No. 121452

IN THE
SUPREME COURT OF ILLINOIS

RICHARD LEE VAN DYKE d/b/a DICK VAN DYKE REGISTERED INVESTMENT ADVISOR, Plaintiff-Appellee, vs. JESSE WHITE, in his official capacity as Secretary of State of the State of Illinois, ILLINOIS DEPARTMENT OF SECURITIES, and TANYA SOLOV, in her official capacity as Director of the Illinois Department of Securities, Defendants-Appellants.	Appeal from the Illinois Appellate Court, Fourth Judicial District, No. 4-14-1109 There Heard on Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 14-MR-305 The Honorable JOHN W. BELZ, Judge Presiding.

REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS-RELIEF OF DEFENDANT-APPELLANT JESSE WHITE

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Van Dyke argues that the hybrid investment products, equity-indexed annuities ("EIAs"), are not "securities" under the Illinois Securities Law ("Act"), 815 ILCS 5/1 *et seq*. (2016), because their regulation under the Insurance Code excludes them from a separate definition of "face amount certificate contract." The Act's plain language, however, defines "security" to include such financial products if they also constitute an "investment contract." By offering buyers returns based on stock market performance, EIAs fall within the U.S. Supreme Court's broad and flexible definitions of "investment contract" and "security" adopted by Illinois and federal courts. Nor does any provision of the Insurance Code – including its article regulating the issuance and maintenance of a distinct product, variable contracts – exclude EIAs from the Act's antifraud provisions. To the contrary, such overlapping oversight is consistent with the Act's plain terms and the simultaneous regulation of hybrid annuities under state insurance laws and federal securities laws.

Second, consistent with federal authority, the Secretary properly concluded that Van Dyke owed a fiduciary duty as an investment adviser under section 12.J to recommend only financial transactions in his clients' best interests. Regardless, Van Dyke's factual disputes over the weight of the evidence fail to demonstrate that the Secretary's decision was arbitrary and

capricious or that the record did not support the Secretary's findings that the replacement transactions were not in his clients' best interests, were unsuitable for those clients, and that he worked a fraud or deceit in recommending them.

Finally, the Court should deny Van Dyke's requests for cross-relief. Van Dyke failed to show that there was insufficient evidence to support the Secretary's determination that he acted as his clients' investment adviser when recommending the replacement transactions. He forfeited any challenge to the fine and other sanctions and, regardless, their imposition was not an abuse of discretion. Van Dyke likewise forfeited his claim for attorney fees, and failed to show that the Illinois Securities Department engaged in improper rulemaking by litigating the factual and legal issues in its individual enforcement action.

I. The EIAs Are Securities Under The Act.

A. The EIAs Are Investment Contracts Under The Act's Plain Language.

Van Dyke primarily argues that EIAs are not "securities" under the Act because they are also regulated under the Insurance Code. (AE Br. at 30-31, 33-35).[1] He asserts that the Act's separate definition of "face amount

[1] This brief refers the Secretary's opening brief as "AT Br. _," the Secretary's appendix as "A_," Van Dyke's brief as "AE Br. _," Van Dyke's supplemental appendix as "SA _," and amici's briefs as "ACLI Br. _," "F&G Br. _," and NAFA Br. _."

certificate contract" excludes annuities issued by an "insurance company authorized to transact business in [Illinois]." 815 ILCS 5/2.14 (2016). Van Dyke ignores, however, that by using the disjunctive "or," the Act defines "security" to include a product if it constitutes an "investment contract" as well as a face-amount certificate. 815 ILCS 5/2.1 (2016). Thus, regardless of whether EIAs are excluded from the definition of "face amount certificate contract," the plain language of section 2.1 clarifies that they are securities if they also constitute investment contracts. *Id.*; *see Integrated Research Serv., Inc. v. Ill. Sec'y of State*, 328 Ill. App. 3d 67, 71-72 (1st Dist. 2002).

This Court, in turn, has long recognized that the Act adopted the broad and flexible definitions of "security" and its component, "investment contract," developed by the U.S. Supreme Court in applying the Federal Securities Act of 1933 ("Federal Act"). *E.g.*, *Daleiden v. Wiggins Oil Co.*, 118 Ill. 2d 528, 538-40 (1987); *Saunders, Lewis & Ray v. Evans*, 158 Ill. App. 3d 994, 996 (4th Dist. 1987). Because EIAs offer purchasers the prospect of variable and unknown financial growth based on their expectation of profits from the future performance of stock-market indexes, they are "profit-seeking venture[s]" that raise the types of concerns addressed by the Act and fall within the broad term "investment contract" as applied by this Court. *See Daleiden*, 118 Ill. 2d at 537-38.

Van Dyke responds that neither *Integrated Research* nor the Secretary's other cited Illinois authority involved annuities. (AE Br. at 46-47; *see* ACLI Br. at 22). *Integrated Research* addressed, however, when financial transactions constitute a "security," and held that the plain language of section 2.1 provides that a product or transaction constitutes a "security" if it falls within *any* of the listed instruments defining that term – even though the currency transaction at issue was excluded from the listed currency transactions. 328 Ill. App. 3d at 70-71; *see In re C.N.*, 196 Ill. 2d 181, 210-11 (2001) (use of "or" indicates disjunctive). Thus, an annuity issued by an authorized insurance company may not be a security based on its status as a face-amount certificate, but still will be a security if it constitutes an "investment contract." 815 ILCS 5/2.1, 2.14 (2016). Accordingly, because there is no conflict between these definitions, section 2.14's exclusion of certain annuities cannot control over the broad and flexible definitions of "security" and "investment contract" under section 2.1. *See People ex rel. Dir. of Corr. v. Booth*, 215 Ill. 2d 416, 424-25 (2005) (declining to find more specific provision controlled over provision that could be read harmoniously); *Daleiden*, 118 Ill. 2d at 538-40.

Van Dyke contends that Illinois courts that have addressed EIAs found that they were not securities under the Act. (AE Br. at 47-48) (*citing Babiarz v. Stearns*, 2016 IL App (1st) 150988, and *Rasgaitis v. Waterstone Fin. Grp.,*

Inc., 2013 IL App (2d) 111112). Neither decision, however, interpreted the plain terms of the Act's definitions nor acknowledged *Daleiden* or any other Illinois authority applying the Act's definitions of "security" and "investment contract." Instead, each concluded that the Act's statute of limitations did not apply to private fraud claims involving EIAs because those contracts were registered under the Insurance Code but not registered as securities under section 3.M of the Act. *See Babiarz*, 2016 IL App (1st) 150988, ¶¶ 33-36; *Rasgaitis*, 2013 IL App (2d) 111112, ¶ 37. Section 3.M exempts such securities issued by authorized insurance companies from *registration*, but not from the antifraud protections of section 12. (AT Br. at 42-44); *see* 815 ILCS 5/3.M, 11, 12 (2016); Samuel H. Young, *Exemptions From Registration Under The Ill. Sec. Law Of 1953*, 1961 U. Ill. L.F. 205, 208, 224 ("*Exemptions*").

