No. 122487

In the

Supreme Court of Illinois

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

Relator-Appellant,

v.

MY PILLOW, INC.,

Defendant-Appellee.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-15-2668.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 12 L 7874 Consolidated with No. 12 L 6782.
The Honorable **Thomas R. Mulroy**, Judge Presiding.

BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF APPELLEE MY PILLOW, INC.

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INTEREST OF AMICUS CURIAE

The Illinois Chamber of Commerce (the "Chamber") is the voice for Illinois businesses. Its "association" consists of manufacturers, railroads, insurers, retailers, banks and a host of other industrial and commercial concerns. Those businesses provide jobs to a myriad of Illinois workers as well as income that is applied to the general economy in the form of redistributed expenditures, profits and taxes.

The Chamber recognizes the significance of the question presented by this appeal, and the impact it will have upon businesses throughout the state, and thereby the public in general. The Chamber wants to make its position on these issues clear. The Illinois General Assembly created the Illinois False Claims Act for the purpose of allowing private citizens to step into the shoes of the Illinois government to deter fraud. The subsequent enactment of the attorney's fee provision provides a powerful tool for the government, allowing the deterrent effect of a whistleblower's legal fees to be absolved. But Mr. Diamond has manipulated the fee provision by making his law firm the Relator that he represents; this has created a cottage industry for Mr. Diamond whereby he collects both attorney's fees and a percentage of the whistleblower award – a double recovery.

Where tax law is complex and litigation is expensive it is of paramount importance that the attorney's fee provision in the Act is being used for its intended purpose: to combat actual fraud. It is the Illinois Department of Revenue's job to monitor businesses and identify tax infractions to assure compliance with tax laws. A relator's enforcement of tax law and his substantial recoveries from attorney's fees and whistleblower damages sets a dangerous precedent for the State, its citizens, and businesses and is contrary to public policy. From the perspective of the Illinois business community and the general public, the

Illinois Chamber of Commerce requests that this Court uphold the Appellate Court's decision that Relator is not entitled to attorneys' fees for the work of its own lawyers. (Op. ¶ 99.).

SUMMARY OF THE ARGUMENT

The award of attorney's fees to a self-represented relator lawyer is contrary to Illinois public policy and is an impingement on Illinois businesses and the common good of Illinois citizens. The collection of attorney's fees by Stephen Diamond ("Diamond") or his law firm, as a relator, is against public policy because both legislative history of the False Claims Act and legal precedent reveal the purpose of the attorney's fee provision is to help the victim avoid unnecessary cost in furthering the common good.

The intention and purpose of the Illinois False Claims Act (the "Act") mirrors the federal law. Congress intended the federal False Claims Act attorney's fee provision to enable private plaintiffs to bring claims, and help the government combat fraud, without the burden of legal fees. Yet, Congress warned that the attorney's fee provision could be subject to abuse and that the provision's purpose is not to penalize businesses.

Relator's self-representation through its member lawyers is abusive and damaging to Illinois businesses. This Court has already recognized, in *Hamer v. Lentz*, 132 Ill.2d 49 (1989), that awarding attorney's fees to a self-represented relator who does not incur any legal fees is also a threat to public policy.

Moreover, Diamond's double recovery makes a mockery of the Act in violation of the common good. Defendants sued by Diamond must factor into their defense and settlement analysis Diamond's demand for both damages and attorney's fees under the Act. Diamond's abusive manipulation of the attorney's fee provision allows Diamond to

double-recover, which impedes the common good. Diamond has profited from his cottage industry by targeting Illinois businesses and hard-working citizens. Awarding attorney's fees to a relator-lawyer, who is incentivized by his own financial gain, is harmful to the common good.

The Illinois Department of Revenue has the duty to administer and enforce tax law, but Diamond has interfered with that duty. The Department is impeded in its efforts to bring Illinois businesses into compliance with the tax laws because Diamond intervenes before the Department can engage with the businesses. As a result, the common good is further harmed as inconsistent tax policies and rulings are created by Diamond's pursuit of filing claims under the Act before the Department can audit and address issues.

ARGUMENT

Statutes enacted by the Illinois General Assembly are created with the purpose of promoting the common good among all citizens. The Illinois False Claims Act ("Act" or "IFCA") is no exception to the common good principle. *See* 740 ILCS 175/1, 4 (West 2004). Thus, the Act's provision awarding attorney's fees to Relator should not impinge on Illinois businesses and the common good of Illinois' citizens. But the creation of a "cottage industry" by relator-lawyer Stephen B. Diamond ("Diamond" or "Relator") is generated and supported by an abuse of that very attorney's fee provision, allowing the common good principle to be consumed.

This brief will explain, from the perspective of the Illinois business community and the general public, through the voice of the Illinois Chamber of Commerce, why this Court should uphold the Appellate Court's ruling denying a relator-lawyer's right to recover attorney's fees under the Act. Each section supports the overall position that sanctioning Relator's manipulation of the attorney's fee provision of the Act does not promote the common good or public policy.

I. DIAMOND, AS A RELATOR-LAWYER, HAS CREATED A HARMFUL COTTAGE INDUSTRY BY FILING LAWSUITS UNDER THE ACT IN VIOLATION OF THE COMMON GOOD.

The Act is a government tool to combat fraud. It allows a private individual to step into the shoes of the government and bring suit under the Act against persons or businesses the individual believes defrauded the government. 740 ILCS 175/1, 4 (West 2004). This is known as a qui tam suit.

The attorney's fee provision in the Act has allowed this Relator to create a harmful cottage industry based on an abuse of that fee provision. "The qui tam provision has effectively recruited attorneys to pursue whistleblower cases because of the large

recoveries available," including "court-awarded attorney's fees and a percentage of the recovery." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam, Litigation under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1236 (2008). The Government only occasionally intervenes in the suit, granting relators unfettered discretion to initiate, to conduct and to settle FCA suits. *Id.* In typical litigation plaintiffs have discretion as well. However, suits brought under the FCA are different because defendants must consider the attorney's fee provision, with regard to a relator standing in the shoes of the government, while assessing the risks of the litigation. A relator's flexibility in litigating FCA suits creates a strong incentive to draw litigation out to maximize financial gain. Dayna Bowen Batthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J. L. REFORM 281, 331 (2007) ("Due to the sizable financial gain, relators pursue cases with poor factual support or flimsy legal theories to establish bad precedent and waste public resources.").

The attorney's fee provision of the Act can be significantly manipulated by a relator, stepping into the shoes of the government, in multiple ways. First, there is potential for abusive fee generation where a relator-lawyer is able to recover fees for work done, whether actually paid for or not. And second, the effect of a double recovery for a relator-lawyer, allowing an attorney to collect lucrative settlements that contain both attorney's fees and also damages that amount to multiple times what the government recovers from the tax deficiency. *United States ex Rel Taxpayers Against Fraud v. Gen Elc.*, 41 F.3d 1032, 1036 (6th Cir. 1994) (revealing relator agreed counsel would receive 25% of the relator share and attorney's fees amounting to a recovery of $4 million). This penalizes

Illinois businesses by allowing relator-lawyers to receive large windfalls, under the Act, at the expense of businesses and the government.

Moreover, Illinois businesses' expansive payouts to Diamond for attorney's fees over the years has threatened the public confidence in the government, as businesses naturally grow skeptical that their government is looking out for their best interest. Thus, the very purpose of the qui tam provision in the Act is diminished.

Here, Diamond has exploited the government's hesitance to intervene in these suits. As a result, he has created a cottage industry from pursuing businesses on state tax laws and engaging in abusive fee generation. Statistics reveal Diamond's success in turning the Act into a cash cow. By 2016, Diamond received approximately $5.9 million in attorney's fees and $5.7 million from his share of settlements. *Id.* (revealing the significant amount of money Diamond has made by receiving both attorney's fees and money from the settlement). The statistics, however, reveal only a small glimpse of his financial gain from filing suits under the Act.[1]

Diamond's cottage industry has been identified as a problem by the business community, *Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen. Assemb. (July 26, 2012) The Revenue Committee held a public hearing in 2012 to discuss with businesses and the Illinois Chamber of Commerce the potential problems with the Act. *Id.* When assessing litigation risk, businesses always assess financial implications of the litigation, the harm that might be done to the business's reputation, and the likelihood of success if the case went to trial. However, under the Act, the fee-shifting provision adds

[1] The data only reveals Diamond's recoveries to 2016. He has recovered significant amounts in the past year that are not cited in this brief.

an extra step to the analysis. As a result, businesses with very small tax liabilities are forced to make a decision whether to assert their defenses or settle simply to avoid Diamond's abusive fee generation.

The public policy behind suits under the Act is to permit private plaintiffs to sue on behalf of the government. Pamela H. Bucy, *Private Justice*, 76 CAL L. REV. 1, 30 (2002). This allows the government, through a relator, to fulfill its duty in protecting the public from harm and furthering the common good. Diamond's manipulation of the Act does not protect the public. Instead Diamond's exploitation of the attorney's fee provision is contrary to the common good as businesses and tax-paying citizens are victimized by his ability to effectuate double-recovery by receiving attorney's fees as a lawyer while representing himself and also recovering a share of the recovery as the relator.

While government funds are generated by Diamond's abusive cottage industry, it comes at the expense of harm to businesses and citizens of Illinois. *See, Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen. Assemb. (July 26, 2012) (revealing how businesses have been victimized by paying extensive fees in IFCA suits over small tax liabilities). An unchecked attorney's fee provision in the Act has resulted in an avalanche of qui tam suits. App. Ct. Op. at ¶ 144 (citing Relator has filed over 600 suits and has hundreds still pending on the Cook County Circuit Court's docket.) [2]

A. Diamond Abuses the Attorney's Fee Provision to Generate Fees in Violation of the Common Good.

Diamond's ability to continue abusing the attorney's fee provision in the Act has allowed him to create a harmful cottage industry. This Court in *Hamer* revealed that the threat of abusive fee generation was not an unreasonable concern. *Hamer v. Lentz*, 132

[2] To date, Diamond's circuit court filings have surpassed 1,000 in total number.

Ill.2d 49 at 60 (1989). This Court warned that if a relator-attorney received attorney's fees on behalf of his member attorneys, the "fee provision might be used by lawyers with an inactive practice to solely generate fees. *Hamer*, 132 Ill.2d 49 at 59 (citing to *Aronson v. United States Department of Housing and Urban Development*, 866 F.2d 1, 4 (1st Cir. 1989) and *Falcone v. Internal Revenue Service*, 714 F.2d 646, 647-48 (6th Cir. 1983)). As a result, this Court did not think it advisable to leave the door open for unscrupulous attorneys, and felt the most effective way to deter abusive fee generation was to deny attorney's fees to lawyers representing themselves. *Hamer*, 132 Ill.2d 49 at 62. (holding an attorney, who is also a relator, should not recover fees as an attorney, even where if his own law firm represents him).

Additionally, policy-based concerns reveal that the guaranteed minimum and the potential maximum awards under the Act coupled with the high settlement rate due to the fee-shifting provision of the Act has created a strong financial incentive for relators to file a qui tam action. Michael Rich, *supra* at 1249. In *The Public Hearing of Illinois House Revenue and Finance Committee*, businesses revealed the risks involved in contesting Diamond's fee petition, as additional costs are incurred if they lose. 98th Gen Assem. (July 26, 2012). With the current framework in place under the Act, prior to the Appellate Court's decision in this case, Illinois' circuit courts have no checks and balance system to prevent abusive fee generation from a self-represented relator who submits a fee petition. Knowing this, businesses are forced to consider not only the litigation risks, but also the large attorney's fee potential in a qui tam action when deciding whether to fight both the claim and the fee petition or to just settle with Diamond.

Relators, like Diamond, have found an improper way to manipulate the fee provision to double the recovery and financial gain under the Act – at the expense of everyone but himself. As a result, relators, like Diamond, have preyed on businesses, knowing that the government will not intervene or audit their abusive fee generation.

This Court should also appreciate that an attorney-relator who is representing himself (or is represented by a law firm created for the sole purpose of collecting attorney's fees) has an obvious stake in furthering litigation to maximize his financial gain. *See, Falcone v. Internal Revenue Serv.*, 714 F.2d 646, 648 (6th Cir. 1983) (explaining that awarding fees to the member lawyers representing the firm "gives rise to the danger of creating a cottage industry for claimants . . . as a way to generate fees rather than to vindicate personal claims"). The following is a small, but representative, sample of the attorney's fees Diamond has received, demonstrating his ability to generate abusive fees in cases he has filed: (1) $109,061 from Quill for a tax liability of $5,181, (2) $310,667 from Office Depot, (3) $156,000 from KB toys, (4) $130,000 from Relax the Back, (5) $372,000 in fees from Ralph Lauren, (6) $15,000 from Wrestling Gear for a tax liability of $4,600, (6) $365,000 from Cowabunga Enterprises, (7) $43,000 from Viking Office Products, Inc. and Office Depot, Inc., and (8) $150,896 from Beach Body. (C00347, C00349); Michael J. Bologna, *Small Business Owner's Tax Nightmare Ends with 30,000 Settlement*, Bloomberg BNA (October 19, 2016).

These statistics reflect a relator's financial incentive to stretch out litigation and increase his fees, even for innocent and/or minor tax infractions. Relator's control over IFCA suits has resulted in the "running up" of fees for businesses, a practice this Court deemed in *Hamer* to be contrary to public policy. *Hamer*, 132 Ill.2d 49 at 60 ("making a

business out of filing lawsuits under a fee-shifting provision is less about vindicating citizens' rights and more about generation of revenue for a law firm.) Here, the filing of IFCA suits is not done with the purpose of assisting the government and private citizens. Relator is incentivized by the lucrative nature of receiving attorney's fees under the Act. Relator's ability to extort abusive fees against businesses has sullied the true purpose of the attorney's fee provision. This Court should put a stop to this by affirming the Appellate Court's correct interpretation of the provision's purpose.

B. Diamond Receives a Double Recovery Through Attorney's Fees and Relator's Share in Violation of the Common Good.

Illinois has a strong public policy against double recovery. *Barkei v. Delnor Hospital*, 207 Ill. App.3d 255, 264 (1990). Therefore, when a party incurs no attorney's fees for doing the work, the opposing party has no obligation to pay for fees. *Uptown People's Law Ctr. v. Dep't of Corrections*, 2014 IL App (1st) 130161, P24. (citing to *Label Printers v. Plfug*, 245 Ill.App. 3d 435, 439-40) ("A court cannot award fees even where the statute authorized the payment of fees.").

In *Uptown,* the public policy against double recovery revealed that attorney's fees cannot be awarded when no additional funds are spent in the representation. *Uptown*, 2014 IL App (1st) at P. 25. Here, the Appellate Court applied this principle holding that Diamond cannot be allowed to double dip by self-representing himself, as it is against Illinois public policy. (App. Ct. Op., ¶¶ 132-33.) This Court has also revealed that allowing a relator and his firm to recover attorney's fees for his own self-representation and to receive a share of the proceeds of the total recovery is against public policy. *Uptown*, 2014 IL App (1st) at P. 24 (citing to *Label Printers v. Plfug*, 245 Ill.App. 3d 435, 439-40) (holding a court cannot

award fees when the attorney incurs no obligation to pay even if "the statute authorized the payment of fees.").

The following numbers are Relator's total awards from attorney's fees plus his share of the settlement: (1) in 2012 Diamond collected $2,594,881, (2) in 2013 Diamond collected $1,862,802, (3) in 2014 Diamond collected $2,324196, (4) in 2015 Diamond collected $1,438,777, and (5) in 2016 Diamond collected $1,463,136. (C00347, C00349, C00352). From 2012 until 2016 Diamond collected a total of $9,653,796 in attorney's fees and his share of the settlement. *Id.*

The data demonstrates the vast amount Diamond has received from businesses by recovering both attorney's fees and the Relator's share. In allowing Diamond to double-dip in damages, he has created a cottage industry at the expense of businesses. This Court should consider the public policy considerations outlined in *Uptown* and preserve the intent of the Act for the common good.

C. Illinois Businesses and Citizens are the True Victims of Relator's Abusive Cottage Industry.

Diamond's harmful cottage industry has forced businesses to pay large sums in attorney's fees, causing those businesses to lay off workers and even shut their doors. Companies that have been victimized by Diamond's scheme have made their concerns known to the legislature. For example, in 2012 Kathy Stevens at the Public Hearing expressed her concerns to the Revenue Committee stating that Brunswick, a company local to Illinois, paid $12,000 in fees and damages to Diamond over a $58 default. *Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen Assem. (July 26, 2012). [3]

[3] Brunswick is a member of the Illinois Chamber of Commerce Tax Institute.

Additionally, Jeff Pape's small online business that sold a $10 jump rope to Diamond resulted in a $30,000 settlement to Diamond and the State. Michael J. Bologna, *Small Business Owner's Tax Nightmare Ends with 30,000 Settlement*, BLOOMBERG BNA (October 19, 2016). Mr. Pape, an accountant, was not aware of the nuances within the shipping and handling tax statute. *Id.* While, Diamond pursued litigation, Mr. Pape had to shut down his business for several days over the span of four months which disallowed Mr. Pape to increase his profits. *Id.* In the end, Mr. Pape settled with Relator for $8,800, $4,600 went to the state, $4,200 went to Diamond for the settlement, and $5,000 went to Diamond for attorney's fees while Mr. Pape paid an additional $10,000 in legal fees for his own defense. *Id.* (explaining the 19-month stretch of litigation created a great amount of stress on him, his family, and his kids).

Another example of a small business owner victimized by Relator's cottage industry is Aaron Susman, the owner of a small folk fabric company. *Public Hearing of Illinois House Revenue and Finance Committee,* 98th Gen Assem. (July 26, 2012). Mr. Susman failed to include sales tax on his tax returns. *Id.* (stating he did not know Illinois law required the shipping costs be included in the cost of goods for tax). *Id.* Mr. Susman's tax liability totaled $1,500. He explained in the *Public Hearing* in front of the Revenue and Finance Committee that he, like many other businesses, has to consider the risks of paying attorney's fees to Diamond, the risk of going to court, the risk of losing in court, and then the risk of having to cut his staff. *Id.* Ultimately, Mr. Susman settled to reduce the amount owed to Diamond in attorney fees. *Id.* Following the suit, Mr. Susman let many staff go and eventually closed his business. *Id.* Like so many other small businesses,

he had to abandon fighting Diamond and settle to keep his company. In the end, Mr. Susman's business was closed and people lost their jobs over a default of $1,500. *Id.*

These are just three examples, made public, out of the hundreds of business owners that have fallen victim to Diamond's manipulation of the fee provision under the Act. This affects not only Illinois businesses and employees, but their families and communities; the public as a whole. Allowing an award of attorney's fees to a relator-lawyer, incentivized by his own financial gain is harming the common good. Indeed, for minor infractions, businesses risk paying absorbent amounts in attorney fees to Diamond.

Diamond argued to the appellate court, in this case, that he provides a great service to Illinois in uncovering tax deficiencies and collecting tax dollars. But Diamond's efforts result in far more than collection of tax deficiencies, at the expense of Illinois businesses and the common good principle. The Department of Revenue is charged with the administration and collection of Illinois taxes. The Department conducts audits, monitors taxpayers, and collects taxes. Diamond's actions impede the ability of the Department of Revenue to do its job, and have a negative impact on Illinois' businesses and citizens. Because of the fee provision abuse, the benefit Diamond purports to add actually results in a tremendous detriment to the State of Illinois.

By upholding the Appellate Court's decision, this Court will further the goal of promoting the common good by helping businesses remain financially stable, while also furthering public policy by no longer allowing abusive fee generation and double recovery.

II. LEGISLATIVE HISTORY AND LEGAL PRECEDENT REFLECT THE PURPOSE OF AWARDING ATTORNEY'S FEES IS TO HELP THE VICTIM AVOID COST IN PROMOTING THE COMMON GOOD.

The Illinois General Assembly modeled the IFCA (the "Act") on the federal False Claims Act ("FCA"). In construing the Act, courts have relied on federal courts' interpretation of the federal FCA for guidance. *People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 2015 IL App (1st) 132999, P. 30; *accord United States ex rel. Geschrey v. Generations Healthcare*, LLC, 922 F.Supp. 2d 695, 704 n.4 (N.D. Ill. 2012) (explaining the Federal FCA applied equally to the IFCA because Illinois courts "look to the similarly worded federal act.").

A. The Legislative Intent Reflects the Purpose of the Attorney's Fee Provision is to Incentivize Individuals to Report Fraud, Not to Act as a Reward.

President Lincoln created the FCA to encourage informants to report fraud. False Claims Act, 31 U.S.C. § 3729 (1862). It wasn't until 123 years later in 1986, when Congress increased the FCA's penalties to include indirect damages and allow attorney's fees to be awarded for qui tam plaintiffs. 31 U.S.C. §§ 3729-3733 (1986). Congress explained that the attorney's fee provision provided an incentive for employees "who report fraud and abuse in conjunction with false claims prosecutions." *Congressional Record*, at 22336 (Representative Brooks). Congress also recognized that changes to the FCA could enhance the ability of the government to prosecute fraudulent activity. *Id.* (Representative Brown). The purpose of adding the attorney's fee provision was to help the government by allowing private plaintiffs to bring FCA suits without the burden of legal fees.

However, while the FCA has an important deterrent effect, the Judiciary Committee in Congressional Records revealed the FCA "is not a penal statute." *Id.* Thus the attorney's fee provision and other consequential damages should not be so intrusive to the defendant that they operate as a punishment. The Committee stated their fear that indirect damages and attorney's fees could be "too sweeping." They stated that awarding attorney's fees for "civil investigative demands, if authorized at all," should not extend "to written interrogatories," because damages for "written interrogatories may be subject to great abuse and encourage fishing expeditions." *Id.* at 22338. The Congressional Record also states Representatives feared the award of attorney's fees could be harmful and an undue burden on "honest business men" who strive to give consumers the best work product "at the best price." *Id.* Therefore, Representatives urged the FCA be monitored to ensure that congressional intent is respected.

When Illinois' General Assembly modeled the Act after the federal FCA, it did so for the same reasons as expressed in Congress' intent for enacting the FCA, including the attorney's fee provision. Whistleblower Reward and Protection Act, Public Act 87-662 (1991). [4] The legislative history of the Act states it is important that the statute adhere to the federal FCA. *Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen Assem. (July 26, 2012). Illinois, like the federal government, wanted to provide a private initiative to supplement the enforcement efforts made by government agencies that do not have the resources to conduct their own investigation. Public Act 87-662 (1991). As a result, Illinois, like the federal government, provided an incentive to qui tam plaintiffs

[4] The General Assembly renamed the Illinois False Claims Act in 2009, replacing the Act's previous name, Whistleblower Reward and Protection Act.

to report fraud without the burden of litigation costs or fear of retaliation. False Claims Act, Public Act 87-662 (2010). Ultimately, the General Assembly gave the Illinois Attorney General the primary responsibility for overseeing all IFCA claims. *Id.*

Congress drafted the FCA to allow qui tam plaintiffs to combat fraud on behalf of the government and generate money to help the deficit. *Congressional Record*, at 22336. In turn, the attorney's fee provision was added to incentivize individuals to pursue fraud, and obtain independent counsel, without the burden of litigation costs. *Id.* It was not intended to provide a double-recovery or to penalize businesses.

