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 Kemp

OPINION AND ORDER

Plaintiffs Richard Campfield and Ultra Bond, Inc. (collectively, "Ultra Bond") allege that Defendants Safelite Group, Inc., Safelite Solutions LLC, and Safelite Fulfillment, Inc. (collectively, "Safelite") misrepresented the nature and characteristics of Ultra Bond's products to consumers. Plaintiffs bring one claim for relief under section 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a)(1)(B). Safelite now moves to dismiss this claim.

For the reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** Safelite's motion. Specifically, the Court **DENIES** the motion with respect to specific statements on Safelite's website and **GRANTS** the motion with respect to the remaining alleged statements.

I. BACKGROUND

The following facts are taken from Ultra Bond's complaint and are assumed true for purposes of this Opinion and Order.

This case involves the market for vehicle glass repair and replacement ("VGRR"). Safelite maintains a significant stake in the sale and installation of replacement windshields. Ultra Bond, on the other hand, maintains a significant stake in the sale of products used to repair cracks longer than six inches (called "long cracks"), as well as the service of performing such repairs.

Safelite operates in the windshield replacement market through multiple entities. One entity manufactures replacement windshields, another sells replacement windshields to wholesalers, and another provides VGRR services to retail and individual customers. Replacement windshields are separate and distinct from the "original equipment manufactured," or "OEM," windshields that come with new vehicles. Compl. ¶ 26, ECF No. 1. Safelite does not manufacture or distribute OEM windshields.

Another Safelite entity acts indirectly in the windshield replacement market by administering VGRR claims on behalf of insurance companies. Approximately 175 insurance companies, including nineteen of the top thirty companies, use Safelite to administer VGRR claims.

In its capacity as a third-party administrator, Safelite deals directly with insured policyholders who contact their insurer to report non-collision windshield damage (such as, *inter alia*, damage from vandalism and stones hitting windshields). Calls of this nature are routed from the insurance company to a Safelite call center. A Safelite representative answers the call and speaks directly to the policyholder about his or her policy, the vehicle, and the damage to

the windshield. Safelite then helps the policyholder schedule repair or replacement services.

Although Safelite acts as the insurer's agent during these calls, it maintains considerable autonomy over where to send policyholders for repair or replacement services. Safelite has a network of "glass shops" that perform these services. *Id.* ¶ 59. That network includes Safelite entities, as well as entities that Safelite does not operate. Of the latter group, some entities order non-OEM replacement windshields that Safelite manufactured or distributed, and some do not.

Safelite representatives must follow a script during each of their calls with insured policyholders. After asking about the damage to the insured's windshield, the Safelite representative must recommend a scripted course of action based on the insured's answer.

If an insured reports a windshield crack that is shorter than six inches, the Safelite representative discusses repair options. If, however, the caller reports a long crack, the Safelite representative processes the claim as a windshield replacement. Ultra Bond does not allege that Safelite makes any specific representations about why it is doing so. Rather, "the script will skip the discussion of repair options and show the operator the next section of the script." *Id.* ¶ 101.

At no point in these conversations does Safelite disclose the option or the benefit of repairing a long crack. If an insured asks about long crack repair,

Safelite informs the insured that such a repair is not safe, is unlikely to hold, and could compromise the structural integrity of the windshield.

Safelite also has scripted answers to questions about windshield replacement. If an insured asks about the safety implications of installing a non-OEM replacement windshield, Safelite informs the insured that such replacements are equivalent to factory-installed OEM windshields.

Ultra Bond disagrees with these statements. According to Ultra Bond, long crack repairs are preferable to windshield replacement. Not only is the repair process cheaper than replacing the windshield, but repair maintains the structural integrity of the OEM windshield, which is factory-installed to ensure the best possible seal for safety purposes. Ultra Bond asserts that Safelite's representations and omissions regarding long crack repairs and the safety of non-OEM windshields are false or misleading to insureds.

The history of long crack repairs is relevant to this assertion. Before 1989, long crack repair was considered infeasible. The so-called "dollar bill rule" developed: if a crack is longer than a dollar bill, the windshield must be replaced. This rule changed in 1989 when Ultra Bond developed a new method for repairing long cracks. Ultra Bond's process allows vehicle owners to repair long cracks rather than replacing the windshield, thus preserving the integrity of the factory-installed OEM windshield. In 2007, the American National Standards Institute approved windshield repair standards stating that windshield cracks up

to fourteen inches are repairable. As such, according to Ultra Bond, the dollar bill rule is no longer the prevailing view in the industry.