Contrary to Van Dyke's claim (AE Br. at 48-49), this construction of the Act does not render all annuities exempt securities. Only hybrid insurance products that shift sufficient risk to buyers or appeal to those buyers based on prospects of investment growth constitute investment contracts and, therefore, securities exempt under section 3. *See* 815 ILCS 5/2.1 (2016); *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 210-12 (1967); *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 170-76 (D.C. Cir. 2010). Buyers of traditional annuities, in contrast, expect a fixed and determinable return, not fluctuating and uncertain profits from the efforts of third parties (*i.e.*, stock performance). *See*

Daleiden, 118 Ill. 2d at 538. Thus, traditional annuities are not investment contracts subject to the Act.

B. The EIAs Are Investment Contracts, And So Securities, Under Federal Authority Applying The Definitions Incorporated Into The Act.

Van Dyke suggests that this Court should ignore federal authority finding that EIAs and other hybrid financial products are securities because Illinois law controls construction of the Act. (AE Br. at 46). But this Court has recognized that by adopting the Federal Act's definition of security, the legislature also adopted the U.S. Supreme Court's construction of the terms "investment contract" and "security" in applying the Act. *Daleiden*, 118 Ill. 2d at 537-40. The U.S. Supreme Court and federal appellate courts, in turn, have determined that hybrid financial contracts, including EIAs, constitute "investment contracts," and so "securities," under the Federal Act. *See, e.g.*, *United Benefit*, 387 U.S. at 210-12; *Am. Equity*, 613 F.3d at 168, 171-77.

Van Dyke and his amicus assert that federal authority holding that variable annuities are securities are distinguishable because EIAs provide minimum guarantees. (AE Br. at 46; ACLI Br. at 21-25). The U.S. Supreme Court and federal appellate courts, however, rejected arguments that guaranteed principal or returns transformed hybrid annuities into exempt insurance contracts rather than securities. *See United Benefit*, 387 U.S. at 205-06, 212; *Am. Equity*, 613 F.3d at 174-77; *Otto v. Variable Annuity Life Ins.*

Co., 814 F.2d 1132, 1141-42 (7th Cir. 1986) (finding fixed annuity offering additional discretionary return was investment contract because it "tend[ed] to shift the investment risk from [the insurer] to the plan participant"); *Peoria Union Stock Yards Co. Ret. Plan v. Penn. Mut. Life Ins. Co.*, 698 F.2d 320, 324-25 (7th Cir. 1983) (finding pension contract providing guaranteed return plus *pro rata* share of portfolio was investment contract).

For example, *United Benefit* concluded that the "Flexible Fund annuity" at issue constituted a security, even though it guaranteed that the buyer would receive a minimum return that increased annually until it constituted all paid premiums. 387 U.S. at 205-06, 212. *Otto* similarly found that a fixed annuity providing a discretionary excess rate over a 4 percent guaranteed return constituted an investment contract because the issuer could subsequently decrease the excess rate in future years. 814 F.2d at 1129, 1140-42. Although the fixed annuity guaranteed a return, the court recognized that the "the prospect of 'excess' interest [was] a principal inducement to purchase this particular instrument." *Id*. at 1142.

Consistent with this authority, the only federal appellate court addressing EIAs concluded that the SEC had reasonably determined that EIAs constitute securities subject to regulation under the Federal Act. *Am. Equity*, 613 F.3d at 170-75. Despite their guaranteed features, EIAs' offer of potential profits involves investment considerations and imposes investment risk that

raises concerns addressed by the securities laws' antifraud protections. *See id*. at 171-75. Indeed, "investments pitched as low risk (such as those offering a 'guaranteed' fixed return) are particularly attractive to individuals more vulnerable to investment fraud, including older and less sophisticated investors." *SEC v. Edwards*, 540 U.S. 389, 394 (2004).

Van Dyke and amici note that *American Equity* ultimately vacated the SEC rule that regulated EIAs as securities, and that Congress subsequently enacted the Dodd-Frank Wall Street Reform And Consumer Protection Act, which effectively amended the Federal Act to exempt EIAs meeting specified criteria as insurance contracts. (AE Br. at 45-46; ACLI Br. at 8-10; F&G Br. at 23-28; NAFA Br. at 12-14); Public Law No. 111-203, 124 Stat. 1376, § 989J (2010) ("Dodd-Frank Act"). *American Equity*, however, vacated the new agency rule only because the SEC had not complied with the Federal Act's procedural requirement to first perform an economic analysis. 613 F.3d at 176-79; *see* 15 U.S.C. § 77b(b). The Department is under no such obligation under Illinois law. Like federal courts, however, Illinois courts defer to an agency's interpretation of an ambiguous provision of a statute that it is charged to enforce. *Ill. Bell Tel. Co. v. Ill. Commerce Comm'n*, 362 Ill. App. 3d 652, 656-57 (4th Dist. 2005). And like the SEC, the Secretary reasonably determined in this case that the EIAs constituted securities. *See Am. Equity*, 613 F.3d at 173-75.

Congress' subsequent amendment of the Federal Act to exempt EIAs reflects only its policy decision to expand the statutory exemption for insurance to those hybrid annuities. But the Act was not modeled on the Dodd-Frank Act; it was modeled on the original definition of "security" in the Federal Act, and the term "investment contract" as developed by the U.S. Supreme Court. *See Daleiden*, 118 Ill. 2d at 537-40. Unlike Congress, the legislature has not amended the Act to exclude EIAs. Therefore, the Dodd-Frank Act, at most, confirms that the original federal definition of "security" adopted under the Act includes EIAs, like those in this case.

C. Alternatively, The Court Should Defer To The Secretary's Reasonable Construction Of The Act.

Because the Act's plain language supports the Secretary's construction of section 2.1 to include the EIAs as securities, extrinsic aids are irrelevant. *See Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 237 (2001). If the Court concludes that section 2.1 is ambiguous, however, neither Van Dyke nor the amici provide any basis for the Court not to defer to the Secretary's reasonable construction of the statute that he is charged to enforce. (AT Br. at 35-36); *Ill. Consol. Tel. Co. v. Ill. Commerce Comm'n*, 95 Ill. 2d 142, 152-54 (1983).

1. The legislative history supports the Secretary's construction of the Act.

Van Dyke and amicus F&G argue that EIAs are not securities because the 1925 predecessor to the Act defined the term "security" to exclude any

annuity contract issued by an authorized insurance company. (AE Br. at 32-33; F&G Br. at 7-9); Ill. Rev. Stat. 1925, ch. 121½, § 97(1). The challenged transactions, however, are governed by the current Act, not prior versions of the statute. When the legislature rewrote the Act, it specifically removed the exclusion for such annuities from the definition of "security." Ill. Rev. Stat. 1955, ch. 121½, § 137.2(A). By eliminating the exclusion of certain annuities from the definition of "security" and placing it in the separate definition for "face amount certificate contract," while including "investment contract" as a type of security, the legislature evidenced its intent to expand the scope of the term "security." *See Lingwall v. Hoener*, 108 Ill. 2d 206, 212 (1985) (if later statute omits words used in prior version, it is presumed legislature intended to change its meaning).