This Court must recognize Congress' concern that the federal FCA's attorney's fee provision and indirect damages could be "too sweeping," is equally applicable to the Act. *Id.* at 22338 (Representative Brown). At the federal level, the Judiciary Committee advised that the statute be monitored to ensure that it is not abused. *Id.* The Judiciary Committee conveyed that the fee provision's purpose is not to penalize or hinder citizens and businesses, rather to allow private plaintiffs to obtain independent counsel and combat fraud in furtherance of the common good. *Id.* These concerns apply at the state level as well.

B. This Court has Established That the Purpose of Awarding Attorney's Fees is to Relieve the Informer's Burden of Costs to Retain an Independent Lawyer.

This Court has already established that rewarding relator-lawyers, like Diamond, is against public policy. See, *Hamer*, supra. This Court stated that the "award of fees is intended to relieve plaintiffs of the burden of legal costs; it is not intended as...a reward for plaintiffs." *Hamer v. Lentz*, 132 Ill.2d 49 at 59 (citing to *Aronson v. United States Department of Housing and Urban Development*, 866 F.2d 1, 4 (1st Cir. 1989) citing *Falcone v. Internal Revenue Service*, 714 F.2d 646, 647-48 (6th Cir. 1983)). The premise

behind this holding is to encourage all plaintiffs, including lawyers, to retain independent counsel without the burden of legal fees. *Hamer*, 132 Ill.2d 49 at 59. This Court acknowledged that an independent lawyer brings an unbiased and objective opinion even to counsel Relator. *Id.* at 62. In contrast, a self-represented lawyer, his member attorneys and firm, all have the same interest in the suit and are not truly independent. *Id.* As a result, a relator's representation of himself as both a client and attorney in IFCA suits violates public policy, because the attorney's fee provision rewards relator for representing his own interest. In such situations, no attorney fees are necessarily incurred, as the Relator's self-representation creates no obligation to pay legal fees to any attorney – win or lose.

Indeed, in *Hamer*, this Court determined that the attorney's fee provision is an incentive for individuals to report fraud without being deterred by the obstacle of legal fees. *Hamer*, 132 Ill.2d 49 at 59. As a result, attorney's fees cannot be awarded when an attorney did not actually incur fees. This Court explained that the legal fees of the relator-lawyer in *Hamer* were not an obstacle, because the relator could perform his own legal work and his fellow member's work. *Id.* Thus, it is contrary to public policy to allow an attorney to represent himself and charge for member lawyers and his services when relator personally incurs no fees.

Here, the Appellate Court observed the ethical implications of allowing Diamond to collect attorney's fees he did not actually incur. App. Ct. Op. at ¶ 144. The court held that if they were to award attorney's fees to Diamond as a Relator it could create the

potential for abusive fee generation and double recovery. *Id.* Thus, it is contrary to public policy to allow Diamond to recover attorney's fees as both a relator and an attorney. [5]

Hamer is even more compelling because it relates to the common good principle. Even the United States Supreme Court, in *Kay v. Ehrler,* 499 U.S. 432 (1991) did not explicitly address the most relevant issue in this case of whether an attorney who represents himself, with his member-lawyers, is entitled to attorney's fees. The precedent from *Hamer* is significantly more important to this issue.

As *Hamer* explained, awarding Diamond attorney's fees is against public policy because it grants fees that are not actually incurred by Diamond as relator. The award of attorney's fees will allow for abusive fee generation and double recovery. This Court should apply the same analysis as it did in *Hamer*, and recognize the public policy implications if the legislature's purpose and the common good is not promoted.

III. RELATOR'S ENFORCEMENT OF SUITS UNDER THE ACT HAS CONCERNING IMPLICATIONS ON GOVERNMENT'S SEPARATION OF POWERS AND PUBLIC POLICY THAT ENDANGERS THE COMMON GOOD.

The purpose of the qui tam plaintiff is to allow a private citizen to litigate on behalf of the government in furthering the common good. Both the Act and the federal FCA provide that the government may pursue claims "through any alternate remedy available." 31 U.S.C. § 3730(c)(5); see also, e.g., 740 ILCS 175/4(c)(5). Yet, public policy concerns arise when the judicial branch and the relator-attorney are enforcing tax policy, a task that is exclusively given to the executive branch of government.

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[5] Diamond has often identified additional counsel in these IFCA cases, although the petitions he has filed seeking fees reflect the majority of time, if not complete legal work, has been incurred by himself and his employees.

A. Relator's Enforcement of Suits Under the Act and Tax Policy Jeopardizes the Government's Separation of Powers.

In qui tam suits, power is taken away from the executive branch and given to the judicial branch and citizens. While the Act itself may not violate separation of powers, its enforcement has muddled what responsibility lay with each branch. *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The Illinois Department of Revenue has revealed that this is currently a problem in Illinois government. Mark Dyckman, General Counsel at the Illinois Department of Revenue, has argued that false claims are interfering with the Department's authority to administer and enforce tax laws. *Public Hearing of Illinois House Revenue and Finance Committee,* 98th Gen Assem. (July 26, 2012). The Department has a responsibility to address state tax issues as well as coordinate and regulate tax policies. However, the Department has observed that they have not been able to properly perform their job because tax policy is being enforced by relators filing IFCA suits alleging tax liability.

Many of the IFCA claims filed by Diamond involve an insignificant amount of money from a business owner, who either inadvertently failed to include certain sums on tax returns or did not fully understand a tax law's obligation to collect. The effect of a business's liability for a small deficiency is minimal in comparison to the great effect Diamond's abusive fee manipulation has on establishing tax policies. Diamond has derailed the Department's ability to broaden their objectives because of businesses' distrust in Illinois' tax system. *Id.* Diamond's IFCA suits are interfering with the Department's ability to conduct audits to help businesses come into compliance with the law. *Id.* Dyckman has explained that the Department's resources are depleted in bringing good faith tax payers into compliance with the tax law, when half-way through the process the

Department is stopped because Diamond has filed an IFCA suit against the taxpayer. Dyckman stated that had the Relator not sued, the Department would not have penalized the retailer. *Id.*

Ultimately, Diamond's interference in the enforcement of tax law has restricted the Department's ability to take care that laws be fully executed. Contrary to principles of sound public policy, private, unelected citizens are given discretion, through the IFCA, to set tax policies and enforce tax laws. This discretion has historically been with the executive branch to investigate, file suit, and choose meritorious theories to litigate.

Additionally, public policy also disfavors a relator pursuing tax liability because political accountability is erased. It is in the public's interest to have the government assess whether prosecution of a particular suit is in the best interest of the government and the overall common good of society. Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381 425. Relators' broad discretion to pursue FCA claims has created inconsistent rulings as well as problematic tax policy.

Overall, Illinois business and the general public are harmed when individuals who are motivated by fee generation are shaping tax law and regulations through the monopolization of the IFCA. In effect, Diamond's pursuit of hundreds of IFCA suits has allowed him to dictate tax policy, enforce tax liability, and set legal precedent. Diamond has taken on the role of the legislature, the executive, and the judiciary, and he obtains double the recovery of any other Relator for his "work." There are serious implications in allowing non-elected or appointed individuals, who may not understand the tax code, establish tax policy through hundreds of IFCA suits.

If allowed to continue, Diamond and other relator-lawyers will adversely affect Illinois' economy, business, and the common good while double-lining their pockets with a share of the proceeds of the action and with attorney fees. Upholding the Appellate Court's decision gives this Court an opportunity to restore tax policy and administrative control and enforcement of tax laws to the Department which will ultimately restore the IFCA and its enforcement to promoting the common good.

CONCLUSION

For the foregoing reasons, this Court should affirm the Appellate Court's order which reversed the fee award to relator and held that the fee shifting provision of the Act does not permit the award of attorney fees to a self-represented relator-law firm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

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