Safelite nevertheless continues to process claims according to the dollar bill rule. Ultra Bond contends that Safelite has a financial incentive to do so, in that windshield replacement is more expensive than repair and therefore generates more money for the insurance companies (thus securing Safelite's role as third-party administrator for those companies). Ultra Bond also argues that Safelite's representations bolster the market for windshield replacement, which in turn bolsters profits for the Safelite entities that manufacture, distribute, and install non-OEM replacement windshields. Ultra Bond notes that insured policyholders typically lack knowledge about the VGRR industry and therefore are particularly vulnerable to Safelite's recommendations.

In addition to advising policyholders over the phone, Safelite also maintains a website designed to assist insureds reporting windshield damage. This website contains the phrases "replace my windshield" and "damage larger than six inches" close together, thereby insinuating (according to Ultra Bond) that the dollar bill rule still applies. *Id.* ¶ 118. The website also contains the phrases "repair" and "does the crack fit under a dollar bill?" in close proximity to one another. *Id.* A video on the Safelite website states: "If the damage spreads beyond the size of a dollar bill a replacement will be necessary." *Id.* In previous versions of the website, a video stated: "Your windshield helps keep you safe. If the damage is larger than 6", it cannot be repaired. You need a replacement."

Id. ¶ 119. The video went on to inform customers who indicated online that their windshield had a long crack: "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 beyond repair." *Id.* Finally, another video on Safelite's website states that its technology places replacement windshields "in perfect position for a strong reliable bond." *Id.* ¶ 120.

Ultra Bond also asserts an additional category of misrepresentations. If a policyholder contacts Safelight about repairing a long crack, Safelite informs the policyholder about the reimbursement amount the insurance company will provide. Safelite quotes a reimbursement price that is lower than the actual cost of repairing a long crack. Safelite informs the policyholder and/or the shop that said price is the "prevailing rate" for all repairs. *Id.* ¶ 124. This policy causes shops performing long crack repair to be underreimbursed, which further deters shops and policyholders from offering and seeking long crack repair services.

Ultra Bond asserts that it has been damaged by Safelite's conduct. Ultra Bond notes that it is the dominant manufacturer of long crack repair kits, while Safelite is the dominant third-party administrator and retailer of non-OEM windshields. Over 90% of policyholders would have (according to Ultra Bond) chosen long crack repair over windshield replacement had Safelite accurately described that option. More businesses would have purchased long crack repair kits, it alleges, and a portion of this business would have gone to Ultra Bond.

Ultra Bond brings its claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) (referred to throughout this Opinion and Order as § 43(a)). Regarding damages, Ultra Bond seeks to recover lost sales based on those consumers who would have opted for long crack repair but for Safelite's misconduct. Ultra Bond also seeks to recover lost sales from an advanced repair system that it has not been able to develop, market, or license due to the artificially depressed market. Finally, Ultra Bond seeks injunctive relief and disgorgement of Safelite's ill-gotten gains.

Safelite moves to dismiss this claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. STANDARD OF REVIEW

Dismissal pursuant to Rule 12(b)(6) is proper if the complaint fails to state a claim upon which the Court can grant relief. Fed. R. Civ. P. 12(b)(6). The court must construe the pleading in favor of the party asserting the claim, accept the factual allegations contained therein as true, and determine whether those factual allegations present a plausible claim for relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). To be considered plausible, a claim must be more than merely conceivable. *Bell Atl. Corp.*, 550 U.S. at 556; *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Assuming all

well-pleaded allegations as true, "Rule 12(b)(6) is the appropriate vehicle to analyze the viability of the legal theories on which a plaintiff bases his or her claim." *Perkins v. Wells Fargo Bank, N.A.*, No. 2:11–cv–952, 2012 WL 5077712, at *5 (S.D. Ohio Oct. 18, 2012).

III. ANALYSIS

Section 43(a) of the Lanham Act precludes any person from making any "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 . . . ." 15 U.S.C. § 1125(a)(1)(B). Plaintiffs asserting a § 43(a) claim must meet a five-part test, known in this circuit as the "*Podiatric Physicians*" test:

> 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.

Grubbs v. Sheakley Grp., Inc., 807 F.3d 785, 798 (6th Cir. 2015) (quoting *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.,* 185 F.3d 606, 613 (6th Cir. 1999)). The Court first addresses Safelite's argument that Ultra Bond fails to allege affirmative "statements" within the meaning of this test.

A. Actionable Representations

Both the *Podiatric Physicians* test and the plain language of the statute require an affirmative representation that can be proven false. *See id.* (requiring a "statement of fact"); 15 U.S.C. § 1125(a)(1)(B) (requiring a "representation of fact"); *Nat'l Air Traffic Controllers Ass'n v. Sec. of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (setting forth the general rule that courts must interpret federal statutes consistently with their plain language). A defendant's failure to mention the plaintiff or its products, therefore, is not itself actionable under § 43(a). *See id.*; *accord Alexso, Inc. v. First Database, Inc.*, No. CV 15-01893, 2015 WL 5554005, at *2 (C.D. Cal. Sept. 21, 2015) (rejecting the plaintiff's argument that an entity's failure to list the plaintiff's pharmaceutical product in a database of pharmaceutical products was an actionable "representation" under § 43(a) absent a corresponding representation that the list was exhaustive); *see also Univ. City Studios, Inc. v. Sony Corp. of Am.*, 429 F. Supp. 407, 410 (C.D. Cal. 1977) ("It is hard to see how a simple failure to disclose can be brought within [§ 43(a)'s] terms. . . . The absence of any statement is neither 'false' nor a 'representation.'"). That is especially true when a for-profit entity lists or discusses some products and not others. "[G]iven the myriad reasons" why this might occur, the entity's omission of certain products "cannot plausibly be read as an affirmative representation of any kind regarding those products." *Alexso, Inc.*, 2015 WL 5554005, at *2.

Ultra Bond argues that a statement can be actionable if it is "untrue as a result of failure to disclose a material fact." Resp. 25, ECF No. 27 (quoting

Trekeight, LLC v. Symantec Corp., No. 04–cv–1479, 2006 U.S. Dist. LEXIS 100609 at *17–18 (S.D. Cal. May 23, 2006) and *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 915 F. Supp. 360, 366 (S.D. Fla. 1996)). That proposition of law, however, does not change § 43(a)'s requirement that a plaintiff identify an affirmative representation by the defendant.

Safelite's failure to mention long crack repair products and services during its discussions with policyholders does not satisfy this requirement. The facts that Safelite does not inform policyholders about the option or benefit of long crack repair, and that its automated script skips to a discussion of windshield replacement when a policyholder reports a long crack, are not statements or representations that can be proven false. Indeed, because there are various reasons that insurance companies might choose to process claims in this manner, this conduct does not represent anything about Safelite's or Ultra Bond's products. *See Alexso, Inc.*, 2015 WL 5554005, at *2. This conduct therefore cannot be considered a misrepresentation under § 43(a).

The same is true regarding the headings on Safelite's website. Ultra Bond alleges that the website contains the phrase "damage larger than six inches" under the heading "replace my windshield," and the phrase "does the chip or crack fit under a dollar bill" under the heading "repair my windshield." Compl. ¶ 118, ECF No. 1. But these phrases do not make any representations about long crack repair or about Safelite's products. Even if this portion of the website implies that insurers process claims pursuant to this formula, there are

"myriad reasons" why they might choose to do so. *Alexso, Inc.*, 2015 WL 5554005, at *2. This portion of the website therefore is not an affirmative "statement" about Safelite's or Ultra Bond's products under § 43(a).

Only the following affirmative statements are alleged in the Complaint:

- In response to policyholders' questions about long crack repair, Safelite informs policyholders that such an option is unsafe, is unlikely to hold, and could compromise the structural integrity of the windshield;

- In response to policyholders' questions about non-OEM windshields, Safelite informs customers that they are equivalent to OEM windshields;

- In response to inquiries from policyholders or glass shops, Safelite states that a certain rate is the "prevailing rate" for long crack repairs;

- Safelite makes the following statements in videos posted to its website: "If the damage spreads beyond the size of a dollar bill a replacement will be necessary;" "if the damage [to a windshield] is larger than 6", it cannot be repaired. You need a replacement;" and "if the damage [to the windshield] is too big . . . the structural integrity of the glass is beyond repair;" and

- Safelite states in a video that its technology places replacement windshields in perfect position for a strong, reliable bond.

Of these, Ultra Bond does not allege that the last representation is false. The Complaint states that non-OEM windshields are not equivalent to OEM windshields and that the OEM bond cannot be replicated. But even if true, this fact does not render false or misleading the statement that Safelite's technology places replacement windshields in perfect position for a strong, reliable bond. This statement cannot reasonably be interpreted to represent that Safelite's non-

OEM windshields have the same bond as OEM windshields. This representation therefore cannot form the basis for a § 43(a) claim.

The Court is left with Safelite's scripted responses to specific inquires and its statements in certain videos posted on its website. Safelite next argues that these statements are not "commercial advertising or promotion" within the meaning of § 43(a).

B. "Commercial Advertising or Promotion"

The issue of whether a plaintiff alleges "commercial advertising or promotion" is a prerequisite to the *Podiatric Physicians* test. Where, as here, the plaintiff does not allege a traditional form of advertising, the Sixth Circuit asks whether the plaintiff has alleged:

> (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, 807 F.3d at 798. "'[T]he 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.'" *Id.* (quoting *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002)). Such campaigns "may not necessarily entail widespread, market-wide dissemination of any given message or false statement as junk mail, newspaper advertisements, and television

commercials might," but as long as they employ "targeted promotion" aimed at persuading discrete segments of the population, they will be considered "commercial advertising or promotion." *Id.*

Safelite's scripted responses to policyholders' questions do not qualify as "commercial advertising or promotion" under the third prong of the *Grubbs* standard. Because many insurance companies do not use Safelite to process their claims, the policyholders to whom Safelite speaks represent only a portion of the "relevant purchasing public" for Ultra Bond's products. Within this limited portion of the market, Safelite makes the representations at issue only to those who affirmatively ask about long crack repair or OEM versus non-OEM windshields. The complaint does not plausibly suggest that a large number of policyholders make these inquiries; rather, most policyholders allegedly lack knowledge about 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 fact that Satelite could, but does not, make these representations to all policyholders with whom it communicates further indicates that such representations are not part of an organized campaign to penetrate the relevant market.

The Court reaches the opposite conclusion with respect to the videos on Safelite's website. Many courts have concluded that posting a statement on a website constitutes "commercial advertising or promotion" within the meaning of

§ 43(a). *See, e.g., C=Holdings B.V. v. Asiarim Corp.*, 992 F. Supp. 2d 223, 243 (S.D.N.Y. 2013) (calling the internet "an obvious 'campaign to penetrate the relevant market'"). Safelite does not offer any contrary authority. Instead, Safelite argues that the Complaint asserts only that the website was "viewable," not that it was actually viewed by the relevant purchasing public, and that it is unclear from the complaint whether these statements were made "outside of the third party administrator context." Mot. Dismiss 12 n. 3, ECF No. 25.

Safelite's argument is not compelling. Ultra Bond's allegations that the website is or was "viewable to retail and insurance customers alike" and that Safelite's statements have substantially impacted the long crack repair market, viewed in Ultra Bond's favor, are sufficient to support the inference at this stage of the litigation that the statements at issue were widely disseminated to the relevant purchasing public. Ultra Bond therefore has alleged "commercial advertising or promotion" with respect to these statements.

Safelite's final argument is that Ultra Bond lacks statutory standing to bring its claim. The Court proceeds to address this argument.

C. Statutory Standing

The issue of statutory standing is a second prerequisite to the *Podiatric Physicians* test. As the Supreme Court explained in *Lexmark International, Inc. v. Static Control Components, Inc.*, not only must a § 43(a) plaintiff have Article III standing to sue, but he or she also must "fall[] within the class of plaintiffs whom Congress has authorized to sue under § [43(a)]." 134 S. Ct. 1377, 1387

(2014). Statutory standing has two requirements: (1) that the plaintiff's interests "fall within the zone of interests protected by the law invoked," and (2) that "his or her injuries are proximately caused by violations of the statute." *Id*. at 1388, 1390. In the § 43(a) context, a plaintiff comes within the zone of interests if he or she "allege[s] an injury to a commercial interest in reputation or sales." *Id*. at 1390. A plaintiff seeking to demonstrate proximate cause "must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Id*. at 1391.

Safelite identifies three categories of damages in Ultra Bond's complaint: harm to the public interest, harm based on a future product that has not been developed, and harm based on lost sales. Safelite appears to concede that the third category of damages, as alleged, meets *Lexmark*'s zone of interest and proximate cause requirements at this stage of the litigation. *See* Mot. Dismiss 8–9, ECF No. 25. Ultra Bond, for its part, clarifies that it is not seeking damages on the public's behalf. Only the second category of damages remains in dispute.

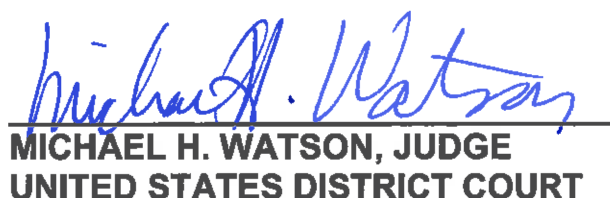
Safelite argues that the loss of generalized business opportunities from future products is too speculative to satisfy Article III or *Lexmark*. Ultra Bond responds, *inter alia*, that the undeveloped products at issue are "simply a continuation of Plaintiffs' earlier patented Long Crack repair products which Plaintiffs have marketed." Resp. 15, ECF No. 27. Safelite disputes this factual assertion.

Because Ultra Bond has alleged lost sales from the current version of its products on the market, the Court finds that the issue of whether Ultra Bond can seek additional damages related to an undeveloped product that may or may not be a continuation of an existing product presents a factual issue that is premature at the Rule 12(b)(6) stage. Ultra Bond's allegations regarding its lost sales from current products bring it within the purview of the statute. Safelite's arguments regarding statutory standing therefore do not provide a basis for dismissal.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Safelite's motion to dismiss, ECF No. 25. Only the allegations regarding Safelite's statements in videos posted to its website remain pending in this litigation.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT