No. 122487

In the

Supreme Court of Illinois

PEOPLE *EX REL.*
SCHAD, DIAMOND & SHEDDEN, P.C.,

Relator-Appellant,

v.

MY PILLOW, INC.,

Defendant-Appellee.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-15-2668.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 12 L 7874.
The Honorable Thomas R. Mulroy, Judge Presiding.

BRIEF OF RELATOR-APPELLANT

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

Qui tam plaintiff Schad, Diamond & Shedden, P.C. ("Relator") brought this action against My Pillow pursuant to the Illinois False Claims Act for its failure to collect and remit use taxes on its Internet and phone sales to Illinois customers. The Attorney General declined its statutory right to proceed with the action against My Pillow but authorized Relator to conduct the action on behalf of the State.

The circuit court found My Pillow recklessly disregarded its obligation to collect taxes on Internet and telephone sales and entered judgement against it for treble damages and penalties. The court also awarded attorneys' fees to Relator, commensurate with prior cases. My Pillow contended the FCA did not provide for attorneys' fees when a Relator represents itself. The court rejected that argument, taking its guidance from *Kay v. Ehrler*, 499 U.S. 432 (1991) (holding that organizations like Schad Diamond & Shedden, P.C. are not comparable to *pro se* litigants) and *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 512 (2005) (holding that both the State and the relator are real parties in interest and that the Attorney General's "complete control" prevents any fee abuse).

My Pillow appealed. The appellate court affirmed all but the attorneys' fee award. Ignoring *Scachitti*, it reversed the fee award, reasoning that Relator was not independent counsel and that there was a potential of fee abuse by overzealous relators, although making no such finding here.

No questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether under the Illinois False Claims Act a law firm that is the relator is entitled to reimbursement of reasonable attorneys' fees generated by its own employees.

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to Supreme Court Rule 315. The appellate court issued its decision on June 15, 2017. *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668. This Court allowed Relator's petition for leave to appeal on September 27, 2017.

STATUTE INVOLVED

Illinois False Claims Act
740 ILCS 175/4(d)(2)

If the State does not proceed with an action under this Section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25% and not more than 30% of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

STATEMENT OF FACTS

Relator Schad, Diamond & Shedden, P.C. filed this action under the False Claims Act ("FCA" or the "Act") for the State of Illinois and itself alleging My Pillow knowingly failed to collect use taxes on Internet and telephone sales to Illinois consumers.[1] 740 ILCS 175/1 *et seq*. This is a "reverse false claim" and was one of many such actions Relator filed beginning in 2001 to collect use taxes under the substantial nexus principles established in *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410 (1996). The State has either intervened and conducted, or permitted Relator to conduct, every one of the actions Relator filed.

Relator made the Act's required pre-filing disclosure to the State on July 2, 2012 and then filed the complaint on behalf of the State and Relator under seal on July 13. (R. C01372.) The State extended the automatic 60-day seal for 120 days to investigate the complaint. Although the State declined to intervene, it requested the circuit court enter an order on January 15, 2013 that provided "the prosecution of this action shall be conducted by Relator on behalf of the State of Illinois as the Plaintiff." (Appendix (attached) at A022.) The order recognized that because "the State of Illinois remains a real party in interest it may intervene in or dismiss this action at a later date." (A022.) Relator served the complaint on March 12, 2013. (R. C00178.)

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[1] On December 18, 2013, Relator filed Articles of Amendment with the Secretary of State changing Schad, Diamond & Shedden, P.C. to Stephen B. Diamond, P.C. The circuit court noted "Stephen B. Diamond, P.C. is a continuation of Schad, Diamond & Shedden, P.C." (R. C01371.)

The State exercised its statutory right to oversee the action. The order unsealing the action required "All Orders of this Court shall be sent to the Attorney General" and "The parties shall serve all pleadings and motions in this action, including supporting memoranda, upon the Attorney General." (A022). Between service of the complaint and the end of circuit court proceedings in December 2015, the State received and reviewed all 117 motions, discovery responses and other pleadings generated in the case.

Attorneys from the Attorney General's office attended the five depositions Relator conducted: Michael Lindell (Supp. R. C 00468), David Boyd (Supp. R. C00256), James Furlong (Supp. R. C00513), Nicole Oestrich (Supp. R. C00551) and Kim Rasmussen (Supp. R. C00572). The parties tried the action on Relator's third amended complaint. (R. C0445.) Attorneys from the Attorney General's office attended the trial.

I. My Pillow Failed to Pay Taxes on Internet and Telephone Sales to Illinois Customers.

A retailer maintaining a place of business in Illinois is required to collect and remit use tax. 35 ILCS 105/3-45. The Use Tax Act defines a retailer maintaining a place of business to include one that has "any agent or other representative operating within this State under the authority of the retailer." 35 ILCS 105/2. My Pillow, Inc., a Minnesota-based corporation, sold merchandise at craft shows throughout Illinois beginning in April, 2010. (R. C01021-23.) Two months later, in June, 2010 My Pillow started selling merchandise through the

Internet and by telephone. (R. C01023.) My Pillow fulfilled Internet and telephone orders from Minnesota. (R. C01049.) My Pillow's salesmen sold merchandise at 89 craft shows in Illinois spanning 304 days during 2010-2013. (Supp. R. C00005-7.)

My Pillow finally registered in Illinois to collect sales tax in July, 2012. It did not collect tax on Internet and telephone sales, however, until July, 2013. (Supp. R. C00011-13.) Even after it began collecting tax, My Pillow did not remit taxes until November, 2013. (R. C1109.) My Pillow's tax returns for July, 2012 through October, 2013 falsely reported "$0.00" of sales from out-of-state. (Supp. R. C746-49, C752-69, C1051 and C1102-09.) For example, My Pillow's ST-1 sales and use tax return for July, 2013 reported $0.00 for "Sales from locations outside Illinois" on line 6a:

ST-1 | SCHEDULE A | SCHEDULE B | ST-2 | PST-2

Illinois Department of Revenue

ST-1 Sales and Use Tax and E911 Surcharge Return

Legal Name: MY PILLOW INC
DBA Name:
Account Id: 4085-2393
Period: 7/1/2013 through 7/31/2013
Due Date: 8/20/2013
Form Instructions

Step 1: Alcoholic Liquor Purchases

If you are not required to report your purchases, go to Step 2.
Note: Distributors will also report your total purchases to us.

A. Total dollar amount of alcoholic liquor purchased (invoiced and delivered) 0.00

Step 2: Taxable Receipts

1. Total receipts (Include tax.) 4,226.00
2. Deductions (Include tax collected.) (From Schedule A, Line 29.) 0.00
3. Taxable receipts (Subtract Line 2 from Line 1.) 4,226.00

Step 3: Tax on Receipts

Sales from locations within Illinois

General merchandise

4a. 4,226.00 x RATE = 4b. 332.00

Food, drugs, and medical appliances

5a. 0.00 x RATE = 5b. 0.00

Sales from locations outside Illinois

General merchandise

6a. 0.00 x 0.0625 = 6b. 0.00

Food, drugs, and medical appliances

7a. 0.00 x 0.0100 = 7b. 0.00

Sales at prior rates

Receipts taxed at other rates

8a. 0.00 8b. 0.00

9. Tax due on receipts

Step 5: Tax on Purchases

General merchandise

12a. 0.00 x 0.0625 = 12b. 0.00

Food, drugs, and medical appliances

13a. 0.00 x 0.0100 = 13b. 0.00

Purchases at other rates

14a. 0.00 14b. 0.00

15. Tax due on purchases (Add Lines 12b, 13b, and 14b.) 0.00

Step 6: Net Tax Due

16. Tax due from receipts and purchases (Add Lines 11 and 15.) 332.00
16a. Manufacturer's Purchase Credit 0.00
17. Prepaid sales tax PST-2 0.00
18. Quarter-monthly payments (Paid on Form RR-3 or by EFT) 0.00
19. Total prepayments (Add Lines 16a, 17, and 18.) 0.00
20. Net tax due (Subtract Line 19 from Line 16.) 332.00

Step 7: Payment Due

21. E911 Surcharge Schedule B 0.00
22. Excess tax and excess surcharge collected 0.00
23. Total tax and surcharge due (Add Lines 20, 21, and 22.) → 332.00
24. Credit amount 0.00

(Supp. R. C00076 (emphasis added).)

My Pillow's chief executive officer, Michael Lindell, conceded Relator's lawsuit was the only reason My Pillow began to collect taxes on Internet and telephone sales. (R. C01125.) My Pillow failed to remit use taxes on $3.78 million of Internet and telephone sales to Illinois between June, 2010 and October, 2013. (R. C02128; Suppl. R. C00347.)

II. My Pillow Never Investigated Its Duty to Collect Tax.

Lindell testified My Pillow never reviewed Illinois statutes, regulations, case law or the Illinois Department of Revenue ("IDOR") website to investigate My Pillow's duty to collect tax on Internet and telephone sales to Illinois. (R. C01075-77, C01084-87, C01098-1100 and C01125.) My Pillow did not seek advice from IDOR and IDOR never audited My Pillow. (R. C01025, C01096-97.)

Relator served an interrogatory asking My Pillow about any advice it sought or obtained about use tax obligations:

> State the name, title, and employer of all persons who gave any legal, accounting, or other advice whether tax should be collected and remitted to the State of Illinois for (a) Internet sales, (b) telephone sales, or (c) My Pillow show sales.

My Pillow's response was "none". (R. C00247, C01087-88.) At trial, Lindell confirmed the answer was still "none":

> Relator: Okay. And that was the answer that My Pillow gave in response to this interrogatory, right?
>
> Lindell: Yes.

Relator: Okay.

Lindell: And my answer is still none.

(C01088.)

Lindell claimed My Pillow had no money to hire a law firm or an accountant to "render a written opinion" about My Pillow's use tax obligation in Illinois. (R. C01088.) My Pillow found $200,000 in 2011, however, to produce an infomercial touting its products. (R. C01218-19, C01221-23.) My Pillow consistently broadcast infomercials in Illinois beginning in October, 2011. As a result My Pillow's nationwide sales "leaped from about $200,000 a month to $10 million a month." (R. C01023.) Under the Use Tax Act soliciting orders "by cable television or other means of broadcasting to consumers located in this State" also means a retailer maintains a place of business in the State and must collect use tax. 35 ILCS 105/2.

III. Circuit Court Holdings

A. My Pillow Recklessly Disregarded Its Tax Obligation.

Lindell admitted he "never sought his accountant's advice or consulted with anyone about the collection, remittance or payment of Illinois sales and use tax." (R. C01377.) The circuit court decided My Pillow acted recklessly because it failed "to make such inquiry as would be reasonable and prudent to conduct under the circumstances." (R. C01375 (quoting *U.S. v. King-Vassal*, 728 F.3d 707, 713 (7th Cir. 2013)).) The circuit court found My Pillow made no attempt to

review Illinois case law, statutes or regulations regarding tax collection on Internet or telephone sales. (R. C01380.) Nor did it seek advice from IDOR or review the IDOR website for guidance. (R. C01380.)

The court observed My Pillow paid a marketing company $200,000 to develop an infomercial, but made no investment researching its tax obligations, engaged no lawyers, and hired no accountants to advise it. (R. C01380.) Even though My Pillow's nationwide sales jumped from $200,000 to $10 million a month as a result of the infomercial, it still paid no tax to Illinois. (R. C01023.)

After My Pillow registered with IDOR in July, 2012, the ST-1's it filed "clearly informed My Pillow that its Internet and telephone sales were taxable." (R. C01380.) The court held "Lindell was not credible when he testified that he did not act with reckless disregard" and concluded "based on all the evidence, My Pillow knowingly violated the IFCA because it recklessly disregarded its obligation to remit tax on Internet and telephone sales in Illinois." (R. C01380-81.) The court entered judgment against My Pillow for its failure to collect and remit taxes in violation of the False Claims Act. (R. C01383.)

B. The Circuit Court Awarded Treble Damages and Penalties.

My Pillow failed to collect taxes of $221,379 between June, 2010 and October, 2013 on Internet and telephone sales of $3.78 million. (R. C01373, C1467; Suppl. R. C00347.) My Pillow filed amended ST-1's before trial and made partial remittances totaling $106,970. (R. C02132.) The court initially deducted

the $106,970 from the $221,379 of unpaid taxes before trebling damages, reasoning "the State benefited" from the $106,970. (R. C01467.)

Relator and the State argued that the trebling decision was incorrect. (R. C02126, C02130.) The court then amended its ruling, holding that *U.S. v. Bornstein*, 423 U.S. 303 (1976) trumped *U.S. v. Anchor Mortgage Corp.*, 711 F. 3d 745 (7th Cir. 2012), so $106,970 of taxes My Pillow paid before trial "should be included in the amount which is to be trebled." (R. C02133.) The court opined: "Defendant is entitled to credit for its payment of the taxes before judgment, but not to a reward for his payment made only because he was found out and sued." (R. C02132.)

The circuit court awarded penalties totaling $225,500 at $5,500 per month for each of the 41 months of False Claims Act violations between June, 2010 and October, 2013. (R. C01468-69.) The court noted: "It is clear from the evidence, in particular the testimony of Defendant's CEO, that these past due taxes would not have been paid to the State had Relator not brought this action." (R. C02132.)

Because resolution of the damages issue required 10 months, the court did not enter an appealable order until December, 2015. (R. C02152-55.) The second amended final order and judgment trebled damages before applying a credit for the taxes My Pillow remitted before trial:

Taxes owed to State (3 x $221,379)	$664,137
Penalties	225,500
Proceeds of action	889,637
Taxes paid before trial	(106,970)
Total damages and penalties	$782,667

(R. C02154.)

In an action where the Attorney General has declined to intervene but authorized the Relator to proceed, the successful Relator "shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages." 740 ILCS 175/4(d)(2). (R. C02155). The Act prescribes "The amount shall be not less than 25% and not more than 30% of the proceeds of the action or settlement and shall be paid out of such proceeds." *Id.* The State received 70% of the proceeds and agreed Relator would receive 30% of the proceeds of the action, or $266,891.

C. The Circuit Court Awarded Relator Attorneys' Fees and Expenses Pursuant to the False Claims Act.

The Act also specifically requires an award of reasonable attorneys' fees, expenses and costs in all successful cases initiated or conducted by the Relator. Whether the State intervenes, the two statutory provisions are identical:

> Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

740 ILCS 175/4(d)(1) and (2). Relator petitioned for attorneys' fees and expenses through trial of $748,383. (R. C01472.) The petition sought compensation for 2,087 hours of work by Relator. (R. C01536.) After examining the submissions, the circuit court awarded Relator $600,960. (R. C02155.) The fees award compensated Relator for work through February, 2015. (R. C01536.) Relator subsequently did extensive work on the treble damages issue that was not resolved until the final judgment in December. (R. C02155.)

The court's fees order incorporated its decision in *State of Illinois ex rel. Schad, Diamond, & Shedden P.C. v. F.C. Organizational Products, LLC,* 11 L 10330 (Jan. 15, 2013), which held "relator is entitled to attorneys' fees because it represented the State in this matter," noting "[a]t the request of the State, the court entered orders in every lawsuit directing [t]he prosecution of this action shall be conducted by relator on behalf of the State of Illinois as the plaintiff." (R. C01821; A028.) Moreover, "while the State remained a real party in interest, the relator did the majority of the legal work in this matter as the State had originally declined to intervene in this action. Therefore, relator is entitled to attorneys' fees." (A028 (citing *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 510-13 (2005)).)

The court relied upon *Kay v. Ehrler*, 499 U.S. 432 (1991), rejecting the argument Relator was acting *pro se*, because "an organization, such as Schad, Diamond & Shedden is distinct from a *pro se* litigant." (A028.) The circuit court recognized Relator's singular work on behalf of the State: "Since the State of

Illinois declined to intervene in the matter, Relator investigated, researched, pursued, litigated, and tried the case without the State's involvement or help." (R. C02131.)

IV. Appellate Court Affirmed as to All Points Except Attorneys' Fees to the Relator.

My Pillow asserted five issues for review. The first was whether My Pillow acted with reckless disregard. (Op. ¶ 34.) The appellate court affirmed liability for My Pillow's knowing failure to collect use tax on Internet and telephone sales. (Op. ¶ 62.)

The second issue was whether damages should be trebled before or after crediting the taxes My Pillow remitted prior to trial. The court upheld the award of treble damages before credits, agreeing that *U.S. v. Bornstein*, 423 U.S. 303 (1976) applied. (Op. ¶¶ 86-87.) My Pillow also argued that it was not liable for damages prior to Relator's investigation that began August 30, 2011, more than a year after My Pillow started Internet and telephone sales to Illinois in June, 2010. (Op. ¶ 89.) The appellate court rejected the argument, calling it "a perverse interpretation of the Act, indeed, to suggest that a company has blanket immunity under the Act to avoid collecting and remitting use taxes until someone begins to realize what the company has been up to." (Op. ¶ 95.)

The final issue was attorneys' fees, divided into two parts. The first was Relator's entitlement to attorneys' fees for the work of its own lawyers, the subject of this appeal. (Op. ¶ 99.) A related issue was whether attorneys' fees

could be awarded for Relator's unsuccessful claims relating to craft shows. (Op. ¶ 149.) As to the latter issue the court accepted that "much of the work relator performed overlapped the different areas of alleged false claims." (Op. ¶ 155.)

The appellate court reversed the award of attorneys' fees for the work of attorneys employed by Relator. (Op. ¶ 148.) Citing *Hamer v. Lentz,* 132 Ill. 2d 49 (1989), the appellate court focused on a public policy it gleaned from *Hamer*. (Op. ¶¶ 106-109.) Without discussion of the "complete control" the Attorney General has under *Scachitti v. UBS Fin. Serv.*, 215 Ill. 2d 484, (2005) the opinion faulted the absence of independent counsel providing an objective, detached viewpoint to Relator. (Op. ¶ 137.) Next, the appellate court held awarding fees to a Relator that employs its attorneys "in-house" does not serve the purpose of the FCA, which "is to reveal fraud against the government." (Op. ¶ 132 (citing *State of Illinois ex rel. Beeler, Schad & Diamond, P.C. v. Ritz Camera Ctr., Inc.*, 377 Ill. App. 3d 990, 996 (1st Dist. 2007)).)

Finally, under its reading of *Hamer* the court cited the potential for abusive fee generation, although there was no evidence of such abuse in this case. (Op. ¶ 146.) The appellate court did not discuss the State's power stemming from its authority to settle or dismiss any action at any time to prevent abusive fee generation. *Scachitti*, 215 Ill. 2d at 513.

The appellate court issued its decision June 15, 2017. (A001.) Petitioner timely filed its Petition for Leave to Appeal July 20, 2017.

STANDARD OF REVIEW

The circuit court awarded Relator attorneys' fees, expenses and costs pursuant to the False Claims Act. The appellate court, construing the Act differently, reversed the attorneys' fees awarded for work done by Relator's own attorneys. The standard of review for statutory interpretation is *de novo*. *People ex rel. Madigan v. Illinois Commerce Comm'n,* 231 Ill. 2d 370, 377 (2008).

ARGUMENT

Introduction

Relator, a professional corporation, has filed many cases under the Act since 2001 against Internet retailers who failed to collect and remit sales taxes. The State either intervened or authorized Relator to conduct every action. Relator's actions have recovered more than $25 million for State coffers and, more significantly, produced a continuing revenue stream from hundreds of violators who agreed to start collecting taxes when they settled a case against them. The appellate court praised Relator for performing the "valuable service of uncovering fraud against the State." (Op. ¶ 143.)

The appellate court's opinion, however, threatens Relator's ability to perform that valuable service by erroneously holding Relator was not entitled to attorneys' fees for the work performed by its own attorneys – fees the circuit court deemed reasonable. The three public policy concerns the appellate court adopted from *Hamer v. Lentz*, 132 Ill. 2d 49 (1989), a FOIA case, do not apply in this FCA action. First, Relator was subject to the Attorney General's "complete control" throughout the litigation, satisfying *Hamer's* concern about the presence of objective, independent counsel. *Scachitti*, 215 Ill. 2d at 512. The appellate court erred by ignoring *Scachitti* and deciding this action was akin to a *pro se* plaintiff acting without benefit of independent counsel.

Second, the FCA, unlike the federal False Claims Act, authorizes fees for the work of both the State's own attorneys acting in-house, as well as those of

Relator. Unlike the FOIA considered in *Hamer*, the FCA provides recoupment for the work of attorneys for both the State and Relator, no matter their status as employees. The public policy expressed in the FCA awarding both Relator and the State fees for work of their own attorneys is distinct from a *pro se* plaintiff under FOIA.

Finally, the Attorney General's complete control of Relator's action, as *Scachitti* recognized, eliminates any concern about potential abusive fee generation. Relator took no action without the State's knowledge and the Attorney General at any time could – and frequently did – intervene, dismiss or settle a case.

I. The State authorized and oversaw every *qui tam* action Relator filed; these actions recovered tens of millions of dollars and created a revenue stream for the State.

