UNITED STATE 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 Terrence P. Kemp

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

INTRODUCTION

This is a straightforward case. Defendant Safelite Group, Inc., and its wholly-owned subsidiaries, including Defendants Safelite Fulfillment, Inc., and Safelite Solutions LLC (collectively "Safelite"), make up the largest retail operations in the country for vehicle glass repair and replacement ("VGRR") services for windshield damage claims. Safelite is also the nation's largest third-party administrator ("TPA") for processing and adjusting policyholders' vehicle glass damage claims. In the course of its business, Safelite falsely advertises, promotes, and otherwise misleads consumers into believing that, without exception, if their windshield has a crack longer than six inches, it cannot be repaired—and that it would be unsafe to do so. Instead, Safelite falsely tells consumers that their windshield must be replaced—referred to as the "Six Inch Rule" or the "Dollar Bill Rule." Safelite performs approximately 3,000,000 windshield replacements each year. Not surprisingly, windshield replacements are vastly more profitable to Safelite than windshield repairs.

Contrary to Safelite's statements in its advertisements and promotions, windshield cracks longer than six inches are, in fact, repairable (but far less profitable for Safelite). Indeed, the repair of cracks up to 14 inches is the VGRR industry standard. Specifically, in June 2007 and updated in February 2014, the American National Standards Institute approved windshield repair standards known as the "Repair of Laminated Automotive Glass Standards" ("ROLAGS"). These industry standards were developed by the National Glass Association and the National Windshield Repair Association and expressly state that cracks longer than six inches—known in the VGRR industry as "Long Cracks"—and up 14 inches can be repaired. Safelite knows that Long Cracks up to 14 inches are repairable because its representatives sat on the committee that developed and approved the ROLAGS in 2007, but knowingly ignores the ROLAGS to improve its bottom line.

Plaintiff Ultra Bond, Inc. (founded and owned by Plaintiff Richard Campfield, collectively "UB") is, among other things, a windshield repair manufacturer that licenses and sells its products to auto-glass shops and related businesses across the country and worldwide.

UB holds (or held) several patents related to the repair of windshield cracks longer than six inches. These patents cover methods of repairing Long Cracks, the tools to be utilized when repairing Long Cracks, and the specific viscosities of chemical resins that are suitable for repairing Long Cracks in windshields.

As detailed in the Complaint, UB's business is based on the industry standard that windshield cracks between six inches and fourteen inches are repairable. In fact, as described below, repairs are a safer and more reliable option than replacement because the factory seal of the windshield is not broken. Safelight itself admits in its internal Training Reference Guide that "nothing can duplicate the factory seal of the original windshield." Windshield repair is also cheaper than replacement, further making it a preferable option. Safelite's knowingly false statements and related omissions to consumers that windshield cracks longer than six inches cannot be repaired and, indeed, that it is "unsafe" to do so, has proximately damaged Plaintiffs' commercial interests in the form of lost sales and harm to its reputation. Safelite's false and misleading statements give rise to a classic claim under the Lanham Act, which prohibits false or misleading statements of fact "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B).

Safelite does not dispute that its statements are false and misleading. Faced with indisputable facts demonstrating the knowing and literal falsity of their statements, Safelite attempts to distract the Court by attacking straw man claims that Plaintiffs do not assert, mischaracterizing or ignoring core facts pertinent to the claims asserted here, and even arguing the wrong legal standard for analyzing Lanham Act claims. Contrary to Defendants' argument, this case is not an antitrust case nor does it mirror Plaintiffs' previous case decided by the Tenth Circuit in 2008. Among other things, the ROLAGS—which are central to the allegations here—did not exist at the time of that case. The ROLAGS show that Defendants' statements that windshield cracks longer than six inches cannot be repaired and are unsafe are false. Tellingly, Defendants do not even mention the ROLAGS in their brief.

Nor do Plaintiffs claim to represent the interests of consumers who have been damaged by Safelite's misrepresentations—though such evidence is relevant to the egregious nature of Defendants' misconduct. And Plaintiffs do not allege that Safelite must expressly promote UB's products and services. Rather, Plaintiffs simply allege that Safelite must stop making false and misleading statements in its commercial advertisements and promotions that: (1) a windshield must be replaced when a crack is longer than six inches; (2) it is unsafe or unreliable to repair a crack longer than six inches; and (3) Safelite's windshield replacements are as safe and reliable as repaired factory-installed windshields. These false and misleading statements are archetypical Lanham Act violations. Defendants' Motion to Dismiss (Doc. 25) should be denied.

STATEMENT OF FACTS[1]

I. The ROLAGS (Which Safelite Ignores in its Brief)

A vehicle's original factory-sealed windshield glass (referred to as "original equipment manufactured" or "OEM" glass) is an integral part of a vehicle's overall passenger safety system. ¶26. Among other things, a factory-sealed windshield is part of a vehicle's airbag crash pulse system and also serves as part of the vehicle's structural system to prevent roof collapse in a rollover crash, providing up to 60% of the roof's support. *Id.* OEM windshields are meticulously designed with strict quality specifications, jointly developed between the car manufacturer and the windshield manufacturer, and are installed at the factory using robotic, temperature and humidity controlled methods to ensure a precise seal of the windshield to the car's frame. ¶¶27-29. In fact, Safelite's Windshield Safety Video states that, "after your seatbelt and airbags what do you think is the next most important safety feature on your vehicle? Your brakes, your tires… In fact, the answer is right before your eyes, your windshield…" ¶26.

Non-OEM replacement windshields, such as those manufactured and sold in the aftermarket (known as auto replacement glass ("ARG")) by Safelite are not as safe and are lower in quality than OEM windshields. ¶¶27-30. Windshield repair is most often preferable to

[1] All "¶" references are to Plaintiffs' Complaint (Doc. 1) filed August 18, 2015. For a full description of the alleged facts, Plaintiffs incorporate the facts pled therein.

replacement with an ARG windshield because a properly repaired windshield restores the structural integrity of a windshield, without breaking its factory sealed bond. ¶¶32-42, 133. And, as an additional benefit, it is a less expensive than replacing the windshield. *Id.*

Windshield repair and/or replacement is a huge market in which "[m]ore than 11 million auto glass service incidents take place every year." ¶47, n.2. Recognizing this important market, the VGRR industry developed the ROLAG Standards which were first approved in April 2007. ¶84. The Foreword to the ROLAGS states in part:

> ROLAGS represents the windshield repair industry's statement of best practices as compiled under ANSI guidelines by a 'balanced' committee of windshield repair system manufacturers, glass manufacturers, windshield repair and replacement retail practitioners, trade associations and other 'interested parties'.

