UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD CAMPFIELD, *et al.*

Plaintiffs

v.

SAFELITE GROUP, INC., *et al.*

Defendants

Case No. 2:15-cv-2733

Judge Michael H. Watson
Magistrate Judge Chelsey M. Vascura

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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I. INTRODUCTION

The Amended Complaint ("AC") does not try "to circumvent the Court's [earlier] holding" denying in part Defendants' (hereinafter "Safelite") motion to dismiss Plaintiffs' initial complaint. Mem. in Supp. of Defs.' Mot. to Dismiss ("Def. Mem.") at 9, Dkt. No. 63. In its Opinion and Order dated September 30, 2016 ("Opinion") at 11, 13-14, Dkt. No. 36, the Court held that Plaintiffs adequately pled a Lanham Act violation based on Safelite's video statements *on its website* regarding six inches being the cutoff length for the safe repair of windshield cracks. The AC simply identifies the multiple other forms of commercial advertising or promotion in which Safelite makes the *same* affirmative misrepresentations of fact that the Court previously held were actionable.

Discovery has revealed the full extent of Safelite's well-orchestrated marketing campaign, which is centered on these same affirmative misrepresentations about crack repair products and services, but strategically and widely deployed across multiple media platforms to purposefully influence the relevant purchasing public to buy more costly windshield replacements. These platforms include the internet; uniform point-of-sale oral communications with consumers; paper brochures; "bulletins" and "educational" materials Safelite prepares for insurance companies and tens of thousands of their agents to relay that same false information to millions of insured automobile owners; press releases; and TV/radio. Safelite's marketing campaign is exactly the type of "organized campaign to penetrate the relevant market" that the Court held was pled in the initial complaint with respect to the videos on its website. *Id*. at 13-14.

Safelite's highly-profitable windshield replacement business hinges on perpetuating the false notion that only windshield cracks up to six inches (about the size of a dollar bill) can be safely repaired and, that if a crack is longer, the windshield must be replaced. Safelite does not use its market dominance to indoctrinate the marketplace simply with a Safelite *"policy"* for windshield repair. Rather, Safelite's advertising and marketing materials promote the false belief that six inches is the maximum safe repairable crack length for windshields, *period*.

Safelite's misrepresentations profit the company and damage Plaintiffs, whose business is repairing "long cracks," windshield cracks longer than six inches. Safelite knows its statements

are false. In June 2007, the American National Standards Institute ("ANSI") approved windshield industry repair standards, the "Repair of Laminated Automotive Glass Standards" ("ROLAGS") which Safelite voted in favor of. The ROLAGS expressly state that windshield cracks up 14 inches can safely be repaired. More important, Safelite's documents show that, not only is it safer and cheaper to repair a crack than to replace a windshield, it should be performed *whenever possible*.

In its motion to dismiss, Safelite misstates the law, misrepresents the Opinion, ignores the allegations in the AC, and repackages arguments that the Court previously rejected. For example, the Court *never* made a blanket finding that *all* "statements to policyholders are not advertising." Def. Mem. 9. Nor does the AC does contain a *single* allegation "that Safelite is liable for failing to disclose long-crack repair." *Id*. at 13-14. Safelite's argument that the misrepresentations Safelite disseminates to and through insurance carriers, i.e. "'contributory false advertising'", are not actionable under the Lanham Act (Def. Mem. at 12) contradicts the Court's conclusion in *Rocky Brands, Inc. v. Red Wing Shoe Co.*, No. 2:06-cv-00275, 2010 U.S. Dist. LEXIS 145726, at *11 (S.D. Ohio Jan. 15, 2010) (Watson, J.), and the majority of federal courts addressing this issue.

Safelite's arguments about its self-described "Type I statements" (e.g. "if a windshield crack is longer than six inches, a replacement is necessary.") and Type II statements (e.g. "if the crack is less than 6 inches, it can be repaired.") are not accurate. Type I statements and Type II statements do not always stand alone in Safelite's marketing materials; nor do the Type I statements appear only on Safelite's website; nor are Type II statements "unequivocally *true* statements," even when they appear by themselves because they unambiguously convey that cracks longer than six inches *cannot* be repaired. As such, at the very least, they are misleading under the Lanham Act. Safelite's arguments that its statements are merely true statements of a Safelite policy, as opposed to misstatements of an objective fact, are either wrong as a matter of law or questions of fact. They cannot be resolved in Safelite's favor on a motion to dismiss.

Safelite's last-ditch argument, that Plaintiffs' claims are barred by laches, is yet another rehashed argument. Nothing has changed to make this failed argument any more compelling than it was the first time around. In short, Safelite's motion to dismiss should be denied.

II. BACKGROUND[1]

The AC details Safelite's organized campaign to enrich itself at the expense of its customers' wallets and safety. Advertisement after advertisement, irrespective Safelite's chosen mechanism for delivery (whether traditional or not), is built on a falsehood presented as an *objective generic fact*, as opposed to simply a Safelite-specific policy: namely, that windshields cannot be repaired and must be replaced if a crack exceeds six inches. ¶ 4.

A. Safelite Admits Internally That Windshield Cracks Longer Than 6" Do Not Require A Replacement And That Repair Is The Safer Option

Safelite itself is one of the reasons the windshield repair community recognized in 2007, after two years of debate, that cracks up to 14 inches can be safely repaired as the industry standard. ¶¶ 57-60. Safelite's National Repair Development Manager, David Erwin, and Paul Syfko, an executive whose company was owned by Safelite's parent, Belron, sat on the ROLAGS Standards Development Committee and voted to approve that standard. ¶ 58.

