e.g.*, Ex. 19 at SafeliteMN0000019-20 (same).

[62] Ex. 4 at 287:14-288:12.

to speak. *See, e.g., PG&E Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

Moreover, whatever unsupported assumptions the DOC might offer about the added value of the mandatory advisory to prevent customer deception, those assumptions are not only "mere speculation or conjecture," they are manifestly incorrect. *Edenfeld*, 507 U.S. at 770-71. The Supreme Court has explained that regulations aimed at misleading commercial speech are permissible only where "the particular advertising is *inherently likely* to deceive or where the record indicates that a particular form or method of advertising has *in fact* been deceptive." *In re R.M.J.*, 455 U.S. 191, 202 (1982). The opposite has been demonstrated here. In his survey of Minnesota policyholders, Dr. Isaacson found that the "presence, order, or length of the [DOC's] advisory statement do not make a material difference in communicating to policyholders that they can go to any glass repair shop they want."[63]

Designing his survey based on actual scripts used by Safelite CSRs, Dr. Isaacson tested language that: (1) included the mandatory advisory; (2) included a partial advisory ("Minnesota law gives you the right to go to any glass vendor you choose"); and (3) omitted the mandatory advisory entirely. Dr. Isaacson found that the vast majority of policyholders—92.7%—"believe that the language Safelite provides to policyholders communicates or implies that policyholders can go to any glass repair shop they want,

[63] Ex. 43 at ¶ 9(i).

even if the DOC's advisory statement is omitted entirely."[64] These results establish that the Choice Clause alone is adequate to satisfy the DOC's interest in informing policyholders of their right to choose.

Further, and at the very least, the DOC failed to justify how the second portion of the advisory (". . . prohibits me from pressuring you to choose a particular vendor") advances its asserted interest. Asked whether the second half of the advisory is necessary for consumers to understand their right to select any glass vendor they want, Fleischhacker responded, "I don't know if they would know that [the first half of the advisory] alone gives them the right to choose."[65] Banishing any doubt, Dr. Isaacson's results illustrate that the second half of the mandatory advisory, that "Minnesota law . . . prohibits me from pressuring you to choose a particular vendor," does not appreciably affect policyholders' understanding of their rights.[66]

On the other hand, Safelite's corporate representative testified that the second half of the advisory *does* have an adverse impact on Safelite; it "provides a negative connotation relative to the service and experience the policyholder is receiving . . . [and] indirectly implie[s] that without this disclosure there may be cause for concern."[67] Whereas the DOC did not identify any customer complaints about misunderstanding their

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64 *Id*.

65 Ex. 1 at 128:2-16.

66 *See* Ex. 43 ¶ 79 (95.6% of respondents understood right to choose with full advisory compared to 93.5% with partial advisory).

67 Ex. 18 at 17:2-17.

rights or being deceived, Safelite testified that the mandatory advisory itself was a cause of customer concern and misunderstanding.[68] 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 prone to unfairly pressuring policyholders and thus requiring unusually tight regulation. Either way, Safelite is being forced—with no legitimate justification—to convey a self-demeaning message it strongly opposes.

2. The DOC's Enforcement Position About the Timing of the Advisory Is Irrational and Contrary to the Statute.

The DOC has also taken the position that Safelite not only must recite the mandatory advisory during calls with policyholders but must do so *before* recommending a vendor to a policyholder or describing the features and benefits of Network shops.[69] During discovery, however, the DOC conceded that this interpretation of the statute—on which it relied to conclude that Safelite had violated Minnesota law and to justify its action against AAA[70]—had no basis in the statutory text and was erroneous.

Although the Choice Clause specifies that the insurer shall offer the policyholder the opportunity to choose the vendor "*before* recommending a vendor," MINN. STAT. § 72A.201, subdiv. 6(14), the statute specifies no time constraint with respect to the

[68] *Id*. at 17:18-18:12, 20:14-22:3.

[69] *See* Ex. 37 at 1.