Id., attaching Ex. D, Foreword at p. iii.

The 2007 ROLAGS expressly state that it is the intention that these standards are to be used "to consistently evaluate damages on laminated auto glass in order to aid in the decision to repair or replace the glass." The ROLAGS also state that the "Scope of th[e] standard shall be to define: Repairable damages." ¶87. The ROLAGS establish an industry-wide standard that windshield cracks up to and including 14 inches **are repairable**. ¶84. Safelite's representative voted in favor of the 2007 ROLAGS 14 inch Long Crack windshield repair standard, which was updated and again approved on February 11, 2014. ¶¶86, 88, 105.

II. The Ultra Bond Process for Repairing Long Cracks

Plaintiff Richard Campfield is the founder and owner of Plaintiff Ultra Bond, Inc., a windshield repair manufacturer. ¶¶12-15. UB sells and/or licenses repair kits to VGRR businesses consisting of specialized tools, specially manufactured resins, primers, additives, and pre-treatment chemicals to be used for repairing (versus replacing) windshields damaged by Long Cracks (*i.e.*, windshield cracks up to 14 inches), in accordance with the ROLAGS, which are a common occurrence. ¶¶13-14, 72-79. Campfield himself also owns retail glass repair and replacement businesses in Colorado and Pennsylvania and recently completed a two and one-half year term as the President of the National Windshield Repair Association. ¶¶15-16.

Prior to the 2007 ROLAGS, Campfield was issued two patents in 1992 and 1995 (the "1990s Patents") covering the UB process for repairing Long Cracks. ¶¶66-70. In September 2012, Campfield was awarded another patent (the "2012 Patent"), which is even easier to use than the 1990s Patents. ¶71. UB is the dominant provider of Long Crack repair products and services, having between 50-75% of the U.S. market. ¶14. The historical rates of customer satisfaction, as judged by warranty claims and customer complaints, is over 99% for windshields repaired using the UB method. ¶83. Data tabulated by UB (from its business records) demonstrates that when customers are told the truth about repair vs. replacement of Long Cracks, customers choose windshield repair over 80-90% of the time. ¶148.

III. Safelite's VGRR Operations

Defendant Safelite Group, Inc., is comprised of four wholly-owned subsidiaries covering all aspects of the VGRR market, all with the common goal of maximizing the profits of Safelite Group, Inc. ¶17. Defendant Safelite Fulfillment, Inc., one of these wholly-owned subsidiaries, operates in all 50 states, serves more than 4.1 million customers each year, and has annual sales of approximately $825 million. ¶4. Of those 4.1 million customers, only about 1 million jobs result in repair of windshield chips or cracks shorter than six inches. The remainder are almost exclusively windshield replacements. ¶¶5, 116. The vast majority of Safelite's profits stem from the approximately 3 million windshields that Safelite sells and installs each year using non-OEM ARG. ¶¶5, 91.

Defendant Safelite Solutions LLC is another wholly-owned subsidiary of Safelite Group, Inc., and serves as a TPA to process VGRR claims on behalf of automobile insurance companies. ¶¶18, 54-65, 90-93. Safelite Solutions operates two national call centers in Columbus, Ohio, and one in Chandler, Arizona, that are staffed 24/7 by approximately 2,000 customer service representatives ("CSRs") trained to handle calls from policyholders reporting a vehicle glass claim (known as the first-notice-of-loss ("FNOL")) call to Safelite Solutions' insurance company clients. *Id*. Safelite Solutions currently serves as a TPA for more than 175 insurance and fleet companies, including 19 of the top 30 insurance companies. ¶¶18, 141. Safelite's TPA network

consists of approximately 500 Safelite Fulfillment-owned shops and 9,000 independent automotive glass shops who have network provider agreements ("NPAs") with Safelite Solutions handling 40% of all insurance VGRR claims annually across the United States. ¶¶61-65.

Safelite Solutions' computer and phone systems are synced to recognize the incoming FNOL calls. CSRs process the policyholders' calls by following a series of scripted prompts that are displayed automatically on each CSR's computer terminal. ¶¶94-95. CSRs are required to read the script precisely as written, and to strictly follow the sequenced stages without deviation. If they change the script, they are subject to disciplinary action or termination. ¶96. Safelite also promotes its products and services to millions of insurance consumers making claims for damaged windshields through Safelite's TPA-run network and FNOL scripts. ¶¶90-92, 99, 103. Because a customer's insurance deductible is often higher than the cost of a windshield replacement, Safelite Solutions essentially becomes the call center for insurance referred retail customers paying for windshields out of their own pocket. ¶¶6, 49, 52.

IV. Safelite's False and Misleading Statements on its Website and FNOL Scripts

Safelite uses its website to advertise and promote its products and services to both insurance referred retail customers and to retail customers. ¶117-22, 132. In its advertisements and promotions, Safelite contradicts the ROLAGS in a video entitled "Windshield repair" by stating that: "If the damage spreads beyond the size of a dollar bill a replacement will be necessary." ¶¶119, 121. Safelite also lists criteria on its website for evaluating windshield damage. Under the heading "Replace my windshield," Safelite lists as a criteria for such replacement: "[d]amage larger than 6," and "[d]oes the chip or crack fit under a dollar bill?" ¶¶118, 121.

Safelite's website contains another video which falsely states and/or implies that its windshield replacement is as safe and reliable as a factory-installed OEM windshield. ¶¶120-21. In that video, Safelite depicts an OEM factory robot installing a windshield with a Safelite model stating in the background that "In the factory high tech robotics installed your original windshield precisely. That precision inspired us to create our exclusive True Seal Technology

which consistently places the new glass in perfect position for a strong reliable bond. That's just another reason to choose the Safelite advantage." ¶120. Safelite knows this is a false and misleading statement because it admits in its internal, nonpublic Training Reference Guide that "nothing can duplicate the factory seal of the original windshield" and that the only way to preserve the "the original factory seal" is to repair (*i.e.*, not to replace) the windshield. ¶121.

