**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, CHANCERY DIVISION**

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| THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. KWAME RAOUL, Attorney General of Illinois,<br><br>Petitioner,<br><br>v.<br><br>OPTUMRX, INC.; EXPRESS SCRIPTS ADMINISTRATORS, LLC; EXPRESS SCRIPTS, INC.; CAREMARK, LLC; AND CAREMARKPCS HEALTH, LLC,<br><br>Respondents. | ) | CASE NO. 2022-CH-07853 |

**MEMORANDUM IN SUPPORT OF RESPONDENTS' JOINT MOTION TO DISQUALIFY CONFLICTED COUNSEL JOANNE CICALA, JOSH WACKERLY, EDWIN GAULT, JR., LAWRENCE DEAS, WILLIAM LISTON, AND MATTHEW MCDONALD**

## INTRODUCTION

The Office of the Attorney General of the State of Illinois (OAG) and its Special Assistant Attorneys General advance a remarkable—and troubling—position: They contend that when the OAG appoints private lawyers to serve as Special Assistant Attorneys General for the purpose of investigating on the State's behalf, those private lawyers can wield governmental power without abiding by the ethical rules that apply to government lawyers. That is not, and cannot be, the law.

The OAG has appointed lawyers from four out-of-state firms to serve as Special Assistant Attorneys General: Joanne Cicala and Josh Wackerly of The Cicala Law Firm, PLLC (Texas), Edwin Gault of Forman Watkins & Krutz LLP (Mississippi), Lawrence Deas and William Liston of Liston & Deas, PLLC (Mississippi), and Matthew McDonald of David Nutt & Associates (Mississippi).[1] Armed with the State's investigative powers, those lawyers served sweeping subpoenas on Respondents OptumRx, Express Scripts, and Caremark seeking all manner of confidential business records, information, and testimony relating to insulin pricing and other facets of Respondents' work as pharmacy benefit managers (PBMs). Yet at the same time, those same private lawyers are actively litigating civil cases against Respondents in other jurisdictions on behalf of other clients. Respondents recognize and do not challenge the OAG's authority to undertake investigations or to appoint Special Assistants. But it is unethical for Cicala, Wackerly, Gault, Deas, Liston, and McDonald—referred to in this brief as "the conflicted lawyers"—to investigate Respondents as Special Assistant Attorneys General while simultaneously suing Respondents in other jurisdictions on behalf of various private and public clients.

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[1] The OAG conditioned each appointment on "full compliance" with Illinois's ethical rules and required each lawyer to disclose potential conflicts. Ex. A.

In the conflicted lawyers' hands, the OAG's Subpoenas are not merely investigative tools but are instead vehicles for obtaining discovery that could benefit their private practices and other clients elsewhere. The ethical concerns do not turn on the conflicted lawyers' intentions (good or bad). It is enough that the conflicted lawyers *could* use confidential information gained through the Subpoenas to advance separate litigation against Respondents. Applicable ethics rules require disqualification.

Illinois Rule of Professional Responsibility 1.11(c) makes that clear. Under Rule 1.11(c), "a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." The conflicted lawyers' involvement in enforcing the Subpoenas violates Rule 1.11(c) because (1) a Special Assistant Attorney General with investigative powers qualifies as a "public officer," (2) the non-public information covered by the Subpoenas constitutes "confidential government information," and (3) the conflicted lawyers represent other private clients whose interests are adverse to Respondents and could use the confidential government information to Respondents' material disadvantage in those cases.

The conflicted lawyers' engagement also violates Illinois's procurement law, which is expressly incorporated in relevant part into their retention agreement with the State. Illinois's procurement law prohibits exploiting for personal benefit "insider information" gained through government service. The conflicted lawyers have contingency-fee arrangements with various public and private clients advancing claims against Respondents. The procurement law prohibits the conflicted lawyers from receiving documents and information responsive to the Subpoenas that they could use to litigate cases in which they have a financial incentive.

That the OAG possesses criminal jurisdiction under the statutes invoked in the Subpoenas highlights the ethical conflicts and appearance of impropriety. Although there is no basis for criminal liability, private-practice lawyers representing clients in civil cases should not be handed (in other cases) criminal power to wield for their clients' or their own ends. Given the conflicted lawyers' ongoing campaign against Respondents in other jurisdictions, their appointment as Special Assistant Attorneys General taints the investigation and undermines public trust.

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Respondents have always been ready and willing to respond to the Subpoenas as soon as the ethical conflicts are eliminated. Each has offered to work directly with the OAG—or with any non-conflicted counsel that the OAG chooses to appoint. But the conflicted lawyers' appointment as Special Assistant Attorneys General represents the clearest kind of ethical conflict: They seek to use the State's power to obtain information that they could use to pursue financial recoveries for their clients and their firms in other lawsuits. That abuse of government power erodes the public trust. The Court should disqualify the conflicted lawyers (and their firms).

