No. 124754

IN THE SUPREME COURT OF ILLINOIS

STATE OF ILLINOIS *ex rel.* DAVID P. LEIBOWITZ, as Trustee of the Bankruptcy Estate of Marie A. Cahill, Appellee, v. FAMILY VISION CARE, LLC, NOVAMED MANAGEMENT SERVICES, LLC, SURGERY PARTNERS, INC., and JENNIFER GULA, Appellants.	On Petition for Leave to Appeal from the Illinois Appellate Court, First District, No. 18-0697 On appeal from the Circuit Court of Cook County, Law Division, No. 17 L 4200 Honorable John C. Griffin, Judge Presiding

BRIEF OF DEFENDANTS-APPELLANTS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

Defendants Family Vision Care, NovaMed Management, Surgery Partners, and Jennifer Gula appeal from the judgment of the Illinois Appellate Court, First District. The Appellate Court reversed the Circuit Court's dismissal for lack of standing under Section 2–619 of the Illinois Code of Civil Procedure. 2019 IL App (1st) 180697.

ISSUES PRESENTED

The Illinois Insurance Claims Fraud Prevention Act (ICFPA) creates a cause of action that the State—or an "interested person"—may pursue for the alleged violation of select Illinois criminal laws. The underlying laws render it a crime to defraud private insurance companies and self-insured entities. If an "interested person" serves as a relator, any penalties recovered from defendants are split between that person and the State. For an injured insurance company (or self-insured entity) to recover via an ICFPA claim, it must itself bring the action.

At issue here is whether the ICFPA's private cause of action is limited to those parties that were actually injured by the defendant's alleged conduct (as the Circuit Court held) or whether any uninjured person may bring a claim (as the Appellate Court held). The case thus presents two questions:

1. Whether the ICFPA's restriction of a lawsuit to an "interested person" requires a relator to have a personal stake in the controversy, con-

sistent with how the term "interested" is used throughout Illinois statutes.

2. Whether an uninjured private relator has standing to sue in the name of the State to vindicate alleged violations of an underlying criminal statute.

STANDARD OF REVIEW

Review of a Section 2–619 dismissal is *de novo*. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29.

JURISDICTION

The Court has jurisdiction under Illinois Supreme Court Rule 315. The First District issued its decision on March 12, 2019, reversing the Circuit Court's dismissal for lack of standing. 2019 IL App (1st) 180697; A28, A40.[1] Defendants filed a timely petition for leave to appeal on April 16, 2019. The Court allowed the petition on September 25, 2019. The Appellate Court had jurisdiction under Illinois Supreme Court Rules 301 and 303.

STATUTE INVOLVED

The Illinois Insurance Claims Fraud Prevention Act ("the ICFPA" or "the Act"), 740 ILCS 92/1 *et seq.* The statute is reproduced in full at A1–A6.

[1] Citations beginning with "A" reference the Appendix to this brief; citations beginning with "C" reference the Record on Appeal.

BACKGROUND

A. Legal background.

Section 5(b) of the ICFPA imposes "a civil penalty of not less than $5,000 nor more than $10,000, plus an assessment of not more than 3 times the amount of each claim for compensation under a contract of insurance" on any person who violates any one of three specifically identified Illinois criminal insurance fraud statutes: Section 17-8.5 (720 ILCS 5/17-8.5), Section 17-10.5 (720 ILCS 5/17-10.5),[2] or Article 46 of the Criminal Code (720 ILCS 5/46, repealed effective July 1, 2011). *See* 740 ILCS 92/5(b). These statutes criminalize insurance and health care benefits fraud, meaning that a plaintiff invoking that portion of the law must plead a violation of Illinois' criminal insurance fraud statutes to state an ICFPA claim.

The Attorney General or "[t]he State's Attorney of the county in which the conduct occurred" may bring a civil action under the ICFPA. 740 ILCS 92/10. Before it may proceed, the Attorney General is required first to "present the evidence obtained to the appropriate State's Attorney for possible criminal or civil filing." *Id*.

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[2] Relevant here is Section 10.5(a)(1), which provides:

> A person commits insurance fraud when he or she knowingly obtains, attempts to obtain, or causes to be obtained, by deception, control over the property of an insurance company or self-insured entity by the making of a false claim or by causing a false claim to be made on any policy of insurance issued by an insurance company or by the making of a false claim or by causing a false claim to be made to a self-insured entity, intending to deprive an insurance company or self-insured entity permanently of the use and benefit of that property.

The statute also permits private actions to pursue the penalties authorized by the Act. Titled "[a]ction by interested person," Section 15 allows "[a]n interested person, including an insurer," to "bring a civil action for a violation of this Act for the person and for the State of Illinois [. . .] in the name of the State." 740 ILCS 92/15.[3]

If the Attorney General or State's Attorney's office intervenes in an action brought by an "interested person," the "interested person" may recover 30 percent or more of the proceeds of a successful action. 740 ILCS 92/25. If the State does not intervene, the "interested person" receives "not [. . .] less than 40% of the proceeds." *Id*.

B. Factual background.

Plaintiff-relator Leibowitz,[4] the trustee of the bankruptcy estate of Marie A. Cahill, sued defendants Family Vision Care, NovaMed Management Services, Surgery Partners, and Jennifer Gula under Section 15 of the ICFPA. After the Cook County State's Attorney and Illinois Attorney General declined to intervene, the complaint was unsealed in July 2017. C46-58.

Ms. Cahill was the practice administrator of Family Vision Care, an optometry clinic in La Grange, Illinois, from October 2012 until her termination in January 2016. A44 ¶¶ 8-9. Cahill filed for Chapter 7 bankruptcy on

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[3] The ICFPA does not independently define "interested person."

[4] Below, the briefs refer to the plaintiff as "Cahill," "the Bankruptcy Estate of Marie A. Cahill" and "the Estate." We adopt "Cahill" for consistency.

January 19, 2016. *See* Bankr. N.D. Ill. No. 16–1529 (Dkt. 1, Jan. 19, 2016). Cahill's bankruptcy estate brought this case more than a year later. A44 ¶ 8.

The complaint contends that, "since at least 2012," all claims Family Vision Care submitted to Vision Service Plan (VSP), a private insurance company, were false. Cahill's theory is that Family Vision Care optometrist Jennifer Gula signed VSP's Application for Network Participation and Vision Service Plan Network Doctor Agreement, allegedly "certifying that a Network Doctor has a majority ownership interest in Family Vision Care," when in fact the Family Vision Care optometrists were "employees of Surgery Partners." A45 ¶ 13, A46-47 ¶¶ 22-23. The complaint alleges that these representations "caused VSP to approve Family Vision Care as a VSP provider" and "pay millions of dollars of insurance claims that Family Vision Care submitted on behalf of its patients," in violation of Section 5(b) of the ICFPA (incorporating Section 10.5(a)(1) of the criminal code (720 ILCS 5/17-10.5(a)(1))). A47 ¶ 25, A48 ¶¶ 29-32, 35.[5]

C. Proceedings below.

Defendants moved to dismiss under Sections 2–615 and 2–619 of the Illinois Code of Civil Procedure. Defendants argued, in part, that the complaint should be dismissed under Section 2–619(a)(9) because Cahill lacked standing to sue. C119, C127-31. Specifically, defendants contended that ICFPA Section 15 is distinct from the qui tam provisions in the Illinois and

[5] VSP is not a party to this case. As we discuss throughout, if Cahill succeeds with the ICFPA claim, VSP would not receive any proceeds.

federal False Claims Acts. 740 ILCS 175/4; 31 U.S.C. § 3729; C129. False Claims Act qui tam plaintiffs have standing—a legal injury that they can pursue in court—only because that law's qui tam provision effects a "partial assignment" to the relator of the government's own actual damages claim resulting from the presentation of a false claim. C129 (citing *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 508-09 (2005) (citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000))). In contrast, under the ICFPA, which took effect in 2002, and which this Court has never addressed, defendants demonstrated that the State has no damages claim and has suffered no assignable injury. C129.

Defendants further argued that although the State may punish insurance fraud perpetrated against third parties both civilly and criminally based on the "injury to its sovereignty arising from violation of its laws" (*Vermont Agency*, 529 U.S. at 771), the government cannot assign that sovereign law enforcement power to an uninjured private plaintiff like Cahill. C127–31.

The Circuit Court requested additional briefing on whether Cahill qualified as an "interested person" within the meaning of the ICFPA. C181; 740 ILCS 92/15.

The Circuit Court granted defendants' motion to dismiss for lack of standing. A30, Order dated February 16, 2018. The court concluded that Cahill does not qualify as an "interested person." The court construed the word "interested" to be "an intentional qualification of the persons who may bring

a civil action under section 15(a)" that "clearly requires an ICFPA claimant to hold some legal interest in the cause of action." A37. Per the Circuit Court, a person has a "sufficient interest in a controversy when he or she possesses a personal claim, status, or right which can be affected by a determination of the controversy." A36. The court found that this statutory construction was "consistent with the general requirements to have standing in Illinois." A37.

The court provided Cahill leave to amend the complaint. A40. Cahill instead sought entry of a final judgment to facilitate an appeal. C218. The court converted its Section 2–619 dismissal without prejudice into a final order on March 8, 2018. A28.

Cahill appealed, and the Appellate Court reversed the Circuit Court's Section 2–619 dismissal. The Appellate Court held that the word "interested" in the phrase "interested person" was "descriptive rather than restrictive." A22 ¶ 43. The court thus found that the term "interested" did not limit the range of parties that may be litigants under the ICFPA. The court concluded that Cahill "does not need to have a personal injury to have standing" or to qualify as an "interested person." *Id*.

The Appellate Court also held that "the plain language of the Act and its purpose support a finding that the State need not have suffered monetary damages to confer standing on a relator" and that "[r]equiring the State to assign damages to a relator would defeat the purpose of the Act because it would preclude a whistleblower from bringing a claim on the State's behalf."

A16-17 ¶ 29. The Appellate Court concluded that the State's "purely sovereign interest" could be "assign[ed]" to Cahill to supply a basis for standing. A17 ¶ 30.

ARGUMENT

In this case, Cahill alleges that defendants defrauded a private insurance company, VSP. But VSP is not present in this lawsuit. In fact, if Cahill were to succeed, VSP would see *none* of the penalties recovered. Rather, Cahill would split any award with the State and County. Used in this way, the ICFPA does not provide remuneration to the party allegedly injured. Instead, as invoked here, the ICFPA is employed as a mechanism of punishment for violations of a criminal statute. For two independent reasons, the Court should hold that uninjured private relators may not bring this sort of action.

First, the ICFPA limits the range of permissible private plaintiffs to "interested person[s]." The term "interested" has well-established legal meaning in this context. For example, this Court has previously construed the Illinois declaratory judgment statute, which requires the plaintiff to be "interested in the controversy." *See Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375-76 (1977). In that similar setting, delineating the scope of appropriate plaintiffs, "[t]he word, 'interested' does not mean merely having a curiosity about or a concern for the outcome of the controversy. Rather, the party seeking relief must possess a personal claim, status, or right which is capable of being affected." *Id*. at 376.

When the General Assembly enacted the ICFPA, it reused a term that had already acquired specific legal meaning. By contrast, the section of the Illinois False Claims Act permitting private suits is not limited to actions by "interested" persons. *See* 740 ILCS 175/4; A20, Appellate Court Op. ¶ 40. As the Circuit Court correctly held, the legislature's use of the term "interested" here has meaning. The construction advanced by Cahill—and adopted by the Appellate Court—reads this crucial word out of the statute. Not only is our construction true to the statute's text, but it also avoids the serious constitutional issues that arise from the Appellate Court's vastly broader construction of the ICFPA.

Second, Cahill lacks the requisite standing to bring this action. Private individuals may pursue claims under the Illinois False Claims Act because the sovereign has assigned to them its claim for damages. Here, however, the State has suffered no pecuniary injury; thus, the State has no damages claim to assign. Rather, Cahill is attempting to sue defendants under the ICFPA for penalties that arise from defendants' alleged violations of Illinois' criminal insurance fraud statutes. This amounts to *criminal* enforcement—and the State cannot assign to a private party the right to enforce the criminal laws.

Indeed, Cahill's construction would violate the Illinois Constitution's requirement that the Attorney General be the legal officer for the State. And it would authorize private parties to enforce the criminal laws in pursuit of a bounty. But courts have roundly rejected such arrangements, for they un-

dermine the neutrality that is essential to the dispassionate prosecution of criminal laws.

Both the statutory and constitutional issues lead to the same conclusion: only those private parties actually injured may serve as ICFPA plaintiffs.

I. Cahill is not an "interested person" authorized to sue under the ICFPA.

Section 15, titled "[a]ction by interested person," provides that "[a]n interested person, including an insurer, may bring a civil action for a violation of this Act for the person and for the State of Illinois." 740 ILCS 92/15. As the Circuit Court properly concluded, a person qualifies as "interested" only if "he or she possesses a personal claim, status, or right which can be affected by a determination of the controversy." A36. Because Cahill lacks such an interest, she does not qualify as an "interested person"—and, by extension, neither does her bankruptcy estate. The Appellate Court's contrary conclusion (at A12-A16) does not withstand scrutiny.

A. The ICFPA's plain text limits relators to those persons with a direct interest in the controversy.

1. The fundamental principles of statutory construction applicable here are well-established. To start, the statute's text is of crucial importance. "When construing a statute, this [C]ourt's primary objective is to ascertain and give effect to the legislature's intent, keeping in mind that the best and most reliable indicator of that intent is the statutory language itself, given its

plain and ordinary meaning." *People v. Perez*, 2014 IL 115927, ¶ 9. *See also, e.g., In re Application of County Treasurer*, 214 Ill. 2d 253, 258 (2005) (stating that "the language of the statute" is "usually the best indicator of the legislature's objectives in enacting the law.") (internal citations omitted).

Additionally, "[w]here a term has a settled legal meaning, this [C]ourt will normally infer that the legislature intended to incorporate that settled meaning." *Perez*, 2014 IL 115927, ¶ 9. And, finally, the Court strongly disfavors constructions that render statutory language surplusage. "Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *Id*.

2. Because the General Assembly specifically restricted the range of proper private plaintiffs under the ICFPA to "*interested* person[s]" (740 ILCS 92/15(a) (emphasis added)), this concrete textual limitation must be given meaning. This stems from the core principle that "[n]o part of a statute should be rendered meaningless or superfluous." *Rushton v. Dep't of Corr.*, 2019 IL 124552, ¶ 14). That is all the more so because elsewhere the legislature has used the unadorned term "person"—most conspicuously in the Illinois False Claims Act. That law, in a section titled "[a]ctions by private persons," provides that "[a] *person* may bring a civil action for a violation of [the law] for the person and for the State." 740 ILCS 175/4 (emphasis added); *see* Circuit Court Op. at A35 ("Specifically, section 15(a) of the ICFPA includes

unambiguous, limiting language that is not found in section 4(b)(1) of the FCA.").

The import of the term "interested" is underscored by its additional placement in the title of Section 15 of the ICFPA. The whole section—titled "[a]ction by interested person"—is the provision authorizing a private party's claim. The legislature provided that statutory heading. *See* 2001 Ill. Legis. Serv. P.A. 92-0233 (S.B. 879). While "a statute's title cannot be used to limit the plain meaning of statutory text, it can provide guidance in resolving statutory ambiguities." *Brunton v. Kruger*, 2015 IL 117663, ¶ 43. Here, given that both the operative statutory language and the title limit the cause of action to an "interested person," it would be extraordinary to interpret the statute without giving due regard to this critical term.

Ultimately, as the Circuit Court correctly concluded, proper construction of Section 15(a) recognizes that "the word 'interested'" is "an intentional qualification of the persons who may bring a civil action under [S]ection 15(a)." A37.

3. The term "interested person" has a well-settled meaning. And, "[w]here a term has a settled legal meaning," the Court "will normally infer that the legislature intended to incorporate that settled meaning." *Perez*, 2014 IL 115927, ¶ 9. *See also People v. Smith*, 236 Ill. 2d 162, 167 (2010) ("[I]f a term has a settled legal meaning, the courts will normally infer that the

legislature intended to incorporate the established meaning."); *People v. Bailey*, 232 Ill. 2d 285, 290 (2009).

Throughout standing law, for example, the Court has long construed the statutory term "interested." In *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371 (1977), the Court addressed what it means for a "party" to be "'interested' in the controversy": "The word, 'interested' does not mean merely having a curiosity about or a concern for the outcome of the controversy. Rather, the party seeking relief must possess a personal claim, status, or right which is capable of being affected." *Id*. at 375-76.

Two years later, this Court reiterated the meaning of the word "interested," using precisely the same language: "The word, 'interested' does not mean merely having a curiosity about or a concern for the outcome of the controversy. Rather, the party seeking relief must possess a personal claim, status, or right which is capable of being affected." *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 450-51 (1979). And the Court reiterated these same principles in *Messenger v. Edgar*, 157 Ill. 2d 162, 171 (1993), and *Flynn v. Ryan*, 199 Ill. 2d 430, 439 (2002).

When the legislature enacted the ICFPA in 2001, courts universally understood the meaning of "interested" as it relates to a limitation on who has ability to sue. *See*, *e.g.*, *Int'l Union of Operating Engineers Local 841 Health & Welfare Fund v. Hickman*, 190 Ill. App. 3d 658, 662 (5th Dist. 1989) ("[T]o be interested, a party must possess more than merely a curiosity about

or concern for the outcome of the controversy. To be entitled to declaratory relief, a party must possess a personal claim, status, or right which is capable of being affected."); *Stark v. Pollution Control Bd.*, 177 Ill. App. 3d 293, 296 (1st Dist. 1988); *Forsberg v. City of Chicago*, 151 Ill. App. 3d 354, 370 (1st Dist. 1986); *Metroweb Corp. v. Lake Cty.*, 130 Ill. App. 3d 934, 936 (2d Dist. 1985).

This line of cases is hardly all. Illinois statutes routinely use the term "interested person" and its variants in ways that inescapably require a party to hold a *personal* interest. In probate law, for example, an "interested person" is defined as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved." 755 ILCS 5/1-2.11. *E.g. In re Estate of Schumann*, 2016 IL App (4th) 150844, ¶ 19 (noting that "[p]ursuant to section 8-1(a) of the Probate Act, 'any interested person' may file a petition to contest the validity of a will.").[6]

Throughout Illinois law, the term "interested" reflects a *personal* stake in the subject of controversy. Some examples include:

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[6] In asserting that there is "nothing to support a finding that the General Assembly was referring to the Probate Act of 1975's use of 'interested persons' when it adopted the [ICFPA]" (at A21 ¶ 38), the Appellate Court missed our point—that the legislature used language that, by then, had well-established legal meaning. *See Sundance Homes, Inc. v. County of DuPage*, 195 Ill. 2d 257, 269 (2001) ("[R]eference to another statute by analogy is a common method of interpretation and has been relied upon by this court on many occasions.").

- Dead-Man's Act: Restrictions are placed on the testimony of an "interested person" as used against a conversation with a deceased individual. 735 ILCS 5/8-201. "A person is interested under the Dead–Man's Act if he or she will directly experience a monetary gain or loss as an immediate result of the judgment." *People v. $5,608 U.S. Currency*, 359 Ill. App. 3d 891, 895 (2d Dist. 2005).

- Corporate law: an "interested shareholder" is a person who owns a sufficiently large share of outstanding stock or otherwise exerts certain control. *See*, *e.g.*, 805 ILCS 5/7.85(D)(2).

- Public contracting: Certain public officials "interested" in entities are broadly barred from contracting with the State or municipalities. See, *e.g.*, 60 ILCS 1/85-45; 605 ILCS 5/6-411.1; 110 ILCS 805/3-48; 65 ILCS 5/3.1-55-10.

The legislature has a long history of using the term "interested" in a way consistent with its established meaning.

The leading legal dictionary agrees: an "interested person" is one "having a property right in or claim against a thing, such as a trust or decedent's estate." *Person*, Black's Law Dictionary (11th ed. 2019).

What is more, the ICFPA provides powerful evidence that this is the correct reading of "interested." Section 15 specifically lists one (and only one) example of an "interested person"—"an insurer." 740 ILCS 92/15(a). This enumerated example helps inform the statute's reach because "established rules of statutory construction inform us that, when a statute provides a list that is not exclusive, [. . .] the class of unarticulated things will be interpreted as those that are similar to the named things." *See People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 48 (2002). As a victim of the sort of fraud that the statute is designed to address, an insurer has a direct personal stake in

such a controversy. Other "interested person[s]" must have a similar, direct stake in the action.

For these reasons, the Circuit Court reached the correct conclusion. The term "interested person" limits the appropriate plaintiffs to those who have "a personal claim, status, or right which can be affected by a determination of the controversy." A36 (citing *Pratt v. Protective Ins. Co.*, 250 Ill. App. 3d 612, 618 (1st Dist. 1993)). Cahill does not meet this standard. Her connection to this case rests on, at most, a "curiosity" or "concern" in the controversy—precisely what the Court found insufficient in *Underground Contractors* to render a person "interested" in the dispute. 66 Ill. 2d 371, at 375-76.

