UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

DIAMOND TRIUMPH AUTO GLASS, INC.,

Plaintiff,

vs.

SAFELITE GROUP, INC., f/k/a SAFELITE GLASS CORPORATION, SAFELITE SOLUTIONS, L.L.C., f/k/a SAFELITE GLASS CORPORATION and SAFELITE FULFILLMENT, INC., f/k/a SAFELITE GLASS CORPORATION,

Defendant.

File No.: 3:CV-02-0514
(James M. Munley, U.S.D.J.)

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

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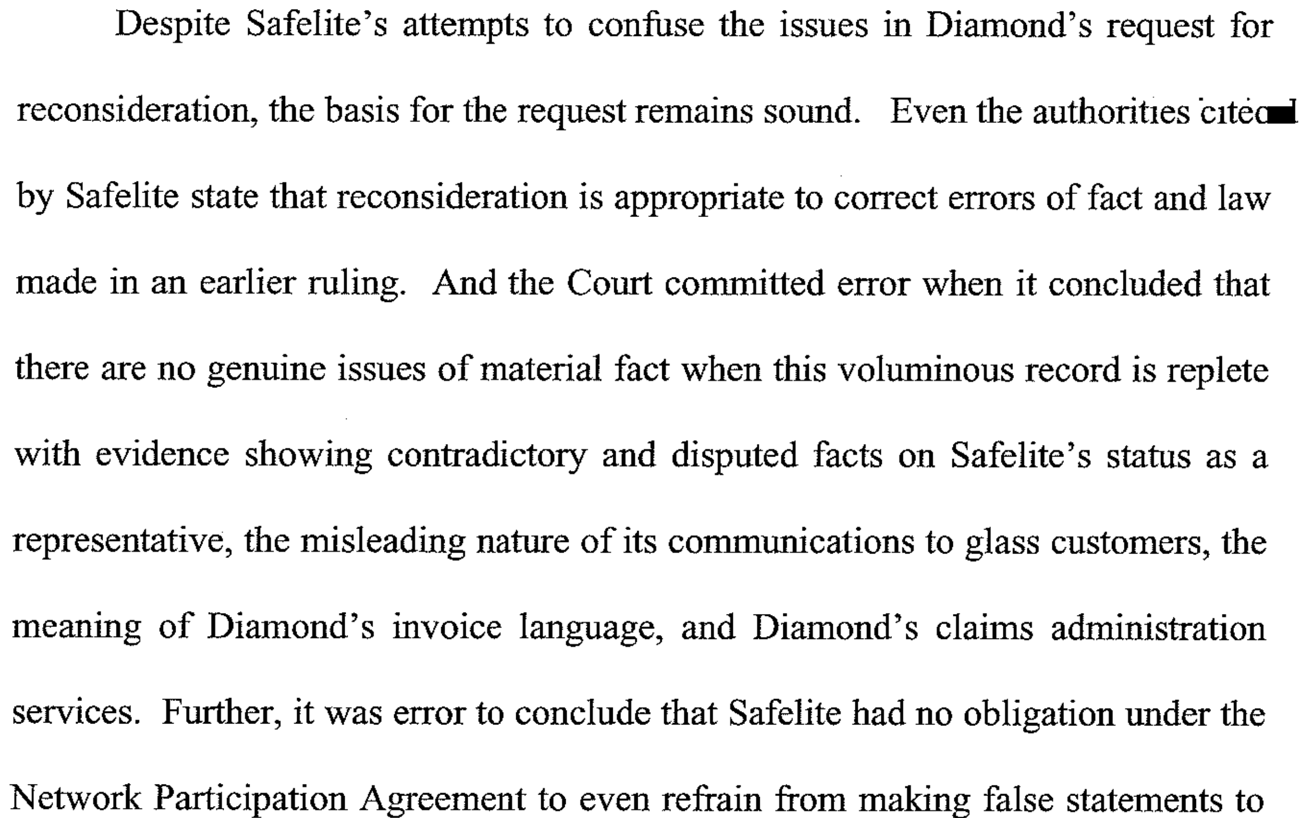
Despite Safelite's attempts to confuse the issues in Diamond's request for reconsideration, the basis for the request remains sound. Even the authorities cited by Safelite state that reconsideration is appropriate to correct errors of fact and law made in an earlier ruling. And the Court committed error when it concluded that there are no genuine issues of material fact when this voluminous record is replete with evidence showing contradictory and disputed facts on Safelite's status as a representative, the misleading nature of its communications to glass customers, the meaning of Diamond's invoice language, and Diamond's claims administration services. Further, it was error to conclude that Safelite had no obligation under the Network Participation Agreement to even refrain from making false statements to