## BACKGROUND

On June 22, the OAG issued Subpoenas to OptumRx, ESI, and Caremark seeking information and testimony about insulin pricing and the provision of PBM services in Illinois, directing Respondents to produce documents and responses to conflicted lawyer Joanne Cicala.[2] *See, e.g.*, OptumRx Subpoena at 1; ESI Subpoena at 1; Caremark Subpoena at 1. The Subpoenas purport to find their authorization in the Illinois False Claims Act, the Illinois Consumer Fraud

[2] The OAG also issued subpoenas to certain of Respondents' parents, subsidiaries, and affiliates—CVS Health Corporation, CVS Pharmacy, Inc., Caremark RX, LLC, Zinc Health Services, LLC, UnitedHealth Group, Inc., Optum, Inc., OptumRx Holdings, LLC, OptumInsight, Inc., Emisar Pharma Services LLC, Coalition for Advanced Pharmacy Services, Inc.—but the OAG did not petition against those entities and did not name them as Respondents.

Act, and the Illinois Antitrust Act, but they also suggest that the OAG's investigation concerns any "potential Illinois statutory and common law violations." *Id.* at 2.

Through the Subpoenas, the conflicted lawyers and the OAG seek information spanning nearly two decades—from January 1, 2003 to the present. The Subpoenas each include 30 to 32 document requests and 23 interrogatories. They demand "[a]ll Documents and Communications" relating to various aspects of the PBM business without any limitation to Illinois. *See, e.g.*, OptumRx Subpoena, Requests 3–5, 8, 9, 13, 14, 16–18, 20–26, 28, 30.[3] The interrogatories are similarly expansive, requiring Respondents to identify, for example, "any situation during the Relevant Time Period where an At-Issue Drug was excluded from one of Your formularies." OptumRx Subpoena, Interrogatory No. 8.

The Subpoenas indicate that the designated recipient, Joanne Cicala, has been "appointed Special Assistant Attorney General" and is vested with government authority to accept materials received under the Subpoenas.[4] *See, e.g.*, OptumRx Subpoena at 2. Cicala's retention agreement with the OAG provides for a contingency fee of up to 25% of any "recoveries" obtained for the State. *See* Ex. B at 4. Although the retention agreement does not specify the factual basis for investigating Respondents, the agreed contingency-fee tiers contemplate that Cicala and the other conflicted lawyers could seek millions in damages. *Id.*

Meanwhile, the conflicted lawyers are seeking substantial monetary damages from Respondents in other lawsuits on behalf of other clients. Cicala and her law partner Wackerly alone have filed more than 50 insulin- and opioid-related private lawsuits against PBMs and affiliated

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[3] *Accord* ESI Subpoena Requests 3–5, 9–11, 13, 15–16, 18, 20, 22–27, 28, 30, 32; Caremark Subpoena Requests 2, 4–6, 9, 11–26, 28, 30. To avoid duplication, this brief refers generally to the OptumRx version of substantially similar interrogatories and document requests.

[4] The Illinois laws underpinning the Subpoenas prohibit the OAG from disclosing the acquired information and documents to the public. *See, e.g.*, 740 ILL. COMP. STAT. ANN. 10/7.

entities. *See, e.g., Jefferson Cnty. v. Dannie E. Williams, M.D., et al.,* No. 20JE-CC00029 (Mo. Cir. Ct.) (suit against OptumRx, ESI, Caremark, and others); *Harris Cnty., Tex. v. Eli Lilly & Co. et al.*, No. H-19-4994 (S.D. Tex.) (suit against OptumRx, ESI, Caremark, and others dismissed with prejudice); *see also* Appendix A (listing Cicala's other litigations against Respondents). For her part, Cicala has already decided before investigating that "PBMs are absolutely among the villains in this story [of the opioid crisis]." Ex. C at 2. Cicala has touted that she "was the first attorney in the country to include PBMs among the corporate entities" allegedly complicit in the opioid crisis.[5] She has also claimed in public statements that "[PBMs and manufacturers] have been working together to create an artificial pricing system, and so anyone purchasing insulin is being harmed by this conspiracy by two dominant market actors."[6] On Twitter, before her *Harris County* lawsuit was dismissed with prejudice, Cicala promised that "change is going to come" to the alleged "pricing scheme." *See* Ex. D, Reply to @ben_ippolito (Jan. 23, 2021).