The ROLAGS 14-inch repair standard tracked the maximum 350mm (or, 13.78 inch) repair standard adhered to by Australia and New Zealand. ¶ 59. As Safelite also admitted internally, the Standards Committee was not presented with a shred of scientific evidence that there was any maximum length beyond which crack repair would be infeasible or unsafe. ¶ 78. The ROLAGS were approved by ANSI on June 20, 2007, and reaffirmed on February 11, 2014. ¶¶ 60, 63.

Safelite also recognizes that the windshield is "[o]ne of the most important structural reinforcement components of a vehicle in the event of a crash or rollover." ¶¶ 65-68. Consistent with that admission, Safelite knows what most consumers do not about the importance of doing repair when possible (and what Safelite does not want its misled replacement customers to know): namely, that a car's original factory installed windshield is optimal from a safety point of view and can never be replicated (but is always destroyed by the replacement process).¶ 68. A Safelite PowerPoint presentation describes repairs—not just repairs of cracks less than six inches, but

[1] Unless otherwise stated, all "¶" references are to the Amended Complaint.

repairs generally—as "safe and effective." ¶ 65. In that same presentation, Safelite acknowledges that repairs are also far less expensive than replacements. *Id.*

B. Safelite Uses Its Dominance To Mislead The Market To Believe That 6" Is The Maximum Crack Length For Safe Repair Of Windshields

Safelite is by far the country's largest provider of vehicle glass repair and replacement (VGRR) services, managing [redacted] contracts with 23 of the "Top 30 Insurance Companies in the U.S.," and a network of 10,000 independent glass providers. ¶ 70. Safelite has three kinds of customers: insurance companies who employ Safelite to act as the third party administrator for auto glass breakage; commercial customers that operate fleets of cars; and individual consumers. ¶ 69. To preserve its more profitable windshield replacement business, Safelite uses its enormous power to its financial advantage to misrepresent to consumers and insurance companies customers (who then pass on Safelite's falsehoods to their insureds) what size cracks can and cannot be repaired. ¶¶ 13-14, 24-26, 71-72.

A December 2012 email discussing the "long term preservation of our replacement business," discussed at ¶ 72, demonstrates Safelite's awareness of this power, stating:

- "Over the last 15 years, Safelite has helped the insurance industry define what can be repaired vs. not repaired."
- Safelite had the market power "to move the [repair] standard in the insurance industry."

Safelite set the standard for the entire "insurance industry" and the marketplace in general. But not honestly. For example, when insurance companies asked about the 14-inch ROLAGS standard, [redacted] That contradicts Safelite's internal conclusions and its votes approving the ROLAGS. ¶¶ 58-59, 76, 78. Safelite's reason for disseminating falsehoods was its bottom line: moving to a 14-inch standard would lead Safelite to perform many more repairs and many fewer, more profitable, replacements costing Safelite hundreds of millions of dollars. ¶¶ 12-15, 79.

C. Safelite Engages In A Coordinated Campaign To Falsely Advertise The Maximum Repairable Crack Length

Safelite's business model is based on its "dollar bill rule," the false communication that (a) windshields can only be repaired if a crack in it is less than six inches; and (b) windshields must be replaced if the crack in it is longer than six inches. ¶ 80. Safelite communicates the dollar bill rule in virtually all formats, including point-of-sale oral communications, on the internet, in videos and brochures, and through so-called "educational" materials for insurance companies. Safelite intentionally communicates the dollar bill rule as a statement of objective generic fact, not simply a matter of Safelite policy. *See, e.g.*, ¶¶ 81-83.

Safelite's strategy is illustrated in multiple presentations like: Safelite's "Messaging Triangle," developed as "[m]edia [t]raining" for Safelite's senior executives who are armed with such "supporting facts" as: "When a chip is smaller than a dollar bill, it can usually be repaired without replacing the windshield"; the "Repair Selling Points/Repair Qualification" slide emphasizing the dollar bill rule as a "consistent" message to insurance "agents and their staff" for transmission to insured auto owners and for dissemination to customers through Satellite's "Call centers" and "Repairing Associates"; and a presentation, "How Marketing Supports our Glass Programs." ¶¶ 18-19, 23-24, 82-83. To further mislead the market into believing that the dollar bill rule is an objective cutoff for safe repair, Safelite characterizes it as "educational" in connection with the promotion of its VGRR services and in courses for insurance agents. ¶¶ 19-22, 106-16.[2]

There is nothing confusing (Def. Mem. at 6) about reconciling Plaintiffs' claims with Safelite's promotion of windshield repair for cracks smaller than six inches. As explained in the AC, Safelite cannot do away with repairs, because of its long standing contracts with insurance carriers. ¶¶12-15. Moreover, Safelite recognizes that offering repairs for cracks below six inches creates "replacement opportunities," *i.e.* opportunities for it to sell replacements when cracks exceed that length. ¶ 24.

[2] Safelite's organized campaign to spread its dollar bill message as a blanket rule also extends to news releases, guest columns, and radio interviews. ¶¶ 117-21.

D. The Goal of Safelite's Marketing Campaign, Including Its Advertising To And Through Insurers, Is To Promote Safelite's Business

As noted above, Safelite's coordinated false advertising campaign "[s]tarts with the [insurance] agents and their staff." ¶ 23. Safelite "conscript[s] agents to parrot to potential individual consumers of its VGRR services Safelite's own false messaging about the 'six inch' or 'dollar bill' rule." ¶¶ 18, 22. The goal is not to "educate" insurers but to "mislead individual consumers of VGRR services to believe that a windshield crack of six inches is a *universal cutoff* for safe windshield repairs." ¶ 17; *see also* ¶¶ 19-21, 106, 115 (Continuing Education Course sponsored by Safelite "purports" to educate). The ultimate goal is to get consumers to rely on the false notion that six inches is a cutoff for safe repair and engage Safelite to replace windshields that, in fact, should be repaired. ¶¶ 25-26.

E. Advertisements Included In Safelite's Organized Campaign To Falsely Represent The Maximum Repairable Crack Length

The AC describes the extent to which Safelite coordinates its use of false marketing and promotional materials to present the false dollar bill rule as an objective fact through a multitude of media formats.

1. Safelite communicates the false dollar bill rule in videos

Safelite posts videos on its website and on YouTube to market its services and products. ¶¶ 85-96. Safelite's website has included videos with the following false statements pled at ¶¶ 86-87, 92 which the Court has already ruled actionable, Opinion at 11-14:

- "Your windshield helps keep you safe. If the damage is larger than 6", it cannot be repaired. You need a replacement."
- "It sounds like we need to replace your windshield. This is because if the damage is too big . . . the structural integrity of the glass is damaged beyond repair."
- "If the damages spreads beyond the size of a dollar bill a replacement will be necessary."

Safelite has similar text on its website. ¶¶ 85-86 & 93. What appears to be the same video, with the same false language in the last bullet point, appears on Safelite's YouTube channel. ¶ 96.

Further, videos designed for Safelite by the company Fathom, include, similar false statements identified at ¶ 91 such as:

- "If the chip or crack is larger than six inches (or bigger than the size of a dollar bill) it cannot be repaired[] so you'll need a full windshield replacement."

- "You're probably wondering [if you get a windshield chip or crack], do I repair it or replace it with a whole new windshield? Is repair even an option? ... If the damage is small enough it can be repaired without removing the windshield. Repairable damage typically fits under a dollar bill."

2. Safelite communicates the false dollar bill rule through "consistent" uniform oral point-of-sale communications to end-users

Safelite has 6,000 repair technicians and 2,000 customer service representatives ("CSRs") who staff Safelite call centers. ¶ 98. Safelite trains these individuals to tell customers that a windshield is only repairable if a crack is less than six inches, and that a windshield must be replaced if the crack is longer than six inches. ¶ 23 (presentation stating "[m]essage must be consistent"); ¶¶ 24, 97-100. Safelite's training instructs CSRs that the "way to determine if the windshield is repairable is to ask if the damage can be covered by the size of a dollar bill." ¶ 99.

Safelite did not take any chances. As shown at ¶ 24, Safelite also uniformly instructs all of its employees who come in contact with consumers to falsely tell consumers that it is not safe to repair a windshield with a crack longer than six inches as shown the following presentation:

- Technicians/Repair Specialists, SR's [service representatives], Services Managers and Retention Specialists recognize these instances [where cracks are longer than six inches] as replacement opportunities, as a replacement [is] the only option for insuring the structural integrity of the windshield within the vehicle's overall safety features. (Emphasis in original.)

This statement is, in substance, exactly what the Court found actionable.

3. Safelite communicates the false dollar bill rule in brochures

Safelite also uses distributes hundreds of thousands of brochures every year to individuals, insurance agents, commercial fleet accounts, and third parties like the 50 million member

American Automobile Association ("AAA") presenting the false dollar bill rule as an objective fact. ¶¶ 101, 103-04. As discussed at ¶ 103, the brochure, entitled "Improving Your view: How to Perform a Proper Repair," states:

- "What is repairable? Did you know that most windshield chips or cracks up to the size of a dollar bill (6 inches) can be repaired? Most certified repair specialists can repair chips, nicks, or cracks up to 6 inches long."

Similarly, a brochure shown at ¶ 102 that Safelite sent to consumers and commercial clients like Penske Corp.—a company that maintains a fleet of tens of thousands of vehicles—states:

- "Windshield damaged? It may be repairable. Use this guide to help decide."

- "Damage to a windshield doesn't always mean the windshield needs to be replaced. . . . many windshield chips and cracks up to the length of a dollar bill can be successfully repaired."

4. Safelite communicates the false dollar bill rule to end-users through insurer "bulletins", "training," and so-called "educational" materials

Safelite's campaign continues into the realm of insurer "bulletins", "training materials," and "education." For example, Safelite created tens of thousands of bulletins for the Farm Bureau Insurance of Idaho ("IDFB"), shown at ¶ 107, which does not mention Safelite, stating:

- "Did you know some windshields can be repaired? That's right. If your windshield has a chip or crack that's smaller than a dollar bill (six inches), we can probably repair it instead of completely replacing it."

Safelite also sends tens of thousands of other bulletins to insurance agents. ¶ 108. These materials are drafted by Safelite but presented as if they were written by a particular insurance company. *Id.* By ghostwriting the materials, Safelite further made it seem like other market participants were espousing the dollar bill rule as an objective fact. *Id.* ¶ 108. For example, bulletins prepared by Safelite for Erie and Progressive state:

- "[S]mall cracks (up to the size of a dollar bill) can be repaired rather than replaced when quick action is taken before the damage spreads."

