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BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

In Re:	Request from the Public Service Commission of South Carolina for Uniform Movers of Charleston LLC to provide information on the implications of a referral program in regard to the South Carolina Unfair Trade Practices Act (S.C. Code Ann. § 39-5-10 et seq.) and the South Carolina Real Estate Licensing Law (S.C. Code Ann. § 40-57-5 et seq.).	Docket No. 2021-219-T

POST-HEARING BRIEF OF REFERRAL FEES PAID TO LICENSED REAL ESTATE AGENTS FROM RESIDENTIAL MOVING COMPANIES

Pursuant to the South Carolina Public Service Commission's request made during the Hearing for Docket No. 2021-219-T, Uniform Movers of Charleston respectfully offers this post-hearing brief for review by the Commission on the issue of whether moving companies with a Class E (Household Goods) Certificate of Public Convenience and Necessity within the State of South Carolina may provide referral fees, or finder's fees, to licensed real estate agents in the State, who refer their clients to such moving companies. For the reasons discussed below, Uniform Movers of Charleston deduces that remittance of referral fees to licensed real estate agents does not violate the South Carolina Unfair Trade Practices Act, and does not violate the South Carolina Real Estate Licensing Law.

BACKGROUND

On October 25, 2021, Gressette Holt, the owner and operator of Uniform Movers of Charleston, a South Carolina limited liability company, appeared before the Public Service Commission of South Carolina to provide testimony in support of their application for a Class E (Household Goods) Certificate of Public Convenience and Necessity for Operation of a Motor Vehicle Carrier, Docket No. 2021-219-T. Commissioner Castin posed a question to Mr. Holt about his choice of a Shipper Witness, specifically in regard to her residing in Greenville, South Carolina. Mr. Holt responded that he chose a South Carolina licensed real estate agent outside of the Charleston area, where Uniform Movers of Charleston intends to primarily operate, because of

his plan to provide referral fees to licensed real estate agents in the Charleston area willing to refer their clients to Uniform Movers of Charleston for residential moving services, should his application for a Class E Certificate be granted by the Commission.

Mr. Holt's response to the question prompted additional questions by the Commissioners, including whether Mr. Holt's proposed referral fees violate the South Carolina Unfair Trade Practices Act, or the South Carolina Real Estate Licensing Law. Uniform Movers of Charleston takes the position that proposed referral fee programs do not violate either statute. Importantly, any benefit received from the licensed real estate agent, or the moving company, would not adversely affect the public interest, as regulated by the Public Service Commission of South Carolina.

ANALYSIS

I. The South Carolina Unfair Trade Practices Act does not apply to referral fees paid to licensed real estate agents in South Carolina by moving companies.

An "unfair trade practice," within meaning of South Carolina Unfair Trade Practices Act (SCUTPA), is a practice which is offensive to public policy or which is immoral, unethical, or oppressive. *In re Hughes*, 627 B.R. 327 (Bankr. D.S.C. 2021). SCUTPA states unfair methods of competition and unfair or deceptive acts or practices are unlawful, and automatically includes (i) auto lenders requiring certain insurance coverage, (ii)the resale of tickets for a higher price, (iii)the use of a fictitious name in business to misrepresent a geographic origin, ownership of manufacturing facilities, or location of the business, (iv) deceptive or false advertising for live musical performances, (v) misleading, deceptive and false advertising by lawyers, (vi) food product misrepresentation, (vii) price gouging during emergency, (viii) soliciting a contribution on behalf of a charity during an emergency that is misleading, (ix)false claims for vehicle glass repairs, (x)wholesaler selling products in retail at wholesale price, (xi)a retailer of motor fuel selling below market price to impair or hurt competition, and (xii) pyramid promotional schemes. S.C. Code Ann. § 39-5-10 et seq. More broadly, SCUTPA applies to any business practices, in trade or commerce, that are deceptive or unfair, such as committing fraud or lying in regard to the quality of the goods and services, so consumers choose that particular business over their competition.

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In the event a licensed real estate agent in South Carolina were to refer a client to a particular moving company, there would be no violation of the SCUTPA, since it would not result in an unfair method of competition on behalf of the moving company, nor would the act be deceptive or unfair. The client of the real estate agent would ultimately decide whether to use the moving company referred by the real estate agent, or choose another company. The moving company would not provide the client a discounted rate, or provide any special services, as moving companies rates are controlled by their tariff submitted and approved by the Public Service Commission of South Carolina. Additionally, due to rates being regulated, the client would not incur any additional costs due to the referral fee. Rather, the moving company would provide compensation to the real estate agent from the company's profits, should they choose to enact such a referral fee program.

Moreover, referring a moving company to a client would not be immoral, unethical, or oppressive. The client may ask the real estate agent for a second or third referral for a moving company, and the agent would not be restricted from providing additional referrals. If exclusivity were at issue, there may be an argument that such an arrangement is offensive to public policy as many individuals moving to the state rely on real estate agents for recommendations of local businesses, and proving only one referral may be inflicting a constraint on the client. However, exclusivity is not at issue here, simply whether or not a real estate agent may refer a client and receive compensation for that referral. Furthermore, real estate agents typically value the relationship with their clients, as those clients may provide them with additional business in the future, thus encouraging real estate agents to provide referrals to companies they trust. The potential for future business would likely dissuade a licensed real estate agent from providing inaccurate information about the services being offered for a referral fee.