4. The ICFPA contains additional textual evidence supporting the result reached by the Circuit Court. The statute provides that the "penalties" recovered by the civil lawsuit "are intended be remedial rather than punitive." 740 ILCS 92/5(c).

This statutory purpose—remediating harm to a defrauded insurer or self-insured entity—can be captured only if the term "interested person" is limited to those that have a preexisting claim or right. The proceeds of a lawsuit are distributed solely to a third-party relator (if any) as well as to the county Treasurer and the State's General Revenue Fund. *See* 740 ILCS 92/25.

If, as the Appellate Court held, third-party individuals with no preexisting stake in controversy may sue, then a successful lawsuit results in

payment to the relator, the County, and the State. *No* funds are paid to the injured insurer or self-insured entity. There would be no remediation at all, at odds with the stated purpose of the ICFPA. The ICFPA thus provides unmistakable evidence that only those persons who actually suffered a cognizable injury may sue as private relators.

* * *

The word "interested" in the ICFPA must be given independent effect. When the legislature used that term in 2001, it had a well-established legal meaning: "interested person[s]" are those that "possess a personal claim, status, or right which is capable of being affected." *See* A36; *Underground Contractors Ass'n*, 66 Ill. 2d at 376.

This provides a sensible scope to the private-party mechanism in the ICFPA: those persons with a *personal* stake in a controversy may bring a claim and recover, among other things, part of the penalty due to the State for the wrongful conduct. By using language materially different from the Illinois False Claims Act, the ICFPA does not create a relator statute that is accessible to *anyone*, regardless of the person's relationship to the underlying controversy.

B. The Appellate Court's statutory construction rests on multiple errors.

The Appellate Court, by contrast, held that the "word 'interested,'" as used in the ICFPA, is "descriptive rather than restrictive." A22 ¶ 43. In its construction, the term "interested" plays no role. This conclusion is mistaken.

1. The Appellate Court provided no meaning—none whatsoever—for the critical qualifier in the ICFPA, the term "interested." Per its decision, the General Assembly's inclusion of the word "interested" is pure surplusage. While the court acknowledges that we advanced this argument (at A20), it did not meaningfully respond. This is compelling evidence that the construction adopted below is incorrect.[7]

2. The court also erred in finding probative that the term "'interested person' only appears once—in [S]ection 15(a)—and is never mentioned again in the statute." A21 ¶ 43. Section 15(a) is the operative part of the ICFPA delineating *who* may bring a lawsuit. When the ICFPA later refers, for example, to the "person bringing the action" (740 ILCS 92/25(c)), that necessarily incorporates Section 15(a)'s limitation on the category of those who may sue. The importance of the term "interested" is underscored by its inclusion in the *title* of Section 15. The legislature's use of this term was not mere accident.

3. The Appellate Court's focus (at A19) on the anti-retaliation provision contained in Section 40 is misplaced. The court reasoned that this Section "plainly appl[ies] to an employee of a health care provider, who, as a whistleblower, identifies potential fraud by his or her employer, and risks the possibility of retaliation." A19 ¶ 38. It thus concluded that Section 15(a)'s use

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[7] The Appellate Court mistakenly relied on *People ex rel. Alzayat v. Hebb*, which contains no analysis of the definition of "interested person." A20 (citing 18 Cal. App. 5th 801, 831 (Cal. App. 2017)). And, as a decision of a California intermediate court, it has little probative value here. Rather, "interested person" has a well-established meaning in Illinois—and that meaning must govern.

of "interested person" must sweep in such employees. A19-20 ¶¶ 37-39. This reasoning is faulty. To begin with, nothing in Section 40 references a "person," much less an "interested person"—the term relevant here. *See* 740 ILCS 92/40. It thus sheds little light on the operative language in Section 15(a).

Additionally, Section 40 has far broader application than merely protecting an ICFPA *relator* against retaliation: it precludes retaliation against one who "investigat[es]" a claim, participates in "initiation" of it, provides "testimony" for the claim, or otherwise supplies "assistance." 740 ILCS 92/40. While an individual like Cahill is not an "interested person" within the meaning of Section 15(a), she certainly may investigate a claim, cause its initiation, provide testimony for a claim, or otherwise assist the prosecution of a claim by one who *is* an interested party. She may also aid the State's investigation of such a claim. Section 40 precludes an employer from retaliating against an "employee" who engages in any such conduct. There is no need to disregard the crucial "interested person" qualification in Section 15(a) in order to provide breadth to Section 40.[8]

[8] The Appellate Court also erred in reasoning that "an insurance company employee would be unlikely to face retaliation for identifying claims that defraud their employer." A19 ¶ 38. This rests on an artificially narrow understanding of the ICFPA. As we have said, the cause of action under the ICFPA is not limited to fraud on an "insurance company;" it also extends to fraud on a "self-insured entity." 720 ILCS 5/17-10.5(a)(1) (incorporated by 720 ILCS 92/5(b)).

C. The constitutional avoidance canon further compels this construction.

As we have explained, there is no ambiguity in Section 15(a): when the General Assembly used the term "interested person," it incorporated the meaning that this Court had previously supplied the term. In so doing, the legislature created an appropriate limitation on the scope of private ICFPA claims.

If "interested person" were understood to authorize suit by *anyone*—the result reached by the Appellate Court—the ICFPA would conflict with the Illinois Constitution. In the following pages, we explain those arguments in detail. The presence of these grave constitutional concerns is all the more reason to adopt the straightforward construction of "interested person" identified by the Circuit Court.

That is because the Court has a "duty [. . .] to interpret [a] statute as to promote its essential purposes and to avoid, if possible, a construction that would raise doubts as to its validity." *People v. Nastasio*, 19 Ill. 2d 524, 529 (1960). Indeed, "[i]t is a cardinal rule of statutory construction that a statute will always be construed so as to uphold its constitutionality if possible." *Bd. of Ed. of Armstrong High Sch. Dist. No. 225 v. Ellis*, 60 Ill. 2d 413, 416 (1975). *See also People v. Shephard*, 152 Ill. 2d 489, 499 (1992) ("It is a court's duty to construe a statute so as to affirm the statute's constitutionality and validity, if reasonably possible. Further, if the statute's construction is doubtful, a court will resolve the doubt in favor of the statute's validity.").

II. Cahill lacks standing to sue under the ICFPA because the State cannot assign its authority to enforce this criminal law.

To bring a lawsuit, a plaintiff must have standing, which "ensures that issues are raised only by parties having a real interest in the outcome of [a] controversy." *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 35. *See also id.* at ¶ 36 ("A party must assert its own legal rights and interests, rather than assert a claim for relief based upon the rights of third parties."). To satisfy Illinois' standing requirement, a plaintiff must allege an injury in fact to a legally cognizable interest. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988). The alleged injury must be (1) distinct and palpable, (2) fairly traceable to the defendants' actions, and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id*. at 492-93.

As the Court explained in *Scachitti*, relators in cases brought under the Illinois False Claims Act and federal False Claims Act have standing because the sovereign has partially assigned a claim for pecuniary damages resulting from the presentation of a false claim. This kind of assignment is cognizable because the underlying claim for damages is a property right and may therefore be transferred. *See Scachitti*, 215 Ill. 2d at 506-09 (citing *Vermont Agency*, 529 U.S. at 772-74).

The action Cahill brings here under ICFPA Section 15 is fundamentally different. It does not involve a claim for pecuniary damages held by the sovereign. Rather, it rests solely on the government's police power to enforce a criminal law and, in turn, collect penalties. Illinois cannot assign

this interest to private entities. First, because a Section 15 claim is not a property right, it is not a claim that Illinois may transfer to another entity. Second, even if the power to enforce criminal laws could be assigned, Illinois law precludes an assignment here.

Only State's Attorneys and the Attorney General may pursue penalties for violations of the criminal law. In so doing, these public officials exercise their discretion to faithfully discharge their duties in the public interest. Authorizing uninjured private plaintiffs to enforce the criminal laws—and receive a bounty for doing so—would fundamentally undermine the disinterested enforcement of the criminal laws.

A. A relator has standing to assert only those claims validly assigned to it by a sovereign.

This Court, following the lead of the U.S. Supreme Court, has tethered a private relator's standing to the sovereign's valid assignment of a claim for damages.

In *Scachitti*, 215 Ill. 2d at 507-08, the Court addressed relator standing under the Illinois False Claims Act (Illinois FCA), then known as the Whistleblower Reward and Protection Act, 740 ILCS 175/1. The Illinois FCA provides that an individual who defrauds the State in certain ways—including by presenting a false or fraudulent claim for payment—is liable for damages incurred by the fraud, "plus 3 times the amount of damages which the state sustains because of the act of that person." 740 ILCS 175/3(a). The law's qui tam provision permits a relator to recover up to "30% of the proceeds of the

action or settlement." 740 ILCS 175/4. Because of the direct parallels to the federal False Claims Act, the Court found *Vermont Agency*, a U.S. Supreme Court case considering the same question, "instructive" and adopted its reasoning. *Scachitti*, 215 Ill. 2d at 506-09 (citing *Vermont Agency*, 529 U.S. at 772-74).

In *Scachitti*, this Court recognized that qui tam relators are not exempt from the standing requirement and cannot proceed as an agent of the government. *Id*. at 507. In considering a relator's standing under the Illinois FCA, *Scachitti* first rejected one claimed basis for standing—the "bounty" the State law provides a successful relator. *Scachitti*, 215 Ill. 2d at 507-08. That "bounty," standing alone, is "insufficient to give rise to a cognizable injury in fact on the part of the relator because it was merely a 'by-product' of the lawsuit itself." *Id*. at 508 (quoting *Vermont Agency*, 529 U.S. at 773). It is for the same reason that "someone who has placed a wager upon the outcome" of a particular lawsuit lacks an interest in "obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency*, 539 U.S. at 772.

Rather, relators—who have not personally suffered a cognizable injury in fact—may nonetheless have standing to sue because of an implicit partial assignment of the government's claim for damages incurred as the victim of false claims. *Scachitti*, 215 Ill. 2d at 507-09. The Court explained:

> Although there was no cognizable injury in fact suffered by the relator to justify the Federal False Claims Act's conferral of an

> interest in the lawsuit upon the relator, the Supreme Court concluded "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor" provided an adequate basis for the relator's suit. *Vermont Agency*, 529 U.S. at 773. The Supreme Court reasoned that the Federal False Claims Act could "reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vermont Agency*, 529 U.S. at 773. Therefore, the relator's complaint alleging an injury in fact to the United States sufficed to confer standing on the relator. *Vermont Agency*, 529 U.S. at 774.

Id. at 508. This assignment of a claim gives a relator the "personal stake in the outcome" required for standing. *Id*.

B. The State cannot assign its law enforcement authority under the ICFPA to a private citizen.

Unlike the Illinois FCA, Section 15 of the ICFPA does not assign a claim involving damages to the public fisc. Instead, the crux of an ICFPA violation is that the defendant (a private party) defrauded a *private* insurance company (or self-insured entity). 740 ILCS 92/5(b). The ICFPA then creates a penalty scheme for this misconduct: A person who violates the law is "subject [. . .] to a civil penalty of not less than $5,000 nor more than $10,000, plus an assessment of not more than 3 times the amount of each claim for compensation under a contract of insurance." 740 ILCS 92/5(b).

As the Appellate Court construed the statute, a claim under the ICFPA need not compensate the insurance company for its loss. If, as here, an uninjured person brings the lawsuit, none of the proceeds from a successful claim go to the defrauded party. *See* 740 ILCS 92/25. Instead, the penalties recovered are split between the uninjured third-party relator and the government,

leaving the injured party free to bring its own lawsuit for damages against the entity that wronged it. *Id*. That is to say, even if Cahill were to recover in this case, VSP—the party she asserts defendants injured—would receive *nothing*.

The ICFPA is thus fundamentally different than the Illinois False Claims Act. Because the *State* is the injured party in the context of an Illinois FCA claim, the injured party *does* achieve a recovery. Thus, an Illinois FCA claim is necessarily a mechanism to recover pecuniary loss suffered by the State. By contrast, an ICFPA action does not recover pecuniary losses suffered by the State. And, when invoked by an uninjured relator, it is solely an action to punish an entity for committing fraud.

A third-party relator like Cahill lacks standing to pursue this claim. She has no independent standing, as the alleged conduct has not injured her. And, unlike with the Illinois FCA, the State cannot assign any interest it holds to Cahill.

1. **The State's power to enforce the criminal laws is not an assignable chose in action.**

The interest at stake in the ICFPA is outside the scope of that which may be assigned. "An assignment occurs when there is a transfer of some identifiable interest from the assignor to the assignee." *Cincinnati Insurance Co. v. American Hardware Manufacturers Ass'n*, 387 Ill. App. 3d 85, 100 (1st Dist. 2008) (internal citations omitted). "A valid assignment needs only to assign or transfer the whole or a part of some particular thing, debt, or chose in

action and it must describe the subject matter of the assignment with sufficient particularity to render it capable of identification." *Id* (internal citations omitted). In sum, one party may "assign" to another its interest in some *property* right.

For this reason, entities "generally" possess "the power to assign a cause of action to others." *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill. 2d 214, 223 (1998). While "[t]his [C]ourt has held that a cause of action cannot be assigned if such assignment violates public policy," *id*. at 224, in general, in Illinois, "assignability is the rule and nonassignability is the exception." *Id*. at 225. Thus, most "causes of action" are assignable. *Id*.

This doctrine ultimately rests on the recognition that a "cause of action" is a *property* interest—and thus it may be transferred from one to another. *See, e.g., Themas v. Green's Tap, Inc.*, 2014 IL App (2d) 140023, ¶ 10 ("A potential claim for damages [. . .] is a chose in action. [. . .] Choses in action are generally assignable."); Black's Law Dictionary (11th ed. 2019) (defining "chose in action" as, among other things, "[a] proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort," and "[t]he right to bring an action to recover a debt, money, or thing.").

Scachitti turned on the fundamental point that the sovereign's claim for damages resulting from fraud committed against it is an archetypal chose

in action. Used as Cahill attempts here, however, the ICFPA addresses the State's exclusive right to enforce its *criminal* statutes through the imposition of civil penalties. In this case, neither the relator nor the sovereign has suffered a discrete "injury in fact"; rather, this is a quintessential example of a "*public* right[]." *Cf. United States v. Wegeler*, 941 F.3d 665, 674 (3d Cir. 2019).

An ICFPA claim is not therefore appropriately viewed as a "chose in action." Rather, it is a claim outside that which is validly assignable. As the U.S. Supreme Court has explained, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). This is a unique facet of sovereign authority—not a property interest that may be assigned from the sovereign to a private party.[9]

2. **Allowing private parties to exercise the State's law enforcement authority violates the Illinois Constitution and disinterested enforcement of the law.**

Separately, the Illinois Constitution precludes the legislature from assigning the enforcement of criminal laws to profit-driven private relators with no personal stake in the controversy.

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[9] In finding that Cahill has standing, the Appellate Court (at A17) relied heavily on *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010). That decision does not bind this Court. Additionally, the patent marking statute it addressed, 35 U.S.C. § 292(a), did not involve an underlying *criminal* statute—and thus does not address the core issues implicated here. And, since Congress has repealed the underlying qui tam provision, 35 U.S.C. § 292(a), *Stauffer* is now immune from further judicial review, notwithstanding its substantial tension with basic standing principles.

As we explained earlier (at 10-17), through its use of the term "interested person," the ICFPA is limited to actions by the State and those individuals who were actually injured. The Appellate Court's contrary construction means that when a relator without a preexisting stake (like Cahill) sues under the ICFPA, a successful claim results in no money being returned to the injured party. Rather, proceeds flow solely to the relator and the State. *See* 740 ILCS 92/25. Used in this way, there is no remediation—just punishment.

The Illinois Constitution of 1970 provides that "[t]he Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law." Ill. Const. art. V, § 15. The Court has consistently interpreted this provision to mean that "the Attorney General is the sole officer authorized to represent the people of this State in any litigation in which the People of the State are the real party in interest, absent a contrary constitutional directive." *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 500 (1976). And, "because the office of the State's Attorney was created by the constitution and functions like the Attorney General in his or her own county [. . .] the State's Attorney is deemed to have constitutional powers similar to those of the Attorney General," with the authority to "represent[] the people in matters affected with a public interest." *County of Cook ex rel. Rifkin v. Bear Stearns & Co., Inc.*, 215 Ill. 2d 466, 478 (2005). In particular, it is the State's Attorney's duty "[t]o commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his

county, in which the people of the State or county may be concerned." 55 ILCS 5/3-9005.

In *Scachitti*, the Court concluded that the Illinois FCA provides sufficient limitations to render the Attorney General sufficiently in control of the action to accommodate Article V, Section 15 of the State Constitution. *See Scachitti*, 215 Ill. at 509-16. But the circumstances are different here for one core reason: the nature of this action is an alleged underlying violation of a State *criminal* law. The ICFPA incorporates State criminal offenses, including 720 ILCS 5/17-10.5, which forms the basis of Cahill's claim. 740 ILCS 92/5(b).

Because this action inescapably involves the *State*'s exercise of its criminal enforcement authority, it is necessary that the State—and the State alone—bring its prosecutorial discretion to bear on the wisdom of a lawsuit. The Court has repeatedly identified that it is the *sovereign*'s "discretion to institute proceedings in any case of purely public interest" and that "[t]he Attorney General, as an elected representative of the citizens of this state, is responsible for evaluating the evidence and other pertinent factors to determine what action, if any, can and should properly be taken and what penalties should be sought." *Lyons v. Ryan*, 201 Ill. 2d 529, 539 (2002) (noting that "the Attorney General has arbitrary discretion to institute proceedings in any case of purely public interest").

Similarly, "the State's Attorney [. . .] has the responsibility to initiate and prosecute all actions by and for the People of the State of Illinois." *People v. Pankey*, 94 Ill. 2d 12, 18 (1983). *See also People v. Buffalo Confectionery Co.*, 78 Ill. 2d 447, 454 (1980) (powers and duties of the Attorney General include "the initiation and prosecution of litigation on behalf of the People," which "may be exercised concurrently with the power of the State's Attorney to initiate and prosecute all actions, suits, indictments and prosecutions in his county as conferred by statute"); *People v. Rhodes*, 38 Ill. 2d 389, 396 (1967) (prosecutor is the representative of the people and "has the responsibility of evaluating the evidence and other pertinent factors and determining what offense can properly and should properly be charged.").

In addition, Illinois law requires court approval before a private attorney can work on behalf of the people in a law enforcement action. Circuit courts historically had the discretion to permit a private attorney to assist the State's Attorney "in the prosecution of a criminal case, so long as the State's Attorney assumes the management of the case and there is no injustice to the defendant." *People v. Jennings*, 343 Ill. App. 3d 717, 723 (5th Dist. 2003) (citing *Hayner v. People*, 213 Ill. 142, 147-48 (1904); *People v. Blevins*, 251 Ill. 381, 389 (1911)). The private attorney did not exercise the discretionary decision whether to institute a case; the private attorney only litigated those cases the State's Attorney decided to pursue, in a role subordinate to the State's Attorney.

Acting in this way, a private attorney's authority is independent of any purported assignment of law enforcement authority to a private party. Rather, attorneys are appointed to represent the State directly, acting as public officers. *E.g. Bianchi v. McQueen*, 818 F.3d 309, 317-18 (7th Cir. 2016) (holding that a private attorney appointed as special prosecutor was a prosecutor, in lawsuit involving prosecutorial immunity). The ICFPA circumvents these safeguards by permitting a private attorney to exercise law enforcement authority with far fewer constraints, including a lack of court approval.

The financial bounty that the ICFPA provides the relator exacerbates its infirmities. Consistent with their duty to represent the public interest exclusively, the Attorney General, State's Attorneys, and other attorneys working for them must swear an oath to the U.S. and Illinois constitutions. 15 ILCS 205/1 (Attorney General); 55 ILCS 5/3-9001 (State's Attorneys). The law governing State's Attorneys explicitly prohibits them from receiving "any fee or reward from or in behalf of any private person for any services within his official duties and shall not be retained or employed, except for the public, in a civil case depending upon the same state of facts on which a criminal prosecution shall depend." 55 ILCS 5/3-9009.

Providing a bounty to a private relator in connection with enforcing those same criminal laws creates extraordinary constitutional and ethical concerns. It is long-recognized that an attorney representing the public in a criminal matter "should represent public justice and stand indifferent as be-

tween the accused and any private interest." *People v. Gerold*, 265 Ill. 448, 478 (1914); *see also* Illinois Rule of Professional Conduct 3.8. It would violate these fundamental principles to allow an assistant Attorney General—who successfully pursues a case on behalf of the people—to personally collect 30 percent of funds recovered. Yet under the Appellate Court's opinion, the ICFPA allows an uninjured private plaintiff to become the roving enforcer of select criminal laws for purposes of securing a bounty.

Courts in other states have broadly precluded arrangements that provide private litigants financial incentives for the prosecution of matters dependent on sovereign authority. In *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 745 (1985), the California Supreme Court held that a city could not hire a private attorney to work on its behalf on a contingency basis to pursue a public nuisance action, a pure law enforcement action. The bounty supplied the lawyer "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id*. at 747-48. When representing the state's interest in criminal prosecution, the lawyers are "the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 746. As a result, "[c]ontingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional." *Id.* at 748.

More recently, the California Supreme Court reaffirmed the principles in *Clancy*, while clarifying that *Clancy*'s prohibition does not apply to *all* nuisance actions in which a government engages a private attorney on a contingency basis. *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010). The court noted that its decision in *Clancy* "was guided, in large part, by the circumstance that the public-nuisance action pursued by [the city] implicated interests akin to those inherent in a criminal prosecution," and the recognition that "it is generally accepted that any type of arrangement conditioning a public prosecutor's remuneration upon the outcome of a case is widely condemned" and "categorically barred" "under most, if not all, circumstances." *Id*. at 51. Thus, "private counsel who are remunerated on a contingent-fee basis have a direct pecuniary interest in the outcome of the case" "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." *Id*. at 57-58. By contrast, when the sovereign acts in an "ordinary civil cases," including "simply enforcing its own contract and property rights against individuals and entities that allegedly have infringed upon those interests," contingency fees may be permissible. *Id*. at 54.

That is the same distinction we urge here: while statutes like the FCA provide private relators authority to pursue the sovereign's *property* rights,

the ICFPA puts criminal enforcement in the hands of financially-interested parties.

In light of these weighty considerations, California has adopted judicial safeguards that govern the sovereign's use of private counsel with contingent fees:

> Specifically, contingent-fee agreements between public entities and private counsel must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation.

Santa Clara, 50 Cal. 4th at 64. Such limitations are not present in the ICFPA.

The Supreme Court of Rhode Island reached the same conclusion regarding the need for neutrality and active government supervision in similar public nuisance actions, which, again, implicate *less* sensitive interests than those at issue in an ICFPA suit. In *State v. Lead Industries Ass'n, Inc.*, the Rhode Island Supreme Court required "exacting limitations" on any contingent fee attorney hired to assist the government in the litigation of "certain *non-criminal* matters," and retention by the attorney general of "***absolute and total control over all critical decision-making***," including personal involvement in all stages of the litigation by a senior member of the attorney general's office, in light of "the special duty of attorneys general to seek justice and their wide discretion with respect to same" in *all* cases, civil and

criminal. 951 A.2d 428, 472, 475-77 (R.I. 2008) (emphasis original) (internal citations omitted). The court noted: "[T]he Attorney General's discretionary decision-making must not be delegated to the control of outside counsel; rather, it is the outside counsel who must serve in a subordinate role." *Id*. at 476. *Cf. Phillip Morris Inc. v. Glendening*, 349 Md. 660, 686 (Md. 1998) (permitting involvement of contingent fee counsel on behalf of the state in tobacco litigation by noting that it does not directly implicate "constitutional or criminal violations," in contrast to *Clancy*, and noting contract provision giving the attorney general "final, sole and unreviewable" authority "to control all aspects of [outside counsel's] handling of the litigation").

* * *

Cahill lacks standing to assert the State's interest in enforcement of the criminal laws relating to insurance fraud. Cahill has no personal stake in this action. And she may not volunteer to enforce State criminal laws—especially not to receive a personal bounty.

The State may not remedy Cahill's lack of standing by assigning its interests under the ICFPA. Because the State has no claim to pecuniary damages, it has no damages claim to assign, in direct contrast to the Illinois False Claims Act. And the State may not transfer to Cahill the authority to investigate, charge, and prosecute offenses unique to the sovereign. When the Attorney General and State's Attorneys investigate crimes, initiate legal proceedings, and prosecute such actions, they exercise discretion so as to act in

the best interest of the people of Illinois. Cahill, by contrast, attempts to wield the power of the State for personal financial gain. Allowing this action would infringe the exclusive power of the Attorney General and the State's Attorneys, undermining the sober and considered enforcement of the criminal laws.

CONCLUSION

The Court should reverse the decision of the Appellate Court, reinstating the Circuit Court's order dismissing this action.

Dated: January 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 341(c) certificate of compliance, and those matters set forth within the appendix, is 37 pages.

Jennifer Aronoff

APPENDIX

APPENDIX

STATUTE INVOLVED

(740 ILCS 92/) Insurance Claims Fraud Prevention Act.

Sec. 1. Short title. This Act may be cited as the Insurance Claims Fraud Prevention Act. (Source: P.A. 92-233, eff. 1-1-02.)

Sec. 5. Patient and client procurement.

(a) Except as otherwise permitted or authorized by law, it is unlawful to knowingly offer or pay any remuneration directly or indirectly, in cash or in kind, to induce any person to procure clients or patients to obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured person or the person's insurer. Nothing in this Act shall be construed to affect any contracts or arrangements between or among insuring entities including health maintenance organizations, health care professionals, or health care facilities which are hereby excluded.

(b) A person who violates any provision of this Act, Section 17-8.5 or Section 17-10.5 of the Criminal Code of 1961 or the Criminal Code of 2012, or Article 46 of the Criminal Code of 1961 shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than $5,000 nor more than $10,000, plus an assessment of not more than 3 times the amount of each claim for compensation under a contract of insurance. The court shall have the power to grant other equitable relief, including temporary injunctive relief, as is necessary to prevent the transfer, concealment, or dissipation of illegal proceeds, or to protect the public. The penalty prescribed in this subsection shall be assessed for each fraudulent claim upon a person in which the defendant participated.

(c) The penalties set forth in subsection (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution for the same conduct. If the court finds, after considering the goals of disgorging unlawful profit, restitution, compensating the State for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud, that such a penalty would be punitive and would preclude, or be precluded by, a criminal prosecution, the court shall reduce that penalty appropriately.

(Source: P.A. 97-1150, eff. 1-25-13.)

Sec. 10. Action by State's Attorney or Attorney General. The State's Attorney of the county in which the conduct occurred or Attorney General may bring a civil action under this Act. Before the Attorney General may bring the action, the Attorney General shall present the evidence obtained to the appropriate State's Attorney for possible criminal or civil filing. If the State's Attorney elects not to pursue the matter, then the Attorney General may proceed with the action. (Source: P.A. 92-233, eff. 1-1-02.)

Sec. 15. Action by interested person.

(a) An interested person, including an insurer, may bring a civil action for a violation of this Act for the person and for the State of Illinois. The action shall be brought in the name of the State. The action may be dismissed only if the court and the State's Attorney or the Attorney General, whichever is participating, gives written consent to the dismissal stating their reasons for consenting.

(b) A copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses shall be served on the State's Attorney and Attorney General. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The State's Attorney or Attorney General may elect to intervene and proceed with the action within 60 days after he or she receives both the complaint and the material evidence and information. If more than one governmental entity elects to intervene, the State's Attorney shall have precedence.

(c) The State's Attorney or Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint shall remain under seal under subsection (b). The motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this Section until 20 days after the complaint is unsealed and served upon the defendant.

(d) Before the expiration of the 60-day period or any extensions obtained under subsection (c), the State's Attorney or Attorney General shall either:

(1) proceed with the action, in which case the action shall be conducted by the State's Attorney or Attorney General; or

(2) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(e) When a person or governmental agency brings an action under this Act, no person other than the State's Attorney or Attorney General may intervene or bring a related action based on the facts underlying the pending action unless another statute or common law authorizes that action. (Source: P.A. 92-233, eff. 1-1-02.)

Sec. 20. Role of State's Attorney or Attorney General.

(a) If the State's Attorney or Attorney General proceeds with the action, he or she shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. That person shall have the right to continue as a party to the action, subject to the limitations set forth in subsection (b).

(b) The State's Attorney or Attorney General may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the State's Attorney or Attorney General of the filing of the motion, and the court has provided the person with an opportunity for a hearing on the motion.

The State's Attorney or Attorney General may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the hearing may be held in camera.

Upon a showing by the State's Attorney or Attorney General that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's Attorney's or Attorney General's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including, but not limited to, the following:

(1) limiting the number of witnesses the person may call;

(2) limiting the length of the testimony of those witnesses;

(3) limiting the person's cross-examination of witnesses; and

(4) otherwise limiting the participation by the person in the litigation.

Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(c) If the State's Attorney or Attorney General elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the State's Attorney or Attorney General so requests, he or she shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts, at the State's Attorney's or Attorney General's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the State's Attorney or Attorney General to intervene at a later date upon a showing of good cause.

(d) If at any time both a civil action for penalties and equitable relief pursuant to this Act and a criminal action are pending against a defendant for substantially the same conduct, whether brought by the government or a private party, the civil action shall be stayed until the criminal action has been concluded at the trial court level. The stay shall not preclude the court from granting or enforcing temporary equitable relief while the actions are pending. Whether or not the State's Attorney or Attorney General proceeds with the action, upon a showing by the State's Attorney or Attorney General that certain actions of discovery by the person initiating the action would interfere with a law enforcement or governmental agency investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay discovery for a period of not more than 180 days. A hearing on a request for the stay shall be conducted in camera. The court may extend the 180-day period upon a further showing in camera that the agency has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed

discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(e) Notwithstanding Section 15, the State's Attorney or Attorney General may elect to pursue its claim through any alternate remedy available to the State's Attorney or Attorney General. (Source: P.A. 92-233, eff. 1-1-02.)

Sec. 25. Costs and proceeds of action.

(a) If the State's Attorney or Attorney General proceeds with an action brought by a person under Section 15, that person is entitled to receive an amount that the court determines is reasonable based upon the extent to which the person contributed to the prosecution of the action. Subject to subsection (d), the amount awarded to the person who brought the action shall not be less than 30% of the proceeds of the action or settlement of the claim, and shall be paid from the proceeds.

(b) If the State's Attorney or Attorney General does not proceed with an action brought by a person under Section 15, that person shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. Subject to subsection (d), the amount shall not be less than 40% of the proceeds of the action or settlement, and shall be paid from the proceeds.

(c) If the person bringing the action as a result of a violation of this Act has paid money to the defendant or to an attorney acting on behalf of the defendant in the underlying claim, then he or she shall be entitled to up to double the amount paid to the defendant or the attorney if that amount is greater than 50% of the proceeds.

(d) Where the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action under Section 15, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award those sums that it considers appropriate, but in no case more than 10% of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

(e) Any payment to a person under subsection (a), (b), (c), or (d) shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(f) If a local State's Attorney has proceeded with an action under this Act, the Treasurer of the County where the action was brought shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred by the State's Attorney, including reasonable attorney's fees and costs, plus 50% of the funds not awarded to a private party. Those amounts shall be used to investigate and prosecute insurance fraud, augmenting existing budgets rather than replacing them. All remaining funds shall go to the State and be deposited in the General Revenue Fund and, when appropriated, shall be

allocated to appropriate State agencies for enhanced insurance fraud investigation, prosecution, and prevention efforts.

(g) If the Attorney General has proceeded with an action under this Act, all funds not awarded to a private party, shall go to the State and be deposited in the General Revenue Fund and, when appropriated, shall be allocated to appropriate State agencies for enhanced insurance fraud investigation, prosecution, and prevention efforts.

(h) If neither a local State's Attorney or the Attorney General has proceeded with an action under this Act, 50% of the funds not awarded to a private party shall be deposited with the Treasurer of the County where the action was brought and shall be disbursed to the State's Attorney of the County where the action was brought. Those funds shall be used by the State's Attorney solely to investigate, prosecute, and prevent crime, augmenting existing budgets rather than replacing them. All remaining funds shall go to the State and be deposited in the General Revenue Fund and, when appropriated, shall be allocated to appropriate State agencies for enhanced crime investigation, prosecution, and prevention efforts.

(i) Whether or not the State's Attorney or Attorney General proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of this Act, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the State's Attorney or Attorney General to continue the action on behalf of the State.

(j) If the State's Attorney or Attorney General does not proceed with the action, and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. (Source: P.A. 100-358, eff. 1-1-18.)

Sec. 30. Limitation on bringing actions.

(a) In no event may a person bring an action under Section 15 that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the State's Attorney or Attorney General is already a party.

(b) A court may not have jurisdiction over an action under this Act based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the State's Attorney, the Attorney General, or a person who is an original source of the information. For purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State's Attorney or Attorney General before filing an action under this Act based on the information. (Source: P.A. 92-233, eff. 1-1-02.)

Sec. 35. Expenses and sanctions.

(a) Except as provided in subsection (b), the State's Attorney or Attorney General is not liable for expenses that a person incurs in bringing an action under this Act.

(b) In civil actions brought under this Act in which the Attorney General or a State's Attorney is a party, the court shall retain discretion to impose sanctions otherwise allowed by law, including the ability to order a party to pay expenses as provided in the Code of Civil Procedure. (Source: P.A. 92-233, eff. 1-1-02.)

Sec. 40. Retaliatory discharge; remedy. An employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this Act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Act, shall be entitled to all relief necessary to make the employee whole. That relief shall include reinstatement with the same seniority status the employee would have had but for the discrimination, 2 times the amount of backpay, interest on the backpay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate court for the relief provided in this Section. The remedies under this Section are in addition to any other remedies provided by existing law. (Source: P.A. 92-233, eff. 1-1-02.)

Sec. 45. Time limitations.

(a) Except as provided in subsection (b), an action pursuant to this Act may not be filed more than 3 years after the discovery of the facts constituting the grounds for commencing the action.

(b) Notwithstanding subsection (a), an action may be filed pursuant to this Act within not more than 8 years after the commission of an act constituting a violation of this Act, Section 17-8.5 or Section 17-10.5 of the Criminal Code of 1961 or the Criminal Code of 2012, or a violation of Article 46 of the Criminal Code of 1961. (Source: P.A. 97-1150, eff. 1-25-13.)

Sec. 90. (Amendatory provisions; text omitted). (Source: P.A. 92-233, eff. 1-1-02; text omitted.)

2019 IL App (1st) 180697
No. 1-18-0697
Opinion filed March 12, 2019

Second Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE STATE OF ILLINOIS *ex rel.* DAVID P. LEIBOWITZ, as Trustee of the Bankruptcy Estate of Marie A. Cahill, Plaintiff-Appellant, v. FAMILY VISION CARE, LLC, NOVAMED MANAGEMENT SERVICE, LLC, SURGERY PARTNERS, INC., and JENNIFER GULA, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 17 L 4200 Honorable John C. Griffin, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Presiding Justice Mason and Justice Pucinski concurred in the judgment and opinion.

OPINION

¶ 1 We are asked to decide two interrelated questions under the Insurance Claims Fraud Protection Act (Act) (740 ILCS 92/1 *et seq.* (West 2016)): (i) whether the State can assign to a third party an injury to its sovereignty and (ii) whether the third party can derive standing from that injury absent monetary damages to the State? Both questions present an issue of first expression.

¶ 2 The trial court found the plaintiff, trustee for the bankruptcy estate of Marie Cahill, lacked standing because the State only suffered an injury to its sovereignty, not a pecuniary loss, and the State cannot assign an injury to its sovereignty to a private citizen. The court also found the plaintiff was not an "interested person" under the Act, as Cahill did not suffer an injury related to the claim and did not allege how determination of the controversy would affect a claim or right personal to her.

¶ 3 We differ with the trial court's standing analysis. Under the plain language of the Act and its purpose in combating insurance fraud, the State need not have suffered monetary damages to confer standing on a relator. Moreover, in the *qui tam* context, a whistleblower employee like Cahill, who has personal, nonpublic information of possible wrongdoing, is an "interested person" under the statute and need not have a personal injury to have standing.

¶ 4 We agree with the trial court that dismissal was not warranted by the separation agreement or for failure to state a claim. Thus, we affirm in part, reverse in part, and remand for further proceedings.

¶ 5 Background

¶ 6 Family Vision Care, LLC, is an optometrist practice in LaGrange, Illinois. NovaMed Management Service, LLC, a medical practice management company, purchased Family Vision Care, LLC, and merged with Surgery Partners, Inc. (Surgery Partners), a publicly traded company. Dr. Jennifer Gula is an optometrist at Family Vision Care, LLC, with no ownership interest in the practice. (Defendants will be referred to as "Family Vision Care.")

¶ 7 Cahill worked for Family Vision Care from October 2012 through January 2016. As an office administrator, Cahill handled insurance billing practices. According to Cahill, about 90%

of Family Vision Care's revenue came from claims it submitted to Vision Service Plan (VSP), a vision care health insurance company. VSP only covers claims from optometrists who have "majority ownership and complete control" of their medical practices. A practice must sign a provider agreement certifying itself as optometrist owned and controlled before VSP will make any insurance payments. Cahill alleges Family Vision Care engaged in fraud by knowingly and falsely certifying their eligibility for VSP insurance payments and accepting payments to which they were not entitled. Specifically, Cahill alleges, in part, that Dr. Gula signed the provider agreements falsely certifying to VSP that she owned Family Vision Care. Cahill also alleges Frank Soppa, a Surgery Partners executive, instructed her to tell VSP that Dr. Gula owned Family Vision Care.

¶ 8 In February 2016, after Cahill left Family Vision Care, she signed a separation agreement and general release "fully and unconditionally" releasing and discharging her employer from liability, claims, and causes of action "arising *** out of or in connection with Employee's employment or separation from employment with Employer, and all claims for any act or failure to act that occurred up to the time that Employee signs this Agreement."

¶ 9 Cahill filed for bankruptcy in January 2016. More than a year later, the trustee of the bankruptcy estate (Estate) filed a one-count complaint against Family Vision Care alleging violation of section 5 of the Act (*id.* § 5) for fraudulently submitting false claims to VSP, which is not a party. (The complaint was filed under the caption "State of Illinois ex rel. Bankruptcy Estate of Marie A. Cahill," but federal law provides that it is the trustee who may prosecute an action on behalf of the bankruptcy estate. 11 U.S.C. § 323(b) (2012). The record indicates that David P. Leibowitz is the bankruptcy estate's trustee.) Section 15(a) of the Act is a *qui tam*

enforcement provision, allowing private whistleblowers with undisclosed information about insurance fraud to sue for civil penalties. *Id.* § 15(a). The Estate's complaint asserts the State is the real party in interest and Cahill is an "interested person" under section 15(a), giving the Estate standing to sue on behalf of her and the State. The State declined to intervene.

¶ 10 Family Vision Care filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)), arguing (i) under section 2-615 (*id.* § 2-615), the Estate's complaint fails to allege a violation of the Act with sufficient particularity; (ii) under section 2-619(a)(6) (*id.* § 2-619(a)(6)), Cahill's severance agreement releasing "any and all claims" against Family Vision Care warranted dismissal; and (iii) under section 2-619(a)(9) (*id.* § 2-619(a)(9)), the Estate lacked standing as not a directly injured "interested person" and that only VSP could bring a *qui tam* claim under the Act. Family Vision Care further asserted that, although the State would have standing to enforce its laws, it cannot assign its standing to a private citizen.

¶ 11 The trial court denied Family Vision Care's section 2-615 motion finding Cahill alleged fraudulent conduct with sufficient specificity. The court also denied Family Vision Care's request for dismissal under section 2-619(a)(6) based on the separation agreement, finding questions of fact exist as to whether Cahill could have released the bankruptcy estate's claim, as well as whether Cahill's claim falls under the release. As to standing, the trial court dismissed the complaint, finding the Estate failed to allege or explain how it has standing to bring a claim under the Act. Specifically, the court observed that unlike the False Claims Act (740 ILCS 175/4(b)(1) (West 2016)), which states that "A *person* may bring a civil action" for violation of the statute, the Act states that the relator must be an "*interested* person." (Emphases added.) 740

ILCS 92/15 (West 2016). Noting that the Act does not define "interested person," the court decided, after supplemental briefing, that a claimant must hold some legal interest in the cause of action. The court concluded that the Estate had not demonstrated Cahill suffered an injury related to the claim or how determination of the controversy would affect "a personal claim, status, or right." Thus, the Estate lacked standing.

¶ 12 Further, the trial court stated that even if the Estate could bring a *qui tam* action, the Estate did not allege an "injury in fact" the State could assign to it. Referencing the False Claims Act, the trial court stated that it addresses allegations of fraudulently obtained public funds and actual monetary damages suffered by the State. Conversely, the State's only injury from a purported Act violation is to its sovereignty, not to its treasury, and the State could not assign that injury to a private citizen.

¶ 13 The Estate moved for, and the court granted, dismissal with prejudice and entered a final judgment.

¶ 14 Analysis

¶ 15 The Estate contends the trial court erred in finding it did not have standing under the Act because (i) the State suffered an "injury in fact" to its sovereignty based on violation of its laws and could assign its standing to the Estate and (ii) the Estate is an "interested person" under the section 15(a). Family Vision Care asks us to affirm the findings that the State has not suffered an assignable injury in fact and that the Estate is not an "interested person" as Cahill was not personally injured. Alternatively, Family Vision Care argues that if we disagree with the findings regarding standing, we should affirm the dismissal under either section 2-615, as the Estate failed

to plead fraud with particularity, or section 2-619(a)(6), as the separation agreement bars the claim.

¶ 16 The Act

¶ 17 The Act, which the Illinois General Assembly adopted in 2001, added civil penalties to existing criminal remedies for fraud against private insurance companies. Relevant to this case, subsection 5(b) creates a private cause of action against any entity that violates the Illinois criminal code relating to insurance fraud. *Id.* § 5(b). The criminal law referenced in subsection (b) states that a person commits insurance fraud "when he or she knowingly obtains, attempts to obtain, or causes to be obtained, by deception, control over the property of an insurance company *** by the making of a false claim or by causing a false claim to be made on any policy of insurance issued by an insurance company *** intending to deprive an insurance company or self-insured entity permanently of the use and benefit of that property." 720 ILCS 5/17-10.5(a)(1) (West 2016).

¶ 18 The Act adopts nearly word-for-word a statute from California (see Cal. Ins. Code § 1871.7 (West 2016)). Both the Illinois and California statutes, which are the only laws of their kind in the United States, include a *qui tam* enforcement provision allowing private whistleblowers with information about insurance fraud to sue for civil penalties. Section 15(a) of the Act provides that "An interested person, including an insurer, may bring a civil action for a violation of this Act for the person and for the State of Illinois." 740 ILCS 92/15(a) (West 2016).

¶ 19 Standing

¶ 20 A plaintiff has standing to sue as long as he or she complains of some injury in fact to a legally cognizable interest. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492

(1988). More precisely, the claimed injury, whether actual or threatened, must be (i) distinct and palpable, (ii) fairly traceable to the defendant's actions, and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* at 492-93. Standing ensures courts decide actual, specific controversies and not abstract questions or moot issues. *People ex rel. Madigan v. Burge*, 2012 IL App (1st) 122842, ¶ 31.

¶ 21 A plaintiff need not allege facts establishing standing. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004). Rather, the defendant bears the burden to plead and prove lack of standing. *Chicago Teachers Union v. Board of Education of the City of Chicago*, 189 Ill. 2d 200, 206 (2000). Where a motion to dismiss challenges standing, a court accepts as true all well-pleaded facts in the complaint and all inferences that can reasonably be drawn in the plaintiff's favor. *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). A court's disposition of a section 2-619 motion on lack of standing presents a question of law, which we review *de novo*. *Wexler*, 211 Ill. 2d at 23.

¶ 22 By definition, *qui tam* suits involve claims brought by private parties to assist the executive branch in enforcing the law, "the violation of which affects the interest of the government, not the individual relator, whose only motivation in bringing the suit is to recover a piece of the action given by statute." *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1212 (7th Cir. 1995). A "*qui tam* plaintiff" or "relator" is generally likened to private attorneys general who stand in the shoes of the state. *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1107-08 (2001). The relator has no personal stake in the damages sought—all of which, by definition, were suffered by the government. *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 369 Ill. App. 3d 507, 513 (2006). Although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the

public, "when a legislative body enacts provisions enabling *qui tam* actions, that act carries with it an understanding that in such suits it is the government, and not the individual relator, who has suffered the injury resulting from the violation of the underlying law and is therefore the real plaintiff in the action." *United States ex rel. Hall*, 49 F.3d at 1212.

¶ 23 Of course, the State suffers an injury to its sovereignty when its laws are violated. See *Vermont Agency of Natural Resources v. United State ex rel. Stevens*, 529 U.S. 765, 771 (2000) (government suffers "injury to its sovereignty arising from violation of its laws"). And the State also has an interest in protecting the public from insurance fraud and the authority to enact laws to prevent it. *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill. 2d 546, 559 (1999) ("the legislature has broad discretion to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest" (internal quotation marks omitted)).

¶ 24 Standing in *qui tam* litigation under the False Claims Act has been addressed by the Illinois Supreme Court. In *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 508 (2005), the court acknowledged that in a *qui tam* case there is "no cognizable injury in fact suffered by the relator." But, relying on the United States Supreme Court's decision in *Vermont Agency*, 529 U.S. 765, the court held that a relator has standing as a partial assignee of the State's claim. *Scachitti*, 215 Ill. 2d at 508. In *Vermont Agency*, the Supreme Court held "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor" as an adequate basis for *qui tam* relator standing because "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vermont Agency*, 215 Ill. 2d

at 773. So, the relator's complaint alleging an injury in fact to the United States sufficed to confer standing on the relator. *Id.* at 774.

¶ 25 Adopting the reasoning in *Vermont Agency*, the Illinois Supreme Court held that a *qui tam* claim constitutes a partial assignment of the State's claim under the *qui tam* provisions of the Act, permitting a private person to " 'bring a civil action for a violation of [the Act] *for the person and for the State*.' (Emphasis added.) 740 ILCS 175/4(b)(1) (West 2002)." *Scachitti*, 215 Ill. 2d at 508. "In other words, the interest of a *qui tam* plaintiff in a claim under the Act is justified as a partial assignment of the state's right to bring suit." *Id.*

¶ 26 The Estate asserts that, like the False Claims Act, the Act allows a relator to bring a civil action "for the person and for the State of Illinois" and, thus, under *Scachitti*, the Estate has an interest as the assignee of the State's interest in bringing the suit. The Estate asserts the *qui tam* provision empowers a private relator to sue on behalf of the State, regardless of a personal financial stake. And as with False Claims Act cases, the attorney general controls the litigation and can intervene to litigate or dismiss the claim, which prevents abuse of the statute.

¶ 27 Family Vision Care agrees that an injury to the relator is not required in a *qui tam* action. But, they argue the Estate does not have standing under the "narrow exception" delineated in *Vermont Agency* and *Scachitti*, as the State has not suffered any monetary damages. Family Vision Care points to the language in *Vermont Agency* that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's *damages* claim." (Emphasis added.) *Vermont Agency*, 529 U.S. at 773. Family Vision Care asserts that when the Illinois Supreme Court, in *Scachitti*, adopted the reasoning in *Vermont Agency*, it too held that in a *qui tam* action under the False Claims Act, the State could effect a partial assignment of its interest in monetary damages, nothing more.

¶ 28 Family Vision Care also contends the text of the False Claims Act and the Act amplifies this difference. Specifically, Family Vision Care notes that a person who violates the False Claims Act is liable for a civil penalty "plus 3 times the amount of *damages* which the State sustains because of the act of that person," and the relator may recover up to "30% of the proceeds of the action or settlement." (Emphasis added.) 740 ILCS 175/3(a)(1), 4(d)(2) (West 2016). Conversely, a person who violates the Act is subject to a civil penalty "plus an *assessment* of not more than 3 times the amount of each claim for compensation under a contract of insurance," and the law permits a relator to recover not "less than 30% of the proceeds of the action or settlement of the claim," with no upper limit. (Emphasis added.) 740 ILCS 92/5(b), 25(a)-(b) (West 2016). Family Vision Care argues that use of the word "assessment" rather than "damages" in light of the language in *Vermont Agency* and *Scachitti*, indicates that the Act was not intended to allow private individuals to litigate a violation on behalf of the State.

¶ 29 We disagree. As Family Vision Care acknowledges, neither *Scachitti* nor *Vermont Agency* directly address whether a *qui tam* relator can have standing when a claim does not involve monetary damages. Both cases hold that the government's standing rests on the "injury to its sovereignty based on the violation of its laws," as well as the "proprietary" injury suffered in False Claims Act cases. *Scachitti*, 215 Ill. 2d at 507; *Vermont Agency*, 529 U.S. at 771. But, the plain language of the Act and its purpose support a finding that the State need not have suffered monetary damages to confer standing on a relator. Section 15(a) provides "[a]n interested person, including an insurer, may bring a civil action for violation of this Act for the person and for the State of Illinois." It does not require the State to have incurred monetary damages for an "interested person" to bring a civil action on the State's behalf. Moreover, the statute's purpose directly involves combating insurance fraud, not recouping damages. Requiring

the State to assign damages to a relator would defeat the purpose of the Act because it would preclude a whistleblower from bringing a claim on the State's behalf.

¶ 30 Relator cites numerous statutes from the 1800s that allowed a private citizen to enforce civil penalties in the absence of any financial loss to the government. Although those long dormant statutes provide a context for examining current *qui tam* statutes, they provide little support on the issue of standing under the Act. More significantly, relator cites *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010), concerning the government's assignment of a purely sovereign interest to a relator under a *qui tam* statute. In *Stauffer*, the *qui tam* relator was a patent attorney who purchased bow ties made by the defendant, which the relator claimed to have been falsely marked in violation of 35 U.S.C. § 292(b) (2012). The court reasoned that the "*qui tam* provision operates as a statutory assignment of the United States' rights, and 'the assignee of a claim has standing to assert the injury in fact suffered by the assignor.' " *Stauffer*, 619 F.3d at 1325 (quoting *Vermont Agency*, 529 U.S. at 773). The court concluded that by creating the statute, Congress determined that a deceptive patent marking was harmful and prohibited; therefore, a violation of section 292 inherently constitutes an injury to the United States. *Id.* The court further reasoned that because the government would have standing to enforce section 292, the relator, as the government's assignee, also had standing to enforce section 292. *Id.* The court held that the plaintiff, by acting as the government's assignee, had standing to enforce section 292 against the defendant without alleging injury to himself or herself. Citing *Vermont Agency*, the court stated "we consider the question decided, that the United States may assign even a purely sovereign interest." *Id.* at 1327 n.3. *Stauffer*, while not binding on this court, supports holding that the State may assign its purely sovereign interest in enforcing the Act.

¶ 31 Family Vision Care's contention that allowing a citizen to sue on behalf of the State will open the proverbial floodgates to litigants seeking a fee is without merit. A plaintiff may bring a *qui tam* claim only if (i) the State authorizes the relator to sue on behalf of the State and the relator and (ii) the State retains control of the litigation. *Scachitti*, 215 Ill. 2d at 494. The Act requires both. Further, for the Act—a statute designed for the purpose of deterring insurance fraud—to have an effect, witnesses of potentially fraudulent insurance claims, like Cahill, must be able to bring a complaint.

¶ 32 Thus, if the Estate qualifies as an "interested person" under section 15 of the Act, it may act as an assignee of the State to enforce section 5 of the statute.

¶ 33 Is the Estate an "Interested Person"?

¶ 34 The Estate contends the trial court erred when it found Cahill was not an "interested person" under the Act. The Estate argues the trial court's definition of an "interested person" as one who has a "personal claim, status, or right" cuts too narrowly, has no basis in the text of the Act or the California analogue, and defeats the statute's purpose. Also, the trial court's interpretation would preclude Act claims by anyone other than an insurance company that lost money from the fraudulent conduct.

¶ 35 Family Vision Care responds that the Estate misinterprets the trial court's ruling, which never stated that only a defrauded insurance company could be an "interested person." Family Vision Care asserts the court correctly defined an "interested person" as one who holds some "legal interest" in the cause of action and that Cahill was not an interested person, as she failed to allege she suffered an injury. Essentially, Family Vision Care excludes a whistleblower from encompassing an "interested person," unless he or she has been personally injured.

¶ 36 The statute fails to define the term "interested person," so we apply the rules of statutory construction to ascertain and give effect to the intent of the legislature. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503-04 (2000) (language of statute offers "the most reliable indicator of the legislature's objectives in enacting a particular law"). We give the statutory language its plain, ordinary, and popularly understood meaning (*Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 397 (1990)), and afford the statutory language the fullest, rather than narrowest, possible meaning to which it is susceptible. *Lake County Board of Review v. Property Tax Appeal Board*, 119 Ill. 2d 419, 423 (1988). Each word, clause, and sentence of a statute must be given a reasonable meaning and not rendered superfluous. *People v. Perez*, 2014 IL 115927, ¶ 9. And the meaning cannot be determined in isolation but, rather, must be drawn from its context. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 27.

¶ 37 Looking at the plain language of section 15(a) in light of other provisions of the statute and the statute's purpose, reveals that "interested person" includes whistleblowers like Cahill. For instance, section 40 of the Act offers protections for employees who bring claims under the Act. 740 ILCS 92/40 (West 2016).

¶ 38 At oral argument, Family Vision Care suggested that "employee" in section 40 refers to an insurance company employee. But, this interpretation makes little sense because an insurance company employee would be unlikely to face retaliation for identifying claims that defraud their employer. Section 40's protections plainly apply to an employee of a health care provider, who, as a whistleblower, identifies potential fraud by his or her employer, and risks the possibility of retaliation.

¶ 39 Allowing whistleblowers, like Cahill, who have evidence of potential fraud to bring a claim, also advances the Act's purpose—protection of the public from insurance fraud. Statutes

must be interpreted with a view toward "the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Perez*, 2014 IL 115927, ¶ 9. The goals of the Act include "disgorging unlawful profit, restitution, compensating the State for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud." 740 ILCS 92/5(c) (West 2016). Permitting parties who have information about possible insurance fraud to bring the claim on the State's behalf satisfies these goals.

¶ 40 Family Vision Care argues the word "interested" must mean something otherwise it is superfluous as "interested" does not appear in the *qui tam* section of the False Claims Act. 740 ILCS 175/4 (West 2016). In addition, Family Vision Care asserts that the history of the use of the words "interested person" shows it does not include Cahill, citing California cases interpreting California statutes to require the plaintiff have a direct interest in the litigation. None of the cases Family Vision Care cites, however, involve a *qui tam* action or section 1871.7 of the California Insurance Code. For instance, *Torres v. City of Yorba Linda*, 17 Cal. Rptr. 2d 400 (Ct. App. 1993), also cited by the trial court, discusses standing of a member of the public in a declaratory judgment action challenging the lawfulness of government action. See also *California Department of Consumer Affairs v. Superior Court*, 199 Cal. Rptr. 3d 354 (Ct. App. 2016) (plaintiffs not interested persons entitled to challenge state's lemon law when they did not own car manufactured by company participating in program).

¶ 41 Indeed, in *People ex rel. Alzayat v. Hebb*, 226 Cal. Rptr. 3d 867, 889 (Ct. App. 2017), a California appellate court held that "[a]s a true qui tam provision, Insurance Code section 1871.7 does not mandate that the relator has suffered his or her own injury." The court further noted that the lawsuit under section 1871.7 was "based on an injury allegedly suffered by the People of the

State of California, and was not filed for the purpose of remedying an injury suffered by [the relator]." *Id.* at 888. As noted, the Act follows directly on the California statute and *Hebb* supports a finding that Act claims are not restricted only to insurance companies or individual relators who have been personally injured.

¶ 42 Family Vision Care also suggests we look to the Probate Act of 1975, which defines an "interested person" as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved." 755 ILCS 5/1-2.11 (West 2016). But the question of who can sue as an interested person in probate proceedings has no bearing on who can be a relator in an Act *qui tam* action. The definition or meaning of a word cannot be blindly transferred from one context to another. See *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 22 ("Care must be taken when importing the definition of a term from one statute to another, since 'the context in which a term is used obviously bears upon its intended meaning.' " (quoting *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 29)); see also *Corbett*, 2017 IL 121536, ¶ 38 (in a case involving a bicyclist who was injured on a bike path, it was inappropriate to import the definition of "trail" from one statute to another). Family Vision Care cites nothing to support a finding that the General Assembly was referring to the Probate Act of 1975's use of "interested persons" when it adopted the Act.

¶ 43 In the *qui tam* context, an employee like Cahill is an "interested person" as she has nonpublic information of possible wrongdoing and, as a whistleblower, does not need to have a personal injury to have standing. Notably, the phrase "interested person" only appears once—in section 15(a)—and is never mentioned again in the statute. And, as noted, the General Assembly did not bother to define the phrase. Conversely, the word "person," in relation to the party

bringing a claim under the Act, appears at least 29 times. Although Family Vision Care would have us focus on the word "interested," its absence in the remainder of the statutory provisions describing the party bringing a claim supports our finding that the word is descriptive rather than restrictive.

¶ 44 Even if Cahill is an interested person by virtue of her whistleblower status, Family Vision Care maintains that the bankruptcy estate does not possess material information of potential wrongdoing by Family Vision Care, only Cahill. But, "once a bankruptcy action is instituted, all unliquidated lawsuits become part of the bankruptcy estate and only the bankruptcy trustee has standing to pursue them." *Board of Managers of the 1120 Club Condominium Ass'n v. 1120 Club, LLC*, 2016 IL App (1st) 143849, ¶ 41. The Estate has standing.

¶ 45 Separation Agreement

¶ 46 Next, even if the Estate has standing under the Act, Family Vision Care argues that the release Cahill signed at the end of her employment bars her complaint. The trial court denied dismissal, finding questions of fact exist as to whether Cahill could have released the Estate's claim and whether Cahill's claim falls under the language of the release provision.

¶ 47 A dismissal would be warranted where the claim set forth has been released, satisfied of record, or discharged in bankruptcy. 735 ILCS 5/2-619(a)(6) (West 2016). When ruling on a section 2-619 motion, courts consider all of the pleadings and supporting documents in the light most favorable to the nonmoving party. *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1001 (2010). We review a motion to dismiss *de novo*. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008).

¶ 48 A settlement agreement is a contract governed by principles of contract law. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991). We determine the intention of the

parties from the settlement agreement, unless it is ambiguous. *Id.* Ambiguity means capable of being understood in more than one sense. *Id.* Releases are strictly construed against the benefitting party and must spell out the parties' intention with particularity. *Janowiak*, 402 Ill. App. 3d at 1014. A motion to dismiss based on a release, where defendants present a facially valid release, shifts the burden to the plaintiff to sufficiently allege and prove that a material issue of fact exists that would invalidate the release. *Id.* at 1005.

¶ 49 Family Vision Care asserts that the Estate should be estopped from arguing the release cannot be enforced against it because (unbeknown to them) Cahill had already filed for bankruptcy when she signed the release, in exchange for compensation that was property of the Estate. Family Vision Care also asserts it would be inequitable to allow the Estate to derive knowledge about the claim from Cahill and then disavow the release she signed. Both arguments fail. By its plain language, the release does not apply to the claim here.

¶ 50 The release applies to "all claims arising or that arose or may have arisen out of or in connection with Employee's employment or separation with Employer." A *qui tam* claim alleging insurance fraud does not constitute a claim arising out of or in connection with Cahill's employment. Simply because Cahill learned of the potentially fraudulent claims during her employment does not establish the complaint arose out of employment.

¶ 51 Moreover, Family Vision Care's estoppel arguments have no merit. As noted, "once a bankruptcy action is instituted, all unliquidated lawsuits become part of the bankruptcy estate and only the bankruptcy trustee has standing to pursue them." *Board of Managers of the 1120 Club Condominium Ass'n*, 2016 IL App (1st) 143849, ¶ 41. Hence, only the bankruptcy estate could release the claim. *Hoseman v. Weinschneider*, 322 F.3d 468, 475 (7th Cir. 2003) ("bankruptcy trustees *** are generally given broad discretion *** to decide whether a

compromise settlement—which may include a release of future claims or a covenant not to sue—is preferable to protracted litigation"). The Estate did not sign the document, so even if it did apply to fraud claims, it could not be used as a bar to the Estate's complaint.

¶ 52 Moreover, the State is the real party in interest, and a relator filing on behalf of the State cannot waive the State's claim. *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 969 (9th Cir. 1995) (prefiling releases of *qui tam* claims, when entered into without United States' knowledge or consent, cannot be enforced to bar later *qui tam* claim).

¶ 53 We affirm the trial court's decision not to dismiss under section 2-619.

¶ 54 Sufficiency of Pleadings

¶ 55 Finally, Family Vision Care contends section 2-615 warrants dismissal because under the heightened standard for fraud allegations, the complaint failed to plead fraud with sufficient particularity and does not delineate or describe a single false claim submitted to VSP.

¶ 56 A motion to dismiss under section 2-615 challenges the legal sufficiency of the complaint based on defects apparent on its face. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. We construe the allegations of the complaint in the light most favorable to the plaintiff and determine whether they state a cause of action on which relief can be granted. *Bogenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 23. In making this determination, we take as true all well-pleaded facts, and all reasonable inferences drawn from those facts. *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297, ¶ 5. Dismissal requires finding no set of facts that would permit the plaintiff to recover. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11. Review under a section 2-615 dismissal is *de novo*. *Id.*

¶ 57 "Fraud claims must be pleaded with sufficient specificity, particularity, and certainty to apprise the opposing party of what he is called upon to answer." *Avon Hardware Co. v. Ace*

Hardware Corp., 2013 IL App (1st) 130750, ¶ 15. A plaintiff must allege with specificity and particularity, facts from which fraud is the necessary or probable inference, including the misrepresentations, when they were made, who made them, and to whom they were made. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996).

¶ 58 The Estate alleged Dr. Gula signed the VSP provider agreements since 2014, certifying she had a majority ownership of Family Vision Care and complied with VSP's requirements for insurance reimbursement. The Estate attached a copy of a provider agreement as an exhibit with Dr. Gula's signature. The complaint also alleged Family Vision Care knew of VSP's ownership requirements but, at the direction of Surgery Partners, Dr. Gula and Family Vision Care continued to make false representations to VSP throughout Surgery Partners' ownership of Family Vision Care. And that Frank Soppy, a vice president at Surgery Partners, instructed Cahill to tell VSP that Family Vision Care was a sole proprietorship owned by Dr. Gula. These allegations satisfy the heightened standard for common law fraud, and invoke the what, when, and who of Family Vision Care's misrepresentations. *Id.*; *Avon Hardware Co.*, 2013 IL App (1st) 130750, ¶ 15.

¶ 59 Affirmed in part, reversed in part, and remanded.

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AAP
A.W.W.

Notice of Appeal (10/18/17) CCA 0256 A

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County **DEPARTMENT,** Law **DIVISION/DISTRICT**

State of Illinois ex rel. Bankruptcy Estate of Marie A. Cahill

Plaintiff/ ◉ Appellant ○ Appellee

v.

Family Vision Care, LLC, Novamed Management Services, LLC, Surgery Partners, Inc., and Jennifer Gula

Defendant/ ○ Appellant ◉ Appellee

Reviewing Court No.:

Circuit Court No.: 2017-L-004200

FILED
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
2018 APR -4 AM 11: 17
CIVIL APPEALS DIVISION
DOROTHY BROWN
CLERK

Plaintiff-Relator's **NOTICE OF APPEAL**

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☐ Joining Prior Appeal ☐ Separate Appeal ☐ Cross Appeal

Appellant's Name: Bankruptcy Estate of Marie Cahill

◉ Atty. No.: 45667 ○ Pro Se 99500

Atty Name: Matthew Piers /José Behar /C. Wysong

Address: 70 W. Madison St., Suite 4000

City: Chicago State: IL

Zip: 60602

Telephone: 312.580.0100

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Tertiary Email: cwysong@hsplegal.com

Appellee's Name: Family Vision Care, LLC et al.

◉ Atty. No.: 90539 ○ Pro Se 99500

Atty Name: Joshua Buchman/Jennifer Aronoff

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Secondary Email: jbuchman@mwe.com

Tertiary Email: jaronoff@mwe.com

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 3/8/18

Name of judge who entered the judgment/order being appealed: Judge John C. Griffin

Notice of Appeal **(10/18/17) CCA 0256 B**

Relief sought from Reviewing Court:

Reversal of Section 2-619 dismissal of the complaint that declared the Illinois Insurance Claims Fraud Prevention Act unconstitutional on the theory that the State cannot confer standing on a private qui tam relator and that created an erroneous statutory standing requirement.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

Charles Tyson

To be signed by Appellant or Appellant's Attorney

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

STATE OF ILLINOIS *ex rel.* BANKRUPTCY ESTATE OF MARIE A. CAHILL,	
Plaintiff,	**Case No. 17-L-004200**
v.	**Judge John C. Griffin**
FAMILY VISION CARE, LLC, NOVAMED MANAGEMENT SERVICES, LLC, SURGERY PARTNERS, INC., and JENNIFER GULA,	
Defendants.	

ORDER OF FINAL JUDGMENT

This matter coming before the Court upon Plaintiff's Unopposed Motion for Entry of Judgment, it is hereby ordered that:

1. For the reasons stated in the Court's February 16, 2018 Order, Defendant's Motion to Dismiss under Section 2-619 is granted, and Plaintiff's complaint is dismissed with prejudice.

2. Final judgment is entered on Plaintiff's complaint in favor of Defendants and against Plaintiff.

3. All existing deadlines and status dates are stricken.

4. This Order fully and finally resolves all disputes between all parties before the Court and is the final judgment in this action.

So ordered:

ENTERED
JUDGE JOHN C. GRIFFIN-1981
MAR - 8 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Dated: _____

_____
Judge John C. Griffin

IAC 4200

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

State of Illinois *ex rel.* Bankruptcy Estate of Marie A. Cahill,	)	
Plaintiff,	)	No. 2017 L 4200
v.	)	Commercial Calendar T
Family Vision Care, LLC, Novamed Management Services, LLC, Surgery Partners, Inc., and Jennifer Gula,	)	Judge John C. Griffin
Defendants.	)	

ORDER

This cause is before the court on defendants', Family Vision Care, LLC, Novamed Management Services, LLC, Surgery Partners, Inc., and Jennifer Gula, motion to dismiss plaintiff's, State of Illinois *ex rel.* Bankruptcy Estate of Marie A. Cahill, complaint pursuant to section 2-619.1.

The court denies defendants' 2-615 motion to dismiss. The court grants defendants' 2-619 motion to dismiss without prejudice, however, and finds plaintiff has not alleged or explained the injury Cahill suffered, or the injury assigned by the State of Illinois. Thus, plaintiff has not alleged standing to bring a claim under the ICFPA. The court denies defendants' 2-619 motion without prejudice as to the release. The court finds that questions of fact exist as to whether Mary Cahill could have released the Bankruptcy Estate's claim, as well as whether plaintiff's claim falls under the language of the release provision.

BACKGROUND

According to plaintiff, Dr. Gula and Family Vision made false representations, "at the direction of Surgery Partners," to qualify for an insurance plan from the Vision Service Plan ("VSP") insurance company. Plaintiff's single-count complaint alleges violation of the Illinois Insurance Claims Fraud Prevention Act ("ICFPA").

STANDARD OF REVIEW

Pursuant to 735 ILCS 5/2-619.1, a party may file together a section 2-615 motion to dismiss, section 2-619 motion to dismiss, and 2-1005 motion for summary judgment. 735 ILCS 5/2-619.1; *Edelman v. Hinshaw & Culbertson,* 338 Ill. App. 3d 156, 164, (1st Dist. 2003). On a 2-619.1 motion, a court should entertain the section 2-615 motion first, and then, only after a legally sufficient cause of action has been found, entertain the section 2-619 motion with affidavits filed in support. *Johannesen v. Eddins,* 2011 IL App (2d) 110108 ¶29.

In a 2-615 motion to dismiss, the movant challenges the legal sufficiency of the complaint or counterclaim based on certain defects or defenses apparent on the face of the allegations. *Beacham v. Walker,* 231 Ill. 2d 51, 57 (2008). In such a motion, all well-pled facts and their reasonable inferences must be taken as true and viewed in the light most favorable to the non-movant. *Jarvis v. S. Oak Dodge,* 201 Ill. 2d 81, 85 (2002). "A motion to dismiss should be granted only if the [claimant] can prove no set of facts to support the cause of action asserted." *Kaiser v. Fleming,* 315 Ill. App. 3d 921, 925 (2nd Dist. 2000). However, Illinois is a fact pleading jurisdiction; therefore, "a [claimant] must allege facts sufficient to bring a claim within a legally recognized cause of action." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 355 (2004). Mere conclusions of law and unsupported conclusory factual allegations are insufficient to survive a 2-615 motion to dismiss. *Alpha Sch. Bus Co. v. Wagner,* 391 Ill. App. 3d 722, 736 (1st Dist. 2009).

A section 2-619 motion to dismiss raises defects, defenses, or other affirmative matters that appear on the face of the complaint, or are established by external submissions, that defeat the plaintiff's claim. *Ball v. County of Cook,* 385 Ill. App. 3d 103, 107 (1st Dist. 2008). In doing so, the motion "admits the legal sufficiency of the [claimant's] allegations." *Miner v. Fashion Enters,* 342 Ill. App. 3d 405, 413 (1st Dist. 2003). The "affirmative matter" must be apparent on the face of the pleadings or be supported by affidavits or other evidentiary materials. *John Doe v. Univ. of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 37. An affirmative matter negates a cause of action completely or refutes crucial conclusions of law or material

fact within the pleadings. *In re Estate of Schleker,* 209 Ill. 2d 456, 461 (2004). A court must take all well-pled facts and reasonable inferences as true, and it must construe all pleadings and supporting documents in the light most favorable to the non-movant. *Porter v. Decatur Mem. Hops.*, 227 Ill. 2d 343, 353 (2008).

DISCUSSION

Defendants' 2-615 Motion to Dismiss

Section 17-10.5 of the Illinois Criminal Code states:

> A person commits insurance fraud when he or she knowingly obtains, attempts to obtain, or causes to be obtained, by deception, control over the property of an insurance company or self-insured entity by the making of a false claim or by causing a false claim to be made on any policy of insurance issued by an insurance company or by the making of a false claim or by causing a false claim to be made to a self-insured entity, intending to deprive an insurance company or self-insured entity permanently of the use and benefit of that property.

720 ILCS 5/17-10.5(a)(1). The ICFPA provides:

> A person who violates [720 ILCS 5/17-10.5] shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than $5,000 nor more than $10,000, plus an assessment of not more than 3 times the amount of each claim for compensation under a contract of insurance.

740 ILCS 92/5(b).

Defendants argue plaintiff has failed to specifically allege a claim for violation of the ICFPA. Defendants argue that the heightened standard for fraud should apply to plaintiff's claim for violation of the ICFPA. *Chatham Surgicore, Ltd. v. Health Care Serv. Corp.*, 356 Ill. App. 3d 795, 803 (1st Dist. 2005). In response, plaintiff cites persuasive authority stating an ICFPA complaint need only allege "enough detail to put the defendants on notice of 'what the fraud entails.'" *United States ex rel. Zverev v. United States Vein Clinics of Chicago, LLC*, 244 F. Supp. 3d

737, 746 (N.D. Ill. 2017). Regardless of the applicable pleading standard, the court finds that plaintiff has minimally pled a claim for violation of the ICFPA.

Plaintiff's complaint alleges:

> 22. On behalf of Family Vision Center, Dr. Gula signed the VSP provider agreements at least since 2014. *See* Exhibit A at 1. She certified that she, as the Network Doctor, had majority ownership of the Family Vision Center. Prior to Dr. Gula, Dr. Christina Sparks was a Network Provider with VSP.
>
> 23. In fact, Drs. Sparks and Gula falsely certified their compliance with VSP's requirements to gain insurance reimbursements for which Surgery Partners, through Family Vision Center, was not eligible. Dr. Gula and Dr. Sparks were not the owners of Family Vision Center, but employees of Surgery Partners.
>
> 24. At the direction of Surgery Partners, Dr. Gula and Family Vision Center continued to make false representations to VSP throughout the entire time that Family Vision Center was owned by Surgery Partners.

In support of paragraph 22, plaintiff provides, as exhibit A, a document dated April 3, 2014, and titled "Application for Network Participation and Vision Service Plan Network Doctor Agreement." Plaintiff further alleges an example of defendants' alleged misconduct, alleging:

> 27. In 2014 for example, Ms. Cahill was instructed by her boss, Frank Soppa, to represent to VSP that Family Vision Center was a sole proprietorship of Dr. Gula, when, in fact, it was owned by Surgery Partners. *See* Exhibit B. Mr. Soppa is the Vice President of Surgery Partners Optical Service Group.

Plaintiff attaches exhibit B, in which Soppa allegedly emailed Cahill "if for some reason you are ever speaking with VSP and they ask who the practice owner is it is Dr. Gula."

Ultimately, even under the heightened standard for common law fraud, plaintiff has pled defendants' allegedly fraudulent conduct "with sufficient

specificity, particularity, and certainty to apprise the opposing part[ies] of what [they are] called upon to answer." *Chatham Surgicore, Ltd. v. Health Care Serv. Corp.*, 356 Ill. App. 3d 795, 803 (1st Dist. 2005). In Illinois, a pleader is not required to set forth evidence and must only allege ultimate facts. *Zeitz v. Village of Glenview*, 227 Ill. App. 3d 891, 894 (1st Dist. 1992). For purposes of a 2-615 motion to dismiss, the court finds that defendants are apprised of what they are called upon to answer, and plaintiff has minimally pled a claim for violation of the ICFPA. *Id.*

The court denies defendants' 2-615 motion to dismiss plaintiff's complaint.

Defendants' 2-619 Motion to Dismiss

Standing

Standing in Illinois requires only some injury in fact to a legally cognizable interest. *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 492 (1988). "More precisely, the claimed injury, whether actual or threatened, must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* at 492-93. The purpose of standing is to ensure that courts are deciding actual, specific controversies and not abstract questions or moot issues. *People ex rel. Madigan v. Burge*, 2012 IL App (1st) 112842, ¶ 31.

Defendants argue plaintiff lacks standing because Cahill was not directly injured, and her claim, as a penal action, cannot be assigned. There is no direct case law concerning the enforceability of section 15(a) of the ICFPA. Nonetheless, the plaintiff argues the court should rely on *Scachitti v. UBS Fin. Servs.*, which concerned a *qui tam* provision in the Illinois False Claims Act ("FCA").

A "*qui tam* action" is brought under a statute that (1) authorizes an informant to bring a civil action to recover a penalty for the commission or omission of a certain act; and (2) provides that a part of the penalty be paid to the informer. *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 494 (2005). In considering standing under a *qui tam* action, the Court in *Scachitti* stated:

> [A] *qui tam* plaintiff is a partial assignee of the state's claim under the *qui tam* provisions of the Act permitting a

> private person to "bring a civil action for a violation of [the FCA] *for the person and for the State*." The *qui tam* statute therefore gives a *qui tam* plaintiff a personal stake in the outcome. In other words, the interest of a *qui tam* plaintiff in a claim under the Act is justified as a partial assignment of the state's right to bring suit. Accordingly, under the Act, a *qui tam* plaintiff is a "real party in interest," together with the state.

Id. at 508-09.

Ultimately, the court finds that the FCA *qui tam* provision is distinguishable from plaintiff's ICFPA claim under section 15(a). Specifically, section 15(a) of the ICFPA includes unambiguous, limiting language that is not found in section 4(b)(1) of the FCA. The provision in the FCA states:

> A *person* may bring a civil action for a violation of Section 3 for the person and for the State. The action shall be brought in the name of the State. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

740 ILCS 175/4(b)(1) (emphasis added).

Section 15 of the ICFPA, however, states:

> An *interested person*, including an insurer, may bring a civil action for a violation of this Act for the person and for the State of Illinois. The action shall be brought in the name of the State. The action may be dismissed only if the court and the State's Attorney or the Attorney General, whichever is participating, gives written consent to the dismissal stating their reasons for consenting.

740 ILCS 92/15(a) (emphasis added).

As emphasized above, section 4(b)(1) of the FCA permits a "person" to bring a civil action for violation of section 3 of the FCA. 740 ILCS 175/4(b)(1). The civil action created in section 15 of the ICFPA, however, must be brought by an "interested person." 740 ILCS 92/15(a). When construing a statute, "[e]ffect must be given, if possible, to *every word*, clause[,] and sentence, and a court may not read a

statute so as to render any part inoperative, superfluous[,] or insignificant." *Bauer v. H.H. Hall Constr. Co.*, 140 Ill. App. 3d 1025, 1028 (5th Dist. 1986) (emphasis added). Accordingly, the court must construe use of the word "interested" to be an intentional qualification of the persons who may bring a civil action under section 15(a). 740 ILCS 92/15(a). An individual has sufficient interest in a controversy when he or she possesses a personal claim, status, or right which can be affected by a determination of the controversy. *Pratt v. Protective Ins. Co.*, 250 Ill. App. 3d 612, 618 (1st Dist. 1993).

The ICFPA does not define the term "interested person." The parties have provided supplemental briefing as to this issue.

Defendants raise the legislative history of the ICFPA, which was modeled after California's Insurance Frauds Prevention Act. *See* Cal Ins Code § 1871, *et seq.* Section 1871.7(e)(1) of the California Act contains similar language, providing that "[a]ny interested persons, including an insurer, may bring a civil action for a violation of this section for the person and for the State of California." Cal Ins Code § 1871.7(e)(1). California courts have interpreted this phrase to mean "a person having a direct, and not a merely consequential, interest in the litigation." *Torres v. City of Yorba Linda*, 13 Cal. App. 4th 1035, 1042 (4th Dist. 1993) (interpreting the phrase "interested person," as used in section 863 of the California Code of Civil Procedure). Defendants additionally observe that in Illinois, the Probate Act also uses the phrase "interested person," defining the term as follows:

> One who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative.

755 ILCS 5/1-2.11.

In response, plaintiff argues that construing the ICFPA to only create a cause of action for insurers is contrary to the ICFPA's purpose. Defendants, however, are only arguing that the claimant under section 15(a) must have a legal interest at stake. Plaintiff additionally argues that the ICFPA indicates an "interested person"

is "the person" with "material evidence and information" to bring an ICFPA claim. The provision to which plaintiff refers, however, only describes the procedural requirements for bringing an ICFPA claim. 740 ILCS 92/15(b). The court finds no language indicating these procedural requirements should be construed as a definition of "interested person."

The court finds the ICFPA clearly requires an ICFPA claimant to hold some legal interest in the cause of action. 740 ILCS 92/15(a). This is consistent with the general requirements to have standing in Illinois. As stated, standing in Illinois requires only some injury in fact to a legally cognizable interest. *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 492 (1988). "More precisely, the claimed injury, whether actual or threatened, must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* at 492-93.

Plaintiff has not alleged how Mary Cahill was an interested person in this cause of action. *Id.* Rather, plaintiff only alleges that Marie Cahill is bringing this case "as a whistleblower." It is not clear how Cahill suffered an injury related to this claim, or how determination of this controversy would affect "a personal claim, status or right." *Id.* Therefore, under the express language of the ICFPA, the Bankruptcy Estate has failed to allege or explain how plaintiff has standing to bring a claim under section 15(a). 740 ILCS 92/15(a).

Further, even if *Scachitti*'s interpretation of the FCA *qui tam* provision applies to section 15(a), plaintiff has not alleged that the State suffered an assignable injury. Because the FCA concerns claims for fraudulently obtained public funds, *qui tam* claims brought under the FCA concern actual damages suffered by the State. *Id.* at 508. The *Scachitti* Court's reasoning was expressly based on this fact when it adopted the U.S. Supreme Court's holding in *Vermont Agency v. United States ex rel. Stevens*, stating:

> "[T]he doctrine that the assignee of a claim has standing to *assert the injury in fact suffered by the assignor*" provided an adequate basis for the relator's suit. [Cite]. The Supreme Court reasoned that the Federal False Claims Act could "reasonably be regarded as effecting a

> partial assignment of the *Government's damages* claim." [Cite]. Therefore, the relator's complaint alleging *an injury in fact to the United States* sufficed to confer standing on the relator.
>
> We adopt the reasoning of *Vermont Agency*[.]

Id. at 508, quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (emphasis added).

Plaintiff has not alleged an "injury in fact" suffered by the State of Illinois. *Id.* Thus, applying the *Scachitti* Court's reasoning, plaintiff has not alleged an injury that plaintiff could assert as a relator for the State of Illinois. Plaintiff has also not alleged an "injury in fact" suffered by Marie Cahill.

Accordingly, the court grants defendants' 2-619 motion to dismiss without prejudice based on the issue of standing.

Release of Claims

Defendants also argue that Cahill entered into a "Separation Agreement and General Release" that released this cause of action. This release, dated February 19, 2016, and attached to defendants' motion, states:

> Employee, on behalf of herself and her agents, representatives, attorneys, assigns, heirs, executors, and administrators, fully and unconditionally releases and forever discharges each of the Employer, its agents, officers, directors, employees, parent, subsidiaries, affiliates, representatives, attorneys, assignees, heirs, executors[,] and administrators ... from any and all liability, claims, demands, actions, causes of action, suits, grievances, debts, sums of money, agreements, promises, damages, back and front pay, costs, expenses, attorneys' fees, and remedies of any type, directly or indirectly regarding any act or failure to act that occurred up to and including the date on which Employee signs this Agreement, including, without limitation, all claims arising or that arose or may have arisen out of or in connection with Employee's employment or separation of employment with Employer, and all claims for any act or failure to act that occurred up to the time that Employee signs this Agreement[.]

In response, plaintiff argues that Cahill filed for bankruptcy on January 19, 2016, and thus, only the bankruptcy estate could release plaintiff's claim. "[O]nce a bankruptcy action is instituted, all unliquidated lawsuits become part of the bankruptcy estate and only the bankruptcy trustee has standing to pursue them." *Bd. of Managers of the 1120 Club Condo. Ass'n v. 1120 Club, LLC*, 2016 IL App (1st) 143849, ¶ 41. Defendants argue that the Bankruptcy Estate should be estopped from arguing the release is not enforceable against it because the Estate has benefited from the release. Plaintiff also disputes whether plaintiff's claim arose "out of or in connection with Employee's employment or separation of employment with Employer." Considering plaintiff's arguments, the court finds that questions of fact exist as to whether Mary Cahill could have released the Bankruptcy Estate's claim, as well as whether plaintiff's claim falls under the language of the release provision. Therefore, the court will not dismiss the Bankruptcy Estate's claim based on the release.

The court denies defendants' 2-619 motion to dismiss based on the release without prejudice.

ORDER 1/C 4200

It is ordered:

(1) Defendants', Family Vision Care, LLC, Novamed Management Services, LLC, Surgery Partners, Inc., and Jennifer Gula, 2-615 motion to dismiss plaintiff's, State of Illinois *ex rel.* Bankruptcy Estate of Marie A. Cahill, complaint is denied; 5211

(2) Defendants', Family Vision Care, LLC, Novamed Management Services, LLC, Surgery Partners, Inc., and Jennifer Gula, 2-619 motion to dismiss plaintiff's, State of Illinois *ex rel.* Bankruptcy Estate of Marie A. Cahill, complaint is denied without prejudice based on the release; defendants may raise this issue as an affirmative defense; 5211

(3) Defendants', Family Vision Care, LLC, Novamed Management Services, LLC, Surgery Partners, Inc., and Jennifer Gula, 2-619 motion to dismiss plaintiff's, State of Illinois *ex rel.* Bankruptcy Estate of Marie A. Cahill, complaint is granted without prejudice based on the issue of standing; 4211

(4) Plaintiff is given leave to amend the complaint by March 9, 2018; 4292

(5) Defendants are to answer or plead to the amended complaint by April 2, 2018; 4234

(6) The case is set for a report on status on April 6, 2018, at 9:30 a.m. 630

ENTERED:

Judge John C. Griffin, No. 1981

ENTERED
JUDGE JOHN C. GRIFFIN-1981
FEB 16 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Civil Action Cover Sheet - Case Initiation (05/27/16) CCL 0520

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

STATE OF ILLINOIS ex rel. BANKRUPTCY ESTATE OF MARIE A. CAHILL

v.

FAMILY VISION CARE, LLC, et al.

No. 2017L004200
CALENDAR/ROOM T
TIME 00:00
~~Statutory Action~~

CIVIL ACTION COVER SHEET - CASE INITIATION

A Civil Action Cover Sheet - Case Initiation shall be filed with the complaint in all civil actions. The information contained herein is for administrative purposes only and cannot be introduced into evidence. Please check the box in front of the appropriate case type which best characterizes your action. Only one (1) case type may be checked with this cover sheet.

Jury Demand ■ Yes ❑ No

FILED
2017 APR 26 PM 12:04
CIRCUIT COURT OF COOK COUNTY, IL
COUNTY DEPARTMENT
LAW DIVISION

(FILE STAMP)

PERSONAL INJURY/WRONGFUL DEATH

CASE TYPES:

- ❑ 027 Motor Vehicle
- ❑ 040 Medical Malpractice
- ❑ 047 Asbestos
- ❑ 048 Dram Shop
- ❑ 049 Product Liability
- ❑ 051 Construction Injuries (including Structural Work Act, Road Construction Injuries Act and negligence)
- ❑ 052 Railroad/FELA
- ❑ 053 Pediatric Lead Exposure
- ❑ 061 Other Personal Injury/Wrongful Death
- ❑ 063 Intentional Tort
- ❑ 064 Miscellaneous Statutory Action (Please Specify Below**)
- ❑ 065 Premises Liability
- ❑ 078 Fen-phen/Redux Litigation
- ❑ 199 Silicone Implant

TAX & MISCELLANEOUS REMEDIES

CASE TYPES:

- ❑ 007 Confessions of Judgment
- ❑ 008 Replevin
- ❑ 009 Tax
- ❑ 015 Condemnation
- ❑ 017 Detinue
- ❑ 029 Unemployment Compensation
- ❑ 031 Foreign Transcript
- ❑ 036 Administrative Review Action
- ❑ 085 Petition to Register Foreign Judgment
- ❑ 099 All Other Extraordinary Remedies

By: José S. Behar
(Attorney) ~~(Pro Se)~~

COMMERCIAL LITIGATION

CASE TYPES:

- ❑ 002 Breach of Contract
- ❑ 070 Professional Malpractice (other than legal or medical)
- ❑ 071 Fraud (other than legal or medical)
- ❑ 072 Consumer Fraud
- ❑ 073 Breach of Warranty
- ■ 074 Statutory Action (Please specify below.**)
- ❑ 075 Other Commercial Litigation (Please specify below.**)
- ❑ 076 Retaliatory Discharge

OTHER ACTIONS

CASE TYPES:

- ❑ 062 Property Damage
- ❑ 066 Legal Malpractice
- ❑ 077 Libel/Slander
- ❑ 079 Petition for Qualified Orders
- ❑ 084 Petition to Issue Subpoena
- ❑ 100 Petition for Discovery

** Illinois Insurance Claims Fraud Prevention Act
740 ILCS Section 92/1

Primary Email: jbehar@hsplegal.com

Secondary Email: _____

Tertiary Email: _____

Pro Se Only: ❑ I have read and agree to the terms of the *Clerk's Office Electronic Notice Policy* and choose to opt in to electronic notice form the **Clerk's Office** for this case at this email address: _____

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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

2017L004200
CALENDAR/ROOM T
TIME 00:00
Statutory Action

STATE OF ILLINOIS ex rel. BANKRUPTCY ESTATE OF MARIE A. CAHILL,	)	**FILED UNDER SEAL**
	)	**DO NOT ENTER IN ECF**
Plaintiff,	)	
	)	**CASE NO. 17 C**
	)	
v.	)	**Judge**
	)	
FAMILY VISION CARE, LLC, NOVAMED MANAGEMENT SERVICES, LLC, SURGERY PARTNERS, INC., and JENNIFER GULA,	)	**JURY DEMANDED**
	)	
Defendants.	)	

FILED
2017 APR 26 PM 12:03
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
LAW DIVISION

INSURANCE FALSE CLAIMS ACT COMPLAINT

Plaintiff State of Illinois, by and through attorneys for the Bankruptcy Estate of Marie A. Cahill, complains against Defendants Family Vision Care, LLC ("Family Vision Care"), NovaMed Management Services, LLC ("NovaMed"), Surgery Partners, Inc. ("Surgery Partners"), and Jennifer Gula, O.D. ("Dr. Gula") (collectively "Defendants") alleging claims under the Illinois Insurance Claims Fraud Prevention Act, ("ICFPA"), 740 ILCS § 92/1 *et seq.*, for fraudulently submitting millions of dollars of false claims to the Vision Services Plan insurance company through Family Vision Care.

The ICFPA

1. The Illinois Insurance Claims Fraud Prevention Act ("ICFPA"), 740 ILCS § 92/1 *et seq.*, provides a civil action for the State and other interested parties to combat false claims filed with private insurance companies.

2. The State is empowered to combat fraud under the Illinois False Claims Act, 740 ILCS 175/1 *et seq.*, which allows the State to sue persons who submit false or fraudulent claims for payment to government health insurance programs like Medicaid. A federal version of this

law, the False Claims Act, 37 U.S.C. § 3729, *et seq.*, protects Medicare and federal insurance programs. The ICFPA is the analogous program that empowers to protect private, rather than public, insurance companies from fraud and false claims.

3. Under these statutes, claims are false if they request reimbursement for services that were not provided (or not provided as agreed) or if the claim includes a false statement that was material to whether the claim would be paid, such as whether the entity providing the service is eligible to submit the insurance claim.

4. The State has a strong interest in protecting the insurance market in Illinois. False claims undermine the insurance industry and setting of rates that impact the public at large. Thus, the State protects insurance markets through extensive regulation under the Department of Insurance, and through criminal penalties for insurance fraud (*see, e.g.*, 720 ILCS 5/17-10.5), and civil actions against fraudulent insurance claims under the ICFPA.

5. Defendants who violate the ICFPA face liability for damages triple the amount of false claims they submitted to the insurance company and civil penalties of $5,000 to $10,000 for each false claim. 740 ILCS 92/5.

6. The ICFPA deputizes private parties with knowledge of the fraud to bring a case on behalf of the State. 740 ILCS 92/15. The statute both protects whistleblowers from retaliation and empowers them to prosecute cases of fraud directly. This provision expands the resources available to fight fraud and allows private individuals, called "interested parties," to litigate cases under the ICFPA with the Attorney General or State's Attorney, or independently. 740 ILCS 92/15.

The Parties

7. The State of Illinois is the real plaintiff in interest. The State has a substantial interest in protecting the integrity of the insurance market for the public at large by stopping fraud against insurance companies and enforcing the ICFPA.

8. Interested party Marie Cahill is the relator who has brought this claim on behalf of the State. From approximately October 2012 through January 2016, Ms. Cahill was employed by NovaMed, which is now Surgery Partners, to serve as the Practice Administrator for Family Vision Care. She was involved with the employment and insurance billing practices of the company, as well as the management of business aspects of the optometry practice. Ms. Cahill separated from Family Vision Care in January 2016 and has filed for bankruptcy. Because her claim as a whistleblower in this case is part of the bankruptcy estate, that estate has filed this claim.

9. Defendant Family Vision Care, LLC ("Family Vision Care") is a vision clinic located at 100 Calendar Court, LaGrange, Cook County, Illinois. Family Vision Care currently has two optometrists and approximately $2 million in annual revenue.

10. Defendant NovaMed Management Services, LLC ("NovaMed") is a medical practice management company that owns and runs dozens of medical practices throughout the United States. It is based at 40 Burton Hills Boulevard, Suite 500, Nashville, Tennessee. NovaMed purchased Family Vision Care, and since has merged into Surgery Partners.

11. Defendant Surgery Partners, Inc. ("Surgery Partners") is a national medical practice management company based at 40 Burton Hills Boulevard, Suite 500, Nashville, Tennessee. Surgery Partners runs a network of more than 150 surgery centers and other medical practices in 29 states, with six in Illinois and more than $1.1 billion in annual revenues. Surgery Partners merged with NovaMed in approximately 2011. Surgery Partners now owns Family Vision Care.

Surgery Partners is also the employer of the doctors and other staff who work at Family Vision Center.

12. Surgery Partners is a publicly traded company, but it is majority owned by H.I.G. Private Equity, a global private equity firm that manages more than $21 billion in equity.

13. Jennifer Gula, O.D. is an optometrist and has worked at Family Vision Care since at least 2008. Since approximately 2011, she has been an employee of Surgery Partners, and, since at least 2014, Dr. Gula, as "Network Doctor," has executed the Application for Network Participation and Vision Service Plan® Network Doctor Agreement, certifying that a Network Doctor has a majority ownership interest in Family Vision Care.

Jurisdiction and Venue

14. Pursuant to 735 ILCS 5/2-209(a), this Court has jurisdiction over Defendants because they transact business in Illinois.

15. Pursuant to 735 ILCS 5/2-101, venue is proper in this Court because Defendants conduct their usual and customary business within Cook County and, thus, Defendants are residents of Cook County pursuant to 735 ILCS 5/2-102(a).

Facts

16. Family Vision Center receives over 90% of its revenue from the Vision Service Plan ("VSP") insurance company.

17. VSP was founded by optometrists in 1955 as a non-profit-vision benefit company. At the core of VSP's business is providing eye care through independent and physician-owned optometry practices. Thus, VSP will only work with providers if a doctor has "majority ownership and complete control" of the medical practice. VSP permits insurance claims only from doctors that enter an "APPLICATION FOR NETWORK PARTICIPATION AND VISION SERVICE

PLAN® NETWORK DOCTOR AGREEMENT." This agreement is attached as Exhibit A and requires:

> "Ownership and Control. Ownership and control of a Network Doctor's practice, including dispensary, is required for participation in the VSP doctor network. Network Doctor shall have majority ownership and complete control of (actual and right thereof), solely or in ownership with other Network Doctors, all aspects of his/her practice, including dispensary, or be an Employee Doctor or Contract Doctor, in a derivative capacity, of another Network Doctor who has such requisite ownership and control...."
>
> Exhibit A at 4 (emphasis added).

18. The Network Doctor is "the optometrist or ophthalmologist who, has entered into, and is compliant, while in effect, with, this Agreement with VSP to provide Vision Care Services to a VSP Patient, and who is, and remains, VSP-credentialed to render Vision Care Services to VSP." Exhibit A at 3. Providers must also notify VSP of any change to the status of the Network Doctor or ownership of the practice within 60 days. Exhibit A at 6.

19. VSP's provider contract is directly with the Network Doctor and subject to review and approval of the doctor by the VSP credentialing committee. Exhibit A.

20. Thus, to make insurance claims to VSP, a provider must certify that the medical practice requesting reimbursement is fully controlled and majority-owned by an optometrist or ophthalmologist, who must certify that they "conform to the terms and conditions of the Agreement... [and will] at all times, comply with any and all doctor network participation requirements established by VSP." Exhibit A at 1.

21. Network doctors must maintain current agreements with VSP and certify physician ownership to seek reimbursement from VSP. This warranty and representation is a necessary condition for VSP to pay claims from that provider.

22. On behalf of Family Vision Center, Dr. Gula signed the VSP provider agreements at least since 2014. *See, e.g.*, Exhibit A at 1. She certified that she, as the Network Doctor, had

majority ownership of the Family Vision Center. Prior to Dr. Gula, Dr. Christina Sparks was a Network Provider with VSP.

23. In fact, Drs. Sparks and Gula falsely certified their compliance with VSP's requirements to gain insurance reimbursements for which Surgery Partners, through Family Vision Center, was not eligible. Dr. Gula and Dr. Sparks were not the owners of Family Vision Center, but employees of Surgery Partners.

24. At the direction of Surgery Partners, Dr. Gula and Family Vision Center continued to make false representations to VSP throughout the entire time that Family Vision Center has been owned by Surgery Partners.

25. These false representations caused VSP to approve Family Vision Care as a VSP provider and, as a result, pay the insurance claims that provided 90% of Family Vision Care's revenue.

26. Surgery Partners and Dr. Gula were fully aware of VSP's physician ownership requirement, and Surgery Partners' management directed Ms. Cahill to falsify information about the ownership of Family Vision Center.

27. In 2014 for example, Ms. Cahill was instructed by her boss, Frank Soppa, to represent to VSP that Family Vision Center was a sole proprietorship of Dr. Gula, when, in fact, it was owned by Surgery Partners. *See* Exhibit B. Mr. Soppa is the Vice President of Surgery Partners Optical Service Group.

28. Likewise, if VSP ever contacted Ms. Cahill (as practice administrator) regarding the ownership of Family Vision Center, she was instructed by Mr. Soppa to represent that Dr. Gula was the sole owner of the practice.

29. These intentionally false statements were intended to induce VSP to pay or continue to pay insurance claims that it would not otherwise approve.

30. All employees at Family Vision Center, including Ms. Cahill, the office staff, and optometrists Dr. Gula and Dr. Lori Zintak were employees of Surgery Partners.

31. Surgery Partners' false statements and subsequent actions caused Family Vision Center to submit millions of dollars of false claims to VSP on behalf of its patients since at least 2012.

Count I: Violation of the ICFPA

32. The ICFPA prohibits a party from causing the submission of a false insurance claim to a private insurance company. 740 ILCS 92/5.

33. The ICFPA provides for damages of three times the amount of the false insurance claims. 740 ILCS 92/5.

34. The ICFPA further provides for a civil penalty of $5,000 to $10,000 per false claim. *Id.*

35. As described in the allegations above and incorporated herein, Defendants knowingly submitted false information to VSP, which directly induced VSP to approve Family Vision Care as a VSP network provider and pay millions of dollars of insurance claims that Family Vision Care submitted on behalf of its patients.

Prayer For Relief

Wherefore, the State of Illinois, through interested party Cahill, prays for judgment against Defendants as follows:

36. That Defendants cease and desist from violating the ICPFA.

37. That this Court enter judgment against Defendants in an amount equal to three times the amount of insurance claims wrongfully paid to Defendants, plus civil penalties of $5,000 to $10,000 per claim under 740 ILCS 92/5.

38. That the Bankruptcy Estate of Cahill be awarded the maximum whistleblower award under 740 ILCS 92/25.

39. That the Bankruptcy Estate of Cahill be awarded all costs in this action, including attorneys' fees and expenses pursuant to 740 ILCS 92/25.

40. For such other and further relief as this Court deems just and proper.

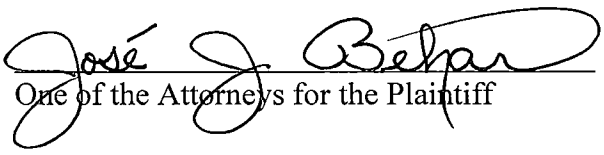
Jury Demand

Plaintiffs demand trial by jury on all issues as to which a jury trial is available.

Dated: April 26, 2017

Respectfully submitted,

HUGHES SOCOL PIERS RESNICK & DYM, LTD.



One of the Attorneys for the Plaintiff

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José J. Behar
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HUGHES, SOCOL, PIERS, RESNICK & DYM, LTD.
70 West Madison Street, Suite 4000
Chicago, Illinois 60602
312.580.0100
Firm No. 45667

EXHIBIT A

VSP Vision care for life

APPLICATION FOR NETWORK PARTICIPATION AND VISION SERVICE PLAN® NETWORK DOCTOR AGREEMENT

APPLICATION

I, the undersigned applicant, a fully licensed and Therapeutic Pharmaceutical Agent (TPA) certified optometrist, or ophthalmologist certified by either the American Board of Ophthalmology (ABO) or the American Osteopathic Board of Ophthalmology and Otorhinolaryngology (AOBOO), in good standing in the State(s) of my licensure, with no restrictions, limitations and/or probationary terms against my license(s), hereby make application ("Application") to participate in the Vision Service Plan ("VSP®") doctor network. In submitting this Application, I certify and agree as follows:

1. This Application, if accepted by VSP, shall become a part of the attached VSP Network Doctor Agreement for participation in the VSP Doctor Network between VSP and me as provided herein;

2. As consideration for VSP doctor network participation, I have read, understand and agree to be bound by every and all of the terms and conditions in this Application as well as those contained in the attached VSP Network Doctor Agreement, including incorporation by reference, the *VSP Provider Reference Manual* and Assigned Fee Report, together with all amendments and addenda to any and all such documents that may be duly adopted by VSP from time to time (collectively the "Agreement");

3. I now conform to the terms and conditions of the Agreement, the rights and obligations of which, subject to VSP approval, will commence on the "Effective Date" as defined therein, and will remain in effect for three years from the Effective Date, until my VSP recredentialing date, or until my failure/inability to be or remain credentialed by VSP, whichever comes first, unless earlier terminated by either party as provided in the Agreement;

4. VSP enters into limited term contracts with individual qualified doctors and not practices or other entities. The responsibility rests with me to establish, maintain and timely provide necessary evidence, as determined by VSP, that I, in fact and at all times, comply with any and all doctor network participation requirements established by VSP;

5. Any and all information, provided by me, or on my behalf, now or in the future to VSP, via hardcopy or in electronic format, is true, complete, and correct; and

6. Any execution to this Agreement will be deemed an original signature, and may be executed in counterparts. Copies of the fully executed form of this Agreement shall be deemed to be originals, and copies of affixed signatures shall be deemed as if they were original signatures, which shall be binding upon the parties hereto.

NOT VALID UNTIL FULLY SIGNED BY ALL PARTIES.

VSP NETWORK DOCTOR AGREEMENT

A. DEFINITIONS

1. "Assigned Fee Report" shall mean a schedule of fees that will be paid by VSP to a Network Doctor for Covered Services.

2. "Clean Claim" shall mean a completed claim with sufficient and necessary documentation, as set forth in the *VSP Provider Reference Manual*, for VSP to accurately evaluate and pay the claim submitted.

3. "Client" shall mean an employer group, MCO or other payer who has entered into a contract with VSP for the provision of Vision Care Services.

4. "Confidential Information" shall mean confidential and/or proprietary information and systems, or access thereto which is unique, valuable and private concerning Enrollees and/or VSP, the disclosure of which would cause irreparable injury to VSP.

5. "Contract" shall mean a written agreement entered into between VSP and a Client pursuant to which VSP is obligated to provide Vision Care Services to Enrollees and to pay Network Doctor for providing Vision Care Services to Enrollees.

6. "Contract Doctor" shall mean a doctor who (i) is considered by VSP to be an independent contractor, hired for a limited period of time and/or purpose, (ii) is not a salaried person, typically receiving an IRS form 1099 for income tax purposes, (iii) has no ownership interest whatsoever in the practice, (iv) may have some level of ownership of certain patient records of the practice, and (v) may receive payment for out-of-pocket expenses directly from patients.

7. "Copayment" shall mean those charges that will be collected directly from the VSP Patient for Covered Services.

8. "Covered Services" shall mean those Vision Care Services and Materials which VSP is obligated to provide under the terms of a Contract that VSP has entered into with a Client, or has guaranteed to provide to an authorized beneficiary of a VSP-sponsored charitable program, and which are (i) identified as Covered Services in the *VSP Provider Reference Manual* or (ii) are not listed as being "Not Covered" in the VSP Patient's Schedule of Benefits or Additional Benefit Rider. These may include discounts on materials.

9. "Cut-Off Date" shall mean the last day of Clean Claims processing prior to the close of the payment cycle, as set forth in the *VSP Provider Reference Manual.*

10. "Effective Date" shall mean the date upon which VSP shall have executed this Agreement, containing the affixed signature of an optometrist or ophthalmologist, as shown on the signature page hereof.

11. "Emergency Services" shall mean services required to evaluate or stabilize a condition to which a reasonable person could expect in the absence of immediate medical attention to result in serious jeopardy to the health of the Enrollee, serious impairment to bodily functions or serious dysfunction of any bodily organ or part thereof.

12. "Employee Doctor" shall mean a doctor who (i) is not considered by VSP to be an independent contractor, (ii) is a salaried person, typically receiving an IRS form W-2 for income tax purposes, (iii) has no ownership interest whatsoever in the practice or its patient records, and (iv) has little or no control over, or any decision-making authority in, the management of the practice.

13. "Enrollee" shall mean an individual entitled to, and/or the recipient of, Vision Care Services pursuant to a Contract with a Client or individual VSP vision care plan, or the authorized beneficiary of a VSP-sponsored charitable program.

14. "Fair Hearing Procedure" shall mean the VSP Peer Review and Fair Hearing Policy, as may be amended or replaced from time to time, which is the sole dispute resolution mechanism established by VSP for determination of any and all permissible disputes, claims and/or controversies involving VSP and any Network Doctor (except any applicable state mandated claim payment dispute requirements).

15. "Franchise" shall mean any existing or continuing commercial relationship created by any arrangement(s) whereby a franchisee (i) offers, sells and/or distributes goods, commodities and/or services which are identified by a trademark, service mark, trade name, logo(s), advertising and/or other commercial symbol(s) designating a franchisor, (ii) is directly or indirectly required to meet the quality, management, and/or operational standards prescribed by a franchisor, and/or (iii) is subject to a franchisor's significant degree or right of, or authority to, control, and/or provision of significant assistance to, franchisee's method(s) of operation, business organization, ownership, promotional activities, management, marketing plans and/or business affairs.

16. "MCO" shall mean a Managed Care Organization that is in contract with VSP.

17. "Medicare Beneficiary" shall mean a VSP Patient or Enrollee who is entitled to receive Vision Care Services under the terms of a Contract between VSP and a Client offering a Medicare Program.

18. "Medicare Program" shall mean a program to provide services to a Medicare Beneficiary eligible for coverage under Title XVII of the Social Security Act (otherwise known as Medicare).

19. "Medicare Provider" shall mean a Medicare certified provider who agrees to accept assigned payment under the Medicare Program.

20. "Network Doctor" shall mean the optometrist or ophthalmologist who, has entered into, and is compliant, while in effect, with, this Agreement with VSP to provide Vision Care Services to a VSP Patient, and who is, and remains, VSP-credentialed to render Vision Care Services to VSP Patients.

21. "Network Doctor List" shall mean a printed or electronic listing of the names and addresses of all Network Doctors, including Network Doctor, in a specific geographical area as prepared by VSP.

22. "Owner Doctor" shall mean a doctor who demonstrates to VSP's satisfaction, legal ownership in a practice as evidenced by official documents such as shares of stock, deeds, property titles, etc.

23. "Protected Health Information (PHI)" shall mean information relating to a VSP Patient's past, present or future health or condition, the provision of health care to a VSP Patient, or payment for the provision of health care to a VSP Patient. PHI includes, but is not limited to, VSP Patient name, Social Security Number, member ID, service date, diagnosis, and claim information.

24. "Qualified Office Location" shall mean the physical location from/in which Network Doctor provides routine Vision Care Services and which complies, in VSP's determination, with all VSP office standards and requirements, as amended from time to time.

25. "Retail-Commercial Chain" shall mean a group of stores, establishments, outlets, operations and/or enterprises of the same or similar nature, kind or function usually operating under common ownership, brand, management and/or control in which the majority of ownership is not held by an optometrist(s) and/or ophthalmologist(s) and/or their controlled professional and/or business entity(ies).

26. "Shared Office" shall mean an arrangement consisting of two or more Network Doctors, who have entered into a contractual agreement to operate separate practices within the same physical location, under separate IRS taxpayer identification numbers, whereby (i) the Network Doctors share a common space, and may or may not share the same office staff, equipment, dispensary and/or overhead, (ii) the shared dispensary must be owned and controlled by a least one Network Doctor, and (iii) all office operations, including the dispensary, must provide a seamless appearance to an Enrollee.

27. "Vision Care Services" shall mean eyecare services and materials. Eyecare services shall be provided according to VSP's guidelines, tests and processes commensurate with intermediate or comprehensive levels of examination, as set forth in the *VSP Provider Reference Manual*, and within the doctor's scope of licensure. Materials shall include any and all vision correction materials and shall include, without limitation, lenses, frames and contact lenses.

28. "VSP" shall mean Vision Service Plan, a not-for-profit corporation, including its subsidiaries and affiliates.

29. "VSP Patient" shall mean an Enrollee who obtains Covered Services from a Network Doctor.

30. "*VSP Provider Reference Manual*" shall mean a manual in electronic or hardcopy form (to which Network Doctor is provided secured access) including any changes or amendments thereto, containing information regarding VSP's vision care plans, programs, policies and the administrative duties and responsibilities of Network Doctor during the term of the Agreement.

B. OBLIGATIONS OF NETWORK DOCTOR

Network Doctor understands and agrees to each and all of the following:

1. Ownership and Operation of the Practice.

a. Independent Eyecare Professionals. VSP was founded on the belief that patients' interests are best served by the independent eyecare professional, which is the cornerstone of VSP's operational philosophy. Network Doctor may not have an ownership interest in Retail-Commercial Chain or Franchise vision care entities.

b. Ownership and Control. Ownership and control of a Network Doctor's practice, including dispensary, is required for participation in the VSP doctor network. Network Doctor shall have majority ownership and complete control of (actual and right thereof), solely or in ownership with other Network Doctors, all aspects of his/her practice, ***including dispensary***, or be an Employee Doctor or Contract Doctor, in a derivative capacity, of another Network Doctor who has such requisite ownership and control. A Shared Office arrangement, subject to VSP prior approval, may

qualify for the purposes of this requirement. Any such dispensary shall be contiguous in location to the examination area of Network Doctor's practice, meaning that the dispensary and examination areas must be within the same defined office suite space, unless prohibited by law. A dispensary and/or an examination area that are separated from each other by a stairwell will be considered to be contiguous in location so long as (i) the dispensary and the examination area are within the same office suite space and (ii) neither the dispensary nor the examination area have any access separate and distinct from that of the Network Doctor's office suite space, including access to an office(s) other than that of Network Doctor.

c. Complete Vision Care Services. To provide complete Vision Care Services at all Qualified Office Locations occupied by Network Doctor for the practice of optometry or ophthalmology. Network Doctor shall maintain the ability at all Qualified Office Locations to provide a comprehensive level of Vision Care Services, including dispensing services, and shall supply ophthalmic materials.

d. All Doctors/All Offices. All Vision Care Services and Covered Services provided to any Enrollee or VSP Patient must be rendered by a Network Doctor at a Qualified Office Location. If an Owner Doctor owns more than one (1) practice location, each and every practice location must be a Qualified Office Location. All doctors working in a Qualified Office Location must be Network Doctors. Owner Doctor shall (i) physically be in attendance in at least one Qualified Office Location of Network Doctor's practice, and (ii) provide Vision Care Services to Enrollees for a minimum of eight (8) hours per week in a combination of no more than two (2) office locations. An Owner Doctor may employ Employee Doctor(s) or contract with Contract Doctor(s) to staff and provide Vision Care Services at any Qualified Office Location. Owner Doctor agrees to ensure that any Employee Doctor or Contract Doctor (i) meets all VSP and National Committee of Quality Assurance (NCQA) requirements and credentialing standards; (ii) complies with all VSP network participation requirements set forth in this Agreement; (iii) complies with VSP's credentialing process every three years, or as mandated by the state of licensure. The Owner Doctor agrees to accept full responsibility for the services and care provided by an Employee Doctor or Contract Doctor to any Enrollee or VSP Patient.

e. Multi-Specialty Practice. If applicable, an optometrist or ophthalmologist who does not meet the ownership and control requirements as set forth above, may qualify to become a Network Doctor if he/she practices in a VSP-approved multi-specialty practice. An approved multi-specialty practice is defined by VSP as one in which the practice and dispensary are owned by a duly constituted professional organization that demonstrates that:

(1) The organization is made up entirely of, and owned totally by, both, eye doctors (optometrists and ophthalmologists), and physicians/surgeons who are not eye doctors;
(2) The optometrists, physicians and surgeons are actively practicing their specialties and provide routine eyecare in, or on behalf of, that organization;
(3) At least one Network Doctor in the organization has an ownership interest in the organization;
(4) The control of all professional eyecare services, including dispensing, is delegated solely to the Network Doctors in that organization; and
(5) The optometrists in that organization are actively practicing to the full extent of their licensure.

f. Doctor/Office Hours.
Each Qualified Office Location shall be open a minimum of 16 office hours per week. Each Qualified Office Location must be staffed by Network Doctor(s) a minimum of eight (8) hours per week. Network Doctor shall provide accessibility for Emergency Services and have ready access to VSP Patient records 24 hours a day, seven days a week.

g. Credentialing Requirement. A doctor is prohibited from providing eyecare services as a Network Doctor or otherwise to an Enrollee, unless he/she is credentialed by VSP and is granted VSP doctor network participation. An Owner Doctor must ensure that all Employee Doctors and Contract Doctors employed or engaged to provide eyecare services to any VSP patient are and remain credentialed by VSP.

2. **Material Events.** To notify VSP, in writing, as soon as reasonably possible of any proposed change, but not more than 30 days following any actual change of address, addition and/or closure of the Qualified Office Location(s), the addition or severance of any associate doctor(s), any material change(s) in/to the ownership, operations and/or management of the practice and/or any activity or event that may constitute an actual or perceived conflict of interest with VSP or VSP doctor network participation. Network Doctor shall provide 60 days' notice to VSP prior to the sale of its practice at any Qualified Office Location. The notice shall include the name, address and account number of any escrow, sufficient for VSP to make a demand for funds owed to VSP from the sale proceeds. (Also see paragraph 6(c) below for further information related to the sale proceeds.)Any non-VSP approved change or condition of/to any of the foregoing, or the determination by VSP that any act of moral turpitude, professional misconduct, criminal or civil wrongdoing has occurred which is or may be detrimental to VSP, its plans, VSP Patients and/or any other patients of Network Doctor, as determined by VSP, shall render this Agreement immediately void. Network Doctor further agrees to immediately notify VSP of the revocation, suspension, restriction, limitation and/or imposition of any probationary or limiting terms against/regarding the licensure of Network Doctor, as well as any condition or event affecting the ability of or limitation on Network Doctor to practice optometry or ophthalmology to the full scope of his/her licensure. The occurrence of any of the events enumerated in this paragraph may, in VSP's sole discretion, result in the immediate termination of this Agreement.

3. **Relationship to Enrollee/Client.**

a. Inducement. Not to offer or provide, or use others to offer or provide, any consideration or other inducement to any Client and/or Enrollee to encourage the obtaining of Vision Care Services from Network Doctor. Further, Network Doctor shall not permit his/her name to be used in any mailing or other solicitation of Enrollees, except in the Network Doctor List and/or as specifically authorized by VSP in writing.

b. Discrimination. To see any Enrollee, without discriminating on the basis of race, color, creed, ancestry, ethnicity, national origin, gender, age, genetic information, religion, marital status, sexual orientation, health status, medical condition, medical history, physical or mental or other disability, participation in government-sponsored health insurance programs, evidence of insurability, or source of payment, claims experience or any VSP program defined herein as Covered Services, in accordance with the requirements set forth in the *VSP Provider Reference Manual.*

c. Industry Standards. To render Covered Services to any Enrollee in a manner consistent with recognized industry standards of care, and provide documentation as set forth in the *VSP Provider Reference Manual.*

d. Courtesy and Service. To give any Enrollee the same level of courtesy and service that Network Doctor would give to any person who is not an Enrollee. Network Doctor further agrees, in consideration of Network Doctor's participation in the VSP doctor network, to conduct himself/herself in a manner that is supportive of VSP, each Client, and every Enrollee, and to avoid actual or perceived conflicts of interest with VSP or VSP doctor network participation. If at any time, Network Doctor fails to serve any Enrollee in a courteous manner, demonstrates any unwillingness or inability to work cooperatively for the best interests of VSP or its plans, enters into an actual or perceived conflict of interest to the interests of VSP or VSP doctor network

participation and/or fails, in VSP's determination, to provide adequate standard of care, Network Doctor's participation in the VSP doctor network will be subject to immediate termination.

e. Procedures and Tests. To perform each of the procedures and tests prescribed in the *VSP Provider Reference Manual,* as well as any other tests that are, in the Network Doctor's professional judgment, indicated. Network Doctor agrees to keep complete and accurate written records of such tests and procedures provided, which shall remain confidential, in compliance with applicable State and Federal law, and make them timely available to VSP, in the event VSP desires to audit or review such records and documents. Network Doctor agrees to obtain authorization from and submit all claims to VSP, in accordance with the requirements set forth by VSP, including those contained in the *VSP Provider Reference Manual.* Network Doctor shall certify and be responsible for the accuracy, completeness, and truthfulness of all claims data and information submitted to VSP, which shall include Eye Health Management condition information. VSP shall have the right to deny payment, withhold payment and/or to make deductions from future payments to Network Doctor as a result of Network Doctor's failure to follow VSP prescribed procedures.

f. Copayment and Fees. To collect any applicable Copayment and any and all other fees for Vision Care Services which are not Covered Services. Network Doctor further agrees not to impose any surcharge on VSP Patients for Covered Services. Upon request, Network Doctor shall report to VSP, in writing, all Copayments, surcharges and/or fees paid by VSP Patient(s) directly to Network Doctor for services that are not considered to be Covered Services.

g. Fee Payment. To accept payment from VSP for Covered Services provided to a VSP Patient in accordance with the compensation specified in the Assigned Fee Report, and not to look to the VSP Patient for additional money(ies) owed for Covered Services, except for (i) Copayments, (ii) coinsurance, (iii) amounts which exceed the VSP Patient's plan allowances, (iv) fees for Vision Care Services which are not Covered Services, according to the published VSP Patient Options List as set forth in the *VSP Provider Reference Manual,* or (v) fees for Vision Care Services listed in the "Not Covered" section of the VSP Patient's Schedule of Benefits or Additional Benefit Rider.

h. Hold Harmless. Neither Network Doctor, nor any permitted agent, trustee and/or assignee of Network Doctor may initiate or maintain any action at law against a VSP Patient for sums owed to Network Doctor by VSP. In the event Network Doctor submits a claim late and/or VSP, due to insolvency or otherwise, is financially unable to pay all or any part of Network Doctor's fee for Covered Services, he/she will not look to the VSP Patient for such payment. This hold harmless provision shall survive the expiration or termination of this Agreement.

i. Additional Services. In the event a VSP Patient wishes to purchase additional Vision Care Services beyond those provided as Covered Services, Network Doctor will not charge the VSP Patient more for such services and/or materials than Network Doctor normally charges a patient who is not a VSP Patient. Network Doctor shall notify the VSP Patient of any monies owed by VSP Patient for non-Covered Services prior to performing any non-Covered Services. Network Doctor agrees to provide to VSP Patients all value-added discounts, as set forth in the *VSP Provider Reference Manual.*

4. **Services Subject to Review.** All of Network Doctor's services and materials provided to VSP Patients, and claims submitted to VSP, are subject to review and audit. Network Doctor shall fully cooperate with any VSP review or audit activity, including, without limitation, in-office audits and inspections, business audits, special investigation audits, medical record reviews and all similar VSP investigative or quality assurance efforts. For quality and authentication purposes, Network Doctor understands and agrees that some audits may be unannounced. Network Doctor shall not refuse to permit an audit because an audit was not announced in advance, may be disruptive or for any other reason. Should

Network Doctor refuse to permit an audit for any reason, Network Doctor may be subject to termination for failure to comply with this Agreement and/or restitution in an amount to be determined by VSP. Network Doctor agrees to cooperate with, abide by, and adhere to, all rulings of any VSP quality assurance or peer review committee. All records, data and information acquired by or prepared for any VSP quality assurance or peer review committee shall be held in confidence, except to the extent necessary to carry out the purposes of such review activities, and shall not be subject to subpoena or discovery, except as may be required by law or as otherwise required in the Agreement. The confidentiality requirements set forth above, shall survive the expiration or termination of this Agreement. Network Doctor further agrees that upon request, Network Doctor will timely furnish case records to VSP of any or all Enrollees for whom claims have been submitted, and that VSP may use any information so obtained for statistical, actuarial, scientific, peer review or other reasonable purposes, including applicable state and federal law requirements, provided that no professional confidence shall be breached thereby. Network Doctor also agrees that utilization and claims information may be released to MCOs and peer review groups. The confidentiality of VSP Patient medical information shall not be compromised. Network Doctor shall reimburse VSP in a timely manner for its reasonable out-of-pocket expenses and costs incurred in audit(s)/inspection(s) resulting in restitution due to improper billing.

5. **Malpractice Liability.** Nothing contained herein shall interfere with the ordinary relationship that exists between Network Doctor and VSP Patient, including the liability for malpractice. Unless expressly limited by applicable state law, Network Doctor shall maintain and upon request furnish evidence of professional liability (malpractice) insurance coverage to VSP in an amount not less than $1,000,000 per occurrence/$3,000,000 annual aggregate total, throughout the term of this Agreement. Network Doctor shall maintain individual limits of professional (malpractice) liability coverage, not to be shared with another individual and/or entity. Network Doctor shall also maintain and upon request furnish evidence of general liability coverage in an amount not less than $1,000,000. Network Doctor shall notify VSP within ten calendar days of any lapse in professional and/or general liability insurance coverage, and shall indemnify and hold VSP harmless against any and all liability, damages or claims it may suffer, including attorney fees and costs, that result from the failure of Network Doctor to maintain such insurance coverage and/or the relationship between Network Doctor and VSP Patient.

6. **Misleading Information; Billing/Payment Disputes.**

   a. Misleading or False Information. The provision of any misleading or false information to VSP, as determined by VSP, including, but not limited to, information regarding claims, services provided, treating doctor, VSP Patient(s) treated, premises where treatment was provided, status of licensure, and/or the ownership/characterization/operation/management of the practice, including the dispensing facility, shall be grounds for immediate termination of this Agreement.

   b. Charge-Back Right. If Network Doctor (1) has been determined by VSP to have incorrectly or improperly billed VSP or a VSP Patient for Vision Care Services provided to a VSP Patient, (2) has billed for Vision Care Services that are excluded from coverage, or (3) has billed for Vision Care Services which are more expensive than those allowed thereunder, VSP will follow state specific law regarding the resolution of billing and claim disputes. If however a Network Doctor has been found to owe money to VSP pursuant to an audit conducted under VSP's Anti-Fraud and Abuse Policy, or, has past due amounts owing to VSP or any of its subsidiaries, to include without limitation, Eyefinity, Altair, Marchon or any one of VSP's optical labs, Network Doctor agrees that VSP is authorized to charge the account of Network Doctor for all monies found owing by Network Doctor to VSP, or to the VSP Patient. Should Network Doctor sell his/her practice at any Qualified Office Location, Network Doctor shall pay VSP from the escrowed gross sale proceeds, any and all amounts owed to VSP. Should Network Doctor be terminated from the Network or

voluntarily resign, when past due amounts are owed to VSP or any of its subsidiaries, Network Doctor further authorizes VSP to reap repayment from monies owed to doctor through out-of-network claim submissions. This provision shall survive expiration or termination of this Agreement.

c. Dispute of Services/Materials/Payment. In the event of any dispute(s) as to services, materials, and/or payment for same, concerning an Enrollee and/or VSP, VSP is authorized to withhold and set-aside in a suspense account or in trust, any funds owed to Network Doctor, pending the resolution of any dispute. To the extent that Network Doctor is in the process of selling his/her practice, Network Doctor grants VSP a security interest in all sale proceeds, for any and all amounts owed to VSP, and shall hold all sale proceeds in escrow pending the resolution of such dispute. The facts of such dispute shall be submitted to the VSP Board of Directors, or any Committee duly appointed thereby, pursuant to the Fair Hearing Process. The decision of the Board or duly appointed Committee shall be final and binding, and any money found owing to VSP by reason of such dispute may be applied from funds held and may be deducted from any future claims or other payments owed to Network Doctor.

7. Medical Information.

a. Patient Records Maintenance. To maintain all VSP Patient medical records and all other books and records relating to Covered Services provided to Enrollees in a complete and accurate form and containing such information as required by community standards, MCO contracts with VSP, accreditation organizations and/or State and Federal law. Upon request and within the time frame requested, Network Doctor shall provide to VSP, appropriate State and Federal authorities, and contracting MCOs access to or copies of all Enrollee medical records and other records relating to the provision of Covered Services for purposes of quality assurance and utilization review or audit; credentialing and peer review; claims processing, verification and payment review or audit; Enrollee grievance and appeal resolution; and other activities reasonably necessary for compliance with the standards of accreditation organizations and the requirements of state and federal law. Network Doctor agrees to make internal practices, books, and records relating to the use and/or disclosure of PHI available to VSP, or at the request of the Secretary of the Department of Health and Human Services, in the time and manner designated by VSP or the Secretary, for purposes of determining VSP's compliance with its requirements under the Health Insurance Portability and Accountability Act (HIPAA).

b. Records Use/Disclosure. To use and disclose VSP Patient records and PHI only in accordance with the terms of this Agreement and applicable state and federal law.

c. Access to Records. To have ready access to and availability of VSP Patient records, and will provide Enrollees with timely access to their records and information on request. All records relating to the provision of Covered Services shall be retained by Network Doctor as required by State or Federal law. This obligation shall not cease upon expiration or termination of this Agreement, by rescission or otherwise. Network Doctor information provided to VSP may be furnished to a third party who has contracted with VSP for the purpose of providing additional care to Enrollees.

d. Individual Rights. To implement the processes necessary to support individual rights, as identified in 45 CFR part 164, including the right to 1) receive Notice of Privacy Practices, 2) request access to PHI, 3) request restriction on use and disclosure of PHI, 4) request amendment of PHI, 5) request confidential communications of PHI, and 6) file a complaint about office privacy practices.

8. Expiration/Termination.

a. Automatic Expiration. This Agreement shall automatically expire without further requirement, on the earlier of (i) three years from the Effective Date, (ii) the VSP recredentialing date, or (iii) Network Doctor's failure/inability to be or remain VSP credentialed, unless earlier terminated by either party as provided in this Agreement. Except as set forth herein otherwise, on expiration hereof, this Agreement shall be of no force and effect and a doctor shall no longer be considered a Network Doctor. Prior to expiration, Network Doctor may request and be considered by VSP for grant and approval of a new Agreement for a limited term between the parties. Under no circumstances shall VSP be required to offer, extend and/or grant any agreement for a new term and/or continuation of VSP doctor network participation to any Network Doctor.

b. Early Termination. Either party may terminate this Agreement by giving the other party at least 90 days prior written notice. VSP may also terminate this Agreement immediately if Network Doctor (i) fails to comply with any term and/or condition of this Agreement, or (ii) has engaged/engages in any act of moral turpitude, professional misconduct, criminal or civil wrongdoing which, in VSP's sole discretion, is or may be detrimental to VSP, its plans and/or VSP Patients. Until such termination is final, Network Doctor will continue to perform service in conformity with this Agreement.

c. Affiliation After Expiration/Termination. In the event of the expiration or termination of this Agreement by either party, Network Doctor is prohibited from making any representation of being affiliated with VSP in any manner. Network Doctor's name will continue to appear on the Network Doctor List only until the next update, at which time it will be removed. Subject to section C7 below, as Enrollees schedule appointments, Network Doctor agrees to promptly advise Enrollees that Network Doctor can no longer provide Covered Services to Enrollee as a Network Doctor, nor will the Enrollee be liable for payment of any charges incurred without the Enrollee's prior knowledge of this fact. This provision shall survive the expiration or termination of this Agreement.

d. Amounts Owed to VSP at Termination. Upon termination of this Agreement and where Network Doctor owes VSP money for outstanding lab invoices, unpaid restitution amounts, or for any other reason, Network Doctor shall make full payment within 30 days of termination of this Agreement. If Network Doctor cannot make full payment as herein provided, Network Doctor shall immediately contact VSP to make other acceptable payment arrangements. During the term of this Agreement and after its termination, Network Doctor hereby grants to VSP a security interest in all of his/her personal property and assets and in all of the assets of his/her practice(s), in an amount equal to the amount of any funds owed to VSP. Except as may be prohibited by state law, VSP may at any time, perfect this security interest by filing a UCC-1 Financing Statement, with the Secretary of State of the state where Network Doctor practices, resides or otherwise owns real or personal property. This provision shall survive the termination of this Agreement.

9. Compliance with VSP Policies.

a. VSP Requirements. To comply, at all times during the term of this Agreement, with all VSP policies, plans, rules, procedures, and guidelines, including eye health management (providing accurate patient conditions on claim submissions), utilization management, quality management and credentialing requirements; and to cooperate in the timely investigation into and resolution of any Enrollee grievance procedures involving Network Doctor. Network Doctor's participation in the VSP doctor network shall be subject to immediate termination dependent on (i) the failure/inability to be credentialed or meet all VSP credentialing requirements, (ii) the occurrence of any material event set forth above in Section B, Paragraph 2, and/or (iii) VSP's evaluation and

determination as to the number, nature and severity of any malpractice claim(s) or quality of care issue(s), as determined by VSP's credentialing or peer review committee.

b. Coordination of Benefits. To cooperate in, and abide by, the coordination of benefits policies and procedures, as set forth in the *VSP Provider Reference Manual.*

c. MCO Contracts. To comply with the applicable provisions of all contracts VSP may have with MCOs and employer groups as amended from time to time. The MCO has a statutory responsibility to monitor and oversee the offering of Covered Services to Enrollees. When required, Network Doctor shall cooperate and comply with all credentialing requirements of any contracted MCOs and with contracted external review organizations. Network Doctor understands that MCOs in contract with VSP are required by law to approve or disapprove the participation in their plan of any Network Doctor in contract with VSP. MCOs shall have the right to disapprove Network Doctor's participation in MCO's plan at any time during the term of the Contract between MCO and VSP. Medicare MCOs are obligated by law to disapprove of a provider who has been excluded from participation in Medicare under sections 1128 or 1128A of the Social Security Act.

d. Medicare. To be, or timely become, a Medicare Provider, refrain from employing or contracting with any doctor who is not a Medicare Provider except for a doctor routinely working less than eight (8) hours per week, provide services to any and all Medicare Beneficiaries, and accept assignment of the VSP approved payment and only bill Medicare Beneficiary for applicable deductible and/or coinsurance amounts for any Vision Care Services provided. Network Doctor is responsible for maintaining an active status with, and may not opt out of, Medicare.

e. E-mail. VSP's primary method of communication is e-mail. At least one network doctor's valid e-mail address is required for each Qualified Office Location. It is network doctor's responsibility to maintain an up-to-date e-mail address to ensure receipt of important updates and critical information from VSP.

10. Compliance with Laws.

a. State/Federal Laws. To comply with all state and federal laws, including applicable Medicare Laws, rules, and CMS instructions, pertaining to Network Doctor and Network Doctor's practice. Network Doctor agrees to indemnify and hold harmless VSP from and against any and all liability, damages and/or claims it may suffer, including attorney fees and costs, resulting from Network Doctor's failure to comply with state and/or federal laws.

b. Request for Assistance. To not seek any legal or business advice, assistance and/or guidance from VSP regarding his/her compliance with state and/or federal laws, and/or this Agreement. Network Doctor shall not rely on any voluntary assistance given by VSP, which shall be without recourse or liability, and shall not constitute a disclaimer or waiver of the preceding sentence.

c. Electronic Communication. To receive business related information and surveys from VSP, including its subsidiaries and affiliates, by electronic or any other reasonable form of transmission.

11. Release. That VSP and its affiliates and subsidiaries, including its/their directors, officers, employees, agents, representatives, trustees and shareholders (if any), is/are specifically released from any and all liability, including, but not limited to, actions/inactions taken in good faith or in the furtherance of quality health care, enforcement of the terms and conditions of this Agreement, and/or for errors/omissions in the preparation and/or dissemination of the Network Doctor List or other information regarding VSP and its doctor network.

12. Confidential Information; VSP Intellectual Property.

a. Non-Disclosure of Information. To not disclose to any third party, directly or indirectly, or use in any way that is adverse to VSP's best interests, Confidential Information that Network Doctor has been provided with, or given access to, by VSP. Such disclosure, as determined by VSP, shall result in the immediate termination of this Agreement. Network Doctor shall indemnify VSP against all liability, damages and loss, including attorney's fees and costs, arising from the breach hereof or arising from VSP's enforcement of this provision. Network Doctor shall promptly notify VSP of any inquiry or legal proceedings seeking disclosure of Confidential Information. This provision shall survive the expiration or termination of this Agreement.

b. Limited Use License. The registered marks, "VSP" and "Vision Service Plan," and other marks that VSP may register from time to time, as well as the VSP logo(s) ("the Marks"), are, and shall remain, exclusively owned by VSP. No license will be granted to use the mark, "Vision Service Plan." Network Doctor is hereby granted a nonexclusive, nontransferable limited and revocable license to use the mark "VSP" and the registered VSP logo(s) in accordance with the guidelines set forth in the *VSP Provider Reference Manual*, and in connection with, the activities of Network Doctor in providing eyecare services and materials ("Limited License".)This Limited License shall commence upon VSP's receipt of an executed copy of this Agreement. The use of the Marks shall be subject to the following:

1. VSP has the right to control the manner and means in which the Marks are used and Network Doctor agrees that all use of the Marks by Network Doctor shall be in strict compliance with, and conform to, the form(s) approved, or to be approved, by VSP, without alteration, and in no other form whatsoever. Network Doctor may not use the Marks in any manner or means not deemed acceptable to VSP, or for any illegal, unlawful or competitive purpose. Network Doctor's use of the Marks shall inure to the benefit of VSP's ownership of, and rights in, the Marks. Upon request by VSP, Network Doctor shall promptly submit exemplars and information to VSP, as requested, indicating the use of the Marks made by Network Doctor.
2. Network Doctor shall refrain from using, or filing, any application(s) to register, in any class and in any country, any mark, that is the same as, is similar to or contains, in whole or part, any and/or all of The Mark.
3. Some promotional materials may contain the Marks as well as the service marks of other companies or vendors ("Co-Branded Materials"). This Limited License does not apply to the Co-Branded Materials and Network Doctor shall not alter or otherwise supplement any Co-Branded Materials with its own service mark or logo or otherwise modify the Co-Branded Materials in any way.
4. Upon termination of this Agreement, all rights granted hereunder to Network Doctor shall immediately cease and automatically revert to VSP, and Network Doctor shall immediately cease to use The Marks for any purpose whatsoever. VSP may revoke this Limited License in its sole and absolute discretion. In the event that a Limited License is revoked by VSP, Network Doctor is prohibited from any use of VSP marks and/or logo(s), or any variation thereof, in any advertising of any kind or nature, including promotions, discounts for products or services to provide to patients, window decals and in-office signage provided to Network Doctor directly by VSP.
5. Network Doctor agrees to indemnify and hold VSP harmless from and against any and all loss, liability, damages, cost or expense of any kind or nature whatsoever, including attorney's fees, expert witness fees and costs, that may occur to VSP as a result of Network Doctor's use of the Marks. Network Doctor agrees that any breach of his/her obligations hereunder, or to VSP, shall result in irreparable harm to VSP which cannot be reasonably

or adequately compensated in damages, and, therefore, VSP, in addition to any other available remedies, shall also be entitled to injunctive and/or equitable relief.

C. OBLIGATIONS OF VSP

VSP understands and agrees to each and all of the following:

1. **VSP Provider Reference Manual.** To provide Network Doctor with, or access to, a *VSP Provider Reference Manual* and timely updates thereto.

2. **Confidential Information.** To maintain to the extent possible the confidentiality of the personal and professional information of Network Doctor provided to VSP, or its authorized agent, for credentialing purposes, subject to the terms of this Agreement and any applicable State or Federal laws.

3. **Enrollee Eligibility.** To provide sufficient mechanisms that allow Network Doctor to verify Enrollee eligibility for Covered Services.

4. **Payment.**

   a. Compensation for Services. To pay Network Doctor for Covered Services provided to a VSP Patient in accordance with the compensation specified in the Assigned Fee Report.

   b. Timeliness of Payment. To pay Network Doctor no later than the end of each month for each Clean Claim received by VSP prior to the Cut-Off Date for that month.

5. **Notification.** To notify Network Doctor if information obtained by VSP, or its authorized agent, during the credentialing process varies substantially from the information provided by Network Doctor. VSP agrees to permit Network Doctor to review and correct this information in a timely manner.

6. **Due Process.** To comply with applicable due process requirements set forth in the Fair Hearing Procedure and VSP processes, as may be amended or replaced from time to time.

7. **Liability for Covered Services.** Notwithstanding anything to the contrary herein, VSP shall remain liable to Network Doctor for Covered Services rendered to any VSP Patient who is under the care of Network Doctor at the time of termination of this Agreement. VSP also agrees to permit Network Doctor to continue providing any VSP Patient with such Covered Services currently in process until such Covered Services are complete, or until VSP makes reasonable and appropriate provision for the Covered Services to be provided by another Network Doctor. This provision shall survive the termination of this Agreement.

8. **No Prohibition on Communication.** Not to prohibit Network Doctor from communicating to VSP any disagreement Network Doctor may have with VSP's decision to deny or limit benefits to a VSP Patient. VSP agrees not to terminate this Agreement merely because Network Doctor discusses with a current, former or prospective VSP Patient any aspect of the VSP Patient's medical condition, any proposed treatments or treatment alternatives, whether covered by VSP or not, policy provisions of a plan, or because of Network Doctor's personal recommendation regarding selection of a health plan based on Network Doctor's personal knowledge of the health needs of such VSP Patient.

9. **Continuing Network Participation.** Under no circumstances shall VSP be required to offer, extend and/or grant any agreement for a new term and/or continuation of VSP doctor network participation to any Network Doctor.

10. **Compliance with Laws.** To comply with all applicable state and federal laws pertaining to VSP.

D. MISCELLANEOUS

Network Doctor and VSP each understand and agree to each and all of the following:

1. **No Relationship.** Nothing in this Agreement shall be construed to make Network Doctor an employee, agent, partner or joint venturer of VSP.

2. **No Assignment/No Third Party Rights.** Network Doctor may not assign his/her rights and/or obligations under this Agreement to any party and/or entity for any purposes. No third party, including Network Doctor's professional or business entity shall have any rights whatsoever because of this Agreement.

3. **Non-Enforcement.** A party's non-enforcement of any right under this Agreement shall not constitute a waiver of its right to subsequently enforce such right(s) and/or to require strict compliance of the other with the terms of this Agreement.

4. **Entire Agreement.** This document, including the *VSP Provider Reference Manual*, Assigned Fee Reports and Fair Hearing Procedure, together with all amendments, addenda and/or replacements to/of any and all such documents that may be duly adopted by VSP from time to time, incorporated herein by reference, shall constitute the entire Agreement between the parties. This document supersedes, extinguishes and replaces any and all prior or contemporaneous discussions, negotiations, understandings, communications, agreements and/or contracts between Network Doctor and VSP. Rights granted to Network Doctor herein shall not be considered to be a property right and any such potential claim is waived.

5. **Headings.** The headings and captions herein are for reference purposes only and shall not be considered in construing this Agreement.

6. **Interpretation.** Any rule of law or legal decision that might require interpretation of any provision or claimed ambiguity in this Agreement against the drafting party has no application, and is expressly waived. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will continue in full force and effect without being impaired or invalidated in any way.

7. **Amendment/No Modification and Waiver.** Except as provided herein, this Agreement may be amended only by a writing that refers to this Agreement and is signed by an authorized representative of each party, and cannot otherwise be modified, amended and/or changed in any respect, orally or by the conduct of the parties.

8. **Attorneys' Fees.** If an attorney is required by a party to secure performance upon the breach and/or default of the other, or if any judicial remedy or arbitration is necessary to enforce and/or interpret any provision of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, expert witness fees, prejudgment or other interest, costs and expenses, in addition to any other relief to which a party may be entitled, as determined by a judge or arbitrator.

9. **Force Majeure.** Neither party shall be liable for breach of this Agreement, if due to delay or nonperformance of an obligation hereunder, caused by an event beyond the reasonable control of and not caused by that party. Such events shall include, without limitation, storms, floods, other acts of

nature, fires, explosions, riots, war or civil disturbance, strikes or other labor unrests, nonperformance by third party providers of utility services, embargos, delays in transportation and other governmental actions or regulations which would prohibit either party from performance of their obligations hereunder. Notwithstanding, the excused party shall use best efforts to alleviate the consequences of the event. If the event continues to prevent the performance of a material service hereunder for more than 30 calendar days, either party shall have the right to terminate this Agreement upon providing the other party 10 business days prior written notice.

10. **Applicable Law.** To the extent allowable so as not to invalidate application of the Federal Arbitration Act, this Agreement shall be governed by the laws of the state of California.

11. **Fair Hearing Procedure/Binding Arbitration**

    a. Fair Hearing. In the event of a dispute as to VSP's imposition of any applicable disciplinary action against Network Doctor, Network Doctor, for himself/herself and on behalf of any derivative associate doctor(s), may appeal such action in accordance with the provisions and requirements, including the payment of fees and costs, set forth in the VSP Peer Review Plan and Fair Hearing Policy, as may be amended or replaced from time to time, and incorporated herein by reference (the "Fair Hearing Procedure").

    b. Binding Arbitration. If the above process does not resolve the dispute, then, unless expressly disallowed by state law, any party may request final determination and resolution of the matter by mandatory binding arbitration, pursuant to the Federal Arbitration Act, 9 U.S.C. Chp. 1-3, in accordance with the Fair Hearing Procedure presently in effect. This mechanism, the initial costs of which shall be shared equally by the parties, shall be the sole method, in lieu of a jury or court trial, of resolving any dispute that may arise between Network Doctor and VSP. By this agreement and agreeing to binding arbitration, Network Doctor hereby waives his/her right to a jury trial as to any dispute with VSP, including without limitation, disputes relating to the delivery of services and disputes relating to claims and billing under any VSP insurance plan.

IN WITNESS WHEREOF, the undersigned have executed this Application and Agreement as written below.

Jennifer M Gulo O.D.
Network Doctor (Print Name)

Signature

4/3/14
Date

100 Calendar Ct
Primary Address

LaGrange IL 60525
City, State, Zip

708-354-0500
Telephone

1912161480
NPI Number

Cheryl Johnson, Vice President Provider Services
VSP (For Internal Use Only)

Cheryl A Johnson
Signature

CONTRACT NOT BINDING UNTIL DOCTOR IS APPROVED BY VSP CREDENTIALING COMMITTEE

IN WITNESS WHEREOF, the undersigned have executed this Application and Agreement as written below.

_____	Cheryl Johnson, Vice President Eyecare Delivery Solutions
Network Doctor (Print Name)	VSP (For Internal Use Only)
_____	_____
Signature	Signature
_____	
Date	
_____	
Primary Address	
_____	
City, State, Zip	
_____	
Telephone and Email Address	
_____	
NPI Number	
_____	
CAQH ID Number	

CONTRACT NOT BINDING UNTIL DOCTOR IS APPROVED BY VSP CREDENTIALING COMMITTEE

EXHIBIT B

Marie A. Cahill

From: Frank L. Soppa
Sent: Thursday, November 13, 2014 3:18 PM
To: Marie A. Cahill
Subject: RE: Phone Call

Marie,

I am under the weather and apologize for snapping at you, just had a long week. Please give me a call back.

Thanks,

Frank L. Soppa
Vice President - Optical Services
Surgery Partners
Office Phone 513-752-2674
Mobile Phone 513-235-4701
fsoppa@surgerypartners.com

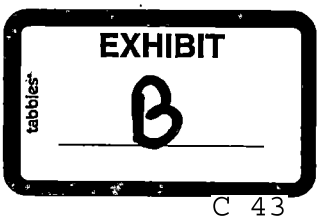
From: Marie A. Cahill
Sent: Thursday, November 13, 2014 3:56 PM
To: Frank L. Soppa
Subject: RE: new doc

I really do not like the situation of filling in for a friend so close to our location. I need to sleep on this. I lowered the non-compete from 10 to 5 miles already. 2.5 is way too close, we do pull some patients from Hinsdale.
I am being very careful with VSP because I am aware of the situation.

From: Frank L. Soppa
Sent: Thursday, November 13, 2014 2:39 PM
To: Marie A. Cahill
Subject: RE: new doc

Well I suppose she could always build up a patient base in our office and then take them over there...I would guess that this is your concern. I agree this does not feel the best, a little too close for comfort. It really comes down to how bad you want her. If you cannot live with this then say no and see what she says. Another thought is to stipulate how many days per quarter she could work there. (i.e. no more than 5 days per quarter or something like that). In any event please do take the time to ensure as best possible that we have a good fit here. It would be good to get some stability in the practice.

Regarding VSP – we have to be a little careful her. Since SP has a management agreement with the practice the owner is listed at Dr. Gula. So you would check Sole proprietorship. If you come across any other questions or things that don't seem to line up give me a call. It may be helpful to pull out Dr. Gula's file and/or Dr. Newman's and see if there is a copy of the VSP application in there. What we would want to do is follow as close as possible how we filled out the last ones. On a related note if for some reason you are ever speaking with VSP and they ask who the practice owner is it is Dr. Gula. Yes, this is not ideal, but the way we have this structured. Historically it was Dr. Sparks.



CLERK OF THE CIRCUIT COURT - COOK COUNTY
00147767 Law-01 4/26/2017 12:05PM
ATTY: 45667 020 SBENDIT
AD DAMNUM: $50,001.00
CASE NO: 2017L004200 CALENDAR: T
COURT DATE: 0/0/0000 12:00AM
CASE TOTAL: $598.00

12 Jurors 3	$230.00
Automation	$25.00
Document Storage	$25.00
Law Library	$21.00
Arbitration	$10.00
Base Filing Fee 6	$240.00
Dispute Resolution	$1.00
Court Services	$25.00
Children Waiting Rm	$10.00
Access Justice Fund	$2.00
e-Business	$9.00
CHECK NO: 205971	
CHECK AMOUNT:	
CHANGE	$598.00
	$0.00
TRANSACTION TOTAL:	$598.00

RECORD ON APPEAL – TABLE OF CONTENTS

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I certify that on January 8, 2020, the above Brief of Defendants-Appellants and the attached Appendix were filed and served electronically on the Clerk of the Illinois Supreme Court, and that true and correct copies of the same were served by electronic mail on the following:

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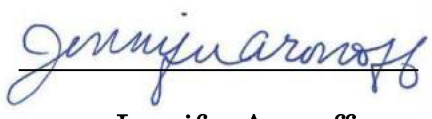
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.



Jennifer Aronoff