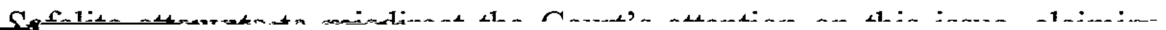


were sufficiently widespread to constitute advertising. Although the Court concluded as a matter of law that Safelite's descriptions of its representative status

to correct "clear errors of fact or law." *See* Safelite's Memorandum of Law in Opposition to Diamond's Motion for Reconsideration, p. 1. That is precisely what Diamond is asking the Court to do. The Court erred when it found no disputed factual issues on Safelite's misleading statements to consumers regarding Diamond's pricing policies and Diamond's claims administrations procedures. Further, the Court erred as a matter of law in its interpretation of the Network Participation Agreement and its application of the law of defamation and tortious interference. It is the necessary correction of these errors that compels Diamond's motion and presents appropriate issues for reconsideration that are well within the Court's discretion to consider and correct.

B. <u>Lanham Act</u>

1. **<u>Safelite's Representative Status</u>**



fact, shows this to be the case.

The evidence presented on summary judgment shows that Safelite had the ability and the will to change its glass-call scripting, without necessarily seeking

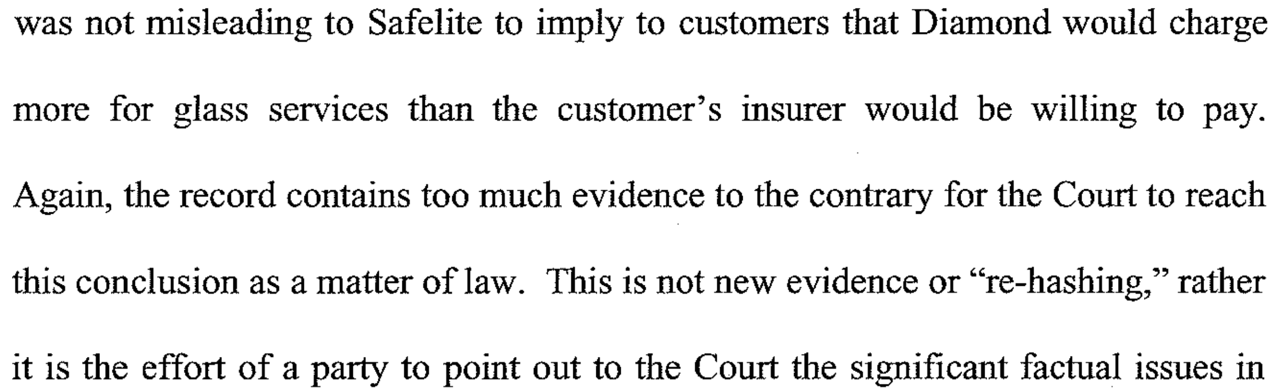
simply too much evidence to the contrary in the record to reach that conclusion as a matter of law.