- "[D]amage to the windshield doesn't always mean the windshield needs to be replaced. If addressed quickly, many windshield chips and even small cracks up to the length of a dollar bill can be successfully repaired."

¶¶ 110, 111. The latter statement was included in a bulletin that Safelite's Area Sales Managers ("ASMs") used as a "script" in visits with more than 5,300 Progressive Insurance Agents, and which Safelite itself used during a national conference call to instruct its sales personnel on how to present the material to Progressive agents in a uniform fashion. ¶ 112.

As described at ¶ 114, Safelite also promotes its business under the guise of objective continuing education courses which it provides for insurance agents when communicating with their automobile insureds, such as "Windshield Repair: Continuing Education Course For Property and Casualty Insurance Agents and Staff," in which Safelite states without qualification: "Cracks 6" or less can be repaired." By characterizing the content of these materials as "education," as opposed to marketing, Safelite thereby reinforces the false notion that it is relaying purportedly objective facts. Another presentation, called, "Agent Continuing Education Course: Controlling Vehicle Glass Losses," also purports to educate insurance agents about repair and replacement when communicating with their automobile insureds, and repeats the false dollar bill rule. ¶ 115. It also embeds Safelite's false and misleading videos regarding repair and replacement. *Id*.

III. LEGAL STANDARD

Under Fed. R. Civ. P. 8(a)(2), a pleading is sufficient if it provides a "short and plain statement of the claim showing that the pleader is entitled to relief." The allegations in the complaint must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a motion to dismiss, the court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 456-57 (6th Cir. 2011) (internal quotations and citations omitted).

IV. ARGUMENT

The Lanham Act targets a "'false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or

geographic origin of his or her or another person's goods, services, or commercial activities . . . .'" Opinion at 8 (quoting 15 U.S.C. § 1125(a)(1)(8)). "Commercial advertising or promotion" means "(1) commercial speech; (2) for the purpose of influencing customers to buy the defendant's goods or services; (3) that is disseminated either widely enough to the relevant purchasing public to constitute advertising or promotion within that industry or to a substantial portion of the plaintiff's or defendant's existing customer or client base." *Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 801 (6th Cir. 2015) ("Grubbs"); Opinion at 12.

To state a claim under the Lanham Act, plaintiffs must allege:

> 1) the defendant has made false or misleading statements of fact concerning his own product or another's; 2) the statement actually deceives or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions: 4) the advertisements were introduced into interstate commerce; 5) there is some causal link between the challenged statements and harm to the plaintiff.

Opinion at 8 (citations omitted) (known in this circuit as the "*Podiatric Physicians*" test).

This time, Safelite does not argue that Plaintiffs failed to satisfactorily plead facts supporting the second, third, fourth, and fifth prongs of the "*Podiatric Physicians*" test. Safelite argues only that its oral representations are not advertising under *Grubbs*, that its statements to and through third party insurance companies and their agents are not advertising under *Grubbs*, and that its statements about crack repair are not false under the "*Podiatric Physicians*" test. None of these argument squares with the AC. At most, Safelite raises questions of fact which cannot be resolved on a motion to dismiss. This is also true regarding Defendants' asserted laches defense.

A. Plaintiffs Adequately Plead Advertising

1. Safelite's uniform oral point-of-sale communications constitute actionable commercial advertising or promotion

Contrary to Safelite's false dichotomy, Plaintiffs' claims relating to oral communications do *not* fit into the rubric of "Safelite's Statements As A Claims Administrator." Def. Mem. 8. Rather, Plaintiffs' allegation relating to oral communication is that Safelite's front-line sales force—including CSRs and technicians—make the same uniform affirmative false and/or

misleading statements to Safelite's individual customers: that the size of a dollar bill or six inches is the cut-off for safe windshield repair – all in order for Safelite to sell a replacement windshield. ¶¶ 23-25, 40-41, 84, 97-100. The existence and content of *actionable* uniform oral communications conveyed by sales representatives to customers are plausibly shown from training documents. *See, e.g.*, *ADT LLC v. Vision Sec*., LLC, 2014 U.S. Dist. LEXIS 104116, at *11 (S.D. Fla. July 30, 2014) ("ADT") ("When advertisements are made orally by sales agents, courts may consider a defendant's sales training materials to determine the contents of the statements that were made.") (citations omitted); *see also Abbott Labs. v. Mead Johnson & Co.*, 1991 U.S. Dist. LEXIS 21010, at *13-14 (S.D. Ind. 1991), *rev'd on other grounds*, 971 F.2d 6 (7th Cir. 1992) ("What the defendant tells its sales force is significant because, as defendant admits, the sales force can be expected to repeat the same messages[.]").

The AC identifies multiple documents showing that Safelite trains its CSRs and technicians (as well as others) to orally convey to customers "that only windshield cracks 'up to six inches' or the size of a 'dollar bill' can be repaired, and that when the crack is longer it is not safe to repair the windshield and/or 'a replacement [is] the only option for insuring the structural integrity of the windshield within the vehicle's overall safety features.'" ¶¶ 24, 97 (describing opportunities for Technicians/Repair Specialists, SR's [service representatives], Services Managers and Retention Specialists); ¶¶ 98-99 (online training courses for technicians and CSRs with instructed selling points and the dollar bill rule to determine whether a windshield is repairable or must purportedly be replaced). Safelite engages in similar "Media Training" for its executives. ¶¶ 82-83.