F&G contends that the legislature adopted its narrow reading of "security" by initially placing the exclusion in its original definition of "investment contract." (F&G Br. at 8); Ill. Rev. Stat. 1953, ch. 121 ½, § 137.2(A), (K). But the legislature promptly amended the new Act to eliminate that restrictive definition of "investment contract," and instead use it as the current definition of "face amount certificate contract." 1955 Ill. Laws 1030, 1034. By adopting the federal definition of "security," and eliminating the prior exclusion restricting the meaning of "investment contract," the legislature expanded the scope of "security" to include the

flexible term "investment contract," as construed by federal courts to encompass "the countless and variable schemes" that may be developed in the future. *See Daleiden*, 118 Ill. 2d at 537-40; *see also* Samuel H. Young, *History, Source, and Effect of the Ill. Sec. Law of 1953 as Amended*, Ill. Rev. Stat. ch. 121 ½ app. 535, 568-69 (1960) (discussing intent of eliminating investment contract definition). When Congress passed the Federal Act, there were only traditional fixed annuities. *See SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65 , 69-70 (1959); *id*. at 75-76 (Brennan, J., concurring). Accordingly, the U.S. Supreme Court recognized that the Federal Act's exemption for annuities was not intended to exclude subsequently developed products that posed significant investment risk to the buyer, regardless of whether they include features of a traditional annuity. *See United Benefit*, 387 U.S. at 210-11. The same is true of the Act.

2. The no-action letters are not evidence of Van Dyke's narrow reading.

The no-action letters cited by Van Dyke and amicus do not provide extrinsic evidence that the EIAs are not securities. (AE Br. at 32; F&G Br. at 15-20). Department no-action letters do not constitute admissible evidence in any civil proceedings, let alone formal legal positions (binding or otherwise) of the Secretary. 815 ILCS 5/15a (2016). Therefore, they are not evidence of the Department's past interpretation of the Act.

Regardless, the cited letters addressed whether the contracts were subject to the Act's registration requirements. The 1984 letter (regarding a variable annuity) and the 2013 letter (regarding an EIA) specifically relied on section 3.M (which exempts such securities from registration requirements), and the 1994 and 2013 letters explicitly warned that this exemption from registration "does not constitute an exemption from the anti-fraud provisions enumerated in Section 12." *Sale of Indexed Annuity Contracts*, No-Action Letter, 2013 Ill. Sec. LEXIS 1, *3 (Ill. Dept. Sec. Jan. 10, 2013); *Teachers Personal Inv'rs Serv., Inc.*, No-Action Letter, 1994 WL 506422, *2 (Ill. Dept. Sec. Aug. 22, 1994); (*see* SA97). Thus, even if they were admissible, the no-action letters would not show that EIAs are excluded from the Act's antifraud protections.

In contrast, in prior official administrative actions, the Secretary has determined that section 2.1 includes variable annuities and, more recently, EIAs as securities subject to section 12. *See, e.g.*, *In re: Sr. Fin. Strategies, Inc.*, Order, 2011 WL 3295987, *6 (Ill. Sec. Dept. May 24, 2011) (finding EIAs were investment contracts in fraud action); *In re: Timmermann*, Consent Order, 2007 WL 1727852, *2 (Ill. Sec. Dept. May 2, 2007) (finding variable annuity was security in fraud action). Thus, the Secretary's determination that the EIAs are investment contracts, and so securities, does not represent a

"drastic change" or "dramatic departure" from any past position. (*See* AE Br. at 32-33; F&G Br. at 31). Accordingly, if the Court concludes that the Act is ambiguous, it should defer to the Secretary's application of section 2.1 to include the EIAs as securities. *See Ill. Consol.*, 95 Ill. 2d at 152-54.

3. Van Dyke's remaining arguments are irrelevant to the proper construction of the Act.

Van Dyke's other arguments regarding the contracts and the Department are irrelevant to the proper construction of the Act. Van Dyke asserts that the EIAs are not securities because the contracts and issuers' sales literature said so. (AE Br. at 41-42). Whether a financial instrument constitutes a security, however, is determined by the substance, not the form, of the contract and transaction. *Ronnett v. American Breeding Herds, Inc.*, 124 Ill. App. 3d 842, 847 (1st Dist. 1984). Thus, this legal question turns on the EIAs' substantive terms that induce consumers to invest in them, not on conclusory boilerplate declarations that have no bearing on the parties' rights, obligations, and investment risks.

Here, there is no dispute that the EIAs offered Van Dyke's clients potential but uncertain profits. *See Am. Equity*, 613 F.3d at 171-74. The terms of those contracts may have varied depending on the complicated formulas under which those returns are calculated. (*See, e.g.*, R1129, 1134-35, 1592, 1601-05, 4657, 4665-68). Under each EIA, however, the clients chose to invest their funds in these contracts instead of other investments, subject to

surrender penalties and annual fees, based upon the hope of reaping profits from future stock performance. (*See id.*); *Am. Equity*, 613 F.3d at 174-75; (*see also* R1064-65, 1331 (emphasizing client's objectives for "Growth" and "Growth potential" in purchasing EIAs)). Therefore, the Secretary reasonably concluded that the EIAs were securities subject to the Act's antifraud protections. (R251).

Van Dyke argues that the Court should not defer to the Secretary's construction of the Act because, he contends, the Secretary and Department lack expertise about insurance products. (AE Br. at 35-39; ACLI Br. at 17). But the Court is addressing the application to complex financial contracts of a statute the Secretary is charged with enforcing. 815 ILCS 5/11 (2016); *see, e.g., Ill. Bell Tel.*, 362 Ill. App. 3d at 656-57. Whether a hybrid contract constitutes a security within the meaning of that statute is clearly within the Secretary's expertise. Van Dyke similarly contends that the Secretary is not entitled to deference because, he claims, the Department's analyses of the challenged sales transactions were inconsistent with the Department of Insurance's suitability regulations. (AE Br. at 37-39). At most, such arguments would go to the merits of the Secretary's violation findings, not to the legislature's intent or the proper construction of the Act.

D. The Insurance Code And Regulations Thereunder Do Not Exclude EIAs From The Act's Antifraud Protections.

Unable to rely on the Act, Van Dyke ultimately argues that EIAs are not securities because they also are regulated under the Insurance Code. (AE Br. at 31-35, 49-52). Neither the Act nor the Insurance Code, however, precludes their overlapping protections for sales to individual consumers. (AT Br. at 41-45). The concurrent regulation of such hybrid financial products under two statutory regimes is consistent with the simultaneous regulation of variable annuities and other hybrid insurance products as securities under the Federal Act and as insurance under state insurance regimes. *See United Benefit*, 387 U.S. at 210 ("conclusively reject[ing]" that adequate state insurance regulation of hybrid annuity demonstrated it was not regulated under Federal Act as security). In light of the Department of Insurance's regulation of insurance companies, contract forms, and related registrations for the issuance or sale of such contracts, section 3 of the Act exempts any such "security" issued by authorized insurance companies from the Act's registration requirements. 815 ILCS 5/3.M (2016). Section 3, however, does not exclude those same securities from the antifraud protections of section 12. *Id.*; *see* Young, *Exemptions*, at 208, 224. Consequently, section 12 still regulates fraud and deceit in the individual sales of hybrid products that raise sufficient investment-related concerns so as to constitute securities. *See Am. Equity*, 613 F.3d at 171-76.

