

Case No. 24-1678

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

SINGH RX, PLLC *d/b/a* SRX SPECIALTY CARE PHARMACY *and*  
AMAN DEEP SINGH,  
*Plaintiffs-Appellants,*

— v —

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA *and*  
AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,  
*Defendants-Appellees,*

*and*

JANSSEN SCIENCES IRELAND UNLIMITED COMPANY, JANSSEN PRODUCTS, LP, *and*  
JOHNSON & JOHNSON, *an interested party,*  
*Defendants.*

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On appeal from the United States District Court  
for the Eastern District of Michigan  
Case No. 2:22-cv-12732

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**Selective Insurance Company of South Carolina's  
Appellee Brief**

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January 10, 2025

## Corporate Disclosure

Under 6th Cir. R. 26.1, Defendant-appellee Selective Insurance Company of South Carolina answers the following questions:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list the identity of the parent corporation or affiliate and the relationship between it and the named party.

Yes. Selective Insurance Group, Inc, is the ultimate parent corporation of Defendant-Appellee Selective Insurance Company of South Carolina.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

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Dated: January 10, 2025

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### **Statement Regarding Oral Argument**

Selective Insurance Company of South Carolina does not believe that this appeal warrants oral argument. This case is a coverage dispute with settled facts. It merely involves interpreting defined words in an insurance policy under established law. Nevertheless, if the Court grants plaintiffs-appellants' request for oral argument, then Selective Insurance Company of South Carolina requests to be heard as well.



### **Statement of Jurisdiction**

Selective Insurance Company of South Carolina agrees that this Court has jurisdiction over this appeal.

## Counter-statement of Questions Presented

### I.

The Selective insurance policies provide liability coverage for injuries caused by an insured's libel, slander, disparagement, or advertisement. The policy defines *advertisement* as a notice that is broadcast to the general public to attract more customers. Michigan interprets the word *broadcast* as the widespread dissemination of information using media platforms like billboards or television.

Here, Singh Rx filled individual prescriptions with counterfeit HIV pills in bottles labelled SYMTUZA<sup>®</sup>. Singh Rx didn't libel, slander, or disparage SYMTUZA<sup>®</sup> or its manufacturer Janssen. And it didn't *broadcast* anything to the general public. Nor does Janssen allege any of those things.

Is there arguable coverage under the policies that would require Selective to defend Singh Rx.

Selective Insurance answers: No.

This Court should answer: No.

Singh Rx and Singh answer: Yes.

*The district court didn't answer and resolved the case under an exclusion.*

II.

The Selective insurance policies broadly exclude coverage for personal and advertising injuries caused by rendering services in the practice of pharmacy. Michigan defines the *practice of pharmacy*, in part, to mean the clinical application of dispensing drugs for the maintenance and management of health.

Here, Janssen's injuries arose from Singh Rx's clinical application of purchasing and dispensing counterfeit SYMTUZA<sup>®</sup> for the prevention of illness and management of HIV.

Does the professional-services exclusion bar coverage?

Selective Insurance answers: Yes.

The district court answered: Yes.

This Court, if it reaches  
this issue, should answer: Yes.

Singh Rx and Singh answer: No

## **Counter-Statement of the Case**

### **A. Aman Singh opened Singh Rx in 2018.**

Aman Singh possesses a doctor of pharmacy and is a licensed pharmacist in the State of Michigan. *Singh Deposition*, RE 60-2, Page ID # 1899. In 2018, he opened a pharmacy located in Royal Oak, Michigan, called Singh Rx, PLLC. *Id.* Singh manages the business and is also the pharmacist in charge. *Singh Deposition*, RE 60-2, Page ID # 1904-1905.

In those roles, he handles inventory, pays bills, runs payroll, checks the mail, contracts with insurance companies, purchases medication, verifies prescriptions, counsels patients, and distributes medication. *Id.*

### **B. Michigan investigated Singh Rx for oxycodone violations.**

In 2018, oxycodone 30 mg comprised almost 80% of Singh Rx's total controlled substance prescriptions—73% of which went to patients with addresses in Detroit, Michigan. *Administrative Complaint*, RE 60-3, Page ID # 1934-1935. In 2019, Singh Rx dispensed more oxycodone 30 mg than 90% of all other pharmacies in Michigan. *Id.* at Page ID # 1934. Two of the doctors for whom Singh Rx filled prescriptions were indicted and charged for

running a \$41 million illegal opioid distribution conspiracy. *Id.* at Page ID # 1937.

In 2020, the State of Michigan Board of Pharmacy investigated Singh Rx and issued a complaint for numerous state-law violations regarding the pharmacy's handling and reporting of oxycodone distribution. *Id.* at Page ID # 1932-1940.

In August 2021, the parties entered into a consent judgment. *Consent Order*, RE 60-4, Page ID # 1942-1946. The State of Michigan placed Singh Rx on a two-year probation and subjected it to six unannounced inspections. *Id.* at Page ID # 1943.

### **C. Singh Rx sold counterfeit HIV medication.**

Around that same time in the summer of 2021, Singh Rx purchased bottles of pills labelled SYMTUZA® from a wholesaler called Safe Chain Solutions. *Singh Deposition*, 60-2, Page ID # 1914, 1916; *Singh Declaration in Opposition to Show Cause Order*, RE 60-11, Page ID # 1984. SYMTUZA® is an HIV medication made by Janssen. *Janssen First Amended Complaint*, RE 1-5, Page

ID # 455. Each bottle came pre-sealed and contained a 30-day supply of what was supposed to be SYMTUZA®.

Singh Rx filled prescriptions for SYMTUZA® without opening the individual bottles. *Singh Deposition*, RE 60-2, Page ID # 1912.

In June 2021, a Singh Rx customer unsealed a bottle labelled SYMTUZA® and saw that the pills looked different. *Singh Deposition*, RE 60-2, Page ID # 1909-1911. The patient notified both Singh Rx and her doctor. *Singh Deposition*, RE 60-2, Page ID # 1917. When Janssen found out, a representative reached out immediately to Singh Rx and asked for the serial number on the label, photos of the bottle and pills, and the identity of the wholesaler. *Singh Declaration in Opposition to Show Cause Order*, RE 60-11, Page ID # 1982. It also sent a pre-paid FedEx mailer with a tracking number so that the pharmacy could return the product to Janssen for investigation. *Id.* at Page ID # 1984.

Singh Rx provided the name of the wholesaler and responded that it still had the bottle. *Id.* But it didn't further cooperate. Singh continued to purchase drugs from Safe Chain. *Singh Deposition*, RE 60-2, Page ID # 1918.

**D. Several manufacturers sued Safe Chain.**

Several drug manufacturers, including Janssen, sued Safe Chain and other wholesalers in the United States District Court for the Eastern District of New York for selling counterfeit drugs. *See Janssen First Amended Complaint*, RE 1-5, Page ID # 440-441; *July 28, 2021 Letter*, RE 60-5, Page ID #1947-1949 (referencing the Gilead suit). The manufacturers shared the same parent company Johnson & Johnson and used the same law firm. *Id.*

Counsel for the manufacturers sent several letters and subpoenas to Singh Rx over the course of 2021 and 2022, asking it to quarantine medications it received from Safe Chain and to provide additional information. *July 28, 2021 Letter*, RE 60-5, Page ID #1947-1949; *August 27, 2021 Letter*, RE 60-6, Page ID # 1950-1952; *September 27, 2021 Letter*, RE 60-7, Page ID # 1953-55; *October 25, 2021 Letter*, RE 60-8, Page ID # 1956-1958; *May 24, 2022 Subpoena*, RE 60-10, Page ID #1962-1971; *July 14, 2022 Letter*, RE 60-9, Page ID # 1959-1961.

Singh Rx ignored these requests—testifying later that it didn’t see them. *Singh Deposition*, RE 60-2, Page ID # 1922-1923.

In August 2022, the district court entered an order to show cause against Singh Rx and froze its assets. *Singh Declaration in Opposition to Show Cause Order*, RE 60-11, Page ID # 1973. That got Singh Rx's attention. *Id.* But it was too late.

**E. Janssen sued Singh Rx.**

In August 2022, Janssen amended its complaint against Safe Chain and the other wholesalers to add Singh and Singh Rx as a defendants. *Janssen First Amended Complaint*, RE 1-5, Page ID # 441.

The complaint alleged that the defendants sold counterfeit HIV medication under a Janssen label and Janssen wanted it to stop. *Id.* at Page ID # 441-445. Janssen explained that failure to take even one dose would cause the entire series of HIV medications to fail, causing permanent physical harm and distrust in the healthcare system. *Id.*, Page ID # 441-442. Specifically against Singh Rx, Janssen alleged that Singh Rx continued to purchase counterfeit bottles from Safe Chain and another wholesaler "after a counterfeit [that Singh Rx] purchased from safe chain and dispensed to a



customer was detected and brought to [Singh Rx's] attention." *Id.*, Page ID # 451.

In sum, Janssen alleged nine counts against the defendants:

1. Federal Trademark Infringement under 15 U.S.C. § 1114(1)(A).
2. Federal Trademark Infringement under 15 U.S.C. § 1114(1)(B).
3. False Description and Designation of Origin in Commerce under 15 U.S.C. § 1125(a)(1)(A).
4. Federal False Advertising under 15 U.S.C. § 1125(a)(1)(B).
5. Federal Dilution of Mark under 15 U.S.C. § 1125(c).
6. New York Dilution of Mark and Injury to Business Reputation.
7. New York Deceptive Business Practices.
8. Common-law Unfair Competition.
9. Common-law Unjust Enrichment.

*Janssen First Amended Complaint*, RE 1-5, Page ID # 475-486.

Janssen sought injunctive relief, return of counterfeit products, actual and punitive damages, disgorgement, and restitution for unjust enrichment. *Id.*, Page ID # 483-486.

**F. Singh Rx sued Selective to defend against the New York suit and lost.**

At the time of the *Janssen* lawsuit, Singh Rx had a Businessowners and Commercial Umbrella Policy through Selective Insurance Company of South Carolina. *Policy*, RE 18-1, Page ID # 1226, 1244. Seeking a defense in the New York action, the pharmacy sued Selective in U.S. District Court for the Eastern District of Michigan. *Complaint*, RE 1, Page ID # 1-18.

The parties then filed cross-motions for summary judgment under the terms of the policy. *Selective MSJ*, RE 60, Page ID # 1867-1896; *Singh Rx MSJ*, RE 57, Page ID # 1773-1805.

Singh Rx argued that the duty to defend was broader than the duty to indemnify, and it applied because the allegations in the New York complaint asserted a personal or advertising injury as defined in the policy. *Singh Rx MSJ*, RE 57, Page ID # 1779. It also argued that the professional-services exclusion that barred coverage for personal and advertising injuries caused

by services in the practice of pharmacy didn't apply. *Id.* Selective disagreed. *Selective MSJ*, RE 60, Page ID # 1867-1896.

After full briefing and argument, the district court denied Singh Rx's motion and granted Selective's motion. *Opinion and Order*, RE 77, Page ID # 2265, 2294. In applying Michigan law, it found that the professional-services exclusion for personal and advertising injuries caused by the practice of pharmacy barred coverage. *Id.*, Page ID # 2278-2284.

### **G. Relevant policy provisions.**

Coverage Form 00-03-0713 provides the businessowner's coverage. *Policy*, RE 18-1, Page ID 1268-1320. Section II of that form delineates liability coverage and states that Selective will cover damages for *personal* and *advertising injury*, which it later defines:

### **Section II—Liability**

#### **A. Coverages**

##### **1. Business Liability**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "personal and advertising

injury” to which this insurance applies. [*Policy*, RE 18-1, Page ID # 1302.]

[...]

## **F. Liability and Medical Expenses Definitions**

1. “Advertisement” means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. [*Policy*, RE 18-1, Page ID # 1314]

[...]

14. “Personal and advertising” means injury, including consequential “bodily injury”, arising out of one or more of the following offenses:

[...]

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;

[...]

f. The use of another’s advertising idea in your own “advertisement”; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement." [*Policy*, RE 18-1, Page ID # 1316-1317]

Yet, section II of coverage form 00-03-0713 broadly excludes coverage for personal and advertising injuries arising from services in the practice of pharmacy:

## **Section II—Liability**

[...]

### **B. Exclusions**

#### **1. Applicable to Business Liability Coverage**

This insurance does not apply to:

[...]

#### **j. Professional Services**

"[P]ersonal and advertising injury" caused by the rendering or failure to render any professional service. This includes but is not limited to:

[...]

(9) Services in the practice of pharmacy.  
[*Policy*, RE 18-1, Page ID # 1304-1308]

Form 4-04-03 provides commercial umbrella liability coverage. *Policy*, RE 18-1, Page ID # 1412-1428. The umbrella policy has slightly different wording than the businessowner's liability policy but are the same in substance. *Id.* Singh Rx agrees that it is substantively the same. *Appellants' Brief*, Doc. 29, Page 49-50.

### **Summary of the Argument**

No matter how it's analyzed, the terms of the policy bar coverage. The underlying conduct giving rise to the Janssen lawsuit does not arguably fit within a personal and advertising injury that would be covered under the policy. And even if, for the sake of argument, it did, an exclusion flat out bars coverage for injuries arising from services in the practice of pharmacy. Therefore, Selective has no duty to defend Singh Rx in the Janssen lawsuit. This Court should affirm the district court's decision granting summary judgment in favor of Selective.

### **Standard of Review**

This Court reviews a district court's interpretation of the insurance policy de novo and in accordance with the substantive law of the forum state. *Dakota Girls, LLC, v. Philadelphia Indem. Ins. Co.*, 17 F.4th 645, 348 (6th Cir. 2021). This Court also reviews de novo a district court's grant of a motion for summary judgment. *DeVore v. Univ. of Kentucky Bd. of Tr.*, 118 F.4th 839, 844 (6th Cir. 2024).

### **Governing Law**

Michigan interprets insurance policies like contracts. *Meemic Ins. Co. v. Fortson*, 954 N.W.2d 115, 119 (Mich. 2020). Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v. United Ins. Group Agency*, 663 N.W.2d 447, 453 (Mich. 2003).

Unambiguous policies are not open to judicial construction and must be enforced as written. *Rory v. Continental Ins. Co.*, 703 N.W.2d 23, 30 (Mich. 2005). "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities." *Id.* at 26.

An insurer's duty to defend an insured against an underlying lawsuit arises from the policy language. *Stockdale v. Jamison*, 330 N.W.2d 389, 392 (Mich. 1982). To determine whether it has a duty to defend, an insurer must consider not only the pleadings but also look beyond the pleadings to analyze whether coverage is arguably possible. *Am. Bumper and Mfg. Co. v. Hartford Fire Ins. Co.*, 550 N.W.2d 475, 481 (Mich. 1996). If it is, then the insurer must defend the lawsuit. *Id.* But if the plain terms of the policy unambiguously rule out coverage, then the duty to defend does not arise. *Id.*

## **Argument**

### **I.**

The Selective insurance policies provide liability coverage for injuries caused by an insured's libel, slander, disparagement, or advertisement. The policy defines *advertisement* as a notice that is broadcast to the general public or specific market segments about an insured's goods to attract more customers.

Here, Singh Rx sold counterfeit HIV pills in bottles labelled SYMTUZA®. Singh Rx didn't libel, slander, or disparage Janssen or its goods. And it didn't



broadcast anything to the general public. Nor does Janssen allege any of those things. So there's no arguable coverage under the insuring agreement that would require Selective to defend Singh Rx.

This Court should affirm the district on this ground. *Does v. Whitmer*, 69 F. 4th 300, 305 (6th Cir. 2023) (The Court of Appeals may affirm the district court's dismissal for any reason supported by the record, even on grounds different from those on which the district court relied.); *Auto-Owners Ins. Co. v. Harrington*, 565 N.W.2d 839, 841 (Mich. 1997) ("Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage.").

**A. The underlying lawsuit does not assert a *personal injury*.**

As explained above, the policy covers certain *personal injuries* and defines a *personal injury*, in part, as an oral or written publication that slanders, libels, or disparages an organization or its goods. *Policy*, RE 18-1, Page ID # 1316-1317.

Here, the Janssen lawsuit does not allege that Singh Rx published material slandering, libeling, or disparaging Janssen or SYMTUZA®. *Janssen First Amended Complaint*, RE 1-4, Page ID # 345-354. So no coverage exists based on the pleadings.

And looking beyond the labels in the pleadings to determine whether coverage could arguably exist also leads to the same conclusion. *Am. Bumper*, 550 N.W.2d at 481.

*First*, slander is a spoken defamatory statement. *Slander*, BLACK'S LAW DICTIONARY, (5th pocket ed. 2016). And there's no evidence showing that Singh Rx made any oral statements regarding SYMTUZA®. So that's out.

*Second*, both libel and slander require that the false statement be defamatory as well. *Libel and Slander*, BLACK'S LAW DICTIONARY, (5th pocket ed. 2016). A defamatory statement is a communication that "tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *Reighard v. ESPN, Inc.*, 991 N.W.2d 803, 810 (Mich. Ct. App., 2022). Similarly, a disparaging statement is one that discredits or casts into doubt another's work or product. *Engineering*

*Technology, Ltd v. Aetna Cas. & Sur. Co.*, 951 F.2d 349 (Table) (6th Cir. 1991) (1991 WL 278971); *see also* RESTATEMENT (SECOND) OF TORTS § 632, comment B (“Thus the vendibility of land, chattels or intangible things may be impaired when a statement makes them appear less desirable for purchase, lease or other dealings than they actually are.”).

Here, the label or the “statement” on the bottle was a compliment to Janssen, intending to make the product inside the bottle appear more desirable—not less. It was the opposite of a defamatory or disparaging statement. And Janssen’s complaint establishes as much. Janssen is a sophisticated party with sophisticated counsel. If it thought that it could state a plausible claim for defamation, it certainly would have. The absence of that claim indicates that Singh Rx didn’t defame or disparage Janssen’s products. Therefore, Singh’s actions couldn’t arguably fall within the covered definitions in the policy. Thus, no duty to defend arises. *Am. Bumper*, 550 N.W.2d at 481.

**B. The underlying lawsuit does not assert an *advertising* injury.**

The policy also provides coverage for certain advertising injuries caused by the insured's *advertisement*. *Policy*, RE 18-1, Page ID # 1316-1317.

As explained above, the policy defines *advertisement* as “a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.” *Policy*, RE 18-1, Page ID # 1314.

Michigan interprets the term *broadcast* or *publish* in the advertising realm to mean the public dissemination of information through media sources, like television, radio, or newspapers, intended to inform potential customers of a company's availability to do business *Citizens Ins. Co. v. Pro-seal Service Group, Inc.*, 730 N.W.2d 682, 687 (Mich. 2007).

In *Citizens*, a manufacturer shipped its own product in a competitor's box but used its own label. *Id.* at 683. The competitor sued the manufacturer for a violation in trade dress. *Id.* The manufacturer sought a defense under its insurance policy for injuries caused by an *advertisement*. *Id.* The Michigan Supreme Court held that the insurer had no duty to defend under the policy

because the manufacturer's conduct didn't fall within the scope of the term *advertisement*. *Id.* at 686-687. Placing a label on a package sent to a specific customer didn't constitute an *advertisement* because it wasn't a public dissemination of information through media sources, like television, radio, newspaper, or billboards, about its goods and services, for the purpose of attracting customers. *Id.* at 687-688.

The same result lies here. Singh Rx's conduct of filling of prescriptions for individual customers in bottles labelled SYMTUZA<sup>®</sup> doesn't constitute an *advertisement* as it's defined in the policy: it wasn't a public broadcast through media sources like television, billboards, or newspapers that disseminated information about its goods and services for the purpose of attracting customers. *Citizens*, 730 N.W.2d at 688. Thus no duty to defend arises. *Id.*

**C. Singh Rx's slander, libel, and disparagement argument fails.**

Singh Rx says Janssen's allegations about a false description constitute slander, libel, or disparagement. *Appellants' Brief*, Doc. 28, Page 43-44. This argument fails.

A claim for false description and designation of origin under the Lanham Act requires only that the statement be false—not also defamatory. *Frisch’s Restaurants, Inc. v. Elby’s Big Boy of Steubenville, Inc.*, 670 F.2d 642, 646-647 (6th Cir. 1982)

Libel, slander, and disparagement, on the other hand, require not only a false statement but also a defamatory one—meaning that the statement tends to lower an individual’s reputation or discredit another’s product. *Reighard*, 991 N.W.2d at 810; *Engineering Technology, Ltd*, 951 F.2d at 349; RESTATEMENT (SECOND) OF TORTS § 632, comment B; *Libel and Slander*, BLACK’S LAW DICTIONARY, (5th pocket ed. 2016).

As explained, the “statement” on the bottle was a compliment to Janssen, intending to make the product inside the bottle appear more desirable—not less. It was the opposite of a defamatory or disparaging statement. Therefore, Singh Rx’s argument fails.

#### **D. Singh Rx’s broadcasting argument fails.**

Singh Rx also says that Janssen alleged that Singh Rx engaged in “widespread selling of medications using Janssen’s bottles and labels.”

*Appellants' Brief*, Doc. 28, Page 44. In its view, this constitutes broadcasting to bring it within the scope of an *advertisement*. Not so.

To begin with, Janssen's amended complaint doesn't make that allegation against Singh Rx. It makes that allegation against the Safe Chain, Scripts, and ProPharma Defendants. *Janssen Amended Complaint*, RE 1-5, Page ID # 461. As explained above, Janssen alleged that Singh Rx continued to buy bottles from Safe Chain after it learning that it had dispensed counterfeit medication "to a customer." *Janssen Amended Complaint*, RE 5-1, Page ID #451 (emphasis added). Dispensing a single bottle of medicine with the SYMTUZA® logo affixed to it to a single customer doesn't constitute broadcasting to the public. *Citizens*, 730 N.W.2d at 687.

But even if Singh Rx had engaged in "widespread selling of medications using Janssen's bottles and labels" to pharmacy patients, as it now says it did, that still wouldn't constitute *broadcasting* or *publishing* under *Citizens*. For one thing, it still wouldn't be a public dissemination of information by way of media, like television, newspapers, radio, billboards.

*Citizens*, 730 N.W.2d at 687. It would have simply been filling and delivering individual prescriptions to specific customers.

For another, Singh Rx wouldn't have done it to inform potential customers of the company's availability to do business, but rather to fill prescriptions for pre-existing customers. *Id.* So the alleged conduct doesn't qualify as an *advertisement* under the plain terms of the policy. Like in *Citizens*, those plain terms unambiguously rule out coverage, and no duty to defend arises. *Id.* at 688; *Am. Bumper*, 550 N.W.2d at 481. This Court should affirm dismissal on this ground. *Whitmer*, 69 F.4th at 305 (affirming the lower court on different grounds).

## II.

The Selective insurance policies broadly exclude coverage for personal or advertising injuries caused by rendering or failing to render professional services in the practice of pharmacy.

Here, Janssen's injuries arose from Singh Rx's actions of purchasing and dispensing prescriptions with counterfeit SYMTUZA® to HIV patients—exactly the type of conduct only a licensed pharmacy under the direct charge



of a licensed pharmacist may do. Therefore, if coverage ever existed (it didn't), the professional-services exclusion bars it. Should the Court reach this issue, it should affirm the trial court.