[70] Ex. 45 (Memorandum of Violations alleging that Safelite violated Minnesota law by not providing the required advisory at a particular time in the claim call).

mandatory advisory. When confronted with the statute's text, Patton conceded that he had "remember[ed] the statute incorrectly," and expressly abandoned the DOC's prior enforcement position.[71] Likewise, Fleischhacker testified that Patton "misquoted the law," and then "used his own misquote when he was negotiating with [AAA]."[72] Asked how the DOC "came up with its view that the advisory had to be read before describing the features and benefits of a network shop," Fleischhacker confessed it was "probably a mistake."[73]

The DOC's *mea culpa* illustrates the lack of justification for requiring insurers to deliver the advisory at a particular point in the call.[74] Because the DOC disclaimed any justification in the statute for the timing restriction, and offered no other compelling reason for imposing this restriction on Safelite's speech, at a minimum the DOC should be enjoined from pursuing this erroneous enforcement position.

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[71] Ex. 4 at 99:4-13 (Patton "remember[e]d the statute incorrectly"); *Id*. at 100:6-14 ("Q: So even if the advisory came later, that's not inconsistent with the statute, correct? A: Correct.").

[72] Ex. 1 at 138:14-24, 139:5-9.

[73] *Id*. at 139:10-14.

[74] Moreover, Dr. Isaacson's survey demonstrates that the timing of reciting the mandatory advisory makes no difference to policyholders' understanding of their rights. Ex 44 ¶ 9(i).

II. SAFELITE IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF ITS DORMANT COMMERCE CLAUSE CLAIM.

The DOC knows that Safelite is the country's largest interstate auto-glass repair business.[75] Minnesota glass shops know this too; they complained that "[t]he only big, out of state company involved in auto-glass in Minnesota is Safelite."[76] Those shops believe that Safelite "take[s] business" from them by informing policyholders about their choices and about the benefits of choosing a Network shop.[77] They also believe Safelite is responsible for "driving down the price of auto glass repair . . . [i]n Minnesota," due to Safelite's "huge business volume" and ability to set "national[]" prices that do not reflect "local considerations."[78]

Discovery confirmed that the DOC's purpose in regulating Safelite's speech was not to protect consumers but to protect the Minnesota Shops from having to compete with Safelite. This discriminatory purpose renders the DOC's speech restrictions independently unconstitutional under the Commerce Clause. The "negative" aspect of the Commerce Clause prohibits regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors. *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004). A regulatory measure may unconstitutionally discriminate against interstate commerce in one of three ways: "The law may be

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[75] Ex. 1 at 47:9-16; Ex. 4 at 60:8-15.

[76] Ex. 46 at 2 (Minnesota Glass Association lobbying materials).

[77] *See* note 18, *supra*.

[78] *See id*.

discriminatory on its face or, even if it is facially neutral, the law may have a discriminatory purpose or a discriminatory effect." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000). If the measure "discriminates against interstate commerce on its face or through its purpose or effects," then it is "presumed invalid" and will be struck down unless the State demonstrates that the measure "serves some legitimate purpose unrelated to limiting interstate commerce" and is "the only possible way to achieve this purpose." *Id*. at 1068.

1. Discovery Revealed Overwhelming Evidence of Discriminatory Purpose.

In this Circuit courts "look to direct and indirect evidence" to infer a discriminatory purpose. *Smithfield*, 367 F.3d at 1065. Before any discovery, the DOC claimed that "[t]here is no evidence that . . . the [DOC] is being led around by the nose by independent shops," (Dkt. 58 at 23:15-17), and argued that Safelite had failed to make "any evidentiary showing" on discriminatory purpose, (Dkt. 31 at 26). But discovery uncovered overwhelming evidence of the DOC's discriminatory purpose, as detailed below.

There Are Zero Consumer Complaints in the Record. Though Fleischhacker testified that the DOC's actions were motivated by "[c]onsumer protection," the DOC admitted in its sworn interrogatory responses that it "has not received *any* complaints directly from consumers regarding Safelite's auto glass claims administration

practices."[79] The fact that the DOC "had not received any complaints from the public regarding the deceptive nature" of Safelite's speech is powerful evidence of discriminatory purpose. *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1015 (W.D. Mo. 1998) (finding discriminatory purpose from lack of consumer complaints); s*ee also McNeilus Truck & Mfg., Inc. v. Ohio ex. rel Montgomery*, 226 F.3d 429, 443 (6th Cir. 2000) (discriminatory purpose where "consumers had not complained about any problems the regulations ostensibly cured").