As noted in Diamond's opening brief, the contracts between Safelite and the insurance companies provide the most convincing evidence on this point. Each of the contracts cited specifically disclaim any representative relationship between Safelite and the insurance company. Further, none of those contracts indicate that Safelite was ever authorized to hold itself out as the insurance company to customers. Even if the insurance company is authorized to make similar statements to the Features & Benefits "Warnings" to customers themselves, similar statements from a major competitor masquerading as that insurance company are exactly the type of misleading statement or false endorsements that the Lanham Act and other consumer protection laws are designed to prevent. *See Seale v. Gramercy Pictures*, 949 F. Supp. 331, 339 (D. Pa. 1996)(allowing a false endorsement claim under the Lanham Act, noting that it "is an appropriate vehicle

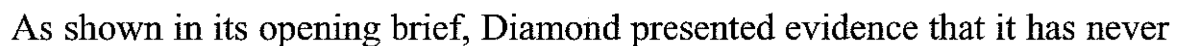
issue of fact here that, in fairness and as a matter of law, needs to be decided at trial.

At the same time that the Court rejected Diamond's Lanham Act claim by concluding as a matter of law that Safelite's statements were true, the Court allowed Safelite's Lanham Act claim to proceed without ever examining the truth or falsity of Diamond's letters to the insurance companies. These letters

was not misleading to Safelite to imply to customers that Diamond would charge more for glass services than the customer's insurer would be willing to pay. Again, the record contains too much evidence to the contrary for the Court to reach this conclusion as a matter of law. This is not new evidence or "re-hashing," rather it is the effort of a party to point out to the Court the significant factual issues in



As shown in its opening brief, Diamond presented evidence that it has never



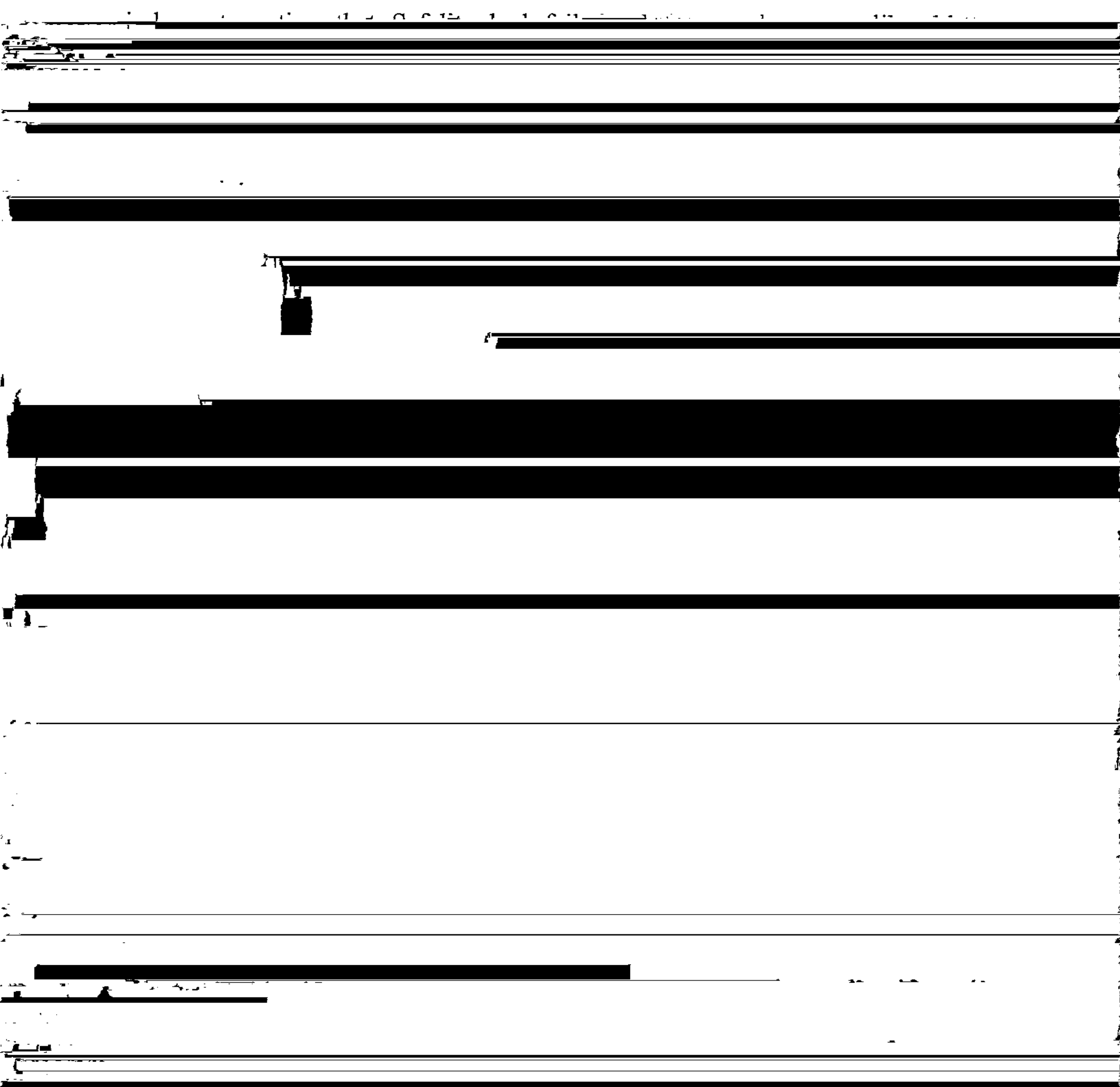
light of the entire record there are simply too many factual disputes here to allow judgment as a matter of law.