Contrary to Van Dyke's suggestion (AE Br. at 31-32), the Insurance Code does not prohibit investment advisers from recommending EIAs or any product that it regulates. It requires investment advisers (and anyone else) to hold a producer license to sell such products. 215 ILCS 5/500-15 (2016). Accordingly, it is irrelevant whether Van Dyke had acted as an insurance agent for purposes of the Insurance Code when he recommended the challenged transactions. (AE Br. at 31). He also was subject to the Act's antifraud protections because he recommended hybrid products that also constituted securities and, alternatively, he simultaneously acted as an investment adviser. (A7 ¶¶ 29-31).

Van Dyke and amici contend that EIAs cannot constitute securities because they are subject to the Department of Insurance's advertising and suitability regulations. (AE Br. at 33-35; ACLI Br. at 10-12; F&G at Br. at 18-20; NAFA Br. at 12-13). Because EIAs contain features of investment contracts and traditional annuities, however, they raise concerns addressed both by the Act and the Insurance Code, and so are regulated under each. Accordingly, the Department of Insurance imposes the same marketing and suitability standards on the issuing companies and producers selling EIAs as it does for the sales of all annuities. *See* 50 Ill. Admin. Code Parts 990, 1405, 3120. Unlike traditional annuities, however, these financial products are structured to appeal to buyers based on potential profit derived from future

stock performance. *See Am. Equity*, 613 F.3d at 174-75. Consequently, they raise concerns of deceit in the sales of such investment-driven products that section 12 is designed to protect against. *See id.* at 173-76.

Van Dyke and amicus argue that Insurance Code section 245.24 preempts any regulation of EIAs under the Act, even though that provision explicitly applies only to "variable contracts." (AE Br. at 49-52; F&G Br. at 11-14); 215 ILCS 5/245.24 (2016). Contrary to Van Dyke's assertion, construing this provision to apply only to the financial instrument and regulatory regime that it specifies is not a "non sequitur" (AE Br. at 50); it is determining the legislature's intent based on the statute's plain language. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 279 (2003). The legislature enacted Article XIV½ to regulate "variable contracts," the companies issuing them, and the separate accounts maintained for those products. *See* 215 ILCS 5/245.23 (2016). As part of this regime, it included section 245.24 to provide the Department of Insurance with "sole authority" over "variable contracts" to carry out those provisions. 215 ILCS 5/245.24 (2016). Thus, when read in light of the surrounding terms with which it was enacted, section 245.24 applies exclusively to variable contracts, not to EIAs. *See Sherman*, 203 Ill. 2d at 279-80, 286 (provisions should be interpreted in light of other relevant and statute's enumeration of exception "is construed as an exclusion of all other exceptions").

At most, section 245.24 reflects that the legislature is specific when it extends the regulatory scope of the Insurance Code. Van Dyke's policy arguments regarding the risks posed by variable contracts and EIAs are properly addressed to the legislature rather than this Court. *See Roselle Police Pension Bd. v. Village of Roselle*, 232 Ill. 2d 546, 557-58 (2009) (courts may not rewrite statutes to make them consistent with their idea of orderliness or public policy).

Even if section 245.24 applied to EIAs, it does not extinguish antifraud protections under other statutes of individual consumer purchases that involve variable contracts. (AT Br. at 40-41). Section 245.24 provides the Department of Insurance with sole authority over the regulation of variable contracts to carry out the provisions of Article XIV½ regulating the issuing companies, their maintenance of their separate accounts and reserves, and the registration and form of variable contracts. 215 ILCS 5/245.24 (2016); *see* 215 ILCS 5/245.21-245.60 (2016). Indeed, the administrative code section implementing Article XIV½ primarily regulates the issuing companies, separate accounts, registration of contracts, contract terms and forms, and disclosures by the issuer. *See* 50 Ill. Admin. Code Part 1551. Although these regulations require a license to sell variable contracts that the Department of Insurance may suspend or revoke, 50 Ill. Admin. Code § 1551.90, this does not suggest that the legislature intended to preempt antifraud protections under other statutes.

To the contrary, that same rule recognizes that licensed producers may be subject to overlapping regulation by requiring them to report any discipline imposed by state securities agencies or judgments under securities law. *Id*. § 1551.90(d).

F&G's argument that *other* parts of the Insurance Code authorize disciplining insurance producers for fraud in individual contract sales only confirms that the legislature did not enact Article XIV½ to regulate individual consumer purchases. (F&G Br. at 14). Where reasonably possible, courts must interpret statutes in a manner that "avoids an inconsistency and gives effect to both statutes." *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311-12, 314-15 (2001). Section 245.24 conflicts only with those statutory provisions that regulate the matters addressed in Article XIV½: the companies issuing variable contracts and their financial condition; the form, content, and registration of variable contracts; and the maintenance of their separate accounts. 215 ILCS 5/Art. XIV½ (2016). But section 12 of the Act does not regulate or prescribe specific standards for variable contracts or companies issuing and maintaining them that could conflict with Article XIV½. It generally prohibits deceptive practices in the sales of securities and in furnishing investment advice. Therefore, Insurance Code section 245.24 does not preclude the enforcement of section 12's antifraud protections in regard to individual consumer purchases involving variable contracts. *See also New*

Mexico Life Ins. Guar. Ass'n v. Quinn & Co., Inc., 809 P.2d 1278, 1287 (N.M. 1991) (insurance department's exclusive jurisdiction to regulate sales of insurance securities did not eliminate private securities-statute fraud action).

E. The Court Should Consider The Secretary's Legal Arguments That The EIAs Are Securities.

Van Dyke and the amici contend that the Court should disregard any arguments or authority not contained in the Secretary's final order. (AE Br. at 39-44; F&G Br. at 28-35; NAFA Br. at 9-10). They do not dispute, however, that the Department argued in the administrative proceedings that the EIAs constituted investment contracts, and so securities, under the Act. (R151). Instead, they complain that the Secretary had not adequately developed the legal arguments presented on appeal. (AE Br. at 41: F&G Br. at 30; NAFA Br. at 10). But all parties agree that whether EIAs are securities presents a purely legal question of statutory construction. (AE Br. at 28; ACLI Br. at 15-16; F&G Br. at 6; NAFA Br. at 11-14). Thus, the Secretary necessarily adopted the Department's argument that EIAs are investment contracts, and his decision on this legal question provides an adequate basis for judicial review. *See Ress v. Office of State Comptroller*, 329 Ill. App. 3d 136, 140 (1st Dist. 2002); *Chicago & Nw. Transp. Co. v. Ill. Commerce Com'n*, 230 Ill. App. 3d 812, 818-19 (1st Dist. 1992); *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 515 (4th Cir. 2011).

Amici's authority is not to the contrary. *See, e.g.*, *Roman v. Cook Cty. Sheriff's Merit Bd.*, 2014 IL App (1st) 123308, ¶¶ 83-84 (finding board's inadequate credibility and fact findings precluded deference on review). And if the Secretary's reasoning is not sufficiently developed, the remedy is to remand the matter for further explanation – not mandate a statute's construction without regard to relevant arguments, terms, or authority. (AT Br. at 39); *see, e.g.*, *Medina Nursing Ctr., Inc. v. Health Facilities & Servs. Review Bd.*, 2013 IL App (4th) 120554, ¶¶ 23-27 (remanding agency decision for further factual findings).

II. Van Dyke Has Not Shown That The Secretary's Findings Were Against The Manifest Weight Of The Evidence Or Arbitrary And Capricious.

A. Van Dyke Was Under A Fiduciary Duty To His Clients As Their Investment Adviser.

Van Dyke primarily argues that the Department forfeited the issue of his fiduciary duty by failing to adequately allege that duty in the administrative proceedings. (AE Br. at 52). The Department, however, argued that Van Dyke owed a fiduciary duty under section 12.J as an investment adviser during the administrative proceedings in opposing his motion to dismiss and its merits briefs. (R156-65, 232, 461-62).

Without explanation, Van Dyke claims that the Secretary's cited authority is irrelevant. (AE Br. at 53). But he does not dispute that federal authority recognizes that section 206 of the Investment Advisers Act ("IAA")

imposes a fiduciary duty on investment advisers to act in their clients' best interests, or that section 12.J was patterned on section 206. (AT Br. at 49-51); 15 U.S.C. § 80b-1; *see, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 189-95 (1963); *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 500-04 (3d Cir. 2013). And Illinois courts look to such federal authority to apply provisions of the Act modeled on federal law. *See JJR, LLC v. Turner*, 2016 IL App (1st) 143051, ¶ 30. Accordingly, the Secretary reasonably determined that Van Dyke owed his clients a fiduciary duty as their investment adviser. (R253).

Van Dyke argues that the insurance placement liability section of the Code of Civil Procedure limits any fiduciary duty otherwise imposed under Illinois law. (AE Br. at 53). That section, however, only limits Van Dyke's civil liability as an insurance producer from a "cause of action" in court. 735 ILCS 5/2-2201(b) (2016). It does not extinguish or restrict an investment adviser's duties under section 12.J, let alone preclude the State from pursuing administrative penalties and discipline under the Act for breaches of that duty. *See also, e.g., Forest Preserve Dist. of Cook County v. Ill. Labor Relations Bd.*, 369 Ill. App. 3d 733, 750 (1st Dist. 2006) (Code of Civil Procedure generally does not apply to administrative proceedings); *SEC v. City of Miami*, 581 Fed. Appx. 757, 760 (11th Cir. 2014) (qualified immunity does not protect respondent from SEC penalties).

B. The Preponderance Of The Evidence Standard Governs The Department's Administrative Actions.

Van Dyke contends that the Department was required to prove that he violated the Act by clear and convincing evidence because his alleged conduct would constitute a crime. (AE Br. at 66-67). In the administrative proceedings and circuit court, however, he affirmatively argued that the preponderance of the evidence standard applied, and so doubly forfeited this challenge. (R176-77; C282); *see IDHS v. Porter*, 396 Ill. App. 3d 701, 720 (4th Dist. 2009) (respondent forfeited challenge to burden of proof by failing to raise it before agency and circuit court).

Regardless, the Administrative Procedure Act ("APA") mandates a preponderance of evidence burden for administrative actions. 5 ILCS 100/10-15 (2016); 1991 Ill. Laws 4496, 4522 (eff. July 1, 1992). This is consistent with the burden imposed in SEC enforcement actions and private actions under the Federal Act, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (preponderance standard applies to private claims under section 17(a) of Federal Act); *Steadman v. SEC*, 450 U.S. 91, 96-103 (1981) (preponderance standard applies to SEC enforcement actions), and in statutory consumer fraud actions, *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 191-92 (2005). Indeed, recent authority generally applies the preponderance standard to administrative actions charging even criminal

conduct as opposed to civil fraud. *See, e.g.*, *Porter*, 396 Ill. App. 3d at 720-21 (physical abuse of disabled patients).

C. The Secretary's Findings Were Neither Against The Manifest Weight Of The Evidence Nor Arbitrary And Capricious.

Van Dyke has failed to demonstrate that the record does not fairly support the Secretary's findings that he breached his fiduciary duty and otherwise violated section 12.J in recommending the replacement transactions. *See Cisneros v. White*, 337 Ill. App. 3d 93, 103-04 (1st Dist. 2003). Van Dyke contends that the Secretary forfeited any challenge to the appellate court's holding that the administrative decision was arbitrary and capricious. (AE Br. at 54-60). In his petition for leave to appeal and opening brief, however, the Secretary challenged each of the appellate court's arbitrariness findings.

The Secretary argued that he was not required to promulgate regulations to evaluate EIAs or any of the other investment vehicles and "countless and variable schemes" subject to the Act's antifraud protections. *See Daleidan*, 118 Ill. 2d at 538; (*cf.* AT Br. at 55-56; PLA at 22 *with* A8 ¶ 36). Nor was he required any more than the SEC to issue rules delineating the contours of investment advisers' fiduciary duties. *See Capital Gains*, 375 U.S. at 199 (rules under IAA are not substitute for "general and flexible antifraud provisions"). Under federal authority applying the IAA, investment advisers must act in their clients' best interests, and disclose all material facts

concerning a recommended investment. *See, e.g.*, *id*. at 194-95, 200-01. Their negligence is sufficient to constitute a breach. *See, e.g.*, *ZPR Inv. Mgmt. Inc. v. SEC*, 861 F.3d 1239, 1254 (11th Cir. 2017). Like all Illinois agencies, the Secretary may develop such statutory standards through individualized administrative adjudications rather than by rulemaking. *See Danigeles v. Ill. Dep't of Fin. & Prof'l Regulation*, 2015 IL App (1st) 142622, ¶ 78.

Contrary to Van Dyke's claim (AE Br. at 55; A9 ¶ 37), the Secretary contested his claim that the Department "arbitrarily eliminated" the Replacement EIA bonuses to assess their future values. (AT Br. at 56; PLA at 23). The Department's assessment of the contract values was not an arbitrary rule, but was based on testimony and evidence showing that the Replacement EIAs' bonuses would be exceeded by related fees and charges within a few years. (R554-55, 612, 624-25, 839-40; 4917-18).

Van Dyke repeats the appellate court's conclusion that the Department's expert witness, O'Neal, failed to apply the Insurance Code's suitability analysis when comparing the Original and Replacement EIAs. (AE Br. at 58-59; A9 ¶ 39-40). Section 12.J, however, held Van Dyke to a higher best-interests standard than the Insurance Code's suitability standard and, regardless, O'Neal considered Insurance Code suitability factors related to the contracts' financial values (*e.g.*, surrender charges and periods, guaranteed benefits, fees) in analyzing the Original and Replacement EIAs. (AT Br. at 57-

59; PLA at 22-24; *see* R610-19, 4957-84); 50 Ill. Admin. Code § 3120.50(a)(4). Van Dyke cites no evidence showing that a specific feature of a Replacement EIA provided a unique value to a client, let alone that the feature compensated them for the lower cash values calculated by O'Neal.

And contrary to counsel's unsupported opinion, O'Neal's calculations of the present day values of the Original and Replacement EIAs by discounting their future values for the time value of money and owner's life expectancy were commonly used finance techniques, not "ad hoc rules" or "gobbledygook." (AE Br. at 56; R616-18, 4973-77). Van Dyke's speculation that his clients would never need to use their EIA accounts because they had other assets or income raises a factual dispute, at best. But it does not provide a basis to reweigh this evidence, let alone demonstrate that the Department's reliance on O'Neal's analyses was arbitrary. *See Cisneros*, 337 Ill. App. 3d at 104-06.

Nor do Van Dyke's remaining arguments show that the Secretary's findings of violations were not supported by any evidence. *See id*. Without legal authority, Van Dyke contends that the clients' signed acknowledgments in their applications and related sales materials preclude a section 12 violation because they were reviewed by the Department of Insurance. (AE Br. at 62-63). But a client's signature on a conclusory statement that "he understand[s] that [he] will be assessed the appropriate Surrender Charge for early

withdrawals" hardly establishes that Van Dyke sufficiently informed him of the comparative fees and terms of the Original and Replacement EIAs. (SA246). And the Department of Insurance's approval of a contract form does not determine whether a buyer was adequately informed of the contracts' comparative values, let alone absolve investment advisers of their duty under section 12.J to recommend transactions in their clients' best interests. *See Rasgaitis*, 2013 IL App (2d) 111112, ¶¶ 32-36 (disclosure statements in insurance applications, annuity disclosure statements, and policies insufficient to negate fraud claims). Otherwise, consumers would have no statutory or common law antifraud protection when purchasing contracts approved by the Department of Insurance.

Van Dyke asserts that his clients testified that they were aware of the surrender charges and the Replacement EIAs' bonuses when they followed his recommendations. (AE Br. at 63). But Van Dyke cites his clients' agreements to vague, leading questions as to whether they were aware of a surrender charge or bonus (*see, e.g.*, R660, 697, 719), or had discussed unidentified features or benefits of their Replacement EIAs (*see, e.g.*, R641, 719, 777). None of this testimony shows whether these clients were aware of the specific surrender charges, the contracts' relative fees and guaranteed rates, or any specific feature of the Replacement EIA that would outweigh its lower present-day or future values. To the contrary, many of his clients could not recall Van

Dyke discussing the additional annual fees. (*E.g.,* R638, 659, 699, 720, 724, 766, 777). Van Dyke improperly asks this Court to reweigh the testimony and O'Neal's analyses to determine whether he had deceptively recommended the replacement transactions as in his clients' best interests. *See Cisneros*, 337 Ill. App. 3d at 104-05.

Van Dyke disputes that he misrepresented any surrender penalties in his suitability worksheets based on his application of the market value adjustments ("MVAs") to the Original EIAs and his settlement of the Department of Insurance's charges under the Insurance Code. (AE Br. at 63-64). Such settlements, however, are generally inadmissible to prove or dispute the existence or amount of liability. Ill. R. Evid. 408(a). After all, Van Dyke chose to avoid the risk of greater penalties by not litigating. Rather, the Department of Insurance's charges in its revocation order reflect that it similarly determined that his suitability worksheet answers were false and dishonest. (C97-100). Indeed, its original order explicitly acknowledged the Securities Department's pending action charging that the same transactions violated the Act. (C98).

Van Dyke also argues that DeWitt improperly added the MVAs to the Original EIA values in calculating the clients' losses in the challenged transactions. (AE Br. at 65). DeWitt calculated the clients' losses, however, by comparing the Replacement EIA account values with the Original EIAs'

surrender values, not with the Original EIAs' hypothetical values absent the transactions. (R808-10, 4877-78). Contrary to Van Dyke's cited testimony, DeWitt subsequently clarified that his calculated losses were not faulty, but compared the contracts' values at "a snapshot in time" when the replacements occurred. (R809). Accordingly, the losses reflect each clients' surrender charges resulting from the transaction. (R808-10; R4873-78). For example, even including his Replacement EIAs' bonuses, Perry suffered over $2,000 in immediate losses. (R4877). Going forward, moreover, Perry would pay 1.05% annual fees when he previously paid none, with a lower 2.25% minimum return instead of his previous 3% minimum return. (R847, 4875, 4881, 4915).

Accordingly, the record provided sufficient evidence to support the Secretary's findings that Van Dyke breached his fiduciary duty and engaged in fraud and deceit in violation of section 12.J by recommending the challenged transactions.

III. The Secretary Did Not Clearly Err By Determining That Van Dyke Acted As An Investment Adviser.

In his request for cross-relief, Van Dyke argues that the Court should reverse the Secretary's decision because there was insufficient evidence to show that he had acted as an investment adviser as required to violate section 12.J. (AE Br. at 68-72). As the appellate court held, however, the Secretary's determination that Van Dyke acted as an investment adviser when he

recommended the challenged transactions was supported by the record. (A7 ¶¶ 29-31; R249-50, 254-55).

To the extent that Van Dyke disputes the Secretary's factual findings, they may only be reversed if no evidence "fairly supports the agency's decision." *Cisneros*, 337 Ill. App. 3d at 103-04. Otherwise, the Secretary's application of the Act to those facts may be reversed only for clear error. *Dep't of CMS v. Ill. Labor Relations Bd.*, 2012 IL App (4th) 110209, ¶ 17. Here, Van Dyke does not dispute that he marketed and held himself out to his clients as an investment adviser, including in financial plans and other materials that he prepared for his clients. (AT Br. 6-7, 46-47; *e.g.*, R667-68, 1035-36, 1532, 1779-82). Indeed, Van Dyke concedes that he acted as an investment adviser with regard to at least some of his clients' purchases of their Original EIAs. (AE Br. at 71). Instead, he asserts that there is no evidence that he continued to act as an investment adviser when he recommended the replacement transactions. (*Id*. at 69-72).

The record, however, shows that Van Dyke presented himself to his clients as their investment adviser in making his recommendations, and that his clients accordingly viewed him as their investment adviser in accepting those recommendations. (*See, e.g.*, R765, 2127-30). There is nothing surprising that the majority of the documents identifying Van Dyke as such arose when he first became their adviser and steered them to the Original

EIAs as an investment vehicle. And Van Dyke cites no evidence demonstrating that their investment-adviser relationships ended when he subsequently recommended that they sell those investments to buy the Replacement EIAs. To the contrary, Van Dyke continued to identify himself to his clients as their "Registered Investment Advisor" in his annuity packages for their Replacement EIAs, and in correspondence on their behalf to the companies issuing those EIAs. (*E.g.*, R1037, 1066-68, 1246-47, 1471-73, 2121-22, 3002, 3028-29, 3560-61, 3791-92, 4472-73, 4633-34, 4645).

Nor does Van Dyke cite any testimony cabining his clients' view that he was their investment adviser to any transaction or time period. (AE Br at 70-71). Rather, his clients testified that they viewed him as their financial adviser and relied on him for investment advice. (*E.g.*, R720, 724, 730, 765, 768). Van Dyke's speculative interpretation of that testimony provides no basis to reweigh or substitute the Secretary's assessment of the evidence.[2] (R249-50, 254-55); *Cisneros*, 337 Ill. App. 3d at 104-05. Thus, the Secretary reasonably determined that Van Dyke continued to act as his clients' investment adviser in recommending that they replace the EIAs that they recently had purchased. *See CMS*, 2012 IL App (4th) 110209, ¶ 17.

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[2] Contrary to Van Dyke's suggestion (AE Br. at 71), his financial planning agreement with the Klees was not irrelevant to their purchase of Replacement EIAs 15 months later. Its retainer covered a "*minimum of three years*." (R1035).

Otherwise, Van Dyke repeats his argument to the appellate court that, because the Act's definition of "investment adviser" refers to securities, he could violate section 12.J only by providing advice concerning securities. (AE Br. at 68-69); 815 ILCS 5/2.11 (2016). He ignores, however, the Secretary's argument in his opening brief that the Act's language and federal authority show that the investment advice need not involve a security to violate section 12.J. (AT Br. at 46, 48-49). Section 12.J broadly prohibits "any device, scheme, or artifice to defraud" and other deceptive or manipulative conduct committed "by any means or instrumentality, directly or indirectly," without referring to or requiring a sale of a security in connection with the violating conduct. 815 ILCS 5/12.J (2016).

Indeed, federal courts and the SEC have clarified that section 206 of the IAA (on which the Act's definition of "investment adviser" and section 12.J were patterned) does not require that investment advice involve a security to prove a violation. (AT Br. at 48-49); *see, e.g., Abrahamson v. Fleschner*, 568 F.2d 862, 877-79 (2d Cir. 1977); *SEC v. Lauer,* 2008 WL 4372896, *24 (S.D. Fla. Sept. 24, 2008); SEC Release No. 1092, 52 Fed. Reg. 38400-1, 38405 (Oct. 16, 1987) ("SEC Release No. 1092"). Therefore, when the Act is liberally construed in light of this federal authority and its purpose to protect consumers, section 12.J broadly requires investment advisers to act in their clients' best interest and not engage in deceit when recommending

investments regardless of whether they involve securities. *See Sherman*, 203 Ill. 2d at 279-80 (courts should give statutes their fullest possible meaning and may consider purpose); *JJR*, 2016 IL App (1st) 143051, ¶¶ 30-35, 42 (construing section 12 provisions in light of federal authority and Act's purpose).

By merely repeating his general position without addressing the Secretary's arguments (AE Br. at 68-69), Van Dyke forfeited any further response. *See Vancura v. Katris*, 238 Ill. 2d 352, 372 (2010) (Rule 341(h)(7) applies equally to appellee briefs); *Cebertowicz v. Baldwin*, 2017 IL App (4th) 160535, ¶ 29 (same). For example, Van Dyke abandoned his prior argument to the appellate court that he did not provide investment advice "for compensation" under the definition of "investment adviser." (A7 ¶ 31); 815 ILCS 5/2.11 (2016). Regardless, the over $360,000 in commissions that he received for his advice constituted such compensation. (R249-50, 810-11, 4873-76, 4880); *see* SEC Release No. 1092, 38403 (compensation under IAA "investment adviser" definition includes "receipt of any economic benefit," including "commissions upon the sale to the client of insurance products").

Likewise, Van Dyke's other arguments that EIAs are not securities because they are regulated under the Insurance Code are irrelevant to whether a section 12.J violation must involve a security. Section 12.J does not purport to regulate securities or any other financial contract. It prohibits fraud and

deceit in the furnishing of investment advice. 815 ILCS 5/12.J (2016). Accordingly, even if Insurance Code section 245.24 preempted the regulation of EIAs under the Act (which it does not), it still would not conflict with or extinguish section 12.J's antifraud protections over investment advice, irrespective of whether it involved such investments. *See Ferguson*, 202 Ill. 2d at 311-12, 314-15 (courts must interpret purportedly conflicting statutes to avoid inconsistency and give effect to both).

IV. Van Dyke Forfeited Any Challenge To The Secretary's Sanctions, And Regardless They Did Not Constitute An Abuse Of Discretion.

Van Dyke contends that the fine and witness costs constituted an abuse of discretion. (AE Br. at 72-74). Van Dyke, however, never asserted this argument in the administrative proceedings or circuit court, and so forfeited it on appeal. *See Wisam 1, Inc. v. Ill. Liquor Control Comm'n*, 2014 IL 116173, ¶ 23 (challenge to agency sanction not raised below was forfeited). Regardless, the Secretary did not abuse his discretion by imposing a $330,000 fine and awarding costs. Like other sanctions, the Secretary's fine and cost award must be affirmed unless they constitute an abuse of discretion, which occurs if they are "(1) overly harsh in view of the mitigating circumstances or (2) unrelated to the purpose of the statute." *Danigeles*, 2015 IL App (1st) 142622, ¶ 93.

Van Dyke claims that the hearing officer "rubber stamped" the Department's proposed fine. (AT Br. at 72). The Act, however, does not

require the Secretary to enter any particular findings before imposing a sanction, but only that he find a violation of section 12. 815 ILCS 5/11.E(4) (2016); *see Siddiqui v. Ill. Dep't of Prof'l Regulation*, 307 Ill. App. 3d 753, 763-64 (4th Dist. 1999) (rejecting argument that agency failed to provide sufficient reasons for sanctions). If the Secretary does, then the Act authorizes him to impose fines up to $10,000 for each violation, and to award the Department "all reasonable expenses, including attorney's fees and witness fees." 815 ILCS 5/11.E(4). (2016); 14 Ill. Admin. Code § 130.1128.

Here, the Secretary found that the transactions resulted in substantial surrender charges and losses to the clients, but that Van Dyke obtained over $360,000 in commissions. (R240, 242, 249-50, 253). In turn, he found that Van Dyke committed at least 33 separate violations of section 12. (R242-46, 253-58). Accordingly, the Secretary imposed a $10,000 fine for each transaction and awarded costs. (R245-46, 258). Such sanctions are reasonably related to the Act's purpose to protect innocent persons from fraud and deceit. *See Carpenter v. Exelon Enters. Co., LLC*, 399 Ill. App. 3d 330, 337 (1st Dist. 2010).

Otherwise, because Van Dyke did not suggest in the circuit court that the Department attorney's initials on the decision's signature line indicated that the penalties were biased, he forfeited that argument. (AE Br. at 74); *see Rispoli v. Police Bd.*, 188 Ill. App. 3d 622, 634 (1st Dist. 1989). Regardless,

Van Dyke provides no evidence that the attorney's initials reflect anything other than an administrative function of signing the order on behalf of the Secretary or his designee. *See Scott v. Dep't of Commerce & Cmty. Affairs*, 84 Ill. 2d 42, 55 (1981) (state administrators are assumed to act with honesty and integrity); 815 ILCS 5/11.F(5) (2016).

V. Van Dyke Is Not Entitled To Attorney Fees.

Van Dyke also requests cross-relief of attorney fees under section 10-55 of the APA because the Department created "ad hoc rules" by inventing the fraud claims against him and ignoring and manipulating the evidence. (AE Br. at 74-76). But Van Dyke never argued in the circuit court that he was entitled to attorney fees under the APA, and so forfeited any such claim on appeal. *See Rispoli*, 188 Ill. App. 3d at 634.

Regardless, the Department's litigation of an individual enforcement action based on its analysis of the evidence, even if erroneous, would not constitute improper rulemaking under the APA. As Van Dyke's factual challenges reflect (AE Br. at 75), the Department applied the Act's antifraud provisions to the facts of the case.[3] *See, e.g.*, *Danigeles*, 2015 IL App (1st) 142622, ¶ 78. The Department does not engage in rulemaking for purposes of

[3] Indeed, the application of an "ad hoc" rule for the particular purpose of a specific case by definition would not constitute rulemaking. *See Stutzke v. Ill. Commerce Comm'n*, 242 Ill. App. 3d 315, 319 (4th Dist. 1993) (distinguishing rulemaking from "individual ad hoc litigation"); Black's Law Dictionary (10th ed. 2014) ("ad hoc" means "Formed for a particular purpose").

the APA by taking legal positions in administrative actions, such as its application of the Act to include EIAs as securities. *See Alternate Fuels, Inc. v. Dir. of IEPA*, 215 Ill. 2d 219, 246-48 (2004) (agency's interpretation of statute does not constitute rulemaking for purposes of APA); *Sparks & Wiewel Constr. Co. v. Martin*, 250 Ill. App. 3d 955, 967-68 (4th Dist. 1993) (agency did not engage in rulemaking under the APA by incorrectly interpreting and applying statute to facts of case). Accordingly, the Department's positions concerning the litigation evidence, such as its assertion that the Replacement EIA bonuses did not provide long-term value in light of related fees or its expert witness' valuations of the contracts, did not have the effect or impact of a rule. *Cf. Ackerman v. Dep't of Public Aid*, 128 Ill. App. 3d 982, 983-84 (3d Dist. 1984) (holding that undisputed procedure requiring beneficiaries to participate in administrative hearings by telephone constituted rule).

Van Dyke does not argue that he is entitled to fees because the Department lacked authority to prosecute this action, and so has forfeited any such claim. *See Vancura*, 238 Ill. 2d at 369-70. Regardless, the Department clearly had authority to pursue this action. An agency's "[s]ubject matter jurisdiction is the power to hear and determine causes of the general class of cases to which the particular case belongs." *Newkirk v. Bigard*, 109 Ill. 2d 28, 36 (1985). At the very least, the Department had authority to pursue this action against Van Dyke as an investment adviser under section 12.J. To

prove a violation of section 12.J, the Department must show that Van Dyke engaged in deceit or breached his fiduciary duty while acting as an investment adviser. 815 ILCS 5/12.J (2016). Accordingly, Van Dyke's defense on cross-relief that the record did not support the Secretary's finding that he acted as an investment adviser is a factual issue going to the merits of the Department's charges, not to whether it had the authority to pursue those charges in the first place. *See Alternate Fuels*, 215 Ill. 2d at 247-48 (agency's erroneous application of statute did not exceed its authority); *City of Waukegan v. IEPA*, 339 Ill. App. 3d 963, 975 (2d Dist. 2003) (plaintiff challenged merits of agency's decision, not its authority to determine matter); *see also Nestle USA, Inc. v. Dunlap*, 365 Ill. App. 3d 727, 734 (4th Dist. 2006) ("Jurisdiction should not be determined by a ruling on the merits."). Thus, even if Van Dyke were successful in his request for cross-relief, the Department had authority to pursue this action under section 12.J.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Secretary of State Jesse White respectfully requests that this Court deny Plaintiff-Appellee's requests for cross-relief, reverse that part of the appellate court decision adverse to the Secretary, and affirm his final administrative decision.

Dated: October 26, 2018

Respectfully submitted,

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SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and 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 8,983 words.

/s/ Christopher M. R. Turner
CHRISTOPHER M. R. TURNER
Assistant Attorney General

October 26, 2018

CERTIFICATE OF FILING AND SERVICE

I certify that on October 26, 2018, I electronically filed the foregoing **Reply Brief And Response To Request For Cross-Relief of Defendant-Appellant Jesse White** with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system. I further certify that the participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system:

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I further certify that the other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and thus were served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by that participant on October 26, 2018:

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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VERIFICATION BY CERTIFICATION
PURSUANT TO 735 ILCS 5/1-109 (2016)

CHRISTOPHER M.R. TURNER, pursuant to 735 ILCS 5/1-109 (2016), states as follows:

1. I am a citizen of the United States over the age of 18. My current business address is 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601. I have personal knowledge of the facts set forth in this verification by certification. If called upon, I could testify competently to these facts.

2. I am an Assistant Attorney General in the Civil Appeals Division of the Illinois Attorney General's Office assigned to file the brief of Defendant-Appellant, JESSE WHITE, in his official capacity as Secretary of State of the State of Illinois ("Secretary"), in the appeal in *Richard Lee Van Dyke v. Jesse White et al.*, Ill. Sup. Ct. Case No. 121452.

3. The Secretary's reply brief in this matter is due today, October 26, 2018. I have attempted to submit the Secretary's reply brief to the Illinois Supreme Court through the Odyssey eFileIL system multiple times today throughout the morning and afternoon. Each time that I attempt to access the case in the Odyssey eFileIL system, however, it has displayed error messages of an "Internal Server Error" and that an "error occurred running the workflow," and has not allowed me to submit the brief or any document.

4. I have contacted the office for the Clerk of the Illinois Supreme Court and Tyler Technologies (who operate the Odyssey eFileIL system), who confirmed that there is a problem with the system. Tyler Technologies further informed me

that they were working on the problem, that I cannot submit any document until it is resolved, and that I should contact the Court to advise me on what to do regarding any filings.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information , and belief.

Executed on October 26, 2018

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