The DOC's Actions Were Instigated by the Minnesota Shops. The DOC has admitted that the complaints it *did* receive came exclusively from Minnesota glass shops and trade associations—entities that compete with Safelite.[80] The DOC's "Memorandum of Violations" underlying the Consent Order described the only complainants as "Alpine" and "Rapid Glass," and called Safelite a "*direct competitor of Alpine, Rapid Glass . . . and other Minnesota glass shops.*"[81] Fleischhacker admitted in his declaration that complaints about Safelite came from "auto glass repair shops and trade associations," and that the specific complaints motivating the DOC's investigation came from Reid. (Dkt. 32 at 2-3.)

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[79] *Compare* Ex. 1 at 120:25-121:2, *and* 126:11-21 (purpose of speech restrictions is consumer protection) *with* Ex. 22 at 4 (DOC received no consumer complaints).

[80] Ex. 1 at 50:25-52:3 (complaints came from "glass repair shops," "trade associations" and "their agents," but "not consumers").

[81] Ex. 45 at DOC005317-5319.

Fleischhacker left out of his declaration, however, that the DOC's investigation began because Reid replaced the windshield of Fleischhacker's car.[82] Immediately following that work, Reid wrote to Fleischhacker "[t]hank you for the opportunity to have Alpine Glass replace your windshield, we appreciate your business"; Reid then complained that Safelite was having a "major impact" on "independent glass companies" with "some having to close their doors," and requested a meeting.[83] For his part, Fleischhacker testified that Alpine's work was "[b]eautiful,"[84] and he promptly replied, "I would be willing to meet with you . . . I have one of my investigators pulling some files to look into this matter."[85] The fact that the Minnesota Shops sought and instigated the DOC's investigation is strong evidence of discriminatory purpose. *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).

Minnesota Shops Asked for and Received a Benefit From the DOC. Not only did the Minnesota Shops launch the DOC's investigation of Safelite, those shops repeatedly told the DOC they wanted action to protect their businesses—not to protect consumers. For example, Rosar told Patton that he was waiting to commence an arbitration proceeding against AAA "to see if once you completed your investigations,

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[82] Ex. 47.

[83] *Id*.

[84] Ex. 1 at 141:20-25.

[85] Ex. 47.

that it may bring them to the table and negotiate with me or if there was anything your department might do that would make them pay."[86] Likewise, Reid told Patton that "I am hopeful that the settlement proposed to AAA has some benefit to the glass industry as we have provided a lot of information to help with the investigation."[87] Reid even told Schmaltz and Rosar that the DOC investigation "might be a good angle to get [more Minnesota shops] to contribute [funding] as it shows Commerce is coming down on insurers and Safelite *which will ultimately put money in their pockets (reduce steering, higher prices, etc).*"[88]

The Minnesota Shops received the benefits they asked for when the Consent Order was signed. Alpine and Rapid issued a press release calling the Consent Order the "culmination of the hard work and dedication from Minnesota glass shops."[89] Reid called the Consent Order "huge,"[90] and Rosar believed it was the "biggest positive news in the auto glass industry in the last 15 years."[91] Rosar explained that the Consent Order was "helpful to Rapid Glass" because it "dealt with some of the things we were having problems with . . . the balance billing, those types of issues."[92] Given these benefits,

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[86] Ex. 26.

[87] Ex. 27.

[88] Ex. 48.

[89] *See* Ex. 49.

[90] Ex. 2 at 164:11-18.

[91] Ex. 50.

[92] Ex. 3 at 223:18-25.

Rosar hoped that a local trade association could "use the Consent Order to gain membership and funding."[93]

The DOC Improperly Shared Confidential Information With the Minnesota Shops. The DOC's Audit Director testified that ongoing DOC investigations are "confidential," and so "facts relating to [investigations] should not be shared with third parties."[94] The DOC's Answer avers that it had produced "no documents" in response to Safelite's request for information underlying the DOC's investigation because such information "*would be classified as non-public data*" under Minnesota law. (Dkt. 45 ¶ 38.)