Safelite does not dispute that its sales-force makes uniform oral communications to its customers regarding six inches being the cutoff for a crack repair, but rather argues that these oral representations "are not made 'for the purpose of influencing customers' to buy Safelite's products" and thus fails the second of the *Grubbs* elements for what is "commercial advertising or promotion". Def. Mem. 10. However, the well pled allegations in the AC show otherwise. First, Plaintiffs have explicitly pled that the purpose of Safelite's "deceptive advertising . . . is intended to maximize the number of unnecessary windshield replacements it performs[.]" ¶¶ 25-26, 100.

That this is plausible is shown by the increased profits Safelite makes from replacements. [redacted] ¶ 80 (hundreds of millions of dollars in yearly profits were at risk).[3]

Second, following the logic *ADT supra* of looking to training materials, Safelite's documents confirm that Safelite instructs its technicians and CSRs that they should always be looking for opportunities to sell Safelite replacements. ¶ 23 ("Repair Selling Points/Repair Qualification" slide); ¶ 24 ("Technicians/Repair Specialists, SR's [service representatives], Services Managers and Retention Specialists recognize these instances [where cracks are longer than six inches] as replacement *opportunities* . . ."") (emphasis added); *see also* Exhibit A, SL0004312 at '19 (identified at ¶ 68) (Safelite instructing employees in an on-line training course that "[w]hen customer calls in with a damage that longer than 6", we cannot attempt a repair. However, we can be first in line to **sell them** a replacement windshield." (emphasis added)); Exhibit B, SL0001133 at '63-64 (identified at ¶ 98) ("selling points").[4]

Safelite also argues that "Safelite Solutions limited, one-on-one statements to policyholders are not widely disseminated to the relevant market" and are thus purportedly not commercial advertising or promotion. Def. Mem. 9-10. Safelite mischaracterizes the allegations in the AC, and ignores the controlling legal standard articulated by this Court and the Sixth Circuit. The claims in the original complaint were limited to "Safelite's scripted responses to policyholders' questions" "about long crack repair" Opinion 11-12. At page 13 of its Opinion, the Court found only that these *specific* claims did not satisfy the third *Grubbs* factor, stating that:

> [t]he complaint does not plausibly suggest that a large number of policyholders make these inquiries; rather, most policyholders allegedly lack knowledge about

[3] That Safelite also in its role as an insurance administrator sometime refers out insurance claims to third party shops (Def. Mem. at 10) does not subtract from the allegation that Safelite has a multi-channel campaign, which includes oral components to sell replacements to end-user customers (insured or otherwise).

[4]Defendants' reliance on *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142 (D. Ariz. 2005) ("*Hy Cite*") is misplaced. Def. Mem. at 10. In *Hy Cite*, which pre-dates *Grubbs* and its rejection of "the requirement that the parties be in competition", the plaintiff was not even in the same business as the defendant whose sole business was "criticizing other businesses".

> the VGRR options available. As such, even viewing Ultra Bond's allegations in its favor, the Court cannot conclude that the representations at issue are widely disseminated or delivered to a substantial portion of the VGRR market.

The Court did not hold that *all* claims concerning "statements to policyholders as a claims administrator are not advertising." Def. Mem. 10. Here, the statements alleged in the AC are not related to statements about Safelite's responses to customer questions about long crack repair at issue above. Rather, the alleged uniform oral statements are *affirmative* misrepresentations made by Safelite's entire front line sales force (which numbers in the thousands interacting with thousands of customers 24/7). *See* ¶¶ 23-25, 40-41, 84, 97-100. Because these claims are based on different facts than the original complaint, the "law of the case" doctrine does not apply. Def. Mem. at 10; *see United States v. Charles*, 843 F.3d 1142, 1145 (6th Cir. 2016) ("Courts need not adhere to the law of the case in the face of … new evidence.") (citation omitted).[5]

These affirmative misrepresentations must be analyzed under the *Grubbs* test for determining whether false statements constitute commercial advertising or promotion. The *Grubbs* test is not solely whether the statements at issue are widely disseminated to the relevant market. Rather, as this Court recognized, *Grubbs* held that the test is whether a statement "is disseminated either widely enough to the relevant purchasing public to constitute advertising or promotion within that industry *or* to a substantial portion of the plaintiff's or defendant's existing customer or client base." Opinion at 12 (*citing Grubbs)* (Emphasis added.). Particularly in light of Safelite's huge market share as identified in the AC, these uniform affirmative oral statements, made by thousands of Safelite front lines sales representatives to Safelite's millions of customers, satisfies either part of this standard for broad dissemination. *See, e.g.*, ¶¶ 3, 37, 39-41, 98; *see also ADT LLC v. Teamtronics, Inc.*, 2015 U.S. Dist. LEXIS 188509, at *5 (S.D. Fla. May 18, 2015) ("[C]ourts have consistently held that oral statements by a company's sales representative concerning a product constitute 'commercial advertising or promotion' under the Lanham Act.")