Regarding Safelite's computer-generated FNOL scripts, the script compels the CSR to process the claim as requiring a windshield replacement when a windshield crack is longer than six inches. ¶¶100-01. Safelite admitted in a court filing that: "if a policyholder indicates during the call that his car's windshield has a crack that is smaller than a dollar bill, the script will prompt the customer service representative to discuss with the policyholder the possibility of repairing the windshield, rather than replacing it… [b]ut if the policyholder indicates that the crack is larger than a dollar bill, the script will skip the discussion of repair options and show the operator the next section of the script." ¶101. If a policyholder asks about repairing a crack longer than six inches, the CSRs falsely state that such repair is not safe; is unlikely to hold or, will compromise the structural integrity of the windshield. ¶102. If an insurance customer asks if there is a difference between Safelite's non-OEM ARG windshields and OEM windshields, CSRs falsely tell the customers they are equivalent. ¶¶29-30, 39, 103.[2]

LEGAL STANDARD

When deciding motions to dismiss, the allegations in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. *See, e.g., Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 246 (6th Cir. 2012). A court cannot dismiss

[2] In addition, when policyholders or independent automobile glass repair shops contact Safelite Solutions about a Long Crack repair, Safelite Solutions only offers to pay the repair shop the same reimbursement as for a chip repair (often at or below $65-75) and misrepresents to the insured (and to the shop) that such a rate is the "prevailing rate" for all repairs (*including* Long Crack repairs). ¶¶124-25. Long Cracks are more expensive to fix than chips due to the need to purchase specialized equipment and resins, and increased material. *Id.* Safelite's misrepresentations about the "prevailing rate" damage Plaintiffs by suppressing the market for Long Crack repair. ¶126

simply because it suspects a plaintiff cannot prove the claims in the complaint. *Zaluski v. United American Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Unless a plaintiff "undoubtedly can prove no set of facts in support of [its] claims that would entitle [the plaintiff] to relief," dismissal is improper. *Severe Records, LLC v. Rich*, 658 F.3d 571, 578 (6th Cir. 2011). Accordingly, a complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," but rather need only "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

ARGUMENT

I. The Lanham Act under *Lexmark*

The Lanham Act provides a private right of action to a business whenever a competitor or another market participant disseminates a false or misleading description of products or services that causes a commercial harm. Section 43(a) of the Lanham Act extends broadly to any "false or misleading description of fact, or false and misleading representation of fact" that "misrepresents the nature, characteristics, qualities, or geographic origin of [the advertiser's] or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1)(B). The Lanham Act "is broadly construed to provide protection against a variety of deceptive commercial practices, including false advertising and promotion." *LidoChem, Inc. v. Stoller Enters.,Inc.*, 500 F. App'x. 373, 379 (6th Cir. 2012) ("*LidoChem*") (reversing summary judgment).

In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) *("Lexmark")*, the Supreme Court clarified a split amongst the Circuit Courts and liberalized the test for standing in Lanham Act false advertising cases, removing any notion that a Lanham Act plaintiff must be a direct competitor to the defendant. In that case, Static Control and Lexmark were not direct competitors. *Lexmark*, 134 S. Ct. at 1384. Lexmark made toner cartridges and Static Control made microchips used by companies who refurbished Lexmark's toner cartridges.

The Supreme Court held that a plaintiff asserting false advertising claims under the Lanham Act have standing when the plaintiff's "interests fall within the zone of interests

protected by the law invoked." *Id*. at 1388. And, that "to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales." *Id*. at 1390. In addition, a plaintiff must also adequately plead that its injuries "are proximately caused by violations of the statute." *Id*. at 1390. The Supreme Court further stated that proximate cause exists where "a plaintiff suing under §1125(a) … show[s] 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 (emphasis added).

II. Plaintiffs Have Standing to Pursue Lanham Act Claims under *Lexmark*

Defendants' arguments that Plaintiffs lack standing to assert Lanham Act claims have no merit. *See* Defendants' Memorandum in Support of Motion to Dismiss ("Def. Mem.") at 8. Contrary to Defendants' arguments, Plaintiffs are asserting claims for injuries to their "commercial interests and reputation" caused by Defendants false advertising—not the injuries to the public. Plaintiffs have standing to pursue claims for lost profits and future profits, and Plaintiffs have adequately plead that Defendants' Lanham Act violations proximately caused these injuries.

A. Plaintiffs meet the "zone of interests" test.

Plaintiffs' claims "fall within the zone of interests protected by" the Lanham Act because Plaintiffs "allege an injury to a commercial interest in reputation or sales." *Lexmark*, 134 S. Ct. at 1388-90. Recognizing this, Defendants mischaracterize Plaintiffs' claims by creating a chart, selecting a snippet of the allegations (¶¶146-47, 150-52) out of the Claim for Relief section of the Complaint. Defendants then mischaracterize such statements as Plaintiffs' "core" claims to make it appear as though a large portion of Plaintiffs' claims are premised solely on harm to the public. Def. Mem. 7-8. Defendants' attempt to distract the Court from Plaintiffs' true core allegations is as misleading as it is obvious.

For example, in their chart, Defendants ignore ¶¶139-45, directly preceding the allegations Defendants list in their chart, as well as ¶148, which all detail Safelite's Lanham Act

violations. As described in these paragraphs (as well as in the remainder of the Complaint), Plaintiffs' core claims are that, in the course of advertising or promotion, Safelite falsely and/or misleadingly states that: (i) a windshield must be replaced when a crack is longer than six inches –contrary to the ROLAGS; (ii) it is "unsafe" to repair a crack longer than six inches—contrary to the ROLAGS; and (iii) that Safelite's windshield replacements are as safe and reliable as repaired factory-installed windshields.[3] Safelite does not even mention the word "ROLAGS," which indisputably demonstrates the falsity of their statements. Defendants' deliberate refusal to acknowledge Plaintiffs' true "core" allegations underscores the fatal weakness of their arguments.

Regarding the Lanham Act "zone of interest" prong, contrary to Defendants' arguments, Plaintiffs are not acting as a "vicarious avenger of the public" injured by Safelite's indisputably false statements. Def. Mem. 8. Instead, Plaintiffs allege damage to their commercial interests and reputation. *See, e.g.*, ¶¶11, 67-83, 127-38, 139-45, 148, 150-52. Indeed, Defendants contradict themselves at Section II.C. of their brief, recognizing that Plaintiffs plead commercial harm to their business, not harm to the public. Def. Mem. 5-6.

Plaintiffs compete in the same market as Safelite—both provide products and services to VGRR businesses and, independently, provide VGRR services to consumers. ¶¶12-20. Indeed, though it is not necessary under *Lexmark* that Plaintiffs and Defendants be "direct competitors," Plaintiffs and Safelite are direct competitors in the sense that Plaintiffs' products offer one solution for windshield cracks that are six to fourteen inches long (repair), while Safelite offers a different solution (replacement). By comparison, in *Lexmark*, Static Control simply manufactured a microchip that "could mimic the microchip" Lexmark made which allowed "remanufacturers … to refurbish and resell used" proprietary Lexmark cartridges. *Lexmark*, 134 S. Ct. at 1384. Regardless of whether Plaintiffs and Safelite are "direct" competitors, which is not required under *Lexmark*, Plaintiffs are within the "zone of interests" protected by the Lanham

[3] *See* ¶¶ 90-126, ¶¶127-38, incorporated by reference at ¶139.

Act because they have suffered an injury to a commercial interest in sales and reputation relating to the repairs of Long Cracks in the VGRR industry. *Id*. at 1390.

Safelite also violates the Lanham Act by misrepresenting the nature of its goods by implying that Safelite's windshield replacements are as safe and reliable as factory-installed windshields that have been repaired. Safelite, however, admits internally that "nothing can duplicate the factory seal of the original windshield." ¶121. These are classic Lanham Act violations. *See, e.g., Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 477, 461 (5th Cir. 2001) (rejecting defendant's argument that plaintiff patent holder lacked standing because he was not a competitor, stating "it is clear that [plaintiff] has a direct business interest in the sales of spiral sliced meats. Moreover, his ability to license his spiral slicing method to others may have been directly affected by [defendant's] false advertising offering spiral sliced products.").

In addition, Safelite argues that Plaintiffs lack standing to pursue damages for lost sales related to the 2012 Patent. Def. Mem. 8-9. In the Complaint, Plaintiffs describe the 2012 Patent expressly alleging that "because of the lost profits and destruction of the Long Crack repair market via Safelite's material misrepresentations and omissions, UB has been unable to bring this more advanced technology to market." ¶¶71, 83, 135-37. Such losses are plainly recoverable under the Lanham Act. *See, e.g., Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 997 F.2d 949, 953-54 (D.C. Cir. 1993) (rejecting defendant's argument that lost profits based on plaintiff's inability to enter the market were too "speculative," stating that "ALPO would have expanded nationally but was stymied by Ralston's false advertisements."); *Princeton Graphics Operating v. NEC Home Elec. Inc.*, 732 F. Supp. 1258, 1264 (S.D.N.Y. 1990) (rejecting argument that plaintiff lacked standing under the Lanham Act, although its monitor had not yet entered the market).

This is especially true here because the products used to repair Long Cracks under the 2012 Patent are simply a continuation of Plaintiffs' earlier patented Long Crack repair products which Plaintiffs have marketed. Plaintiffs adequately allege that Defendants' misconduct caused them to "delay marketing and selling" the improved, patented Long Crack repair method

(¶152)—not that Plaintiffs are not ready to do so absent Defendants' misconduct. *Lexmark*, 134 S. Ct. at 1389-90 (stating that Lanham Act false advertising cause of action protects against "unfair competition," which is "concerned with injuries to . . . present and future sales") (emphasis added); *See also Par Sterile Products, LLC v. Fresenius Kabi USA LLC*, 2015 U.S. Dist. LEXIS 32409 at *7 (N.D. Ill. March 17, 2015) (rejecting defendant's argument that plaintiff "has no standing to bring a Lanham Act claim because it has not yet begun to sell" its product.).

The cases relied on by Defendants are either irrelevant or actually support Plaintiff's claims. Def. Mem. 9. Defendants' reliance on *Platinum Sports Ltd. v. Snyder*, 715 F.3d 615 (6th Cir. 2013), is especially perplexing. That case involved claims by a strip club complaining about a violation of its free speech rights, which has nothing to do with Lanham Act claims.[4]

B. Plaintiffs adequately plead proximate cause.

Defendants spend over five pages—again selectively citing to the Complaint—to make a tortured argument based on a misleading reading of *Lexmark* to argue that Plaintiffs do not adequately plead proximate cause. Def. Mem. 16-21. Other than *Main Springs*, distinguished *supra*, Defendants do not cite any other authority to support their argument. However, it is well-settled that "*evidence* of injury" is not necessary to survive a motion to dismiss. *Lexmark*, 134 S.Ct. at 1395 (emphasis in original). Proximate cause is a question of fact that is normally not appropriately resolved on a motion to dismiss. *See, e.g., In Re: Syngenta Ag Mir 162 Corn Litig.*, 2015 U.S. Dist. LEXIS 124087 at *277 (D. Kan. Sept. 11, 2015) (analyzing *Lexmark*, stating "[p]laintiffs have at least alleged a plausible claim that [defendant's] false and misleading

[4] Defendants' reliance on its other cases is equally flawed. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105 (2d Cir. 1997), held that "a future 'potential for a commercial or competitive injury' can establish standing," but found that plaintiff and defendant were "not competitors for purposes of Lanham Act standing." *Id*. at 1112 (emphasis added). And, unlike this case, *Maine Springs, LLC v. Nestle Waters North America*, 2015 U.S. Dist. LEXIS 33259 (D. Me. March 18, 2015), held that the "[c]omplaint does not allege that Maine Springs has ever marketed any bottled water or that it is prepared to sell bottled water at this time." *Id*. at *15 (emphasis added).

statements caused [the] sales of [its products] which in turn caused contamination [of plaintiff's products]… because proximate cause ordinarily presents a question of fact, the Court cannot conclude as a matter of law at this stage that plaintiffs' injuries were not fairly traceable to or proximately caused by [defendant's] conduct.").[5] Here, Plaintiffs properly allege that Defendants' false and misleading statements proximately caused their injuries.[6]

First, Safelite selectively quotes the standard for pleading loss causation under *Lexmark* and ignores the Court's elucidation of that standard that immediately follows. That guidance eviscerates Defendants' entire follow-on argument on pages 18-21 of their brief. Specifically, Safelite relies on *Lexmark*, stating that a plaintiff:

> 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. That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff.