Since 2001, Relator has recovered $25 million for Illinois by pursuing tax cheats under the Act. More importantly, every settlement requires violators to collect tax going forward, creating a substantial revenue stream for Illinois. Before this Court in *Scachitti*, the Attorney General lauded the role of *qui tam* plaintiffs like Relator:

> [T]he Attorney General insists: 'In many instances, but for the efforts of these private citizens and their attorneys, the Attorney General would not have known of these schemes to defraud the State.'

215 Ill. 2d at 513. Indeed, the appellate court noted the circuit court's conclusion that but for Relator, the State likely would not have learned My Pillow was a tax scofflaw. (Op. ¶¶ 71-73.)

The appellate court erred by applying the *Hamer* public policy rationale. Unlike a FOIA case, an FCA case involves the Attorney General and the Relator at each step. Relator has pursued every action under the "complete control" of the Attorney General, which has the power to intervene, settle or dismiss every action at any time. *Scachitti*, 215 Ill. 2d at 512. The Attorney General exercised that control by dismissing many actions it initially authorized Relator to conduct. The State's complete control of Relator easily satisfies *Hamer's* requirement for objective, independent counsel.

A. Relator's actions recovered more than $25 million in unpaid taxes and created a revenue stream for Illinois.

Internet merchants secure price advantages over brick and mortar stores and cheat the State of revenue when they fail to collect sales taxes from Illinois residents. The State relies on a voluntary compliance program to manage sales taxes that often fails. The legislature filled that compliance gap with the False Claims Act, which authorizes *qui tam* plaintiffs to pursue tax cheats in exchange for a percentage of the back taxes collected plus attorneys' fees.

Relator's actions have produced the results the Attorney General promoted to this Court in *Scachitti*: "As the Attorney General's brief points out, private citizens and their attorneys play a vital role in bringing cases involving

fraud and abuse of government-funded programs to the attention of the state." 215 Ill. 2d at 513. *Scachitti* added, "Since the Act was enacted in 1991, the Attorney General has brought or intervened in approximately 130 cases, almost all being brought to the attention of the Attorney General by private citizens filing *qui tam* actions." *Id.*

The Bureau of National Affairs *("BNA")* in 2016 analyzed almost every action Relator filed, all of which the State either intervened or authorized Relator to conduct for the State. (A031.) The *BNA* analysis confirms 32 of the 130 actions the Attorney General referred to in *Scachitti* were actions Relator actually initiated. Bologna, Michael, *Settlement Data Reveals Lawyer's False Claims Freight Train*, October 19, 2016, https://www.bna.com/settlement-data-reveals-n57982078846/.

Relator also sued Target and Wal-Mart in 2001. Both sought to evade taxation by separately incorporating their Internet sellers and then claiming they had no duty to collect use tax on sales made from outside Illinois to Illinois customers. *State of Ill. ex rel. Beeler, Schad & Diamond, P.C. v. Target Corp.*, 367 Ill. App. 3d 860, 861 (1st Dist. 2006). The State intervened in the action and recovered more than $2.4 million from Target, Wal-Mart and Office Depot, a third violator Relator also had sued. (A021.) Importantly, as part of their settlement each began to collect tax on all Internet sales, generating millions of dollars for the State.

Adding the *Target* and *Wal-Mart* complaints to the 32 in the *BNA* analysis, Relator was the source of 34 of the 130 cases the Attorney General told this Court about in *Scachitti*. Underscoring the benefit of Relator's actions, *BNA's* analysis also showed that settlements from Relator's actions alone reaped more than $25 million in recoveries for the State when *Target* and *Wal-Mart* are included. The analysis does not include the *My Pillow* judgment.

More important than the dollar recovery is the prophylactic effect on tax collections. Every settlement required defendants to collect taxes going forward, creating an enormous revenue stream for the State. The appellate court acknowledged this revenue stream, stating "The result is that the State is able to recover much-needed tax money going back several years and going forward, as well—revenue it quite possibly never would have recovered otherwise." (Op. ¶ 143.)

B. Under *Scachitti*, which confirmed the Attorney General's "complete control," the Attorney General provided the objective, detached review of independent counsel *Hamer* requires.

The Attorney General's complete control over Relator under *Scachitti* distinguishes *Hamer's* concern in a FOIA action about "an objective detached review of independent counsel." (Op. ¶ 137.) This Court in *Scachitti* held "Even when the Attorney General declines to intervene the Attorney General retains complete control of the litigation." 215 Ill. 2d at 512 (citing 740 ILCS 175/4(c)(2)(A)). According to *Scachitti*, "Although the *qui tam* plaintiffs may 'conduct' the litigation on the state's behalf, the Attorney General retains

authority to 'control' the litigation." *Id.* at 510. *Scachitti* repeatedly emphasized Relator's subordinate position: "Moreover, *qui tam* plaintiffs, acting as statutorily designated agents for the state, may proceed only with the consent of the Attorney General, and remain completely subordinate to the Attorney General at all times." *Id.* at 515. This complete control provides the independent counsel the appellate court said *Hamer* required in the FOIA context "[t]o both weed out non-meritorious claims and more effectively prosecute meritorious ones." (Op. ¶ 112.)

This case exemplifies how the State controls the action. The circuit court's order allowing Relator to proceed directed "[t]he prosecution of this action shall be conducted by relator on behalf of the State of Illinois as the plaintiff" and recited the Attorney General's power to intervene, settle or dismiss this action. (A033.) Under *Scachitti* "Even when the Attorney General declines to intervene, the Attorney General retains control over the litigation by monitoring the proceedings through receiving copies of all pleadings and deposition transcripts. 740 ILCS 175/4(c)(3) (West 2002)." The parties provided 117 pleadings and discovery responses to the Attorney General, whose attorneys attended every deposition and the trial. (A022; Supp. R. C00256, C00259.) The Attorney General's complete control over this action – and every action Relator filed – satisfies *Hamer's* requirement for objective, detached independent counsel.

C. The Attorney General acted as independent counsel by dismissing actions it initially authorized Relator to conduct.

Although the Attorney General's control is illustrated by its intervention or its authorization to conduct every action canvassed in the *BNA* article, "Most critically, the Attorney General has authority to dismiss or settle the action at any time, despite the objections of the *qui tam* plaintiff. 740 ILCS 175/4(c)(2)(A), (c)(2)(B)." *Scachitti*, 215 Ill. 2d at 512. The appellate court confirmed the State's power to dismiss an action initiated by Relator in *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 369 Ill. App. 3d 507, 512 (1st Dist. 2006) ("it is clear that the state has complete control over a *qui tam* action and, accordingly, almost unlimited discretion to voluntarily dismiss such action.")

The Attorney General exercised this power in 2014 when it dismissed Relator's actions against 202 out-of-state liquor retailers who were making unlicensed Internet liquor sales to Illinois and collecting no taxes. (A034.) These actions were directly related to the relaxed limits on Internet liquor sales mandated by *Granholm v. Heald,* 544 U.S. 460 (2005) but, as the legislature found, abused by many vendors. 235 ILCS 5/6-29.1(b). A similar result occurred a few months earlier when the Attorney General dismissed 114 cases against unlicensed out-of-state wineries. (A035.) These dismissals demonstrate the Attorney General's power to act as independent counsel and exercise complete control over the actions pursuant to *Scachitti*.

II. The Act entitles both the State and Relator to fees for the work of their own attorneys.

Unlike the FOIA, the FCA authorizes both the State and Relator to initiate actions and mandates fees for both the State and Relator when they do. An award of fees to the State when it initiates or proceeds with an action is also a major difference from the federal False Claims Act and reflects the General Assembly's uniform policy declaration that attorneys' fees must be awarded for the work of a party's own attorneys, regardless whether they work in-house or as outside attorneys. This declaration governs this appeal because "In relation to the judicial branch, the General Assembly, which speaks through the passage of legislation, occupies a 'superior position' in determining public policy." *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55-56 (2011).

A. Unlike the federal False Claims Act, the Act entitles the State to fees for the work of its own attorneys so Relator should receive fees too.

Scachitti noted the Act "closely mirrors the Federal False Claims Act originally enacted in 1863." *Scachitti* at 506. This quotation is the appellate court's sole reference to *Scachitti*. (Op. ¶ 6.) But citing 31 U.S.C. §§ 3729- 3733, the appellate court overlooked a critical difference between the Illinois FCA and the federal statute. (*Id.*) The federal statute enables the Attorney General of the United States to file false claim actions, but does *not* authorize fees for the work of its lawyers. 31 U.S.C. § 3730(a). When Illinois enacted the FCA in 1991 the

legislature made a significant addition, providing compensation to the State for the work of the Attorney General's lawyers when the State initiated an action:

> The State shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred by the Attorney General, including reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

740 ILCS 175/4(a).

Similarly, in addition to a share of the proceeds, Relator "shall also receive" attorneys' fees when Relator initiates an action and the State authorizes Relator to conduct the action:

> Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

740 ILCS 175/4(d)(2). The Act mandates the State shall receive reasonable attorneys' fees for the work of its own attorneys when the Relator initiates the action and the State elects to conduct the action – the third scenario under the FCA. 740 ILCS 175/4(d)(1). This again is different than the federal statute, which does not authorize fees for the government when it intervenes to conduct an action. 31 U.S.C. § 3730(d)(1).

Relator should be treated the same as the State. If the State had intervened and conducted this action against My Pillow, it would have been entitled to attorneys' fees. By providing attorneys' fees to the Attorney General for the

work of its lawyers when it either files an action or intervenes, and directing Relator "shall also receive" attorneys' fees when it files or conducts an action, the Act established the public policy to reimburse both the State and Relator for the work of their own attorneys.

The legislature establishes public policy, as this Court has recognized:

> Because it is primarily the function of the legislature, not the courts, to construct public policy, '[w]hen the legislature has declared, by law, the public policy of the State, the judicial department must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to, and not the judiciary, whose function is to declare law but not to make it.'

Phoenix, 242 Ill. 2d at 65. Nullifying the fees awarded to Relator here is contrary to the policy expressed in the Act.

In addressing the scope of the Act, courts give effect to the statute's plain language. *Murray v. Chicago Youth Ctr.*, 224 Ill. 2d 213, 235 (2007). Denying legal fees to Relator, the appellate court quoted *Hamer*: "'[a] lawyer representing himself or herself simply does not incur legal fees.'" (Op. ¶ 107 (quoting 132 Ill. 2d at 62).) Under this analysis, however, the State would not be entitled to reimbursement for the work of its own attorneys. This result runs directly counter to the plain language of the Act and is at war with the public policy of the Act. It substitutes the appellate court's judgment for that of General Assembly. This it could not do.

B. *Hamer* and *Uptown* do not bar fees to Relator for the work of its own attorneys.

A fundamental difference between the FOIA and the FCA is that in an FCA action the Relator brings the action for itself and for the State whereas a FOIA action is brought by a plaintiff *against* the State. As *Scachitti* stated at the beginning, "It is called a *qui tam action;* because the plaintiff states that he sues *as well* for the state as for himself." 215 Ill. 2d at 495 (internal quotations omitted).

The court's fees order incorporated its decision in *State of Illinois ex rel. Schad, Diamond, & Shedden P.C. v. F.C. Organizational Products, LLC,* 11 L 10330, which relied on *Scachitti* to hold "relator is entitled to attorneys' fees because it represented the State in this matter," noting "at the request of the State, the court entered orders in every lawsuit directing [t]he prosecution of this action shall be conducted by relator on behalf of the State of Illinois as the plaintiff." (A028 (internal quotations omitted).) Moreover, "[w]hile the State remained a real party in interest, the relator did the majority of the legal work in this matter as the State had originally declined to intervene in this action. Therefore, relator is entitled to attorneys' fees." (A028.)

The appellate court also incorrectly concluded the fee provisions in the FCA and the version of the FOIA at issue in *Hamer* were identical. *Hamer* rebuffed a *pro se* lawyer who sought relief under a FOIA statutory provision that provided the trial court "may" award fees. 132 Ill. 2d at 57 (quoting 1987 version of FOIA). The Act, however, prescribes that Relator "shall also" receive

attorneys' fees. 740 ILCS 175/4(d)(1)-(2). The appellate court missed this important difference by erroneously concluding *Hamer* interpreted a fee-shifting provision identical to the Act: "The FOIA, like the Act in this case, contained a standard fee-shifting provision." (Op. ¶ 106.)

Another important difference is that the scale of FCA actions is far greater than FOIA cases, which involve a discrete legal issue. The difference means that the burden of fees and expenses is much higher as was the case for Relator here. Relator's time spent litigating this matter highlights that burden. My Pillow, which hired one of the largest law firms in the country to defend this action, vigorously contested this case at every turn. As a result, Relator's fee petition sought compensation for 2,087 hours of work. (R. C01536.) The Relator then devoted substantial additional time to the damages issue in the circuit court, the appeal to the First District, and now the appeal to this Court. A FOIA case requires nowhere near the amount of time and investment.

In addition to the dramatic difference in scale, FCA actions carry considerably greater risk than FOIA actions. *Scachitti* recognized Relator's status as an informant enhanced that risk. *Scachitti* distinguished an informant from a whistleblower, the latter defined as "an employee who reports his or her employer's misconduct." 215 Ill. 2d at 495. A whistleblower has access to the amount of the potential false claim but an informant has no such knowledge. Relator did not learn of My Pillow's potential tax liability until discovery responses in 2013, two years after it first investigated My Pillow. (R. C00278.)

The appellate court conceded Relator's status as an informant would make it difficult for Relator to obtain counsel because the relator's share "could be 25% to 30% of an amount so small that it is not worth the cost of paying a lawyer to fight the case on an hourly-fee basis, for several years." (Op. ¶ 133.) But the appellate court started from the wrong premise because no relator ever hires counsel on an hourly-fee basis; only on a contingent basis. Lawyers litigate FCA cases on a contingent basis and they must be compensated for the risk of litigation:

> The premium added for contingency compensates for the *risk* of nonpayment if the suit does not succeed and for the *delay* in payment until the end of the litigation -- factors not faced by a lawyer paid promptly as litigation progresses. All else being equal, attorneys naturally will prefer cases where they will be paid regardless of the outcome, rather than cases where they will be paid only if they win. Cases of the latter type are inherently riskier and an attorney properly may expect greater compensation for their successful prosecution.

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 736 (1987) (Blackmun, J. dissenting).

Although *Hamer* applied its reasoning only to a lawyer representing himself, *Uptown People's Law Ctr. v. Dep't of Corr.*, 2014 IL App. (1st) 130161 wrongly extended *Hamer* to a not-for-profit entity that prosecuted the case with lawyers on its staff. *Uptown* reasoned the People's Law Center had no fees because it "was not required to spend additional funds specifically for the purpose of pursuing FOIA requests." *Id.* at 7. This is not the case here. Relator

incurred enormous costs, fees and expenses – sums the FCA specifically required be reimbursed to the Relator. The fact that "salaried lawyers" were involved does not suggest expenses and fees were not actually incurred by Relator.

Moreover, an award of fees is made to the party for its expenses incurred, not the lawyers. *Central States, Southeast Areas Pension Fund v. Central Cartage Co.*, 76 F.3d 114, 117 (7th Cir. 1996) (fee-shifting statutes direct the award to the litigant not the lawyer.) *Central States* held a pension fund was entitled to fees for in-house counsel pursuant to ERISA. As *Central States* concluded, fees should be awarded for attorneys who worked on the matter "no matter how the litigant actually acquired those services." *Id*. Thus, regardless of how the lawyers performing the work for the entity are paid, the FCA fee-shifting provision allows recovery of fees by the relator *together with* the relator's share.

The circuit court determined Relator's attorneys' fees were reasonable after a $150,000 reduction. (R. C01853.) The court recognized Relator's exemplary work on behalf of the State: "Since the State of Illinois declined to intervene in the matter, Relator investigated, researched, pursued, litigated, and tried the case without the State's involvement or help." (R. C02131.)

C. Since *Kay v. Ehrler* every circuit court of appeals decision has held a law firm representing itself entitled to fees pursuant to a fee-shifting statute.

The Supreme Court distinguished an individual lawyer acting *pro se* from an organization, which "is always represented by counsel":

> [A]n organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono,* and thus, there is always an attorney-client relationship.

Kay v. Ehrler, 499 U.S. 432, 436, n. 7 (1991). The circuit court below applied *Kay* to find Relator entitled to its attorneys' fees in *State of Illinois ex rel. Schad, Diamond & Shedden v. F.C. Organizational Products, LLC*, 11 L 10330. (A036-37.) *F.C. Organizational* held "an organization, such as Schad, Diamond & Shedden, is distinct from a *pro se* litigant." (A028 (citing *Kay*, 499 U.S. at 436, n.7).) The circuit court then relied on its *F.C. Organizational* opinion to award fees against My Pillow. (R. C01821.)

Every court of appeals confronting whether a law firm representing itself is entitled to fees pursuant to a fee-shifting statute has awarded fees based on *Kay*'s rationale. *See Bond v. Blum,* 317 F.3d 385, 399-400 (4th Cir. 2003); *Baker & Hostetler LLP v. U.S. Dep't of Commerce,* 473 F.3d 312, 326 (D.C. Cir. 2006); *Gold, Weems, Bruser, Sues & Rundell v. Metal Sales Mfg. Corp.,* 236 F.3d 214, 218-19 (5th Cir. 2000); *Treasurer v. Goding,* 692 F.3d 888, 898 (8th Cir. 2012); *Fontanillas-Lopez v. Bauza Cartagena,* 832 F.3d 50, 61 (1st Cir. 2016). Even the appellate court conceded: "We agree without hesitation that, in this case, relator had an attorney-client relationship with its member lawyers." (Op. ¶ 130.) The appellate court never discussed *Scachitti*'s recognition that the Relator "sues *as well* for the State as for himself." 215 Ill. 2d at 495 (emphasis in original).

Uptown is not contrary. *Uptown* conceded the legal services organization was not *pro se* and limited its holding to the conclusory statement that "the purpose of the attorney fee provision would not be furthered by awarding attorney fees in this instance." 2014 IL App. (1st) 130161 ¶ 25. Here, awarding attorneys' fees to Relator furthers the purpose of the Act's fee-shifting provision by enabling Relator to obtain competent counsel, which the appellate court acknowledged could otherwise be very difficult: "The fee provision in the Act permits citizen-relators to ferret out fraud even when the reward at the end of the rainbow would ordinarily not warrant the cost of litigation." (Op. ¶ 133.)

Moreover, "Uptown was not required to spend additional funds specifically for the purpose of pursuing FOIA requests." (Op. ¶ 124 (quoting *Uptown*, 2014 IL App. (1st) 130161 ¶ 25).) Here Relator plainly was required to spend additional funds to pursue My Pillow for six years. Relator, a professional corporation, is entitled to its fees for the work of its attorneys just as the State is entitled to its fees for the work of its attorneys pursuant to the Act. The result Relator requests is consistent with both the FCA and every court of appeals decision.

III. The Attorney General's complete control of Relator's lawsuits eliminates the potential for abusive fees generation.

The appellate court erred in finding the potential for abusive fee generation here because it relied on *Hamer* and *Uptown* instead of *Scachitti*. A FOIA action is different than the FCA because under FOIA, claims for attorneys'

fees are brought *against* the State, with no one independently deciding whether to bring the case that underlies fees. Thus, the potential for abusive fee generation against the State was a real consideration in both *Hamer* and *Uptown* because the State was potentially liable for fees. That concern does not exist here because under the Act the Relator litigates *on behalf* of the State, not against it. Attorneys' fees here were awarded against My Pillow, not the State.

Further, *Scachitti's* holding that the Relator is always subject to the Attorney General's complete control eliminates the potential for abusive fee generation. *Scachitti* noted "that the Attorney General in all circumstances effectively maintains control over the litigation, consonant with the Attorney General's" constitutional role as the chief legal officer of the State. 215 Ill. 2d at 513. Inexplicably, the appellate court *never* discusses *Scachitti*.

The Act further negates the potential for abusive fee generation when the State declines to intervene, as here, because it threatens a *qui tam* plaintiff that asserts a frivolous claim with payment of defendant's attorneys' fees and expenses. 740 ILCS 175/4(d)(4). No fees have been awarded against Relator under this provision in any action it has filed.

To support its conclusion that the potential for abusive fee generation exists here, the appellate court reviewed the Cook County circuit court docket in May 2017 and erroneously concluded "hundreds of cases are currently pending bearing relator's name." (Op. ¶ 144.) In fact, 321 of the 364 cases listed had been dismissed by that date. Only 43 cases were pending, eight against retailers with

a substantial nexus to Illinois and 35 against custom tailors from London, Hong Kong and states other than Illinois who made sales in Illinois but failed to collect taxes. Regardless, that such cases were pending at one time is not evidence of the potential for abusive fee generation. Because the Attorney General authorized Relator to proceed with every case, Relator always remained subject to the Attorney General's complete control and the Attorney General exercised the power to dismiss many of the actions.