The other conflicted lawyers—Gault, Deas, Liston, and McDonald—have joined Cicala in representing the State of Mississippi and the State of Arkansas in insulin-pricing suits against Respondents. *State of Miss. ex rel. Fitch v. Eli Lilly & Co., et al.*, No. 3:21-CV00674 (S.D. Miss.); *State of Arkansas ex rel. Rutledge v. Eli Lilly & Co., et al.*, No. 4:22-cv-549 (E.D. Ark.). McDonald is also suing OptumRx in *Ohio Bureau of Workers Compensation v. OptumRx Administrative Services, LLC*, No. 19-cv-002263 (Ohio Comm. Pleas). The discovery requests that conflicted counsel served in those and other private cases in many respects mirror the requests in the

[5] The Cicala Law Firm PLLC, *Joanne Cicala*, https://cicalapllc.com/joanne-cicala/.
[6] STAT+, *For the first time, drug makers and PBMs must jointly face an insulin price fixing lawsuit* (Sept. 30, 2020) available at https://cicalapllc.com/wp-content/uploads/2020/09/Pharma-and-PBMs-must-jointly-face-insulin-price-fixing-lawsuit-for-first-time.pdf

Subpoenas. *See* Ex. E, Expert Report and Opinion of Sari W. Montgomery and Wendy J. Muchman at 9.

After receiving the Subpoenas, Respondents alerted the OAG to the conflicts with the private lawyers. In a July 27, 2022 call, OptumRx's counsel expressed to the OAG their concerns about the conflicted lawyers' involvement and affirmed OptumRx's willingness to discuss the scope of the Subpoena. *See* Ex. F, Email from Cicala to Boone (July 27, 2022, 2:35 p.m.). In an August 3, 2022 letter, OptumRx memorialized those positions. Ex. G, Letter from Patterson to Buysse (Aug. 3, 2022). On August 9, 2022, Express Scripts's counsel sent a letter raising the same ethical concerns. Ex. H, Letter from Scherr to Buysse (Aug. 9, 2022). Likewise, on July 29, 2022, Caremark's counsel sent an e-mail to Cicala expressing similar concerns and requesting a call with an attorney from the OAG, which Cicala agreed to arrange. *See* Ex. I, Email from Dockery to Cicala (July 29, 4:37 p.m.), Email from Cicala to Dockery (Aug. 1, 2022, 3:13 p.m.). While those discussions were ongoing, OAG extended Respondents' time to move to quash or to respond to the Subpoenas. *See* Ex. F, Email from Cicala to Boone (July 27, 2022, 2:35 p.m.); Ex. J, Email from Cicala to Scherr (July 21, 2022, 11:07 a.m.); Ex. I, Email from Dockery to Cicala (July 29, 4:37 p.m.); *see also* Ex. K, Letter from Buysse to Patterson, Scherr, and Dockery (Aug. 11, 2022).

Despite having agreed to extensions of Respondents' time to move to quash or respond to the Subpoenas, the OAG filed a Petition for Enforcement of the Subpoenas. *See* Ex. K. The OAG emailed the Petition to Respondents and, in the same email, attached a letter for the first time setting forth the OAG's positions on the conflicts. *See, e.g.,* Ex. L, Email from Buysse to Patterson (Aug. 11, 2022, 5:45 p.m. ET). Respondents now move to disqualify the conflicted lawyers from enforcing the Subpoenas.

## LEGAL STANDARD

This Court has discretion to grant a motion to disqualify counsel. *Skokie Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 116 Ill. App. 3d 1043, 1053 (1983). Disqualification safeguards courts' "vital interests in protecting the attorney–client relationship, maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings." *In re Est. of Wright*, 377 Ill. App. 3d 800, 804 (2007) (citation omitted). "Accordingly, any doubts as to the existence of a conflict should be resolved in favor of disqualification." *SK Handtool Corp. v. Dresser Indus.*, 246 Ill. App. 3d 979, 989–90 (1993).

The ethical standards for government lawyers are even higher. "Society reposes in its prosecutors an awesome and sacred trust . . . . Not surprisingly, the grant of such staggering power carries with it commensurate responsibilities." *People v. Weilmuenster*, 283 Ill. App. 3d 613, 626 (1996). "[A]ttorneys general are charged with the special duty to seek justice—a duty which is quite different from the responsibilities of the usual advocate." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 476 (R.I. 2008). Accordingly, a government attorney has "a particularly high duty to comply with the law," *Shomon v. Pott*, No. 84 C 10583, 1986 U.S. Dist. LEXIS 28956, at *4 (N.D. Ill. Feb. 24, 1986), and "to strive toward fairness, independence and impartiality in official proceedings." *EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 250 (N.D. Ill. 1980).