Id. at 1391 (emphasis added). Def. Mem. 17.

However, Defendants conveniently ignore the sentence that immediately follows which explains:

---

[5] *See also The Hershey Co., v. Friends of Steve Hershey*, 2015 U.S. Dist. LEXIS 22789 at *14 (D. MD. Feb. 26, 2015) (analyzing *Lexmark*, stating that "[i]n the complaint, Hershey pled damage to their goodwill and reputation. . . Although this may not be sufficient to ultimately succeed on their § 1125(a) claim, it is enough to survive a motion to dismiss before discovery."); *Marten Transp. Ltd. v. Platform Advertising, Inc.*, 2015 U.S. Dist. LEXIS 8985 at *10 (D. Kan. Jan. 26, 2105) (analyzing *Lexmark*, stating "plaintiff has argued that such confusion could increase the use of defendant's websites among plaintiff's competitors, which could in turn increase traffic to those sites and reduce traffic to sites listing plaintiff's openings . . . . Arguments relating to proximate cause are more appropriately considered at the summary judgment stage or at trial.").

[6] Defendants contend that Plaintiffs "acknowledge" the UB Long Crack repair process is "more expensive," and imply that this is the reason why UB has not been more successful in selling its products. Def. Mem. 3. Defendants ignore that the Complaint states that while "Long Cracks are more expensive to fix than chips" (¶125), this pricing disparity is irrelevant to Plaintiffs' claims about windshield replacement, which is far more expensive than Long Crack repair. ¶¶41-42, 133.

> [f]or example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's 'inability to meet [its] financial obligations.'

Id. (emphasis added).

Here, Plaintiffs and Defendants are both in the VGRR industry. Plaintiffs are not the equivalent of a complaining competitor's "landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's 'inability to meet [its] financial obligations.'" *Id*. Indeed, Defendants unwittingly demonstrate that Plaintiffs meet this standard; *i.e.*, that Defendants' "deception of consumers causes them to withhold trade from" Plaintiffs. *Id*. Specifically, Defendants' summary states in part: "[1] Safelite follows insurance company scripts that [deceptively] inform policyholders not to repair long cracks. [2] Therefore policyholders choose glass replacements instead of long crack repair… [7] [Absent Defendants' false and misleading statements], Plaintiffs would sell more licenses and products to some of these shops, who would undoubtedly turn to Plaintiffs for their long crack repair needs." Def. Mem. 16-17. Defendants' rendition **is** the standard under *Lexmark* to adequately plead proximate cause.

In *Bern Unlimited, Inc. v. The Burton Corp.*, 25 F. Supp. 3d 170 (D. Mass. 2014), the court faced similar arguments as Defendants make here. Analyzing *Lexmark* in connection with a defendant's counterclaim under the Lanham Act, the court rejected the argument that defendants did not plead proximate cause stating that defendants:

> allege that plaintiff's false advertising deceived customers, which resulted in increased sales for plaintiff and decreased sales for defendants. Assuming those allegations are true, defendants suffered harm directly caused by plaintiff's false advertising. The counterclaims therefore allege sufficient facts to state a claim for false advertising under the Lanham Act.

Id. at 184 (emphasis added).[7]

[7] *See also Logan*, 263 F.3d at 461, discussed *supra*.; *Greater Houston Transp. Co. v. Uber Tech., Inc.*, 2015 U.S. Dist. LEXIS 28867 *19-20 (S.D. Tex. March 10, 2015) (stating "[w]hile Plaintiffs have not offered the precise amount of business they have lost, they have alleged that

Second, though Plaintiffs adequately plead proximate cause based solely on the above allegations, Plaintiffs' other allegations bolster causation as well. Those additional allegations, ignored by Defendants, are found at ¶¶104, 127-38 ("Safelite Has Caused Ultra Bond Significant Damage Due To Its Misrepresentations and Nondisclosures Concerning Long Crack Repair"), and at ¶¶146, 148, 150-52 ("Claim for Relief"). Defendants' selective citation to the Complaint at ¶¶2, 14, 92-93, 130-31, is as obvious as it is damning. Def. Mem. 17. For example, Defendants completely ignore any causation allegations in Claim for Relief section. There, Plaintiffs expressly plead, based on customer surveys, that "80-90% of total replacements could in fact have been repaired had the market for Long Crack repair not been suppressed and negatively impacted by Safelite's misrepresentations and nondisclosures," which is evidence of causation that Defendants apparently don't want the Court to consider. ¶¶133, 148.[8]

Plaintiffs also adequately plead proximate cause in connection with Safelite's false representations about its products, *i.e.*, that its aftermarket replacement windshields—which require breaking the factory seal of the original windshield—are as safe and reliable as repairing a factory-installed windshield. ¶¶120-21. However, Safelite admits the truth in its internal documents—that replacement is not as safe or reliable as repairs. *Id*. Defendants' false statements about its products are alleged to have harmed Plaintiffs by "result[ing] in increased

---

Defendants' misrepresentations sway consumers of vehicle-for-hire services to use their services, resulting in damage to competing transportation services, such as Plaintiffs.").

[8] Defendants also argue (incorrectly) that in *Lexmark* the Supreme Court required close to a 1:1 relationship between lost sales and the misrepresentations. Def. Mem. 18-20. The Supreme Court did not make any such sweeping qualification to the proximate cause standard it had just enunciated. Rather, the Court simply discussed the particular facts of the parties' relationship. *Lexmark*, 134 S. Ct. at 1394; *see also Greater Houston*, 2015 U.S. Dist. LEXIS 28867 *19-20 (rejecting defendant's argument that proximate cause would be too "speculative" because plaintiffs were not the only injured competitors.). However, as discussed above, Plaintiffs do plead close to a 1:1 relationship —which Defendants ignore—in alleging that 80-90% of customers would chose Long Crack repair if they had been told the truth. ¶¶133, 148.

sales for [Safelite] and decreased sales for [Plaintiffs]." *Bern Unlimited*, 25 F. Supp. 3d 170 at 184.[9]

III. Safelite's Arguments that the Lanham Act Does Not Otherwise Apply to Plaintiffs' Claim Is Contrary to Established Law

As explained above, Plaintiffs clearly plead an actionable claim under the Lanham Act under *Lexmark*. However, Safelite makes four other scattershot arguments in support of its motion that: (i) the alleged misstatements are not "commercial advertising or promotion"; (ii) Safelite acts as an agent for insurers for purposes of the Lanham Act; (iii) there is no allegation that Safelite made any representations about Plaintiffs' or their products; and (iv) the Lanham Act does not require Safelite to promote Plaintiffs' products. Def. Mem. 9. These arguments have no merit.

A. *LidoChem* supports denial of Defendants' motion.

It is well-settled that "the 'commercial speech' covered by the Lanham Act extends beyond the classic advertising campaign into other forms of promotion used to influence consumers to purchase goods or services… Speech does not have to resemble a typical advertisement to be commercial." *LidoChem*, 500 F. App'x. at 379 (reversing summary judgment) (citations omitted). Defendants' arguments that their false and misleading statements on their website and in their scripts used by Safelite's CSRs do not constitute "commercial advertising or promotion" under *LidoChem* either have no basis in law or mischaracterize Plaintiffs' claims.

First, Defendants reliance on the entire four-part test enunciated in *LidoChem* is incorrect. The second element articulated in *LidoChem*, that the statement be made "by a defendant who is

---

[9] Plaintiffs also adequately plead damage to their "reputation" in connection with Safelite's CSR scripts, by which CSRs falsely tell insurance customers that repairing a windshield crack longer than six inches is not safe, is unlikely to hold, or will compromise the structural integrity of the windshield. ¶102. Defendants are, for all intents and purposes, stating that Plaintiffs' products and services are unsafe and unsound. ¶104. As the Court stated in *Lexmark*, "when a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant's aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage." *Lexmark*, 134 S. Ct. at 1394 (emphasis added).

in commercial competition with plaintiff," argued by Defendants here, no longer applies. Def. Mem. 10. *Lexmark* expressly rejected the "direct competitor" test. *Id.* at 1391; *see also Healthnow New York, Inc. v. Catholic Health System, Inc.*, 2015 U.S. Dist. LEXIS 129656 at *9 (W.D.N.Y. Sept. 26, 2015) ("'competitors' requirement [of this four-part test] was firmly closed by the Supreme Court's decision in *Lexmark*"); *Educational Impact, Inc. v. Danielson*, 2015 U.S. Dist. LEXIS 9467 at *37-38 (D.N.J. Jan. 28, 2015) (same).

Next, Defendants' argument that Plaintiffs "fail element (3) of the *LidoChem* test because, when Safelite Solutions makes statements as a third party administrator, it is not for the purpose of influencing the policyholders to buy Safelite products" is not only false but is directly contradicted by the sworn testimony of Safelite's corporate representative. Def. Mem. 11. First, Defendants do not address the false and misleading statements made on Safelite's website in their argument and thus concede this element for those statements. ¶¶117-22. Second, the Complaint details how Safelite uses its scripted false and misleading statements to promote Safelite's products and services to millions of consumers (¶¶54-65, 90-116) and even compels CSRs to process insurance claims by having Safelite shops install Safelite's non-OEM ARG windshields. ¶103.

Furthermore, Safelite's corporate representative admitted, under oath, that Safelite uses these scripts to direct customers to buy Safelite's products and services. Specifically, in *Safelite Group Inc. v Jespen*, (referred to at ¶101 n.4), Safelite sought a preliminary injunction challenging the constitutionality of a Connecticut law targeting the same scripts at issue here. That law, known as an "anti-steering" law, required Safelite to change its scripts to "prohibit Safelite from informing its insurance customers' policyholders about Safelite-owned [VGRR] shops unless Safelite simultaneously recommends another local glass repair shop."[10] Safelite argued that the law infringed upon its First Amendment right to engage in "commercial speech."

[10] Safelite's Memorandum In Support of Motion for Preliminary Injunction. *See* Exhibit A at 1. The Court may take judicial notice of this document as it is expressly referenced in the Complaint.

That filing included the declaration of Brian O'Mara, Safelite's VP, National Contact Center Operations (the "O'Mara Decl."). O'Mara testified that Safelite uses these scripts to "include a recommendation to Safelite AutoGlass." O'Mara Decl. ¶11 (attached as Exhibit B). O'Mara testified further that "[i]f Safelite AutoGlass shops deliver poor customer service, it will certainly impact the insurer's decision to utilize Safelite Solutions as its third party administrator of vehicle glass claims, resulting in a decrease in referrals to Safelite AutoGlass [and] undoubtedly affect the customers' willingness to accept a recommendation to use Safelite AutoGlass." *Id*. at ¶12. For Safelite to argue here that the scripts are not "for the purpose of influencing the policyholders to buy Safelite products" is, at best, disingenuous.

Lastly, Defendants' argument that Plaintiffs' "allegations also fail element (4) of the standard adopted in *LidoChem* because the statements are not alleged to have been 'disseminated sufficiently to the relevant purchasing public' to constitute advertising or promotion in the industry" is without merit. Def. Mem. 11-12. First, Defendants argue that "Plaintiffs identify neither the source of these statements, which Defendant made them, nor when the statements appeared … [or that they] were actually viewed" by consumers." Def. Mem. 12 n.3. In making this erroneous argument, Defendants ignore the allegations in the Complaint where Plaintiffs specifically identify the web address and statements from Safelite's website. ¶¶117, 120. The Complaint further goes on to expressly state that the statements are "current" or uses the present tense. And there is not any requirement under the Lanham Act for Plaintiffs to plead which consumers viewed Safelite's website. These false statements are clearly actionable under the Lanham Act. *See, e.g., Cross, Inc. v. Zerbonia*, 2010 U.S. Dist. LEXIS 103173 at*32-33 (N.D. OH. Sept. 29, 2010) (statements from Defendants' website actionable under the Lanham Act).[11]

The Complaint also adequately pleads that Safelite uses its scripts to disseminate false and misleading information to the market of insurance consumers seeking windshield repair.