The appellate court conflated the roles of relator and relator's attorneys when voicing concern about the potential for abusive fees. (Op. ¶ 146.) The relator's share is earned by filing the action. As *Scachitti* recognized, "'the relator's bounty is simply the fee he receives *out of the United States'* recovery for filing and/or prosecuting a successful action, on behalf of the Government.'" 215 Ill. 2d at 507 (quoting *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000)). The bounty compensates Relator and its attorneys for the significant risks of FCA action. Even if Relator is successful, the State *always* receives a minimum of 70% and as much as 85% of any recovery. Moreover, if the State had intervened and conducted the action the State would have incurred attorneys' fees comparable to Relator. Relator saved the State this burden and must be compensated as the statute provides.

My Pillow cheated the State of more than $200,000 in taxes and was compelled to pay treble damages and statutory penalties. My Pillow defended tenaciously, necessitating Relator's attorneys to perform work the trial court

valued at $600,000. Indeed, although the appellate court premised denial of attorneys' fees to Relator on the *potential* for "abusive fee generation," it did not suggest Relator's legal work fell within such concerns, did not greatly benefit the State, or was unnecessary in face of My Pillow's aggressive defense.

If left undisturbed, the appellate court's decision grants the malefactor in this case a $600,000 windfall in forgiven fees plus a reprieve from any additional fees. The result penalizes Relator, not My Pillow, by limiting it to relator's share for six years of work its attorneys performed on behalf of the State.

CONCLUSION

For the reasons stated Relator Schad, Diamond & Shedden, P.C. requests the part of the opinion below reversing the award of attorneys' fees for the work of its own attorneys be reversed and that this matter be remanded for further proceedings in the circuit court.

Respectfully submitted,

/Stephen B. Diamond
One of Relator's Attorneys

Dated: December 6, 2017

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Certificate of Compliance

I certify that this petition conforms to the requirements of Rules 315, 341(a) and (b). The length of this petition, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 36 pages.

/s Stephen B. Diamond

APPENDIX

INDEX TO THE APPENDIX

People ex rel. Schad v. My Pillow, Inc.

Appellate Court of Illinois, First District, Fourth Division

June 15, 2017, Decided

No. 1-15-2668

Reporter
2017 IL App (1st) 152668 *; 2017 Ill. App. LEXIS 384 **

THE PEOPLE ex rel. SCHAD, DIAMOND & SHEDDEN, P.C., Plaintiff-Appellee, v. MY PILLOW, INC., Defendant-Appellant.

Subsequent History: Appeal granted by *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc., 2017 Ill. LEXIS 943 (Ill., Sept. 27, 2017)*

Prior History: **[**1]** Appeal from the Circuit Court of Cook County. Nos. 12 L 7874, cons. with 12 L 6782. Honorable Thomas R. Mulroy Judge Presiding.

Disposition: Affirmed in part and reversed in part; cause remanded.

Counsel: For APPELLANT: Catherine A. Battin, Nicholas M. Furtwengler.

For APPELLEE: Stephen B. Diamond, Tony Kim, David Kim.

Judges: PRESIDING JUSTICE ELLIS delivered the judgment of the court, with opinion. Justices McBride and Burke concurred in the judgment and opinion.

Opinion by: ELLIS

Opinion

PRESIDING JUSTICE ELLIS delivered the judgment of the court, with opinion.

Justices McBride and Burke concurred in the judgment and opinion.

OPINION

[*P1] This case requires us to consider matters of first impression arising under the Illinois False Claims Act, including whether damages paid by defendant prior to final judgment should be included in, or credited against, the amount of "damages" to be trebled under the Act and whether a law firm serving both as client and attorney may recover statutory attorney fees under the Act.

[*P2] Relator, Stephen B. Diamond, P.C., formerly Schad, Diamond & Shedden, P.C. (relator), brought this *qui tam* action, on behalf of the State of Illinois, under the Illinois False Claims Act. *740 ILCS 175/1 et seq.* (West 2012). Relator alleged that defendant, My Pillow, Inc. (My Pillow), knowingly failed to collect and remit use taxes on merchandise sold at craft shows in **[**2]** Illinois and on Internet and telephone sales to Illinois customers, as required by State law.

[*P3] After a bench trial, the circuit court found in favor of relator as to the claims regarding Internet and telephone sales. The court awarded relator treble damages and attorney fees totaling $1,383,627.

[*P4] We affirm the judgment in favor of relator. The evidence was sufficient to demonstrate that My Pillow acted in reckless disregard of its obligation to collect and remit use taxes on its Internet and telephone sales. The damages found by the trial court were supported by the evidence, and the trial court properly included, within the amount of damages to be trebled, those tax payments made by My Pillow before final judgment. We reverse that portion of the attorney-fee award that granted fees to relator for legal work performed by its own attorneys but otherwise affirm the fee award. We remand to the circuit court only for a recalculation of the attorney-fee award.

[*P5] I. FALSE CLAIMS ACT

[*P6] The Illinois False Claims Act (Act), formerly known as the Whistleblower Reward and Protection Act, allows the Attorney General or a private individual to bring a civil action on behalf of the State for false claims. **[**3]** See, *e.g.*, *State ex rel. Pusateri v. Peoples Gas Light & Coke Co., 2014 IL 116844, ¶ 16, 386 Ill.*

Dec. 674, 21 N.E.3d 437; see also 740 ILCS 175/1, 4 (West 2008). The Act closely mirrors the federal False Claims Act originally enacted in 1863. Scachitti v. UBS Financial Services, 215 Ill. 2d 484, 506, 831 N.E.2d 544, 294 Ill. Dec. 594 (2005); see also 31 U.S.C. §§ 3729 through 3733 (2000). Both acts provide for *qui tam* actions brought by citizens seeking to reveal fraud against the government. People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc., 2015 IL App (1st) 132999, ¶ 30, 391 Ill. Dec. 687, 31 N.E.3d 363.

[*P7] Thus, in construing the Act, Illinois courts have relied on federal courts' interpretation of the Federal False Claims Act for guidance. See *id.* (and cases cited therein); accord United States ex rel. Geschrey v. Generations Healthcare, LLC, 922 F. Supp. 2d 695, 702 n.4 (N.D. Ill. 2012) (court's reasoning on false claim under Federal False Claims Act applied equally to state act, because "Illinois courts interpreting the state act look to interpretations of the similarly worded federal [act]").

[*P8] Relator's claim is based on section 3 of the Act. 740 ILCS 175/3 (West 2012). Section 3 states, in relevant part, that a person is liable under the Act when he

> "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State." 740 ILCS 175/3(a)(1)(G) (West 2012).

For purposes of section 3, the term "knowingly" means that a person, "with respect to information: (i) has actual knowledge of the information; **[**4]** (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." 740 ILCS 175/3(b)(1)(A) (West 2012). "[N]o proof of specific intent to defraud" is required. 740 ILCS 175/3(b)(1)(B) (West 2012).

[*P9] This case concerns a unique form of false claim involving the failure to collect and remit use taxes on the sale of merchandise in Illinois under the Retailer's Occupation Tax Act (ROTA) (*35 ILCS 120/1 et seq.* (West 2012)) and the Use Tax Act (35 ILCS 105/1 et seq. (West 2012)). "ROTA and the Use Tax Act are complementary, interlocking statutes that comprise the taxation scheme commonly referred to as the Illinois 'sales tax.'" Kean v. Wal-Mart Stores, Inc., 235 Ill. 2d 351, 362, 919 N.E.2d 926, 336 Ill. Dec. 1 (2009). "[B]ecause of the impracticality of collecting the tax from individual purchasers, the burden of its collection is imposed upon the out-of-state vendor." Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 418, 665 N.E.2d 795, 216 Ill. Dec. 537 (1996).

[*P10] The gist of relator's complaint is that My Pillow was required to collect and remit use taxes to the State but failed to do so. This specimen of false claim is known as a "reverse false claim," in that the defendant is not alleged to have obtained money fraudulently from the government but, rather, to have failed to pay money duly owed. See, *e.g.*, People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp., 2016 IL App (1st) 151580, ¶ 19, 408 Ill. Dec. 281, 65 N.E.3d 503 (reverse false claim is where material misrepresentation is made to avoid **[**5]** paying money owed to government); State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Centers, Inc., 377 Ill. App. 3d 990, 996, 878 N.E.2d 1152, 316 Ill. Dec. 128 (2007) ("[t]he reverse false claims provision was added to provide that an individual who makes a material misrepresentation to avoid paying money owed to the Government would be equally liable under the Act as if he had submitted a false claim to receive money" (internal quotation marks omitted)).

[*P11] II. BACKGROUND

[*P12] My Pillow is a Minnesota corporation involved in the sales, marketing, and distribution of pillows. The company was founded in 2004 by Mike Lindell, who is the company's chief executive officer. Lindell says he sewed the first pillows himself by hand. By 2009, the company had between 5 and 20 employees.

[*P13] Beginning in 2010, independent contractors began selling My Pillow's products at craft shows in Illinois and throughout the country. Between April 2010 and July 2012, My Pillow sold its products at 44 craft shows in Illinois. It is no longer disputed that My Pillow collected use tax on its craft show sales and remitted all the tax to the Illinois Department of Revenue (IDOR). (Relator alleged otherwise at trial, but the court ruled in favor of My Pillow on the craft-show use taxes, and relator does not challenge that ruling on appeal.)

[*P14] In June 2010, My **[**6]** Pillow began selling its products through the Internet. My Pillow did not collect sales or use tax on Internet or telephone sales to Illinois purchasers. Relator began its investigation of My Pillow

in August 2011.

[*P15] In October 2011, Lindell created and launched a detailed infomercial, for which he paid a marketing company close to $200,000. In 2011, as a result of the infomercial, the company expanded impressively. Monthly sales increased from $200,000 to $10 million. The number of employees grew from 20 in October 2011 to 500 in a very short period of time. By February 2013, My Pillow had 650 employees.

[*P16] My Pillow registered to do business in Illinois in July 2012. On July 13, 2012, relator filed its initial complaint under the Act, claiming that My Pillow failed to collect and remit Illinois use tax on merchandise sold at craft shows in Illinois and on its Internet sales and telephone sales to Illinois customers. Relator filed an amended complaint on October 31, 2012. The State declined to intervene, and the amended complaint was unsealed on January 15, 2013.

[*P17] Relator filed a second amended complaint on February 26, 2013. My Pillow was served with process in March 2013.

[*P18] In November **[**7]** 2013, My Pillow began to collect and remit use tax on Internet and telephone sales. My Pillow amended its sales and use tax returns, *i.e.*, the IDOR Form ST-1s, and paid a total of $106,970 in taxes it owed to Illinois on Internet and telephone sales for 2012 ($61,218) and 2013 ($45,752).

[*P19] Relator filed a third amended complaint on April 28, 2014. In its third amended complaint, relator alleged in count I that, although My Pillow collected tax on craft show sales, it did not remit the tax to IDOR. In count II, relator alleged that My Pillow failed to collect and remit use tax on website and telephone sales.[1]

[*P20] A two-day bench trial began on September 22, 2014. Four witnesses testified at trial: Lindell, Nicole Oestrich, Stephen Diamond, and David Kim.

[*P21] Lindell testified that, in April or May 2010, he asked an accountant, who had been doing his tax returns for 30 years, whether he had to charge sales tax on Internet sales. According to Lindell, it was his understanding that he would have to charge sales tax on Internet purchases within Minnesota but not on those that were shipped out of state. Lindell, however, never sought his accountant's advice or consulted with anyone about the collection, **[**8]** remittance, or payment of Illinois sales and use tax.

[*P22] Lindell testified that, in July 2013, he told an employee, David Boyd, to begin collecting tax on Internet and telephone sales. Boyd did not follow Lindell's directions, and Lindell fired him for insubordination in November 2013. Lindell also testified that My Pillow contacted its customers and collected tax on Internet and telephone sales to Illinois customers for the prior years.

[*P23] Nicole Oestrich was the My Pillow employee who filed its Form ST-1 with IDOR. Both Lindell and Oestrich testified that the independent contractors at the craft shows collected tax on the products they sold and either remitted the tax at the shows or gave it to My Pillow to remit with its monthly Form ST-1.

[*P24] Stephen Diamond testified regarding relator's investigation of My Pillow and the discovery obtained from My Pillow.

[*P25] Relator's attorney, David Kim, testified regarding relator's investigation of My Pillow. He also testified as to relator's damages calculations.

[*P26] The trial court found that My Pillow did not violate the Act with respect to the craft shows, because relator failed to meet its burden of proving that My Pillow did not remit all of the taxes **[**9]** it received from the 44 craft shows it attended from April 2010 through July 2012. But the court found in favor of relator on its claims concerning My Pillow's Internet and telephone sales. The court found Lindell was not credible and further found that, "based on all the evidence, My Pillow knowingly violated [the Act] because it recklessly disregarded its obligation to remit tax on Internet and telephone sales."

[*P27] The court reserved ruling on damages until after the matter had been fully briefed. The court awarded relator treble damages and attorney fees totaling $1,383,627. This calculation came from computing the damages, trebling them, and adding penalties, for an amount of damages—the proceeds of the action—of $889,637. Then the court subtracted the $106,970 in taxes My Pillow paid prior to trial for a final amount of damages of $782,667. To this number, the court added attorney fees, expenses, and costs of $600,960 for a total award against My Pillow of $1,383,627.

[*P28] Of that amount, relator received $266,891 in

[1] In its prior complaints, relator had alleged that My Pillow had failed to "collect" taxes on craft show sales but dropped this allegation after conducting discovery.

damages (30% of the proceeds of the action, or $889,637) and attorney fees in the amount of $600,960.

[*P29] III. ANALYSIS

[*P30] A. Standard of Review

[*P31] After a bench trial, our standard **[**10]** of review is whether the order or judgment is against the manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo, 2011 IL 111871, ¶ 12, 965 N.E.2d 393, 358 Ill. Dec. 322*. We also review an award of damages made after a bench trial under the manifest-weight standard. *1472 N. Milwaukee, Ltd. v. Feinerman, 2013 IL App (1st) 121191, ¶ 13, 996 N.E.2d 652, 374 Ill. Dec. 957*. A trial court's judgment is against the manifest weight of the evidence "only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best, 223 Ill. 2d 342, 350, 860 N.E.2d 240, 307 Ill. Dec. 586 (2006)*. Under the manifest-weight standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses. *Id.* Accordingly, we will not substitute our judgment for that of the trial court. *Id. at 350-51*.

[*P32] B. Issues on Appeal

[*P33] My Pillow raises several issues on appeal. First, My Pillow challenges the trial court's finding that My Pillow violated the Act, claiming that it could not possess the requisite *scienter* because the issue of whether My Pillow had an obligation to collect and remit tax on its Internet and telephone sales is a disputed legal issue. My Pillow next argues that the circuit court erred in calculating damages where it (1) trebled amounts paid prior to trial and (2) awarded relator damages for **[**11]** periods prior to its investigation. My Pillow additionally contends that the court erred in awarding attorney fees because relator is a *pro se* litigant who cannot recover its own attorney fees. My Pillow's final argument is that, because relator did not prevail on any claims related to craft shows, the trial court erred in awarding attorney fees for legal work related to craft shows.

[*P34] 1. Whether My Pillow Acted With Reckless Disregard

[*P35] We first address My Pillow's argument that it could not possess the requisite culpable state of mind of "knowingly" violating the Act, because the underlying issue of whether My Pillow had an obligation to collect use taxes on its Internet and telephone sales was, itself, a disputed legal issue. To reiterate, *section 3*, relevant to this lawsuit, defines "knowingly" as acting "in reckless disregard of the truth or falsity of the information." *740 ILCS 175/3(b)(1)(A)(iii)* (West 2012).

[*P36] My Pillow is referring to the constitutional requirement that before a state may impose a sales tax on an out-of-state company's sale within the state that company must have a "substantial nexus" with the state. See *Quill Corp. v. North Dakota, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992)*; *Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 421, 665 N.E.2d 795, 216 Ill. Dec. 537 (1996)*. My Pillow is arguing here that the initial question of whether My Pillow owed a duty to collect **[**12]** and remit use taxes in Illinois at all—whether a "substantial nexus" existed—is a disputed and complicated legal question, and thus, My Pillow could not possibly have acted with reckless disregard of its obligation to collect and pay sales taxes. The reasoning, in essence, is that one cannot recklessly disregard an obligation when it is debatable whether that obligation exists in the first instance.

[*P37] We should clarify at the outset that My Pillow does not deny that it had a duty to collect and remit use taxes on the sales of its products in Illinois. That point was conceded. As we noted in the factual background, My Pillow began collecting and remitting use taxes in response to relator's lawsuit sometime in 2013 (and had intended to start in 2012). My Pillow's argument is that this liability was not sufficiently clear, during the relevant time period before it began to "voluntarily" collect and remit, for My Pillow to be found to have recklessly disregarded its tax obligations.

[*P38] We do not quarrel with the proposition that the "substantial nexus" requirement is far from a clear requirement, especially in this digital age. We are instructed that the out-of-state vendor must have a "physical **[**13]** presence" in the taxing state. *Quill Corp., 504 U.S. at 317*; *Brown's Furniture, Inc., 171 Ill. 2d at 423*. But what, precisely, a "physical presence" means these days has proven difficult to pin down.

[*P39] The "'slightest' physical presence within a state will not establish substantial nexus." *Brown's Furniture, Inc., 171 Ill. 2d at 423* (quoting *Quill Corp., 504 U.S. at 315 n.8*). On the other hand, the physical presence

"'need not be substantial.'" *Id. at 424* (quoting *Orvis Co. v. Tax Appeals Tribunal, 86 N.Y.2d 165, 654 N.E.2d 954, 960-61, 630 N.Y.S.2d 680 (N.Y. 1995)*). Ultimately, "[l]eft unclear after *Quill* *** is the extent of physical presence in a state needed to establish more than a 'slight' physical presence." *Id. at 423*; accord *Relax the Back Corp., 2016 IL App (1st) 151580, ¶ 22* ("the law on what constitutes sufficient physical nexus to justify collection of the use tax is far from clear"). It is a decision to be made on a case-by-case basis. *Irwin Industrial Tool Co. v. Department of Revenue, 394 Ill. App. 3d 1002, 1014, 915 N.E.2d 789, 333 Ill. Dec. 718 (2009)*, *aff'd*, *238 Ill. 2d 332, 938 N.E.2d 459, 345 Ill. Dec. 20 (2010)*.

[*P40] If the only question were whether this is a nebulous area of the law, My Pillow would win the debate, hands down. But the question is more subtle. The question is not only whether, under the facts of a specific case, the existence of a sufficient nexus is difficult or simple, but also what the company did to try to figure out the answer to that question. After all, if we are to determine whether a company acted in "reckless disregard" of its obligation to collect and remit taxes, it stands to reason that our focus, at least in part, must be on that **[**14]** company's conduct. This court previously recognized that, given the murky nature of use-tax law in this context, a company is not *automatically* deemed to have "knowingly" violated the False Claims Act (then the Whistleblower Reward and Protection Act) by failing to collect and remit use taxes on its Illinois sales, but rather "necessary factual determinations *** must be made regarding defendants' knowledge" in each particular case. *Ritz Camera, 377 Ill. App. 3d at 999*.

[*P41] Thus, though we agree with My Pillow that this area of use-tax law is imprecise, we must also consider My Pillow's conduct in this case before determining whether it acted in reckless disregard of its use-tax obligations in Illinois.

[*P42] "Reckless disregard" under *section 3* requires more than "'[i]nnocent mistakes or negligence.'" *State ex rel. Schad, Diamond & Sheddon, P.C. v. National Business Furniture, LLC, 2016 IL App (1st) 150526, ¶ 33, 407 Ill. Dec. 139, 62 N.E.3d 1061* (quoting *United States v. King-Vassel, 728 F.3d 707, 712 (7th Cir. 2013)*). It refers to "the failure '"to make such inquiry as would be reasonable and prudent to conduct under the circumstances,"'" a '"'limited duty to inquire as opposed to a burdensome obligation.'"'" *Id.* (quoting *United States ex rel. Williams v. Renal Care Group, Inc., 696 F.3d 518, 530 (6th Cir. 2012)*, quoting S. Rep. No. 99-345, at 20-21 (1986)).

[*P43] "Reckless disregard" under *section 3* has been aptly described as "'the ostrich type situation where an individual has buried his head in the sand and failed to make simple inquiries which would **[**15]** alert him that false claims are being submitted.'" *Relax the Back Corp., 2016 IL App (1st) 151580, ¶ 27* (quoting *National Business Furniture, 2016 IL App (1st) 150526, ¶ 33*). "Thus, one acting in reckless disregard ignores 'obvious warning signs' and 'refus[es] to learn of information which [it], in the exercise of prudent judgment, should have discovered.'" *Id.* (quoting *United States ex rel. Ervin & Associates, Inc. v. Hamilton Securities Group, Inc., 370 F. Supp. 2d 18, 42 (D.D.C. 2005)*).