[5] *Macko v. Byron*, 555 F. Supp. 470, 473 (N.D. Ohio 1982) is inapposite, because contrary to Safelite's assertion here, the claim is not essentially the same claim as the claim that was dismissed; and, *Ramsey v. Allstate Ins. Co.*, 2011 WL 13203129, at *2 (S.D. Ohio Aug. 23, 2011) is immaterial, because the question in that case involved the scope of a remand order.

(citations omitted); *Reed Const. Data Inc. v. McGraw-Hill Companies, Inc.*, 49 F. Supp. 3d 385, 411 (S.D.N.Y. 2014) ("[Where] management directed individual salespeople to disseminate several of the allegedly false or misleading statements . . . [t]here is little difference between this and a traditional advertising campaign . . . the mere fact that the promotional campaign took the form of individual conversations does not mean that it is not advertising when taken as a whole.").

Additionally, in *Grubbs* the Sixth Circuit further found that "the touchstone of whether a defendant's actions may be considered 'commercial advertising or promotion' under the Lanham Act is that the contested representations are part of an organized campaign to penetrate the relevant market." *Grubbs*, 807 F.3d 785, 800 (internal citation and quotation omitted). As alleged here, the oral statements are but one channel in a much broader campaign. *See also Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 462 (D.N.J. 2009) (looking at the entirety of the campaign to determine whether the oral advertisements were sufficiently distributed including "sales calls, websites, print marketing materials and more").[6]

2. Safelite's statements to and through insurers constitute actionable commercial advertising or promotion

Safelite's statements "to and through insurers" alleged at ¶¶ 101-16, also "constitute advertising or promotion within that industry or to a substantial portion of [Plaintiffs' and/or Saflite's] existing customer or client base," in accordance with *Grubbs*, 807 F.3d at 801. Def. Mem. at 10-12. Indeed, Safelite proudly describes internally how it did not just share information with particular insurers, but how it "helped the insurance industry define what can be repaired vs. not repaired" and how it was able "to move the [repair] standard in the insurance industry." ¶ 72.

[6] *Optimum Techs., Inc. v. Home Depot USA, Inc.*, 2005 WL 3307508, at *5 (N.D. Ga. Dec. 5, 2005) is distinguishable. It was a summary judgment ruling and the plaintiffs had "not presented any evidence that the disseminated statements were part of an organized campaign to penetrate the market place[.]" To the extent it conveyed a broad rule that face to face advertisements can never be commercial advertisement or promotion, the court relied on *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803 (7th Cir.2001), which is in direct conflict with *Grubbs*.

In *Rocky Brands, Inc. v. Red Wing Shoe Co.*, No. 2:06-cv-00275, 2010 U.S. Dist. LEXIS 145726, at *11 (S.D. Ohio Jan. 15, 2010) (Watson, J.), this Court ruled *in limine* that "evidence of third-party conduct amounting to false advertising is relevant and admissible only if [the plaintiff] lays a foundation to show that [the defendant] either directly participated in the conduct or exercised control over the third-party with respect to the conduct." *Id.* Plaintiffs clearly allege and show that Safelite "directly participated" and "exercised control" over the statements it made to and through the third party insurance companies and agents. Remarkably, Safelite omits to mention *Rocky Brands*, and instead focuses on pure dicta in *Acad. of Doctors of Audiology v. Int'l Hearing Soc'y*, 237 F. Supp. 3d 644, 666 (E.D. Mich. 2017). Safelite also ignores the two circuit cases, *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1277 (11th Cir. 2015) and *Societe Des Hotels Meridien v. LaSalle Hotel Operating P'ship, Ltd. P'ship*, 380 F.3d 126, 132-33 (2d Cir. 2004) that recognized claims for contributory false advertising.

The AC satisfies the *Rocky Brands* standard. It describes how Safelite incorporated the false dollar bill rule into brochures, training, and "educational" materials it wrote for—and sometimes ghostwrote for its insurer clients. Safelite characterizes these materials as non-advertising because, it says, insurance companies would use them to "simply explain their claims process to their policyholders." Def. Mem. 12. That is not what the AC alleges. The AC alleges that Safelite "disguises" its marketing materials as "educational" and that it "conscripted agents to parrot" its false dollar bill rule. ¶¶ 18, 22; *see also* ¶¶ 17, 19, 106, 115.[7]

And contrary to Safelite's preferred view of the facts, the AC alleges that the goal of Safelite's advertising to and through insurers was for insurers and insureds to rely on the false dollar bill rule and to engage Safelite for replacement when they could have chosen a safer and cheaper repair. *Id.* ¶¶ 25-26 ("Safelite's deceptive advertising . . . is intended to maximize the

[7] Safelite states, "[a]s this Court explained, 'there are various reasons that insurance companies might choose to process claims' using the dollar bill rule, but they do 'not represent anything about Safelite's or Ultra Bond's products.'" Def. Mem. at 12. Safelite takes this language out of context. The Court was referring to whether Plaintiffs had pled affirmative statements in the original complaint, not whether the insurer materials now at issue in the AC are actionable.

number of unnecessary windshield replacements it performs."). Safelite ignores these allegations when it maintains that its purported falsehoods were directed at insurers and not at insureds. Additionally, Safelite's position that the advertisements and promotional materials it wrote only describe the "scope" of coverage, Def. Mem. at 11, ignores the plain text of the materials, which describe the dollar bill rule as an objective fact about windshields, and not a "fact" about coverage.

Safelite also argues that its false statements are "not widely disseminated to the relevant market." Def. Mem. at 11. The AC alleges that Safelite has claims management contracts with more than 75% of the top insurance companies in the country, that it supplies hundreds of thousands of its brochures every year, and that it developed a uniform statement for meetings with more than 5,300 Progressive insurance agents. *Id.* ¶¶ 70, 101, 107, 108, 112. Providing hundreds of thousands of brochures to the top insurers in the nation easily satisfies the *Grubbs* standard. *See Hillman Grp., Inc. v. Minute Key Inc.*, No. 1:13-cv-00707, 2016 U.S. Dist. LEXIS 88747, at *42 (S.D. Ohio July 8, 2016) (denying summary judgment where advertising disseminated to a single customer; finding that definition of relevant market was a fact question for a jury).

B. Plaintiffs Adequately Plead Falsity

In the falsity section of its brief, Def. Mem. at 12-17, Safelite spends considerable energy describing the extent to which it has been up-front with its customers. However, Safelite does not even mention the Sixth Circuit's standard for falsity under the Lanham Act.

The Lanham Act imposes "[l]iability . . . if the commercial message or statement is either (1) literally false or (2) literally true or ambiguous, but has the tendency to deceive consumers." *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 735 (6th Cir. 2012) (citation omitted) ("*Innovation*"). Literal falsity "may be either explicit or 'conveyed by necessary implication when, considering the advertisement *in its entirety*, the audience would recognize the claim as readily as if it had been explicitly stated.'" *Id.* (emphasis added).

1. Safelite's statements are false

The statements pled in the AC are false under the Lanham Act. "Type I" statements, to use Safelite's term, have already been held actionable by the Court. Opinion at 12-14. Type I

statements—those identified in the AC and other similar statements—convey that if a windshield crack exceeds the size of a dollar bill, the windshield *cannot* be repaired and *must* be replaced. *See* ¶¶ 86, 87, 91, 92, 96. These statements are literally false because windshields with cracks longer than a dollar bill *can* be repaired and *need not* be replaced. ¶¶ 54-76, 78.[8]

The AC also adequately pleads that the statements Safelite refers to as "Type II" are literally false by "necessary implication" or, at a minimum, "literally true or ambiguous, but ha[ve] the tendency to deceive consumers." *Innovation*, 694 F.3d at 735. As noted by the Sixth Circuit in *Innovation*, *supra*, but ignored by Safelite, the Lanham Act recognizes "falsity by necessary implication" where an advertisement or promotional material unambiguously conveys a falsehood. *Id.*; s*ee also Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 843 F.3d 48, 65 (2d Cir. 2016) ("*SPD*") (citations omitted); *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1367 (Fed. Cir. 2013).

Considered in context, Type II statements, which provide that cracks "less than" or "up to" six inches can be repaired, unambiguously convey that *only* cracks less than six inches can be repaired, and anything longer require a windshield replacement. Type II statements convey the same message as the Type I statements the Court has already found actionable.[9] For example, Safelite's "How to Perform a Proper Repair" brochure, distributed to the 50 million member AAA and many insurance companies, and used as a handout with Safelite's repair video, states: "What is repairable? Did you know that most windshield chips or cracks up to the size of a dollar bill (six inches) can be repaired? Most certified repair specialists can repair chips, nicks, and cracks up to six inches long." *Id.* ¶ 104. No one other than Safelite would read this brochure and think the answer to the question "what is repairable?" is "Safelite's preferred standard of repair." *See, e.g.*,

[8] Safelite misunderstands the AC and the ROLAGS when it argues that its falsehoods are consistent with "the very 'industry standard' that forms a cornerstone of Plaintiffs' case." Def. Mem. at 17. By adopting the 14 inch standard, the ROLAGS accepts that long crack repair is possible and that it is safe. Safelite says it is neither. That is why Safelite's statements are false.

[9] Safelite's division of statements into Type I and Type II is an oversimplification. Some advertisements contain both replacement and repair statements. *See, e.g.*, ¶¶ 91, 111.

SPD, 843 F.3d at 65-67 (statement false by necessary implication where consumers would have assumed statement reflected generally accepted medical standard).

The materials Safelite prepares (often without attribution) for insurance companies are no different and reinforce the false notion that six inches is the cutoff for safe windshield crack repair. These materials are all ultimately directed at insurance customers, they all contain hotline phone numbers for people to call Safelite customer service representatives when they have glass damage, and they all state that only cracks up to six inches can be repaired. ¶¶ 106-13. The same or similar statements placed in "educational" materials disseminated to insurers convey the same message. In the alternative, if Safelite's Type II statements are not literally false, they still have the "tendency to deceive consumers" for the reasons discussed above. *See Innovation*, 694 F.3d at 736-37; *Grubbs*, 807 F.3d at 802. Finally, whether a representation is "false statement of fact" is not a question that can be resolved on a motion to dismiss. *See Mercer Publ'g, Inc. v. Smart Cookie Ink, LLC*, 2012 U.S. Dist. LEXIS 162185, at *8 (W.D. Wash. Nov. 11, 2012).

2. Safelite's counterarguments to falsity fail uniformly

Not one of Safelite arguments for why its false statements are not actionable succeeds.

First, Safelite argues that the AC is "premise[d]" on omissions in Safelite's advertising. Def. Mem. at 13. That is incorrect. The AC does not assert *any* omissions-based claim.

Second, Safelite recycles from its prior briefing the argument that its false statements are not "about" Safelite's or Plaintiffs' products or services. Def. Mem. at 14; *see* Mem. in Supp. of Mot. to Dismiss at 14-15, Dkt. No. 25. The argument was unsuccessful before; it has no more merit now. Plaintiffs sell technology to repair shops and technicians that repair long cracks (and they also repair long cracks). *See, e.g.*, ¶¶ 30-33, 128-32. Safelite tells the market that safe long crack repair is impossible in order to promote its replacement goods and services. Safelite's statements, therefore, also concern Plaintiffs' products and services. Regardless, contrary to Safelite's position (Def. Mem. at 15), the Lanham Act does not require that a false advertisement *explicitly* name another business or it specific products. *See, e.g.*, *SPD*, 843 F.3d at 65-70 (affirming verdict where false advertising did not explicitly name a competitor); *Champion Labs.*,

Inc. v. Cent. Ill. Mfg. Co., No. 14 CV 9754, 2015 U.S. Dist. LEXIS 60422, at *6-7 (N.D. Ill. May 8, 2015) ("An advertisement can be false even if it does not explicitly name Plaintiff.").

Third, as it did in its previous briefing, Safelite argues that its false statements are not really false because they are accurate statements of Safelite policy rather than statements of fact. Def. Mem. at 16; Reply in Supp. of Mot. to Dismiss at 9, Dkt. No. 28. But Safelite's customers were not told that the dollar bill rule was simply a Safelite-specific policy. They were presented with the false dollar bill rule as a statement of generic fact. At summary judgment and at trial, Safelite will have every opportunity to try and establish that customers somehow divined its statements of fact were actually only Safelite's policy preferences. Not now.

C. Safelite Has Not Met Its Burden To Demonstrate Laches

Plaintiffs previously explained in arguments incorporated by reference here that "laches is not appropriately resolved on a motion to dismiss." Opposition to Motion to Dismiss at 21, Dkt. No. 27. The Court previously did not accept Safelite's laches argument. It should not change course.[10]

Safelite fails to acknowledge that laches does not apply to injunctive relief absent estoppel, which Safelite does not argue here and could not argue since it acknowledges it has known Plaintiffs' position for years. *See Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412-13 (6th Cir. 2002); Def. Mem. at 20 (referencing "decades of threats").

[10] *Axcan Scandipharm Inc. v. Ethex Corp.*, 585 F. Supp. 2d 1067, 1081 (D. Minn. 2007) ("[L]aches generally cannot be decided 'on a motion for summary judgment, let alone a motion to dismiss.'") (citations omitted); *Campbell v. Grand Trunk W. R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001) ("Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run."). Moreover, even if Plaintiffs knew of certain advertisements more than two years before the complaint was filed, that would not preclude relief for the two years preceding initiation. *See Zinn v. Seruga*, 2009 U.S. Dist. LEXIS 89915, at *77 (D.N.J. Sep. 28, 2009); Che*ckPoint Fluidic Sys. Int'l, Ltd. v. Guccione*, 888 F. Supp. 2d 780, 793–94 (E.D. La. 2012). This is especially true because Safelite continued to add additional methods like the text on its website to its broad based advertising campaign. *See Hofheinz v. A.V.E.L.A., Inc.*, 2013 WL 12306480, at *10 (C.D. Cal. Aug. 21, 2013).

Additionally, even if a presumption of laches applies, Plaintiffs have rebutted the presumption for the reasons set forth in earlier briefing. *See* Dkt. No. 27 at 22-23. And Safelite's reliance on *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir. 2002) supports Plaintiffs. *Id.* at 841 ("the public's interest will trump laches…when the suit concerns allegations that the product is harmful or otherwise a threat to public safety and well being."). Def. Mem. 17, 19. Laches is inapplicable because Safelite is making cars less safe and knows it. *See* ¶¶ 6, 9, 58-59, 65-68.

Furthermore, it would be premature to accept Safelite's suggestion that it would have changed course if this case were filed earlier. Def. Mem. 20. Safelite has known about Plaintiffs' concerns for years but it did not change its practices. *See Axcan Scandipharm Inc. v. Ethex Corp.*, 585 F. Supp. 2d 1067, 1082 ("[I]f the Defendants' conduct would have been the same regardless of whether…sued earlier, then they cannot demonstrate any 'change' in their position as a result of…delay and, hence, they cannot demonstrate prejudice."). As for the suggestion that laches applies because this exact suit was not previously filed, that argument also fails inasmuch as Safelite admits to "decades" of threats and litigation from Plaintiffs. *See Kehoe Component Sales Inc. v. Best Lighting Prod., Inc.*, 796 F.3d 576, 585 (6th Cir. 2015) ("[A]ttempts to resolve a dispute without resorting to a court do not constitute unreasonable delay.") (internal quotations and citation omitted). Accordingly, Safelite's laches argument should be rejected.

V. CONCLUSION

For the reasons set forth above, Safelite's motion to dismiss should be denied.[11]

Respectfully submitted,

s/ Kurt B. Olsen

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[11] If the Court deems any or all of Plaintiffs' claims unsupported, Plaintiffs would respectfully request another opportunity to re-plead their allegations, as much additional evidence has been garnered from 8 depositions taken of Defendants since the time the AC was filed.

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Signed by,

s/ Kurt B. Olsen
Kurt B. Olsen

Exhibit A

(FILED UNDER SEAL)

Exhibit B

(FILED UNDER SEAL)