Yet DOC representatives routinely fed the Minnesota Shops confidential information concerning its investigation of Safelite, including (1) the status of the DOC's information requests to Safelite and various insurers; (2) settlement negotiations between the DOC and AAA; and (3) the DOC's efforts to pursue a cease-and-desist order against Safelite.[95]

The Minnesota Shops knew this information-sharing was wrong. Rosar instructed others to keep the information "*on the down low*";[96] Reid was more explicit, warning, "*[i]t's very important that we continue to keep this info between us as technically we are*

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93 *Id*. at 225:21-24; Ex. 50.

94 Ex. 38 at 25:12-22.

95 *See* note 29, *supra*.

96 Ex. 51.

not supposed to know."[97] The DOC recognizes its conduct was improper as well. When shown an email from Patton feeding confidential information to the Minnesota Shops, Fleischhacker acknowledged that "I would advise against this type of communication . . . no, I would not want my investigators to be talking to the . . . complainant about this."[98] These improper communications demonstrate that the DOC worked in tandem with the Minnesota Shops to harm their out-of-state competitor, Safelite, and therefore provide additional evidence of discriminatory purpose. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001) ("significant departures from normal procedures" indicate discriminatory purpose).

The DOC Sought to Ban Safelite From Minnesota. Reid reported that during an October 2013 meeting with Reid and Lloyd—at the very beginning of the DOC's investigation—Fleischhacker announced that he wanted to "*slap [Safelite] with a cease and desist order*" and "*get Safelite out of Minnesota*."[99] Just three days after Safelite served its objections to the DOC's administrative subpoenas, Patton (at Fleischhacker's direction) reacted by threatening Safelite with a "cease and desist" order that would prohibit Safelite from operating in Minnesota.[100]

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[97] Ex. 52.

[98] Ex. 1 at 206:19-207:6.

[99] *See* note 24, *supra*.

[100] *See* Ex. 4 at 72:23-73:15; *see also* Ex. 53.

Patton candidly acknowledged at his deposition that the cease-and-desist order he threatened was "too strong" and not a "proportional" response.[101] Although the DOC ultimately did not pursue a cease-and-desist order directly against Safelite, the DOC's animus toward Safelite continued. As Patton explained in an internal DOC email, rather than pursuing direct action against "the elephant in the room," the DOC decided to "[go] after companies using Safelite as a TPA one by one."[102] In the same email chain, Fleischhacker expressed "concern[] that Safelite isn't cooperating with our subpoena but is *nonetheless expanding their presence in our state.*"[103]

The DOC followed the strategy Patton described, first "[going] after" Safelite's client, AAA. In September 2014 the DOC sent AAA a proposed consent order containing the "*minimum terms* the Department is willing to accept to settle the matter."[104] Those terms included a provision forever barring AAA from doing business with Safelite in Minnesota,[105] a provision that was also included in the final Consent Order.[106] The DOC's discriminatory animus toward Safelite and the procedural irregularity of its efforts to drive Safelite from Minnesota demonstrate the discriminatory purpose behind the DOC's actions.

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[101] Ex. 4 at 74:13-15, 75:24-76:5.

[102] Ex. 36.

[103] *Id*.

[104] Ex. 54 at 2.

[105] Ex. 55 at 3.

[106] Ex. 37 at 3.

The DOC Entered a Consent Order Behind Safelite's Back. Despite the fact that the Consent Order accused Safelite of legal violations, and banned AAA from ever using Safelite as a claims processor, Safelite did not learn of the Consent Order until the DOC handed Safelite representatives a copy during a January 20, 2015 meeting—12 days after it was signed. After reviewing the Consent Order, Safelite informed the DOC that it was willing to modify its scripts to conform to all of the DOC's views. But the DOC—evidently more interested in harming Safelite than in achieving compliance with its purported regulations—ignored that offer. The procedural irregularity of penalizing Safelite's business without affording Safelite notice and an opportunity to be heard, or even a chance to conform its conduct to the DOC's interpretation of the law, provides still more evidence of discriminatory purpose.