[*P44] For example, in *National Business Furniture, 2016 IL App (1st) 150526, ¶ 7*, the defendant was a Wisconsin company that sold furniture by phone, catalog, or the Internet and shipped its product to customers. Customers selected a shipping method, and a delivery charge was calculated at the completion of the purchase. *Id. ¶ 8*. The defendant did not collect and remit use tax on the shipping charges, but the relator (the same one as in this case) alleged that the defendant was in violation of Illinois law. *Id. ¶¶ 10-11*.

[*P45] The evidence at trial showed that the defendant collected and remitted taxes on shipping charges in some states but not others, depending on the defendant's interpretation of the applicable state's laws and regulations, and that the defendant interpreted Illinois's administrative rule as not requiring the tax's imposition. *Id. ¶¶ 13-14*. The defendant subscribed to a publication that tracked changes in sales tax rules by state and used software that did the same. *Id. ¶¶ 15-16*. In **[**16]** addition, the Illinois Department of Revenue (IDOR) had conducted an "Illinois Sales Tax audit" for a one-year period, and the defendant opened up its books to IDOR. *Id. ¶ 18*. Those records included a document plainly showing that the defendant was collecting the use tax on the sale of merchandise but not on shipping. *Id. ¶ 21*. The former chief financial officer testified that he believed, at all relevant times, that the company was complying with Illinois tax laws. *Id. ¶ 22*.

[*P46] At the close of trial, the circuit court found that the relator had failed to prove that the defendant acted with reckless disregard, that instead the defendant had reasonably relied on the IDOR audit and its own interpretation of the applicable Illinois administrative rule to determine that it owed no duty to collect use tax on shipping charges in Illinois. *Id. ¶ 23*. We affirmed, finding

that the trial judge's findings were not against the manifest weight of the evidence. Id. ¶¶ 37-39. We reasoned that the relator failed to "prove that defendant ignored obvious warning signs, buried its head in the sand, and refused to learn information from which its duty to pay money to the State would have been obvious." **[**17]** Id. ¶ 39.

[*P47] In Relax the Back, 2016 IL App (1st) 151580, ¶¶ 6-7, another recent case involving the same relator, the question was whether the defendant was liable for failing to collect and remit use taxes for catalog and Internet sales for its neck and back care products (chairs, massage products, books, and videos). The claim regarding Internet sales was rejected because the trial court determined that no use taxes were owed in the first instance due to a lack of sufficient nexus. Id. ¶ 13. But as to catalog sales, the trial court found a sufficient nexus to impose tax liability, based on evidence that defendant's franchises in Illinois distributed a thousand catalogs to customers in Illinois every year. *Id.* Thus, as to catalog sales, the trial court proceeded to the question relevant here, whether the defendant recklessly disregarded its obligation to collect and remit those use taxes. *Id.*

[*P48] The evidence showed that the defendant's chief financial officer (CFO) consulted with an outside tax attorney, who concluded that the defendant lacked a sufficient nexus to Illinois and owed no duty to collect and remit use taxes. Id. ¶ 8. The CFO likewise consulted with a "sales tax specialist in accounting" who reached the same conclusion. **[**18]** Id. ¶ 9. The CFO testified that outside certified public accountants audited the defendant's financial statements annually, and he understood that they would not have approved the financial statements had they believed the company should be collecting use taxes. Id. ¶ 10. Finally, the defendants presented an opinion witness, a former bureau manager of the audit bureau of IDOR, who testified that the defendant's investigation of its Illinois tax obligations was reasonable. Id. ¶ 11.

[*P49] The trial court found that the defendant's CFO "'made an honest effort to determine whether or not any tax liability occurred as a result of its *Internet* operations.'" (Emphasis added.) Id. ¶ 13. The trial court noted, however, that the defendant's investigation of its tax liability concluded in 2004 or 2005, and that its new requirement to Illinois franchises to mail catalogs to Illinois residents (the act that gave it a "substantial nexus" and triggered its use-tax obligation) began in either 2005 or 2006. Id. ¶¶ 14-15. Thus, because the defendant failed to re-examine its potential tax liability regarding catalog sales after imposing that new "catalog requirement" on its Illinois stores, the trial court **[**19]** found that the defendant recklessly disregarded its use-tax obligation as to catalog sales and was liable under the False Claims Act. Id. ¶¶ 15-16.

[*P50] This court reversed the judgment in the relator's favor on the catalog sales. Id. ¶ 30. We reasoned that a mistaken interpretation of a somewhat gray area of the law was not reckless disregard. *Id.* Though we acknowledged that the defendant "did not actively seek the opinion of the IDOR or reevaluate [its] use tax obligation in light of its catalog requirement, this failure to ensure that [defendant] had no duty to collect Illinois use tax [was] not evidence of reckless disregard." *Id.*

[*P51] A comparison of the facts in those cases, versus the facts here, shows the weakness of My Pillow's position. In National Business Furniture, 2016 IL App (1st) 150526, ¶¶ 13-22, the evidence showed that the defendant company investigated its potential tax liability under Illinois law in many ways, including attempts to remain updated on any changes in the law and surviving an audit from the State, and that instead of flatly denying tax liability throughout the country, the defendant actually conducted distinct, state-by-state analyses of its obligations, sometimes concluding that it owed a use-tax obligation and sometimes **[**20]** not.

[*P52] And in Relax the Back, 2016 IL App (1st) 151580, ¶¶ 8-13, the defendant relied on legal and sales-tax accounting expertise in determining its lack of Illinois use-tax liability, an expert at trial opined that its efforts in doing so were reasonable, and even the trial court found that the defendant had made an honest effort, at least initially, to determine its use-tax liability under Illinois law, even if it failed to reconsider that liability after imposing the new "catalog requirement." Indeed, in *Relax the Back*, the defendant continued to deny at trial that it owed a use-tax obligation in the first place, prevailing on that argument as to Internet sales, though losing as to catalog sales. Id. ¶¶ 13-15.

[*P53] In stark contrast, in the matter before us, the trial court found that the evidence showed that My Pillow did not make a reasonable and prudent inquiry as to its tax obligations on Internet and telephone sales to Illinois customers. As the trial court explained, "Lindell testified that My Pillow did not review Illinois statutes or regulations regarding tax collection on Internet or telephone sales; did not review [the] IDOR website or IDOR publications and General Information letters

posted on the website; did not review any **[**21]** case law; and never sought advice from IDOR."

[*P54] The trial court also noted that "no one" at My Pillow did these things "even though My Pillow was participating at craft shows in Illinois and was selling products over the Internet and through phone sales to Illinois customers." The court noted that My Pillow paid its marketing company approximately $200,000 to nationally advertise its products but made no investment whatsoever in researching its tax obligations nor did it hire any lawyers or accountants.

[*P55] The trial court further noted that My Pillow registered with IDOR in July 2012 and began filing Form ST-1s, which required it to report "[s]ales from locations outside of Illinois." But, as the trial court found, "[e]ven though the ST-1s clearly informed My Pillow that its Internet and telephone sales were taxable, My Pillow did no investigation and did not consult with any professional whether Internet and telephone sales were taxable."

[*P56] The trial court noted that "Lindell testified that he thought he spoke to his accountant about tax collection but could not recall the meeting." The court found that Lindell was "not credible" when he testified that he did not act with reckless disregard. "Based on **[**22]** all the evidence," the court found that My Pillow knowingly violated the Act because it recklessly disregarded its obligation to collect and remit use taxes on Internet and telephone sales in Illinois.

[*P57] We would also note that, after being served with relator's second amended complaint, My Pillow's response was not to hold firm to some good-faith conclusion that it had no tax obligations—rather, My Pillow's CEO immediately instructed an employee to begin collecting the tax, which it eventually began to do in 2013, amending its tax submissions to the State and paying the past-due tax. A rational fact finder might find it difficult to believe that My Pillow had engaged in a reasonable, thoughtful analysis of its use-tax liability in Illinois when it folded so quickly in the face of accusations that it had failed to pay the tax.

[*P58] Having reviewed the record at trial and the trial court's careful, well-reasoned ruling, we cannot say that the trial court's findings are against the manifest weight of the evidence. We cannot say that the opposite conclusion is clearly evident or that the finding is arbitrary or not based on the evidence presented. See *Best, 223 Ill. 2d at 350*.

[*P59] While My Pillow may be correct that its **[**23]** tax liability under Illinois law was less than clear, the trial court found that it did nothing to try to comb through the thicket to make a reasonable judgment about its tax obligations. That is the fatal blow for My Pillow, the fact that distinguishes this case from the others discussed. In those other cases, the companies undertook investigations and came to reasonable conclusions, and they could not be held liable under the False Claims Act for what amounted to nothing more than reasonable differences in legal opinions. My Pillow cannot altogether ignore any possible tax liability under Illinois law and then, when called to account for it, claim that it was too confusing to determine, so it never should have had to try to figure it out in the first place.

[*P60] In a case under the federal False Claims Act brought to our attention by relator, a New York federal court said this:

> "It is true that FCA liability cannot attach where an incorrect submission results simply from a misunderstanding concerning what the applicable regulations require of a claimant. The record demonstrates, however, that this is not what happened here. While confusion apparently existed on the margins concerning the **[**24]** precise requirements of the new cost-reporting instructions *** *the [defendants] have not pointed to any evidence that they tried to comply with the new regulations, and somehow blundered in the attempt*. *Nor do the [defendants] claim at any point that they were confused by the new instructions*. Instead, the [defendants] attempt to hide behind the general 'abundance of confusion and misdirection' that they contend surrounded the issuance of [the new cost-reporting instructions] to argue, in effect, that the dispute over the meaning and validity of [the new cost-reporting instructions] created blanket immunity for everyone ordered to comply with the new interpretation." (Emphasis added.) *Visiting Nurse Ass'n of Brooklyn v. Thompson, 378 F. Supp. 2d 75, 95 (E.D.N.Y. 2004)*.

[*P61] That passage appropriately describes My Pillow's argument and the correct response. If My Pillow is correct that the murky nature of this area of use-tax law is enough, by itself, to avoid liability under the "knowing"/reckless-conduct standard of *section 3*, then in effect we would be writing *section 3* out of existence, at least as it concerns reverse false claims of use-tax liability in interstate commerce. It would make no difference whether a company engaged in a reasonable,

thoughtful inquiry as to its use-tax obligations **[**25]** or brazenly ignored any potential liability—all that would matter is that the question is a thorny one, subject to good-faith dispute, and thus, as a matter of law no reckless conduct occurred.

[*P62] My Pillow did not demonstrate that it *had* a good-faith dispute over its use-tax obligations in Illinois, because it never made any reasonable effort to determine that obligation one way or the other. The trial court found that My Pillow's conduct was far removed from a reasonable, prudent inquiry into its use-tax obligations under Illinois law and was much more akin to burying its head in the sand and ignoring obvious warning signs. We cannot say that these findings were against the manifest weight of the evidence. We affirm the trial court's judgment on liability.

[*P63] 2. Damages

[*P64] My Pillow next challenges the trial court's damages award. A person who violates the Act "is liable to the State for a civil penalty of not less than $5,500 and not more than $11,000, plus 3 times the amount of damages which the State sustains because of the act of that person." *740 ILCS 175/3(a)(1)* (West 2012). My Pillow claims that the trial court erroneously trebled the amount that My Pillow remitted prior to trial ($106,970), when it filed **[**26]** its amended Form ST-1s for 2012 and 2013. My Pillow also challenges the trial court's decision to award relator damages (and penalties) for the period prior to its investigation, which began on August 30, 2011. We first address the "trebling" issue.

[*P65] a. Trebling of $106,970 Paid Before Trial

[*P66] The first issue concerns the $106,970 that My Pillow paid in taxes to the State before trial. Everyone agrees that My Pillow is entitled to some form of credit against the judgment for the $106,970 it paid before trial. But the question is whether that money should be included in the amount of "damages" that are trebled, and *then* credited (as relator argues), or whether it should be deducted *before* trebling (as My Pillow argues).

[*P67] The trial court ruled one way and then reversed itself, so a brief review of the relevant procedural history and the trial court's reasoning is in order.

[*P68] After trial, relator filed a memorandum requesting an award of $1,008,167 ($557,167 in damages and $451,000 in penalties). In support of its request for $557,167 in damages, relator claimed that My Pillow's unpaid tax liability for the period of June 2010 through October 31, 2013, was $221,379. This amount included the **[**27]** $106,970 tax liability that My Pillow had remitted prior to trial. Relator argued that My Pillow's untimely compensatory payments should not be subtracted until after the damages were trebled and claimed that the $221,379 amount had to be trebled under the Act (for a trebled total of $664,137). *After* trebling the damages, relator credited My Pillow for the $106,970, to arrive at the final figure of $557,167. In response, My Pillow claimed that its remittance of the $106,970 in taxes should be subtracted from the damages amount *prior* to trebling.

[*P69] On February 18, 2015, the court entered its original order. The court agreed with My Pillow and concluded that the $106,970 that My Pillow remitted to the state in 2013 and 2014 should be subtracted from the damages prior to trebling. The court based its decision on the fact that My Pillow had timely filed the amended Form ST-1s, which it was allowed to do under ROTA.

[*P70] On December 17, 2015, in its second amended final order and judgment, the court changed its decision and concluded that the $106,970 that My Pillow paid to the State must be included in the amount to be trebled and must be considered "proceeds" of this action. My Pillow would **[**28]** still get credit for the payment, but it would be deducted from the damages *after* trebling.

[*P71] As the trial court explained, the evidence at trial was that, *after* being served with the second amended complaint filed by relator, Lindell instructed an employee to begin collecting the tax alleged in the complaint and that finally, in 2013, My Pillow began to collect the tax, amended its Form ST-1s, and paid the delinquent tax. Thus, in the court's view, "the $106,970 must be considered proceeds of this action because they were remitted after Relator sued [My Pillow] and in response to the suit and because they were produced or derived from Relator's Complaint." As the court further found: "It is clear from the evidence, in particular the testimony of [My Pillow]'s CEO [Lindell], that these past due taxes would not have been paid to the State had Relator not brought this action."

[*P72] The court further noted that "damages" under the Act are what the State sustained because of My Pillow's acts. The court found that My Pillow "did not pay this tax until it was sued by Relator; thus, the State was

deprived of it. Those are the damages." The court ordered that "the $106,970 is considered damages which **[**29]** should be included in the amount which is to be trebled."

[*P73] The trial court found, and My Pillow does not dispute, that "these past due taxes would not have been paid to the State had Relator not brought this action." The fact that the amendments to the Form ST-1s were allowed under ROTA was not the decisive consideration. The relevant consideration, the trial court reasoned, was the fact that My Pillow made those amendments and paid the $106,970 in past due taxes as a direct result of this lawsuit.

[*P74] My Pillow argues that the court's initial ruling was correct and that relator cannot treble the $106,970 that My Pillow paid with its amended Form ST-1s for 2012 and 2013. For the reasons that follow, we disagree with My Pillow.

[*P75] We begin with the analysis by the U.S. Supreme Court, considering the federal false claims statute, in *United States v. Bornstein, 423 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976)*. In *Bornstein*, the federal government filed an action against a subcontractor that had knowingly provided falsely-marked products to the prime contractor, which resulted in the prime contractor presenting false claims to the government. After the government discovered the fraud, the prime contractor made payments to the government. *Id. at 307*. But the government sued the **[**30]** subcontractor under the False Claims Act and sought, among other things, double damages (before the statute was amended to provide for treble damages). The subcontractor argued that, before determining the amount of "damages" that should be doubled, any earlier compensatory payments should be deducted. The Supreme Court disagreed, holding that "the [g]overnment's damages should be doubled before any compensatory payments are deducted, because that method of computation most faithfully conforms to the language and purpose of the [federal act]." *Id. at 314*.

[*P76] The Court first noted that the federal act "speaks of doubling 'damages' and not doubling 'net damages' or 'uncompensated damages.'" *Id. at 314 n.10*. It further reasoned that the "make-whole purpose of the Act is best served by doubling the Government's damages before any compensatory payments are deducted." *Id. at 315*. The Court gave a detailed discussion of those reasons:

> "First, this method of computation comports with the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims. Second, the rule that damages should be doubled prior to any deductions fixes the liability **[**31]** of the defrauder without reference to the adventitious actions of other persons. The position [advanced by the subcontractor] would mean that two subcontractors who committed similar acts and caused similar damage could be subjected to widely disparate penalties depending upon whether and to what extent their prime contractors had paid the Government in settlement of the Government's claims against them. *** [T]he prime contractor's fortuitous acts should not determine the liability of the subcontractor under the [treble]-damages provision. *Third, the reasoning [advocated by the subcontractor] would enable the subcontractor to avoid the Act's double-damages provision by tendering the amount of the undoubled damages at any time prior to judgment. This possibility would make the double-damages provision meaningless*. Doubling the Government's actual damages before any deduction is made for payments previously received *from any source* in mitigation of those damages forecloses such a result." (Emphasis added.) *Id. at 315-16*.

[*P77] Based on *Bornstein*, the trial court correctly found that the amount of use tax My Pillow remitted to the State prior to trial—the amount of $106,970—should not be deducted before trebling, **[**32]** but should be credited after trebling. First, the Supreme Court noted that the federal act in effect at the time referred to "doubling 'damages' and not doubling 'net damages' or 'uncompensated damages'" (*id. at 314 n.10*), and the same may be said of our state Act. The federal act at the time provided for "double the amount of damages which the United States may have sustained by reason of the doing or committing such act" of submitting a false claim. (Internal quotation marks omitted.) *Id. at 305 n.1*. *Section 3* of our Act provides for penalties for violations "plus 3 times the amount of damages which the State sustains because of the act of that person" submitting the false claim. *740 ILCS 175/3(a)(1)* (West 2012). In substance, these provisions are identical.

[*P78] Moreover, as *Bornstein* aptly noted, were it otherwise, a strategic defendant could render the treble-damages provision meaningless with a preemptive, prejudgment payment of the original amount sought.

See Bornstein, 423 U.S. at 316. A defendant, fearing an adverse judgment on a False Claim Act count, could wait months or years—or in some cases, until the eve of a final trial judgment—then pay the entire nontrebled amount of damages sought by the relator or the government and claim that there was nothing left **[**33]** to treble. Admittedly, that is not precisely what happened here, but something very close to it did—the trial court specifically found that the $106,970 My Pillow remitted the State was in direct response to the relator's lawsuit.

[*P79] Similar reasoning has been applied by one court, in a different context. In McGinty v. State of New York, 193 F.3d 64 (2d Cir. 1999), plaintiffs sued several defendants, including the State of New York, for wrongfully reducing death or disability benefits based on age, in violation of the federal Age Discrimination in Employment Act (ADEA) (29 U.S.C. §§ 621-634 (1994)). In an attempt to bring the state in compliance with the ADEA, the state later made additional death benefit payments to plaintiffs. McGinty, 193 F.3d. at 67-68. But the court rejected the defendants' claim that the plaintiffs' death benefit claims were moot. Id. at 70-71. The court stated: "[P]laintiffs here unquestionably suffered actual damages at the time that defendants willfully paid them less in death benefits than ADEA required upon the deaths of their decedents." Id. at 71. As the court further explained: "If defendants were correct that plaintiffs' consequent statutory right to liquidated damages could be wiped out by defendants' later preemptive distribution of the willfully-caused deficit in those death benefits, **[**34]** any ADEA defendant could violate the law with impunity, then avoid its statutory obligation to pay liquidated damages simply by paying off plaintiffs' compensatory damages claims before resolution of the suit." *Id.* Citing *Bornstein*, the court in *McGinty* concluded: "That cannot be and is not the law." *Id.*

[*P80] My Pillow relies on United States v. Anchor Mortgage Corp., 711 F.3d 745 (7th Cir. 2012), which it claims "requires" that the tax payments that My Pillow made prior to trial be deducted from the amount of damages prior to trebling. In *Anchor Mortgage*, the defendants, a mortgage brokerage corporation and its former president, fraudulently obtained eleven federally-guaranteed home mortgage loans secured by real property by submitting false certifications with the loan applications (falsely stating that relatives had provided the down payments for the loans and that Anchor Mortgage had not paid anyone for referrals). Id. at 747. Before trebling the amount of damages sustained by the government, the court considered what those damages actually were. Id. at 748. The government, as the guarantor of those loans, had paid money to the lenders to compensate them, but later had sold the land securing the loans to recoup some of the loss. The district court took the amount the government **[**35]** had paid to the lenders, trebled it, and then deducted the sales proceeds as a credit against the trebled damages award. Id. at 746.

[*P81] The Seventh Circuit reversed, holding that the sales proceeds should have first been deducted before trebling—what it called "net trebling." Id. at 750-51. As the court reasoned:

> "Basing damages on net loss is the norm in civil litigation. If goods delivered under a contract are not as promised, damages are the difference between the contract price and the value of what arrives. If the buyer has no use for them, they must be sold in the market in order to establish that value. If instead the seller fails to deliver, the buyer must cover in the market; damages are the difference between the contract price and the price of cover. If a football team fires its coach before the contract's term ends, damages are the difference between the promised salary and what the coach makes in some other job (or what the coach could have made, had he sought suitable work). Mitigation of damages is almost universal." Id. at 749.