[11] *See also Marten Transp,* 2015 U.S. Dist. LEXIS 8985 at *10 (same); *Advanced Fluid Systems, Inc. v. Huber*, 28 F. Supp. 3d 306, 334 (M.D. Pa. 2014) (concluding websites are a medium of advertising under the Lanham Act stating "[a]n internet website is a broad advertising medium, offering wide-ranging and instantaneous dissemination of the false information.").

Safelite Solutions is the nation's largest TPA, currently serving more than 175 insurance and fleet companies, and handling at least 40% of all insurance VGRR claims reported per year across the entire United States. ¶¶2, 18, 61, 65. The scripts used by the CSRs make uniform false and misleading statements to millions of customers each year, who usually have to pay out of their own pocket for windshield replacements. ¶¶4-6, 20, 49, 95-96, 100-104, 108-13, 116. Safelite's use of these scripts constitutes sufficient dissemination to the market to be actionable under the Lanham Act. *LidoChem*, 500 F. App'x. at 379-80 ("[t]he required level of dissemination to the relevant purchasing public 'will vary according to the specifics of the industry.' … The 'touchstone' is whether the 'contested representations are part of an organized campaign to penetrate the relevant market.'") (citing *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1386 (5th Cir. 1996) (presentation to 11 reps out of market of 74 reps "disseminated sufficiently to the relevant purchasing public to constitute 'advertising" or "promotion'").[12]

B. Safelite's remaining arguments are without merit.

Safelite's remaining arguments are equally without merit. First, Safelite argues that it cannot be liable for its false and misleading statements in its scripts because the insurance companies that Safelite services are to blame for those statements. Def. Mem. 13. Safelite proclaims, without any legal support, that "[t]his is not the sort of thing that can be redressed by Plaintiffs against Safelite under the Lanham Act." *Id*. Safelite's "who, me?" defense is baseless.

The plain text of the Lanham Act directly contradicts Safelite's argument stating: "Any person who … in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities … of his or her or another person's goods, services, or commercial activities, shall be liable" under the Act. 15 U.S.C. § 1125(a)(1)(B) (emphasis added). Safelite disseminates the

[12] None of the cases Defendants rely on support their argument. *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803-04 (7th Cir. 2001), dealt with "negotiations between[the defendant] and particular hospitals—negotiations handled in private, among business executives and lawyers" and further the plaintiff did "not established that any of [defendants'] statements was false or even misleading."); *Am. Needle & Novelty, Inc. v. Drew Pearson Mktg., Inc.*, 820 F. Supp. 1072, 1078 (N.D. Ill. 1993) ("single private correspondence").

false and misleading statements, and is promoting its own products and services in connection with those scripts. And, contrary to Safelite's misleading argument that it is an innocent conduit for the false and misleading language in the scripts, Safelite's representative testified in the Connecticut action that "the CSRs communicate with policyholders through scripted language that Safelite develops in conjunction with each insurance provider." O'Mara Decl. ¶8. Whether or not Safelite initially answers the phone on behalf of the insurance company, the scripts are an attempt by them to sell their goods and services to consumers who usually have to pay out of their own pocket for the windshield replacement. ¶¶6, 49, 108-09.

Second, Safelite argues that "Plaintiffs do not challenge any factual statement that concerns 'the nature, characteristics, qualities, or geographic origin' of Plaintiffs' products or services." Def. Mem. 14. Safelight also argues that its statements to consumers that Long Crack repairs are "unsafe" or that its "replacement windshields are equivalent to original windshields" are not actionable because they are purportedly "highly generalized" statements that "say nothing about Plaintiffs or their products." *Id.* To argue that Defendants' statements at issue here are "highly generalized" strains credulity. It doesn't get much more specific than: (i) falsely telling consumers that if the windshield crack is longer than six inches, the windshield "must be replaced"; (ii) saying it is "unsafe" to repair a windshield crack over six inches; and (iii) depicting a robot installing a windshield at the factory and claiming "[t]hat precision inspired us to create our exclusive True Seal Technology which consistently places the new glass in perfect position for a strong reliable bond." Safelite's argument that such statements are too "highly generalized" is not credible.

Moreover, there is no requirement that the Defendants specifically reference Plaintiffs or their products by name to violate the Lanham Act, nor do Defendants cite any authority for that proposition.[13] Falsely stating that a windshield over six inches cannot be repaired, and that it's

[13] The cases cited by Defendants do not relate to naming a plaintiff's product. For instance, in *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 308 (S.D.N.Y. 2011), the court found that a statement about authorship was not a statement about nature, characteristics, qualities, or geographic origin at all –the case did not relate to naming a company by name. Similarly, in

unsafe and unreliable to do so, says all it has to about UB's products characteristics and quality to be actionable. And Plaintiffs do not allege that Defendants must expressly "inform policyholders about the alleged relative merits of Plaintiffs' products and services." Def. Mem. 15-16. But their false and/or misleading statements and omissions that injure Plaintiffs' commercial interests and reputation are actionable. *See, e.g., Trekeight, LLC v. Symantec Corp.*, 2006 U.S. Dist. LEXIS 100609 at *17-18 (S.D. Ca. May 23, 2006) ("[A] statement is actionable under § 43(a) if it is affirmatively misleading, partially incorrect, or ***untrue as a result of failure to disclose a material fact***.") (quoting J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:65 (2006)) (emphasis in original).[14]

IV. Laches Is Not Appropriately Resolved on a Motion to Dismiss

Defendants' laches argument raises a number of fact issues that confirm long standing precedent that laches is not appropriately resolved on a motion to dismiss. Def. Mem. 21-22. "Because [laches is] 'inherently fact specific,' district courts throughout this circuit and others have found that challenges to an action based on the doctrine of laches are "'not amenable to dismissal at the pleading stages.'" *Westfield Ins. Co. v. Tosh*, 2013 U.S. Dist. LEXIS 42970 at *9 (W.D. Ky. March 27, 2013) (collecting cases). Laches "involves more than the mere lapse of time and depends largely upon questions of fact… and a motion to dismiss generally is not a useful vehicle for raising the issue.'" *Id*. at *8-9, quoting 5 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, Federal Practice & Procedure § 1277 (3d ed.).

CMH Mfg., Inc. v. U.S. GreenFiber, LLC, 2013 U.S. Dist. LEXIS 91914, at *2 (E.D. Tenn. July 1, 2013), the claim failed because the alleged misrepresentation was not about the quality of the plaintiff's product.

[14] Any the omission by Safelite regarding Long Crack repair is part and parcel with Defendants' misrepresentation that cracks longer than six inches cannot be repaired because in either instance Safelite falsely states, misleads or implies that Long Crack repair is not feasible. "[W]here an advertisement becomes untrue or is affirmatively misleading as a result of a competitor's failure to disclose a material fact, an actionable Lanham Act violation may arise."). *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 915 F. Supp. 360, 366 (S.D. Fla. 1996). Safelight's reliance on *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 710 (M.D. Pa. 2006), is not relevant as the court merely held that advertising could be used for persuasion, not that an advertiser could utter blatant falsehoods as Defendants do here.

Regardless, laches "does not bar injunctive relief." *Kellogg v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000).

Further underscoring why laches is not appropriately decided on a motion to dismiss is that it is a rebuttable presumption which can be defeated by "'(1) rebu[ting] the presumption of prejudice; (2) establish[ing] that there was a good excuse for its delay; or (3) show[ing] that the defendant engaged in 'particularly egregious conduct which would change the equities significantly in plaintiff's favor.'" *Laukus v. Rio Brands, Inc.*, 391 Fed. Appx. 416, 422 (6th Cir. 2010) (citing McCarthy on Trademarks and Unfair Competition, § 31:29 (collecting cases holding time delays of between three months and thirteen years not sufficient for laches defense)). A myriad of fact issues are present here.

First, Defendants incorrectly argue that this case is "nearly identical" to the allegations in *Campfield v. State Farm Mut. Auto Ins. Co.*, 532 F.3d 1111 (10th Cir. 2008). Def. Mem. 3, 22. Neither the Lanham Act nor Safelite's actions were at issue in that litigation. And, unlike this case, the Tenth Circuit upheld the dismissal of Mr. Campfield's claim because there were no industry standards (*i.e.*, ROLAGS) concerning windshield repair. *Id*. at 1121. Second, Campfield was awarded in a new patent in 2012 and the ROLAGS were updated just recently in 2014. ¶¶71, 88. Third, whether Defendants have been unduly prejudiced by any purported delay in filing this action is a fact issue. As Defendants allude to in their Introduction, there is a long history between Safelite and Campfield which will be relevant to whether laches is appropriate.

Safelite also ignores that both Safelite and Campfield sat on the committee of industry representatives that approved the ROLAGS. ¶105, Ex. D Foreword at p. iii. Safelite indisputably knows the falsity of its statements at issue and yet continues to make these false and misleading statements.[15] Finally, the egregiousness of Defendants' misconduct cannot be

[15] *Axcan Scandipharm Inc. v. Ethex Corp.*, 585 F. Supp. 2d 1067, 1082 (D. Minn. 2007) ("In other words, if the Defendants' conduct would have been the same regardless of whether Axcan sued earlier, then they cannot demonstrate any "change" in their position as a result of Axcan's delay and, hence, they cannot demonstrate prejudice.").

overstated. In addition to damaging Plaintiffs, Defendants not only willfully bilked hundreds of millions of dollars from consumers, they also admittedly endangered their safety by unnecessarily breaking the factory seal on the windshield to replace it for ill-gotten profits. *See Wilcox Associates, Inc. v. Xspect Sols.*, 2009 U.S. Dist. LEXIS 87902, at *5 (E.D. Mich. Sept. 24, 2009) (accepting allegation of willful behavior as sufficient for pleading egregious conduct). In short, at a minimum, it is premature to determine whether laches should apply. But, if the Court finds that laches applies, Plaintiffs have rebutted the presumption of prejudice.[16]

CONCLUSION

Therefore, Defendants' Motion to Dismiss (Doc. 25) should be denied.

Respectfully submitted,

s/ Drew Legando

Drew Legando (0084209)
Jack Landskroner (0059227)
LANDSKRONER GRIECO MERRIMAN LLC
1360 West 9th Street, Suite 200
Cleveland, Ohio 44113
T. (216) 522-9000
F. (216) 522-9007
E. drew@lgmlegal.com
jack@lgmlegal.com

Kurt B. Olsen, Esq.
KLAFTER OLSEN & LESSER, LLP
1250 Connecticut Ave., NW, Suite 200
Washington DC 20036
T. (202) 261-3553
F. (202) 261-3533
E. ko@klafterolsen.com

Fran L. Rudich, Esq.
KLAFTER OLSEN & LESSER, LLP
Two International Drive, Suite 350
Rye Brook, New York 10573
T. (914) 934-9200

[16] Defendants' reliance on *Cataldo v. US Steel Corp.*, 676 F.3d 542 (6th Cir. 2012), is misplaced. Not only is that case not a Lanham Act claim, it did not involve laches, or a continuing wrong as in this case.

F. (914) 934-9220
E. fran@klafterolsen.com

Peter R. Kahana, Esq.
Michael Kane, Esq.
Y. Michael Twersky, Esq.
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
T. (215) 875-3000
F. (215) 875-4604
E. pkahan@bm.net, mkane@bm.net, mitwerseky@bm.net

Counsel for Plaintiffs

PROOF OF SERVICE

A copy of this document was served by the Court's ECF System on counsel of record on December 15, 2015, pursuant to Fed. R. Civ. P. 5(b)(2)(E).

Signed by,

s/ Drew Legando
Drew Legando (0084209)