## ARGUMENT

Government lawyers must play by the rules that apply to government lawyers. The conflicted lawyers have chosen not to play by those rules, so they must be disqualified.

### I. THE COURT SHOULD DISQUALIFY THE CONFLICTED LAWYERS BECAUSE THEIR INVOLVEMENT VIOLATES ILLINOIS RULES OF PROFESSIONAL CONDUCT.

Section 3.5.1 of the conflicted lawyers' contract with the Attorney General confirms that they "[are] bound by the Attorney General's Rules of Professional Conduct." Illinois's legal ethics

rules—like many states' ethics codes—include special requirements that apply to government attorneys. Illinois Rule of Professional Conduct 1.11(c) is one such rule:

> Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

The conflicted lawyers' use of the Subpoenas to gather information and documents violates Rule 1.11(c) because they would gain access to the Respondents' confidential information through their roles as Special Assistant Attorneys General while simultaneously pursuing other private cases against Respondents to enrich themselves and their clients. There is no question that the conflicted lawyers *could* use the confidential government information to Respondents' material disadvantage, which is all that is required to violate Rule 1.11(c).

### A. Rule 1.11(c) applies to Special Assistant Attorneys General.

In response to Respondents' concerns about the conflicted lawyers' involvement, the OAG argued that Special Assistant Attorneys General are not "government officers or employees." Ex. K. But the question is not whether Special Assistant Attorneys General are government officers or employees for *all* purposes; it is whether Rule 1.11 applies to Special Assistant Attorneys General when they act on the government's behalf. The answer, of course, is that it does. *See* Ex. E at 19–21.

Although "[m]ere representation of, or work for, a government agency" does not convert a private lawyer into an OAG employee, the conflicted lawyers are not merely representing the OAG as a client. Instead, the OAG appointed them as Special Assistant Attorneys General, vesting the conflicted lawyers with the State's investigative power that the OAG is uniquely authorized by statute to undertake. The conflicted lawyers' contract with the OAG explains that they not only

"represen[t] the Attorney General of the State of Illinois" but also "*exercis[e] the delegated authority* of the Attorney General." Ex. B at § 3.2.3 (emphasis added).

That the conflicted lawyers are classified as independent contractors rather than employees (*see id.* § 3.9.6) is beside the point. Just as an attorney cannot accomplish through an agent what the ethical rules bar the attorney from accomplishing directly, the OAG cannot assign its powers to a private lawyer and then exempt that lawyer from complying with Rule 1.11(c). That is presumably why the conflicted lawyers' contract with the OAG specifies that "[e]very Special Assistant Attorney General is bound by the Attorney General's Rules of Professional Conduct as now and hereafter amended." Ex. B at § 3.5.1 (Conflicts of Interest and Ethics).

**B. The Subpoenas seek confidential government information under Rule 1.11(c).**

Rule 1.11(c) defines "confidential government information" as "information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public." *Id.* The information sought through the Subpoenas meets that definition.

*First*, there is no dispute that, through the Subpoenas, the conflicted lawyers seek information "under governmental authority." The Subpoenas were issued under Illinois statutes, "in the course of an investigation," to determine whether Respondents violated those statutes. OptumRx Subpoena at 1. Each Illinois statute cited gives the Attorney General—and the Attorney General alone—unique investigative authority. 815 ILL. COMP. STAT. ANN. 505/3; 740 ILL. COMP. STAT. ANN. 175/6; 740 ILL. COMP. STAT. ANN. 10/7.2. The conflicted lawyers are not merely *representing* a government agency; they are exercising a coercive investigative power uniquely vested in the Attorney General.

*Second*, the information sought constitutes "confidential government information" because the OAG is prohibited by law from disclosing the acquired information and documents to the public. The statutes authorizing the Subpoenas confirm as much. Take 740 ILL. COMP. STAT. ANN. 10/7.2, for example: "Except as otherwise provided in this Section, no documentary material, transcripts of oral testimony, or answers to interrogatories, or copies thereof, in the possession of the Attorney General shall be available for examination by any individual other than an authorized employee of the Attorney General or other law enforcement officials, federal, State, or local, without the consent of the person who produced such material, transcripts, or interrogatory answers." *See also* Ex. E at 24–26.

*Third*, the information sought through the Subpoenas also qualifies as confidential government information because it is not "otherwise available to the public." Through the Subpoenas, the OAG and the conflicted lawyers seek proprietary and competitively sensitive information that is not publicly available—including information that Respondents have objected to producing in litigation outside Illinois. And now the conflicted lawyers seek even more confidential information through the State's power. Given their representations outside of Illinois, that violates Rule 1.11(c). *See, e.g.*, *In re Nat'l Prescription Opiate Litig.*, No. MDL 2804, 2019 U.S. Dist. LEXIS 46065, at *74 (N.D. Ohio Mar. 19, 2019) ("information concern[ing] the inadequate staffing levels, funding deficiencies, strategies, initiatives, operations, and allocation of resources" qualified as confidential government information); *United States v. Villaspring Health Care Ctr., Inc.*, U.S. Dist. LEXIS 129933, at *18 (E.D. Ky. Nov. 7, 2011) (disqualifying lawyer under Kentucky's identical Rule 1.11(c) and concluding that "strategic insights, such as [the disqualified lawyer's] knowledge of the strengths and weaknesses of the evidence compiled

against [the investigated company]," qualified as confidential government information); Ex. E at 24–26.

The conflicted lawyers and the OAG have argued that they can address Respondents' concerns about access to confidential government information through a confidentiality agreement that would prevent the conflicted lawyers from using or disclosing information outside of their work as Special Assistant Attorneys General in Illinois. *See* Ex. K at 5 ("As a practical matter, any documents and information obtained in this matter will be subject to confidentiality agreements and, potentially, protective orders."). Setting aside that the conflicted lawyers could not unlearn what they learn by reviewing confidential information under the Subpoenas, the conflicted lawyers and the OAG's argument on that score confirms that they would in fact receive confidential government information through the Subpoenas.

The OAG nevertheless argues that once Respondents produce information in response to the Subpoenas, it won't be "confidential government information" at all. The OAG's explanation for that remarkable proposition is that a plaintiff in civil litigation could seek the same information, rendering the information "otherwise available to the public." *See* Ex. K at 4. But just because a party in a lawsuit can seek information through civil discovery does not make the information publicly available. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984) (unless admitted as evidence, materials obtained through civil discovery are not "a traditionally public source of information"); *see also* Ex. E at 25–26. As the conflicted lawyers and the OAG well understand, parties often produce discovery in civil litigation only once a court has entered a protective order shielding the information from the public. *See* ILL. SUP. CT., R. 201(c)(1).

**C. The conflicted lawyers currently represent private clients in other litigation with interests adverse to Respondents and could use the confidential government information to Respondents' material disadvantage.**

The conflicted lawyers are already representing other plaintiffs asserting claims against Respondents and related entities. *See, e.g.*, *State of Miss., ex rel. Fitch v. Eli Lilly & Co., et al.*, No. 3:21-CV00674 (S.D. Miss.); *State of Arkansas ex rel. Rutledge v. Eli Lilly & Co., et al.*, No. 4:22-cv-549 (E.D. Ark.); *Jefferson Cnty. v. Dannie E. Williams, M.D., et al.*, No. 20JE-CC00029 (Mo. Cir. Ct.). That is the clearest type of adverse interest. The conflicted lawyers could use the information and documents sought through the Subpoenas to Respondents' material disadvantage in those other active matters, which involve the same or related subject matters as the Subpoenas. The Subpoenas seek vast amounts of information about Respondents' businesses relating to, among other things, rebate negotiations, formulary offerings, pharmacy reimbursement, and financial strategies. *See, e.g.*, OptumRx Subpoena at 1. The conflicted lawyers are suing Respondents about those very issues in insulin- and opioid-related litigation outside of Illinois. *See,* Third Amended Complaint, *supra*, *State of Miss.*, No. 3:21-CV00674 (S.D. Miss. Feb. 17, 2022), ECF No. 71 ¶ 24 (involving allegations that "PBM Defendants profit off the false list [insulin] prices that result from the scheme in numerous ways, including (1) retaining a significant—yet undisclosed—percentage of the secret Manufacturer Payments, (2) using the false list price produced by the Insulin Drug Pricing Scheme to generate profits from pharmacies in their networks and (3) relying on those same false list prices to drive up the PBMs' profits through their own pharmacies"); *see, supra, State of Ark..*, No. 4:22-cv-549 (E.D. Ark.) (same); *see also,* Second Amended Petition, *Jefferson Cnty.*, No. 20JE-CC00029 (Mo. Cir. Ct. June 15, 2020) ("PBMs are brokers between payers (representing patients), drug manufacturers, and retailers and they influence which drug products are used most frequently and set prices for pharmacies.").

Given that a lawyer cannot unlearn facts, the conflicted lawyers would use confidential information obtained under the Subpoenas to Respondents' disadvantage in other active litigations, but Rule 1.11(c) does not require a showing that the conflicted lawyer *would* use confidential information. The rule applies so long as the information in question *could* be used elsewhere to Respondents' disadvantage. Even if the conflicted lawyers were prohibited by a confidentiality agreement or protective order from using the documents themselves in another action, Rule 1.11(c) concerns the actual knowledge that an attorney gains that could be used to disadvantage an adverse party. Ill. Sup. Ct. R. Prof'l Conduct, R 1.11 Cmt. [8] (paragraph (c) applies "when the lawyer in question has knowledge of the information, which means actual knowledge"); *see also Kronberg v. LaRouche*, No. 1:09-cv-0947, 2010 U.S. Dist. LEXIS 35097, at *10–11 (E.D. Va. Apr. 9, 2010) (focus is on "attorney's possession of actual knowledge of confidential information"). It is worth underscoring that Rule 1.11(c) does not simply prohibit the *use* of "confidential governmental information" in other matters; it goes further, prohibiting the conflicted representation that could even give rise to such use.

That certain of the conflicted lawyers' other clients are state and local government entities does not change the Rule 1.11(c) analysis. *See* Ex. E at 23–24. Although Rule 1.11(c)'s prohibition refers to a "private client" with adverse interests, the concern underlying the rule applies with equal force to a lawyer's public clients. According to the comments, Rule 1.11 mitigates the risk that "where the successive clients are a government agency and another client, *public or private*, power or discretion vested in the agency might be used for the special benefit of the lawyer's other client." ILL. SUP. CT. R. PROF'L CONDUCT, R 1.11 cmt. 4 (emphasis added). Part of the concern is that "*unfair advantage could accrue to the other client* by reason of access to confidential government information about the client's adversary *obtainable only through the lawyer's government*

*service*." *Id.* (emphasis added); *see also Gen. Motors Corp. v. N.Y.*, 501 F.2d 639, 651–52 (2d Cir. 1974) (disqualifying a former DOJ lawyer from representing the City of New York against General Motors where the former DOJ lawyer was previously involved in an action that the United States brought against GM for similar conduct).

The conflicted lawyers and the OAG have argued that Rule 1.11(c) does not apply because the conflicted attorneys' work as Special Assistant Attorneys General in Illinois and their representation of clients in insulin and opioid litigations are simultaneous rather than "successive." That is wrong—and a concerning argument from a State Attorney General's Office. The rule does not speak in terms of "successive" representations. It prohibits representation when "confidential government information about a person acquired when the lawyer *was* a public officer or employee" could be used by an adverse party to the person's material disadvantage. *Id.* (emphasis added). Here, of course, the conflicted attorneys could receive confidential government information under the Subpoenas one minute in their capacities as Special Assistant Attorneys General, and then use it to Respondents' material disadvantage the next in one of their non-Illinois litigations against the companies; that would qualify as obtaining confidential government information while they "were" a government lawyer.

Consistent with that reality, rules committees have explained that Rule 1.11 applies to concurrent as well as successive representations. *See, e.g.*, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT § 1.11 (AM. BAR ASS'N 9th ed. 2019) ("In addition, Rule 1.11(c) prohibits a lawyer *currently or formerly* employed by the government from representing a private client if the lawyer possesses 'confidential government information' . . . that is damaging to someone with adverse interests." (emphasis added)); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1997-2 (1997) (Rule 1.11 governs concurrent as well as successive service); Peter A. Joy &

Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 541 (2002) (explaining that "courts, bar ethics opinions, and other ethics authorities agree that Model 1.11 may be extended to apply to concurrent representation"); *see also* Ex. E at 24.

In fact, the concerns underlying the rule—that "unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary" (ILL. SUP. CT. R. PROF'L CONDUCT R 1.11 cmt. 4)—are at their highest when a lawyer tries to wield government power and sue the investigated company at the same time in other jurisdictions on behalf of private clients. Interpreting Rule 1.11(c) to permit that sort of simultaneous conduct would make mincemeat of the rule's language and purpose, which is why state ethics boards have rejected the OAG's argument. *See* Ex. E at 24.

Because the conflicted lawyers could use information provided under the Subpoenas to Respondents' material disadvantage in other matters, their appointment as Special Assistant Attorneys General here violates the Illinois Rules of Professional Conduct.

## II. THE CONFLICTED LAWYERS' ACCESS TO CONFIDENTIAL INFORMATION WOULD VIOLATE THE ILLINOIS PROCUREMENT CODE.

Under Article 50 of the Illinois Procurement Code, "[i]t is unlawful for any current or former elected or appointed State official or State employee to knowingly use confidential information available only by virtue of that office or employment for actual or anticipated gain for themselves or another person." 30 ILCS 500/50-50.

Rather than acknowledge the conflict of interest, the OAG has argued that the procurement conflict-of-interest rules do not apply to the Special Assistant Attorneys General. *See* Ex. K at 2. That is wrong. Although the Procurement Code exempts "[c]ontracts necessary to prepare for anticipated litigation, enforcement actions, or investigations" with the agency's chief legal

counsel's prior approval (30 ILCS 500/1-10(b)(7)), the contract makes clear that Special Assistant Attorneys General must comply with the Procurement Code's conflict-of-interest rules:

> The Special Assistant Attorney General expressly covenants that it has no public or private interest which would conflict in any manner with the performance of this contract or which would violate Article 50 of the Illinois Procurement Code (Procurement Code) prohibiting conflicts of interest (30 TLCS 500/50-1 through 50-75). All the terms, conditions, and provisions of those Sections apply to this contract and are made a part hereof the same as though included herein.

§ 3.5.1. Those rules require disqualification: The conflicted lawyers are prohibited from using "confidential information available only by virtue" of their role as a Special Assistant for their own or their other clients' "actual or anticipated gain." 30 ILCS 500/50-50. And there is no way for the conflicted lawyers to wall-off whatever confidential information might be produced in response to the Subpoenas from all the other information that they have access to in connection with their other lawsuits. They are inherently conflicted. The Court should disqualify them from enforcing the Subpoenas against Respondents.

## III. THE COURT SHOULD ALSO DISQUALIFY THE CONFLICTED LAWYERS FROM ENFORCING THE SUBPOENAS BECAUSE THEIR INVOLVEMENT IS AGAINST PUBLIC POLICY AND UNDERMINES FAIRNESS.

The OAG has a special ethical and legal duty to see that justice is done. *See generally* 15 ILCS 205/4; *Lead Indus. Ass'n*, 951 A.2d at 476 ("attorneys general are charged with the special duty to seek justice—a duty which is quite different from the responsibilities of the usual advocate"). "Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole." *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351 (Cal. 1985).

Here, the conflicted lawyers purport to step into the OAG's shoes to lead an investigation. The OAG has discretion to appoint private attorneys as Special Assistant Attorneys General to

conduct certain matters on the OAG's behalf. *See* ILL. ADMIN. CODE TIT. 2, § 575.260. But when that happens, the public in general—and the companies investigated—must be assured that the OAG is acting impartially and in the public interest, as due process requires.

The conflicted lawyers are not impartial. Take Cicala, for example. If her 50-plus insulin- and opioids-related lawsuits against Respondents left any doubt, she has publicly labeled Respondents "villains" and touted her crusade against them in opioid and insulin litigation. Ex. C. Cicala lacks the "neutrality essential to a fair outcome." *Clancy*, 705 P.2d at 351. Cicala's mind is made up before gathering a single fact in Illinois. The OAG, by contrast, has a duty to seek the truth and to do justice as a neutral party. *See id.*; Ex. E at 26–27.

Fundamental protections are also absent because the conflicted lawyers are acting on a contingency-fee basis. Ex. B at 4. The conflicted lawyers will get paid only if there are "recoveries, whether by settlement or judgment," and are eligible to receive as much as 25% of any recovery. *Id.* The conflicted lawyers' incentive in this case is profit, not justice. And not just in Illinois: The conflicted lawyers are pursuing similar cases in other jurisdictions for other clients.

Illinois law does not authorize the appointment of private counsel to lead an FCA investigation, let alone on a contingency-fee basis, which is why the Subpoenas do not mention (and Respondents are not aware of) any statute or authority that would permit the OAG to delegate its investigative powers in that manner.[7] Of course, Respondents recognize—as the conflicted lawyers will surely argue—that courts have held that contingency-fee arrangements are

[7] The Illinois FCA does not give the OAG this power. On the contrary, it says that only the "Attorney General" or its "designee" may issue a subpoena—and goes on to expressly define who that "designee" may be—specifying that the Attorney General may delegate its powers to "the Department of State Police." When a statute enumerates certain powers or authorities, and excludes others, courts must give effect to the statutory text. *Cf. Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 151-52 (1997) ("Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions.").

appropriate in *non-criminal* litigation provided that the OAG retains "complete control over the course and conduct of the case," "a veto power over any decisions" of outside counsel, and that "a senior member of the Attorney General's staff [is] personally involved in all stages of the *litigation*." *Lead Indus. Ass'n*, 951 A.2d at 477; *see also, e.g., Cnty. of Santa Clara v. Superior Court.*, 235 P.3d 21, 36 (Cal. 2010) (similar); *City of Chi. v. Purdue Pharma L.P.*, No. 14 C 4361, 2015 U.S. Dist. LEXIS 24712, at *16 (N.D. Ill. Mar. 2, 2015). Courts require those safeguards because when an Attorney General engages private counsel under a contingency-fee arrangement, heightened scrutiny is necessary to protect defendants' due process rights. *See Lead Indus. Ass'n*, 951 A.2d at 475 ("such contractual relationships must be accompanied by exacting limitations"). Here, OAG's refusal to accept documents directly and insistence that Respondents produce documents to Cicala suggests that the OAG does not plan to retain meaningful control over the investigation. *See* Ex. M, (October 7, 2022 Declaration of R. Hoernlein).

Contingency arrangements are "categorically barred" in criminal cases because it is "beyond dispute that due process would not allow for a criminal prosecutor to employ private co-counsel pursuant to a contingent-fee arrangement." *Cnty. of Santa Clara*, 235 P.3d at 31; *id.* at n.7.[8] For the same reasons that prosecutorial impartiality is a categorical requirement in criminal cases, courts also have extended the prohibition against the use of contingency fees in criminal actions to "quasi-criminal" civil actions that "coincide with" or "resemble" criminal prosecutions. *Clancy*, 705 P.2d at 351; *Cnty. of Santa Clara*, 235 P.3d at 33. This is because "some civil cases

[8] *See also Lead Indus. Ass'n*, 951 A.2d at 475 n.48 (precluding contingent-fee arrangement in criminal context because the court was "unable to envision a criminal case where contingent fees would ever be appropriate"); *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000) ("Numerous courts ... have recognized ... that the use of a private attorney in the prosecution of a criminal case may present ethical dilemmas, including conflicts of interest.").

may demand[] the representative of the government to be absolutely neutral," which "precludes the use [of private counsel] in such cases of a contingent fee arrangement." *Id.*

Here, the conflicted lawyers' investigation implicates all of those concerns. The Illinois FCA authorizes treble damages, civil penalties, and punitive damages. Courts across the country have recognized that statutory causes of action that authorize civil penalties are quasi-criminal, including the federal FCA. *See United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 197 (4th Cir. 2018) (FCA is "quasi-criminal"); *First Am. Bank of Va. v. Dole*, 763 F.2d 644, 651 n. 6 (4th Cir. 1985) ("Civil penalties may be considered 'quasi-criminal' in nature."); *United States v. Sanchez*, 520 F. Supp. 1038, 1040 (S.D. Fla. 1981) ("[T]he imposition of a fine as a penalty for violation of the law can be considered 'quasi-criminal' in nature."). And the Supreme Court has recognized that actions under the federal FCA—which mirrors the Illinois FCA—involve penalties that are "essentially punitive in nature." *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).

Beyond that, the stated scope of this investigation extends, at least potentially, to criminal theories of liability. The Subpoenas themselves suggest that the OAG is pursuing an open-ended inquiry into "potential Illinois statutory and common law violations" (*see, e.g.*, OptumRx Subpoena at 2), which inherently "carrie[s] the threat of criminal liability" (*Cnty. of Santa Clara*, 235 P.3d at 33), even if (as here) criminal liability is unjustified. The conflicted lawyers' deployment of government subpoenas ungrounded in any factual predicate makes this investigation far removed from the traditional civil case in which the OAG's retention of outside counsel may be appropriate—one where, unlike here, the OAG has already investigated and concluded that a suit has merit.

## IV. RESPONDENTS ARE WILLING TO WORK WITH THE OAG DIRECTLY AND DISQUALIFICATION WOULD NOT PREJUDICE OAG.

Although courts must enforce the "canons of legal ethics," that need is balanced with the potential "use of disqualification motions as a tactical weapon in litigation." *SK Handtool,* 246 Ill. App. 3d at 989. That risk does not exist here. Respondents have complied with other investigations relating to insulin pricing without moving to quash. And they have repeatedly made clear that they intend to respond to the Subpoenas so long as conflicted counsel cannot access Respondents' confidential information. This motion is not a tactic. It is grounded in ethical concerns that are legitimate and legitimately held.

No remedy other than disqualification would resolve the conflict. It would be impossible for the conflicted lawyers (and the other lawyers at their firms) *not* to use what they learn through the Subpoena responses for their own benefit. Once a lawyer learns something, she can't unlearn it. *See* Ex. E at 23–24.

And disqualification will not prejudice the OAG's investigation. The OAG's investigation is in its preliminary stages, and the office has already appointed non-conflicted Special Assistant Attorney General—Illinois lawyer James F. Clayborne of Clayborne & Wagner LLP—who can negotiate with Respondents about the Subpoenas. There is no prejudice to the OAG.

## CONCLUSION

Illinois law and the rules of professional conduct prevent Cicala, Wackerly, Liston, Deas, Gault, and McDonald from investigating Respondents as Special Assistant Attorneys General while representing private clients elsewhere in related litigation against Respondents. The Court should disqualify them (and their firms) from enforcing the Subpoenas.

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