[*P82] My Pillow contends that this "benefit of the bargain" approach applies to the instant case involving My Pillow's failure to pay sales taxes that were due. We disagree. It may be **[**36]** true that "[i]n most [federal false claims act] cases, damages are measured as they would be in a run-of-the-mine breach-of-contract case—using a 'benefit-of-the-bargain' calculation in which a determination is made of the difference between the value that the government received and the amount that it paid." United States ex rel. Feldman v. van Gorp, 697 F.3d 78, 87 (2d Cir. 2012).

[*P83] But this is not the typical false-claims case involving the provision of goods to the government that were worth less than what the government thought it was getting. As we mentioned at the outset, this case presents what is known as a "reverse false claim, where a material misrepresentation is made to avoid paying money owed to the government." Relax the Back, 2016 IL App (1st) 151580, ¶ 19. As we have noted, "[t]he reverse false claims provision was added to provide that

an individual who makes a material misrepresentation to avoid paying money owed to the Government would be equally liable under the Act as if he had submitted a false claim to receive money." (Internal quotation marks omitted.) *Ritz Camera, 377 Ill. App. 3d at 996*.

[*P84] My Pillow did not breach a contract. There was no "bargain" or contract in the instant case. My Pillow simply failed to pay taxes it owed—*i.e.*, it "knowingly conceal[ed] or knowingly and improperly avoid[ed] *** an obligation **[**37]** to pay or transmit money *** to the State." *740 ILCS 175/3(a)(1)(G)* (West 2012).

[*P85] *Anchor Mortgage* was a typical false-claims case, where the defendant submitted false documents to procure government-backed mortgages. *Anchor Mortgage, 711 F.3d at 747*. Its holding was grounded, as the court noted, in the contractual concept of "mitigation of damages" (*id. at 149*), the notion that if a bad product is delivered, the government should not get *all* of its money back, but rather it must first determine the worth of what it did receive and subtract that from the amount it paid. *Id.* ("If goods delivered under a contract are not as promised, damages are the difference between the contract price and the value of what arrives."). It is difficult to fit that concept into this reverse false claim, where My Pillow did not "mitigate" its damages in any reasonable meaning of that phrase. All it did was prepay some of the damages. It should get a credit on the back end—as it did—but only after its inclusion in the amount of damages that were trebled. Otherwise, as the trial court correctly noted, My Pillow would be "reward[ed] for [a] payment made only because My Pillow was found out and sued."

[*P86] *Bornstein* clearly holds that if a wrongdoer is caught in an act of submitting a false **[**38]** claim, the prepayment of some of the damages should not be deducted from the damages that are doubled (now trebled). *Bornstein, 423 U.S. at 316*. That is precisely what happened here. My Pillow started remitting taxes only after relator sued it for failing to do so. It was a preemptive, partial payment of the State's actual damages. If we allowed that to serve as a credit against the damages award *before* being trebled, we would render the treble-damages provision meaningless. See *id.*

[*P87] We agree with the trial court that, at the time My Pillow failed to pay the sales tax it owed, the State was deprived of the sales tax My Pillow owed to Illinois on Internet and telephone sales for 2012 ($61,218) and 2013 ($45,752); thus the State sustained damages totaling $106,970. Those were actual damages. We agree with the trial court's conclusion that, although My Pillow is entitled to a credit for the $106,970 that it paid before judgment, that credit must come after the damages—including that $106,970—are trebled. We affirm the award of damages on this question.

[*P88] b. Damages for Periods Prior to Relator's Investigation

[*P89] It is undisputed that My Pillow failed to collect tax on Internet and telephone sales beginning in June 2010. **[**39]** Relator claimed it was entitled to damages for 41 months (June 2010 - October 2013). But My Pillow argues that relator was not entitled to any damages for the period prior to relator's investigation, which began on August 30, 2011. My Pillow claims that "[n]o facts are alleged in the Third Amended Complaint regarding a violation of the Act for earlier time periods" than August 30, 2011. Thus, My Pillow argues, relator is not entitled to any damages for false claims that occurred prior to August 30, 2011.

[*P90] If we are to take this argument literally, My Pillow's argument that "[n]o facts are alleged in the Third Amended Complaint regarding a violation of the Act for earlier time periods" than August 30, 2011, sounds like an argument in a motion to dismiss a complaint for lack of sufficient fact-pleading. See *735 ILCS 5/2-615* (West 2010). But as relator notes, My Pillow answered that complaint and thus waived any objection to insufficient factual pleading. See *735 ILCS 5/2-612(c)* (West 2010) ("All defects in pleadings, either in form or substance, not objected to in the trial court are waived."); see *Fox v. Heimann, 375 Ill. App. 3d 35, 41, 872 N.E.2d 126, 313 Ill. Dec. 366 (2007)* (defendant's answer to complaint waived any defect in pleading).

[*P91] And regardless of how insufficient the factual pleading may have **[**40]** been, it would have been cured under the doctrine of aider by verdict. Under that doctrine, "where a defendant allows an action to proceed to verdict, that verdict will cure not only all formal and purely technical defects and clerical errors in a complaint, but will also cure any defect in failing to allege or in alleging defectively or imperfectly any substantial facts which are essential to a right of action." (Internal quotation marks omitted.) *Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 60-61, 645 N.E.2d 888, 206 Ill. Dec. 636 (1994)*; see also *Swager v. Couri, 77 Ill. 2d 173, 185, 395 N.E.2d 921, 32 Ill. Dec. 540 (1979)*; *Fox, 375 Ill. App. 3d at 41*. This case went to final judgment

before the bench, and the court found that the evidence established that My Pillow's failure to collect and remit use taxes reached back to June 2010. That judgment cured any deficiency, if one existed in the first place, in the third amended complaint.

[*P92] Another way to read this argument, conceivably, is that My Pillow is claiming surprise at trial that relator was seeking damages for actions that pre-dated August 30, 2011, which prejudiced its ability to defend the case. If that is what My Pillow means, it has not said so or even hinted as much. Absent citation to prevailing law or any development of that argument, My Pillow has forfeited the argument. *Old Second National Bank v. Indiana Insurance Co., 2015 IL App (1st) 140265, ¶ 35, 390 Ill. Dec. 898, 29 N.E.3d 1168* (failure to cite legal authority results **[**41]** in forfeiture of issue on appeal). Regardless, our review of the third amended complaint reveals that relator alleged the following with regard to My Pillow's obligation to collect and remit use tax on its Internet and phone sales:

> (1) "My Pillow did not begin to collect and remit tax on Website and telephone sales until at least July or possibly September, 2013."
>
> (2) "My Pillow is liable for making false claims under the Act for six years prior to the filing of the initial complaint on July 13, 2012. *** My Pillow is liable under the Act as amended July 27, 2010 because it knowingly concealed or knowingly and improperly avoided an obligation to pay money to the State."
>
> (3) "Beginning July 27, 2010, My Pillow knowingly concealed or knowingly and improperly avoided or decreased its obligation to pay money to the State by failing to collect and remit sales tax on its Website and infomercial sales to Illinois purchasers."
>
> (4) "The limitations period under the Act is six years. My Pillow is liable for making false claims as defined in the False Claims Act for a period of six years prior to the filing of the initial complaint on July 13, 2012."
>
> (5) "From January 2010 through July 2013, the date **[**42]** My Pillow, Inc. began to collect and remit tax on Website and telephone sales, each failure to maintain records showing the tax owed constitutes a separate violation for which a mandatory individual penalty will be assessed."

[*P93] It is not credible to believe, from reading these allegations, that My Pillow was unaware that relator would be seeking damages pre-dating August 30, 2011.

[*P94] Finally, to the extent that My Pillow is raising a *legal* argument here—that, as a matter of law, relator could not have recovered for any actions that pre-date the commencement of relator's investigation on August 30, 2011—that argument is both forfeited and without merit. Forfeited, because My Pillow has pointed to no language in the Act, or to any case law, that would suggest that a company that fails to collect and remit use taxes to the State cannot be held liable for that conduct until the fortuitous moment that either a relator or the State begins to inquire into the matter. See *Old Second National Bank, 2015 IL App (1st) 140265, ¶ 35* (failure to develop argument or cite to pertinent authority constitutes forfeiture of argument on appeal).

[*P95] And without merit, because it would be a perverse interpretation of the Act, indeed, to suggest that a company has blanket **[**43]** immunity under the Act to avoid collecting and remitting use taxes until someone begins to realize what the company has been up to. The remedy for a violation of the Act, besides penalties and fee awards, is an award for "damages which the State sustains because of the act of" the wrongdoer. *740 ILCS 175/3(a)(1)* (West 2012). That language is unconcerned with when the State, much less a relator, first got wind of the problem. Here, the evidence showed that the "damages which the State sustain[ed] because of the act[s] of" My Pillow went back to June 2010. Relator thus proved its case for damages going back to that date. The date on which relator began its investigation or discovered the problem is irrelevant.

[*P96] That is not to say that a wrongdoer's liability can extend back into time indefinitely. It cannot. The Act provides a limitations period for civil actions, generally limiting actions to six years from the date on which the violation was committed. *740 ILCS 175/5(b)(1)* (West 2012). *That* is the protection afforded to a company that fails to collect and remit use taxes—the knowledge that the State cannot go back more than six years from the filing of the complaint—not some unwritten, judicially-bestowed immunity that allows a company to **[**44]** avoid its tax obligations with impunity until the day it is caught.

[*P97] The evidence showed that, by My Pillow's own admission, My Pillow did not remit tax on Internet and telephone sales from June 2010 through July 2013. The trial court properly assessed damages relating back to the relevant date of June 2010. We affirm the damages award.

[*P98] 3. Attorney Fees

[*P99] a. Relator's Entitlement to Attorney Fees for Work of Its Own Lawyers

[*P100] My Pillow next argues that the trial court erred in awarding attorney fees to relator, a law firm, because a plaintiff who is also an attorney cannot recover his or her own attorney fees.[2]

[*P101] We first address our standard of review. Under Illinois law, a trial court cannot award attorney fees to a party unless the fees are specifically authorized by statute or by contract between the parties. *Grate v. Grzetich, 373 Ill. App. 3d 228, 231, 867 N.E.2d 577, 310 Ill. Dec. 886 (2007)*. Generally, where the trial court has the authority to award attorney fees, we review its decision to award attorney fees for an abuse of discretion. *Id.* But whether a trial court has the *authority* to grant attorney fees as an available remedy is a question of law that we review *de novo*. *Id*; accord *Spencer v. Di Cola, 2014 IL App (1st) 121585, ¶ 35, 383 Ill. Dec. 819, 16 N.E.3d 1*. My Pillow is challenging the trial court's authority to award fees under the Act **[**45]** to a relator who is both the litigant and an attorney. So our review is *de novo*.

[*P102] The Act provides that, when the State does not intervene in a false claims action, the person who brings the action:

> "shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25% and not more than 30% of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." *740 ILCS 175/4(d)(2)* (West 2012).

[*P103] The plain language of *section 4(d)(2)* does not explicitly preclude an award of attorney fees to a law firm that was both the relator and the law firm representing the relator. No reported Illinois decision has addressed this topic under the Act. Nor, as far as both this court and the parties could determine, has any decision, anywhere in the country, discussed whether a relator-law firm can obtain attorney fees under a false-claim statute for work performed representing itself in the litigation. Neither party **[**46]** has pointed to any illuminating legislative history on this question, and we have found none, either.

[*P104] The parties have cited case law concerning two areas of the law—case law involving an *individual* attorney's attempt to collect attorney fees when that lawyer represents himself *pro se* in a proceeding, and case law concerning a plaintiff-*law firm*'s ability to collect fees for work performed by its member lawyers in representing the firm in court. Neither of these are perfect analogies, particularly because none of them concern a fee-shifting provision under a state or federal false-claims statute, but these decisions are helpful in analyzing this difficult question.

[*P105] i. Individual Plaintiff-Attorney's Entitlement to Fees for Self-Representation

[*P106] In *Hamer v. Lentz, 132 Ill. 2d 49, 63, 547 N.E.2d 191, 138 Ill. Dec. 222 (1989)*, the Illinois Supreme Court held that an attorney proceeding *pro se* in an action brought pursuant to the Illinois Freedom of Information Act (FOIA) (Ill. Rev. Stat. 1987, ch. 116, ¶ 201 *et seq.*) was not entitled to fees under that statute. The FOIA, like the Act in this case, contained a standard fee-shifting provision that did not speak to the question. The court based its decision on three grounds.

[*P107] First, the court explained that the purpose **[**47]** of the fee provision was to ensure enforcement of the FOIA by "removing the burden of legal fees, which might deter litigants from pursuing legitimate FOIA actions." *Hamer, 132 Ill. 2d at 62*. But "[a] lawyer representing himself or herself simply does not incur legal fees," so the specter of having to pay an attorney did "not present a barrier" to the *pro se* lawyer, as it would to a nonlawyer plaintiff. *Id.*

[*P108] Second, the court reasoned that another purpose of the fee-shifting provision was to "avoid unnecessary litigation by encouraging citizens to seek legal advice before filing suit." *Id.* The presence of an independent lawyer brought a detached, second set of eyes on the facts and the law, even if the plaintiff was already a lawyer himself or herself. *Id.*

[*P109] Third, the court feared the potential for abusive fee generation if a lawyer were permitted to represent

[2] My Pillow does not contest the attorney fees awarded for services performed by another law firm that was hired by relator.

himself or herself *pro se* and then collect fees for the self-representation. FOIA actions, in other words, could become less about vindicating citizen requests for information from the government and more about a vehicle to generate legal fees. Though the court in *Hamer* had no indication that the plaintiff was engaged in such a practice, or that he had **[**48]** an otherwise "inactive practice," the court did not "think it advisable to leave the door open for unscrupulous attorneys." *Id.*

[*P110] Appellate courts have applied the holding in *Hamer* in contexts beyond the FOIA, denying attorney fees to individual attorneys representing themselves in litigation. See, *e.g.*, *Kehoe v. Saltarelli, 337 Ill. App. 3d 669, 677-78, 786 N.E.2d 605, 272 Ill. Dec. 66 (2003)* (individual lawyer not entitled to fees for self-representation in malpractice action); *In re Marriage of Pitulla, 202 Ill. App. 3d 103, 117-18, 559 N.E.2d 819, 147 Ill. Dec. 479 (1990)* (individual attorney representing self in dissolution-of-marriage action not entitled to recover attorney fees).

[*P111] Two years after our supreme court decided *Hamer*, the United States Supreme Court weighed in on this topic in *Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991)*, holding that a *pro se* attorney was not entitled to recover attorney fees under *42 U.S.C. § 1988 (1988)*, a federal civil-rights statute. As the Court noted:

> "A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Kay, 499 U.S. at 438*.

[*P112] *Kay*, then, **[**49]** simply reinforced what our supreme court had cited as its second basis for denying fees to *pro se* lawyers under the Illinois FOIA—that the law should encourage even lawyer-plaintiffs to retain independent counsel, who can provide an objective perspective to both weed out non-meritorious claims and more effectively prosecute meritorious ones. See *Hamer, 132 Ill. 2d at 62*.

[*P113] ii. Plaintiff-Law Firm's Entitlement to Fees for Self-Representation

[*P114] Though the U.S. Supreme Court's decision in *Kay* was limited to holding that an individual plaintiff-attorney could not collect fees for self-representation under a fee provision in a civil-rights statute, the U.S. Supreme Court dropped a footnote in response to the suggestion that Congress had intended to compensate *organizational* plaintiffs that represent themselves for the legal work they performed:

> "Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house **[**50]** or *pro bono*, and thus, there is always an attorney-client relationship." *Kay, 499 U.S. at 436 n.7*.

[*P115] Thus, though this footnote was not directly central to the Supreme Court's holding, the Court clearly signaled that organizational plaintiffs would stand on different ground than individual plaintiffs engaged in self-representation. The existence of an attorney-client relationship between the organization and its lawyer, even if that lawyer were an employee of that organization, apparently satisfied the Court's concern about the need for objective counsel.

[*P116] When one thinks of the Supreme Court's reference to "organizations" that "represent[ ] themselves" through "in-house or *pro bono*" lawyers (*id.*), included within that category would be obvious examples of nonprofit organizations devoted to public-policy issues such as protection of the environment, fair-housing practices, or the like. See, *e.g.*, *Lujan v. Defenders of Wildlife, 504 U.S. 555, 559, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ("organizations dedicated to wildlife conservation and other environmental causes"); *Havens Realty Corp. v. Coleman, 455 U.S. 363, 368, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)* (nonprofit corporation whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area" (internal quotation marks omitted)); *National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 252, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994)* ("national nonprofit organization that supports the legal availability **[**51]** of abortion").

[*P117] Does it also include law firms, who are party-plaintiffs and whose member attorneys represent the firm in court? Several federal circuit courts of appeals

have considered this question and have unanimously answered: "Yes."

[*P118] These courts, relying heavily on this footnote in *Kay*, have held that a prevailing plaintiff-law firm *may* collect attorney fees for the work performed by its member lawyers under a statutory fee-shifting provision—that a law firm is one of the "organizations" referenced in the *Kay* footnote. See, *e.g.*, Gold, Weems, Bruser, Sues & Rundell v. Metal Sales Manufacturing Corp., 236 F.3d 214, 218-19 (5th Cir. 2000) ("when an organization is represented by an attorney employed by the organization, the attorney has a status separate from the client" and thus, plaintiff law firm could collect attorney fees under Louisiana statute for work performed by member lawyers on plaintiff law firm's behalf); Bond v. Blum, 317 F.3d 385, 400 (4th Cir. 2003), *abrogated on other grounds by* Kirtsaeng v. John Wiley & Sons, Inc., U.S. , 136 S. Ct. 1979, 195 L. Ed. 2d 368 (2016) (appellate court allowed fees to plaintiff law firm for work of its member lawyers in copyright lawsuit, because "[w]hen a member of an entity who is also an attorney represents the entity, he is in an attorney-client relationship with the entity and, even though interested in the affairs of the entity, he would not be so emotionally involved **[**52]** in the issues of the case so as to distort the rationality and competence that comes from independent representation").

[*P119] Following these holdings in *Gold* and *Bond*, the D.C. Circuit Court of Appeals held that a plaintiff law firm could seek fees under the federal FOIA for work performed by its member lawyers. Baker & Hofstetler LLP v. United States Department of Commerce, 473 F.3d 312, 326, 374 U.S. App. D.C. 172 (D.C. Cir. 2006). The court reasoned that the *Kay* footnote had made a "crystal clear" distinction between organizational plaintiffs and individual plaintiffs (id. at 325), and it could find no "principled basis" to distinguish law firms from other organizational plaintiffs employing inhouse counsel. *Id.* The court wrote that *Kay*'s footnote "suggests that an in-house counsel for a corporation is sufficiently independent to ensure effective prosecution of claims," and "[a]n attorney who works for a law firm certainly is no less independent." *Id.*

[*P120] The Eighth Circuit relied on these three decisions (and the *Kay* footnote) to hold that a successful defendant-law firm in an ERISA action could recover legal fees for the work of its member associate. Treasurer, Trustees of Drury Industries, Inc. Health Care Plan & Trust v. Goding, 692 F.3d 888, 898 (8th Cir. 2012). The court found "no meaningful distinction between a law firm and any other organization on the issue of whether there exists an attorney-client relationship between the **[**53]** organization and its attorney." *Id.* Last year, the First Circuit agreed, holding that a successful defendant-law firm could recover attorney fees for the work performed by one of the law firm's salaried associates. Fontanillas-Lopez v. Morell Bauzá Cartagena & Dapena, LLC, 832 F.3d 50, 61 (1st Cir. 2016).