The DOC's Charges Against Safelite Are Baseless. After Safelite filed this suit, the DOC filed an administrative action alleging that Safelite (1) is an unlicensed adjuster, (2) failed to pay Minnesota glass shops fair and reasonable rates, and (3) failed to comply with the DOC's subpoenas.[107]

The DOC previously boasted that "[Safelite] [has] no likelihood of success in defending against these clear violations of law," which the DOC claimed justified its enforcement actions. (Dkt. 31 at 10.) Yet on February 6, 2016, the ALJ presiding over the matter, Judge LaFave, recommended dismissing *every single one* of the DOC's

[107] *See* Ex. 56 at 4-5.

charges.[108] In so holding, Judge LaFave found that (1) "the record evidence belies the Department's assertion" that Safelite is an adjuster, (2) the DOC's charge concerning payment of fair and reasonable rates was "not supported by the facts," and (3) the DOC "materially misstate[d] the law" when seeking a penalty against Safelite for alleged failure to comply with subpoenas.[109] Judge LaFave's decision confirms the baselessness of the DOC's contentions and lays bare the discriminatory purpose motivating its actions. The DOC's response was just as telling. Instead of following Judge LaFave's well-reasoned decision, the DOC disregarded it, and ordered that the matter proceed to a hearing.[110]

The evidence in this case leads to a single conclusion: the intent of the DOC in imposing its speech restrictions was not to protect consumers from harm but to protect the Minnesota Shops from having to compete with Safelite. "Such an intent bespeaks of the economic protectionism that the Commerce Clause prohibits." *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596 (8th Cir. 2003).

2. The DOC's Actions Cannot Survive Strict Scrutiny.

Because the DOC's speech regulations are motivated by a discriminatory purpose, they are unconstitutional unless the DOC shows that they serve "some legitimate purpose unrelated to limiting interstate commerce" and that the DOC has no other means to advance that purpose. *Columbus*, 205 F.3d at 1063. The Supreme Court has called this

[108] Ex. 40 at 11.

[109] *Id*. at 7-9.

[110] Ex. 57.

test the "strictest scrutiny," and a "virtually *per se* rule of invalidity." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994).

The DOC cannot come close to satisfying that high standard. At bottom, the only interest the DOC has identified in support of its speech restrictions is preventing supposed consumer deception. But as set forth above in Sections I.A.3. and I.B.1., the DOC has failed to provide any evidence that any consumer deception exists, let alone that the DOC's speech restrictions will remedy that deception. *See Whitehead*, 19 F. Supp. 2d at 1016 (striking down ordinance under the dormant Commerce Clause where "the Defendants have failed to produce any evidence that there currently is any dishonesty in labeling or that this statute remedies the dishonesty"). Nor can the DOC show, as it must, that it has "no other method by which to advance" its asserted interest. *Hazeltine*, 340 F.3d at 596. Numerous nondiscriminatory alternatives would—or already do—advance the DOC's asserted interest, such as those identified above in Sections I.A.4. and I.B.1. *See Whitehead*, 19 F. Supp. 2d at 1016 (striking down ordinance where "there are currently nondiscriminatory alternatives available" to ensure "beer producers do not engage in unfair or misleading market practices."); *South Dakota*, 871 F. Supp. at 359 (speech restrictions violated dormant Commerce Clause where another statute "already requires that insurers maintain policyholder choice of automobile repair services.").

III. SAFELITE IS ENTITLED TO A PERMANENT INJUNCTION.

A permanent injunction depends on four factors: (1) success on the merits; (2) threat of irreparable harm; (3) balance of the harms; and (4) the public interest. *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999). The DOC has violated both the

First Amendment and the Commerce Clause, and therefore Safelite succeeds on the merits. Absent a permanent injunction, Safelite will suffer irreparable harm to its constitutional rights; it is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). By contrast, the DOC will suffer no hardship; "[t]here is no cognizable harm to [a party] from being enjoined from doing something that is against the law." *Doctor's Assocs., Inc. v. Subway.SY LLC*, 733 F. Supp. 2d 1083, 1087 (D. Minn. 2010). Finally, granting the injunction will serve the public interest because "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds*, *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012).

CONCLUSION

The Court should grant Safelite's motion for summary judgment, enjoin and declare invalid the DOC's restriction on balance billing speech and the compelled speech provision of Minnesota Statute § 72A.201, subdivision 6(14), and award Safelite its reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

DATED: June 24, 2016

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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) **WORD COUNT COMPLIANCE CERTIFICATE**

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