A referral program will likely not have an impact on public interest, or be offensive to public policy. "Unfair or deceptive acts or practices in the conduct of trade or commerce have an impact upon the public interest if the acts or practices have the potential for repetition. *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 480, 351 S.E.2d 347, 350–51 (Ct. App. 1986). Trade or commerce is defined to include "any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 35-9-10(b). Any unfair or deceptive acts must have an effect on the public, or the citizens of South

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Carolina, and in the instance of businesses participating in such actions, they must have an adverse effect on the consumer. SCUTPA is not intended to right a private wrong, such as a breach of contract or other tort action. South Carolina courts have consistently rejected speculative claims of adverse public impact and required evidentiary proof of such effects. *Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc.*, 974 F.2d 502, 507 (4th Cir. 1992).

A moving company and licensed real estate agent would have a business relationship in respect to a referral program consisting of compensation. The referrals would have the potential for repetition, and would involve a third-party client, or consumer. However, there is no evidence to suggest that a program for referrals would cause an adverse effect on the consumers, or have a negative impact on the public interest or be offensive to public policy. More likely, any action brought against the moving company from the consumer would be an action in tort, or breach of contract. As aforementioned, residential moving services are regulated, protecting consumers from any adverse effects on them. With no evidence to suggest that a referral program would have an impact on the public interest, or be offensive to public policy, any assertions to the contrary would be speculative at this time.

In addition, the remedies available under the South Carolina Unfair Trade Protection Act will likely not be available to plaintiffs against moving companies, due to the regulations under S.C. Code Ann. § 58-23-1010., enforced by the South Carolina Public Service Commission. "To recover in an action under the SCUTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct.App.2006). The act must have a tendency to deceive, the act must affect the public interest, which may be shown by demonstrating a potential for repetition, and the deceptive act directly resulted in damages to the defendant, either monetarily or in property loss.

Providing a referral fee to a licensed real estate agent for their recommendation to a client for a particular moving company, is not unfair or deceptive, and the plaintiff could not show they suffered monetarily, or a property loss, since all rates of residential moving companies in the State of South Carolina are

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regulated. If the plaintiff did not compare the recommended company with other licensed moving companies in the area, they may pay a higher rate. However, all tariffs of licensed moving companies in South Carolina are available to the public, thus such difference in rates could not be deceptive or unfair. Moreover, the services provided by licensed moving companies are listed on each tariff and made available to the public, along with the bill of lading and any terms. The tariff also clearly states the limits on liability and includes information in the event of property loss. Residential moving companies with a Class E Certificate in South Carolina are liable for $0.60 per pound for the actual weight of any lost or damaged article or articles, virtually equalizing any amount of liability for property loss, regardless of the moving company. Thus, a moving company, with such strict regulations, could not participate in unfair or deceptive acts that would cause monetary or property loss.

The South Carolina Unfair Trade Practices Act is intended to protect the public interest from unfair or deceptive practices in trade or commerce. A licensed real estate agent does not have the intent to deceive a client by providing a referral to a moving company, which in turn compensates them for the referral, and moving companies with a Class E Certificate are regulated in rates and services, reducing any possibility of unfair or deceptive practices. SCUTPA is likely not applicable to compensation provided to licensed real estate agents from moving companies for referrals.

II. South Carolina Real Estate Commission does not regulate referral fees paid to real estate agents from private companies offering complementary services.

The South Carolina Real Estate Commission, under the administration of the Department of Labor, Licensing, and Regulation, is commissioned by the state to regulate the real estate industry, including brokers, salespersons, and property managers, as to protect the public's interest when involved in real estate transactions. S.C. Code Ann. § 40-57-5 et seq. The regulations under the statute, generally known as The South Carolina Real Estate Licensing Law, does not comment on referral fees paid to salespersons, or licensed real estate agents as they are referred above, by private companies with complementary services. However, the South Carolina Real Estate Commission warns salespersons of violating federal laws which supersede state law, such as the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq. (2005). RESPA addresses referral fees, or "kick-backs" for settlement services, which "includes any service provided in connection with a real

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estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement." 12 U.S.C.A. § 2602. RESPA does not include other industries that complement services real estate agents provide when a person is moving into a new home, such as moving companies, interior designers, contractors, or landscapers, and thus receiving compensation for referrals from companies in these industries would not be in violation of the federal statue.

The moving industry would clearly fall outside of RESPA, since moving services are not considered settlement services, and there are no provisions within the South Carolina Real Estate Licensing Law that would restrict a licensed real estate agent from accepting referrals from moving companies. The South Carolina Real Estate Commission may decide at a later date that licensed real estate agents must disclose any referral opportunities to their clients, thus creating an atmosphere of full disclosure. However, no such requirements around disclosure exist currently. Rather, a licensed real estate agent may receive referral fees from various industries, including the moving industry, for recommendations for services to their clients. As mentioned above, it is unlikely a licensed real estate agent would jeopardize a relationship with a client for a referral fee, as many real estate agents rely on those clients for future business, or referrals to their client's friends and family. But, accepting referral fees from businesses offering complementary services is not a violation of South Carolina law, nor federal law.

CONCLUSION

The South Carolina Unfair Trade Practices Act is not applicable to referral fees, or referral programs as those contemplated herein, and the South Carolina Real Estate Licensing Law does not include any provisions that would prevent a licensed real estate agent in South Carolina from accepting consideration for referrals of clients to moving companies.

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Respectfully Submitted,

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