[*P121] But My Pillow cites a recent decision of the Michigan Supreme Court that reached the opposite conclusion under that state's law. In Fraser Trebilcock Davis & Dunlap PC v. Boyce Trust 2350, 497 Mich. 265, 870 N.W.2d 494, 501 (Mich. 2015), the court denied a plaintiff-law firm fees for legal work its member attorneys performed in a suit to collect unpaid fees from a client. The court considered the *Kay* footnote to be "nonbinding dictum" and reasoned that, whatever else that footnote may have meant, it was not intended to "affirmatively distinguish an individual attorney-litigant from a law firm seeking fees for the representation it provided to itself through its member lawyers—a distinction we particularly hesitate to read into *Kay*'s footnote, given the overall thrust of the opinion." *Id.* Ultimately, the court saw no meaningful distinction between an individual lawyer's self-representation and a law firm's self-representation. *Id.*

[*P122] While that holding supports My Pillow's position that relator should be denied fees, this passage in the court's opinion does not:

> "*Kay*'s footnote **[**54]** spoke to the attorney-client relationship that may arise between an organization and its in-house or pro bono counsel. Hoping to duck under *Kay*'s umbrella, Fraser Trebilcock likens the member lawyers who appeared on its behalf to such in-house counsel, but we find this characterization inapt. As *Kay*'s dictum reflects, *the relationship between an organization and its in-house counsel is typically one of attorney and singular client; the attorney is employed by the organization in order to provide legal services to the organization*. There is no indication, however, that Fraser Trebilcock enjoyed this same type of relationship with its member lawyers in the instant suit—namely, that these lawyers were employed by and affiliated with the firm to provide legal services to the firm as a distinct and exclusive client, rather than to provide such services on behalf of the firm to its clients. Whether and under what

> circumstances a law firm may recover fees for representation provided to it by in-house counsel is not before us, and we decline to reach that question here." (Emphasis added.) *Id.*

[*P123] This language is helpful to relator, as the record demonstrates that virtually all of relator's legal **[**55]** work consists of filing false-claims cases as a party-plaintiff. My Pillow does not dispute that fact and, in fact, has gone to great lengths to characterize relator as a professional relator, a characterization relator does not dispute (and which the record amply supports). Thus, while in *Fraser Trebilcock*, the law firm was a traditional law firm with an assortment of clients and that one-off collection case was an anomaly where the firm was representing itself, in this case relator's member lawyers routinely, and nearly exclusively, represent the firm—a singular client. Thus, relator could plausibly argue that the associates and shareholders of its law firm are more akin to "in-house" counsel, falling under *Kay*'s footnote, than they are a traditional law firm.

[*P124] We now turn to Illinois law on this topic. This court recently considered whether a plaintiff-organization that provided legal services to prisoners could collect fees for the work performed by its in-house, salaried lawyers for the successful prosecution of a FOIA claim. *Uptown People's Law Center v. Department of Corrections, 2014 IL App (1st) 130161, 379 Ill. Dec. 676, 7 N.E.3d 102*. This court ruled that it could not. The court first noted that Uptown People's Law Center (Uptown), as a corporate entity, could not proceed *pro se* but, **[**56]** rather, was represented by two of its in-house lawyers, Mr. Mills and Ms. Schult. *Id. ¶ 25*. The court reasoned, however, that "the purpose of the attorney fee provision would not be furthered by awarding attorney fees in this instance" because, given that the lawyers were already salaried employees of Uptown:

> "Uptown was not required to spend additional funds specifically for the purpose of pursuing FOIA requests. [Citation.] Thus, legal fees were never a burden that Uptown was required to overcome in order to pursue its FOIA requests. In addition, Mills and Schult had no expectation of receiving additional fees from Uptown for performing this work. [Citation.] As a result, providing Uptown with legal fees for pursuing FOIA requests would not compensate Uptown. On the contrary, an award of fees would reward Uptown. Moreover, it would encourage salaried employees working for a not-for-profit organization to engage in fee generation for the organization's behalf. Accordingly, we hold that the reasoning of *Hamer* prohibits a not-for-profit legal organization from being awarded legal fees [for work performed by its member lawyers]." *Id.*

[*P125] Notably, *Uptown* does not merely present the example **[**57]** of a nonprofit organization whose in-house lawyers provided the representation—it was a nonprofit *legal* entity that "represent[ed] prisoners regarding conditions of confinement." *Id. ¶ 3*.

[*P126] For understandable reasons, the court in *Uptown* did not discuss *Kay* or these federal cases but instead focused on *Hamer*—understandable because *Uptown* considered the same statutory fee provision interpreted in *Hamer*, the FOIA fee provision. Still, we are *not* construing FOIA, and so in taking *Uptown* into account, it is fair to note that it runs directly counter to *Kay*—at least to *Kay*'s footnote—as well as the federal circuit court decisions we have discussed above. Even the Michigan Supreme Court, distinguishing those cases and reading the *Kay* footnote differently, conceded that the Supreme Court was clearly talking, approvingly, about inhouse counsel's work for an organizational plaintiff in that footnote. See *Fraser Trebilcock, 497 Mich. at 279-80*. The organizational plaintiff in *Uptown* would fall, at least arguably, within the *Kay* footnote's reference.

[*P127] Finally, we would note that this court earlier ruled that a law firm seeking to collect unpaid fees from a client could not collect attorney fees performed by two of that law firm's member lawyers, **[**58]** Mr. Jacquays and Ms. Kennison. *In re Marriage of Tantiwongse, 371 Ill. App. 3d 1161, 1164-65, 863 N.E.2d 1188, 309 Ill. Dec. 291 (2007)*. Without distinguishing between plaintiff-law firms and individual plaintiff-lawyers, the court simply relied on *Hamer* to hold that these two lawyers were "representing themselves" in the collection action and "could not incur any legal fees on their own behalf." *Id.* Thus, though the court there did not explain why, the court appeared to unhesitatingly apply *Hamer* in the context of a plaintiff-law firm representing itself.

[*P128] Having taken all of this case law into account, it is our judgment that relator should not be allowed to recover attorney fees in this instance. We reach this holding, and do not follow the case law cited by relator, for several reasons.

[*P129] First, the federal circuit court decisions that favor relator's position were focused, properly so, on

Kay. But *Kay*'s holding—and its footnote—focused on the presence of an attorney-client relationship and nothing more. The entire point of the holding in *Kay* was that an independent lawyer was necessary to counsel the plaintiff-lawyer, to provide an objective, detached view of the case. Likewise, the entire point of footnote 7 in *Kay* was that organizational plaintiffs are different because in *that* context, **[**59]** an attorney-client relationship *always* exists. Accordingly, as we noted above in detail, the federal circuit court decisions repeatedly emphasized that an attorney-client relationship *did* exist in the context of a plaintiff-law firm and its member lawyers, and thus, the concern in *Kay* was satisfied.

[*P130] But it is possible to agree with that assessment and still reach a different outcome under Illinois law. We agree without hesitation that, in this case, relator had an attorney-client relationship with its member lawyers. Of course it did. A corporation cannot appear in court without a lawyer representing it. *Downtown Disposal Services, Inc. v. City of Chicago, 2012 IL 112040, ¶ 22, 979 N.E.2d 50, 365 Ill. Dec. 684* ("Courts in this country, including this court, unanimously agree that a corporation must be represented by counsel in legal proceedings."). And nothing prevents a corporation of any kind—a law firm or any other company—from using its own, in-house, salaried lawyers in court. See, *e.g.*, *Uptown, 2014 IL App (1st) 130161, ¶ 25*. If our only concern were whether an attorney-client relationship existed between relator and its member lawyers, we would agree with relator's position.

[*P131] But *Kay*, and its singular consideration, is not our only concern. Our supreme court's decision in *Hamer*, while not directly on point because it **[**60]** involved a *pro se* individual plaintiff-lawyer rather than a corporate entity that cannot appear *pro se*, nevertheless is instructive in that it considered an attorney-fee provision much like ours and raised several public policy reasons in interpreting that provision. When we analyze the policy considerations raised in *Hamer*, we find that they favor denying fees to relator in this case.

[*P132] Under the first *Hamer* consideration, we consider the purpose of the fee provision. The purpose of the Act is to reveal fraud against the government. See *Ritz Camera, 377 Ill. App. 3d at 996*. The fee-shifting provision in the Act incentivizes individuals to ferret out such fraud by removing the burden of legal fees as a deterrent. We do not view the fee provision as a reward for successful relators. The Act rewards prevailing relators in other ways. It provides for an award of 25% to 30% of the proceeds of the lawsuit to a relator who handles the litigation from start to finish, without the State's intervention. *740 ILCS 175/4(d)(2)* (West 2012). It awards a smaller share to a prevailing relator in cases where the State intervenes—15% to 25%, "depending on the extent to which the [relator] substantially contributed to the prosecution of the action." *740 ILCS 175/4(d)(1)* (West **[**61]** 2012). Thus, the successful relator-law firm is not only rewarded, but rewarded (at least roughly) based on the amount of effort it expended. To reward that law firm for its efforts *again*, this time based on an hourly fee rate, strikes us as a double recovery.

[*P133] And while an action under the Act could bring along with it a rich bounty for the relator—as it did in this case—that is not necessarily always true. Here, the reverse false-claims action snared a defendant with significant sales in Illinois, but a false-claims action (particularly a traditional one) could very well reveal fraud against the government in a far smaller amount. The relator would still get its 25% to 30% of the recovered proceeds, but it could be 25% to 30% of an amount so small that it is not worth the cost of paying a lawyer to fight the case, on an hourly-fee basis, for several years. And even in a case like this one, where the amount of recovery was larger, a relator could lose part of its case—as it did here, regarding craft-show sales. The fee provision in the Act permits citizen-relators to ferret out fraud even when the reward at the end of the rainbow would not ordinarily warrant the cost of litigation. **[**62]**

[*P134] Relator could argue that the legal fees *are* a burden, because of the opportunity cost—the time that its member lawyers could have spent on other matters instead of this one. We do not agree, first, because this particular relator's attorneys do not appear to perform any legal work *other than* these false-claims cases. They are not taking time away from other clients to perform this work; this work is the only work they do. More importantly, we reject this reasoning because the same thing could have been said of Mr. Hamer in the *Hamer* decision—he was an attorney at a "large Chicago law firm" (*Hamer, 132 Ill. 2d at 62*) who presumably could have used the time litigating the FOIA case to bill hours on work for the law firm's clients. He certainly had more profitable ways to spend his time than litigating a FOIA case, but the supreme court nevertheless reasoned that legal fees did not present an obstacle to him, because he was capable of performing the legal work himself.

[*P135] And the same thing could have been said of the lawyers representing the Uptown People's Law Center in *Uptown, 2014 IL App (1st) 130161, 379 Ill. Dec. 676, 7 N.E.3d 102*. The lawyers in that case could have been spending their time on other lawsuits involving prisoners' rights, but that did not persuade this **[**63]** court that attorney fees were appropriate or consistent with the fee-shifting provision in the FOIA. *Id. ¶ 25* (because organizational plaintiff had salaried, in-house counsel, "legal fees were never a burden that Uptown was required to overcome in order to pursue its FOIA requests").

[*P136] The same is true of relator here. We thus find that the purpose of the fee-shifting provision—to eliminate the barrier of attorney fees—would not be served by awarding fees to a relator that is both client and attorney.

[*P137] The second consideration discussed in *Hamer* was the need for an objective, detached viewpoint of independent counsel—much the same as the concern in *Kay*. We acknowledge that the *Kay* footnote seemed to bless the concept of in-house counsel representing its corporation—its singular client. We also acknowledge that this relator appears to function in a manner unlike a traditional law firm, that it seems to exist only for the purpose of filing, as a party-plaintiff, false-claims cases. Its lawyers might appear to be more like in-house counsel for an organizational plaintiff than lawyers at a law firm with assorted clientele.

[*P138] On the other hand, the traditional corporation with "in-house counsel" **[**64]** is not a corporation where all of the shareholders are lawyers, like a law firm. The "in-house counsel" for a traditional corporation would typically be giving his or her opinion to people who do not actively practice law or, at least, are not experts in the particular field. There is at least some measure of "independence" in that context, in that the "in-house" lawyer would be guided by what he or she believes to be the merits of the case, providing objective advice to a client whose interests and motivations may be contrary to that objective advice.

[*P139] In the specific context before us, we are not convinced of the "independence" of the relator's lawyers from the relator itself. We are not intimately familiar with the relator's corporate structure, but we know this much: First, the company is presently incorporated as Stephen B. Diamond, P.C. (formerly Schad, Diamond & Sheffen, P.C.), and Diamond testified at trial that he is the president of the corporation and has been since Mr. Schad's death approximately 7 years ago. Second, Diamond testified that he, personally, made at least one of the purchases of products from My Pillow, using his personal credit card on the Internet while driving **[**65]** to Wisconsin. Third, Diamond performed legal work on this case, as indicated by the fee petitions and as disclosed in the record, in that he conducted the direct examination of relator's principal witness, Lindell of My Pillow. It would be fair to say that Diamond was the lead counsel at the rather brief trial—as well as a witness called in My Pillow's case-in-chief.

[*P140] If the same person is both the final decision-maker at the client-corporation—its president—and the lead attorney giving advice to the decision-maker, do we have the requisite "independence" envisioned by these federal circuit courts relying on the *Kay* footnote? If the corporate decision-maker and the lead counsel are one and the same person, our situation would seem to be more along the lines of the holding in *Kay*—denying fees for lack of objective, independent counsel—than the organizational exception in the *Kay* footnote, allowing fees for work performed by in-house counsel.

[*P141] The second *Hamer* consideration thus provides marginal assistance, if any, to relator's position.

[*P142] The third consideration in *Hamer* was the potential for abusive fee generation, the notion that a law firm with an otherwise "inactive practice" would **[**66]** make a business out of filing lawsuits under a statute such as the FOIA with a fee-shifting provision. *Hamer, 132 Ill. 2d at 62*. In that regard, the FOIA could become less about vindicating citizens' rights to information and more about generating legal fees for a law firm.

[*P143] We recognize that, whatever one may think of relator's practice, it does perform the valuable service of uncovering fraud against the State, primarily discovering companies that are selling products in Illinois but failing to remit and collect use taxes. The result is that the State is able to recover much-needed tax money going back several years and going forward, as well—revenue it quite possibly never would have recovered otherwise.

[*P144] But that does not alter the fact that this relator has made a business out of filing these false-claims cases as a party-plaintiff. The record discloses the trial court's notation that at one point early on in the development of relator's practice, relator had filed 157 such lawsuits. My Pillow, in its brief, says that relator

has filed over 600 such lawsuits in Illinois, and relator has not taken issue with that number. Our review of the docket of the circuit court of Cook County indicates that hundreds **[**67]** of cases are currently pending bearing relator's name. See https://courtlink.lexisnexis.com/cookcounty/FindDock.aspx?NCase=&SearchType=2&Database=2&case_no=&Year=&div=&caseno=&PLtype=1&sname=Stephen+Diamond&CDate (last accessed May 17, 2017). And we can attest that it is virtually impossible to conduct legal research regarding the Act without constantly running into decisions bearing the relator's name as the plaintiff (or its predecessor name of Schad, Diamond & Sheffen, P.C.), many of which we have cited in this opinion.

[*P145] It is true that a relator receives a reward, a percentage of the proceeds, for ferreting out these nontaxpayers. But it is also true, as we noted earlier, that not all of these cases result in large money judgments, and it is quite likely that the 25% to 30% of the proceeds will pale in comparison to the award of attorney fees. This case is an example. The "proceeds" from this action—the amount that My Pillow failed to pay, trebled—was $889,637, a sizeable number by any estimation. From that amount, relator recovered the maximum 30% fee of $266,891. Compare that maximum-rate recovery, in a case involving significant proceeds, with the amount relator recovered for attorney fees and costs: $600,960. Even granting that a small portion of that award could be shaved off for the "costs" aspect of fees and costs, the attorney-fee **[**68]** award was still more than double relator's statutory recovery of proceeds. And that was in a case involving significant revenue; imagine the disparity should relator litigate roughly the same case, for roughly the same amount of time, resulting in roughly the same amount of attorney fees, in a case where the resulting proceeds are far smaller. The fee award could dwarf a relator's statutory recovery of the proceeds.

[*P146] It is hard to imagine, in other words, that the prospect of earning fees is not a significant driver in the decision to file these cases. It is presumably the reason why relator chooses to file these lawsuits in the name of the law firm and perform (or at least primarily perform) the legal work on the case, too—to obtain both the statutory percentage of recovery as well as attorney fees. In any event, even if this is not relator's intention, *Hamer* tells us to consider the *potential* for abusive fee generation, even if not present in the situation currently before us (as it was not in *Hamer*), and we can, at a minimum, find the potential for abusive fee generation if attorney fees were awarded to a law firm that was both relator and attorney.

[*P147] Relator, at oral argument, reminded **[**69]** us of the value of the service relator performs and warns that it may not be able to provide this service going forward, should this court rule against it on this issue. Again, we do recognize the value of relator's legal work to the State of Illinois. It is not our intention to have any such devastating impact, but rather to interpret this fee provision consistent with our supreme court's consideration of various factors. Moreover, nothing we have said prevents this law firm from continuing to practice in its specialty of false-claims actions. It will simply not be able to serve as the client simultaneously—at least not if it wants to recover attorney fees.

[*P148] For all of these reasons, we hold that the fee-shifting provision in the Act does not permit the award of attorney fees to relator, who served as its own attorney for much of this case. To the extent that the trial court awarded relator fees for work performed by relator's own attorneys, that fee award is reversed.

[*P149] b. Attorney Fees Related to Unsuccessful Claims Regarding Craft Shows

[*P150] My Pillow also argues that the trial court erred in awarding attorney fees for work relator performed relating to the craft shows since relator did **[**70]** not prevail on any claims related to those craft shows.

[*P151] We have already decided that relator was not entitled to any attorney fees whatsoever for its own legal work. But we will address this argument to the extent that its resolution affects the trial court's recalculation of attorney fees regarding services performed by those attorneys hired by relator.

[*P152] On this issue, which does not question the court's authority to impose fees but, rather, concerns whether the court properly exercised that authority, we apply an abuse-of-discretion standard. *Grate, 373 Ill. App. 3d at 231*. We will overturn an award of fees under this deferential standard "only where the trial court acts arbitrarily, without conscientious judgment, or, in view of all of the circumstances, it exceeds the bounds of reason and ignores recognized principles of law, thereby resulting in substantial injustice." *In re Marriage of Faber, 2016 IL App (2d) 131083, ¶ 39, 405 Ill. Dec. 245, 58 N.E.3d 52*.

[*P153] My Pillow claims that whether it submitted false claims related to its craft show sales (for which My Pillow was found not liable) and whether it submitted false claims related to its Internet and telephone sales (for which it was liable) are "two distinct questions." In awarding attorney fees related to relator's work regarding the craft shows, **[**71]** the trial court relied, in part, on *Berlak v. Villa Scalabrini Home for the Aged, Inc., 284 Ill. App. 3d 231, 671 N.E.2d 768, 219 Ill. Dec. 601 (1996)*. The trial court noted that, in Illinois, a party petitioning pursuant to a fee-shifting statute is entitled to obtain fees for all work involving "a common core of facts" or "based on related legal theories." (Internal quotation marks omitted.) *Berlak, 284 Ill. App. 3d at 238*. The trial court concluded that relator's claims were all based on a common core of facts and related legal theories, entitling relator to its attorney fees and expenses related to its trade and craft show claims.

[*P154] This rationale has also been applied in federal false claims act cases. See *United States ex rel. Longhi v. Lithium Power Technologies, Inc., 575 F.3d 458 (5th Cir. 2009)*. In *Longhi*, the court noted that when a plaintiff's claims for relief "'involve a common core of facts'" or are "'based on related legal theories,'" much of counsel's time will be "'devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.'" *Longhi, 575 F.3d at 476* (quoting *Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*).

[*P155] We find that reasoning persuasive and applicable to this case. The trial court found that much of the work relator performed overlapped the different areas of alleged false claims and determined that it would be inappropriate to dice up the claims in awarding fees.

[*P156] The trial court's judgment on this question **[**72]** was reasonable and supported by case law. We cannot say that its decision was arbitrary, without conscientious judgment, or so unreasonable as to result in substantial injustice. *In re Marriage of Faber, 2016 IL App (2d) 131083, ¶ 39*. Thus, the trial court did not abuse its discretion by awarding relator fees for legal work (performed by outside counsel) relating to the craft show claims.

[*P157] IV. CONCLUSION

[*P158] For the foregoing reasons, we affirm the judgment of the circuit court of Cook County in favor of relator as to the false claims regarding Internet and telephone sales. We reverse that portion of the attorney-fee award for legal services performed by relator's own member lawyers; the fees that were awarded for services performed by outside counsel retained by relator shall stand. We remand this matter only for a recalculation of the attorney-fee award consistent with this opinion.

[*P159] Affirmed in part and reversed in part; cause remanded.

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ILLINOIS ATTORNEY GENERAL LISA MADIGAN

PRESS RELEASE

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For Immediate Release
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December 10, 2004

MADIGAN ANNOUNCES STORES PAYING ILLINOIS MORE THAN $2.4 MILLION IN BACK TAXES FROM INTERNET SALES

Chicago – Attorney General Lisa Madigan and Illinois Department of Revenue Director Brian Hamer today announced that three retail giants have agreed to pay the State of Illinois more than $2.4 million in taxes the companies failed to collect on sales of their merchandise over the internet. The settlements were finalized this week.

The companies that have settled lawsuits with Madigan are Wal-Mart Stores, Inc., and its affiliate, Wal-Mart.com, Inc.; Target Corporation and its affiliate, Target.Direct, LLC; and Office Depot, Inc., and its affiliate Viking Office Products, Inc.

According to the complaints filed by Madigan, the companies did not collect tax because they argued the dot-coms were separate companies not located in Illinois. However, according to the complaints against the companies, the dot-com subsidiaries established a presence in Illinois when their parent stores in this state accepted returns of merchandise bought online by Illinois residents.