**A. A professional service is intellectual in nature or reasonably relates to providing a professional service.**

Michigan has interpreted the professional-service exclusion to bar any activity involving a special skill that is predominantly intellectual in nature or one that reasonably related to providing a professional service. *Schuler v. Michigan Physicians Mut. Liability Co.*, 679 N.W.2d 106, 125-127 (Mich. Ct. App. 2004) (holding that a medical service provider's failure to supervise one of its doctors who sexually assaulted patients fell within the scope of its professional services as a medical provider to bar coverage); *Orchard, Hiltz & McCliment, Inc., v. Phoenix Ins. Co.*, 676 Fed. Appx 515, 520-521 (6th Cir. 2017) (applying Michigan's interpretation).

*Schuler* further explained that "[w]hether a professional service is being rendered depends on the nature of the act or omission, not the character or title of the person who acted or failed to act." *Schuler*, 679 N.W.2d at 126; *Centennial Ins. Co. v. Neyer, Tiseo & Hindo, Ltd.*, 523 N.W.2d

808, 809-810 (Mich. App. 1994) (Geo-technical engineering firm’s decision to drill for soil samples fell within the scope of professional services even though subcontractor dug the holes.).

**B. Michigan’s definitions of *pharmacist* and the *practice of pharmacy*.**

Under Michigan’s public health code, a *pharmacist* means an individual who is licensed to practice pharmacy. MICH. COMP. LAWS § 333.17707(3). To become licensed requires, among other things, obtaining a doctor of pharmacy degree from an accredited school and passing the North American Pharmacist Licensure Exam (NAPLEX). MICH. ADMIN. CODE R. 338.521(2)(a)(i) & (2)(b).

A *pharmacy* means a facility licensed to dispense or prepare prescriptions drugs for delivery or distribution. MICH. COMP. LAWS § 333.17707(6). A *pharmacy* must be under the personal charge of a *pharmacist*. MICH. COMP. LAWS § 333.17741(2).

The *practice of pharmacy* means the clinical application of a health service that includes “the encouragement of safety and efficacy in the prescribing, *dispensing*, administering, and use of drugs and related articles

for the prevention of illness, and the maintenance and management of health.” MICH. COMP. LAWS § 333.17707(8) (emphasis added).

**C. The professional-services exclusion for the practice of pharmacy bars coverage.**

Here, Singh had a doctor of pharmacy and was licensed *pharmacist* in Michigan. *Singh Deposition*, RE 60-2, Page ID # 1899; MICH. COMP. LAWS § 333.17707(3); MICH. ADMIN. CODE R. 338.521(2)(a)(i) & (2)(b).

Singh Rx was a licensed *pharmacy* authorized to dispense or prepare prescription drugs for delivery or distribution. *Administrative Complaint*, RE 60-3, Page ID # 1934; MICH. COMP. LAWS § 333.17707(6).

Singh, as a licensed *pharmacist*, had personal charge of Singh Rx. *Singh Deposition*, RE 60-2, Page ID # 1899, 1904-1905; MICH. COMP. LAWS § 333.17741(2). He handled inventory, and he verified patient prescriptions. *Singh Deposition*, RE 60-2, Page ID # 1899. And under his direct charge, Singh Rx performed the clinical application of dispensing drugs for the prevention of illness and management of HIV. *Singh Deposition*, RE 60-2, Page ID # 1912; MICH. COMP. LAWS § 333.17707(8). The Janssen complaint alleged Singh and

Singh Rx purchased and dispensed counterfeit HIV medication to pharmacy customers. *Janssen First Amended Complaint*, RE 1-5, Page ID # 451.

That alleged conduct of purchasing and dispensing counterfeit HIV medication to pharmacy customers falls squarely within the *practice of pharmacy* as defined under Michigan's public health code and Singh Rx's professional services as a licensed *pharmacy*. *Shuler*, 679 N.W.2d at 125-127; *Orchard*, 676 Fed. Appx at 520-521. At minimum, the conduct reasonably relates to services in the practice of pharmacy. *Id.*; *Centennial*, 523 N.W.2d at 809-810.

Therefore, the Selective insurance policies bar any coverage that may have existed for the alleged personal and advertising injuries because they were caused by Singh Rx's rendering or failure to render professional service in the *practice of pharmacy*. *Policy*, RE 18-1, Page ID # 1304-1308. As a result, no duty to defend arises. *Am. Bumper*, 550 N.W.2d at 481. If it reaches this issue, this Court should affirm the district court.

**D. Singh Rx's discussion about two other exclusions is irrelevant.**

Singh Rx devotes several paragraphs discussing why Selective's expected-and-intended injury exclusion and its trademark-infringement exclusion don't apply. *Appellant's Brief*, Doc. 28, Page 44-45, 48. Its discussion is irrelevant.

Although Selective may have referenced those exclusions in its pre-suit discussions as being some of the reasons for denying defense and indemnification, it didn't advance those two particular exclusions as applicable in its motion briefing. *Selective MSJ*, RE 60, Page ID # 1889-1893; *Selective MSJ Reply Brief*, RE 69, Page ID # 2205-2208. Nor did the district court consider them. *Opinion and Order*, RE 77, Page ID # 2278-2284. So the Court should ignore Singh's arguments about those two exclusions.

**E. Singh's false dichotomy about malpractice insurance fails.**

Singh Rx says that if its malpractice insurance through co-defendant American Casualty Insurance Company doesn't provide coverage, then the underlying conduct cannot constitute professional services to trigger the

professional-services exclusion in the Selective insurance policies. *Appellants' Brief*, Doc. 28, Page 46. Not so.

*First*, American Casualty never argued that the underlying conduct didn't qualify as a professional service. Rather, it argued that it wasn't a professional service provided *to Janssen*. *American Casualty's MSJ*, RE 58, Page ID # 1823, 1826, 1832, 1838-1839. And the district court granted American Casualty's motion on other grounds. *Opinion and Order*, RE 77, Page ID # 2292. So the question of whether the conduct constitutes a professional service under the American Casualty policy isn't even before the Court. Besides, it's logically possible (and is, in fact, true) for the underlying conduct to constitute *professional services* under both policies and still result in no coverage under either policy.

*Second*, American Casualty's policy doesn't dictate whether coverage exists under the Selective insurance policies. Policy language varies and is unique to the wishes of the contracting parties. See, e.g., *Rory*, 703 N.W.2d at 31 (policy shortened the statutory period of limitations). Each policy must be considered individually and enforced as written. *Id.* ("Courts are to

enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy.”). Thus Singh’s use of a false dichotomy and attempt to yoke the policies together fail.

#### **F. Singh Rx’s professional-services argument fails.**

Singh Rx argues that the professional-services exclusion doesn’t apply because, in its view, the conduct didn’t require special learning—any non-licensed person could have could have done it. *Appellants’ Brief*, Doc. 28, Page 46-47. In support, it cites *St. Paul Fire & Marine Ins. Co v. Quintana*, 419 N.W.2d 60 (Mich. Ct. App. 1988) and *Kuznar v. Raksha Corp*, 750 N.W.2d 121 (Mich. 2008). Singh Rx mishandles the case law, and *Centennial* has already rejected his argument.

##### **1. *Centennial* rejected Singh Rx’s argument.**

In *Centennial Ins. Co. v. Neyer, Tiseo & Hindo, Ltd.*, 523 N.W.2d 808, 809-810 (1994), a geo-technical engineering firm hired to perform soil investigation contracted with a drilling company to conduct soil sampling. Employees from the engineering firm attended the drilling and determined that no utility lines ran through the area. *Id.* at 809.

But when the drilling company dug the holes, it hit a telephone line. *Id.* After getting sued by the telephone company, the engineering firm sought a defense and indemnification from their general liability insurer—arguing that the professional services exclusion didn’t apply because digging holes didn’t require any special skill. *Id.* at 810. *Centennial* disagreed, finding that the decision making of where to drill required special knowledge and was preliminary to and part of the soil investigation. *Id.* The same result lies even more so here.

Here, by law, Singh, as the licensed *pharmacist*, was charged with personal oversight of the pharmacy’s operation. *Singh Deposition*, RE 60-2, Page ID # 1899, 1904-1905; MICH. COMP. LAWS § 333.17741(2). He made the inventory decisions and he verified patient prescriptions as they were dispensed. *Singh Deposition*, RE 60-2, Page ID # 1899. These actions required special, intellectual knowledge and form an integral part of the clinical application of the *practice of pharmacy*. Thus, they don’t just reasonably relate but fall comfortably within professional “services in the practice of pharmacy.” *Centennial*, 523 N.W.2d at 810; MICH. COMP. LAWS § 333.17707(8);



*Policy*, RE 18-1, Page ID # 1304-1308. Therefore, *Centennial* defeats Singh Rx's argument.

## **2. *Kuznar* doesn't support Singh Rx.**

Singh Rx's reliance on *Kuznar* and *Quintana* is misplaced. Neither case lends Singh Rx any support.

*Kuznar* dealt with the distinction between a negligence and a malpractice claim under Michigan law for the purpose of deciding which statutory limitations period applied. *Kuznar*, 750 N.W.2d at 124-125. *Kuznar* held that a pharmacist, as a natural person, was a licensed health-care professional subject to malpractice claims under MICH. COMP. LAWS § 600.5838a whereas a pharmacy, which, at the time, was considered a building, was not. *Id.* at 127-128.<sup>1</sup> By citing *Kuznar*, Singh Rx appears to be

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<sup>1</sup> The definition of "pharmacy" under MICH. COMP. LAWS § 333.17701 has under gone many versions since *Kuznar* and the Legislature no longer defines it as a building. At the time of the facts giving rise to this case, the definition of *pharmacy* read as follows: "(6) 'Pharmacy' means a facility or part of a facility that is licensed under this part to dispense prescription drugs or prepare prescription drugs for delivery or distribution. Pharmacy does not include the office of a dispensing prescriber or an automated device. For the purpose of a duty placed on a pharmacy under this part, 'pharmacy' means the person to which the pharmacy license is issued, unless

saying that since it was a pharmacy and can't be sued for malpractice under Michigan's malpractice statute, then it couldn't have rendered professional services to trigger the exclusion. Not so. Singh Rx gets off track because it mishandles *Kuznar*.

*First*, Janssen didn't sue Singh Rx for medical malpractice. So whether the underlying conduct sounded in malpractice for purposes of triggering the statute of limitations under MICH. COMP. LAWS § 600.5838a is irrelevant. Furthermore, simply because a claim doesn't qualify as a malpractice claim under the statute doesn't necessitate the conclusion that the underlying conduct didn't constitute professional services in the practice of pharmacy according to the plain terms of the policy. The policy language alone controls the outcome. *Rory*, 703 N.W.2d at 31. And the exclusion is much broader than the definition of a malpractice claim under the statute. It doesn't distinguish between acts of a natural person versus acts of a building like the statute does, but, rather, it excludes coverage for injuries that the named insured

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otherwise specifically provided." MCL 333.17701(6) (effective July 14, 2020 to July 18, 2023) (emphasis added).

caused in providing services in the *practice of pharmacy*. Singh Rx, as a licensed pharmacy and the named insured, caused the alleged injuries by performing the clinical application of purchasing and dispensing drugs for the prevention of illness and management of HIV. *Singh Deposition*, RE 60-2, Page ID # 1912. That conduct falls squarely within “services within practice of pharmacy.” *Policy*, RE 18-1, Page ID # 1304-1308; MICH. COMP. LAWS § 333.17707(8). As a consequence, it’s excluded under the policy. *Policy*, RE 18-1, Page ID # 1304-1308. The Court should reject Singh Rx’s continued attempt to yoke coverage to inapplicable language found elsewhere.

### **3. *Quintana* doesn’t support Singh Rx.**

*Quintana*, for its part, dealt with whether a professional liability policy covered a medical technician’s sexual assault and battery of a patient. *Quintana*, 419 N.W.2d at 61. The technician argued that the act constituted a professional service and required coverage. *Id.* *Quintana* disagreed, holding that since sexual assault and battery didn’t reasonably relate to any medical procedure and didn’t require special learning, it didn’t constitute a professional service. *Id.* at 63.

Here, the opposite result lies because purchasing inventory, verifying prescriptions, and dispensing medications requires special learning and is integral to the practice of pharmacy. So *Quintana* actually supports Selective's position and defeats Singh Rx's argument. This Court should affirm the district court.

### **Conclusion and Request for Relief**

No matter how it's analyzed, no coverage arguably exists for the underlying conduct of purchasing and distributing of counterfeit HIV medication. As a result, Selective has no duty to defend Singh or Singh Rx in the underlying Janssen lawsuit. This Court should affirm the district court's order granting summary judgment in favor of Selective.

Respectfully submitted,

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## Certificate of Compliance

I certify that this brief complies with the type-volume limitation under Fed. R. App. P. 32(a)(7)(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 14-point proportional font (Palatino Linotype), and the word count for this brief is 5,924.

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January 10, 2025

### Designation of District Court Record

<i>Record Entry</i>	<i>Name of Document</i>	<i>Page ID</i>
1	Complaint	1-18
5-1	Janssen First Amended Complaint	440-486
18-1	Selective Policy	1226-1428
57	Singh Rx MSJ	1773-1805
58	American Casualty's MSJ	1823-1839
60	Selective's MSJ	1867-1896
60-2	Aman Singh's Deposition	1899-1923
60-3	Administrative Complaint	1934-1940
60-4	Consent Order	1942-1946
60-5	July 28, 2021 Letter	1947-1949
60-6	August 27, 2021 Letter	1950-1952
60-7	September 27, 2021 Letter	1953-1955
60-8	October 25, 2021 Letter	1956-1958
60-9	July 14, 2022 Letter	1959-1961
60-10	May 24, 2022 Subpoena	1962-1971
60-11	Singh Declaration in Opposition to Show Cause Order	1973-1984
69	Selective MSJ Reply Brief	2205-2208
77	District Court Opinion and Order	2265-2284

### Certificate of Service

I hereby certify that on January 10, 2025, I electronically filed Defendant-Appellee Selective Insurance Company of South Carolina's Brief with the Clerk of the U.S. Court of Appeals for the Sixth Circuit using the ECF system which will send notification of such filing to all attorneys of record.

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