3. Safelite's Misleading Statements

Diamond's arguments from its opening brief remain largely unrefuted on this issue, other than Safelite's non sequiter about an attempt to "resurrect" Prof. Kahn's testimony (the Court did not exclude or restrict her report or testimony in

any way). Further, Safelite ignores Diamond's fundamental argument that it is the combination of evidence that establishes Diamond's claim here, not any individual item. When one takes Dr. Kahn's testimony on what the established scholarship in the field of consumer behavior tells us about how customers react as a group to statements like Safelite's and combines that testimony with the direct evidence that Safelite's statements caused actual significant confusion among Diamond's consumers (many canceling their appointments with Diamond), the picture of Diamond's claim begins to take focus. That focus is further sharpened when one considers the evidence of Diamond employees reporting on the level of confusion

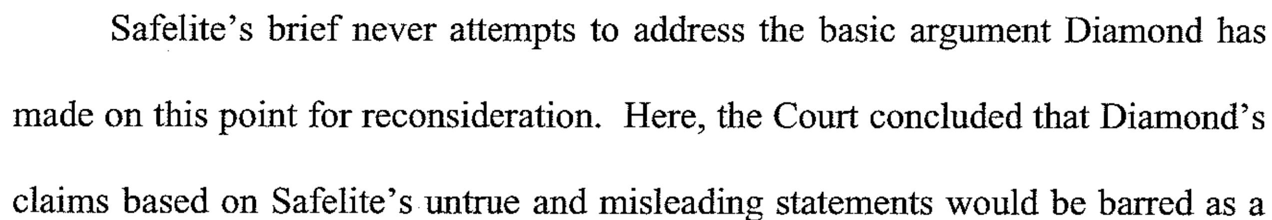
The Court's ruling here dismissing Diamond's claim highlights the disparity in level of evidence that Court seems to require of Diamond to present to sustain its claims in this matter. The Court rejected Diamond's argument in its summary



whatsoever. Diamond was also able to present far more evidence that it was actually harmed by Safelite's conduct. Its expert, Joseph Kenyon, examined Diamond's business in Safelite administered accounts and non-Safelite administered accounts and concluded that there was a significant disparity between

4. Unclean Hands

Safelite's brief never attempts to address the basic argument Diamond has made on this point for reconsideration. Here, the Court concluded that Diamond's claims based on Safelite's untrue and misleading statements would be barred as a



conduct in its limited third-party claims administration service as did Safelite.

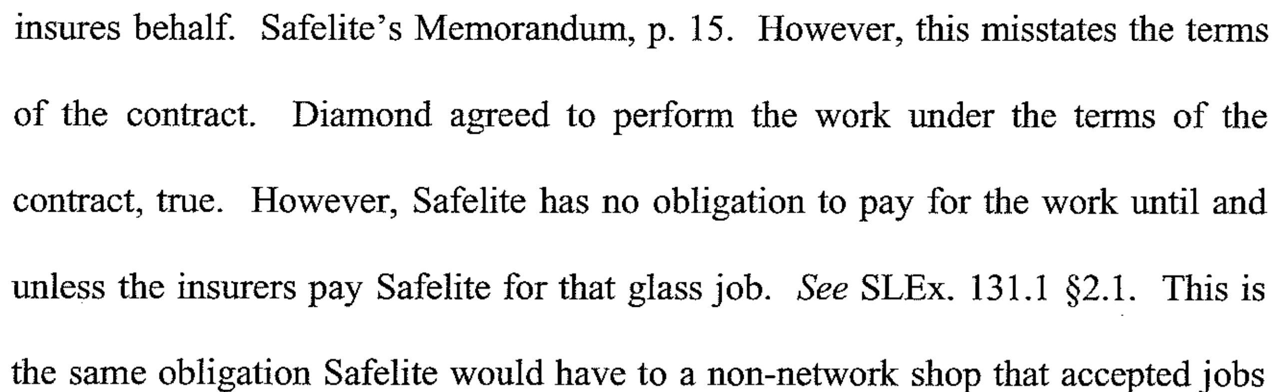
that statement more weight or view it less critically. Kahn Report, pp.6-7, Plaintiff's Ex. 127.

Even if the recorded greetings were found by a fact-finder to have been used by Diamond (and there is at least a dispute on this), absent any evidence of false or misleading statements about any aspect of Safelite's glass business, there is no basis for any finding that Diamond's conduct bars its claims under the unclean hands doctrine, let alone such a conclusion as a matter of law. This conclusion by the Court can only be described as manifest error and warrants reconsideration.

C. Breach of Contract

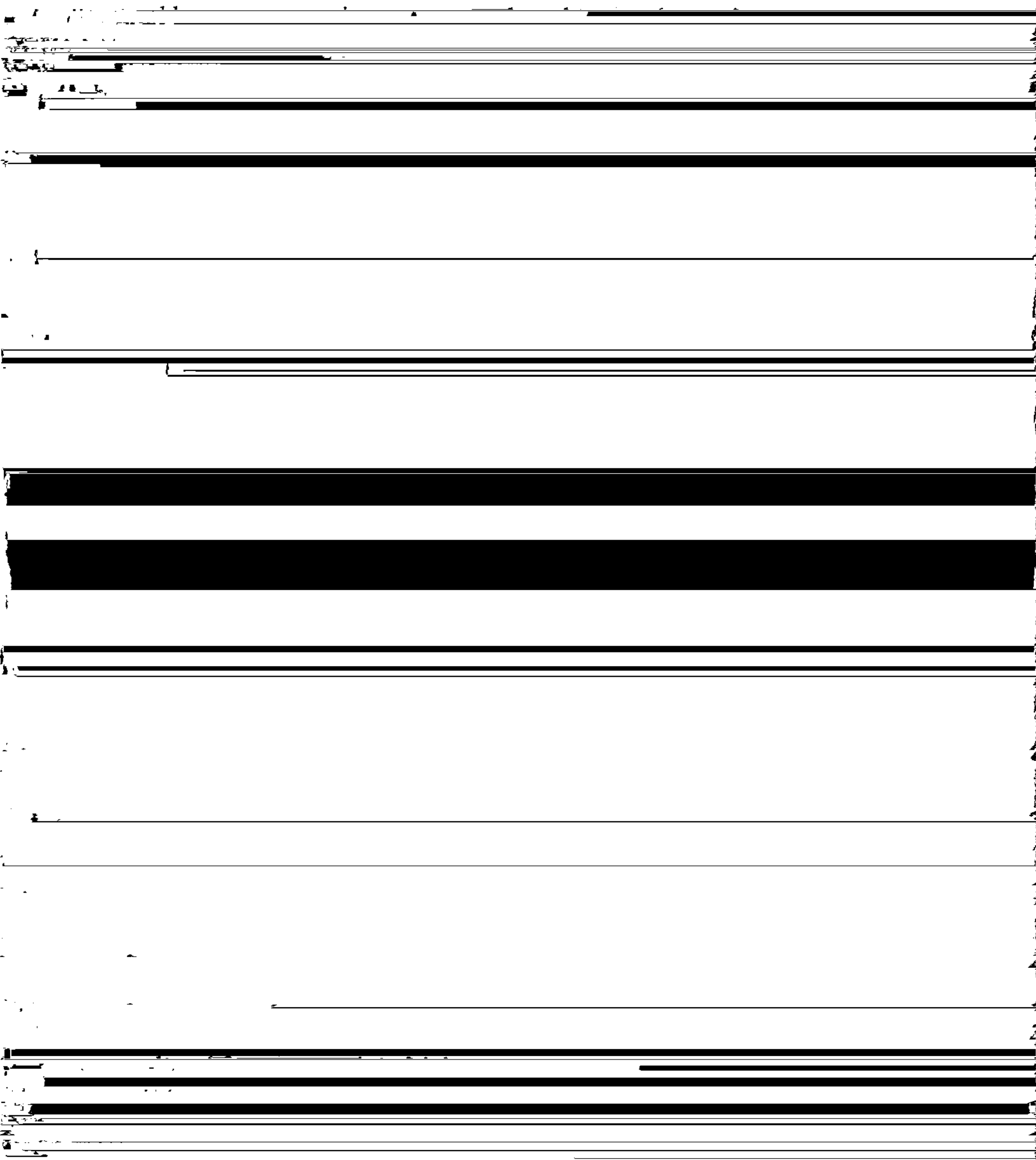
Safelite again tries to cast this argument as "new" and waived because it was

insures behalf. Safelite's Memorandum, p. 15. However, this misstates the terms of the contract. Diamond agreed to perform the work under the terms of the contract, true. However, Safelite has no obligation to pay for the work until and unless the insurers pay Safelite for that glass job. *See* SLEx. 131.1 §2.1. This is the same obligation Safelite would have to a non-network shop that accepted jobs

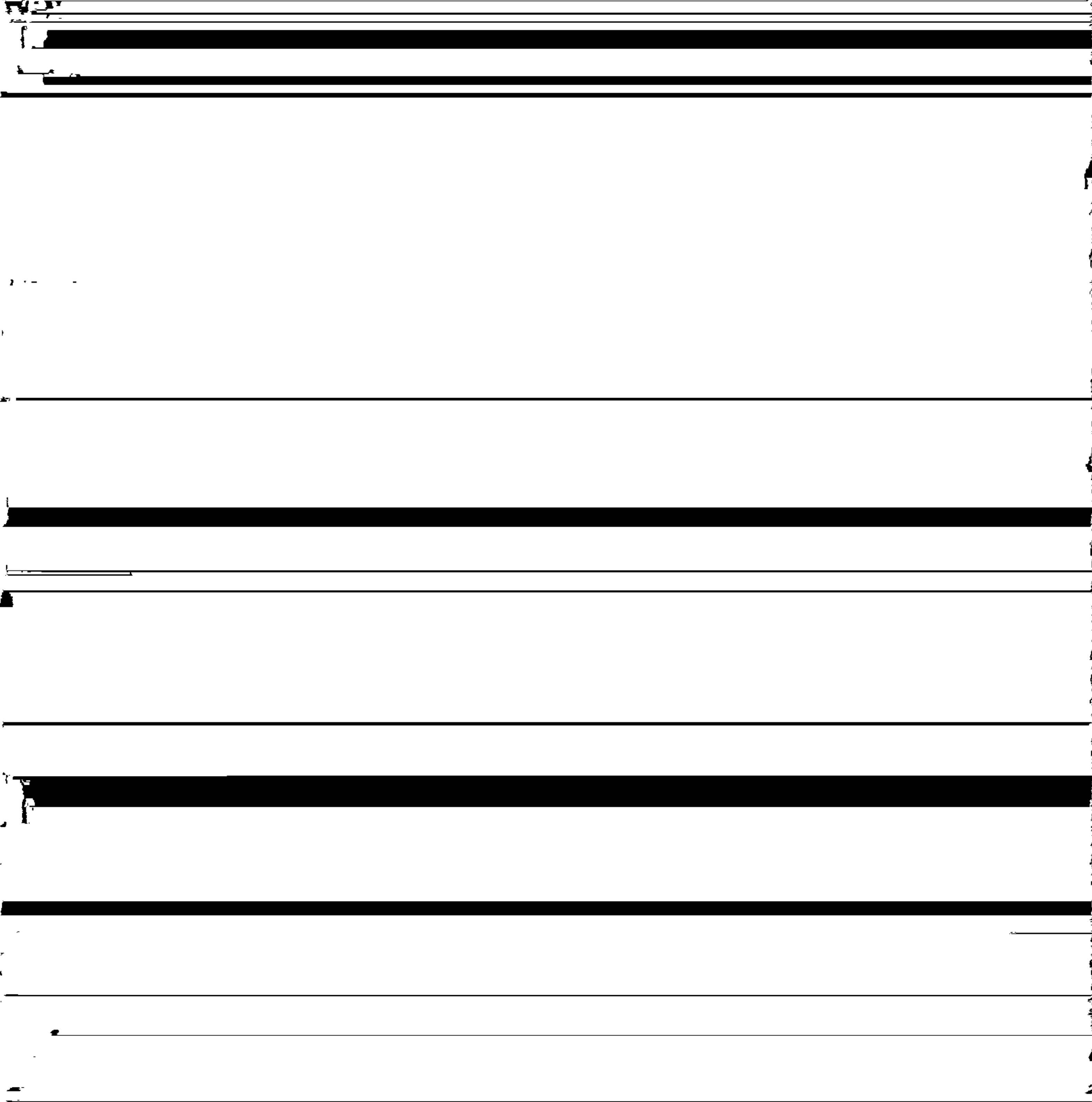


(SAFE31G000012 (Erie Service Agreement))(SAFE27B000106 (Liberty Mutual Service Agreement))(stating that Safelite agrees to pay third-party (non-network)

contract is manifest error under Ohio law and defies even common sense. Why



those services. To hold that preference completely unprotectable until an actual appointment is made, is contrary to cases cited by both parties[3] and renders the



"reasonable possibility" of a business relationship than the attenuated possibility the Court allowed for Safelite's tortious interference claims. The Court's error here is clear and warrants reconsideration.

F. Certification Under Rule 54(b)

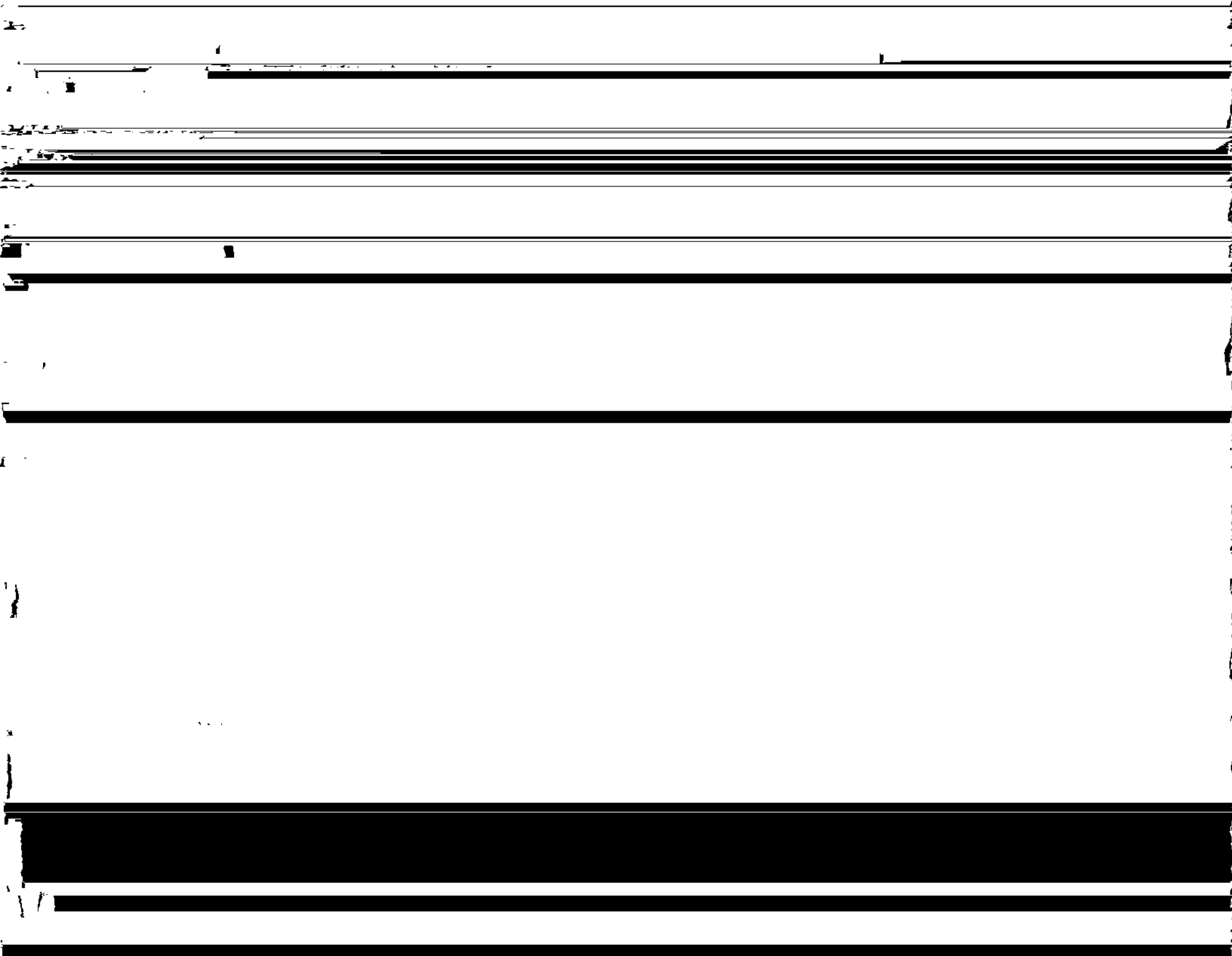
standard for certification of issues for appeal under Fed. R. Civ . P. 54(b). Rather

from," "closely related to," or "sufficiently independent of" those in

Vreeland, 357 F.2d 801, 805 (3d Cir. 1966), we noted the "difficulty of providing simple criteria to resolve this onerous problem." In that case we held that preclusion of recovery on one item of damages

Further, the possibility that the parties will be able to resolve this matter through settlement discussions is seriously hampered by the uncertainty created by this Court's ruling and by the lengthy and costly appellate process Diamond must now pursue to vindicate and clarify its rights and remedies in this case.

This case has dragged on for over four years. It has cost the parties millions of dollars in legal fees and expenses and created uncertainty and mistrust in the industry.



certify these same issues under Fed. R. Civ. P. 54(b) for immediate appeal, and

Respectfully submitted,

LIVGARD & RABUSE, P.L.L.P.

Dated: November 17, 2006

By: /s/ Michael A. Hellwich
Charles J. Lloyd, MN174257
Michael A. Hellwich, MN292850
2520 University Ave. SE, Suite 202
Minneapolis, MN 55414
Telephone: (612) 825-7777