“In times of fiscal crisis, it is especially important that all taxpayers pay their fair share of taxes,” Madigan said. “These settlements level the playing field between Illinois stores without dot-com subsidiaries and internet retailers.”

“I am pleased that these three businesses have paid their tax obligations and have registered to make payments going forward,” Hamer said.

As a result of the settlements, Madigan has dismissed the cases. From the group, Illinois has collected a total of $2,411,714.97.

Assistant Attorney General Charles Godbey and Bureau Chief Chaka Patterson handled the case for Madigan’s Special Litigation Bureau.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

State of Illinois, *ex rel.* Schad, Diamond & Shedden, P.C., Plaintiffs,	)	2012 L 007874
	)	Cal. I
	)	Judge Thomas R. Mulroy
v.	)	
My Pillow, Inc., a Minnesota Corporation, Defendant.	)	

ORDER

This cause coming to be heard on the State of Illinois' Notice of Election to Decline to Intervene pursuant to the Illinois False Claims Act, 740 ILCS § 175/4, wherein the State of Illinois has elected to decline to intervene, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT:

1) The prosecution of this action shall be conducted by Relator on behalf of the State of Illinois as the Plaintiff;

2) The State of Illinois remains a real party in interest and may intervene in or dismiss this action at a later date;

3) The Complaint is hereby unsealed and made public and shall be served upon Defendant. Summons to issue;

4) All other documents in the Court file filed prior to entry of this Order, including Motion to Extend Seal, shall remain under seal and shall not be made public;

5) All Orders of this Court shall be sent to the Attorney General;

6) The parties shall serve all pleadings and motions in this action, including supporting memoranda, upon the Attorney General;

7) The State of Illinois may order any deposition transcripts;

8) The Attorney General shall be given prompt and reasonable notice by the parties of any efforts to settle or mediate this matter;

9) Should any party propose that this action be dismissed, settled, or otherwise

discontinued, such party shall notify and solicit the written consent of the Attorney General before submitting such proposal to the Court.

10) This matter set for status on March 12, 2013 at 9:30a.m.

ENTERED: Judge Thomas R. Mulroy, Jr.

JAN 15 2013

Circuit Court-1941

Dated: _____

Prepared by:
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ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

State of Illinois *ex rel.* Schad, Diamond and Shedden, P.C., **Plaintiff,**	)	
v.	)	**No. 11 L 10330**
	)	Honorable Thomas R. Mulroy
FC Organizational Products, LLC **Defendant.**	)	

ORDER

Relator has petitioned the Court for an Award of Attorneys' Fees, Expenses and Costs.

Facts

Relator, Schad, Diamond and Shedden, initiated 157 *qui tam* actions pursuant to the Illinois False Claims Act, 740 ICLS 175 (herein: the Act), against multiple defendant retailers alleging that they failed to collect and pay a certain Illinois use tax. On October 4, 2011, relator filed a *qui tam* complaint under seal against defendant FC Organizational Products (herein: FC Organizational). The State filed its Notice to Decline to Intervene, pursuant to 740 ILCS 175/4(b)(4)(B), on December 1, 2011 and the case was unsealed on December 15, 2011. Defendant filed a motion to dismiss the complaint on February 24, 2012 and relator filed a response brief on March 29, 2012. This Court denied defendant's motion on May 25, 2012.

In March of 2012, the parties began settlement discussions and on July 24, 2012, defendant and the State filed a joint motion to approve the settlement over relator's objection. On August 7, 2012, the State filed a motion to intervene for good cause. On September 12, 2012, relator filed an objection to the State's motion to intervene and on October 3, 2012, relator filed a memorandum and supplemental memorandum in

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EXHIBIT
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opposition to the State's proposed settlement. On October 25, 2012, this Court granted the State's motion to intervene for good cause. Two hearings were held before this Court, on November 2, 2012 and November 7, 2012, regarding the proposed settlement. This Court granted the State and defendant's joint motion to approve the settlement on November 13, 2012 over relator's objection, but reserved ruling on the issue of relator's fee petition until December 14, 2012 after the matter had been fully briefed.

Relator seeks the following fees from FC Organizational:

- Case specific fees and expenses = $14,554
- Common fees, expenses, costs = $4,933 (which is an allocation)
- Drafting fee petition = $2,100
- Total = $21,587

Hearing was held before this Court on December 14, 2012 and the Court took the matter under advisement.

Decision

I. Relator's Share Award

Under §175/4 of the Act, a relator is entitled to a percentage of the settlement proceeds received by the State, ranging from 15 to 30 percent. In this case, relator conducted an investigation, informed the State of its findings, and then on October 4, 2011, filed a complaint under seal. When the State declined to intervene, relator went forward with the case, which included: responding to a motion to dismiss; filing a motion to strike an affidavit; providing a settlement demand; attending various status hearings; opposing a proposed settlement reached by the State and defendant and filing memorandums regarding this opposition; filing a memorandum in opposition to the State's motion to intervene; and, presenting oral argument before this Court regarding both the proposed settlement and the State's motion to intervene. This Court agrees

with the State that due to the amount of work relator has done in this matter, relator is entitled to 25% of the settlement received by the State.

This Court notes that this decision does not affect or set precedent for any future fee petitions brought in these *qui tam* cases.

II. Relator's Fee Petition

A. Joint Opposition to Relator's Fee Petition

Nine defendants, including FC Organizational, have filed a joint opposition to relator's fee petitions arguing that relator cannot receive its share of the settlement amount plus attorneys' fees when relator represents itself. Defendants maintain that the Act provides that relator is entitled to receive an award for its efforts in bringing the action or settling the claim. *See* 740 ILCS 175/4(d)(1). The Act also provides that a *qui tam* plaintiff may receive "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." *See* 740 ILCS 175/4(d)(2). Defendants contend that Vanasco, Genelly & Miller, a law firm which represented relator in this matter, is entitled to attorneys' fees under the Act but that Schad, Diamond & Schedden is not entitled to fees because an attorney who acts *pro se* in a matter is not entitled to attorney's fees. Defendants cite to *Hamer v. Lentz,* 132 Ill.2d 49 (Ill. 1989) to support this proposition.

In *Hamer,* an attorney represented himself in an action under the Illinois' Freedom of Information Act. The court recognized that legislatures often allow for the recovery of fees because plaintiffs might otherwise be discouraged from bringing suit due to the cost of litigation. *Id.* at 62. The court found however that the prospect of legal fees would not act as a deterrent to a plaintiff-attorney in FOIA actions because "a lawyer representing himself or herself simply does not incur legal fees." *Id.* Further, the court found it self-evident that one of the goals of a fee provision is to "avoid unnecessary litigation by encouraging citizens to seek legal advice before filing suit" and that such was not an issue for a self-represented attorney. *Id.* Lastly, the court noted

there was a threat of overcompensating *pro se* attorneys whose real interest is abusive fee generation. The court stated "we do not think it advisable to leave the door open for unscrupulous attorneys . . .. The most effective way to deter potential abusive fee generation is to deny fees to lawyers representing themselves." *Id.* at 62-63. Following *Hamer, Kehoe v. Saltarelli,* 337 Ill. App. 3d 669, 678 (1st Dist. 2003) refused to award legal fees to plaintiff, an individual lawyer who acted *pro se.*

Relator responds that it is not acting *pro se* but rather has an attorney-client relationship with the Schad Diamond & Shedden entity. The U.S. Supreme Court distinguished an individual lawyer acting *pro se* from an organization in *Kay v. Ehrler,* 499 U.S. 432 (1991). In *Kay,* the Supreme Court disallowed a fee award to a *pro se* attorney who sought fees for a §1988 claim but made a distinction between an individual lawyer acting *pro se* from an organization, which the Court stated, "is always represented by counsel." *Id.* at 436-37. "[A]n organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono,* and thus there is always an attorney-client relationship." *Id.* at 436, fn. 7.

Similarly, in *Bond v. Blum,* 317 F.3d 385 (4th Cir. 2003), law firms sought attorneys' fees under the Copyright Act and relying on *Kay,* the court concluded that law firms as entities representing themselves could recover attorneys' fees: "the law firm still remains a business and professional entity distinct from its members, and the member representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship." *Id.* at 399-400. Similarly, in *Baker & Hostetler LLP v. U.S. Dept. of Commerce,* 473 F.3d 312 (D.C. Cir. 2006), a law firm represented itself in a FOIA action and sought attorneys' fees under the statute. The court relied on *Kay* and held that the law firm was entitled to its attorneys' fees because "an attorney-client relationship exists when a member of an entity who is also an attorney represents the entity." *Id.* at 326. Relator contends that it is a professional corporation represented by licensed attorneys so there is an attorney-client relationship and therefore entitled to attorneys' fees.

This Court finds that pursuant to *Kay*, relator is entitled to attorneys' fees. *Kay* held that an organization, such as Schad, Diamond, & Shedden, is distinct from a *pro se* litigant. *See Kay*, 499 U.S. at 436, fn. 7.

In addition, relator is entitled to attorneys' fees because it represented the State in this matter. Defendants argue that relator cannot recover attorneys' fees for representing the State as relator did not act as the State's counsel. Throughout a *qui tam* case, the State's counsel remains the Attorney General. *See Scachitti v. UBS Fin. Servs.*, 215 Ill.2d 484, 510-13 (Ill. 2005). In fact, even when the State declines to intervene, the Attorney General retains control over the litigation, may stay discovery, and has the authority to settle or dismiss the case at any time, even over a relator's objection. *Id.* at 511-12. However, under the Act, the relator, as well as the State, are the real parties in interest. *Id.* at 508-09. In addition, at the request of the State, the court entered orders in every lawsuit directing "[t]he prosecution of this action shall be conducted by relator on behalf of the State of Illinois as the plaintiff." *See* Order of Declination By State of Illinois to Intervene. While the State remained a real party in interest, the relator did the majority of the legal work in this matter as the State had originally declined to intervene in this action. Therefore, relator is entitled to attorneys' fees.

B. Case-Specific Opposition to Relator's Fee Petition

In addition to arguing that relator is not entitled to fees in the joint opposition to relator's fee petition, defendant FC Organizational filed a brief in opposition to relator's specific fees in regards to this case. First, FC Organizational argues that relator is billing for fees in connection with its Rule 191 motion to strike the affidavit of Bob Sumbot, which was attached to defendant's motion to dismiss. Relator filed the Rule 191 motion to strike Mr. Sumbot's affidavit since defendant did not attach the contract to which it referred. According to defendant, both the affidavit and motion to dismiss explained that the contract at issue could not be attached to the motion due to a confidentiality agreement contained in the contract. Defendant maintains that it specifically informed relator of this issue and relator did not have a 201(k) conference with defendant before

bringing the motion. Lastly, defendant argues that relator's motion was denied by this Court on April 12, 2012 and therefore relator should not be entitled to fees for this motion. Defendant contends that since relator should not be allowed to recover fees for the Rule 191 motion, relator's fee petition should be reduced by $1,464.

This Court finds that whether or not a party is successful in bringing a motion has no bearing on whether a party is entitled to fees for the work it did in preparing and arguing the motion. As such, this Court finds that relator is entitled to its fees for the Rule 191 motion.

Next, defendant argues that relator requested $1,000 for fees incurred by David Genelly of Vanasco, Genelly & Miller. Of that amount, $800 related to fees incurred on May 4, 2012, with a task description as follows: "Review documents in preparation for hearing today (1.0); attendance at court re: status (.5); attention to settlement issues (.5)." However, the only court hearing on May 4, 2012 was a status for all the *qui tam* cases before this Court at which the State presented its initial motion to approve a global settlement. There was no case-specific business transacted that day. Therefore, defendant objects to all but $5.10 (800/157 (number of *qui tam* cases) = 5.095) of Mr. Genelly's fee for that day, bringing the total due down to $205.10.

During oral arguments regarding the fee petition, which were held on December 14, 2012, Mr. Genelly admitted that he made an error and the $800.00 for the May 4, 2012 status appearance should have been added to the common fees worksheet and not designated to this specific defendant. As such, the parties and this Court agreed that $800 would be deducted from relator's fee petition.

ORDER

It is hereby Ordered:

1. Relator is entitled to 25% of the settlement fee received by the State.

2. Relator is entitled to attorneys' fees pursuant to *Kay*.

3. Relator is entitled to fees and expenses for its work on this case against FC Organizational in the amount of $13,754 which represents the original amount requested of $14,554 minus the $800 from the May 4, 2012 status; common fees, expenses, and costs in the amount of $4,933; and a drafting fee petition in the amount of $2,100, for a total of $20,787.

Judge Thomas R. Mulroy, Jr.

JAN 15 2013

Circuit Court-1941

_____, 2013

ENTER:

Judge Thomas Mulroy

Bloomberg BNA

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Electronic Commerce

Settlement Data Reveals Lawyer's False Claims Freight Train

Attorney Stephen B. Diamond, regarded by some as Chicago's ''king of qui tam,'' and likely the most prolific tax whistle-blower in the country, could be coming to the end of his false claims gravy train, a new analysis by Bloomberg BNA reveals.

Diamond, who has filed at least 911 qui tam actions in Cook County Circuit Court under the Illinois False Claims Act (FCA), has racked up almost $30 million in settlements over 15 years. While a large portion of the funds belongs to the state of Illinois, Diamond's share of the proceeds totals $11.6 million.

At the same time, Diamond's litigation freight train may have hit a bump in the tracks.

Bloomberg BNA's analysis, drawn from hundreds of previously confidential settlements collected though a Freedom of Information Act request on the Illinois Attorney General's Office, provides the first clear picture of Diamond's false claims business model and the financial impact it has had on hundreds of defendants.

The list of defendants is impressive, ranging from the most powerful corporations in the world to hundreds of tiny online retailers. A brief list of Diamond's targets includes Microsoft Corp., Boeing Co., Fox Broadcasting Co. and Deere & Co., but also WrestlingGear.com Ltd., an Elmhurst, Ill., seller of wrestling shoes and athletic wear (see related story in this issue) and the Infinite Monkey Theorem, a small Denver-based wine seller and one of more than 500 wineries and liquor retailers sued in the last three years.

The Bureau of National Affairs Inc., which publishes Daily Tax Report, was also a defendant in an action brought by Diamond and settled in February 2015 (*Illinois ex rel. Stephen B. Diamond P.C. v. The Bureau of National Affairs Inc.*, Ill. Cir. Ct., No. 14 L 278, *settlement* 2/17/15).

While the 900-plus cases are filed under the FCA, they all feature legal strategies that accuse defendants of improperly administering provisions of Illinois' sales and use tax code. A unique quality of the FCA permits a private citizen, acting as a whistle-blower or relator, to sue on behalf of Illinois to correct an alleged fraud. Various iterations of Diamond's law firms, including Beeler, Schad & Diamond P.C.; Schad, Diamond & Schedden P.C.; and Stephen B. Diamond P.C., are designated as relators in each case.

The device is controversial and has led to many calls for overhauling the law, though practitioners tell Bloomberg BNA that is unlikely to happen.

371 Settlements Net $29.3 Million. Highlights of the settlement data show:

- Diamond and his law firms have negotiated 371 settlements, netting $29.3 million in proceeds and attorneys' fees for the state and himself;
- the amount of unpaid taxes in dispute is estimated by tax practitioners at $6.7 million;
- the average settlement paid by defendants totaled $79,089, not including amounts paid for legal representation;
- settlements ranged from a high of $6.3 million to as little as $500;
- Illinois' share of the settlements totaled $17.7 million;
- the Illinois Attorney General office's share of the settlements was about $2.9 million;
- defendants paid Illinois $45,000 in attorneys' fees and costs;
- Diamond's share of the settlements totaled $5.7 million;
- defendants paid Diamond $5.9 million in attorney's fees and costs; and
- 78 percent of the settlements involved a defendant's failure to properly apply the sales and use tax on shipping and handling charges on merchandise sold into Illinois.

(A full list of the settlements disclosed to Bloomberg BNA is available at the end of the online version of this story.)

'Abusing the Statute.' Dennis Ventry, a professor of tax policy at the University of California Davis School of Law who has written extensively on whistle-blower statutes, said Diamond's settlement track record points to a level of success demonstrating he is more than a serial filer of ''nuisance claims.''

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Diamond's Top Ten Settlements

Case Name	Case No.	State's Share	State's Fees & Costs	Relator's Share	Relator's Fees & Costs	Total Settlement
State of Illinois ex rel Stephen S.Diamond, P.C. v. Cowabunga Enterprises, Gateway Inc.	07 L 12287	$5,331,728	$0	$940,893	$365,000	$6,637,622
State of Illinois ex rel Beeler, Schad & Diamond, P.C. v. Viking Office Products, Inc. and Office Depot, Inc.	01 L 11263	$1,069,734	$0	$267,433	$43,134	$1,380,302
State of Illinois ex rel Peggy Mathy Diamond v. Polo Ralph Lauren Corporation	08 L 2582	$588,000	$0	$252,000	$120,000	$960,000
State of Illinois ex rel Schad, Diamond & Shedden, P.C. v. Bed, Bath & Beyond, Inc., and Buy Buy Baby, Inc.	11 L 8281	$565,622	$0	$242,409	$0	$808,031
State of Illinois ex rel Peggy Mathy Diamond v. Burberry, Ltd.	06 L 6675	$386,903	$0	$181,243	$215,000	$783,146
State of Illinois ex rel Beeler, Schad & Diamond, P.C. v. KB Toys, Inc. and Kbtoys.com, Inc.	06 L 5195	$624,000	$0	$156,000	$0	$780,000
State of Illinois ex rel Schad, Diamond & Shedden, P.C. v. Beach Body, LLC	12 L 8329	$401,733	$200	$172,171	$150,896	$725,000
State of Illinois ex rel Schad, Diamond & Shedden, P.C. v. Euromarket Designs, Inc. d/b/a Crate & Barrel, and CB2; and Meadowbrook, LLC, d/b/a The Land of Nod	11 L 8289	$414,638	$0	$177,702	$0	$592,340
State of Illinois ex rel Beeler, Schad & Diamond, P.C. v. Delia's Corp.	02 L 1435	$475,000	$0	$103,520	$0	$578,520
State of Illinois ex rel Schad, Diamond & Shedden, P.C. v. Restoration Hardware, Inc.	11 L 8292	$404,079	$0	$173,176	$0	$577,256

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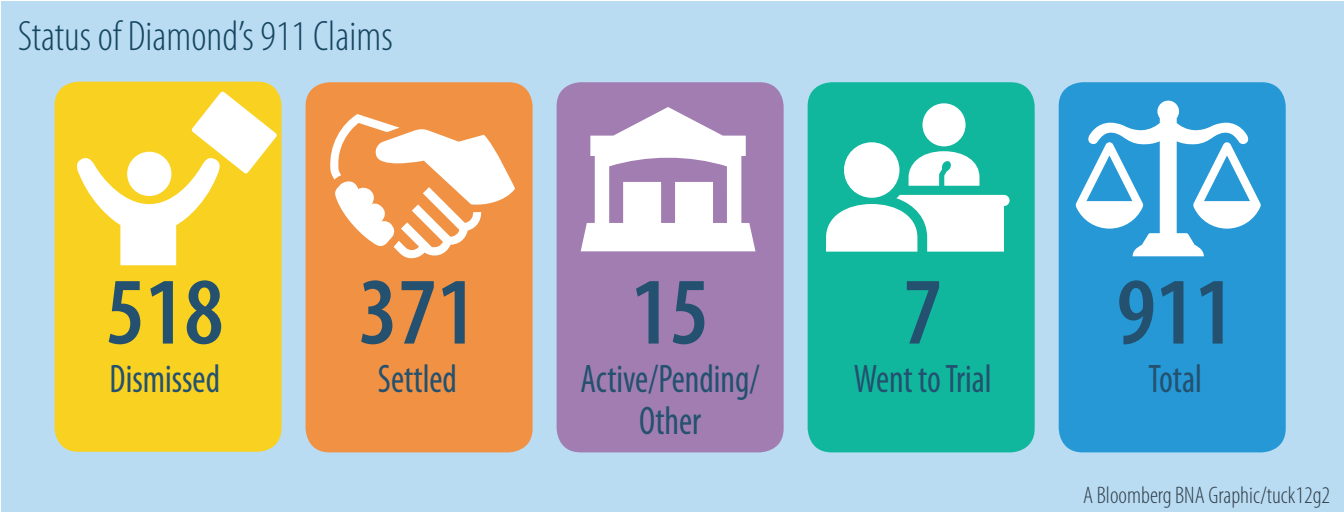
''If he's winning 40 percent of these cases, maybe this isn't as frivolous as we thought,'' Ventry said.

''These are still nuisance claims. Diamond is still, to my mind, abusing the statute. The statute, however, is what it is and until it's changed, he's not doing anything wrong.''

In an Oct. 3 letter to Bloomberg BNA, Diamond characterized his long history of false claims suits as a significant service to ''a state which has enormous tax revenue problems.'' He objected to any suggestion that his lawsuits abuse the false claims process.

''The Relator does not establish tax policy, the legislature and the courts do,'' Diamond wrote.



Running Out of Steam? While Bloomberg BNA's analysis shows that Diamond has successfully used false claims suits for several years, it also shows that the strategy may be running out of steam.

Diamond's false claims onslaught peaked in 2012, when he settled 124 cases, netting almost $6 million for himself and the state. Three good years followed, with 36 settlements totaling $3.5 million in 2013, 54 settlements totaling $4.3 million in 2014, and 102 settlements totaling $2.4 million in 2015.

But Diamond's batting average fell precipitously in 2016 due to the dismissal of more than 300 of his cases at the attorney general's urging, as well as legal defeats in a small number of cases that went to trial. Diamond's business model also suffered a blow in April when the Illinois Department of Revenue (DOR) issued regulations clarifying the taxability of shipping and handling charges—a crucial tax administration question featured in more than 500 of the lawsuits.

As a result, the first nine months of 2016 yielded only 12 settlements totaling $208,566.

Diamond, however, scored an October surprise with a $6.6 million settlement against Cowabunga Enterprises Inc., a defunct subsidiary of the personal computer companies Gateway Inc. and Acer Inc. Diamond's law firm confirmed that the Cowabunga settlement, the largest in the firm's 15 years of FCA actions, was an outlier with no similar deals on the horizon.

Still, business organizations and practitioners defending corporate taxpayers expressed doubts about a long-term batting slump for Diamond.

''There is no case and no legislation that says Steve Diamond cannot keep doing what he's doing as long as he finds another issue,'' said Michael Wynne, a partner with Reed Smith LLP in Chicago and counsel to dozens of defendants sued by Diamond. ''Nothing has really changed. This all just means there is a next issue ripe for Steve Diamond to find and sue.''

Diamond signaled he isn't ready to abandon the FCA, saying he has filed an unspecified number of additional cases ''under seal.'' The FCA requires details of a relator's claim to remain confidential until the attorney general decides whether to intervene.

29 State False Claims Laws. According to the Taxpayers Against Fraud Education Fund, Illinois is one of 29 states to administer a false claims statute. Within that group, Delaware, Florida, Illinois, Indiana, Nevada, New Hampshire, New York, Rhode Island and Washington permit actions targeting tax code frauds.

False claims or qui tam actions permit the relator or whistle-blower to step into the shoes of the state to sue persons or entities who knowingly perpetrate fraud against the state. The classic whistle-blower is an insider holding specific knowledge of misconduct, but the law also permits actions by third parties witnessing improper conduct harming the state.

The FCA incentivizes relators to come forward, permitting them to share in any proceeds resulting from their lawsuits. Those proceeds can be substantial. The FCA permits civil penalties of between $5,500 and $11,000, plus three times the damages sustained by the state due to the misconduct. The relator's portion of the award ranges between 15 percent and 30 percent of the total. Whistle-blowers are also entitled to litigation costs, expenses and reasonable attorneys' fees.

Settlements reached under the FCA are poured into a settlement fund. One-sixth of the funds are forwarded to the Office of the Attorney General, and another one-sixth goes to the state police for law enforcement purposes. The relator's share is also removed from the fund, and any remaining dollars are distributed to Illinois' General Revenue Fund.

Nexus Cases. A spokesman for Illinois Attorney General Lisa Madigan (D) pointed to five tranches of litigation engineered by Diamond over 15 years.

Diamond's FCA pattern began in 2001 with actions targeting out-of-state retailers that failed to collect and remit use taxes on internet-based transactions to Illinois customers. The ''nexus cases'' continued for several years during a period of confusion about retailers' duties with regard to electronic-commerce transactions.

Diamond went on to file 111 nexus lawsuits over eight years. His first, and second-largest, settlement came at the end of 2003 in a case against Viking Office Products Inc. and Office Depot Inc., netting $1,069,734 for the state and $310,567 for himself (*Illinois ex rel. Beeler, Schad & Diamond P.C. v. Viking Office Products Inc.*, Ill. Cir. Ct., No. 01 L 11263, *settlement* 11/19/03).

Similar success came in 2006 in a settlement with KB Toys Inc., bringing $624,000 to the state and $156,000 to Diamond (*Illinois ex rel. Beeler, Schad & Diamond*

Stephen B. Diamond's Five-Year Settlement Track Record

Year	Total Cases Settled	Illinois Share	Illinois Fees	Diamond's Share	Diamond's Fees	Total	Average Cost/Case
2012	124	$3,294,193	$0	$1,409,748	$1,185,133	$5,889,075	$47,492
2013	36	$1,687,141	$1,300	$698,873	$1,163,929	$3,551,244	$98,645
2014	54	$1,950,315	$16,250	$789,118	$1,535,078	$4,290,762	$79,458
2015	102	$982,443	$17,416	$435,258	$1,003,519	$2,438,637	$23,908
2016 - 9 months	12	$81,123	$200	$34,767	$92,476	$208,566	$17,380
Cowabunga/Gateway October 2016	1	$5,331,729	$0	$940,893	$365,000	$6,637,622	$6,637,622
	329	$13,326,947	$35,166	$4,308,658	$5,345,138	$23,015,909	$69,957

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P.C. v. KB Toys Inc., Ill. Cir. Ct., No. 06 L 5195, *settlement* 9/11/06).

Peggy Mathy Diamond, Diamond's wife, scored a huge success in 2011 with a settlement against Polo Ralph Lauren Corp. that earned $588,000 for the state and $372,000 for herself and the Diamond law firm (*Illinois ex rel. Peggy Mathy Diamond v. Polo Ralph Lauren Corp.*, Ill. Cir. Ct., *settlement* 12/13/11).

Later that year, she succeeded in an action against Burberry Ltd., with a $386,903 settlement for the state and $396,243 for herself and the Diamond law firm (*Illinois ex rel. Peggy Mathy Diamond v. Burberry Ltd.*, Ill. Cir. Ct., No. 06 L 6675, 12/28/11).

Madigan's spokesman said 58 of the 111 nexus cases eventually settled and 48 were dismissed. A handful of the cases are pending.

Shipping and Handling Cases. The Illinois Supreme Court opened a fertile field for a second tranche of suits in 2009 in a case called *Kean v. Wal-Mart Stores, Inc.*, 235 Ill.2d 351 (2009). The court held that delivery charges for products purchased over the internet and shipped to Illinois customers must be taxed when an ''inseparable link'' exists between the sale and delivery of the merchandise.

The ruling received limited attention among retailers, and the DOR failed to adjust its regulations and audit protocols, which had held that tax on shipping and handling charges shouldn't be assessed in cases where the charges are separately negotiated and stated on invoices, and such charges are equal to the retailer's actual shipping cost.

The resulting regulatory gap spurred Diamond to file 451 shipping and handling actions in a few years. Court documents reveal that Diamond and his law firm purchased hundreds of products each year from hundreds of online retailers simply to determine if the seller would impose tax on the shipping and handling charges. Sellers who failed to apply the tax were slapped with false claims lawsuits.

The actions were particularly frustrating to defendants, who had received rulings from the DOR approving their tax treatment of shipping and handling charges. Others were stunned to become defendants after surviving DOR audits without any comment on the issue.

According to Madigan's office, the shipping and handling juggernaut netted 291 settlements and 147 dismissals. Five cases went to trial, and eight remain pending.

Wine and Liquor Cases. Three additional tranches of litigation have developed since 2011 and operate as variants on the shipping and handling cases.

Diamond has filed 202 actions against out-of-state liquor retailers, claiming the companies defrauded the state by failing to collect and remit sales and liquor gallonage taxes on their sales into Illinois.

In a departure from their previous posture, Madigan's attorneys directly intervened in these lawsuits, calling for dismissal based on lack of merit. The state argued the defendant liquor companies lacked ''substantial nexus with Illinois'' and couldn't be compelled to collect and remit sales taxes.

Similarly, assistant attorneys general argued the defendants aren't required to remit liquor gallonage taxes under the liquor control statute because sales of distilled spirits, wine and beer by nonmanufacturers is illegal in Illinois.

On May 23, Cook County Circuit Court Judge James Snyder agreed, dismissing the entire block of cases before the court (*Illinois ex rel. Stephen B. Diamond P.C. v. Arco Industries, Inc.*, Ill. Cir. Ct., No. 14 L 8002, *motion to dismiss granted* 5/23/16).

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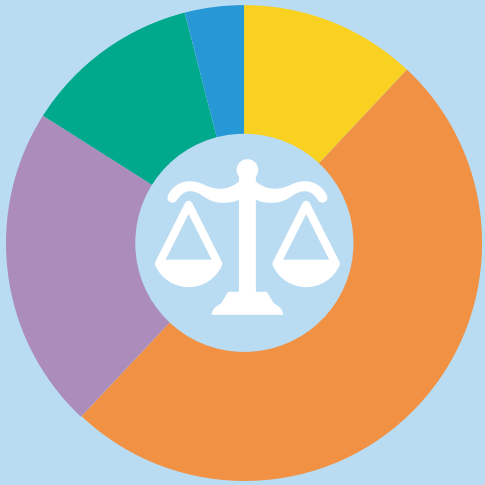
Five Categories of Suits Under the Illinois False Claims Act

Stephen B. Diamond Has Filed 911 Actions in Cook County Circuit Court

Out-of-State Retailers Failing to Pay Use Tax to Illinois	111	12.2%
Retailers Failing to Pay Use Tax on Shipping and Handling Charges	451	49.5%
Unlicensed Out-of-State Liquor Retailers	202	22.2%
Unlicensed Out-of-State Wine Sellers	114	12.5%
Licensed Out-of-State Wine Sellers	33	3.6%
Total	911	100%



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$120 Million Left on Table. Diamond initially objected, but ultimately declined to appeal the dismissals. Diamond told Bloomberg BNA his lawsuits could have recovered $120 million for the state if the actions hadn't been dismissed.

A similar result occurred a few months earlier in a fourth tranche of 114 cases involving unlicensed out-of-state wineries. Here again, attorneys for Madigan argued the defendants weren't licensed to sell alcohol into the state and thus had no tax collection duties in Illinois.

Snyder dismissed the entire group of winery cases in an order dated Dec. 17, 2015 (*Illinois, ex rel. Stephen B. Diamond P.C. v. Nils Venge*, Ill. Cir. Ct., No. 15 L 666, *dismissed* 12/17/15).

A final tranche of 33 cases involving licensed out-of-state wineries has netted mixed results for Diamond. Fourteen of the cases have been settled, but 17 have been dismissed. Two cases remain pending.

DOR Frustration. There is no shortage of people frustrated with Diamond's litigation strategies and interventions on behalf of the state.

Mark Dyckman, general counsel for the state revenue department, said the FCA is a potent tool for uncovering tax fraud, and many earnest whistle-blowers have brought big-impact tax compliance cases to the DOR. But Dyckman said Diamond's false claims model ''interferes with the department's authority to administer and enforce the tax laws.''

Dyckman told Bloomberg BNA that Diamond's relentless focus on minor tax issues second-guesses broader agency objectives, interferes with the trajectory of audits and frequently derails the department's ability to wisely use limited resources. In some cases, Dyckman said Diamond has obstructed the DOR's ability to settle compliance problems, carrying real revenue consequences to the state.

By way of example, Dyckman pointed to a series of negotiations the DOR conducted with a team of attorneys representing more than two dozen retailers attempting to make good on their tax obligations during the early years of e-commerce transactions. The deal would have held the retailers harmless for some past compliance failures, but compelled them to collect and remit the proper taxes going forward.

Ultimately, Dyckman said, the DOR wasn't free to complete the negotiations because some of the retailers became targets of actions filed by Diamond.

'It Makes No Sense.' Rob Karr, president of the Illinois Retail Merchants Association, said Diamond's interventions hamper retailers' efforts to properly comply with the state revenue code. He pointed to the years of confusion over the proper method for computing taxes on shipping and handling charges.

''This violates the fundamental principles of the tax system where you have one administrator, one interpreter of the tax code in the Illinois Department of Revenue, and you have retailers following the regulations and interpretations of the department,'' Karr said. ''But now they are being sued and financially punished for following the law. It makes no sense.''

''If he's winning 40 percent of these cases, maybe this isn't as frivolous as we thought.''

DENNIS VENTRY
UNIVERSITY OF CALIFORNIA DAVIS SCHOOL OF LAW

Karr added that part of the genius of Diamond's business model, particularly in the shipping and handling context, is the nuisance value of the claims. By targeting a low-dollar problem and pressuring defendants to respond quickly, Karr said Diamond forces his targets to abandon viable defenses and settle.

''He has found this sweet spot where he tries to incent the defendant to settle due to the way the finances look to the company,'' Karr said. ''They ultimately real-

ize they could spend $100,000 or more litigating, or they could settle for $20,000 or $25,000.''

Tax Fairness? Defense attorney Wynne, and former DOR general counsel, faulted Diamond on tax fairness grounds, accusing him of turning innocent tax infractions into expensive trips to court.

By way of example, Wynne pointed to a typical Diamond-driven qui tam where the taxpayer might be forced to admit a $3,000 shipping and handling tax deficiency. Assuming the taxpayer wishes to settle quickly, the deficiency could quickly turn into a $15,000 settlement when treble damages and penalties are assessed. Diamond's fees and costs add another $7,000 to $10,000 to the taxpayer's bill. The taxpayer then pays a similar amount for representation by defense counsel.

By the time the smoke has cleared, Wynne said the taxpayer has shelled out almost $30,000 to take care of a $3,000 infraction.

''If the Department of Revenue had gotten to those people instead of Diamond, those people would have paid the tax, they probably would have paid no penalties because of the lack of clarity between the *Kean* case and the regulations, and there would have been some interest,'' Wynne said. ''Instead, they paid through the nose for the same violations that on audit would have been almost nothing.''

After examining the data collected by Bloomberg BNA, Wynne estimated that the unpaid taxes in dispute in the 371 settled cases likely totaled no more than $4.1 million. The dispute involving Cowabunga/Gateway adds more than $2.5 million to that pot.

Attorney General Maligned. The business community has also been critical of Illinois Attorney General Lisa Madigan (D) for letting Diamond pursue actions against hundreds of taxpayers. They point to long periods in which Madigan declined to intervene in Diamond-initiated cases and ignored taxpayers' pleas for relief.

''One of the assumptions of the taxpayer community is the people he is suing are getting poorly treated in part because the Attorney General's office enjoys bringing that money into the state,'' said Carol Portman, president of the Taxpayers' Federation of Illinois. ''They don't care about getting to the right answer, they care about looking good and bringing in money. I hope that's not right, but I've heard it a lot.''

Madigan's spokesperson Eileen Boyce disagreed, pointing to recent efforts to cut the case volume in Cook County Circuit Court.

''Attorney General Madigan has been able to diminish these cases significantly in recent years as the legal theories evolved, leaving only about a dozen pending out of more than 900,'' Boyce told Bloomberg BNA.

Diamond Rebuts Criticisms. Diamond vigorously objects to criticism that his litigation interferes with the state's tax collection and administration duties.

Diamond said his actions have sought to enforce two core principles of Illinois' sales and use tax code: the collection of taxes by out-of-state sellers with substantial nexus in the state, and the collection of taxes on shipping and handling charges as established under the *Kean* decision.

In addition, Diamond stressed that his actions have had a ''significant prophylactic effect,'' forcing retailers on a prospective basis to make good on their duties under the tax code. He noted that several of the early cases brought no settlement dollars to the state, but generated millions of dollars in revenue as major retailers, including Target Corp. and Wal-Mart Stores Inc., commenced their compliance duties.

''Similarly, although the State intervened in Relator's lawsuit against Amazon that was filed in 2003, the State dismissed the lawsuit in 2014 at the same time Amazon agreed to establish a warehouse in Illinois and collect taxes on all sales,'' Diamond wrote.

Diamond also disputed criticism that his patterns of litigation could be characterized as ''abusive'' when the Illinois attorney general can seek dismissals.

''Under the False Claims Act the State has the power to dismiss any claim filed by the Relator,'' he wrote. ''The State has never asserted that the lawsuits filed by the Relator were abusive of the false claims process.''

Complement to Tax Enforcement. While the University of California's Ventry questions Diamond's tactics, he agreed that Chicago's king of qui tam has likely pushed Illinois to more vigorously enforce its tax statutes.

''We don't know if the revenue department ever would have gotten around to collecting these taxes,'' Ventry said. ''So I look at this as a compliment to traditional tax enforcement, especially in a world where the tax officials and tax agencies are woefully underfunded.''

Some in the business community are expressing hope that Diamond's storm of FCA actions has run its course. The dismissals of 114 out-of-state winery cases in December 2015 and 202 out-of-state liquor retailer cases in May created a significant gap in Diamond's litigation pipeline and demonstrated a new willingness by Madigan to intervene.

Regulatory Fix. Most significantly, the DOR amended its regulations under Ill. Admin. Code tit. 86 Sections 130.415 and 130.410 with regard to shipping and handling effective April 1. The regulations clarify when ''transportation and delivery charges'' are considered part of gross receipts subject to the sales and use tax code.

Dyckman said the regulations incorporate the precedent established in *Kean*, finding that delivery charges on products purchased electronically and shipped to Illinois consumers are subject to tax when ''an inseparable link'' exists between the sale and the delivery of the merchandise. The regulations provide guidance on the inseparable link principle through a series of examples.

''Under the False Claims Act the State has the power to dismiss any claim filed by the Relator. The State has never asserted that the lawsuits filed by the Relator were abusive of the false claims process.''

STEPHEN B. DIAMOND

In addition, the regulations offer a safe harbor in cases where the seller offers the purchaser the option to

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pick up the property and charges the same price for the property regardless of whether it is delivered or picked up. The regulations specify that shipping and handling charges aren't subject to taxation.

Dyckman said the adjustments would have a chilling effect on Diamond's ability to file shipping and handling cases.

Retailers ''know what the rules are and they can plan accordingly,'' Dyckman said. ''It probably has the effect of not totally eliminating, but reducing the amount of shipping and handling cases down to the point where it wouldn't be a good business model anymore.''

Defend Instead of Settle. The defense bar also points to losses in two important Diamond cases this summer, raising expectations that defendants, armed with the right fact patterns, will choose to defend themselves instead of settle.

Cook County Circuit Court Judge Thomas Mulroy on Aug. 30 rejected an action brought against Australia-based Treasury Wine Estates Americas Co., one of the world's largest makers and distributors of wine (*Illinois ex rel. Stephen B. Diamond, P.C. v. Treasury Wine Estates Americas Co.*, Ill. Cir. Ct., *No. 14L7563* 8/30/16).

After a bench trial, Mulroy found that Diamond had failed to prove Treasury Wine had ''acted knowingly or with reckless disregard'' when it declined to collect Illinois use tax on shipping and handling charges between 2008 and 2015. Mulroy agreed that Illinois' tax regulations were unclear in the aftermath of the *Kean* decision and found Treasury Wine had presented evidence showing it acted responsibly during this period of confusion.

On Aug. 1, an Illinois appeals court panel tossed a whistle-blower action against National Business Furniture LLC, finding that the e-commerce retailer hadn't engaged in ''gross negligence-plus'' when it failed to collect use tax on shipping charges for internet and catalog sales made to in-state customers (*Illinois ex rel. Schad, Diamond & Shedden, P.C. v. Nat'l Business Furniture LLC*, Ill. Cir. Ct., No. 1-15-0526, 8/1/16).

Retailers "are being sued and financially punished for following the law. It makes no sense."

ROB KARR
ILLINOIS RETAIL MERCHANTS ASSOCIATION

The court agreed with Diamond that Wisconsin-based NBF failed to understand its obligations to collect Illinois' use tax on shipping charges and remit those funds to the state. However, the appeals court also found that NBF's conduct didn't constitute reckless disregard for any obligations due to the state.

Statutory Change? Despite the regulatory changes and courtroom losses, many in the business community insist Diamond won't dial down his false claims fury without statutory changes.

Portman said Illinois needs to amend the FCA to minimize opportunities for potentially abusive whistleblower actions, something the Illinois General Assembly has been reluctant to do.

''Part of me hopes that because these cases are drying up due to the Attorney General kicking them out, the courts shutting them down, and the legal provisions tightening up, maybe the political resistance to change will diminish,'' Portman said. ''I mean, the pot at the end of the rainbow is going away.''

She added, ''but that might be naive.''

BY MICHAEL J. BOLOGNA

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

PEOPLE *EX REL*. SCHAD, DIAMOND & SHEDDEN, P.C., *Relator-Appellant*,	)	No. 122487
v.	)	
MY PILLOW, INC., *Defendant-Appellee.*	)	

The undersigned, being first duly sworn, deposes and states that on the December 6, 2017, there was electronically filed and served upon the Clerk of the above court the Brief of Relator-Appellant and that on the same day, a pdf of same was e-mailed to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that he will send to the above court thirteen copies of the Petition for Leave to Appeal bearing the court's file-stamp.

/s/ Tony Kim
Tony Kim

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Tony Kim
Tony Kim

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12/6/2017 12:37 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK