THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2018-000326
Civil Action No. 2016-CP-40-06276

Opternative, Inc., ... Appellant,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation,..... Respondents,

and

South Carolina Optometric Physicians Association, ... Respondent.

RECORD ON APPEAL

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CERTIFICATE OF COMPLIANCE

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4006276

Opternative Inc

PLAINTIFF(S)

South Carolina Board Of Medical Examiners
South Carolina Dept Of Labor Licensing And Regulation

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Voluntary Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.
Additional Information for the Clerk : Motion to Intervene granted - formal order to follow

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2061 **Date** 2-15-17

For Clerk of Court Office Use Only

This judgment was entered on the 1 day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of Feb, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Miles Edward Coleman

Eugene Hamilton Matthews
Lyndey Ritz Zwingelberg

Kirby Darr Shealy III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Opternative, Inc.,

Plaintiff,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation,

Defendants.

and

South Carolina Optometric Physicians Association,

Defendant-Intervenor.

C/A No.: 2016-CP-40-06276

ORDER

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CLERK OF COURT

THIS MATTER came before this Court on October 4, 2017, on cross-Motions for Summary Judgment by Plaintiff Opternative, Inc. ("Plaintiff" or "Opternative") and Defendants South Carolina Board of Medical Examiners (the "Board") and the South Carolina Department of Labor, Licensing & Regulation ("LLR") (collectively the "Defendants"). Defendant-Intervenor South Carolina Optometric Physicians Association ("SCOPA") was also present and participated in oral argument.

In this action, Plaintiff has brought a declaratory judgment action to challenge the constitutionality of South Carolina's Eye Care Consumer Protection Law ("ECCPL"), S.C. Code Ann. § 40-24-10 *et seq.*, arguing that the ECCPL is protectionist legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Plaintiff's Complaint, ¶¶ 87-97).

For the reasons set forth below, I hereby GRANT the Defendants' Motion for Summary Judgment only as to the issue of standing and DENY the Plaintiffs' Motion for Summary Judgment. The case is, therefore, dismissed with prejudice.

PLAINTIFF'S LAWSUIT

Plaintiff is a private foreign corporation that has developed an online technology designed to conduct eye examinations and produce prescriptions for corrective lens. (Plaintiff's Complaint, ¶¶ 1, 5). In bringing this declaratory judgment action, Plaintiff argues that the ECCPL is protectionist legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Plaintiff's Complaint, ¶¶ 87-97). Regarding both grounds, Plaintiff alleged that "[u]nless Defendants are enjoined from enforcing the ECCPL, Opternative will suffer continuing and irreparable harm." (Plaintiff's Complaint, ¶¶ 91, 97). In its Complaint, Opternative describes the injury to the Plaintiff in the following manner:

"80. As a direct result of the passage of the ECCPL, the use of Opternative's Technology has been effectively prohibited in South Carolina.

81. Prior to the adoption of the ECCPL, Opternative could (and did) allow a South Carolina-licensed ophthalmologist to write corrective-lens prescriptions for South Carolina residents.

82. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are legally prohibited from working with Opternative to provide corrective-lens prescriptions for South Carolina residents.

83. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are no longer willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents.

84. As a direct result of the passage of the ECCPL, Opternative has ceased business operations in South Carolina.

85. But for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents.

86. But for the ECCPL, state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents."

THE ECCPL

The ECCPL has two parts. The first part establishes the definitions of terms that it uses, and the second establishes the substance of the act.

Importantly, the first part of the act defines "provider" as "an individual licensed by the South Carolina Board of Examiners in Optometry or the South Carolina Board of Medical Examiners." S.C. Code Ann. § 40-24-10(7). The second part of the ECCPL provides as follows:

> **SECTION 40-24-20.** Valid prescription required to dispense spectacles or contact lenses; penalties.
>
> (A) A person in this State may not dispense spectacles or contact lenses to a patient without a valid prescription from a provider.
>
> (B) To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. The prescription must take into consideration medical findings made and refractive error discovered during the eye examination. If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.
>
> (C) A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk.

THE BOARD AND LLR

The Board is the professional licensing board in South Carolina that regulates physician practice and conduct. S.C. Code Ann. § 40-47-5 *et seq.*. The Board does not regulate Opternative, as it is not a physician licensed in the State of South Carolina. S.C. Code Ann. § 40-1-70; S.C. Code Ann. § 40-47-10(I).

The LLR administers the Board. S.C. Code Ann. § 40-1-40(B). Like the Board, LLR does not regulate Opternative, as it is not licensed by a Board that LLR administers. Rather, LLR merely "is responsible for all administrative, fiscal, investigative, inspectional, clerical, secretarial, and license renewal operation and activities" of the Board, and in fact does make such support available to the Board. S.C. Code Ann. § 40-1-50(A).

DECISION

I. THE LAWSUIT MUST BE DISMISSED BECAUSE PLAINTIFF DOES NOT HAVE PROPER STANDING.

Where a private party seeks to have a statue declared unconstitutional, it must first demonstrate that it has standing. *ATC v. Charleston Cty.*, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008). Standing is defined as "a personal stake in the subject matter of a lawsuit." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (citing *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999)).

A private person or entity does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Such imminent prejudice must be of a personal nature to the party laying claim to standing, and not merely of general interest common to all members of the public. *Id.* (citing *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)).

To make the required showing, the challenging party must satisfy the following three-part test:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

ATC, 380 S.C. at 195-96, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted)); *see also Youngblood v. S.C. Dept. of Social Services*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

A. <u>Injury in Fact</u>.

First, Opternative must show that it has suffered an "injury in fact," which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical." From its Complaint, Opternative appears to argue that its "injury in fact" is its loss of business and belief that the ECCPL prevents South Carolina-licensed ophthalmologists from being "willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents," and that if the ECCPL were struck down, they presumably would be willing to use Opternative's technology to write corrective-lens prescriptions. (Plaintiff's Complaint, ¶¶ 83, 86). The ECCPL does not appear to forbid a South Carolina-licensed ophthalmologist from using Opternative's technology to assist in his or her work. Opternative alleges that it hast lost business in South Carolina and has been forced to shut down business. (Plaintiff's Complaint, ¶¶ 80). Opternative's allegations make it clear that the law directly affects their business model, but it is unclear that the Defendants are perpetuating the injury. (Plaintiff's Complaint, ¶¶ 80-86)

Although Plaintiffs present the argument that the ECCPL directly affects its business, Plaintiffs are not regulated under the act by the Defendants. *See Joytime Distrib. and Amusement Co., Inc. v. State*, 338 S.C. 634, 640 528 S.E.2d 647, 650 (1999) (holding the Plaintiffs had standing to sue the State alleging the unconstitutionality of a law that directly affected Plaintiff's business and required the Plaintiffs to pay a license surcharge fee under the law). Professionals under the authority of the Board are not forbidden by the ECCPL – and not by any action of the Board or LLR – from using Opternative's technology. Indeed, a South Carolina-licensed ophthalmologist may still use Opternative's technology to assist him or her in making a determination to write a prescription for spectacles or contact lenses. He or she simply cannot solely base the prescription on the refractive eye error of the human eye or be generated by a kiosk. Opternative has certainly presented evidence that the ECCPL will deter state-licensed ophthalmologists and optometrists from using its technology *within Opternative's current business model*.

In sum, Opternative has failed to show that it has suffered an "injury in fact," and instead has only raised theories of injury that are "conjectural" or "hypothetical."

B. <u>Causal Connection</u>.

Second, Opternative has not shown that there is a causal connection between the injury and the conduct complained of. The injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *ATC*, 380 S.C. at 195-96, 669 S.E.2d at 339.

In the instant case, the causal connection does not exist because the injury alleged by Opternative – that South Carolina-licensed ophthalmologists are no longer "willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents" – actually

requires an act from a third party not before the court. Namely, as set forth above, Opternative alleges that South Carolina-licensed ophthalmologists are no longer willing to use its on-line exam because, under the ECCPL, its on-line exam cannot be the sole basis to write a prescription for spectacles or contact lenses.

South Carolina-licensed ophthalmologists can presumably make their own decisions about whether and how to use – or not use – Opternative's on-line technology to assist them in their provision of lawful corrective-lens prescriptions to their patients. In any event, that decision rests with South Carolina-licensed ophthalmologists, and not with the Board or with LLR.

C. Redress by a Favorable Decision.

Even if Plaintiff could show an "injury-in-fact" and a "causal connection," Plaintiff must also allege adequately that the particularized injury would be redressed by a favorable decision in this case. *Sea Pines Ass'n*, 345 S.C. at 602, 550 S.E.2d at 292. In its Complaint, Plaintiff appears to address this element by alleging that "[b]ut for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents" and that "state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents." (Plaintiff's Complaint, ¶¶ 85-86).

In this regard, Plaintiff's claims appear similar to those of the plaintiffs in *Sea Pines Ass'n*, who raised a constitutional challenge to the decision of the South Carolina Department of Natural Resources ("SCDNR") to issue permits to lethally eliminate a substantial number of white-tailed deer on Hilton Head Island. The court found that the plaintiffs lacked standing in part because their alternative plan to hunting permits – use of non-lethal means to reduce the deer population – would lead to the same result, namely, the reduction of the deer population at Sea Pines. 345 S.C.

at 603, 550 S.E.2d at 292. For that reason, the plaintiffs failed to demonstrate standing because the proposed alternative would result in the same "injury."

In this case, Plaintiff's showing of redress is complicated by the fact that "state-licensed ophthalmologists" can already work with Opternative to provide corrective-lens prescriptions for South Carolina residents. The true "injury" of which Opternative complains is that it wants "state-licensed ophthalmologists" to use Opternative's technology *within its current business model*. This is insufficient to demonstrate standing for a constitutional challenge.

* * *

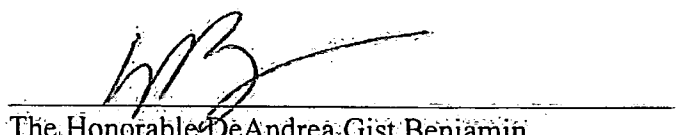
To show standing, Plaintiff must satisfy each of the three elements referenced above. Plaintiff has failed to demonstrate that it can satisfy any of them. For this reason, Plaintiff's lawsuit must be dismissed.

CONCLUSION

As set forth above, Plaintiff has failed to demonstrate that it has standing to bring this claim. The Court declines to address any equal protection and due process arguments in light of its conclusion that Plaintiffs fail to demonstrate standing.

For these reasons, the motion of the Board and LLR is GRANTED as to the issue of standing, the motion of Opternative is DENIED, and this action is dismissed with prejudice, with each side to bear its own costs and fees.

AND IT IS SO ORDERED.



The Honorable DeAndrea Gist Benjamin
Presiding Judge
Fifth Judicial Circuit

1-25, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Opternative, Inc., Plaintiff, vs. South Carolina Board of Medical Examiners, and South Carolina Department of Labor, Licensing, and Regulation, Defendants.	Civil Action No. 2016-CP-40-06276 **COMPLAINT**

RICHLAND COUNTY
FILED
2016 OCT 20 AM 9:33
JEANNETTE W. McBRIDE
C.C.P. & G.S.

INTRODUCTION

1. This civil-rights lawsuit seeks to vindicate the rights of consumers, doctors, and entrepreneurs to use innovative technology to enhance access to care for people in need of corrective lenses. Plaintiff Opternative, Inc., has developed an online technology (the "Technology") that enables licensed ophthalmologists to conduct refractive examinations,[1] establish a diagnosis, and determine the correct prescription for many patients (an "Exam"). This Technology has been used across the country—including in South Carolina—but a recent law effectively prohibits South Carolina-licensed ophthalmologists from using the Technology to issue any prescriptions at all. The purpose of this new law is not to protect the public health or safety but instead to protect the profits of established businesses. Because the South Carolina Constitution forbids regulation for no purpose beyond economic protectionism, Defendants must

[1] Refractive examinations determine the refractive error of a person's eye and therefore the proper corrective-lens prescription for that person.

be enjoined from enforcing the new law that has banned Opternative (and businesses like it) from continuing their work in South Carolina.

JURISDICTION AND VENUE

2. Plaintiff brings this action under Article I, Section 3 of the South Carolina Constitution, and the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-20, 15-53-30, and 15-53-120.

3. Plaintiff seeks declaratory and injunctive relief against enforcement of provisions of South Carolina's Eye Care Consumer Protection Law ("ECCPL"), South Carolina Code sections 40-24-10(9), 40-24-20(C) and (D), which violate Plaintiff's constitutional rights to equal protection and due process of law.

4. This Court has jurisdiction and venue lies pursuant to South Carolina Code section 15-77-50.

THE PARTIES

5. Plaintiff Opternative, Inc. ("Opternative") is a Delaware corporation with its headquarters in Illinois.

6. Defendant South Carolina Board of Medical Examiners ("the BME") is the state agency responsible for licensing physicians and for enforcing much of South Carolina's eye care regulatory regime—including the ECCPL.

7. Defendant South Carolina Department of Labor, Licensing, and Regulation is the department of the South Carolina government which is responsible for administering the BME and in which the BME is incorporated. *See* S.C. Code Ann. § 1-30-65.

STATEMENT OF FACTS

South Carolina's Eye-Care Regulatory Regime

8. Title 40 of the South Carolina Code authorizes the state to regulate certain professionals for the "health, safety, and welfare of the public." S.C. Code Ann. § 40-1-10.

9. Among these are physicians and other miscellaneous healthcare professionals, who fall under the specific authority of the South Carolina Board of Medical Examiners. S.C. Code Ann. § 40-47-10.

10. Ophthalmologists are medical doctors specializing in eye and vision care, who by study and training are qualified chiefly to diagnose and treat ocular diseases, perform eye exams and surgeries, and prescribe lenses to correct vision problems.

11. As physicians, ophthalmologists are licensed and regulated by the BME. *Id.* The BME has broad powers to restrict the practice of ophthalmology, including the setting of minimum standards of professional care and the promulgation of rules of professional conduct. *Id.* The BME is also empowered to take disciplinary action—including suspension and even revocation of a physician's license to practice ophthalmology—against those it deems guilty of professional misconduct. S.C. Code Ann. § 40-47-110.

12. Continuing to practice ophthalmology with a suspended or revoked license is a misdemeanor. S.C. Code Ann. § 40-27-200.

13. Unlike ophthalmologists, optometrists are not medical doctors. Rather, optometrists are more limited medical professionals who by study and training are qualified chiefly to detect and treat certain ocular diseases, perform eye exams and vision tests, and prescribe and dispense corrective lenses.

14. While optometrists provide professional medical care and fall under South Carolina's Title 40 regulatory powers, they are not governed by the BME. Instead, optometrists are licensed and regulated exclusively by the South Carolina Board of Examiners in Optometry. S.C. Code Ann. § 40-37-10.

15. South Carolina's regulatory regime provides that the only way to obtain a prescription for corrective lenses in the state is through a licensed ophthalmologist or optometrist. S.C. Code Ann. § 37-25-20. Prescriptions must be based on "medical findings made and refractive error discovered during [an] eye examination." S.C. Code Ann. § 40-24-20.

Opternative's Innovative Eye Care Services

16. Opternative is a healthcare technology company founded in 2012 by optometrist Steven Lee and entrepreneur Aaron Dallek out of their sincere belief that appropriate eye care and corrective-lens prescriptions should be accessible and affordable to everyone.

17. As a practicing optometrist who had completed over 20,000 refractive exams, experience taught Steven that refractive eye exams—conducted by brick-and-mortar providers, typically through use of a phoropter[2]—were needlessly time-consuming, inconvenient, and expensive for patients.

18. Traditional refractive eye exams rely on patient self-reporting. An individual sits in a chair and reports to the administering optometrist or ophthalmologist what they perceive as they are shown a series of images using a phoropter.

19. Traditional refractive eye exams are *subjective*, in that they rely on an individual's self-reporting of what they see, as distinct from *objective* exams that rely on physically measuring an individual's eyes.

[2] A phoropter is a mechanical device that switches multiple lenses in front of a patient's eyes.

20. An Exam conducted using Opternative's Technology relies on exactly the same self-reporting principle as a traditional exam.

21. Opternative's Technology is accessed through the Opternative website.

22. At the outset, an individual uses the Technology to answer a detailed list of questions, including (but not limited to) questions about their existing eyeglass prescription (if any) and their relevant medical history.

23. The Technology then presents a set of written and audio instructions that guides the individual through a self-administered vision assessment.

24. Opternative's Technology is interactive in nature: An individual observes a series of individually calibrated ophthalmological images on a computer screen and uses a smartphone to self-report what they perceive.

25. As with a traditional in-person examination, the Technology relies on individuals' honestly reporting what they perceive. Throughout the process, individuals are reminded that the correct answer is an honest answer, and the Technology employs a specialized algorithm to detect inconsistent responses.

26. A user's interaction with the Technology—from answering the initial medical-history questions to self-reporting responses to the various images—generally takes 20–25 minutes.

27. The Technology automatically collects and generates data based on the patient's interactive responses, which Opternative then shares with an ophthalmologist licensed to practice in the relevant state.

28. A licensed ophthalmologist reviews the data collected and generated by the Technology (which includes both the individual's medical-history responses and their responses

to the ophthalmological images) and decides either to write an appropriate prescription for corrective lenses or that no appropriate prescription can be written based on the data.

29. If a licensed ophthalmologist writes a prescription based on the data collected and generated by the Exam, the prescription is made available to the patient via Opternative's website. The patient can then use the prescription to purchase corrective lenses wherever they please.

30. While Opternative makes the Technology available on its website freely available to everyone, ophthalmologists working with Opternative will only conduct an Exam and write prescriptions for corrective lenses for individuals who meet certain criteria, which include age-, health-, and prescription-based considerations.

31. Opternative only charges a fee for an Exam—that is, for a doctor to review an individual's results; there is no fee for simply trying the Technology itself.

32. The Exam is designed to determine a patient's refractive error (and therefore the appropriate corrective prescription). It is not designed to be a comprehensive eye exam.

33. The American Academy of Ophthalmology recommends that otherwise-healthy patients (patients who do not have symptoms of disease or other risk factors for eye disease) who are between 18 and 39 years old receive a comprehensive eye-health exam once every 5–10 years. *See* American Academy of Ophthalmology, *Comprehensive Adult Medical Eye Evaluation*, at P216 (2015), *available at* www.aaojournal.org/article/S0161-6420(15)01269-5/pdf.

34. The American Academy of Ophthalmology recommends that otherwise-healthy patients who are between 40 and 54 years old receive a comprehensive eye exam once every 2–4 years. *Id.*

35. The American Academy of Ophthalmology recommends that otherwise-healthy patients who are between 55 and 64 years old receive a comprehensive eye health exam once every 1-3 years. *Id.*

36. In order to encourage compliance with these guidelines, Opternative asks a series of preliminary questions before examining any patient to ensure compliance with its strict eligibility requirements, which are displayed on its website at www.opternative.com:

> Opternative **is not a replacement** for a comprehensive eye examination. Our licensed Ophthalmologists use Opternative's on-line technology to evaluate a patient's visual acuity and a portion of the ocular health profile, diagnose refractive error, and issue a prescription for corrective eyewear, where clinically appropriate. Our services are limited to patients between the ages of 18 and 50 who are in good health. All examinations are conducted and all prescriptions are issued based on the independent clinical judgment of an ophthalmologist. Because our services are not a replacement for an eye health examination, we encourage everyone to obtain a comprehensive eye health exam at least once every 2 years. We prohibit patients from taking an Opternative exam more than 4 consecutive years without certifying that they have received a comprehensive eye health exam first. If you need help finding an eye care professional near you, please contact us at info@opternative.com.

37. The instructions on Opternative's website regarding the importance of comprehensive eye exams far exceed the minimum recommendations of the American Academy of Ophthalmology.

38. Eyeglass prescriptions in South Carolina expire after only one year. S.C. Code Ann. § 40-24-20(B).

39. An ophthalmologist in South Carolina is not required to conduct a comprehensive eye-health exam in order to write a prescription for corrective lenses.

40. For eligible patients, an Exam using the Technology is just as effective in the diagnosis of refractive error as traditional exams performed by ophthalmologists and optometrists using phoropters in brick-and-mortar offices.

41. In a side-by-side clinical trial, Exams that used Opternative's Technology proved just as accurate as a traditional refractive exam performed by an optometrist or ophthalmologist using a phoropter.

42. Upon information and belief, Defendants have no evidence that Exams using Opternative's Technology are any less accurate than a traditional in-person refractive exam.

43. Upon information and belief, Defendants have no reason to believe that Exams using Opternative's Technology are any less accurate than a traditional in-person refractive exam.

44. For eligible patients, an Exam using Opternative's Technology is quicker, more convenient, and more affordable than traditional exams performed by ophthalmologists and optometrists using phoropters in brick-and-mortar offices.

45. For eligible patients, an Exam using Opternative's Technology expands access to prescriptions for corrective lenses for those who can least afford to visit traditional brick-and-mortar offices.

46. Upon information and belief, Defendants possess no evidence that Exams using Opternative's Technology result in lower patient satisfaction than a traditional in-person refractive exam.

47. Upon information and belief, Defendants have no reason to believe that Exams using Opternative's Technology result in lower patient satisfaction than a traditional in-person refractive exam.

South Carolina's Unconstitutional Ban on Online Eye Care

48. Upon information and belief, many professional optometrists make the majority of their revenue from selling expensive frames in their brick-and-mortar offices rather than from professional fees earned from conducting traditional in-person eye examinations.

49. Upon information and belief, Opternative's service model disrupts this bundling of in-person eye examinations and frame sales, allowing patients the option of taking an eye exam and obtaining a prescription from the comfort of their own homes without ever having to see or consider buying expensive eyeglass frames in a brick-and-mortar office.

50. Upon information and belief, since almost immediately after Opternative's founding in 2012, the American Optometric Association ("the AOA") and related local optometric groups have conducted both a public media and private lobbying campaign to drive Opternative out of business.

51. Upon information and belief, almost immediately after Opternative began providing its services in South Carolina, the AOA and related South Carolina optometric groups conducted both a public media and private lobbying campaign to drive Opternative out of the state. These efforts culminated in the passage of the aforementioned Eye Care Consumer Protection Law on May 11, 2016.

52. The ECCPL provides that vision assessments "may not be based solely on objective refractive data or information generated by an automated testing device, including an auto refractor or other electronic refractive-only testing device, to provide a medical diagnosis or to establish a refractive error for a patient as part of an eye examination." S.C. Code Ann. § 40-24-10(9).

53. The ECCPL specifically targets "kiosks," or "automated equipment or an automated application, which is designed to be used on a phone, computer, or Internet-based device that can be used in person or remotely to provide refractive data or information." S.C. Code Ann. § 40-24-10(4).

54. The ECCPL effectively prohibits ophthalmologists from conducting Exams or writing prescriptions based on Opternative's Technology by providing that "[a] prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk." S.C. Code Ann. § 40-24-20(C).

55. Opternative's Technology is not a purely automated system; instead, Opternative's Technology uses an interactive and adaptive system to elicit responses from a patient. As part of this system, Opternative's Technology automatically collects and generates refractive data and information, which is transmitted to a participating ophthalmologist, who uses his training and judgment to write a prescription based on this data if it is appropriate to do so.

56. It is illegal to write a corrective-lens prescription based on an Exam using Opternative's Technology in South Carolina because the patient responses on which the ultimate prescription is based are being automatically recorded and compiled by a computer system designed for use on a phone, computer, or Internet-based device instead of (for example) being written down by a human being holding a clipboard.

57. Writing a prescription based on a system similar to Opternative's—which asked the same questions and showed the patient the same images—would be generally legal in South Carolina as long as the patient's responses were written down by a human being instead of being automatically recorded and compiled by a computer system.

58. The purpose of the ECCPL is to prohibit South Carolina-licensed ophthalmologists from working with Opternative (or anyone providing technology like Opternative's).

59. The effect of the ECCPL is to prohibit South Carolina-licensed ophthalmologists from working with Opternative (or anyone providing technology like Opternative's).

60. Defendants have no authority or ability to interpret the ECCPL in a way that would allow South Carolina-licensed ophthalmologists to work with Opternative (or anyone providing technology like Opternative's).

61. Therefore, asking Defendants to issue an interpretation or regulation that would permit South Carolina-licensed ophthalmologists to work with Opternative (or anyone providing technology like Opternative's) would be futile.

62. The ECCPL threatens Opternative—and specifically, state-licensed ophthalmologists who work with Opternative—with the full range of penalties covered in ¶¶ 11-12 above. *Id.* § 40-24-20(D).

63. The ECCPL's ban on prescribing corrective lenses based on information that is automatically collected or generated is unrelated to the quality or accuracy of a prescription.

64. The ECCPL prohibits prescribing corrective lenses based solely on information generated through any computerized process, whether that process is Opternative's more traditional subjective exam or a meticulously accurate objective scan of a patient's eye.

65. South Carolina law does not require that ophthalmologists or optometrists physically examine patients for risk factors or diseases before writing a prescription for corrective lenses.

66. South Carolina law does not require that ophthalmologists or optometrists take into account any particular medical facts not generated by an eye exam before writing a prescription for corrective lenses.

67. South Carolina law does not require that patients obtain a comprehensive eye-health exam once per year, once every five years, or even at all, in order to obtain a prescription for corrective lenses.

68. An ophthalmologist who writes a corrective-lens prescription without conducting a comprehensive eye-health exam has not necessarily violated any standard of care.

69. The ECCPL has no valid public health or safety purpose.

70. Upon information and belief, Defendants possess no evidence that the ECCPL serves any valid public health or safety purpose.

71. The sole purpose of the ECCPL is economic protectionism.

72. The ECCPL, in purpose and effect, reduces access to online eye care in South Carolina in order to prop up professional optometrists' outdated business model.

73. On May 16, 2016, Governor Nikki Haley vetoed the ECCPL for precisely these reasons, specifically condemning its protectionist and anti-competitive nature.

74. Governor Haley's veto statement reads, in full:

> **I am vetoing this bill because it uses health practice mandates to stifle competition for the benefit of a single industry,** effectively banning eye care kiosks statewide.
>
> During my administration, South Carolina has expanded access to health care, including mental health services, to rural and underserved regions of our state using telemedicine. Unfortunately, a small group of eyecare professionals is seeking to block new technologies that expand low-cost access to vision correction services, using two basic arguments.

> First, advocates state that kiosks pose a public health risk, which is simply untrue. Individuals can, and should, continue to see their doctor for comprehensive medical exams; and these kiosks do not offer medical evaluations or advice. Second, optometrists argue that kiosks create an uneven playing field because licensed practitioners cannot take advantage of this technology and charge patients for its use in a medical practice. The answer to this problem is not to ban a new technology, but rather to expand its use. **Send a bill to my desk that allows for the expanded use of automated vision evaluations in all settings, and I will sign it.**
>
> If [the ECCPL were] allowed to become law, South Carolina would become the eighth state to impose such a ban, putting us on the leading edge of protectionism, not innovation. This is the wrong message to send to the business community. **I urge you to continue promoting South Carolina's use of innovative technologies to expand access to medical care and sustain this veto.**

Veto Message of Governor Nikki Haley, March 16, 2016, *available at* http://www.governor.sc.gov/ExecutiveOffice/Documents/R.178,%20S.1016%20-%20Eye%20Care.pdf.

75. The assertions in Governor Haley's May 16 veto statement are true.

76. On May 18, 2016, the South Carolina General Assembly voted to override Governor Haley's veto of the ECCPL.

77. The ECCPL stands in stark contrast to how South Carolina regulates telemedicine overall. On June 3, 2016, the South Carolina Telemedicine Act legalized telemedicine generally throughout the state. S.C. Code Ann. § 40-47-37.

78. Under the South Carolina Telemedicine Act, a medical doctor may use online tools to provide medical care provided the doctor otherwise meets the relevant standard of care.

79. Under the ECCPL, however, an ophthalmologist may not use online tools like Opternative's Technology to write corrective-lens prescriptions, even if they otherwise meet the relevant standard of care.

INJURY TO PLAINTIFF

80. As a direct result of the passage of the ECCPL, the use of Opternative's Technology has been effectively prohibited in South Carolina.

81. Prior to the adoption of the ECCPL, Opternative could (and did) allow a South Carolina-licensed ophthalmologist to write corrective-lens prescriptions for South Carolina residents.

82. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are legally prohibited from working with Opternative to provide corrective-lens prescriptions for South Carolina residents.

83. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are no longer willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents.

84. As a direct result of the passage of the ECCPL, Opternative has ceased its business operations in South Carolina.

85. But for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents.

86. But for the ECCPL, state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents.

COUNT I: DUE PROCESS VIOLATION

87. Opternative re-alleges and incorporates by reference each and every allegation set forth in ¶ 1 through ¶ 86 of this Complaint as if fully set forth herein.

88. Article I, Section 3 of the South Carolina Constitution protects Opternative's right to pursue an honest living free from arbitrary, irrational, and protectionist regulation and the

rights of doctors and patients to make responsible decisions about medical care by providing that "[t]he privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law." S.C. Const. art I, § 3.

89. South Carolina's eye-care regulatory regime—specifically, the ECCPL provisions described above and codified at South Carolina Code sections 40-24-10(9), and 40-24-20(C) and (D)—does not further any valid public health or safety purpose, and therefore violates Opternative's right to pursue an honest living free from arbitrary, irrational, and protectionist regulation.

90. The ECCPL is a purely protectionist piece of legislation, and protectionism is not a legitimate basis under the South Carolina Constitution for depriving Opternative of its constitutional right to pursue an honest living by providing innovative eye-care solutions to patients who need them.

91. Unless Defendants are enjoined from enforcing the ECCPL, Opternative will suffer continuing and irreparable harm.

COUNT II: EQUAL PROTECTION VIOLATION

92. Opternative re-alleges and incorporates by reference each and every allegation set forth in ¶ 1 through ¶ 86 of this Complaint as if fully set forth herein.

93. Article I, Section 3 of the South Carolina Constitution further protects the rights of South Carolinians by providing "nor shall any person be denied the equal protection of the laws." S.C. Const. art I, § 3.

94. The ECCPL has no valid public health or safety purpose but is a purely protectionist piece of legislation, and therefore serves no legitimate state end.

95. The ECCPL draws an arbitrary and irrational distinction between ophthalmologists who write corrective-lens prescriptions based on an in-person refractive examination and ophthalmologists who write corrective-lens prescriptions based on Opternative's Exam.

96. The ECCPL draws an arbitrary and irrational distinction between ophthalmologists, who are not allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care, and other kinds of medical doctors, who are allowed to use their medical judgment to use online tools to provide medical services that otherwise meet the general standard of care.

97. Unless Defendants are enjoined from enforcing the ECCPL, Opternative will suffer continuing and irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Opternative respectfully requests that this Court:

A. Enter a declaratory judgment that the Eye Care Consumer Protection Law, S.C. Code Ann. §§ 40-24-10(9), and 40-24-20(C) and (D), violates Article I, Section 3 of the South Carolina Constitution;

B. Enter a declaratory judgment that Defendants cannot legally penalize South Carolina-licensed ophthalmologists solely on the basis that they have written corrective-lens prescriptions using Opternative's Technology;

C. Enter an order permanently enjoining Defendants from enforcing the ECCPL;

D. Award Opternative its reasonable costs and attorneys' fees in this action;

E. Award Opternative any other legal or equitable relief to which Opternative is justly entitled.

Respectfully submitted,

INSTITUTE FOR JUSTICE

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Attorneys for Plaintiff Opternative, Inc.

Columbia, South Carolina
October 20, 2016.

COPY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Opternative, Inc.,

Plaintiff,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-06276

ANSWER TO COMPLAINT

2016 NOV 21 PM 2:58
JEANNETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND CO.
FILED

Defendants South Carolina Board of Medical Examiners (the "Board") and the South Carolina Department of Labor, Licensing & Regulation ("LLR") (collectively the "Defendants") hereby answer the Complaint of Plaintiff Opternative, Inc., denying all allegations not explicitly admitted, as follows:

INTRODUCTION, PARTIES, JURISDICTION AND VENUE

1. In Paragraphs 1 through 7 of the Plaintiff's Complaint, Plaintiff attempts to (1) characterize its lawsuit as a "civil-rights lawsuit" seeking to declare South Carolina's Eye Care Consumer Protection Law ("ECCPL") to be unconstitutional, (2) identifies the parties named in the Complaint, and (3) references jurisdiction and venue pursuant to S.C. Code Ann. § 15-77-50. A response from Defendants to the allegations does not appear to be required. To the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

2. More specifically, in Paragraph 6, Plaintiff alleges that the Board enforces the ECCPL. The Defendants deny that the Board has ever had the occasion to enforce the ECCPL

against any physician in the course of its duties as a regulatory body.

PLAINTIFF'S FACTUAL ALLEGATIONS

3. In Paragraphs 8 through 79 of the Plaintiff's Complaint, Plaintiff sets forth allegations in support of its argument that the ECCPL violates its rights under the South Carolina Constitution, specifically its rights to due process and equal protection. Plaintiff generally sets forth allegations concerning the Board and its regulation of physicians, including ophthalmologists, and that the Board does not regulate optometrists. Plaintiff also sets forth allegations concerning Plaintiff's operations, business model, and technology, and complains that its business model will be adversely affected by enforcement of the ECCPL. To the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

4. More specifically, Plaintiff also alleges "upon information and belief" in Paragraphs 42, 43, 46 and 47 that (1) the Defendants "have no evidence that Exams using Opternative's Technology are any less accurate than a traditional in-person refractive exam," (2) the "Defendants have no reason to believe that Exams using Opternative's Technology are any less accurate than a traditional in-person refractive exam," and (3) the Defendants possess no evidence and have no reason to believe that Opternative's Technology results in lower patient satisfaction than a traditional in-person refractive exam. Because Defendants are not the General Assembly and could not pass legislation – including the ECCPL – these allegations do not appear relevant to Plaintiff's Declaratory Judgment action. In any event, to the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

5. In Paragraph 54, Plaintiff also alleges that the ECCPL "effectively prohibits

ophthalmologists from conducting Exams or writing prescriptions based on Opternative's Technology." To the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

6. In Paragraphs 60 and 61, Plaintiff also alleges that the Defendants have no authority or ability to interpret the ECCPL in a way that would allow South Carolina-licensed ophthalmologists to work with Opternative (or anyone providing technology like Opternative's)" and that "asking Defendants to issue an interpretation or regulation that would allow South Carolina-licensed ophthalmologists to work with Opternative (or anyone providing technology like Opternative's) would be futile." To the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

7. In Paragraphs 77 and 78, Plaintiff attempts to characterize the South Carolina Telemedicine Act. To the extent a response is required, the Defendants note that the South Carolina Telemedicine Act speaks for itself, and that these allegations are denied and strict proof of them is demanded.

INJURY TO PLAINTIFF

8. In Paragraphs 80 through 86 of the Plaintiff's Complaint, Plaintiff sets forth allegations regarding its claimed injury as a result of the passage of ECCPL. To the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

COUNT 1: DUE PROCESS VIOLATION

9. The Defendants incorporate its responses to Paragraphs 1 through 86 of the Plaintiff's Complaint as if set forth herein.

10. In Paragraphs 87 through 91 of the Plaintiff's Complaint, Plaintiff sets forth

allegations in an attempt to support its claim that the passage of ECCPL – and theoretical enforcement of the ECCPL by the Defendants – constitutes a violation of its due process rights under the South Carolina Constitution. To the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

COUNT 2: EQUAL PROTECTION VIOLATION

11. The Defendants incorporate its responses to Paragraphs 1 through 91 of the Plaintiff's Complaint as if set forth herein.

12. In Paragraphs 92 through 97 of the Plaintiff's Complaint, Plaintiff sets forth allegations in an attempt to support its claim that the passage of ECCPL – and theoretical enforcement of the ECCPL by the Defendants – constituted a violation of its equal protection rights under the South Carolina Constitution. To the extent a response is required from the Defendants, these allegations are denied and strict proof of them is demanded.

NOW THEREFORE, having fully answered the allegations in Plaintiff's Complaint, the Defendants now sets forth its **DEFENSES AND AFFIRMATIVE DEFENSES**:

FOR A FIRST DEFENSE

1. Plaintiff has failed to state a claim for which relief can be granted, and its lawsuit must be dismissed under Rule 12(b)(6) or Rule 12(c), SCRCP.

FOR A SECOND DEFENSE

2. Plaintiff cannot establish that it has standing to bring this lawsuit, in that it cannot establish (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) the injury will be likely to be "redressed by a favorable decision." *Joseph v. South Carolina Dept. of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016).

FOR A THIRD DEFENSE

3. Plaintiff cannot establish that it can present a justiciable controversy, which exists when (1) a concrete issue is present, (2) there is a definite assertion of legal rights, and (3) a positive legal duty which is denied by the adverse party. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 889 (S.C. App. 2002).

FOR A FOURTH DEFENSE

4. Where a statute does not implicate a suspect class or abridge a fundamental right, the rational basis test is used to determine the constitutionality of the statute. Classifications will survive rational basis review when they bear a reasonable relation to the legislative purpose sought to be achieved, where members of the class are treated alike under similar circumstances, and where the classification rests on a rational basis. *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013). To the extent that Plaintiff has standing to bring its lawsuit, it cannot show that the State of South Carolina lacked a rational basis when it enacted and implemented the statutes at issue.

WHEREFORE, having fully answered the Complaint herein, the Defendants request:

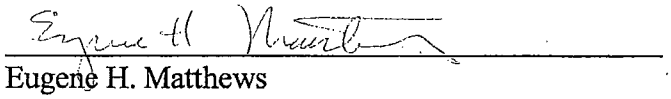
1. That the relief sought by Plaintiff be denied in each and every respect;

2. That the claims asserted by Plaintiff be dismissed in their entirety with prejudice; and,

3. That Defendants be awarded costs and attorney's fees under applicable case and statutory laws and such other and further relief as this Court may deem just and proper.

Dated this the 21st day of November, 2016.

RICHARDSON PLOWDEN & ROBINSON, P.A.



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COUNSEL FOR DEFENDANTS SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS AND THE SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Opternative, Inc., Plaintiff, v. South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A No.: 2016-CP-40-06276 **CERTIFICATE OF SERVICE**

2016 NOV 21 PM 2:58
RICH. CO. C.C.P. & G.S.
FILED
JANNIE L. W. HOGRUE
C.C.P. & G.S.

I, the undersigned employee of Richardson Plowden & Robinson, P.A., counsel for the Defendants South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation, do hereby certify that I have served a copy of the *ANSWER TO COMPLAINT* via electronic delivery and by causing a copy of the same to be personally deposited in a United States Postal Service mail box, postage prepaid, with the return address clearly visible, addressed to counsel of record for the Plaintiff as indicated below on this 21st day of November, 2016:

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Paralegal

November 21, 2016
Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
		Civil Action No. 2016-CP-40-06276
Opternative, Inc.,	)	
Plaintiff,	)	
v.	)	**ANSWER OF DEFENDANT-INTERVENOR SOUTH CAROLINA OPTOMETRIC PHYSICIANS ASSOCIATION**
	)	
South Carolina Board of Medical Examiners, South Carolina Department of Labor, Licensing and Regulation,	)	
	)	
Defendants,	)	
and	)	
	)	
South Carolina Optometric Physicians Association,	)	
	)	
Defendant-Intervenor.	)	

Defendant-Intervenor South Carolina Optometric Physicians Association ("SCOPA"), by and through its undersigned attorneys, hereby answers the Complaint of Opternative, Inc. ("Plaintiff"), filed October 20, 2016, as follows.

FOR A FIRST DEFENSE

1. Each and every paragraph of Plaintiff's Complaint not specifically admitted, qualified, or explained herein is denied.

2. The allegations in Paragraph One (1) of Plaintiff's Complaint state legal conclusions to which no response is required. To the extent a response is required, SCOPA admits Plaintiff claims rights and interests in certain online technology (the "Technology") alleged in this Paragraph. Further answering the allegations in this paragraph, SCOPA denies Plaintiff's characterization of the South Carolina Eye Care Consumer Protection Law, S.C. Code

Ann. §§ 40-24-10, et seq. and denies Plaintiff's entitlement to a declaratory judgment and demands strict proof thereof.

3. The allegations in Paragraph Two (2) of Plaintiff's Complaint state legal conclusions to which no response is required. To the extent a response is required, SCOPA does not contest jurisdiction.

4. The allegations in Paragraph Three (3) of Plaintiff's Complaint state legal conclusions to which no response is required. To the extent a response is required, SCOPA admits Plaintiff seeks a declaratory judgment and injunctive relief. SCOPA denies Plaintiff's characterization of the South Carolina Eye Care Consumer Protection Law, S.C. Code Ann. §§ 40-24-10, et seq. and denies Plaintiff's entitlement to a declaratory judgment.

5. The allegations in Paragraph Four (4) of Plaintiff's Complaint state legal conclusions to which no response is required. To the extent a response is required, SCOPA does not contest jurisdiction.

6. Upon information and belief, SCOPA admits the allegations in Paragraph Five (5) of Plaintiff's Complaint.

7. Upon information and belief, SCOPA admits the allegations in Paragraphs Six (6) and Seven (7) of Plaintiff's Complaint.

8. The allegations in Paragraphs Eight (8) and Nine (9) of Plaintiff's Complaint state legal conclusions to which no response is required.

9. SCOPA admits the allegations in Paragraph Ten (10) of Plaintiff's Complaint.

10. The allegations in Paragraphs Eleven (11) and Twelve (12) of Plaintiff's Complaint state legal conclusions to which no response is required.

11. SCOPA admits the allegations in Paragraph Thirteen (13) of Plaintiff's Complaint.

12. The allegations in Paragraphs Fourteen (14) and Fifteen (15) of Plaintiff's Complaint state legal conclusions to which no response is required.

13. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraphs Sixteen (16) and Seventeen (17) of Plaintiff's Complaint.

14. SCOPA admits the allegations in Paragraphs Eighteen (18) and Nineteen (19) of Plaintiff's Complaint.

15. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraphs Twenty (20), Twenty-One (21), Twenty-Two (22), Twenty-Three (23), Twenty-Four (24), Twenty-Five (25), Twenty-Six (26), Twenty-Seven (27), Twenty-Eight (28), Twenty-Nine (29), Thirty (30), Thirty-One (31), and Thirty-Two (32) of Plaintiff's Complaint.

16. SCOPA admits the allegations in Paragraphs Thirty-Three (33), Thirty-Four (34), and Thirty-Five (35) of Plaintiff's Complaint.

17. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraphs Thirty-Six (36) and Thirty-Seven (37) of Plaintiff's Complaint.

18. The allegations in Paragraphs Thirty-Eight (38) and Thirty-Nine (39) of Plaintiff's Complaint state legal conclusions to which no response is required.

19. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraphs Forty (40), Forty-One (41), Forty-Two (42), Forty-Three (43), Forty-Four (44), Forty-Five (45), Forty-Six (46), and Forty-Seven (47) of Plaintiff's Complaint.

20. Upon information and belief, SCOPA admits the allegations in Paragraph Forty-Eight (48) of Plaintiff's Complaint.

21. SCOPA denies the allegations in Paragraphs Forty-Nine (49), Fifty (50), and Fifty-One (51) of Plaintiff's Complaint as stated.

22. The allegations in Paragraphs Fifty-Two (52), Fifty-Three (53), and Fifty-Four (54) of Plaintiff's Complaint state legal conclusions to which no response is required.

23. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraph Fifty-Five (55) of Plaintiff's Complaint.

24. The allegations in Paragraphs Fifty-Six (56), Fifty-Seven (57), Fifty-Eight (58), Fifty-Nine (59), Sixty (60), Sixty-One (61), Sixty-Two (62), Sixty-Three (63), Sixty-Four (64), Sixty-Five (65), Sixty-Six (66), Sixty-Seven (67), Sixty-Eight (68), Sixty-Nine (69), Seventy (70), Seventy-One (71), Seventy-Two (72), Seventy-Three (73), Seventy-Four (74), Seventy-Five (75), Seventy-Six (76), Seventy-Seven (77), Seventy-Eight (78), and Seventy-Nine (79) of Plaintiff's Complaint state legal conclusions to which no response is required.

25. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraphs Eighty (80), Eighty-One (81), Eighty-Two (82), Eighty-Three (83), Eighty-Four (84), Eighty-Five (85), and Eighty-Six (86) of Plaintiff's Complaint.

26. In response to the allegations in Paragraph Eighty-Seven (87) of Plaintiff's Complaint, SCOPA hereby reincorporates the preceding allegations of this Answer as if fully restated herein verbatim.

27. The allegations in Paragraphs Eighty-Eight (88), Eighty-Nine (89), and Ninety (90) of Plaintiff's Complaint state legal conclusions to which no response is required.

28. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraph Ninety-One (91) of Plaintiff's Complaint.

29. In response to the allegations in Paragraph Ninety-Two (92) of Plaintiff's Complaint, SCOPA hereby reincorporates the preceding allegations of this Answer as if fully restated herein verbatim.

30. The allegations in Paragraphs Ninety-Three (93), Ninety-Four (94), Ninety-Five (95), and Ninety-Six (96) of Plaintiff's Complaint state legal conclusions to which no response is required.

31. SCOPA is without sufficient information or knowledge to respond to the allegations in Paragraph Ninety-Seven (97) of Plaintiff's Complaint.

32. SCOPA denies the allegations in the Plaintiff's Prayer for Relief.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant-Intervenor South Carolina Optometric Physicians Association prays that it be dismissed with prejudice, for the taxable costs of this action, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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March 7, 2017.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Opternative, Inc., Plaintiff, v. South Carolina Board of Medical Examiners and South Carolina Department of Labor, Licensing and Regulation, Defendant, and South Carolina Optometric Physicians Association, Defendant-Intervenor.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2016-CP-40-06276 **CERTIFICATE OF SERVICE**

The undersigned does certify that on March 7, 2017, she did cause to have served via U.S. Mail a copy of South Carolina Optometric Physicians Association's Answer for the above-captioned action on the following:

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
		Civil Action No. 2016-CP-40-06276
Opternative, Inc.,	)	
	)	
Plaintiff,	)	**MOTION TO INTERVENE**
v.	)	
	)	
South Carolina Board of Medical Examiners, South Carolina Department of Labor, Licensing and Regulation,	)	
	)	
Defendants.	)	

Pursuant to Rule 24 of the *South Carolina Rules of Civil Procedure*, South Carolina Optometric Physicians Association ("SCOPA") hereby moves to intervene as a defendant in this action to assert the defenses set forth in its proposed answer, a copy of which is attached as **Exhibit 1**. This motion is further supported by the affidavit of Dr. Jennifer Zolman, President of SCOPA, a copy of which is attached hereto as **Exhibit 2**.

BACKGROUND

Plaintiff Opternative, Inc. initiated this action on October 20, 2016, seeking a declaratory judgment finding portions of the Eye Care Consumer Protection Law, S.C. Code Ann. §§ 40-24-10, *et seq.*, enacted on May 11, 2016 ("ECCPL"). Specifically, Opternative challenges sections 40-24-10(9) and 40-24-20(C) and (D) of the ECCPL, alleging these provisions violate Article I, Section 3 of the South Carolina Constitution.

Opternative is a healthcare technology company that has allegedly produced certain technology which allows ophthalmologists and optometrists to conduct a refractive eye

examination using a computer. *See* Complaint at ¶¶ 16, 21-28. Opternative challenges section 40-24-10(9) of the ECCPL, which provides that vision assessments

> may not be based solely on objective refractive data or information generated by an automated testing device, including an auto refractor or other electronic refractive-only testing device, to provide a medical diagnosis or to establish a refractive error for a patient as part of an eye examination.

Opternative claims the ECCPL "effectively prohibits ophthalmologists from conducting Exams or writing prescriptions based on Opternative's Technology." Complaint at ¶ 54 (citing S.C. Code Ann. § 40-24-20(C) (barring the issuance of "prescription[s] for spectacles or contact lenses ... based solely on the refractive eye error of the human eye or be generated by a kiosk."). Opternative seeks a ruling prohibiting Defendants South Carolina Board of Medical Examiners and South Carolina Department of Labor, Licensing, and Regulation from penalizing South Carolina-licensed ophthalmologists pursuant to Section 40-24-40(D) of the ECCPL.

Movant is an association of optometric physicians practicing in South Carolina. Optometrists are healthcare professionals who provide primary vision care ranging from sight testing and correction to diagnosis, treatment, and management of vision changes. *See* Exhibit 2 at ¶ 5. Optometrists are different from ophthalmologists in that ophthalmologists are medical professionals or osteopathic doctors who specialize in eye and vision care. *Id.* at ¶ 6.

The ECCPL affects both ophthalmologists and optometrists because it expressly provides that the only way to obtain a prescription for corrective lenses in the state is through a licensed ophthalmologist or optometrist. S.C. Code Ann. § 37-25-20. Plaintiff acknowledges as much in its Complaint. *See* Complaint at ¶¶ 9, 13-15. Prescriptions must be based on "medical findings made and refractive error discovered during [an] eye examination," which may be conducted by either an ophthalmologist or optometrist. S.C. Code Ann. § 40-24-20; S.C. Code Ann. § 37-25-20. SCOPA's members are directly affected by the ECCPL and, potentially, the outcome of this

litigation. If Plaintiff prevails in this case, SCOPA's members and the patients they treat could be affected. For the reasons that follow, SCOPA's intervention should be permitted.

ARGUMENTS

The Rules of Civil Procedure provide for intervention as of right as well as permissive intervention. Intervention as of right is governed by Rule 24(a), SCRCP. Rule 24(a)(2) provides

> anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a) is a counterpart to Rule 19(a), SCRCP, regarding joinder of persons needed for a just adjudication. Under Rule 19(a), upon motion of a party to the action, a non-party should be joined so that he may protect his interest which, as a practical matter, may be substantially impaired by the disposition of the action. Pursuant to Rule 24(a), that same non-party has a right to intervene in the action on his own motion. Case law interpreting both rules hold admission of a non-party who is necessary to adjudication of the action should be liberally granted. *See Government Employee's Ins. Co., Ex Parte*, 373 S.C. 132, 136, 644 S.E.2d 699, 701 (2007); *Berkeley Electric v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).

Permissive intervention is governed by Rule 24(b), SCRCP, which provides for intervention: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." "Rule 24(b) intervention is premised on the theory that when claims or defenses have a question of law or fact common to each other, sound administrative procedures encourage the disposition of all of the claims or defenses in one action rather than a multiplicity of actions." *S.C. Tax Comm'n v. Union City Treasurer*, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988).

Courts interpret Rule 24 "to permit liberal intervention particularly where, as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected." *Berkeley Electric*, 302 S.C. at 189, 394 S.E.2d at 714. *See also TPI Corp. v. Merchandise Mart of South Carolina, Inc.*, 61 F.R.D. 684, 690 (D.S.C. 1974) ("most cases call for a liberal construction of Rule 24") (citations omitted). Granting intervention is wholly discretionary with the court. *See* Rule 24(b), SCRCP; *Berkeley Electric*, 302 S.C. at 189, 394 S.E.2d at 714. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

I. SCOPA IS ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE 24(A).

In order to establish intervention as of right, a proposed intervenor must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate it is in a position such that without intervention, disposition of the action may impair or impede his ability to protect that interest; and (4) demonstrate its interest is inadequately represented by other parties." *Berkeley Electric*, 302 S.C. at 189, 394 S.E.2d at 714; *Ex Parte Reichlyn*, 310 S.C. 495, 498, 427 S.E.2d 661, 663 (1993). The court "must consider the pragmatic consequences of a decision to permit or deny intervention" and should "avoid setting up rigid applications of Rule 24(a)(2)." *Id.* at 189, 394 S.E.2d at 714.

A. SCOPA's intervention is reasonable and timely.

SCOPA's motion to intervene is timely. The Supreme Court has set forth a four-part test to determine timeliness of a motion to intervene: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Davis v. Jennings*, 304

S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (reversing trial court's denial of newspaper's motion to intervene for limited purpose of challenging a protective order, rejecting respondents' contention that motion was untimely).

Rule 24 provides no definition of what constitutes a "timely" motion. Rather, "the question must . . . be answered in each case by the exercise of the sound discretion of the court." *Black v. Central Motor Lines*, 500 F.2d 407, 408 (4th Cir. 1974); *Berkeley Electric*, 302 S.C. at 189, 394 S.E.2d at 714 ("Each case will be examined in the context of its unique facts and circumstances"). It is clear here, based on the stage of litigation, SCOPA's motion to intervene is timely and would not prejudice the rights of the original parties. The above-captioned action was filed on October 20, 2016. *See generally* Complaint. SCOPA received notice of the action on the date it was initiated through its relationship with the American Optometric Association. Exhibit 2 at ¶ 14. On November 21, 2016, the original defendants in the action answered Plaintiff's Complaint.

When evaluating prejudice to the original parties, "[p]articular focus must be had on the posture of th[e] litigation at the time the motion is made." *U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 72 (2d Cir. 1994) (citation omitted). A motion to intervene is timely when it causes no delay in the resolution of the action or otherwise prejudices a party. *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171 (2d Cir. 2001); *Jet Traders Investment Corp. v. Tekair, Ltd.*, 89 F.R.D. 560 (D. Del. 1981). Any delay that may result from SCOPA's intervention would be minimal, as SCOPA's involvement would not disturb or challenge existing orders or upset past discovery. SCOPA's intervention is both reasonable and timely.

B. SCOPA has a real and substantial interest relating to the subject of this action.

To meet the second prong of Rule 24(a)(2), SCRCP, a party must have a real and protectable interest in the property or transaction that is the subject matter of the lawsuit. "A real party in interest . . . ordinarily is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Dockside Ass'n, Inc. v. Detyens, Simmons and Carlisle*, 285 S.C. 565, 568-69, 330 S.E.2d 537, 539 (Ct. App. 1985), *aff'd as modified by* 287 S.C. 287, 337 S.E.2d 887 (1985). "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights." *Allen v. County Sch. Board*, 28 F.R.D. 358, 362 (D. Va. 1961) (citation omitted); *Radford Iron Co. Inc. v. Appalachian Elec. Power Co.*, 62 F.2d 940 (4th Cir. 1933)).

The court's analysis under the second prong of the applicable test for intervention as of right under Rule 24(a) amounts to a determination of a party's standing, a fundamental requirement for instituting a civil action. Standing requires a party to have an interest in the subject matter of the action and a personal stake in the outcome of the litigation. *Furman Univ. v. Livingston*, 244 S.C. 200, 204, 136 S.E.2d 254, 256 (1964); *Duke Power Co. v. S.C. Pub. Serv. Com'n*, 284 S.C. 81, 96, 326 S.E.2d 394, 404 (1985). In declaratory judgment actions, the interest of the parties to the subject matter of the controversy must be more than merely general; it must be a substantial, direct, and legally protected interest in the relief sought. S.C. Code Ann. § 15-53-30; *Carolina Alliance for Fair Employment v. S.C. Dept. of Labor, Licensing, and Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999).

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the

organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000) (citing *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). In *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, the South Carolina Supreme Court recognized the three-part *Laidlaw* test for associational standing applied in this state. 407 S.C. 67, 76-77, 753 S.E.2d 846, 851-52 (2014).

SCOPA meets the three-part test for associational standing. First, SCOPA's members, optometrists practicing in the State of South Carolina, would otherwise have standing to intervene in this action in their own right. As acknowledged by Plaintiff in its Complaint, both ophthalmologists and optometrists are affected by the ECCPL. *See also* Exhibit 2 at ¶ 8 (stating the ECCPL directly regulates SCOPA's members). A declaration in Plaintiff's favor in the subject action would substantially and materially change the manner in which optometrists treat their patients, conduct refractive eye examinations, and prescribe spectacles or contact lenses. *See* Exhibit 2 at ¶ 16.

In *New York Public Interest Research Group, Inc. v. Regents of University of State of N.Y.*, 516 F.2d 350 (2d Cir. 1975), the Court of Appeals for the Second Circuit reversed a district court's order refusing to allow a pharmaceutical association from intervening in a consumer action challenging a prohibition on advertising prescription drugs. The appellate court recognized: "Clearly the pharmacists have an interest in the transaction which is the subject of the action." *Id.* at 351. "Pharmacists also have an interest in the action as professionals since any lifting of the prohibition against advertising prescription drug prices might well lead to significant changes in the profession and in the way pharmacists conduct their businesses." *Id.*

For similar reasons, SCOPA's members have an interest in the subject matter of the subject action and have a personal stake in the outcome of the litigation because any declaratory judgment that may be issued in this case could materially change the manner in which SCOPA's members treat their patients. Because SCOPA's members would have personal standing to intervene in this matter, SCOPA has standing to intervene.

Second, SCOPA has standing to intervene because the interests at stake are germane to the organization's purpose. SCOPA operates for the purpose of representing optometrists in South Carolina and advocating for patient care. Exhibit 2 at ¶ 11. To the extent the subject litigation may affect the statutory and regulatory regime under which SCOPA's members operate, SCOPA has an organizational interest in the outcome of the action. *See New York Public Interest Research Group, Inc.*, 516 F.2d at 352 ("With respect to the association of pharmacists, we hold that it has a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged."); *Sierra Club v. Ruckelshaus*, 602 F.Supp. 892, 896 (N.D. Cal. 1984) ("Because Association members mine phosphorus, they will be directly affected by final radionuclide emission standards"). Accordingly, the interests at stake in this case are germane to SCOPA's organizational purpose and SCOPA should be allowed to intervene.

Finally, SCOPA has standing to intervene because neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The potential declaration in this case has the effect of determining whether certain provisions of the ECCPL are valid or invalid. Should Plaintiff prevail in this suit, portions of the ECCPL under which SCOPA's members are currently regulated and required to follow would be set aside or materially rewritten and enforced. The effect of such a declaration would impact all of SCOPA's

members and the patients SCOPA treats, rather than affecting only a limited number. Further, requiring intervention by SCOPA's individual members, more than 425 optometrists in the State of South Carolina, *see* Exhibit 2 at ¶ 10, would be a waste of judicial time and resources and would be antithetical to this court's interest in promoting judicial economy.

Similarly, in *Berkeley Electric*, the Supreme Court held a proposed intervenor, SCE&G, had a substantial interest in the litigation and was allowed to intervene under Rule 24(a) where SCE&G showed it "may be impaired or impeded in its ability to protect its asserted interests." 302 S.C. at 191, 394 S.E.2d at 715. The Court recognized, "[a] declaration by the trial judge in favor of [the plaintiff] would, as a practical matter, prevent [SCE&G] from serving customers that it believes it is legally entitled to serve . . . ." *Id.* Similarly, here, SCOPA believes the provisions of the ECCPL are reasonably necessary to protect and uphold the applicable standard of care for SCOPA's members' patients. SCOPA's members are under an affirmative obligation to look after the best interests and health of their patients. *See* Exhibit 2 at ¶ 13 (citing American Optometric Association Standards of Professional Conduct). The American Optometric Association's Code of Ethics states: "It shall be the ideal, resolve, and duty of all optometrists to keep their patients' eye, vision, and general health paramount at all times." *Id.* at ¶ 13. A finding that the ECCPL's provisions are unconstitutional or illegal would directly affect the nature of services provided by SCOPA's members and the quality of care SCOPA's members' patients receive.

In cases in other jurisdictions challenging various statutory schemes as unconstitutional or improperly interpreted and applied, courts have permitted persons who are governed by those schemes to intervene. *See, e.g., Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (detainees allowed to intervene as a matter of right in action brought to challenge housing of

alien felons); *Taft v. Pontarelli*, 100 F.R.D. 19 (D.R.I. 1983) (parents of children who attended religiously-affiliated schools permitted to intervene in action challenging a federal program purporting to aid children in both public and nonpublic schools nationwide). This judicial willingness to allow intervention extends to associations whose members are governed by the subject statutory or regulatory schemes. *See Great Atl. & Pac. Tea Co. v. Town of East Hampton*, 178 F.R.D. 39 (D.N.Y. 1998) (group dedicated to preserving the rural character of a municipality permitted to intervene in action contesting the continued existence of an ordinance restricting commercial activities outside of the central business district); *Stevenson v. Rominger*, 905 F.Supp. 836 (D.Wash. 1995) (environmental group allowed to intervene as of right in landowner's action challenging Forest Service regulation); *Sierra Club v. Ruckelshaus*, 602 F.Supp. 892 (D.Cal. 1984) (mining association permitted to intervene in environmental organization's suit against EPA arising out of agency's failure to timely promulgate regulations concerning radionuclide emission standards).

For these reasons, SCOPA has a real and substantial interest relating to the subject of this action and should be permitted to intervene.

C. Without intervention, disposition of the action could impair SCOPA's ability to protect its interest.

In order to show that its interest will be impaired or impeded, "a party need not prove that it would be bound in a *res judicata* sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene." *Berkeley*, 302 S.C. at 189, 394 S.E.2d at 714. It is not a sufficient ground to deny intervention in a declaratory judgment case that the proposed intervenor "protect [its] interests after an adverse decision in the instant case by attacking any new regulation on constitutional, antitrust or unfair competition grounds." *New*

York Public Interest Research Group, Inc., 516 F.2d at 352. In *Sierra Club v. Ruckelshaus*, 602 F.Supp. at 896, a federal district court recognized,

> Although the Association ... would have the opportunity to litigate the merits of the regulations at a later date, such an after-the-fact remedy "may, 'as a practical matter,' afford much less protection than the opportunity to participate in ... proceedings that seek to ensure sustainable regulations in the first place, with no need for judicial review ...." Thus, the Association's interests might be impaired if intervention in th[e] action were not allowed.

602 F.Supp. at 896 (quoting *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977). For the same reasons, judicial economy would be served by permitting SCOPA to intervene in this action rather than require SCOPA to later challenge the downstream effect of a ruling in this case.

D. SCOPA's interest is not adequately represented by other parties.

The last requirement of Rule 24(a), SCRCP, is met upon a showing by the party seeking intervention that "the representation of [its] interests 'may be' inadequate. *Berkeley Electric*, 302 S.C. at 191, 394 S.E.2d at 715 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed2d 686 (1972)). "This burden is minimal." *Id.* In order to determine whether another party will adequately protect the interest of an intervenor, the Court should consider three factors: (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent. *In re Horry County State Bank*, 361 S.C. 503, 508-09, 604 S.E.2d 723, 726 (Ct. App. 2004); *Berkeley Electric*, 302 S.C. at 191, 394 S.E.2d at 715.

Even though the Board and SCLLR are parties to the subject action, and may at this stage have similar interests to SCOPA, courts have recognized "even when a governmental agency's interests appear aligned with those of a particular private group at a particular moment in time,

'the government's position is defined by the public interest, [not simply] the interests of a particular group of citizens." *Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986); *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991); *see also New York Public Interest Research Group, Inc.*, 516 F.2d at 352 ("[W]e are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would [the existing parties] ... [as] their interests 'may significantly differ.'").

Moreover, should SCOPA's intervention be denied, there is a risk that the original defendants could settle the case in a manner that could harm SCOPA's interests. Thus, if SCOPA is not permitted to intervene, it would be precluded from protecting its interests as well as the interests of its members, as it would have no meaningful way to attempt to affect the outcome of this case.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION IS APPROPRIATE.

As an alternative, SCOPA should be allowed permissive intervention pursuant to Rule 24(b)(2), SCRCP. Under Rule 24(b)(2), permissive intervention is appropriate where "an applicant's claim or defense and the main action have a question of law or fact in common" and the intervention does not "unduly delay or prejudice" the rights of the original parties. *Id.* The commonality requirement for permissive intervention is satisfied where the "petitioner-intervenor's claims and the main action arose out of the same transaction." *TPI Corp. v. Merchandise Mart of South Carolina, Inc.*, 61 F.R.D. 684, 689 (D.S.C. 1974).

When considering a request for permissive intervention, the court must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (internal quotation omitted). Additional relevant factors "include the nature and extent of the intervenors' interests," the degree to which

those interests are "adequately represented by other parties," and "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 797 F.2d 85, 89 (citation omitted).

The same reasons that call for an order permitting SCOPA to intervene under Rule 24(a), SCRCP, provide equally compelling grounds for an order permitting SCOPA to intervene under Rule 24(b), SCRCP.

CONCLUSION

Because SCOPA has met each requisite element for intervention, SCOPA respectfully requests this Court grant it leave to intervene in this action pursuant to Rule 24, SCRCP.

Respectfully submitted,

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January 12, 2017.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Opternative, Inc., Plaintiff, vs. South Carolina Board of Medical Examiners, and South Carolina Department of Labor, Licensing, and Regulation, Defendants.	Civil Action No. 2016-CP-40-06276 **OPTERNATIVE'S CONDITIONAL CONSENT TO THE SOUTH CAROLINA OPTOMETRIC PHYSICIANS ASSOCIATION'S MOTION TO INTERVENE**

RICHLAND CO. FILED
2017 FEB -1 PM 3:3
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C.C.P. & G.S.

INTRODUCTION

Plaintiff Opternative, Inc. ("Opternative") files this Response to the South Carolina Optometric Physicians Association's ("SCOPA") pending Motion to Intervene in this lawsuit. As explained below, Opternative consents to the intervention so long as the intervention does not result in an undue expansion of the time, cost, scope, or issues related to discovery or necessary to the resolution of this suit.[1]

THIS CASE INVOLVES FEW, IF ANY, DISPUTED FACTS AND TURNS SOLELY ON QUESTIONS OF LAW

This is not a fact-intensive case. As Plaintiff has alleged, Opternative is a healthcare technology company that offers qualifying customers the ability to take an innovative eye exam from the comfort of their own homes using a smart phone and computer. *See* Compl. ¶¶ 16, 20–

[1] Opternative's counsel conferred with counsel for the putative Intervenors on this matter but did not reach any formal agreement on the appropriate scope of any discovery. Counsel for the putative Intervenors represented that, although they do not disagree that this lawsuit should involve *de minimis* discovery, they are unwilling to enter into a formal agreement to that effect at this early stage of the case. Counsel for Defendants likewise agreed during conversation with Opternative's counsel that little discovery is needed in this suit.

26. Opternative then shares the patient's results—which include the patient's medical history and refractive error—with a state-licensed ophthalmologist, who decides either (1) to write a medically-appropriate prescription for corrective lenses or (2) that none can be written based on the data. *Id.* ¶¶ 22, 27–30, 32, 36. Opternative operated in South Carolina until May 11, 2016, when the Eye Care Consumer Protection Law (ECCPL) was passed. *Id.* ¶¶ 1, 51, 81.

The ECCPL provides that vision assessments "may not be based solely on objective refractive data or information generated by an automated testing device, including an auto refractor or other electronic refractive-only testing device, to provide a medical diagnosis or to establish a refractive error for a patient as part of an eye examination." S.C. Code Ann. § 40-24-10(9). The law specifically targets "kiosks," or "automated equipment or an automated application, which is designed to be used on a phone, computer, or Internet-based device that can be used in person or remotely to provide refractive data or information." S.C. Code Ann. § 40-24-10(4). It effectively prohibits ophthalmologists from writing prescriptions based on Opternative's exam by providing that "[a] prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk." *Id.* § 40-24-20(C).

But this case is not ultimately about Opternative or the nuances of its technology. The ECCPL's ban does not hinge on the specifics of how any process works—it bans *any* prescriptions based on an exam where the patient's responses were recorded by an electronic technology rather than a physical person. Compl. ¶¶ 56–57. The only question this Court needs to resolve is a question of law, namely whether the ECCPL's ban itself has a constitutionally sufficient relationship to the public health or safety or whether instead (as alleged in the Complaint) it serves only to protect the profits of brick-and-mortar eye care professionals. *Id.*

¶¶ 48–51. As a result, resolving this case should require little in the way of discovery or disputed facts.

INTERVENTION MUST NOT DELAY THE PROMPT RESOLUTION OF THIS SUIT

SCOPA should not be permitted to intervene if it would delay the prompt resolution of this suit. The South Carolina Rules of Civil Procedure are meant "to secure the just, *speedy*, and *inexpensive* determination of every action." Rule 1, SCRCP (emphasis added). Thus, it is no surprise that courts interpreting this State's intervention rules agree that "[g]enerally, the rules of intervention should be liberally construed *where judicial economy will be promoted* by declaring the rights of all affected parties." *Ex parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (emphasis added); *see also In re Horry Cty. State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004). This liberality "does not mean that intervention should always be granted," but rather that courts "'must consider the pragmatic consequences of a decision to permit or deny intervention,'" and that "'[e]ach case will be examined in the context of its unique facts and circumstances.'" *Horry Cty. State Bank*, 361 S.C. at 507, 604 S.E.2d at 725 (quoting *Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)). On that front, authorities are in accord that intervenors should not be permitted to derail the course of a lawsuit with peripheral inquiries. *See, e.g.*, *Stoney v. Stoney*, 417 S.C. 345, 363–64, 790 S.E.2d 31, 41 (Ct. App. 2016), *reh'g denied* (Sept. 9, 2016) (reversing lower court's failure to limit scope of third party's intervention to his interest in matters disputed among original parties); *Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013) (affirming denial of intervention where third party would have needlessly complicated discovery process and consumed additional resources of court and original parties without adding correlative benefit).

PLAINTIFF CONDITIONALLY CONSENTS TO SCOPA'S INTERVENTION

Plaintiff does not anticipate a fact-intensive case because this suit turns on the constitutionality of the ECCPL as a matter of law, rather than on any facts specific to Opternative's operations or technology. Accordingly, Plaintiff consents to SCOPA's Motion to Intervene so long as the subsequent scope or duration of discovery is not expanded through unnecessary and irrelevant inquiries.

CONCLUSION

For the foregoing reasons, Plaintiff consents to SCOPA's proposed intervention conditional on this Court's limiting the scope of that intervention in order to avoid unnecessary or expansive discovery or undue delay.

Respectfully submitted,

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Columbia, South Carolina
February 1, 2017

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiff, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Opternative's Conditional Consent to the South Carolina Optometric Physicians Association's Motion to Intervene

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February, 2017

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Optemative, Inc.,	)	Civil Action No. 2016-CP-40-06276
Plaintiff,	)	
vs.	)	**PLAINTIFF'S MOTION TO COMPEL RESPONSES AND PRODUCTION**
South Carolina Board of Medical Examiners and South Carolina Department of Labor, Licensing, and Regulation,	)	
Defendants.	)	
and	)	
South Carolina Optometric Physicians Association	)	
Defendant-Intervenor.	)	

Plaintiff, by and through the undersigned counsel, and pursuant to South Carolina Rule of Civil Procedure 37(a)(2), respectfully requests this Court to issue an order compelling Defendants to respond to discovery requests in the above-captioned case. Plaintiff has propounded both Requests for Production and Interrogatories on Defendants South Carolina Board of Medical Examiners and South Carolina Department of Labor, Licensing, and Regulation, and responses to those Requests and Interrogatories were due fully 25 days ago at the time of the filing of this Motion. Defendants have not responded to these requests, however, either by providing substantive responses or written objections, and Plaintiff therefore respectfully requests that this Court compel a response. Should the Court grant this motion, Plaintiff also requests the award of its reasonable costs and expenses incurred in obtaining said order under Rule of Civil Procedure 37(a)(4).

RELEVANT FACTS

Plaintiff filed this constitutional challenge to South Carolina's Eye Care Consumer Protection Law, South Carolina Code sections 40-24-10(9), 40-24-20(C) and (D), on October 20, 2016. Defendants timely answered on November 21, 2016. Defendant-Intervenor South Carolina Optometric Physicians Association then moved to intervene on January 12, 2017. That motion was granted on February 22, 2017.

On March 3, 2017, Plaintiff served Defendants with Requests for Admissions, Interrogatories, and Requests for Production of Documents pursuant to South Carolina Rules of Civil Procedure 36, 33, and 34, respectively. On April 6, 2017, counsel for Defendants called counsel for Plaintiff to request a four-day extension in responding to Plaintiff's Requests for Admissions, a fifteen-day extension in responding to Plaintiff's Interrogatories, and a fifteen-day extension in responding to Plaintiff's Requests for Production. Extensions were to run from the date of the call, such that responses to Plaintiff's Requests for Admissions were due on April 10, and responses to Plaintiff's Interrogatories and Requests for Production were due on April 21. Counsel for Plaintiff granted those extensions orally and confirmed via e-mail. *See* Ex. A (Plaintiff's E-Mail to Defendants, 4/6/2017 at 5:19 PM).

On April 10, 2017, Defendants timely served Plaintiff with responses to Plaintiff's Requests for Admissions. However, Plaintiff did not hear from Defendants on or before April 21 regarding Defendants' outstanding responses and production. After waiting seven full days, counsel for Plaintiff finally e-mailed counsel for Defendants on April 28, 2017, for an update on the status of Defendants' outstanding responses and production. *See* Ex. B (Plaintiff's E-Mail to Defendants, 4/28/2017 at 2:37 PM). Counsel for Defendants did not respond.

After waiting another three days, on May 1, 2017, counsel for Plaintiff e-mailed once more for an update on the status of Defendants' outstanding responses and production. *See* Ex.

C (Plaintiff's E-Mail to Defendants, 5/1/2017 at 3:33 PM). Counsel for Defendants responded that day by indicating that Defendants were in possession of numerous responsive documents, and asked how Plaintiff would like to receive them. *See* Ex. D (Defendants' E-Mail to Plaintiff, 5/1/2017 at 7:23 PM). The following day, counsel for Plaintiff responded with preferred means of receipt and a request that Defendants produce "as soon as practicable" within those parameters. *See* Ex. E (Plaintiff's E-Mail to Defendants, 5/2/2017 at 9:24 AM). Counsel for Defendants responded that day by indicating that his paralegal would "assist in a way that helps." *See* Ex. F (Defendants' E-Mail to Plaintiff, 5/2/2017 at 10:01 AM).

After hearing nothing further from Defendants, on May 8, 2017—sixteen days past the already-extended April 21 deadline for Defendants' outstanding responses and production—counsel for Plaintiff emailed counsel for Defendants yet again to request a prompt response and also to warn that judicial action would be taken should Defendants continue to neglect their discovery obligations. *See* Ex. G (Plaintiff's E-Mail to Defendants, 5/8/2017 at 3:16 PM). Counsel for Defendants, yet again, did not respond. The following day, counsel for Plaintiff called counsel for Defendants to gain clarity on the situation. Counsel for Defendants advised that he would respond to Plaintiff's May 8, 2017 e-mail by the close of business on May 10, 2017. Plaintiff did not hear back by that time.

On May 11, 2017, counsel for Defendants emailed to inform counsel for Plaintiff that it would cost between $2,000 and $5,000 to produce a number of e-mails deemed responsive to Plaintiff's requests, and to ask whether Plaintiff would like to review those e-mails prior to production. *See* Ex. H (Defendants' E-Mail to Plaintiff, 5/11/2017 at 10:51 AM). That day, counsel for Plaintiff replied that there was no need for pre-production review and reiterated once more Defendants' duty to comply with their outstanding discovery obligations. *See* Ex. I

(Plaintiff's E-Mail to Defendants, 5/11/2017 at 5:42 PM). Counsel for Defendants replied that Defendants would produce the requested documents just as soon as Plaintiff paid the previously-indicated cost, with no word on Defendants' outstanding interrogatory responses. *See* Ex. J (Defendants' E-Mail to Plaintiff, 5/11/2017 at 5:47 PM).

Counsel for Plaintiff responded the following day, noting that "hundreds" of emails should be easily producible, for free, using any number of common electronic means and reiterating that Plaintiff would accept document production in "whatever form is easiest for [Defendants] to produce." *See* Ex. K (Plaintiff's E-Mail to Defendants, 5/12/2017 at 8:46 AM). Counsel for Defendants, again, has not responded.[1]

ARGUMENT AND AUTHORITIES

A party has thirty days to respond to interrogatories and requests for production of documents. Rules 33(a) and 34(b), SCRCP. That deadline may be extended by written agreement between counsel for an additional period not exceeding thirty days. *See* Rule 6(b), SCRCP. When a party fails to answer an interrogatory submitted under Rule 33 or fails to allow or otherwise object to inspection of documents requested under Rule 34, the discovering party may move for an order compelling the relevant responses and production. Rule 37(a)(2), SCRCP. If the moving party succeeds, that party may also move for the award of its reasonable costs and expenses incurred in obtaining the order. Rule 37(a)(4), SCRCP.

Here, Defendants were originally slated to respond to Plaintiff's discovery requests on April 7, 2017, under Rules 33(a) and 34(b). Defendants timely requested a fifteen-day extension

[1] Meanwhile, discovery between Plaintiff and Defendant-Intervenor has proceeded without incident. Those parties have exchanged written discovery requests and responses to those requests without requiring any judicial intervention. But for Defendants' refusal to respond to the outstanding discovery requests, discovery in this matter would continue toward an efficient resolution.

in responding to Plaintiff's Interrogatories and Requests for Production of Documents. Plaintiff granted those extensions, setting an updated deadline of April 21, 2017, under Rule 6(b). Defendants then failed to meet that deadline, which alone provides a sufficient basis for this Court to grant the present motion to compel under Rule 37(a)(2), as well as to award Plaintiff its reasonable costs and expenses under Rule 37(a)(4). Rather than come to this Court immediately, however, Plaintiff has made numerous good-faith efforts to allow extra time for Defendants' outstanding responses and production. Defendants have responded mostly with silence.

In short, Defendants have not objected to Plaintiffs' discovery requests; they have simply disregarded them. Plaintiff now respectfully requests the Court to issue an order compelling Defendants to respond to their outstanding discovery obligations, and to award Plaintiff its reasonable costs and expenses incurred in obtaining said order.

CONCLUSION

For the foregoing reasons, the Court should grant this motion and award Plaintiff any costs and expenses that may be appropriate.

Respectfully submitted,

INSTITUTE FOR JUSTICE

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May 17, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Opternative, Inc.,

Plaintiff,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation,

Defendants.

and

South Carolina Optometric Physicians Association,

Defendant-Intervenor.

C/A No.: 2016-CP-40-06276

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS AND THE SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION

Defendants South Carolina Board of Medical Examiners (the "Board") and the South Carolina Department of Labor, Licensing & Regulation ("LLR") (collectively the "Defendants"), by and through undersigned counsel, hereby submit their Motion for Summary Judgment under Rule 56, SCRCP, and request that this Court dismiss the lawsuit of Plaintiff Opternative, Inc. ("Plaintiff" or "Opternative").

Plaintiff has brought a declaratory judgment action to challenge the constitutionality of South Carolina's Eye Care Consumer Protection Law ("ECCPL"), S.C. Code Ann. § 40-24-10 *et seq.*, arguing that the ECCPL is "protectionist" legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Plaintiff's Complaint, ¶¶ 87-97).

The Defendants move to dismiss this Complaint on the following grounds:

- Opternative has not suffered an "injury in fact" at the hands of the Defendants, who do not do not regulate Opternative and are not proper parties in this case;

- The ECCPL is constitutional because it bears a reasonable relation to its legislative purpose that is supported by a rational basis.

For these reasons, as set forth in greater detail below, the Defendants request that this Court GRANT their motion and DISMISS the case with prejudice.

PLAINTIFF'S LAWSUIT

Plaintiff is a private foreign corporation that has developed an online technology designed to conduct eye examinations and produce prescriptions for corrective lens. (Plaintiff's Complaint, ¶¶ 1, 5). In bringing this declaratory judgment action, Plaintiff argues that the ECCPL is "protectionist" legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Plaintiff's Complaint, ¶¶ 87-97). Specifically, Plaintiff has argued that:

- Article I, Section 3 of the South Carolina Constitution forbids protectionist legislation. Because the ECCPL does not further any valid public health or safety purpose, it has no legitimate basis under the South Carolina Constitution. For that reason, the ECCPL allegedly violates the "due process" rights of Plaintiff. (Plaintiff's Complaint, ¶¶ 87-90).

- Article I, Section 3 of the South Carolina Constitution provides for "equal protection of the laws." The ECCPL violates Plaintiff's equal protection rights by drawing an "arbitrary and irrational distinction between ophthalmologists who write corrective-lens prescriptions based on an in-person refractive examination and ophthalmologists who write corrective-lens prescriptions based on Opternative's Exam." Plaintiff also argues that the ECCPL offends equal protection because it draws an "arbitrary and irrational distinction between ophthalmologists [] who are not allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care, and other kinds of medical doctors [] who are allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care." (Plaintiff's Complaint, ¶¶ 92-96).

- Regarding both grounds, Plaintiff alleged the "[u]nless Defendants are enjoined from enforcing the ECCPL, Opternative will suffer continuing and irreparable harm." (Plaintiff's Complaint, ¶¶ 91, 97).

THE ECCPL

The ECCPL has two parts. The first part establishes the definitions of terms that it uses, and the second establishes the substance of the act.

Importantly, the first part of the act defines "provider" as "an individual licensed by the South Carolina Board of Examiners in Optometry or the South Carolina Board of Medical Examiners." S.C. Code Ann. § 40-24-10(7). The second part of the ECCPL provides as follows:

> **SECTION 40-24-20.** Valid prescription required to dispense spectacles or contact lenses; penalties.
>
> (A) A person in this State may not dispense spectacles or contact lenses to a patient without a valid prescription from a provider.
>
> (B) To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. The prescription must take into consideration medical findings made and refractive error discovered during the eye examination. If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.
>
> (C) A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk.
>
> (D) Violation of this section constitutes misconduct as provided for in Sections 40-37-110 and 40-47-110. A provider who violates this section is subject to the penalties authorized in Chapter 37, Title 40 or Chapter 47, Title 40, as applicable.[1]

When requested to identify the public health or safety purpose advanced by the ECCPL, and how the ECCPL is tailored to achieve that purpose, Defendant-Intervenor South Carolina Optometric Physician's Association ("SCOPA") noted that the ECCPL "protects patients of ophthalmologists and optometrists from unwittingly putting their eye health at risk by obtaining

[1] Chapter 37, Title 40 applies to optometrists. Chapter 47, Title 40 applies, among other physicians, to ophthalmologists.

a prescription for corrective lenses without a comprehensive eye examination. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination." (Answer of SCOPA to Plaintiff's First Set of Interrogatories, p. 2). SCOPA further asserts that this assertion derives from the collective training and clinical experience of SCOPA's members. (Answer of SCOPA to Plaintiff's First Set of Interrogatories, p. 3).

THE BOARD AND LLR

The Board is the professional licensing board in South Carolina that regulates physician practice and conduct. S.C. Code Ann. § 40-47-5 *et seq.* **Notably, it does not regulate Plaintiff, as Plaintiff is not a physician licensed in the State of South Carolina.** S.C. Code Ann. § 40-1-70; S.C. Code Ann. § 40-47-10(I).

The LLR administers the Board. S.C. Code Ann. § 40-1-40(B). Like the Board, **LLR does not regulate Plaintiff, as Plaintiff is not licensed by a Board that LLR administers.** Rather, LLR merely "is responsible for all administrative, fiscal, investigative, inspectional, clerical, secretarial, and license renewal operation and activities" of the Board, and in fact does make such support available to the Board. S.C. Code Ann. § 40-1-50(A).

In any event, neither the Board nor LLR has ever taken any enforcement action against any person that it regulates for an alleged violation of the ECCPL.

LEGAL ARGUMENT

I. UNDER SOUTH CAROLINA LAW, STATUTES ARE PRESUMED TO BE CONSTITUTIONAL.

The provisions of the South Carolina Constitution are not a grant but a limitation of legislative power, so that the Legislature may enact any law not expressly, or by clear implication, prohibited by the state or federal constitution. *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010).

Moreover, when the constitutionality of a statute is challenged, every presumption will be made in favor of its validity. A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the constitution. *Id.* A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs. and Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). The challenging party bears the burden of proving the statute unconstitutional. *Home Health Serv., Inc. v. South Carolina Tax Comm'n*, 312 S.C. 324, 440 S.E.2d 375 (1994); *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002).

II. PLAINTIFF CANNOT BRING THIS LAWSUIT BECAUSE IT DOES NOT HAVE PROPER STANDING.

Where a private party seeks to have a statue declared unconstitutional, it must first demonstrate that it has standing. *ATC v. Charleston Cty.*, 380 S.C. 191, 195–96, 669 S.E.2d 337, 339 (2008). Standing is defined as "a personal stake in the subject matter of a lawsuit." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (citing *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999)).

A private person or entity does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Such imminent prejudice must be of a personal nature to the party laying claim to standing, and not merely of general interest common to all members of the public. *Id.* (citing *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)).

To make the required showing, the challenging party must satisfy the following three-part test:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

ATC, 380 S.C. at 195-96, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted)); *see also Youngblood v. S.C. Dept. of Social Services*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

In its Complaint, Opternative describes the "Injury to Plaintiff" in the following manner:

"80. As a direct result of the passage of the ECCPL, the use of Opternative's Technology has been effectively prohibited in South Carolina.

81. Prior to the adoption of the ECCPL, Opternative could (and did) allow a South Carolina-licensed ophthalmologist to write corrective-lens prescriptions for South Carolina residents.

82. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are legally prohibited from working with Opternative to provide corrective-lens prescriptions for South Carolina residents.

83. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are no longer willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents.

84. As a direct result of the passage of the ECCPL, Opternative has ceased business operations in South Carolina.

85. But for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents.

86. But for the ECCPL, state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents."

(Plaintiff's Complaint, ¶¶ 80-86). However, for the reasons stated below, these allegations fail to meet the standards set for establishing standing.

A. **Injury in Fact.**

First, Opternative must show that it has suffered an "injury in fact," which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *ATC*, 380 S.C. at 195, 669 S.E.2d at 337. From its Complaint, Opternative appears to argue that its "injury in fact" is its belief that the ECCPL prevents South Carolina-licensed ophthalmologists from being "willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents," and that if the ECCPL were struck down, they presumably would be willing to use Opternative's technology to write

corrective-lens prescriptions.[2] (Plaintiff's Complaint, ¶¶ 83, 86). As an initial matter, this appears to be a conjectural or hypothetical harm rather than a concrete and particularized harm. In fact, nothing in the ECCPL appears to forbid a South Carolina-licensed ophthalmologist from using Opternative's technology to assist in his or her work. Rather, Opternative appears to argue that it is at a competitive disadvantage because a South Carolina-licensed ophthalmologist cannot base a prescription for spectacles or contact lenses solely on the refractive eye error of the human eye or be generated by a kiosk. S.C. Code Ann. § 40-24-20(C). Instead, the South Carolina-licensed ophthalmologist must also "take into consideration medical findings made and refractive error discovered during the eye examination." S.C. Code Ann. § 40-24-20(B).

On its face, this showing is insufficient to establish an "injury in fact." It is well-established that South Carolina has "rejected a competitor's assertion that standing exists when alleged damages flow from increased or perceived unfair competition." *ATC*, 380 S.C. at 196, 669 S.E.2d at 340 (citing *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 86, 644 S.E.2d 58, 60–61 (2007)). Further, our courts have observed that this is the "prevailing law throughout the country." *ATC*, 380 S.C. at 197, 669 S.E.2d at 340 (citations omitted).

This is especially apparent when Opternative is compared to the plaintiffs in *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016), who were a physical therapist (PT) and two orthopedic surgeons challenging a 2011 position statement from the South Carolina Board of Physical Therapy that – unlike other licensed healthcare professionals – forbade PTs from providing treatment as direct employees of physicians. In

[2] More specifically, the role of a state-licensed ophthalmologist appears to be as follows: (1) the patient takes an on-line test through Opternative's website, (2) Opternative shares the test results with a state-licensed ophthalmologist, and (3) the state-licensed ophthalmologist uses the test results to determine an appropriate a corrective lens prescription, which is made available to the patient via the Opternative website. (Plaintiff's Complaint, ¶¶ 27-29). Opternative admits that its on-line test is not a "comprehensive eye exam." (Plaintiff's Complaint, ¶ 32).

Joseph, the court found that 2011 position statement – an actual act taken by the South Carolina Board of Physical Therapy – injured the PT "by the infringement on her ability to practice her chosen profession and by the adoption of a regulation that requires she and other PTs be treated differently from other health care professionals who may be employed by doctors." 417 S.C. at 449, 790 S.E.2d 770. Similarly, the court found that the surgeons were injured because "they have an interest in how the PT system works and in their ability to employ PTs." *Id.*

In this case, Opternative can justly lay claim to none of these concerns. Professionals under the authority of the Board are not forbidden by the ECCPL – and certainly not by any action of the Board or LLR – from using Opternative's technology. Indeed, a South Carolina-licensed ophthalmologist may still use Opternative's technology to assist him or her in making a determination to write a prescription for spectacles or contact lenses. He or she simply cannot solely base the prescription on the refractive eye error of the human eye or be generated by a kiosk.

In sum, Opternative has failed to show that it has suffered an "injury in fact," and instead has only raised theories of injury that are "conjectural" or "hypothetical." For this reason alone, Opternative's claim must be dismissed.

B. Causal Connection.

Second, Opternative has no show that there is a causal connection between the injury and the conduct complained of. The injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *ATC*, 380 S.C. at 195-96, 669 S.E.2d at 339.

In the instant case, the causal connection does not exist because the injury alleged by Opternative – that South Carolina-licensed ophthalmologists are no longer "willing to work with

Opternative to provide corrective-lens prescriptions for South Carolina residents" – actually requires an act from a third party not before the court. Namely, as set forth above, Opternative alleges that South Carolina-licensed ophthalmologists are no longer willing to use its on-line exam because, under the ECCPL, its on-line exam cannot be the sole basis to write a prescription for spectacles or contact lenses.

Naturally, South Carolina-licensed ophthalmologists can presumably make their own decisions about whether and how to use – or not use – Opternative's on-line technology to assist them in their provision of lawful corrective-lens prescriptions to their patients. In any event, that decision rests with South Carolina-licensed ophthalmologists, and not with the Board or with LLR.

Indeed, to the extent that Opternative argues that the ECCPL places it at a competitive disadvantage because its on-line technology cannot serve as the sole basis for a corrective-lens prescription, its claim must be rejected, as "a competitor challenging legislative or executive action solely to protect its own economic interests lacks standing." *ATC*, 380 S.C. at 198, 669 S.E.2d at 340.

Furthermore, the pleadings are devoid of any "conduct complained of" by either the Board or LLR. In fact, neither the Board nor LLR have ever taken any enforcement action against Opternative, perhaps because Opternative is not an entity that is regulated by either the Board or LLR. This fact alone eviscerates Opternative's argument that either the Board or LLR has engaged in "conduct" that is causally connected to an "injury in fact" that Opternative has suffered.

C. **Redress by a Favorable Decision**

Plaintiff must allege a particularized harm – which is denied – and it has failed to allege adequately that the injury would be redressed by a favorable decision in this case. *Sea Pines Ass'n*, 345 S.C. at 602, 550 S.E.2d at 292. In its Complaint, Plaintiff appears to address this element by alleging that "[b]ut for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents" and that "state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents." (Plaintiff's Complaint, ¶¶ 85-86).

In this regard, Plaintiff's claims appear similar to those of the plaintiffs in *Sea Pines Ass'n*, who raised a constitutional challenge to the decision of the South Carolina Department of Natural Resources ("SCDNR") to issue permits to lethally eliminate a substantial number of white-tailed deer on Hilton Head Island. The court found that the plaintiffs lacked standing in part because their alternative plan to hunting permits – use of non-lethal means to reduce the deer population – would lead to the same result, namely, the reduction of the deer population at Sea Pines. 345 S.C. at 603, 550 S.E.2d at 292. For that reason, the plaintiffs failed to demonstrate standing because the proposed alternative would result in the same "injury."

As set forth above, Plaintiff cannot rely on the alleged "competitive disadvantage" imposed by the ECCPL on Opternative's technology to serve as the "injury in fact." In any event, there is no showing here that a favorable ruling would lead to state-licensed ophthalmologists using Opternative's technology to provide corrective-lens prescriptions for South Carolina residents.

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To show standing, Plaintiff must satisfy each of the three elements referenced above. Plaintiff has failed to demonstrate that it can satisfy any of them. For this reason, Plaintiff's lawsuit must be dismissed.

III. PLAINTIFF CANNOT SHOW THAT THE ECCPL LACKS A "RATIONAL BASIS," AND FOR THAT REASON, ITS DUE PROCESS AND EQUAL PROTECTION CLAIMS MUST BE DISMISSED.

Plaintiff's constitutional attack on the ECCPL is based on both "due process" and "equal protection" grounds. Plaintiff's due process claim is based on its allegation that the ECCPL is protectionist legislation that does not further any valid public health or safety purpose. In this regard, the claim is presumably a "substantive due process" claim.[3] Plaintiff's equal protection claim is based on two imagined "classifications" of physicians that Plaintiff posits are created by the ECCPL:

- between (1) ophthalmologists who write corrective-lens prescriptions based on an in-person refractive examination and (2) ophthalmologists who write corrective-lens prescriptions based on Opternative's Exam;
- Between (1) ophthalmologists who are not allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care, and (2) other kinds of medical doctors who are allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care.

(Plaintiff's Complaint, ¶¶ 92-96).

However, each of these arguments fails because the ECCPL is supported by a "rational basis."

[3] Plaintiff's Complaint contains no discernable allegations that it has been denied "procedural" due process. Plaintiff bases its due process claim on its allegations that the ECCPL is protectionist legislation that deprives it of its "right to pursue an honest living." (Plaintiff's Complaint, ¶¶ 88-90).

A. **Due Process.**

In order to show that the ECCPL violates Plaintiff's substantive due process rights, Plaintiff must show that it was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). The standard for reviewing all substantive due process challenges to state statutes or municipal ordinances, including economic and social welfare legislation, is whether the statute or ordinance bears a reasonable relationship to any legitimate interest of government. *Id.* at 430, 593 S.E.2d at 470; *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917, 923 (2004).

"No one has an unfettered right to pursue a business detrimental to the public health, safety, and welfare." *Denene, Inc.*, 359 S.C. at 97, 596 S.E.2d at 923 (citing *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 170-71, 577 S.E.2d 428, 435 (2003) (county ordinance requiring a 1,500-foot setback for sexually oriented businesses based on the rationale of combating secondary effects of those businesses was constitutional)); *Curtis v. State*, 345 S.C. 557, 573, 549 S.E.2d 591, 599 (2001) (statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace, which is a legitimate exercise of the State's police powers in regulating public safety and welfare, and outweighs any legitimate interest of the business).

As set forth above, Defendant-Intervenor SCOPA noted that the ECCPL "protects patients of ophthalmologists and optometrists from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person

comprehensive eye examination." (Answer of SCOPA to Plaintiff's First Set of Interrogatories, p. 2). SCOPA further asserts that this assertion derives from the collective training and clinical experience of SCOPA's members. (Answer of SCOPA to Plaintiff's First Set of Interrogatories, p. 3).

In light of the standards applicable to Plaintiff's due process claim, it appears uncontested that (1) undiagnosed diseases of the eye are a legitimate health concern of the state, and (2) requiring an in-person comprehensive eye examination may increase the chance of detecting these diseases. Therefore, the statute in question bears a reasonable relationship to a legitimate interest of government.[4]

For these reasons, Plaintiff's due process claim must fail.

B. <u>Equal Protection</u>.

In ruling on an equal protection challenge to a statute, if a classification does not implicate a suspect class[5] or abridge a fundamental right,[6] courts employ the "rational basis" test. *Denene, Inc.*, 359 S.C. at 91, 596 S.E.2d at 920. In such a case, Plaintiff bears the burden "to

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[4] Furthermore, as set forth above, nothing prevents South Carolina-licensed ophthalmologists from deciding for themselves whether to use – or not use – Opternative's on-line technology to assist them in their provision of lawful corrective-lens prescriptions to their patients. That decision does not rest with the Board or with LLR.

[5] A suspect class, as defined by numerous court opinions, is a discrete and insular minority that is unable to shake or rise above the bonds and stigma of its minority status. Courts have been unwilling to extend suspect class status to any classification other than race, alienage and national origin. *Eldridge v. Bouchard*, 645 F. Supp. 749, 752 (W.D. Va. 1986), *aff'd*, 823 F.2d 546 (4th Cir. 1987). Plaintiff does not appear to argue that "ophthalmologists" are a suspect class.

[6] There is also no fundamental right for a physician to use Opternative's technology in violation of the ECCPL. *In re Evans*, 413 B.R. 315, 322 (Bankr. E.D. Va. 2009) (no "fundamental right" under the equal protection clause to pursue a calling as a bankruptcy petition preparer).

negate every conceivable basis which might support" the legislation. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973); *Mitchell v. Comm'r of the Soc. Sec. Admin.*, 182 F.3d 272, 274 (4th Cir. 1999). To be irrational in the Constitutional sense, "the relationship of the classification to its goal" must be "so attenuated as to render the distinction arbitrary." *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *Johnson v. Hall*, 2011 WL 4501323, at *8 (D.S.C. Aug. 9, 2011), *report and recommendation adopted*, 2011 WL 4483642 (D.S.C. Sept. 28, 2011), *aff'd sub nom. Johnson v. Bryant*, 474 F. App'x 105 (4th Cir. 2012). Indeed, when social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.[7] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985) (citations omitted).

Whatever Opternative's substantive objection to the ECCPL, and however it may disagree with the underlying reason articulated by SCOPA, it cannot dispute that the state has a legitimate interest in supporting good eye health, that undiagnosed diseases of the eye are a legitimate public health concern, and that legislation requiring an in-person comprehensive eye examination in order to increase the chance of detecting these diseases is reasonably related to a sound legislation.

For these reasons alone, Opternative's equal protection argument must fail.

[7] Indeed, the ECCPL only became law after the General Assembly overrode the Governor's veto.

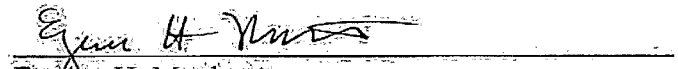
CONCLUSION

As set forth above, Plaintiff has failed to raise a genuine issue of material fact sufficient to satisfy the exacting standard that a statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the Constitution. Further, Plaintiff has failed to demonstrate that it has standing to bring this claim.

For these reasons, the Board and LLR respectfully request that this lawsuit be dismissed, and that the Court grant any other such relief as it deems just and proper.

Dated this the 10th day of July, 2017.

RICHARDSON PLOWDEN & ROBINSON, P.A.



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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Opternative, Inc.,

Plaintiff,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation,

Defendants.

and

South Carolina Optometric Physicians Association,

Defendant-Intervenor.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-06276

CERTIFICATE OF SERVICE

I, the undersigned employee of Richardson Plowden & Robinson, P.A., counsel for the Defendants South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation, do hereby certify that I have served a copy of the *MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS AND THE SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION* by causing a copy of the same to be personally deposited in a United States Postal Service mail box, postage prepaid, with the return address clearly visible, addressed to counsel of record as indicated below on this 18th day of July, 2017:

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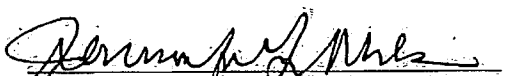

JENNIFER L. MILES
Paralegal

July 10, 2017
Columbia, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Opternative, Inc.,	)	Civil Action No. 2016-CP-40-06276
Plaintiff,	)	
vs.	)	**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
South Carolina Board of Medical Examiners,	)	
and	)	
South Carolina Department of Labor, Licensing, and Regulation,	)	
Defendants,	)	
South Carolina Optometric Physicians Association,	)	
Defendant-Intervenor.	)	

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INTRODUCTION

This case concerns an attempt by one group of medical professionals to use the power of government to prevent another group of medical professionals from exercising their medical judgment to rely on innovative technology that expands access to care. Plaintiff Opternative, Inc., ("Opternative") has developed an online refractive test and software ("Technology") that allows customers to renew or update their corrective-lens prescriptions from the comfort of their own homes using a smartphone and a computer. South Carolina-licensed ophthalmologists were actively using that Technology to write prescriptions for patients who needed them. But last year, the South Carolina Optometric Physicians Association (SCOPA)—a group of licensed optometrists whose brick-and-mortar business model depends on selling patients expensive eyeglass frames in their offices—launched an aggressive lobbying campaign to pass legislation specifically designed to prevent licensed ophthalmologists from using Opternative's Technology.

Although SCOPA publicly claimed the legislation would protect patient health, internal communications reveal that the law was actually designed to achieve one thing only: economic protectionism. And SCOPA succeeded: The Eye Care Consumer Protection Law (ECCPL) prohibited Opternative's ongoing business activities, caused South Carolina-licensed ophthalmologists to refuse to continue working with Opternative, and forced the business to shut down operations in South Carolina—all while doing literally nothing to protect the public health or safety.

The question for this Court to resolve is whether that sort of naked economic protectionism is a legitimate use of the state's police power. Under binding South Carolina precedent, it is not. The South Carolina Constitution forbids protectionist legislation and requires that laws restricting constitutionally protected rights bear a real and substantial

relationship to a legitimate government end. Because the evidence in this case clearly establishes that the ECCPL bears no such relationship to anything other than the anti-competitive, economic interests of SCOPA's members, summary judgment should be entered on behalf of Plaintiff.

STATEMENT OF FACTS

I. Opternative's Automated Technology Disrupts Optometrists' Brick-And-Mortar Business Model.

A. Optometrists' brick-and-mortar business model.

Vision care is a lucrative business. In 2014, the total market generated over $35 billion in revenue, $23 billion of which came from the sale of eyeglasses and contact lenses alone.[1] Optometrists—limited eye-health professionals who specialize in corrective-vision and certain ocular-pathological care—have a major stake in that market.[2] And a significant portion of that stake comes from their ability to bring patients into brick-and-mortar offices so the patients can be induced to purchase expensive frames from the optometrist after receiving their prescription.

Most optometrists rely heavily on patients seeking corrective-lens prescriptions for a consistent source of daily appointments.[3] That is because, traditionally, it has only been possible to determine an appropriate prescription through an in-person examination: To generate an appropriate prescription, the optometrist instructs the patient to sit in a chair and view certain projected images through a lens-switching device called a phoropter.[4] The optometrist then asks

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[1] *See* Windham Aff., Ex. 2 at 153, 177.

[2] *See id.*, Ex. 1 at 9:2–9:18.

[3] *See id.* at 9:25–11:3 (South Carolina-licensed optometrist Michael Zolman admitting that half of his daily appointments come from patients seeking corrective-lens prescriptions and that his practice model is "fairly typical").

[4] SCOPA Ans. ¶ 14; *see also* Windham Aff., Ex. 1 at 35:25–36:9, 36:13–37:7, 37:12–38:7 (Zolman explaining how optometrists use a phoropter to generate a patient's corrective-lens prescription).

the patient to self-report subjective responses to what they see as the optometrist physically cycles through various lenses in an effort to measure what is called the eye's refractive error.[5] Finally, the optometrist manually records the patient's responses and uses that refractive data to write an appropriate corrective-lens prescription.[6]

At the conclusion of each appointment, it is common practice for optometrists (or office staff) to lead patients to a display room and attempt to sell them expensive eyeglass frames.[7] For many optometrists, such in-person sales constitute a majority of their overall revenue stream.[8] In this way, optometrists have traditionally enjoyed a dual status as both the gatekeepers (prescription-writers) and first vendors (eyeglass-sellers) patients encounter as they enter the broader eye-care market.

B. Opternative's Technology.

Opternative is a healthcare-technology company founded in 2012 by optometrist Steven Lee out of a sincere belief that corrective-lens prescriptions should be accessible and affordable for everyone.[9] As a practicing optometrist who had conducted over 20,000 refractive tests, experience taught Steven that the traditional, brick-and-mortar model was needlessly

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[5] SCOPA Ans. ¶ 14; *see also* Windham Aff., Ex. 1 at 36:10–36:12, 36:13–36:23, 38:14–38:17 (Zolman explaining that optometrists rely on subjective refractive information based on patient's responses to projected images to generate a patient's corrective-lens prescription). "Refractive" in this context refers to how light bends in a person's eye. *See id.* at 34:21–35:3.

[6] *See id.* at 34:16–34:20, 39:23–40:6 (Zolman explaining how optometrists record the patient's refractive data in order to generate an appropriate corrective-lens prescription).

[7] *See id.* at 65:5–66:15 (Zolman admitting that optometrists attempt post-appointment eyeglass sales "most of the time").

[8] *Compare* SCOPA Ans. ¶ 20 (admitting on information and belief the allegations of Paragraph 48 of Plaintiff's Complaint) *with* Compl. ¶ 48 (alleging that "many professional optometrists make the majority of their revenue from selling expensive frames in their brick-and-mortar offices rather than from professional fees earned from conducting traditional in-person eye examinations"); *see* Windham Aff., Ex. 5 at 28:20–28:22 (SCOPA Executive Director Jackie Rivers admitting that "most South Carolina optometrists sell eyeglass frames").

[9] *See* Bodde Aff. at ¶¶ 3–4.

inconvenient and expensive for patients just looking to renew or update their previous prescriptions.[10] Steven knew there must be a way for patients to obtain that simple care without having to physically travel to an optometrist's office—or endure a sales pitch on the way out—every single year.[11]

Opternative was the solution. In essence, Opternative's Technology allows qualifying customers to obtain a corrective-lens prescription from their own homes by using a smartphone and a computer.[12] Opternative's Technology is not a replacement for a comprehensive eye-health exam, as both Opternative's Technology and website repeatedly inform users; instead, it is a tool that an ophthalmologist can use where appropriate to write or renew a corrective-lens prescription for someone not currently in need of a comprehensive in-person eye-health exam.[13]

Using Opternative's Technology is straightforward. Customers start by visiting the Opternative website and providing detailed information about their existing prescription and relevant medical history.[14] Opternative's Technology then prompts customers with a series of written and audio questions that guide them through a vision assessment.[15] Customers next view various individually calibrated images on a computer screen and use a smartphone to self-report subjective responses to what they perceive.[16] Opternative's Technology records those responses and sends all of the user's responses (to both the vision assessment and the personal- and medical-history questions) to a state-licensed ophthalmologist for review.[17]

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[10] *See id.* at ¶ 4.
[11] *See id.*
[12] *See id.* at ¶ 3.
[13] Bodde Aff. at ¶¶ 8–9.
[14] *See id.* at ¶ 6.
[15] *See id.*
[16] *See id.*
[17] *See id.*; Chaum Aff. at ¶ 2.

Opternative's users are *not* guaranteed a prescription. Ophthalmologists are medical doctors who specialize in total eye care, which includes not only corrective-vision and ocular-pathological care, but also overall eye-health assessments and surgeries.[18] Accordingly, participating ophthalmologists review the information generated by the Technology and only write prescriptions where, in their *medical judgment*, it is appropriate to do so.[19] In addition, Opternative imposes front-end screening requirements to filter out people for whom ophthalmologists will not write prescriptions based on the Technology. Only otherwise-healthy customers between the ages of 18 and 50 are eligible for a prescription, and customers are prohibited from using Opternative's Technology four years in a row without first certifying that they have received a comprehensive eye-health examination.[20]

C. Opternative's Technology disrupts optometrists' business model.

Opternative's Technology expands access to care. There is real patient demand for more convenient and affordable access to renewed or updated corrective-lens prescriptions,[21] and, prior to the enactment of the ECCPL, South Carolina-licensed ophthalmologists successfully used Opternative's Technology to write or renew prescriptions.[22] But this expanded access to care is also a threat to optometrists' profits, because their bottom line depends on frequent office visits from patients seeking corrective-lens prescriptions.[23]

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[18] SCOPA Ans. ¶¶ 9, 11; Bodde Aff. at ¶ 7.

[19] *See id.* at ¶ 7.

[20] *See id.* at ¶¶ 8–9.

[21] *See id.* at ¶ 10; Chaum Aff. at ¶ 4; Windham Aff., Ex. 2 at 153 (Zolman asking rhetorically "how many patients do we see daily who really come in just wanting a new prescription for glasses and/or contacts?" and remarking that online refractive technology would "allow them to get what they want").

[22] *See* Chaum Aff. at ¶ 2; Bodde Aff. at ¶ 11.

[23] SCOPA Ans. ¶ 20; *see* Windham Aff., Ex. 1 at 66:16–67:9 (Zolman admitting that his revenue from eyeglass sales "would go down" if online refractive tests like Opternative's Technology ever became commercially popular).

II. Optometrists Drafted And Lobbied For The ECCPL To Protect Their Brick-And-Mortar Business Model From Competition By Opternative's Automated Technology.

A. The American Optometric Association drafted model legislation as part of a national campaign to shut Opternative down.

The threat Opternative's Technology poses to the commercial viability of brick-and-mortar optometry shops has not gone unnoticed. Since Opternative's Technology entered the market, the American Optometric Association ("AOA")—a national association of optometrists devoted to the promotion of the optometric profession[24]—has devoted significant time and attention to combatting what it calls "the Opternative issue."[25]

As relevant here, that time and attention has come through the AOA's State Government Relations Committee, which works with state affiliates to pursue legislation.[26] In 2014, the AOA informed affiliates of a special campaign to shut Opternative down in states across the country.[27] Months later, the AOA produced a model bill: the Consumer Protection in Eye Care Act.[28] In 2015, the AOA's State Government Relations Committee formally presented that bill to state affiliates in a webinar titled "Online Vision Screening, Self-adjusting Glasses and Kiosks and What ODs Need to Know."[29] That webinar had three principal agenda items: (1) survey the most recent innovations and technologies in vision care and how those stood to impact the

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[24] *See id.*, Ex. 1 at 11:15–13:7.

[25] *See id.*, Ex. 7 at 501 (AOA providing state affiliates an "update on AOA actions on the Opternative issue").

[26] *See id.*, Ex. 1 at 15:3–15:19 (Zolman admitting that the State Government Relations Committee works with state affiliates—including SCOPA—to pursue legislation).

[27] *See id.*, Ex. 7 at 501 (AOA informing state affiliates of an upcoming legal review of Opternative's Technology and promising to "make recommendations to state affiliates about suggested strategies to stop this from operating in your state").

[28] *See id.*, Ex. 2 at 181–93.

[29] *See id.* at 155 (AOA webinar slides introducing the Consumer Protection in Eye Care Act to state affiliates).

business side of optometry; (2) recommend actions for state affiliates; and (3) explain the AOA's model bill.[30]

The webinar began with a "Background on The Issue."[31] According to the AOA, recent technological innovations have made self-refracting kiosks available through companies like CVS and Rite Aid, direct-to-consumer vision care available through companies like Warby Parker and 1-800 Contacts, and online refractive tests available through companies like Opternative—who received far more attention throughout the presentation than any other market entity.[32] The webinar was frank about the source of the AOA's interest in these innovations: A screen titled "Why are We Discussing Any of This???" explained that a majority of the revenue generated in the vision-care market comes not from medical treatment like eye examinations, but from the combined sales of eyeglasses and contact lenses.[33]

The webinar proceeded by asking, "Can We Fight This and Protect Our Patients?"[34] That question was answered below an image of two soldiers on horseback with an enthusiastic "YES!!!," followed by a slide recommending that affiliates "Pass the 'Consumer Protection in Eye Care Act.'"[35] As explained more fully below, the AOA's model bill formed the basis of the law challenged in this action.[36]

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[30] *See id.*, Ex. 2 at 158.

[31] *See id.* at 158, 160.

[32] *See id.* at 161–76.

[33] *See id.* at 177.

[34] *See id.* at 178.

[35] *See id.* at 178–79.

[36] *See id.*, Ex. 5 at 34:17–35:2 (Rivers explaining that "[t]he original draft language [for the ECCPL] came from the American Optometric Association" and admitting that "SCOPA . . . generate[d] a draft based on that language").

B. SCOPA adapted the AOA's model legislation to shut Opternative down in South Carolina.

One of the attendees at the AOA's 2015 webinar was then-Legislative Co-Chair of the South Carolina Optometric Physicians Association, Michael Zolman.[37] SCOPA—Defendant-Intervenor in this case—is an AOA state affiliate devoted to the promotion of the optometric profession in South Carolina through a combination of public, legislative, and other advocacy.[38]

After viewing the webinar, Zolman shared the AOA's concerns about how the innovations and technologies presented might impact the business side of optometry.[39] Indeed, Zolman was so concerned by what he learned from the webinar that he immediately e-mailed the SCOPA Board to explain how "kiosks and online eye exams" posed "a huge threat to our profession"—and what could be done about it.[40] Echoing the AOA webinar, Zolman was frank about the economic interests at stake, noting that "total eye care [is] a 35 BILLION DOLLAR industry, 23 BILLION coming from glasses and [contact-lens] sales," and that this amount of revenue would give competing retailers an incentive to cut optometrists out of the process.[41]

With Opternative in mind, Zolman explained that "kiosks and online eye exams" would be cheaper, more convenient, and would generate more revenue because there was real patient demand for such options.[42] He warned that "[i]t would only take one sellout OD or

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[37] *See id.*, Ex. 1 at 48:21–48:25, 51:3–51:5 (Zolman acknowledging having attended the webinar); *id.*, Ex. 2 at 153–54 (same).

[38] *See id.*, Ex. 1 at 16:4–16:21, 22:15–22:21.

[39] *See id.* at 51:25–52:9, 53:23–54:1 (Zolman admitting that he was concerned with how new vision-care technologies presented in the webinar might impact the "business side" of the optometric profession).

[40] *See id.*, Ex. 2 at 153–54 (Zolman's post-webinar e-mail to the SCOPA Board); *id.*, Ex. 1 at 51:3–51:5 (Zolman confirming that his e-mail was prompted by the webinar).

[41] *See id.*, Ex. 2 at 153.

[42] *See id.*; *id.*, Ex. 1 at 54:2–54:12 (Zolman admitting that he "had Opternative in mind" when he wrote the e-mail).

ophthalmologist to approve of countless prescriptions generated from self-refracting kiosks and forego the exam altogether."[43] Zolman recommended that SCOPA "address [the issue] quickly and attack aggressively," explaining that "the AOA is on the ball and recently drafted a bill that can be modified on a state-by-state basis to prevent this . . . [which is] something we definitely want to do."[44]

To be fair to Zolman, one line of his eleven-paragraph e-mail actually does discuss patient safety, instead of just the economic impact of new technology on optometrists: "Think of all the glaucoma, ARMD, Diabetic retinopathy, Cataracts, amblyopia, (the list goes on and on) that would be missed."[45] But Zolman does not discuss how the AOA's proposed legislation would actually protect the public from these diseases. And as explained below, while the legislation eventually adopted in South Carolina would do nothing to address the public-health concern briefly identified in Zolman's e-mail, it would do quite a lot to address his economic-competition concerns.

In any event, the SCOPA Board took Zolman's advice.[46] In the months that followed, SCOPA engaged in a vigorous, AOA-assisted and Department of Labor, Licensing, and Regulation (LLR)-backed lobbying campaign to get their version of the AOA's model bill passed in South Carolina.

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[43] *See id.*, Ex. 2 at 153.

[44] *See id.*

[45] *See id.*

[46] *See id.* at 152 (Wayne Cannon notifying SCOPA's lobbyists that "[t]he SCOPA board voted to evaluate the passing of a consumer protection leg. The AOA suggested bill is attached for your review. We will need to meet soon to evaluate our strategy."); *id.*, Ex. 5 at 26:16–26:19 (explaining that Wayne Cannon was the President of the SCOPA Board).

C. SCOPA engaged in a vigorous lobbying campaign—assisted by the AOA and LLR—to ensure the passage of a law banning Opternative's Technology.

Both government employees and SCOPA officials agree that the ECCPL was passed at SCOPA's behest and as the result of SCOPA's lobbying campaign.[47] And SCOPA consistently viewed the purpose of the ECCPL as to prevent anyone from employing technology like Opternative's to compete with brick-and-mortar optometry shops. Indeed, when someone suggested amending the ECCPL to regulate optometrists only, SCOPA took the position that removing ophthalmologists from the ECCPL would render the entire legislation "moot."[48] The point of the law, in other words, was not to simply regulate the conduct of optometrists, but to limit the medical discretion of medical doctors in an effort to prevent them from undercutting optometrists' profits.

To be sure, SCOPA carefully managed its talking points (with help from the national AOA), with internal e-mails stressing the importance of avoiding any discussion of telemedicine.

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[47] *See id.* at 23:13–23:15 (Rivers admitting that "the ECCPL is a bill that SCOPA passed"), 46:22–47:2 (Rivers admitting that "the bill that eventually became the ECCPL was primarily pushed by the optometrists"); *id.*, Ex. 3 at 129 (Zolman boasting that the passage of the ECCPL "is what organized Optometry looks like at it's [sic] best!" and that "[i]t took the grassroots efforts of all of you contacting your legislators to make this happen as well as the tireless efforts of your SCOPA Board of Directors working in conjunction with AOA to make this possible"); *id.*, Ex. 15 at 455, 573–74, 721 (Holly Beeson confirming that the ECCPL "was largely pushed by the optometrist community"); *id.*, Ex. 11 at 6:13–7:1, 40:18–41:5 (LLR 30(b)(6) designee Darra Coleman explaining that Holly Beeson is an attorney "responsible for the supervision of [LLR's] Office of Communications, which includes [LLR's] legislative affairs").

[48] *See id.*, Ex. 8 at 469 (Rivers forwarding AOA feedback on Opternative's proposed edit to the bill that would have removed ophthalmologists: "Removing MDs basically makes the bill moot."); *id.*, Ex. 5 at 52:1–52:8 (Rivers explaining that removing ophthalmologists would have made the bill moot "[b]ecause it would still create an avenue potentially for someone to give themselves a refraction utilizing technology that removes them out of the doctor's office"), 55:16–55:22 (Rivers admitting that SCOPA's "effort to pass the ECCPL [was] prompted by the existence of businesses offering online eye exams").

or kiosks and instead casting the ECCPL as a consumer protection law.[49] But these talking points were ultimately unpersuasive to then-Governor Nikki Haley, who vetoed the ECCPL on May 16, 2016. Her explanation of the veto read, in full:

> **I am vetoing this bill because it uses health practice mandates to stifle competition for the benefit of a single industry**, effectively banning eye care kiosks statewide.
>
> During my administration, South Carolina has expanded access to health care, including mental health services, to rural and underserved regions of our state using telemedicine. Unfortunately, a small group of eyecare professionals is seeking to block new technologies that expand low-cost access to vision correction services, using two basic arguments.
>
> First, advocates state that kiosks pose a public health risk, which is simply untrue. Individuals can, and should, continue to see their doctor for comprehensive medical exams, and these kiosks do not offer medical evaluations or advice. Second, optometrists argue that kiosks create an uneven playing field because licensed practitioners cannot take advantage of this technology and charge patients for its use in a medical practice. The answer to this problem is not to ban a new technology, but rather to expand its use. **Send a bill to my desk that allows for the expanded use of automated vision evaluations in all medical settings, and I will sign it.**
>
> If [the ECCPL were] allowed to become law, South Carolina would become the eighth state to impose such a ban, putting us on the leading edge of protectionism, not innovation. This is the wrong message to send to the business community. **I urge you to continue promoting South Carolina's use of innovative technologies to expand access to medical care and sustain this veto.**[50]

SCOPA's lobbying efforts continued after the veto, as did its internal insistence on message discipline: "We do NOT want to make this an anti-Opternative arguement [sic],"

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[49] *See id.*, Ex. 13 at 1257–58 (Zolman response to SCOPA membership e-mail with subject line "Fw: Governor Haley's Decision on The Consumer Eye Care Protection Bill"); *id.*, Ex. 8 at 469 (Rivers forwarding e-mail from AOA with subject line "RE: Meeting Monday"); *id.*, Ex. 6 at 667 (Rivers forwarding e-mail from SCOPA Board Member Michael Campbell with subject line "SCOPA's Bill – How to Reference").

[50] *See id.*, Ex. 16 (emphases in original).

Zolman explained in one e-mail, "as Legislators frown upon legislation that singles out and restricts a specific business."[51] Instead, SCOPA "must maintain the argument that this bill protects the consumer from false and misleading claims to what an eye exam is as well as that it protects our citizens from unproven technology and that anything less jeopardizes consumers [sic] health care."[52]

SCOPA was not alone in resisting the veto; it had help from the South Carolina Board of Examiners in Optometry ("Optometry Board"), which is part of Defendant LLR. *See* S.C. Code Ann. § 1-30-65. While LLR and its agencies are prohibited from engaging in lobbying and can generally provide input on legislation "[w]hen asked by . . . legislative staff or individual legislators,"[53] the Optometry Board appears to have been unusually excited about the ECCPL, engaging in atypical and apparently uninvited lobbying efforts of its own. On May 16, 2016, the Optometry Board's then-President—and SCOPA member—Peter Candela sent a letter on behalf of the Board to the Governor's office "in support of her hopeful signature," and asking his colleagues at LLR that, "if someone has a direct contact to the Gov, please pass a long [sic] that we strongly support this bill and hope that she signs it in to [sic] law."[54] The following day, Candela sent Senator John Scott a letter emphasizing the Optometry Board's support for the ECCPL and asking Scott to "continue to encourage your colleagues in the House and Senate to override the Governors [sic] veto."[55]

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[51] *See id.*, Ex. 13 at 1258.

[52] *See id.*

[53] *See* Windham Aff., Ex. 11 at 37:9–38:9.

[54] *See id.*, Ex. 12 at 2621; *id.*, Ex. Windham Aff., Ex. 11 at 46:18–47:22 (Coleman explaining that Candela is "an optometrist licensed in South Carolina" and that "in 2016, he would have been president of the Board of Examiners of Optometry"); *id.*, Ex. 5 at 20:15–20:18 (Rivers explaining that Candela is a SCOPA member).

[55] *See id.*, Ex. 14 at 86–87.

The post-veto lobbying efforts were successful, and the legislature overrode Governor Haley's veto on May 19, 2016.[56] Once the law's passage was final, though, SCOPA and its officials seemed to lose some of the message discipline that had characterized their lobbying efforts. Indeed, SCOPA's uncensored internal reaction to the veto override was markedly different from the organization's careful public statements. In public, SCOPA hewed to the AOA's advice to "[c]ontinue talking about public safety" to make it seem like the law was not protectionist legislation designed to restrict a single business—namely, Opternative.[57] But in private, as the Senate voted to override Governor Haley's veto, SCOPA Executive Director Jackie Rivers sent an e-mail to AOA officials, exclaiming: "[T]ake that Opternative!!!!!!"[58] Zolman followed almost immediately by describing the law's effect in a message to SCOPA's membership: "It's with the utmost pleasure to announce that today, Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!"[59] He closed with a final message summing up what SCOPA had achieved: "Good-bye Opternative!"[60]

Months later, when the AOA asked SCOPA to present for its other state affiliates on their success adapting and passing the AOA's model legislation in South Carolina, SCOPA used that

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[56] *See id.*, Ex. 3 at 129 (Zolman e-mail to SCOPA's membership with subject line "It's a GREAT day in SC" announcing that "[b]oth the SC House and Senate voted to override Governor Haley's veto of our bill S1016").

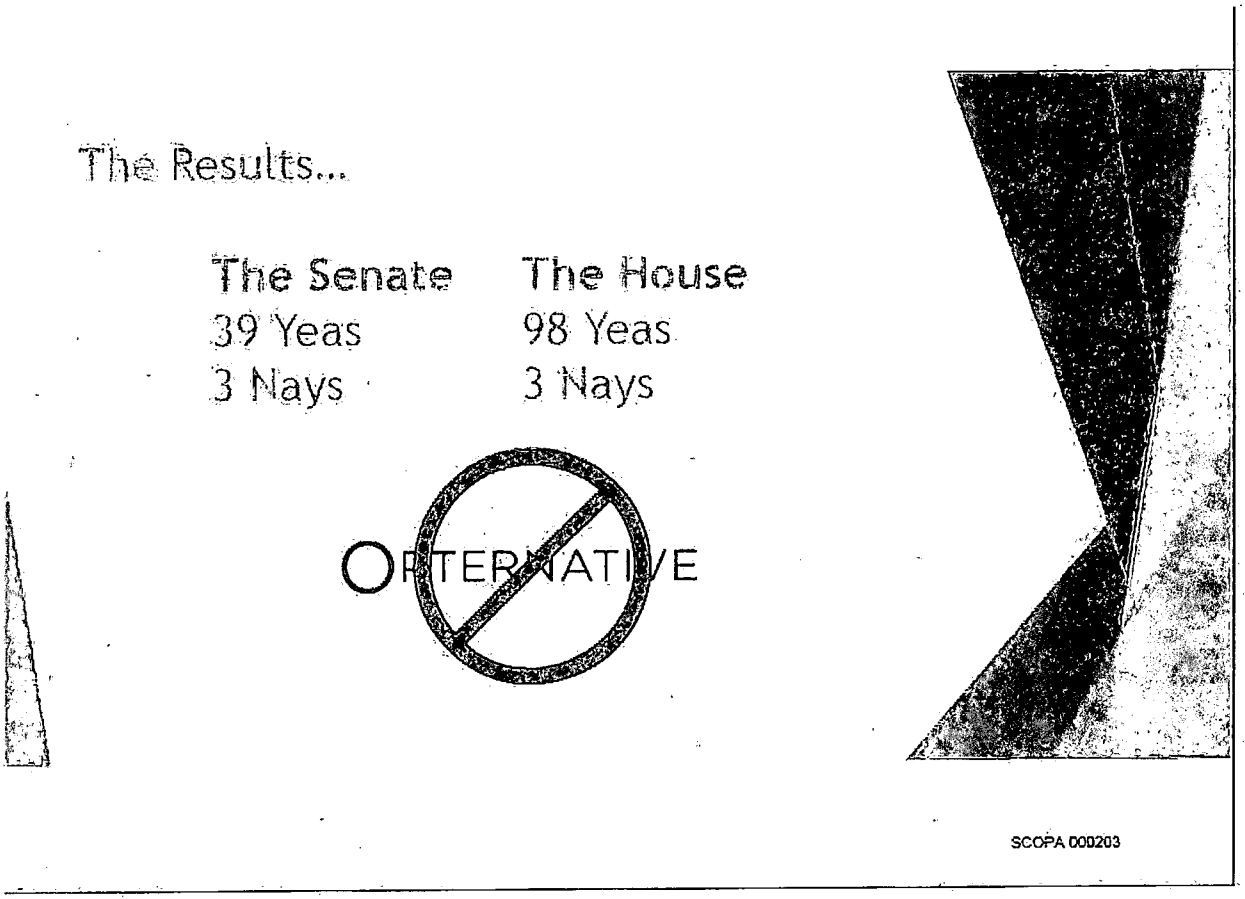
[57] *Compare id.*, Ex. 8 at 469 (Rivers forwarding AOA admonition to "continue talking about patient safety"), *with id.*, Ex. 5 at 55:16–55:22, 56:6–56:11 (Rivers admitting that the ECCPL was "prompted by the existence of online eye exams" but that there were "internal discussions at SCOPA about the importance of discussing the ECCPL as if it were not an effort to ban Opternative").

[58] *See id.*, Ex. 9 at 116.

[59] *See id.*, Ex. 3 at 129.

[60] *See id.*

presentation as an opportunity to boast without restraint about what the ECCPL had really accomplished[61]:



In sum, SCOPA and its officers treated the passage of the ECCPL as what it really was: The culmination of a successful effort to ban Opternative and its Technology.[62]

Understandably, South Carolina-licensed ophthalmologists seem to have had the same understanding of what the ECCPL does. Before the ECCPL, Opternative had no problem operating in South Carolina, and many South Carolinians actually received corrective-lens prescriptions after a South Carolina-licensed ophthalmologist used his medical judgment to write

[61] *See id.*, Ex. 10 at 203.

[62] *See id.*, Ex. 5 at 59:5–60:6.

a prescription based on information generated by the Technology.[63] But after the ECCPL passed, no ophthalmologist was willing to use Opternative's Technology.[64] And rightly so: As explained below, the ECCPL clearly prohibits the use of Opternative's Technology because it requires corrective-lens prescriptions to be based in part on an examination by a human being (though not necessarily by the prescribing ophthalmologist).

South Carolina-licensed ophthalmologists have good reason not to test the boundaries of South Carolina law. *See* S.C. Code Ann. §§ 40-1-80, 40-47-80, 40-47-110. If the South Carolina Board of Medical Examiners receives a complaint that a licensed ophthalmologist has violated the law, that complaint triggers an investigatory process that lasts at least a year—indeed, the Board's 30(b)(6) designee testified that it was not even theoretically possible for the process to conclude in *less* than a year.[65] And while the Board has some discretion over the degree of punishment to mete out, it has no discretion at all to refrain from enforcing the law. If an ophthalmologist violates the ECCPL by writing a prescription based solely on automatically collected information (using Opternative or any other computerized technology), that ophthalmologist would face a lengthy investigation followed by an enforcement action.[66]

Unable to find ophthalmologists willing to risk burdensome investigations and ruinous penalties, Opternative was forced to cease its operations in South Carolina—though it is currently in contact with South Carolina-licensed ophthalmologists who would continue using

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[63] *See* Bodde Aff. at ¶ 11; Chaum Aff. ¶ 2.

[64] *See* Bodde Aff. at ¶ 12–13; Chaum Aff. at ¶ 3.

[65] *See* Windham Aff., Ex. 11 at 19:17–19:23 (Coleman responding "No, I would not say so" and "I would not say that that would be a realistic expectation" in response to question about whether case-investigation process could theoretically conclude in less than a year).

[66] *See id.* at 10:13–15:17 (Coleman explaining procedures of lengthy case-investigation process), 69:5–69:10 (Coleman explaining that LLR "[doesn't] have the luxury of not enforcing law").

the Technology to write corrective-lens prescriptions (where medically appropriate) if the barrier of the ECCPL were removed.[67]

III. The ECCPL Bans Opternative's Technology—And That Is All It Does.

The ECCPL was intended as a ban on Opternative's Technology, rather than as a requirement that patients receive a comprehensive eye-health examination before updating or renewing their corrective-lens prescriptions. Unsurprisingly, then, the ECCPL does a very good job of banning Opternative but almost nothing at all to ensure that patients receive comprehensive eye-health exams.

The ECCPL is codified at S.C. Code Ann. sections 40-24-10 and 40-24-20. The law lays out two requirements for a corrective-lens prescription:

> **To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider** or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. **The prescription must take into consideration medical findings made and refractive error discovered during the eye examination.** If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.

Id. § 40-24-20(B) (emphasis added). It also provides that "[a] prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk." *Id.* § 40-24-20(C). Both the term "eye examination" and the term "kiosk" are further defined: To be valid, an eye examination "must not be based solely on objective refractive data or information gathered by an automated testing device." *Id.* §§ 40-24-10(3) and 40-24-10(9). Similarly, "kiosk" is broadly defined to include any "automated application, which

[67] *See* Bodde Aff. at ¶¶ 13–14; Chaum Aff. at ¶¶ 3–4.

is designed to be used on a phone, computer, or Internet-based device . . . to provide refractive data or information." *Id.* § 40-24-10(4).

In other words, the ECCPL requires that corrective-lens prescriptions must expire annually, and they must be based at least in part on information collected by a human being.

Tellingly, and as confirmed by the Defendants' 30(b)(6) designee at deposition, these are the only constraints the ECCPL places on an ophthalmologist's medical judgment.[68] The ECCPL does not specify what findings an ophthalmologist must make before prescribing corrective lenses.[69] It does not require an ophthalmologist to conduct or not conduct any particular tests.[70] It only requires that some part (however small) of the medical information on which an ophthalmologist bases his corrective-lens prescription must have been collected by a human being instead of by a computerized device.[71]

And that human being *does not even need to be the prescribing ophthalmologist.* Ophthalmologists, like other South Carolina-licensed doctors, can and do delegate some or all of their examinations to assistants, either licensed assistants like nurses or totally unlicensed assistants, in their sole discretion.[72] The ECCPL does nothing to change this. In other words, the only requirement actually imposed by the ECCPL before an ophthalmologist writes a

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[68] *See* Windham Aff., Ex. 11 at 65:17–65:23 (Coleman admitting that "the ECCPL leaves it to an ophthalmologist's professional judgment exactly what diagnostic methodologies and exactly what medical information he needs before writing a prescription").

[69] *See id.* at 65:4–65:16 (Coleman admitting that the ECCPL "doesn't identify diagnostic methodologies that have to be employed in order to develop the medical findings" or even "specify what those medical findings must be").

[70] *See id.* at 64:16–65:2 (Coleman explaining that the ECCPL has "no explicit requirement" regarding tests that must be performed before writing a corrective-lens prescription).

[71] *See id.* at 67:14–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

[72] *See id.* at 65:17–65:23, 67:14–68:10 (Coleman explaining it is generally within the physician's discretion to use any number of "physician extenders" and that such extenders can even include "unlicensed professionals, such as a medical assistant or a certified nurse assistant").

prescription is that a human—any human—obtain some information—any information—from the person seeking the prescription.

This very effectively bans Opternative, whose Technology uses a computer program to automatically collect and send information over the Internet for a doctor's review. But it does nothing to require that an ophthalmologist conduct a comprehensive eye-health examination every single time he writes a corrective-lens prescription. Nor should we expect an ophthalmologist to do so. While periodic comprehensive eye-health examinations are important, the American Academy of Ophthalmology does not recommend that most people receive such exams annually. Instead, the American Academy of Ophthalmology recommends that otherwise-healthy people obtain at least *one* such examination by the time they reach 40 years old, and that otherwise-healthy people between the ages of 40 and 54 obtain one every 2–4 years.[73]

To be sure, the ophthalmologists' professional recommendations recognize that comprehensive eye-health exams are important, but they also recognize that for most people—people without sudden changes in their vision or other symptoms of eye disease—more regular exams are simply unnecessary. That group—the people who need new glasses occasionally but whose doctors believe they do not need annual eye-health checkups—is exactly the group that was using and benefitting from Opternative prior to the ECCPL.

The ECCPL's expiration period is further evidence that it has no relationship to public health or safety. While the one-year expiration requirement has no footing whatsoever in—and

[73] *See id.*, Ex. 4 at 1–2 ("Adults with no signs or risk factors for eye disease should receive a baseline comprehensive eye evaluation at age 40. Individuals without risk factors aged 40 to 54 should be examined by an ophthalmologist every 2 to 4 years."); *id.*, Ex., 1 at 47:24–48:3 (Zolman admitting that he has no reason to doubt that the American Academy of Ophthalmology's statement conveys the ophthalmological standard of care because "I'm not an ophthalmologist"); *see also* SCOPA Ans. ¶ 16.

indeed, is radically different from—ophthalmologists' actual recommendations for comprehensive eye-health examinations, it bears an obvious relationship to optometrists' interest in selling expensive eyeglass frames to their customers on a regular basis.

In short, the ECCPL does not require ophthalmologists to conduct comprehensive eye-health examinations; instead, it requires in-person exams by someone (who can be anyone) who is looking for something (which can be anything). And it requires these in-person exams far more frequently than practicing doctors believe comprehensive eye-health examinations are necessary for the vast majority of the population. These requirements bear strikingly little relationship to a concern about the detection of eye disease in the general public, but they bear an undeniable relationship to the economic interests of practicing optometrists—the very group that everyone agrees drafted and lobbied for the law in the first place. The question before the Court, as discussed below, is whether this kind of pure economic protectionism is a valid use of government power under the South Carolina Constitution.

STANDARD OF REVIEW

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 220, 781 S.E.2d 548, 554 (2015); *accord Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 448, 790 S.E.2d 763, 769 (2016) (plurality). Material facts cannot be disputed based upon mere denials or averments of ignorance as to the factual basis for allegations set forth in the pleadings. *Bankers Tr. of S.C. v. Benson*, 267 S.C. 152, 154–55, 226 S.E.2d 703, 704 (1976). Nor will contrary allegations suffice. *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994). Instead, the non-

moving party must proffer actual evidence of a specific factual dispute. *Coker v. Cummings*, 381 S.C. 45, 54–55, 671 S.E.2d 383, 388 (Ct. App. 2008). If the non-moving party fails to meet that burden, the trial court must enter summary judgment. *Id.* at 55, 671 S.E.2d at 388.

ARGUMENT

Summary judgment is appropriate in this case because the undisputed evidence reveals the ECCPL to be nothing more than a protectionist law designed to ban Opternative's Technology in order to protect South Carolina optometrists' outdated business model from competition, and protectionism is not a legitimate use of the state's police power. Moreover, this case is brought under the South Carolina Constitution, which demands a far more searching version of rational-basis review than is sometimes applied by federal courts. Not only have South Carolina courts squarely rejected the sort of naked economic protectionism embodied by the ECCPL, but South Carolina's due-process and equal-protection jurisprudence demand that economic regulations like the ECCPL bear a real and substantial relationship to some legitimate, non-protectionist end of government—a standard the ECCPL cannot hope to meet.

I. The South Carolina Rational-Basis Test Controls.

Plaintiff challenges the ECCPL under Article I, Section 3 of the South Carolina Constitution—and only that provision. Because this case involves no suspect class or fundamental right, the rational-basis test applies. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). But this Court is bound to apply the version of that test articulated and applied by South Carolina courts—and that test (unlike some articulations of the federal rational-basis test) requires an inquiry into the true purpose of a statute and whether the record evidence suggests that the statute actually serves that purpose. As explained more fully below, under *that* test, the ECCPL cannot hope to survive. *See infra* 23–35.

This difference between state and federal law matters because the facts of this case bear a striking resemblance to those considered by the United States Supreme Court over a half-century ago in *Williamson v. Lee Optical of Oklahoma, Inc.* *See* 348 U.S. 483 (1955). There, an Oklahoma statute made it illegal for opticians to fit already-prescribed lenses into new eyeglass frames, or to replace those lenses when they broke, unless customers obtained an additional prescription from a state-licensed optometrist or ophthalmologist. *Id.* at 485. A review of the record led the District Court to conclude that while some patient-health interest was at stake, banning opticians from "tak[ing] old lenses and plac[ing] them in new frames and then fit[ting] the completed spectacles to the face of the eyeglass wearer" failed to further that interest by means "reasonably necessary []or reasonably related to the end sought to be achieved." *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 135, 137 (W.D. Okla. 1954).

But the Supreme Court reversed. Rather than weigh record evidence to determine whether the law actually protected patient health, the Court suggested that no such facts were necessary to dispose of the challenge: "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Lee Optical*, 348 U.S. at 487–88. The Court suggested that "the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or disease, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert." *Id.* at 487.

Defendants will undoubtedly invoke *Lee Optical* here, arguing that the ECCPL makes it harder to get corrective-lens prescriptions without going to an optometrist or ophthalmologist's office, and that simply being in such an office makes it more likely that certain eye diseases will

be detected. But *Lee Optical* does not control the outcome of this case. Indeed, *Lee Optical* does not even describe the rational-basis test as actually applied by modern federal courts. Modern federal courts have repeatedly rejected regulations that, like the regulation at issue here, are justified by purported "health and safety" concerns that the government has declined to regulate more directly. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

Moreover, the South Carolina Supreme Court has never adopted *Lee Optical*. Quite the contrary. The case has been cited all of twice in South Carolina history, most recently in a two-Justice plurality opinion—which cites it in dicta, in a footnote noting that the plaintiff had failed to make arguments "sufficient to invoke the rational basis test." *State v. Dykes*, 398 S.C. 351, 369, 728 S.E.2d 455, 464 n.8 (2012), *superseded by State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013); *see also Dantzler v. Callison*, 230 S.C. 75, 94 S.E.2d 177 (1956) (weighing challenge under Article 3, Section 17 of the South Carolina Constitution and citing *Lee Optical* in dicta as illustration of police power). And South Carolina courts have flatly disclaimed acquiescence to the federal judiciary on questions of state-constitutional interpretation. *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) ("[T]he federal Constitution sets the floor for individual rights . . . the state constitution establishes the ceiling."); *State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991) ("It is firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution.").

Most significantly for purposes of this case, South Carolina's courts have read the South Carolina Constitution to provide far more robust protection for individual rights against economic regulations than the sort of deference embodied by *Lee Optical*. Indeed, twice in the

past year alone, pluralities of the South Carolina Supreme Court have used the specific guarantees of the South Carolina Constitution to reject economic regulations subject to so-called "rational-basis review." *See Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 474, 799 S.E.2d 665, 667 (2017) (plurality) (rejecting law restricting liquor-license ownership); *accord Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 453, 790 S.E.2d 763, 772 (2016) (plurality) ("It is the duty of this Court, not the legislature, to determine the constitutionality of a statute.").

South Carolina's robust review of economic regulation is not an anomaly; it is a natural outgrowth of South Carolina's independent constitutional language. Neither is South Carolina alone here. Other states with similar constitutions to South Carolina's have similarly rejected *Lee Optical*-style deference in favor of more meaningful review of economic regulations. For example, Texas, like South Carolina, has a state constitution whose individual-rights protections that are phrased differently than those of the United States Constitution and which state courts have applied differently.[74] As in South Carolina, the relevant language of Texas's Constitution was adopted in the second half of the 19th century, "after the United States Supreme Court decision in the *Slaughter-House Cases* by which the Court put the responsibility for protecting a large segment of individual rights directly on the states." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015).[75] And as in South Carolina, Texas courts have held

[74] Article I, Section 3 of the South Carolina Constitution, the provision raised in this action, reads: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." Article I, Section 19 of the Texas Constitution similarly provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

[75] The relevant provision of Texas's Constitution was adopted in 1875. *Id.* at 86–87. The relevant provision of the South Carolina Constitution was adopted in 1895. *See State v. Duncan*,

that their independent Constitution was meant to take this responsibility seriously and have interpreted it to provide more robust protection for individual rights than is provided in some instances by the U.S. Constitution. *Id.*

Specifically, Texas courts interpret their Constitution to require a real examination of record evidence to determine whether a challenged "statute's purpose could not arguably be rationally related to a legitimate governmental interest" or "when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Id.* In other words, in interpreting Texas's parallel constitutional provision, Texas courts look both to the arguable legislative motive and to the evidence of the effect a challenged law would have in the real world. The Texas Supreme Court in *Patel* used this test in 2015 to reject a cosmetology regulation that, while nominally related to public health and safety, did not actually achieve public-safety goals commensurate with the restrictions it imposed on individuals. *See id.* at 87–90.

As discussed more fully below, the South Carolina Supreme Court has interpreted its own independent Constitution to require review just as robust as that of Texas (if not more so). South Carolina courts are *also* charged to examine whether a law's actual purpose is a legitimate one and are *also* charged to examine record evidence to determine whether, in the real world, a law actually serves that legitimate purpose (instead of another, illegitimate purpose). As explained below, the ECCPL fails on both scores, and summary judgment should therefore be granted in favor of Plaintiff.

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269 S.C. 510, 512, 238 S.E.2d 205, 206 n.2 (1977); *Standard Oil Co. v. City of Spartanburg*, 66 S.C. 37, 44 S.E. 377, 377 (1903).

II. The ECCPL Is A Purely Protectionist Law, And Protectionism Is Not A Legitimate Government End.

Article I, Section 3 of the South Carolina Constitution secures individual rights against encroachment by government power: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art I, § 3. Under any provision of Article I, Section 3, whether styled as a due process or equal protection guarantee, the fundamental requirement is that all exercises of the police power further a *legitimate* government end, such as the protection of the public health or safety. *See Denene, Inc.*, 359 S.C. at 93, 596 S.E.2d at 921; *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000) (per curiam).

While the police power is broad, South Carolina has a proud tradition of consistently rejecting naked economic protectionism. *See, e.g.*, *Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 474, 799 S.E.2d 665, 667 (2017) (plurality) (rejecting law limiting owner to three retail liquor licenses because economic protectionism for a certain class of retailers is not a constitutionally sound basis for regulating liquor sales); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771–72 (plurality) (striking down arbitrary employment and referral restriction on physical therapists and surgeons as merely anti-competitive regulation intended to protect therapists' personal financial interests rather than those of patients); *Kirven v. Cent. States Health & Life Co.*, 409 S.C. 30, 42–43, 760 S.E.2d 794, 801 (2014) (rejecting retroactive application of statutory definition to existing insurance contracts because it appeared that insurance industry had merely convinced General Assembly to contract for them by fiat); *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 340 (2008) (denying standing to

cell-phone-tower company seeking to use zoning system to prevent competitor from building tower on nearby land because increased business competition is not a cognizable injury); *G-H Ins. Agency, Inc. v. Cont'l Ins. Co.*, 278 S.C. 241, 248–49, 294 S.E.2d 336, 340–41 (1982) (striking down law forbidding auto-insurance providers from terminating agents where it appeared that predominant purpose was merely to protect private profits of insurance agents rather than any broader social interest); *Painter v. Town of Forest Acres*, 231 S.C. 56, 61, 97 S.E.2d 71, 73 (1957) (rejecting ordinance requiring all businesses to close at midnight where ordinance would have destroyed lawful enterprises and appeared directed at respondent with that purpose in mind); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905, 907–09 (1940) (striking down petroleum-vehicle restrictions so specific as to apply to only one filling station because restrictions appeared designed to discriminate against that station to benefit of all other local stations); *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783, 785 (1936) (rejecting ordinance declaring door-to-door solicitation a nuisance where no public-health justification appeared and ordinance was passed not due to complaints by homeowners but at request of city's Retail Merchants Association).

Thus, where a challenged law appears designed to further merely private interests rather than some broader social purpose, or its asserted justification appears spurious, courts in this state will not hesitate to recognize economic protectionism as the true motivation behind that law and strike it down.

This approach is perhaps best illustrated by the South Carolina Supreme Court's recent plurality opinion in *Joseph*. *See* 417 S.C. at 442, 790 S.E.2d at 766.[76] There, a physical therapist

[76] While the lead opinion in *Joseph* commanded only two votes, two Justices dissented on the grounds that the appellants lacked standing while calling the lead opinion otherwise "laudable." 417 S.C. at 466, 790 S.E.2d at 799 (Beatty, J., dissenting).

and two orthopedic surgeons challenged certain South Carolina Board of Physical Therapy position statements and judicial precedent interpreting a law that allowed physicians to employ and refer patients to healthcare professionals according to their judgment—*except* physical therapists, who could only be employed by and refer patients to one another. *Id.* at 446, 790 S.E.2d at 768. The government claimed the distinction was intended to protect patients and state-sponsored programs from conflicts of interest, but the Court did not hesitate to pull back the veil to identify the true motivation at work: "[This law] appears merely to be anti-competitive protectionist legislation intended to protect personal financial interests, which is driven by reimbursement purposes, rather than actual benefits to patients." *Id.* at 452–53, 790 S.E.2d at 771–72. The interpretation was declared unconstitutional. *Id.* at 453, 790 S.E.2d at 771–72.

Similarly here, the overwhelming evidence indicates that the ECCPL was intended to protect the personal financial interests of optometrists rather than to serve patient health. While the Court in *Joseph* made an inference about the corrupt purpose of the challenged law based on the lack of any plausible connection to a legitimate justification, here there is actually *direct evidence* that the ECCPL was designed by the very group that stands to benefit economically from its enforcement.[77] Moreover, just as the interpretation in *Joseph* appeared arbitrary absent any evidence that it protected patients, so the ECCPL—which does nothing to require a

[77] *See* Windham Aff., Ex. 7 at 501 (AOA e-mail to state affiliate on "the Opternative issue" and forecasting plan to "stop this from operating in your state"); *id.*, Ex. 2 at 152–53 (Zolman post-webinar e-mail to SCOPA Board stressing that "kiosks and online eye exams" posed "a huge threat to our profession" and recommending that SCOPA adapt the AOA's model legislation for a legislative campaign); *id.* at 152 (Cannon e-mail informing SCOPA's lobbyists that the Board had voted to pursue Zolman's recommendation); *id.*, Ex. 5 at 23:13–23:15, 34:17–34:20, 38:6–38:14 (Rivers taking complete responsibility for the ECCPL on SCOPA's behalf); *id.*, Ex. 3 at 129 (Zolman boasting to SCOPA's membership after veto override about SCOPA's efforts to get the ECCPL passed and exclaiming that "Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!"); *id.*, Ex. 10 at 203 (SCOPA presentation slide portraying "The Results . . ." of SCOPA's efforts to get the ECCPL passed and prominently displaying the word "Opternative" with a red circle and strikethrough).

comprehensive eye-health examination—is arbitrary if viewed as anything *other* than economic protectionism. Indeed, the only justification in the record is that requiring an examination by a human being *might* result in ophthalmologists' choosing to conduct comprehensive eye-health exams more frequently than they otherwise would.[78] But again, Defendants admit they have no evidence for this justification, and the ophthalmological standard of care does not even recommend annual comprehensive eye-health examinations for the vast majority of the population.[79]

Accordingly, the ECCPL is nothing more than "anti-competitive protectionist legislation" of the sort expressly rejected in *Joseph*, and is beyond the legitimate bounds of the state's police power. The ECCPL therefore violates the South Carolina Constitution, and summary judgment should be granted in Plaintiff's favor.

III. The ECCPL Lacks A Rational Relationship To Patient Health And Thereby Violates Both Due Process And Equal Protection.

The best either Defendants or Defendant-Intervenor can muster in defense of the ECCPL is to say that comprehensive eye-health examinations are good, and that certain diseases of the eye can be detected in the course of such examinations. But that rationale simply has no connection to the ECCPL, which: (1) requires prescriptions to be renewed annually (even though the relevant ophthalmological guidelines do not call for comprehensive eye-health exams on an annual basis); and (2) in any event, does not require ophthalmologists to conduct in-person examinations at all—only that some information (any information) be collected by a human (any

[78] *See id.*, Ex. 17 at ¶ 1 (SCOPA interrogatory response asserting that "[c]ertain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination").

[79] *See id.*, Ex. 11 at 54:22–55:7, 55:9–56:1 (Coleman admitting that Defendants have no evidence that the ECCPL actually protects the public health or safety); *id.*, Ex. 4 at 2 (American Academy of Ophthalmology policy statement); *see also* Chaum Aff. at ¶ 4.

human) who then reports that information to the ophthalmologist. This falls far short of the kind of genuine relationship to public health and safety that South Carolina courts consistently demand under the South Carolina Constitution's due-process and equal-protection guarantees.

A. The ECCPL lacks a reasonable relationship to patient health and thereby violates due process.

The South Carolina Supreme Court has recently clarified that the standard for reviewing all substantive-due-process challenges to state statutes is: "Whether it bears a reasonable relationship to any legitimate interest of government." *Boardman*, 338 S.C. at 478, 527 S.E.2d at 765. This makes sense, because the whole point of substantive due process is to protect against arbitrary deprivations of life, liberty, and property. *Worsley Cos. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). While the threshold is not high in rational-basis cases, it nonetheless demands a genuine inquiry into how a law actually operates. Unlike federal courts, which sometimes reach for any *conceivable* justification, South Carolina courts consistently look to see whether laws have *plausible* justifications. *Joseph*, 417 S.C. at 452, 790 S.E.2d at 771 (plurality opinion); *see also Lurey v. City of Laurens*, 265 S.C. 217, 222, 217 S.E.2d 226, 228 (1975) (principle of avoiding judicial lawmaking "does not suggest that this Court should abdicate its obligation to closely scrutinize legitimate constitutional questions").

In practice, this means requiring that the relationship between a law and its purported end have at least some basis in fact, and rejecting mere speculation as a substitute for that relationship. *See, e.g.*, *Retail Servs.*, 419 S.C. at 475–76, 799 S.E.2d at 668 (plurality opinion) (striking down law limiting owner to three retail liquor licenses absent record evidence of alleged safety concerns); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771–72 (rejecting employment and referral restriction on physical therapists and surgeons because appellants failed to articulate basis for law rooted in actual benefits to patients); *Kirven*, 409 S.C. at 43, 760 S.E.2d at 801

(striking down retroactive application of statutory definition to existing insurance contracts absent showing that actual language of definition addressed some important societal problem); *G-H Ins. Agency*, 278 S.C. at 248–49, 294 S.E.2d at 340 (rejecting law forbidding auto-insurance providers from terminating agents where experience revealed that provision lacked tailoring that should have been obvious given purpose of law); *McCoy*, 193 S.C. 390, 8 S.E.2d at 907–09 (striking down petroleum-vehicle restrictions for lack of real connection to actual dangers involved in handling petroleum despite recitation of protective purpose in preamble); *Orangeburg*, 181 S.C. 143, 186 S.E. at 785 (rejecting ordinance banning door-to-door solicitation where appellant offered testimony to effect that solicitation was harmless and ordinance lacked tailoring to valid public health concern despite numerous less-restrictive alternatives).

The thrust is that under the South Carolina Constitution, where the evidence reveals no tendency in a law to serve its purported purpose, and there appear to be obvious means by which it might have done so, that law is arbitrary and cannot survive even rational-basis review.

Joseph is again illustrative. There, the question was whether a statutory interpretation that banned physicians from employing and referring patients to physical therapists was rationally related to the goal of protecting patients and state-sponsored programs from conflicts of interest. *Joseph*, 417 S.C. at 443–46, 790 S.E.2d at 766–68. The Court observed that if the statute were actually intended to do that, it would have prevented referral-for-pay situations. *Id.* at 452, 790 S.E.2d at 771. Instead, all it did was "deprive[] physicians of their right to practice medicine in the best interests of their patients." *Id.*, 790 S.E.2d at 771. The Court found the interpretation arbitrary and, therefore, unconstitutional. *Id.* at 453, 790 S.E.2d at 771–72. Similarly, in *Retail Services*, the Court was not persuaded by the fact that (as the dissent noted)

the challenged statute's protectionist justifications were "listed *after* several non-protectionist motives, such as promoting temperance by discouraging business practices that promote alcohol consumption." *Retail Servs.*, 419 S.C. at 480, 799 S.E.2d at 670 (dissenting opinion). These notional rationales, the plurality noted, were simply "not supported by the record below." 419 S.C. at 475, 799 S.E.2d at 668.

Similarly, here, the challenged law can be supported only by hypothetical rationales, not by record evidence of how it actually addresses patient safety. Just like the statutory interpretation in *Joseph*, which deprived physicians of the right to practice in the best interests of their patients, the ECCPL deprives South Carolina-licensed ophthalmologists from using their medical judgment to write corrective-lens prescriptions for patients who need them.[80] Defendant-Intervenor admits that there is real patient demand for more convenient and affordable access to updated corrective-lens prescriptions, and that Opternative's Technology would help meet this demand.[81] Even Michael Zolman, who led SCOPA's efforts to pass the ECCPL, concedes that in some circumstances updating a corrective-lens prescription without first conducting a comprehensive eye-health examination neither violates the standard of care nor endangers patient health, but instead can actually *improve* patients' quality of life.[82] And the South Carolina-licensed ophthalmologists who have exercised their medical judgment to use Opternative's Technology in appropriate cases obviously agree.[83]

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[80] *See* Chaum Aff. at ¶ 3.

[81] *See* Windham Aff., Ex. 2 at 153 (Zolman asking rhetorically "how many patients do we see daily who really come in just wanting a new prescription for glasses and/or contacts?" and remarking that online refractive technology would "allow them to get what they want"); *see also, e.g.*, Bodde Aff. at ¶ 10; Chaum Aff. at ¶ 4.

[82] *See* Windham Aff., Ex. 1 at 32:8–33:14, 47:5–48:3.

[83] *See* Chaum Aff. at ¶¶ 2, 4.

Moreover, just as there was an obvious means by which the statute in *Joseph* could have addressed the government's purported concern, there are numerous simple ways that the ECCPL could have addressed the "diseases-might-be-missed" issue if that were truly the law's motivating concern (which it was not). As explained above, the ECCPL requires valid corrective-lens prescriptions to: (1) expire annually; and (2) be based on an eye examination that includes (a) a written or electronic medical history, (b) an assessment of the patient's visual acuity (including refractive error), *plus* (c) some additional "medical findings." *See generally* S.C. Code Ann. §§ 40-24-10 and 40-24-20.

But the ECCPL fails to specify *which* medical findings must be made, *how*, or even *by whom*. The law could have required that they be made during an in-person, comprehensive eye-health exam—it does not.[84] It could have required ophthalmologists to physically examine patients for certain ocular-pathological risk factors before writing prescriptions—it does not.[85] It could have even required ophthalmologists to take particular medical facts into account before writing prescriptions—it does not.[86] It does not require these things because for most people, annual comprehensive eye-health exams are unnecessary, and South Carolina law relies on ophthalmologists (like other doctors) to exercise their medical judgment on a case-by-case basis—*unless* the ophthalmologist is using computerized technology.

Instead of requiring that a doctor conduct a particular test or search for particular diseases, all the ECCPL requires is that a doctor writing a corrective-lens prescription rely on

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[84] *See* Windham Aff., Ex. 11 at 65:17–65:23 (Coleman admitting that "the ECCPL leaves it to an ophthalmologist's professional judgment exactly what diagnostic methodologies and exactly what medical information he needs before writing a prescription").

[85] *See id.* at 64:16–65:2 (Coleman explaining that the ECCPL has "no explicit requirement" regarding tests that must be performed before writing a corrective-lens prescription).

[86] *See id.* at 65:4–65:16 (Coleman admitting that the ECCPL "doesn't identify diagnostic methodologies that have to be employed in order to develop the medical findings" or even "specify what those medical findings must be").

information collected by a human being instead of an automated device.[87] Unsurprisingly, Defendant-Intervenor has failed to produce any evidence that restricting ophthalmologists' medical judgment in this way—and *only* in this way—actually protects patient health, and Defendants outright admit they have none.[88] By contrast, the impact on SCOPA's members' economic well-being is obvious: Opternative's Technology is automated, and it is therefore banned.[89]

In short, just like in *Joseph* and the numerous other cases cited above, there is no evidence here that the ECCPL furthers a public health or safety purpose. The law hinders patient health by preventing ophthalmologists from using innovative technology to write corrective-lens prescriptions—prescriptions their patients want—when their medical judgment indicates that such prescriptions are appropriate and within the ophthalmological standard of care. And it lacks any of the obvious tailoring that would be expected of a law actually designed to address the "diseases-might-be-missed" justification. Accordingly, the ECCPL is arbitrary, does not bear a reasonable relationship to patient health, and cannot stand under the Article I, Section 3's guarantee of due process.

B. The ECCPL lacks a fair and substantial relationship to patient health and thereby violates equal protection.

The basic mandate of equal protection is that government classifications must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 783 (Ct.

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[87] *See id.* at 67:14–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

[88] *See id.*, Ex. 11 at 54:22–55:7, 55:9–56:1 (Coleman admitting that Defendants have no evidence that the ECCPL actually protects the public health or safety).

[89] *See* Bodde Aff. at ¶¶ 6, 12–13; Chaum Aff. at ¶¶ 2–3.

App. 2009) (citation omitted). Should the Court decide to credit SCOPA's spurious "diseases might be missed" justification, therefore, equal protection still demands that any classifications drawn by the ECCPL bear a fair and substantial relationship to that end. As in the substantive-due-process context, while this is not a heavy burden, it does still require that classifications find their basis in *facts*, not fancy. *Daniel v. Cruz*, 268 S.C. 11, 14, 231 S.E.2d 293, 294 (1977) ("If there is no *real* difference between localities, persons, occupations, or property, the State cannot make one." (emphasis added) (citation omitted)).

Indeed, it is only when such facts support the classification as a reasonable means of achieving the asserted end that the relationship between the two can be called "fair and substantial," and courts in this state have no trouble recognizing when no such relationship exists. *See, e.g.*, *Joseph*, 417 S.C. at 452, 790 S.E.2d at 771 (plurality opinion) (law prohibiting physicians from employing physical therapists and referring patients to them was not calculated to further asserted end); *Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 5, 416 S.E.2d 623, 626 (1992) (law lacked rational basis for distinguishing between charitable hospitals and other medical providers for purposes of limiting liability); *Broome v. Truluck*, 270 S.C. 227, 230–31, 241 S.E.2d 739, 740 (1978) (law lacked rational basis for drawing statute-of-limitations distinctions for recovery against various professionals whose work involved designing improvements to real estate); *Daniel*, 268 S.C. at 14, 231 S.E.2d at 294 (law prohibiting practice of fortunetelling in some counties but not others was not based on any real difference between fortunetellers); *Gasque, Inc. v. Nates*, 191 S.C. 271, 2 S.E.2d 36, 44 (1939) (law imposing maximum-hours caps on certain manufacturing and mercantile establishments but not others was not based on any material differences between such establishments).

The ECCPL draws two clear classifications. First, the law penalizes South Carolina-licensed ophthalmologists who use their medical judgment to write corrective-lens prescriptions based on "medical findings" generated automatically, but does not penalize ophthalmologists who base prescriptions on precisely the same information, *some* of which was collected manually by a human being. *See generally* S.C. Code Ann. §§ 40-24-10 and 40-24-20. Second, the law forbids South Carolina-licensed ophthalmologists from using telehealth technologies to provide services according to their medical judgment and within the relevant standard of care, while all other South Carolina-licensed physicians are statutorily permitted to do just that. *See* S.C. Code Ann. § 40-47-37. The question for both is whether the classification bears a fair and substantial relationship to the "diseases-might-be-missed" justification.

As for the first, *Daniel* is instructive. There, a statute prohibiting licensed fortunetellers from practicing in one county while allowing them to practice in the other state counties was challenged under Article I, Section 3. *Daniel*, 268 S.C. at 13–14, 231 S.E.2d at 294. Relying on the principle that "[i]f there is no real difference between localities, persons, occupations, or property, the State cannot make one," the South Carolina Supreme Court found no rational basis for the classification and struck it down as an equal-protection violation. *Id.*, 231 S.E.2d at 294 (citation omitted).

Similarly here, there is no "real difference" between information collected manually by a human being and the *same* information when collected automatically. The ECCPL would allow South Carolina-licensed ophthalmologists to use Opternative's Technology to write corrective-lens prescriptions based on information collected by a physical person who manually recorded

patients' responses using, say, a clipboard.[90] But the same prescription based on the same information would be banned if the ophthalmologist received that information directly from Opternative's Technology, over the Internet.[91] Information does not become tainted simply because it was generated automatically, and there is no valid health or safety reason to pretend that it does.

As for the second classification, *Joseph* is again instructive. There, a statute was interpreted to prohibit physicians from employing and referring patients to physical therapists, despite the fact that physicians were generally allowed to do so for all other types of healthcare professionals. *Joseph*, 417 S.C. at 442–43, 790 S.E.2d at 766–67. The government claimed the classification was intended to protect patients and government-sponsored programs from conflicts of interest, but the Court observed that "the PTs stand alone in South Carolina," *id.* at 442–43, 790 S.E.2d at 767, and found the distinction "arbitrary and not calculated to avoid the legislative purpose," *id.* at 452, 790 S.E.2d at 771. That classification violated equal protection, too. *Id.*, 790 S.E.2d at 771.

Just like the physical therapists in *Joseph*, ophthalmologists "stand alone" in South Carolina as the *only* physicians forbidden from using telehealth technologies to provide services according to their medical judgment and within the relevant standard of care. *See generally* S.C. Code Ann. §§ 40-24-10 and 40-24-20. All other South Carolina-licensed physicians are statutorily permitted to do so without running afoul of the "diseases-might-be-missed" concern in their respective practice areas. *See id.* § 40-47-37. And neither Defendants nor Defendant-

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[90] *See* Defs.' Mot. Summ. J. 9 ("[A] South Carolina-licensed ophthalmologist may still use Opternative's technology to assist him or her in making a determination to write a prescription for spectacles or contact lenses. He or she simply cannot solely base the prescription on the refractive eye error of the human eye or be generated [sic] by a kiosk.").

[91] *See* Windham Aff., Ex. 11 at 67:14–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

Intervenor have produced any evidence of the sort of "real difference" between ophthalmologists and all other physicians that would warrant singling the former out for disparate treatment.

In sum, SCOPA contends that the ECCPL is designed to prevent certain diseases of the eye from going undetected. But the record is utterly devoid of evidence that would help to explain how either of the two distinctions discussed above alleviate that concern. The argument for the ECCPL seems to boil down to: "If Opternative is banned, then patients will need to see their optometrists more frequently—where, perhaps, they will receive comprehensive eye-health exams." While that sort of purely speculative argument may have carried the day in *Lee Optical*, it is not the stuff of which "fair and substantial" relationships are made. The South Carolina Constitution, equal protection, and common sense demand more.

CONCLUSION

The ECCPL is a purely protectionist law that bears no rational relationship to patient health or safety, which violates both the due-process and equal-protection guarantees of the South Carolina Constitution. Plaintiff therefore respectfully requests this Court to issue an Order granting summary judgment for Plaintiff on both claims, declaring the ECCPL unconstitutional, and permanently enjoining Defendants from enforcing that law.

[*SIGNATURE PAGE ATTACHED*]

Respectfully submitted,

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September 6, 2017.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Opternative, Inc.,

Plaintiff,

vs.

South Carolina Board of Medical Examiners,

and

South Carolina Department of Labor, Licensing, and Regulation,

Defendants,

South Carolina Optometric Physicians Association,

Defendant-Intervenor.

Civil Action No. 2016-CP-40-06276

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case concerns an attempt by one group of medical professionals to use the power of government to prevent another group of medical professionals from exercising their medical judgment to rely on innovative technology that expands access to care. Plaintiff Opternative, Inc., ("Opternative") has developed an online refractive test and software ("Technology") that allows customers to renew or update their corrective-lens prescriptions from the comfort of their own homes using a smartphone and a computer. South Carolina-licensed ophthalmologists were actively using that Technology to write prescriptions for patients who needed them. But last year, the South Carolina Optometric Physicians Association (SCOPA)—a group of licensed optometrists whose brick-and-mortar business model depends on selling patients expensive eyeglass frames in their offices—launched an aggressive lobbying campaign to pass legislation specifically designed to prevent licensed ophthalmologists from using Opternative's Technology.

SCOPA succeeded: The Eye Care Consumer Protection Law (ECCPL) prohibited Opternative's ongoing business activities, caused South Carolina-licensed ophthalmologists to refuse to continue working with Opternative, and forced the business to shut down operations in South Carolina—all while doing literally nothing to protect the public health or safety. Plaintiff has challenged that law as a violation of its due-process and equal-protection rights under Article I, Section 3 of the South Carolina Constitution, and Defendants Department of Labor, Licensing, and Regulation (LLR) and Board of Medical Examiners (BME) have moved for summary judgment, arguing that that Plaintiff lacks standing and that the ECCPL is supported by a rational basis.[1]

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[1] Plaintiff has also separately moved for summary judgment in its favor. *See generally See* Pl.'s Mot. Summ. J.

That motion should be denied because, as explained more fully below, Defendants are incorrect on both fronts. First, Plaintiff has standing because: (1) before the ECCPL passed, Plaintiff was operating in South Carolina and South Carolina-licensed ophthalmologists were using its Technology; (2) after the ECCPL passed, Plaintiff ceased operations in South Carolina because South Carolina-licensed ophthalmologists could no longer use its Technology; and (3) if this Court rules in favor of Plaintiff in this action, Plaintiff (and at least some South Carolina-licensed ophthalmologists) will resume their past business practices in South Carolina. Second, the summary-judgment record shows that the ECCPL fails constitutional scrutiny under the South Carolina Constitution because it is a purely protectionist law that is not reasonably related to protecting the public health or safety. For these reasons, Defendants' Motion for Summary Judgment should be denied, and Plaintiff's Motion for Summary Judgment should be granted.

STATEMENT OF FACTS[2]

The record in this case tells a simple, undisputed story: Opternative developed Technology that allowed patients to take an online vision test and connect remotely with an ophthalmologist, who would review the patient's medical information and write a prescription for corrective lenses if, in his medical judgment, it would be safe to do so. But South Carolina optometrists felt that their brick-and-mortar business model was threatened by that Technology, and pushed the Eye Care Consumer Protection Law to shut Opternative down. That law does nothing to promote the public health or safety, though, and does only what it was actually

[2] As noted above, Plaintiff has filed its own Motion for Summary Judgment with supporting evidence. In the interest of judicial economy, Plaintiff has not re-filed its supporting evidence along with this Motion; that evidence is hereby incorporated by reference. What follows is a brief summary of that evidence designed to provide context for discussion of Defendants' Motion while limiting repetition of the fuller discussion contained in Plaintiff's Motion for Summary Judgment. *See* Pl.'s Mot. for Summ. J. at 2–19.

designed to do: ban Opternative's Technology in order to protect brick-and-mortar optometrists' profits.

I. Opternative's Automated Technology Disrupts Optometrists' Brick-And-Mortar Business Model.

Optometrists are limited-practice eye-health professionals who specialize in corrective-vision and certain ocular-pathological care.[3] Most optometrists operate on a brick-and-mortar business model that depends heavily for appointments on patients seeking corrective-lenses.[4] Traditionally, that model has been successful because it has only been possible to determine an appropriate prescription through an in-person vision test: To generate an appropriate prescription, an optometrist instructs the patient to sit in a chair and view certain projected images through various lenses while they self-report their subjective responses—e.g., reporting whether a lens makes an image "better" or "worse."[5] The optometrist physically cycles through the lenses and records patients' responses in an effort to measure what is called the eye's refractive error, which the optometrist then uses to write an appropriate corrective-lens prescription.[6] At the conclusion of each appointment, it is common practice for optometrists (or

[3] *See* Affidavit of Joshua Windham in Support of Opternative, Inc.'s Motion for Summary Judgment (Windham Aff.), Ex. 1 at 9:2–9:18.

[4] *See id.* at 9:25–11:3 (South Carolina-licensed optometrist Michael Zolman admitting that half of his daily appointments come from patients seeking corrective-lens prescriptions and that his practice model is "fairly typical").

[5] SCOPA Ans. ¶ 14; *see also* Windham Aff., Ex. 1 at 35:25–36:9, 36:13–37:7, 37:12–38:7 (Zolman explaining how optometrists use a phoropter to generate a patient's corrective-lens prescription).

[6] SCOPA Ans. ¶ 14; *see also* Windham Aff., Ex. 1 at 36:10–36:12, 36:13–36:23, 38:14–38:17 (Zolman explaining that optometrists rely on subjective refractive information based on patient's responses to projected images to generate a patient's corrective-lens prescription). "Refractive" in this context refers to how light bends in a person's eye. *See id.* at 34:21–35:3.

office staff) to lead patients to a display room and attempt to sell them expensive eyeglass frames.[7]

Opternative's Technology disrupts that business model by allowing people to conduct the self-reporting part of the eye exam from the comfort of their own home.[8] Using Opternative's Technology is straightforward: Customers start by visiting the Opternative website and providing detailed information about their existing prescription and relevant medical history.[9] The Technology then prompts customers with a series of written and audio questions that guide them through a vision assessment.[10] Customers next view various individually calibrated images on a computer screen and use a smartphone to self-report subjective responses to what they perceive.[11] Opternative's Technology then records those responses and sends all of the collected information (from both the vision assessment and the personal- and medical-history questions) to a state-licensed ophthalmologist for review.[12]

Ophthalmologists are medical doctors who specialize in total eye care, including not just vision correction but overall eye health and surgical interventions.[13] Licensed ophthalmologists in states across the country (including, until last year, South Carolina) have successfully used

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[7] *See id.* at 65:5–66:15 (Zolman admitting that optometrists attempt post-appointment eyeglass sales "most of the time").

[8] *See* Affidavit of Daniel Bodde in Support of Opternative, Inc.'s Motion for Summary Judgment (Bodde Aff.) at ¶¶ 3–6; Windham Aff., Ex. 1 at 66:16–67:9 (Zolman admitting that his revenue from eyeglass sales "would go down" if online refractive tests like Opternative's Technology ever became commercially popular).

[9] *See* Bodde Aff. at ¶ 6.

[10] *See id.*

[11] *See id.*

[12] *See id.*; Affidavit of Edward Chaum, MD, in Support of Opternative, Inc.'s Motion for Summary Judgment (Chaum Aff.) at ¶ 2.

[13] SCOPA Ans. ¶¶ 9, 11; Bodde Aff. at ¶ 7.

information generated by Opternative's Technology to write prescriptions for patients when, in their medical judgment, such a prescription is appropriate.[14] But ophthalmologists have not always determined a prescription is appropriate, and Opternative users are never guaranteed a prescription.[15] Opternative's Technology is not a replacement for a comprehensive eye-health examination (a fact of which Opternative's users are repeatedly reminded), and ophthalmologists reviewing information generated by Opternative's Technology always have (and have frequently exercised) the option to refuse to write a prescription and instead refer a particular user to a local eye-health practitioner for a full in-person examination.[16] A reviewing ophthalmologist can refuse to write a prescription for any reason, including particular factors revealed in a patient's medical history, particular indications from a patient's responses to the eye exam, or simply the length of time since a patient last saw an ophthalmologist in person.[17] Indeed, Opternative imposes front-end screening requirements to filter out people for whom ophthalmologists generally decline to write prescriptions based on the Technology: Only otherwise-healthy customers between the ages of 18 and 50 are eligible for a prescription, and customers are prohibited from using Opternative's Technology four years in a row without first certifying that they have received a comprehensive eye-health examination.[18]

Opternative's Technology expands access to care: There is real patient demand for more convenient and affordable access to renewed or updated corrective-lens prescriptions.[19] And

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[14] *See* Chaum Aff. at ¶ 2; Bodde Aff. at ¶ 11.

[15] *See* Bodde Aff. at ¶ 7.

[16] *See id.* at ¶¶ 7–9.

[17] *See id.* at ¶¶ 7–8.

[18] *See id.* at ¶¶ 8–9.

[19] *See id.* at ¶ 10; Chaum Aff. at ¶ 4; Windham Aff., Ex. 2 at 153 (Zolman asking rhetorically "how many patients do we see daily who really come in just wanting a new prescription for

prior to the enactment of the ECCPL, South Carolina-licensed ophthalmologists successfully used Opternative's Technology to write or renew prescriptions in appropriate circumstances.[20] But allowing qualified patients to avoid in-person visits when they were not medically necessary was a threat to the business model of optometrists who rely on in-person visits to bolster their retail business selling glasses and contacts.[21] These optometrists sought (and obtained) economic protection from the legislature.[22]

II. Optometrists Drafted And Lobbied For The ECCPL To Protect Their Brick-And-Mortar Business Model From Competition By Opternative's Automated Technology.

The threat Opternative's Technology poses to the commercial viability of brick-and-mortar optometry shops has not gone unnoticed. The American Optometric Association—a national association of optometrists devoted to the promotion of the optometric profession—distributed a model bill to affiliates in 2015 to stop Opternative from operating in states across the country.[23] One such affiliate, the South Carolina Optometric Physicians Association—Defendant-Intervenor here—adapted that bill and waged an aggressive lobbying campaign to get

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glasses and/or contacts?" and remarking that online refractive technology would "allow them to get what they want").

[20] *See* Chaum Aff. at ¶ 2; Bodde Aff. at ¶ 11.

[21] SCOPA Ans. ¶ 20; *see* Windham Aff., Ex. 1 at 66:16–67:9 (Zolman admitting that his revenue from eyeglass sales "would go down" if online refractive tests like Opternative's Technology ever became commercially popular).

[22] *See* Windham Aff., Ex. 5 at 23:13–23:15 (Rivers admitting that "the ECCPL is a bill that SCOPA passed"), 46:22–47:2 (Rivers admitting that "the bill that eventually became the ECCPL was primarily pushed by the optometrists"), 55:16–55:22 (Rivers admitting that SCOPA's "effort to pass the ECCPL [was] prompted by the existence of businesses offering online eye exams").

[23] *See id.*, Ex. 1 at 11:15–13:7 (Zolman describing the AOA's mission); *id.*, Ex. 2 at 181–93 (AOA webinar slides introducing model legislation to state affiliates).

it passed in South Carolina.[24] While e-mail communications reveal that the legislation was designed from the very start to shut Opternative down and protect the optometrists' share of the multi-billion-dollar corrective-lens industry, SCOPA maintained a strict internal policy of not focusing on Opternative in public, instead clothing the law in public-health rhetoric.[25] Nonetheless, internal emails from SCOPA show that when the Eye Care Consumer Protection Law ultimately went into effect, its members dropped the pretext and openly celebrated their success in banning Opternative.[26]

As a direct result of the ECCPL's passage, Opternative was no longer able to offer online vision tests in South Carolina, and was forced to shut down business operations in the state.[27] Before the ECCPL, Opternative had no problem operating in South Carolina, and many South Carolinians actually received corrective-lens prescriptions after a South Carolina-licensed

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[24] *See id.*, Ex. 1 at 16:4–16:21, 22:15–22:21 (Zolman describing SCOPA's mission); *id.*, Ex. 2 at 153–54 (Zolman e-mailing the SCOPA Board after attending the AOA webinar to recommend that SCOPA adapt and push the AOA's model legislation in South Carolina); *id.*, Ex. 5 at 34:17–35:2 (Rivers confirming that "[t]he original draft language [for the ECCPL] came from the American Optometric Association" and admitting that "SCOPA . . . generate[d] a draft based on that language").

[25] *Compare id.*, Ex. 8 at 469 (Rivers forwarding AOA admonition to "continue talking about patient safety"), *with id.*, Ex. 5 at 55:16–55:22, 56:6–56:11 (Rivers admitting that the ECCPL was "prompted by the existence of online eye exams" but that there were "internal discussions at SCOPA about the importance of discussing the ECCPL as if it were not an effort to ban Opternative"); *see also id.*, Ex. 13 at 1258 (Zolman e-mail to SCOPA membership explaining that "We do NOT want to make this an anti-Opternative arguement [sic] as Legislators frown upon legislation that singles out and restricts a specific business").

[26] *See id.*, Ex. 9 at 116 (Rivers e-mail to AOA during veto-override vote, exclaiming: "[T]ake that Opternative!!!!!!"); *id.*, Ex. 3 at 129 (Zolman post-veto override e-mail to SCOPA's membership boasting: "It's with the utmost pleasure to announce that today, Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!," and "Good-bye Opternative!"); *id.*, Ex. 10 at 203 (SCOPA presentation slide portraying "The Results…" of SCOPA's efforts to get the ECCPL passed and prominently displaying the word "Opternative" with a red circle and strikethrough).

[27] *See* Bodde Aff. at ¶ 13.

ophthalmologist used his medical judgment to write a prescription based on information generated by the Technology.[28] But after the ECCPL passed, no ophthalmologist was willing to use Opternative's Technology.[29] And understandably so: The ECCPL clearly prohibits the use of Opternative's Technology because it requires corrective-lens prescriptions to be based, at least in part, on an examination by a human being (though not necessarily by the prescribing ophthalmologist).[30]

Ophthalmologists have good reason not to test the boundaries of South Carolina law. *See* S.C. Code Ann. §§ 40-1-80, 40-47-80, 40-47-110. If the South Carolina Board of Medical Examiners receives a complaint that a licensee has violated the law, that complaint triggers an investigatory process that lasts at least a year, and can result in ruinous penalties.[31] And the Board has no discretion at all to avoid enforcing the law, which means that ophthalmologists have no grounds for thinking that they would be free to use Opternative or any other Internet-based, computerized vision test, without risking their reputation and careers.[32] Understandably unable to find ophthalmologists willing to disregard the law by using its Technology, Opternative was forced to immediately cease operations in South Carolina—though it is currently in contact with South Carolina ophthalmologists who would continue using the

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[28] *See* Bodde Aff. at ¶ 11; Chaum Aff. at ¶ 2.

[29] *See* Chaum Aff. at ¶ 3.

[30] *See* Windham Aff., Ex. 11 at 67:14–67:18 (Defendants' 30(b)(6) designee Darra Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

[31] *See id.* at 10:13–15:17 (Coleman explaining procedures of lengthy case-investigation process), 19:17–19:23 (Coleman responding "No, I would not say so" and "I would not say that that would be a realistic expectation" in response to question about whether case-investigation process could theoretically conclude in less than a year).

[32] *See id.* at 69:5–69:10 (Coleman explaining that LLR "[doesn't] have the luxury of not enforcing law").

Technology to write corrective-lens prescriptions (where medically appropriate) if the barrier of the ECCPL were removed.[33]

III. The ECCPL Bans Opternative's Technology—And That Is All It Does.

The ECCPL was intended as a ban on Opternative's Technology, rather than as a requirement that patients receive a comprehensive eye-health examination before updating or renewing their corrective-lens prescriptions. Unsurprisingly, then, the ECCPL does a very good job of banning Opternative but nothing at all to ensure that patients receive comprehensive eye-health examinations.

The ECCPL is codified at S.C. Code Ann. sections 40-24-10 and 40-24-20. The law lays out two requirements for a corrective-lens prescription:

> **To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider** or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. **The prescription must take into consideration medical findings made and refractive error discovered during the eye examination.** If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.

Id. § 40-24-20(B) (emphasis added). It also provides that "[a] prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk." *Id.* § 40-24-20(C). An "eye examination" is further defined: To be valid, an eye examination "must not be based solely on objective refractive data or information gathered by an automated testing device." *Id.* §§ 40-24-10(3) (providing that an eye examination must include a "visual status") and 40-24-10(9) (defining a visual status).

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[33] *See* Bodde Aff. at ¶¶ 13–14; Chaum Aff. at ¶¶ 3–4.

In other words, the ECCPL requires that corrective-lens prescriptions must expire annually, and they must be based at least in part on information collected by a human being. And as Defendants' 30(b)(6) designee confirmed at deposition, these are the *only* constraints the ECCPL places on an ophthalmologist's medical judgment.[34] The ECCPL does not specify what findings an ophthalmologist must make before prescribing corrective lenses.[35] It does not require an ophthalmologist to perform any particular test or to use any particular diagnostic methods before prescribing corrective lenses.[36] All it requires is that prescriptions for corrective lenses be based at least in part on some in-person, human involvement.[37] But the law does not say who the human has to be—it does not need to be the prescribing ophthalmologist (or even someone with a medical license of any kind)—and the law does not say what that involvement needs to consist of—*only that it cannot be computerized.*[38]

In short, prior to the ECCPL's passage, an ophthalmologist could use any method he wanted to determine a person's refractive error and then write a prescription so long as he was satisfied that he had enough information to write a medically appropriate prescription without further examination. After the passage of the ECCPL, an ophthalmologist can still do exactly

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[34] *See* Windham Aff., Ex. 11 at 65:17–65:23 (Coleman admitting that "the ECCPL leaves it to an ophthalmologist's professional judgment exactly what diagnostic methodologies and exactly what medical information he needs before writing a prescription").

[35] *See id.* at 65:4–65:16 (Coleman admitting that the ECCPL "doesn't identify diagnostic methodologies that have to be employed in order to develop the medical findings" or even "specify what those medical findings must be").

[36] *See id.* at 64:16–65:2 (Coleman explaining that the ECCPL has "no explicit requirement" regarding tests that must be performed before writing a corrective-lens prescription).

[37] *See id.* at 67:14–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

[38] *See id.* at 67:14–68:10 (Coleman explaining that it is generally within the physician's discretion to use any number of "physician extenders" and that such extenders can even include "unlicensed professionals, such as a medical assistant or a certified nurse assistant").

that—so long as he is sure he has enough information to write a medically appropriate prescription without further examination *and* as long as he is relying at least in part on information generated by a human being instead of information collected by automated software.[39] This does nothing to change the medical standard of care: Ophthalmologists can (and will) still decide what tests and examinations a particular patient needs by using their own medical judgment. But it does a very good job of banning Opternative's Technology by requiring that ophthalmologists insert a human at some point (any point) in the prescription-writing process.

This matters because not everyone who seeks a new corrective-lens prescription actually needs (or will get) a comprehensive eye-health examination. Under the ECCPL, corrective-lens prescriptions expire after only one year. S.C. Code Ann. § 40-24-20(B). But the American Academy of Ophthalmology does not recommend that most people receive comprehensive eye-health examinations on an annual basis. Instead, the American Academy of Ophthalmology recommends that otherwise-healthy people obtain at least ***one*** such examination by the time they reach 40 years old, and that otherwise-healthy people between the ages of 40 and 54 obtain one every 2–4 years.[40]

In short, there are any number of people who might need a renewed or updated corrective-lens prescription but who do not need a new comprehensive eye-health exam. Prior to the ECCPL, such people could get prescriptions (where appropriate) by using Opternative's

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[39] *See id.* at 65:17–65:23, 67:14–67:18.

[40] *See id.*, Ex. 4 at 1–2 ("Adults with no signs or risk factors for eye disease should receive a baseline comprehensive eye evaluation at age 40. Individuals without risk factors aged 40 to 54 should be examined by an ophthalmologist every 2 to 4 years."); *id.*, Ex., 1 at 47:24–48:3 (Zolman admitting that he has no reason to doubt that the American Academy of Ophthalmology's statement conveys the ophthalmological standard of care because "I'm not an ophthalmologist"); *see also* SCOPA Ans. ¶ 16.

Technology without getting a full comprehensive eye-health examination. After the ECCPL, they can still get a new prescription without a full comprehensive eye-health examination, but they must go see a human being—a human being who is not legally required to conduct any particular medical tests. That legal requirement may do a splendid job of ensuring that more people walk into brick-and-mortar shops that sell glasses, but it does essentially nothing to ensure that people get comprehensive eye-health examinations that the American Academy of Ophthalmology says they do not need.

STANDARD OF REVIEW

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 220, 781 S.E.2d 548, 554 (2015). In conducting that analysis, "the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004). While there are no disputes of material fact here—indeed, Defendants' Motion relies almost exclusively on citations to the allegations of the Complaint—Defendant has failed to show that it is entitled to judgment as a matter of law, and its Motion must therefore be denied.

ARGUMENT

Defendants are not entitled to summary judgment. First, Plaintiff has standing: Undisputed record evidence shows that Plaintiff *was* operating in South Carolina prior to the ECCPL's passage, that it was forced to *stop* operating in South Carolina because of the adoption of the ECCPL, and that it *would resume* operations in South Carolina if Defendants were

enjoined from enforcing the ECCPL. That is a concrete injury redressable by this Court. Second, under the South Carolina Constitution, this Court has a duty to determine whether the record evidence demonstrates that the ECCPL bears a genuine relationship to patient health rather than being mere economic protectionism. Plaintiff has built an extensive record demonstrating that the ECCPL is related to nothing but what it was expressly designed to do: banning Opternative in order to preserve brick-and-mortar optometrists' profits. Defendants' Motion not only fails to address this record evidence, but it is also unsupported by any evidence of its own beyond bare citations to Defendant-Intervenor's interrogatory responses. For both of these reasons, Defendants' Motion must be rejected, and Plaintiff's cross-motion should be granted.

I. Plaintiff Has Standing Because The ECCPL Bans South Carolina-Licensed Ophthalmologists From Using Plaintiff's Technology.

Defendants first wrongly contend that Plaintiff lacks standing. Standing is defined as "a personal stake in the subject matter of a lawsuit." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). To establish standing, a plaintiff must demonstrate that: (1) the plaintiff has suffered an injury; (2) there is a causal connection between that injury and the conduct complained of; and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. Plaintiff clearly satisfies all three elements.

A. The ECCPL injures Opternative by preventing it from operating its business in South Carolina.

Standing demands an "injury in fact." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. This requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan v. Defenders of*

Wildlife, 504 U.S. 559-61 (1992) (internal quotes and citations omitted)). Plaintiff meets both requirements.

1. Plaintiff's economic interests are legally protected.

The South Carolina Constitution guards against deprivations of "life, liberty, or property." S.C. Const. art. I, § 3. It is well-settled that those interests include the right to engage in a chosen occupation free from unreasonable government interference. *See Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 770 (2016) (recognizing physical therapist's interest in practicing her profession and physicians' interest in hiring therapists like her) (plurality). One aspect of the right to engage in a chosen occupation is the overarching liberty interest a plaintiff holds in the pursuit of that occupation. *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) ("The liberty interest at stake is the individual's freedom to practice his or her chosen profession."). Another aspect is the particularized property interest a plaintiff holds in the financial living earned by such pursuit. *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 484, 636 S.E.2d 598, 615 (2006) ("'It cannot be doubted that a man's trade or profession is his property.'") (quoting *Byrne's Adminstrs. v. Stewart's Adminstrs.*, 3 S.C. Eq. 446, 479, (1812)), *overruled on other grounds by Joseph*, 417 S.C. at 452, 790 S.E.2d at 771–72. Both are economic interests, and deprivation of either constitutes an "injury in fact." Under these cases, Opternative's financial injury in being barred from South Carolina obviously counts as an "injury" to support standing.

Defendants ignore these cases, though, instead relying on *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 669 S.E.2d 337 (2008), to contend that mere "competitive disadvantage" is not a cognizable injury for purposes of standing.[41] But *ATC* is inapposite here: That case involved

[41] *See* Defs.' Mot. Summ. J. 8.

one cell phone-tower company's challenge to a rezoning classification that would have allowed a competing cell phone-tower company to build on a tract of land near one of the first company's towers. *ATC*, 380 S.C. at 193–94, 669 S.E.2d at 338–39. The Supreme Court found that increased business competition is not an injury, and that accordingly, the first company's lawsuit to *prevent* competition "solely to protect its own economic interests" could not proceed. *Id.* at 340.

In short, if Plaintiff were arguing that South Carolina law allowed *someone else* to operate a business to its economic detriment, this case would be controlled by *ATC*. But Plaintiff is instead arguing (and has shown with evidence) that South Carolina law prevents *it* from running its business in the state. That is *exactly* the sort of injury that the South Carolina Supreme Court has recognized as establishing standing to sue.

The evidence supporting Opternative's injury here is overwhelming and undisputed. The ECCPL was expressly designed to prohibit Opternative from operating in South Carolina.[42] As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists refused to use Opternative's Technology in South Carolina.[43] And rightly so, given that Defendants concede that they have no discretion to decline to enforce the ECCPL and that any allegation that

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[42] *See* Windham Aff., Ex. 7 at 501 (AOA providing state affiliates an "update on AOA actions on the Opternative issue" and promising to "make recommendations to state affiliates about suggested strategies to stop this from operating in your state"); *id.*, Ex. 1 at 54:2–54:12 (Zolman admitting that he "had Opternative in mind" when he recommended that the SCOPA Board push the AOA's model legislation); *id.*, Ex. 5 at 55:16–55:22 (Rivers admitting that SCOPA's "effort to pass the ECCPL [was] prompted by the existence of businesses offering online eye exams"); *id.*, Ex. 3 at 129 (Zolman boasting to SCOPA's membership after veto override about SCOPA's efforts to get the ECCPL passed and exclaiming that "Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!"); *id.*, Ex. 10 at 203 (SCOPA presentation slide portraying "The Results…" of SCOPA's efforts to get the ECCPL passed and prominently displaying the word "Opternative" with a red circle and strikethrough).

[43] *See* Chaum Aff. at ¶ 3; Bodde Aff. at ¶ 13.

a licensed doctor had violated the ECCPL would trigger an investigatory process that would last *at least* a full year, with the doctor's license hanging in the balance.[44] To be sure, Defendants are right to say they have not yet enforced the ECCPL against anyone,[45] but that is because no doctor has dared to violate the law (and because Opternative, therefore, has ceased operating in South Carolina). Defendants do not suggest they will not enforce the law—indeed, they freely admit that they *must* enforce the law[46]—nor do they suggest that South Carolina's ophthalmologists acted unreasonably in abandoning Opternative. Nor could they: The ECCPL bans Opternative's Technology, which is the only reason Opternative stopped operating after the ECCPL passed.[47]

Similarly, Defendants' suggestion that Opternative could get around the ECCPL if an ophthalmologist used its Technology *in addition to* a human examination simply misses the point. Opternative's business model was allowing ophthalmologists to write prescriptions (where appropriate) without requiring an in-person visit. To suggest that the company instead offer a product that can be used while a patient is physically in a physician's office is simply to suggest that it go into a different business. But nothing in South Carolina law suggests that the ability to go into a different business obviates standing. Indeed, the physical therapists in *Joseph* could have provided their services without being employed by a physician. *See* 417 S.C. 436, 790 S.E.2d 763 (2016). The plaintiffs in *Retail Services* could have refrained from acquiring more than three liquor licenses. *See* 419 S.C. 469, 799 S.E.2d 665 (2017). The drive-in

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[44] *See* Windham Aff., Ex. 11 at 10:13–15:17 (Coleman explaining procedures of lengthy case-investigation process), 19:17–19:23 (Coleman responding "No, I would not say so" and "I would not say that that would be a realistic expectation" in response to question about whether case-investigation process could theoretically conclude in less than a year).

[45] Defs.' Mot. Summ. J. 10.

[46] *See id.* at 69:5–69:10 (Coleman explaining that LLR "[doesn't] have the luxury of not enforcing law").

[47] *See* Bodde Aff. at ¶¶ 11–14.

restaurant owner in *Painter* could have simply borne a 50-percent cut to her evening business by closing down shop after midnight each night. *See* 231 S.C. 56, 97 S.E.2d 71 (1957). But the South Carolina Supreme Court decided all of those cases on their merits, and this Court should do the same here.

2. *Destruction of Plaintiff's South Carolina business operations constitutes concrete and particularized harm.*

A plaintiff must have a "real, material, or substantial interest in the subject matter of the action." *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992). It is difficult to imagine a more "concrete" injury in this sense than the deprivation of a party's actual, day-to-day business, or the past goodwill cultivated by such business, or the future earnings expected from such business—and the South Carolina Supreme Court, again, has repeatedly recognized as much. *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (2005) (recognizing anesthesiologist's pecuniary interest in her professional practice and business goodwill); *see also Sloan*, 370 S.C. at 483–84, 636 S.E.2d at 614–15 (collecting cases recognizing same principle), *overruled on other grounds by Joseph*, 417 S.C. at 452, 790 S.E.2d at 771–72. This is precisely the sort of harm Plaintiff has endured.[48]

The harm must also be "direct," and "not merely of a general nature which is common to all members of the public." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639–40, 528 S.E.2d 647, 650 (1999). But Optemative—the company at which the ECCPL was expressly aimed, and the company whose business operations in the state ceased as a direct result of the ECCPL—has surely established a harm distinct from that of the general public that now must do without the possibility of an online eye exam, and Defendants do not seriously contend otherwise.

[48] *See* Bodde Aff. at ¶¶ 11–13.

3. Destruction of Plaintiff's past business operations in South Carolina constitutes actual harm, the threat of such destruction in the future constitutes imminent harm.

An "injury in fact" is actual or imminent, rather than merely hypothetical. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. Plaintiff's injury is actual because the plain language of the ECCPL banned Opternative's Technology, forcing Plaintiff to shut down business operations in South Carolina.[49] *See* S.C. Code Ann. §§ 40-24-10(3), (9), and 40-24-20(B). And the ECCPL remains a continuing threat to Plaintiff's economic interests because Plaintiff is currently in touch with South Carolina-licensed ophthalmologists who would use its Technology *but for* the existence of the ECCPL. The only reason Opternative remains closed for business in South Carolina is that the state's ophthalmologists understandably do not want to risk their licenses to practice medicine by violating the ECCPL.[50] *See* S.C. Code Ann. §§ 40-24-20(D) ("Violation of this section constitutes misconduct as provided for in Section[] . . . 40-47-110. A provider who violates this section is subject to the penalties authorized in . . . Chapter 47, Title 40, as applicable.") and 40-47-110(A) ("[U]pon finding misconduct that constitutes one or more of the grounds for disciplinary action [BME] may cancel, fine, suspend, revoke, . . . or restrict, including probation . . . the authorization of a person who has engaged in misconduct.").

Defendants contend that since neither LLR nor BME regulates Opternative, Plaintiff's injuries are merely hypothetical.[51] But the ECCPL regulates ophthalmologists, S.C. Code Ann. §§ 40-24-10(7) and 40-24-20(D), whose willingness to use Opternative's Technology is at the

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[49] *See* Bodde Aff. at ¶¶ 11–13.

[50] *See* Chaum Aff. at ¶ 3; Windham Aff., Ex. 11 at 69:5–69:10 (Coleman explaining that LLR "[doesn't] have the luxury of not enforcing law").

[51] *See* Defs.' Mot. Summ. J. 10

core of the company's business model.[52] And both LLR and BME are bound to enforce that law.[53] As a direct result of this prospect of enforcement, licensed ophthalmologists—not hypothetically, but in reality—have stopped using Plaintiffs' Technology in South Carolina and Plaintiff has shut down its operations in the state. In the absence of a court order preventing LLR and BME from fulfilling their duty to enforce the ECCPL, no South Carolina ophthalmologist will resume using Opternative's Technology in the state.

Moreover, an ophthalmologist does not need to break state law and ruin his career in order for Plaintiff to have standing to sue. This case was filed under the Declaratory Judgments Act, which courts have held "should be liberally construed to accomplish its intended purpose of affording a *speedy and inexpensive* method of deciding legal disputes and of settling legal rights and relationships, *without awaiting a violation of the rights* or disturbance of the relationships." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 888–89 (Ct. App. 2002) (emphasis added). The South Carolina Supreme Court made a similar point just last year regarding constitutional challenges to existing statutes or interpretations, noting that "[t]he only viable avenue to seek redress and access to our courts cannot be solely through disregarding our laws." *Joseph*, 417 S.C. at 450, 790 S.E.2d at 770. The upshot is that Opternative need not run through the charade of resuming operations in South Carolina, persuading state-licensed ophthalmologists to risk their careers (and an expensive, lengthy investigation process) and then waiting for Defendants to initiate enforcement of the ECCPL (which they have no discretion to refrain from doing) simply to generate an "injury in fact." The law bans Opternative. Opternative (and the South Carolina-licensed ophthalmologists who used to use its Technology)

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[52] *See* Bodde Aff. ¶ 13.

[53] *See* Windham Aff., Ex. 11 at 69:5–69:10.

are obeying the law.[54] But if that law is unconstitutional—and, as discussed below, it is—they want to *stop* obeying it.[55] This is precisely what the Declaratory Judgments Act was designed for, and Defendants' Motion must therefore be denied.

B. The destruction of Plaintiff's South Carolina business operations was directly caused by the ECCPL and Defendants' duty to enforce the ECCPL.

A plaintiff must also establish "a causal connection between the injury and the conduct complained of." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan*, 504 U.S. at 559–61 (internal quotes and citations omitted)). When challenging a legislative act, this requires the plaintiff to show that, "as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained." *Joytime Distribs.*, 338 S.C. at 639, 528 S.E.2d at 650.

Both are true here, and *Joseph* is illustrative. There, the Supreme Court had no trouble finding standing where a physical therapist challenged a South Carolina Board of Physical Therapy position statement and judicial precedent interpreting a statute to prohibit physicians from employing and referring patients to physical therapists. *Joseph*, 417 S.C. at 449, 790 S.E.2d at 769–70. The Court found that the plaintiff, a physical therapist, had been injured by the law's restriction on her ability to practice her chosen profession and disparate treatment of her relative to all other healthcare professionals, who could be employed by physicians. *Id.*, 790 S.E.2d at 770. Those were injuries that she *had* suffered and would *continue* to suffer, so long as the challenged law remained on the books. Likewise here, Plaintiff was deprived of the freedom

[54] *See* Chaum Aff. at ¶ 3; Bodde Aff. at ¶ 13.

[55] *See* Chaum Aff. at ¶ 4; Bodde Aff. at ¶ 14.

to engage in its chosen occupation as soon as the ECCPL went into effect, and will continue to suffer that injury until the ECCPL is struck down.[56]

Defendants attempt to distinguish *Joseph* by arguing that while the Board of Physical Therapy's position statement in that case was an "actual act," South Carolina-licensed ophthalmologists here "are not forbidden by the ECCPL—and certainly not by any action of the Board or LLR—from using Opternative's technology."[57] But there is no "actual act" requirement to challenge the constitutionality of a statute under the Declaratory Judgments Act—just the opposite. *See Pond Place Partners*, 351 S.C. at 16, 351 S.E.2d 881, 888–89 (the Act "should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or disturbance of the relationships"). The plain text of the ECCPL bans (and was *designed* to ban) Plaintiff's technology.[58] *See* S.C. Code Ann. §§ 40-24-10(3), (9), and 40-24-20(B). As such, there is no non-futile act Plaintiff could take (short of persuading its partner physicians to defy the law and await prosecution) that would make its injury any more concrete than it already is.

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[56] *See* Bodde Aff. at ¶¶ 13–14.

[57] *See* Defs.' Mot. Summ. J. 9.

[58] *See* Windham Aff., Ex. 7 at 501 (AOA providing state affiliates an "update on AOA actions on the Opternative issue" and promising to "make recommendations to state affiliates about suggested strategies to stop this from operating in your state"); *id.*, Ex. 1 at 54:2–54:12 (Zolman admitting that he "had Opternative in mind" when he recommended that the SCOPA Board push the AOA's model legislation); *id.*, Ex. 5 at 55:16–55:22 (Rivers admitting that SCOPA's "effort to pass the ECCPL [was] prompted by the existence of businesses offering online eye exams"); *id.*, Ex. 3 at 129 (Zolman boasting to SCOPA's membership after veto override about SCOPA's efforts to get the ECCPL passed and exclaiming that "Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!"); *id.*, Ex. 10 at 203 (SCOPA presentation slide portraying "The Results…" of SCOPA's efforts to get the ECCPL passed and prominently displaying the word "Opternative" with a red circle and strikethrough).

Finally, Defendants' is just the sort of argument rejected in *Joseph*. While the physical therapist there had not yet faced punishment or discipline as a result of the challenged position statement, the Court explained that she need not willfully violate the law and risk enforcement simply to seek redress of her injuries in court. *Joseph* , 417 S.C. at 450, 790 S.E.2d at 770. And neither should Plaintiff have to risk its business reputation and long-term viability (which it successfully maintains in 39 other states across the country) by asking partnering ophthalmologists to disregard the ECCPL and subject themselves to ruinous fines and penalties.[59] The plain language of the ECCPL—which Defendants admit they are bound to enforce—is sufficient.[60]

C. Enjoining Defendants from enforcing the ECCPL would redress Opternative's injury.

Finally, a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan*, 504 U.S. at 559–61 (internal quotes and citations omitted)). Once again, *Joseph* is instructive. There, where unconstitutional interpretations of a statute restricted a physical therapist's freedom to practice her chosen profession, the Supreme Court found declaratory relief adequate to redress her injuries. *Joseph*, 417 S.C. at 449–50, 790 S.E.2d at 769–70. Similarly here, the ECCPL's ban on Opternative's Technology is the only thing preventing Plaintiff from resuming operations in South Carolina.[61] If Defendants are enjoined from enforcing the ECCPL against licensees who use Opternative's Technology, that barrier would disappear and at least

[59] *See* Bodde Aff. at ¶ 10.

[60] *See* Windham Aff., Ex. 11 at 69:5–69:10.

[61] *See* Bodde Aff. at ¶ 13; Chaum Aff. at ¶ 3.

some state-licensed ophthalmologists would resume using Opternative's Technology in South Carolina.[62] That is textbook redressability.

II. Defendants Are Not Entitled To Summary Judgment Because The ECCPL Is A Purely Protectionist Law That Bears No Relationship To Patient Health.

Defendants also argue that the ECCPL passes constitutional muster on the merits, but their argument fails on multiple fronts. First, Defendants fail to acknowledge that this case is governed by the South Carolina Constitution, not the U.S. Constitution, and that South Carolina courts review economic regulations like the ECCPL with significantly more demanding scrutiny than the federal rational-basis test. Second, Defendants' Motion fails to acknowledge the substantial record evidence demonstrating that the ECCPL is designed purely to advance the economic interests of one group (licensed optometrists) at the expense of others—an end South Carolina courts have consistently held is an illegitimate use of the police power. And third, Defendants' Motion fails (indeed, does not even attempt) to demonstrate the kind of reasonable, evidence-based connection between the ECCPL and the public health or safety that South Carolina courts consistently demand of economic regulations. For all these reasons, Defendants' Motion for Summary Judgment must be denied, and Plaintiff's cross-motion should be granted.

A. The South Carolina rational-basis test controls.

As a preliminary matter, much of Defendants' argument is premised on a misguided view of the relevant standard. This case raises claims under Article I, Section 3 of the South Carolina Constitution, and courts in this state have developed an extensive jurisprudence interpreting that Constitution independent of the U.S. Constitution. Defendants would have this Court depart from that jurisprudence and instead apply federal law to state-law claims. It should not do so.

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[62] *See* Bodde Aff. at ¶ 14; Chaum Aff. at ¶ 4.

Defendants essentially ask this Court to apply the most deferential form of federal rational-basis review, citing to the U.S. Supreme Court's decision in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (among other federal authorities) for the proposition that Plaintiff must "negative every conceivable basis which might support" the ECCPL.[63] But even if this case were governed by the federal test—and it is not—mere "conceivability" in the absence of record evidence would not suffice. That was the standard applied in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955) (dreaming up various justifications legislators might have had for banning opticians from fitting already-prescribed lenses into new eyeglass frames unless customers first obtained an additional prescription), which modern federal courts have begun to cabin as "a zenith of . . . judicial deference to state economic regulation." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221 (5th Cir. 2013); *see also Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (invoking *Lehnhausen* before applying recent federal trend of skepticism towards regulations with doubtful justifications and a close fit to anti-competitive effects).[64]

In any event, *no* version of the federal rational-basis test governs this case. South Carolina courts have flatly disclaimed deference to the federal judiciary on questions of state-constitutional interpretation. *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) ("[T]he federal Constitution sets the floor for individual rights . . . the state constitution establishes the ceiling."); *State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991) ("It is firmly established that state courts may interpret their won constitutions in such a way as

[63] *See* Defs.' Mot. Summ. J. 14–15.

[64] *See* Pl.'s Mot. Summ. J. 21–22.

to expand rights conferred by the Federal Constitution.").[65] Instead, decades of caselaw reveal that South Carolina courts interpreting their own Constitution have articulated an independent formulation of the rational-basis test: (1) courts look to see whether a law's *actual* purpose is legitimate; and (2) courts examine the record for evidence that, in the real world, a law *actually* furthers that purpose (rather than another, illegitimate purpose).[66] That is the test that applies here. And under that test—which the Defendants' Motion does not even discuss—the ECCPL cannot hope to survive.

B. The ECCPL is a purely protectionist law, and protectionism is not a legitimate government end.

The core of Plaintiff's argument is that the ECCPL is nothing more than anti-competitive, protectionist legislation designed by South Carolina optometrists to shut Opternative down and protect their bottom line.[67] But Defendants' Motion fails to even acknowledge Plaintiff's contentions about protectionism, much less address the substantial record evidence supporting them, instead apparently hoping that the Court will simply ignore the obviously protectionist nature of the law. Whatever the merits of Defendants' argument under federal law (which, as noted above, are dubious), it is utterly meritless as a matter of controlling *state* law.

Unlike federal courts, which sometimes look past obvious economic protectionism, the South Carolina Supreme Court has for decades—and as recently as earlier this year—consistently rejected attempts to use the police power simply to stifle competition. *See, e.g.*, *Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 474, 799 S.E.2d 655, 667 (2017) (plurality) (rejecting law limiting owner to three retail liquor licenses because economic

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[65] *See also* Pl.'s Mot. Summ. J. 22–24.

[66] *See also id.* at 29–34 (collecting and discussing cases applying that test).

[67] *See id.* at 25–28 (setting forth that argument at length).

protectionism for a certain class of retailers was not a constitutionally sound basis for regulating liquor sales); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771–72 (plurality) (striking down arbitrary restriction on physicians' employment and referral practices as merely anti-competitive regulation designed to protect therapist's personal economic interests).[68]

In short, decades of unbroken precedent follows a simple rule: Where a challenged law appears designed to further merely private economic interests, and the record is bereft of evidence that the law serves any other legitimate purpose, courts in South Carolina will not hesitate to recognize economic protectionism as the true motivation behind that law and strike it down. *See Retail Servs.*, 419 S.C. at 474, 799 S.E.2d at 667 ("[T]here [is] no indication in the record that these provisions exist for any other purpose than economic protectionism . . . ."). That is exactly what happened in *Joseph*, where the Supreme Court rejected a law restricting physicians from employing and referring patients to physical therapists, while allowing physical

[68] *See also, e.g.*, *Kirven v. Cent. States Health & Life Co.*, 409 S.C. 30, 42–43, 760 S.E.2d 794, 801 (2014) (rejecting retroactive application of statutory definition to existing insurance contracts because it appeared that insurance industry had merely convinced General Assembly to contract for them by fiat); *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 340 (2008) (denying standing to cellphone-tower company seeking to use zoning system to prevent competitor from building tower on nearby land because increased business competition is not a cognizable injury); *G-H Ins. Agency, Inc. v. Cont'l Ins. Co.*, 278 S.C. 241, 248–49, 294 S.E.2d 336, 340–41 (1982) (striking down law forbidding auto-insurance providers from terminating agents where it appeared that predominant purpose was merely to protect private profits of insurance agents rather than any broader social interest); *Painter v. Town of Forest Acres*, 231 S.C. 56, 61, 97 S.E.2d 71, 73 (1957) (rejecting ordinance requiring all businesses to close at midnight where ordinance would have destroyed lawful enterprises and appeared directed at respondent with that purpose in mind); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905, 907–09 (1940) (striking down petroleum-vehicle restrictions so specific as to apply to only one filling station because restrictions appeared designed to discriminate against that station to benefit of all other local stations); *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783, 785 (1936) (rejecting ordinance declaring door-to-door solicitation a nuisance where no public-health justification appeared and ordinance was passed not due to complaints by homeowners but at request of city's Retail Merchants Association).

therapists to do so amongst themselves. *See* 417 S.C. at 446, 453, 790 S.E.2d at 768, 771–72.[69] While the government claimed the distinction was intended to guard against conflicts of interest, the Court saw through that justification to strike the restriction down, explaining: "[This law] appears merely to be anti-competitive protectionist legislation designed to protect personal financial interests, which is driven by reimbursement purposes, rather than actual benefits to patients." *Id.* at 452–53, 790 S.E.2d at 771–72.

Similarly here, the overwhelming evidence indicates that the ECCPL was intended to protect South Carolina optometrists' personal financial interests rather than to serve patient health. While the Court in *Joseph* made an inference about the corrupt purpose of the challenged law based on the lack of any plausible connection to a legitimate justification, here there is actually *direct evidence* that the ECCPL was designed by the very group that stands to benefit economically from its enforcement.[70]

Ignoring this evidence entirely, Defendants ask this Court to rely on the bare assertion that the ECCPL was intended to promote comprehensive eye-health exams so that certain diseases that might be missed during an online vision test do not go undetected.[71] But

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[69] While the lead opinion in *Joseph* commanded only two votes, two Justices dissented on the grounds that the appellants lacked standing while calling the lead opinion otherwise "laudable." 417 S.C. at 466, 790 S.E.2d at 799 (Beatty, J., dissenting).

[70] *See* Windham Aff., Ex. 7 at 501 (AOA e-mail to state affiliate on "the Opternative issue" and forecasting plan to "stop this from operating in your state"); *id.*, Ex. 2 at 152–53 (Zolman post-webinar e-mail to SCOPA Board stressing that "kiosks and online eye exams" posed "a huge threat to our profession" and recommending that SCOPA adapt the AOA's model legislation for a legislative campaign); *id.*, Ex. 5 at 23:13–23:15 (Rivers admitting that "the ECCPL is a bill that SCOPA passed"), 46:22–47:2 (Rivers admitting that "the bill that eventually became the ECCPL was primarily pushed by the optometrists"); *id.*, Ex. 3 at 129 (Zolman boasting to SCOPA's membership after veto override about SCOPA's efforts to get the ECCPL passed and exclaiming that "Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!").

[71] *See* Defs.' Mot. Summ. J. 3–4 (quoting SCOPA interrogatory responses).

Defendants cannot avoid record evidence by ignoring it—and (as discussed below) even in the *absence* of evidence of protectionist intent, bare assertions of public purpose are insufficient to survive constitutional scrutiny in South Carolina. Defendants' Motion must therefore be denied.

C. The ECCPL lacks a real and substantial relationship to patient health, and thereby violates both due process and equal protection.

The best Defendants can muster in defense of the ECCPL is to say that comprehensive eye-health examinations are good, and that certain diseases can be detected in the course of such exams. But that rationale has nothing to do with the ECCPL, which: (1) requires prescriptions to be renewed annually (even though the relevant ophthalmological guidelines do not call for comprehensive exams that frequently); and (2) in any event, does not require ophthalmologists to conduct in-person, comprehensive exams at all—only that some information (any information) be collected by a human (any human) who then reports that information to the ophthalmologist. This falls far short of the kind of genuine relationship to public health and safety that South Carolina courts consistently demand under the South Carolina Constitution's independent due-process and equal-protection guarantees.

1. The ECCPL lacks a reasonable relationship to patient health, which violates due process.

Defendants are correct that the standard for reviewing all substantive-due-process challenges to state statutes is: "Whether [the statute] bears a reasonable relationship to any legitimate interest of government." *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 488, 527 S.E.2d 763, 765 (2000). But Defendants misconstrue that test, ignoring the word "reasonable" and pretending that it is coterminous with the federal test (which asks for a "rational" or "conceivable" relationship). South Carolina courts do not look for "conceivable" justifications; instead, they consistently look to see whether laws have *plausible* justifications. In

practice, this means requiring that the relationship between a law and its purported end have at least some basis in fact, and rejecting mere speculation as a substitute for that relationship. *See, e.g.*, *Retail Servs.*, 419 S.C. at 475–76, 799 S.E.2d at 668 (plurality) (striking down law limiting owner to three retail liquor licenses absent record evidence of alleged safety concerns); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771–72 (rejecting employment and referral restriction on physical therapists and surgeons because appellants failed to articulate basis for law rooted in actual benefits to patients) (plurality); *see also Lurey v. City of Laurens*, 265 S.C. 217, 222, 217 S.E.2d 226, 228 (1975) (principle of avoiding judicial lawmaking "does not suggest that this Court should abdicate its obligation to closely scrutinize legitimate constitutional questions").[72] Under that test, the ECCPL must fail.[73]

Joseph illustrates why. In that case, the question was whether a statutory interpretation banning physicians from employing and referring patients to physical therapists was rationally related to the goal of preventing conflicts of interests. *Joseph*, 417 S.C. at 443–46, 790 S.E.2d at 766–68. The Court observed that if the statute was actually intended to do that, it would have simply prevented referral-for-pay situations. *Id.* at 452, 790 S.E.2d at 771. Instead, all it did was "deprive[] physicians of their right to practice medicine in the best interests of their patients."

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[72] *See also, e.g.*, *Kirven*, 409 S.C. at 43, 760 S.E.2d at 801 (striking down retroactive application of statutory definition to existing insurance contracts absent showing that actual language of definition addressed some important societal problem); *G-H Ins. Agency*, 278 S.C. at 248–49, 294 S.E.2d at 340 (rejecting law forbidding auto-insurance providers from terminating agents where experience revealed that provision lacked tailoring that should have been obvious given purpose of law); *McCoy*, 193 S.C. 390, 8 S.E.2d at 907–09 (striking down petroleum-vehicle restrictions for lack of real connection to actual dangers involved in handling petroleum despite recitation of protective purpose in preamble); *Orangeburg*, 181 S.C. 143, 186 S.E. at 785 (rejecting ordinance banning door-to-door solicitation where appellant offered testimony to effect that solicitation was harmless and ordinance lacked tailoring to valid public health concern despite numerous less-restrictive alternatives).

[73] *See* Pl.'s Mot Summ. J. 29–33 (setting forth Plaintiff's affirmative due-process argument at length).

Id., 790 S.E.2d at 771. The Court found the interpretation arbitrary and, therefore, unconstitutional. *Id.* at 453, 790 S.E.2d at 771–72.

Similarly, in *Retail Services*, the Court was not persuaded (as the dissent noted) by the fact that the challenged statute's protectionist justifications were "listed *after* several non-protectionist motives, such as promoting temperance by discouraging business practices that promote alcohol consumption." *Retail Servs.*, 419 S.C. at 480, 799 S.E.2d at 670 (dissenting opinion). These notional rationales, the plurality pointed out, were simply "not supported by the record below." 419 S.C. at 475, 799 S.E.2d at 668.

Here, Defendants have offered only a single, hypothetical justification for the ECCPL, unsupported by any record evidence: that if patients take online vision tests, certain diseases that *could* be detected during a more comprehensive eye-health exam, *might* be missed.[74] But that justification holds no water for a number of reasons.

At its core, all the ECCPL requires is that: (1) corrective-lens prescriptions expire annually, S.C. Code Ann. § 40-24-20(B); and (2) ophthalmologists base such prescriptions on medical findings and refractive error discovered during an eye exam—except online vision tests, *id.* §§ 40-24-10(3), (9). Just like the statutory interpretation in *Joseph*, which deprived physicians of the right to practice in the best interests of their patients, the ECCPL deprives South Carolina-licensed ophthalmologists from using their medical judgment to write corrective-lens prescriptions for patients who need them.[75] It does so despite SCOPA's admission that there is real patient demand for more convenient and affordable access to updated prescriptions, and

[74] *See* Defs.' Mot. Summ. J. 3–4 (quoting SCOPA interrogatory responses).

[75] *See* Chaum Aff. at ¶ 3.

that Opternative's Technology would help meet this demand.[76] It does so despite optometrist Michael Zolman (the ECCPL's legislative architect)'s admission that in some circumstances, updating a corrective-lens prescription without first conducting a comprehensive eye-health exam can actually *improve* a patient's quality of life—and that he himself has actually done so.[77] And it does so against the convictions of the licensed ophthalmologists who have actually used Opternative's Technology to write prescriptions for patients who needed them, according to their medical judgment and within their standard of care.[78]

Moreover, nothing in the ECCPL requires or even encourages a comprehensive eye-health exam. But just like in *Joseph*, there are multiple obvious ways in which the ECCPL *could have* directly addressed Defendants' concern about undetected diseases, if that were truly the law's motivating concern (which it was not): The law could have required that the relevant "medical findings" be made during an in-person, comprehensive eye exam—it does not.[79] It could have required ophthalmologists to physically examine patients for certain ocular-pathological risk factors before writing prescriptions—it does not.[80] It could have even required ophthalmologists to take particular medical facts into account before writing prescriptions—it

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[76] *See* Windham Aff., Ex. 2 at 153 (Zolman asking rhetorically "how many patients do we see daily who really come in just wanting a new prescription for glasses and/or contacts?" and remarking that online refractive technology would "allow them to get what they want"); *see also, e.g.*, Bodde Aff. at ¶¶ 10–11; Chaum Aff. at ¶¶ 3–4.

[77] *See* Windham Aff., Ex. 1 at 32:8–33:14, 47:5–48:3.

[78] *See* Chaum Aff. at ¶¶ 2, 4.

[79] *See* Windham Aff., Ex. 11 at 65:17–65:23 (Coleman admitting that "the ECCPL leaves it to an ophthalmologist's professional judgment exactly what diagnostic methodologies and exactly what medical information he needs before writing a prescription").

[80] *See id.* at 64:16–65:2 (Coleman explaining that the ECCPL has "no explicit requirement" regarding tests that must be performed before writing a corrective-lens prescription).

does not.[81] It does not require these things because for most people, annual comprehensive eye-health examinations are unnecessary, and South Carolina law relies on ophthalmologists (like other doctors) to exercise their medical judgment on a case-by-case basis—*unless* the ophthalmologist is using computerized technology.

The upshot is that the ECCPL has essentially nothing to do with patient health—and Defendants actually admit they possess no evidence that the ECCPL furthers that end.[82] But it bears a striking relationship to South Carolina optometrists' economic interests: The ban on online vision tests like Opternative means that patients seeking updated corrective-lens prescriptions must continue visiting optometrists' brick-and-mortar offices—where, conveniently, optometrists can attempt to sell them expensive eyeglass frames (as most of them do).[83] And the annual expiration requirement keeps them coming on a regular basis, which boosts optometrists' revenue stream.[84]

Defendants cite two South Carolina cases in support of their argument that the ECCPL bears a reasonable relationship to a legitimate government interest, but both are clearly

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[81] *See id.* at 65:4–65:16 (Coleman admitting that the ECCPL "doesn't identify diagnostic methodologies that have to be employed in order to develop the medical findings" or even "specify what those medical findings must be").

[82] *See id.* at 54:22–55:7, 55:9–56:1 (Coleman admitting that Defendants have no evidence that the ECCPL actually protects the public health or safety).

[83] *See id.*, Ex. 1 at 65:5–66:15 (Zolman admitting that optometrists attempt post-appointment eyeglass sales "most of the time"); *see also id.*, Ex. 5 at 28:20–28:22 (SCOPA Executive Director Jackie Rivers admitting that "most South Carolina optometrists sell eyeglass frames").

[84] *Compare* SCOPA Ans. ¶ 20 (admitting on information and belief the allegations of Paragraph 48 of Plaintiff's Complaint) *with* Compl. ¶ 48 (alleging that "many professional optometrists make the majority of their revenue from selling expensive frames in their brick-and-mortar offices rather than from professional fees earned from conducting traditional in-person eye examinations"); *see* Windham Aff., Ex. 5 at 28:20–28:22 (SCOPA Executive Director Jackie Rivers admitting that "most South Carolina optometrists sell eyeglass frames"); *id.*, Ex. 1 at 66:16–67:9 (Zolman admitting that his revenue from eyeglass sales "would go down" if online refractive tests like Opternative's Technology ever became commercially popular).

distinguishable. The first, *Denene, Inc. v. City of Charleston*, involved a city ordinance requiring all commercial establishments that served alcohol for on-site consumption to close at 2:00 a.m. 359 S.C. 85, 97–98, 596 S.E.2d 917, 923–24 (2004). Bar owners challenged the restriction under Article I, Section 3, relying in part on *Painter*, 231 S.C. 56, 97 S.E.2d 71 (cited in Plaintiff's opening brief). *Id.* at 98, 596 S.E.2d at 923. The Supreme Court explained that *Painter* was distinguishable because there, "the Court found that the ordinance would seriously impair, if not destroy, many lawful businesses" and "seemed to be directly aimed at destroying Painter's business." *Id.*, 596 S.E.2d at 923. Since the ordinance in *Denene* was only a limited measure designed to maintain safety and quietude during the early morning hours—based on *actual record evidence* tending to show the burden otherwise imposed on residents' quality of life—the Court found it bore a reasonable relationship to a legitimate purpose. *Id.* at 93, 596 S.E.2d at 921.

The ECCPL is much more like the arbitrary ban rejected in *Painter* than the limited, evidence-based restriction imposed in *Denene*. Just as in *Painter*, the ECCPL actually destroyed Plaintiff's South Carolina business operations.[85] And just as in *Painter*, the ECCPL not only "seemed" designed to do so—it *actually was* designed to do so.[86] Moreover, unlike in *Denene*,

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[85] *See* Bodde Aff. at ¶ 11–13; Windham Aff., Ex. 10 at 203 (SCOPA presentation slide portraying "The Results…" of SCOPA's efforts to get the ECCPL passed and prominently displaying the word "Opternative" with a red circle and strikethrough).

[86] *See id.*, Ex. 7 at 501 (AOA providing state affiliates an "update on AOA actions on the Opternative issue" and promising to "make recommendations to state affiliates about suggested strategies to stop this from operating in your state"); *id.*, Ex. 1 at 54:2–54:12 (Zolman admitting that he "had Opternative in mind" when he recommended that the SCOPA Board push the AOA's model legislation); *id.*, Ex. 5 at 55:16–55:22 (Rivers admitting that SCOPA's "effort to pass the ECCPL [was] prompted by the existence of businesses offering online eye exams"); *id.*, Ex. 3 at 129 (Zolman boasting to SCOPA's membership after veto override about SCOPA's efforts to get the ECCPL passed and exclaiming that "Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!").

where the government produced record evidence tending to show the real-world basis for the scope of the restriction imposed, Defendants here have completely failed to produce any evidence of the real-world basis for the ECCPL. That makes sense, given that Defendants outright admit they possess no such evidence.[87] In short, *Denene* does not aid Defendants' case—it undermines it.

The other case, *Curtis v. State*, involved a challenge to a law criminalizing the sale of urine with the intent of helping customers defraud drug-screening tests. 345 S.C. 557, 565–66, 549 S.E.2d 591, 595 (2001). While the law in that case destroyed the plaintiff's business, it did so because that business was designed to help people commit fraud, and the government very reasonably wanted to prevent fraud. But *Curtis* is clearly distinguishable here: The ECCPL does not outlaw fraud; it bans licensed ophthalmologists from using their medical judgment to incorporate technology like Opternative's into their practice of medicine to expand care to patients who otherwise might not get it—something every other kind of medical doctor in South Carolina is allowed to do. *See* S.C. Code Ann. § 40-47-37. To compare a law banning Opternative with a law thwarting fraudulent urine-traffickers, is absurd. In any event, *Curtis* was also a purely federal constitutional challenge, while this case was brought exclusively under the South Carolina Constitution. *See id.* at 570–76, 549 S.E.2d at 597–61. As explained above, only the latter governs this case.

In sum, just like in *Joseph* and unlike in *Denene*, the record here is devoid of any evidence that the ECCPL furthers a public health or safety purpose. The law hinders patient health by preventing ophthalmologists from using online vision tests like Opternative to write corrective-lens prescriptions—prescriptions their patients want—when their judgment indicates

[87] *See.id.*, Ex. 11 at 54:22–55:7, 55:9–56:1 (Coleman admitting that Defendants have no evidence that the ECCPL actually protects the public health or safety).

that it would be medically appropriate and accord with the ophthalmological standard of care. And it lacks any of the obvious tailoring that would be expected of a law actually designed to address a concern about undetected diseases. Accordingly, the ECCPL is arbitrary, does not bear a reasonable relationship to patient health, and cannot stand Article I, Section 3.

2. The ECCPL lacks a fair and substantial relationship to patient health, which violates equal protection

Defendants also contend that the ECCPL satisfies equal protection, offering two chief arguments: first, that the ECCPL's classifications are only "imagined"; second, that in any case, "undiagnosed diseases of the eye are a legitimate public health concern, and that legislation requiring an in-person comprehensive eye examination in order to increase the chance of detecting these diseases is reasonably related to [that purpose]."[88] Both points miss the mark.

The ECCPL draws two clear classifications: First, the law penalizes South Carolina-licensed ophthalmologists who use their medical judgment to write corrective-lens prescriptions based on "medical findings" generated automatically, but does not penalize ophthalmologists who base prescriptions on precisely the same information, *some* of which was collected manually by a human being. *See* S.C. Code Ann. §§ 40-24-10(3), (9), and 40-24-20(B). Second, the law forbids South Carolina-licensed ophthalmologists from using telehealth technologies to provide services according to their medical judgment and within the relevant standard of care, while all other South Carolina-licensed physicians are statutorily permitted to do just that. *Compare id.*, *with* S.C. Code Ann. § 40-47-37 (permitting the use of telemedical technologies in medical practice so long as the physician honors the relevant standard of care).

Relying overwhelmingly on federal caselaw—Defendants cite exactly one South Carolina case (*Denene*, distinguished above at *supra* p. 32) in support of its equal-protection

[88] *See* Defs.' Mot. Summ. J. 12, 15.

argument—Defendants would have this Court weigh those classifications under a more deferential test. But as repeatedly emphasized above, South Carolina courts have developed a distinct test under their own, independent Constitution: In brief, the basic mandate of equal protection is that government classifications must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 783 (Ct. App. 2009) (citation omitted). As in the due-process context, while this is not a heavy burden, it does still require that classifications find their basis in *facts*, not fancy. *Daniel v. Cruz*, 268 S.C. 11, 14, 231 S.E.2d 293, 294 (1977) ("If there is no *real* difference between localities, persons, occupations, or property, the State cannot make one." (emphasis added) (citation omitted)).[89] The ECCPL fails that test.[90]

As for the first classification, *Hanvey* is instructive. There, a patient was admitted to a charitable hospital for a hip replacement suffered complications, and sued the hospital seeking actual and punitive damages of $200,000. *Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 2–3, 416 S.E.2d 623, 624 (1992). The hospital invoked a statute specifically capping liability for charitable hospitals at $100,000, which the patient then challenged under Article I, Section 3. *Id.*

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[89] *See, e.g.*, *Joseph*, 417 S.C. at 452, 790 S.E.2d at 771 (plurality) (law prohibiting physicians from employing physical therapists and referring patients to them was not calculated to further asserted end); *Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 5, 416 S.E.2d 623, 626 (1992) (law lacked rational basis for distinguishing between charitable hospitals and other medical providers for purposes of limiting liability); *Broome v. Truluck*, 270 S.C. 227, 230–31, 241 S.E.2d 739, 740 (1978) (law lacked rational basis for drawing statute-of-limitations distinctions for recovery against various professionals whose work involved designing improvements to real estate); *Daniel*, 268 S.C. at 14, 231 S.E.2d at 294 (law prohibiting practice of fortunetelling in some counties but not others was not based on any real difference between fortunetellers); *Gasque, Inc. v. Nates*, 191 S.C. 271, 2 S.E.2d 36, 44 (1939) (law imposing maximum-hours caps on certain manufacturing and mercantile establishments but not others was not based on any material differences between such establishments).

[90] *See* Pl.'s Mot Summ. J. 33–37 (setting forth that argument at length).

at 4–5, 416 S.E.2d at 625–26. The South Carolina Supreme Court found "no rational basis for distinguishing between charitable hospitals, on the one hand, and medical providers of goods and services, such as the Red Cross, on the other," and struck the cap down. *Id.* at 5, 416 S.E.2d at 626.

Similarly here, there is no real difference between information collected manually by a human being and the *same* information when collected automatically. The ECCPL would allow South Carolina-licensed ophthalmologists to use Opternative's Technology to write corrective-lens prescriptions based on information collected by a physical person who manually recorded patients' responses using, say, a clipboard.[91] But the same prescription based on the same information would be banned if the ophthalmologist received that information directly from Opternative's Technology, over the Internet.[92] Information does not become tainted simply because it was generated automatically, and there is no valid health or safety reason to pretend that it does.

As for the second classification, *Joseph* is again instructive. There, a statute was interpreted to prohibit physicians from employing and referring patients to physical therapists, despite the fact that physicians were generally allowed to do so for all other types of healthcare professionals. *Joseph*, 417 S.C. at 442–43, 790 S.E.2d at 766–67. The government claimed the classification was intended to protect patients and government-sponsored programs from conflicts of interest, but the Court observed that "the PTs stand alone in South Carolina," *id.* at

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[91] *See* Defs.' Mot. Summ. J. 9 ("[A] South Carolina-licensed ophthalmologist may still use Opternative's technology to assist him or her in making a determination to write a prescription for spectacles or contact lenses. He or she simply cannot solely base the prescription on the refractive eye error of the human eye or be generated [sic] by a kiosk.").

[92] *See* Windham Aff., Ex. 11 at 67:11–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

442–43, 790 S.E.2d at 766–67, and found the distinction "arbitrary and not calculated to avoid the legislative purpose," *id.* at 452, 790 S.E.2d at 771. That classification violated equal protection, too. *Id.*, 790 S.E.2d at 771.

Similar to the physical therapists in *Joseph*, who were accorded arbitrarily preferential treatment, ophthalmologists "stand alone" in South Carolina as the *only* physicians forbidden from using telehealth technologies to provide services according to their medical judgment and within the relevant standard of care. *See* S.C. Code Ann. §§ 40-24-10(3), (9), and 40-24-20(B). All other South Carolina-licensed physicians are statutorily permitted to do so without running afoul of a concern about undetected diseases in their respective practice areas. *Compare id.*, *with* § 40-47-37. And Defendants have not produced any evidence of the sort of "real difference" between ophthalmologists and all other physicians that would warrant singling the former out for disparate treatment. Again, they fully admit they have no such evidence.[93]

In sum, Defendants contend that the ECCPL was designed to guard against certain undetected eye diseases. But the record is utterly devoid of evidence that would help to explain how either of the two distinctions discussed above alleviate that concern. The argument for the ECCPL seems to boil down to: "If Opternative is banned, then patients will need to see their optometrists more frequently—where, perhaps, they will receive comprehensive eye-health exams." While that sort of purely speculative argument may have carried the day in *Lee Optical*, it is not the stuff of which "fair and substantial" relationships are made. The South Carolina Constitution, equal protection, and common sense demand more.

CONCLUSION

[93] *See* Windham Aff., Ex. 11 at 54:22–55:7, 55:9–56:1 (Coleman admitting that Defendants have no evidence that the ECCPL actually protects the public health or safety).

The ECCPL is a purely protectionist law that bears no relationship to patient health, which violates both the due-process and equal-protection guarantees of the South Carolina Constitution. Relying on inapposite tests and obviously distinguishable cases, Defendants ask this Court to turn a blind eye to the naked protectionism throughout the record based on nothing more than brute speculation. Under Article I, Section 3 and South Carolina's rich jurisprudence interpreting it, that is not sufficient. Plaintiff therefore respectfully requests this Court to deny Defendants' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Opternative, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: *Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment*

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September 27th, 2017.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Opternative, Inc.,

Plaintiff,

v.

South Carolina Board of Medical Examiners, South Carolina Department of Labor, Licensing and Regulation,

Defendants,

and

South Carolina Optometric Physicians Association,

Defendant-Intervenor.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-40-06276

DEFENDANT-INTERVENOR'S MEMORANDUM OF LAW IN RESPONSE TO THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

Defendant-Intervenor South Carolina Optometric Physicians Association ("SCOPA"), by and through its undersigned counsel, submits this memorandum of law in response to the Motion for Summary Judgment filed by Defendants South Carolina Board of Medical Examiners ("BME") and South Carolina Department of Labor, Licensing and Regulation ("LLR") (collectively, "Defendants") on July 12, 2017 and the Motion for Summary Judgment filed by Plaintiff Opternative, Inc. ("Plaintiff" or "Opternative") on September 7, 2017. For the reasons set forth below, SCOPA respectfully requests that this Court grant Summary Judgment to Defendants. Alternatively, SCOPA would respectfully request that Plaintiff's Motion be denied. SCOPA is simultaneously filing affidavits of Dr. Mark E. Robinson and Dr. Melvin D. Shipp, attached hereto as Exhibits 1 and 2, respectively, as further support for Defendants' Motion.

FACTUAL BACKGROUND

Plaintiff initiated this action on October 20, 2016, seeking a declaratory judgment that portions of the Eye Care Consumer Protection Law, S.C. Code Ann. §§ 40-24-10, et seq., enacted

on May 11, 2016 ("ECCPL") are unconstitutional because they result in both a denial of equal protection and substantive due process. The ECCPL establishes minimum parameters for issuing prescriptions for corrective lenses in South Carolina:

> **SECTION 40-24-20.** Valid prescription required to dispense spectacles or contact lenses; penalties.
>
> (A) A person in this State may not dispense spectacles or contact lenses to a patient without a valid prescription from a provider.
>
> (B) To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. The prescription must take into consideration medical findings made and refractive error discovered during the eye examination. If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.
>
> (C) A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk.
>
> (D) Violation of this section constitutes misconduct as provided for in Sections 40-37-110 and 40-47-110. A provider who violates this section is subject to the penalties authorized in Chapter 37, Title 40 or Chapter 47, Title 40, as applicable.

S.C. Code Ann. § 40-24-20 (Supp. 2016).

Opternative challenges sections 40-24-20(C) and (D) of the ECCPL, alleging these provisions violate Article I, Section 3 of the South Carolina Constitution. It also challenges Section 40-24-10(9) of the ECCPL, which provides that vision assessments:

> may not be based solely on objective refractive data or information generated by an automated testing device, including an auto refractor or other electronic refractive-only testing device, to provide a medical diagnosis or to establish a refractive error for a patient as part of an eye examination.

Opternative is a healthcare technology company that has produced a computer interface which allows ophthalmologists and optometrists to collect refractive data and other information from patients ("Technology"). The Technology is designed to be used by a patient without having

an ophthalmologist or optometrist in the room. *See* Shipp Aff., ¶ 7; Robinson Aff., ¶ 5. Opternative's Technology can be accessed by individuals through Opternative's website, and it relies on an individual's subjective self-reporting to collect refractive data using a computer. Per the website, the use of Opternative's Technology does not constitute a comprehensive eye examination. *See* Shipp Aff., ¶¶ 8-10; Robinson Aff., ¶ 8.

SCOPA is an association of optometric physicians practicing in South Carolina. Doctors of optometry are known as "optometrists." Optometrists are independent primary health care professionals for the eye. Optometrists examine, diagnose, treat, and manage diseases, injuries, and disorders of the visual system, the eye, and associated structures as well as identify related systemic conditions affecting the eye. *See* Shipp Aff., ¶ 6.

Ophthalmologists are Ophthalmologists are medical doctors specializing in eye and vision care, who by study and training are qualified to diagnose and treat ocular diseases, perform eye exams and surgeries and prescribe lenses to correct vision problems. Ophthalmologists who practice in South Carolina are licensed and regulated by BME. *See* Robinson Aff. ¶¶ 3-4.

Both optometrists and ophthalmologists are under an affirmative obligation to look after the health and safety of their patients, which requires them to use their judgment to determine whether their patients' complaints or symptoms pertaining to their eyesight or eye health are indicators of systemic or body-wide disease processes or pathologies. They are likewise obliged to make such determinations even when the disease processes or pathologies are asymptomatic. *See* Shipp Aff. ¶ 22; Robinson Aff., ¶ 14.

The ECCPL expressly regulates both licensed ophthalmologists and licensed optometrists. See S.C. Code Ann. § 40-24-10(7) (defining "provider" to include both professions); S.C. Code Ann. § 40-24-20 (prescribing penalties for "provider[s]" who violate the ECCPL).

Conducting comprehensive eye examinations is within the scope of practice of both optometrists and ophthalmologists. Comprehensive eye examinations consist of, but are not limited to, the following: a review of the patient's health history; measuring visual acuity, both aided and unaided; performing an examination with a slit lamp of the anterior segments of the eyes and eyelids; performing an internal ophthalmoscopic examination through a dilated pupil, including evaluation of the optic nerve head, macular and peripheral retina; performing a subjective refraction; performing tonometry; evaluating pupils; assessing ocular motility and eye alignment; performing confrontation visual field or similar screening field; performing other tests and procedures as indicated by the patient's chief complaint, case history or objective signs and symptoms discovered during the course of the eye examination; making a diagnosis and formulating a treatment plan; seeking consultation and/or making referrals for assessment/treatment to other health providers as appropriate. *See* Shipp Aff., ¶ 21; Robinson Aff., ¶ 10.

Opternative's Technology generates a set of data about a user and the user's ocular refractive error. This set of data is sent to a licensed ophthalmologist, who determines if a corrective-lens prescription is appropriate. *See* Shipp Aff., ¶ 11; Robinson Aff., ¶ 9. It collects information by soliciting a user's responses to questions and visual stimuli; it does not measure objective data about the user's eyes or eye health. *See* Shipp Aff., ¶ 12; Robinson Aff., ¶ 11. Opternative's Technology cannot detect or aid in diagnosing diseases of the eye or systemic diseases. *See* Shipp Aff., ¶ 13. Opternative's Technology does not perform a corneal examination and evaluation. *See* Robinson Aff., ¶ 13.

Both optometrists and ophthalmologists are authorized to issue prescriptions for corrective lenses, including both spectacles and contact lenses. A contact lens is a medical device that can be used to correct vision, or for cosmetic or therapeutic reasons. A contact lens evaluation is a set of diagnostic tests and procedures performed in addition to a comprehensive eye examination. These tests and procedures include a measurement of the corneal curvature (keratometry, or corneal topography) and an evaluation of the anterior segment and tear layer of the eye in relation to the contact lens fit. A poorly fit contact lens can cause irritation to the eyes. Continuing to wear the irritating contact lens for a prolonged time can create pain and cause scarring and vision loss for a patient. A patient may not have any symptoms from a poorly fit contact lens, but scarring and vision loss can develop nonetheless. Such consequences of a poorly fit contact lens can only be detected by a corneal evaluation. *See* Shipp Aff., ¶ 14; Robinson Aff., ¶ 12.

Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination. There is a risk that individuals may mistakenly believe that they have received a comprehensive eye examination after receiving a prescription for spectacles or contact lenses from an ophthalmologist who only relies upon Optemative's Technology. It is possible that some of those individuals may have an asymptomatic eye or systemic disease. *See* Shipp Aff., ¶ 15; Robinson Aff., ¶ 15.

In addition to assessing eye and vision problems, an eye examination may be the first opportunity to detect diabetes and other health conditions. Examples include high blood pressure, hypercholesterolemia, and certain inflammatory diseases. *See* Shipp Aff., ¶ 16; Robinson Aff., ¶ 16. Diabetes is currently the nation's seventh leading cause of death in the United States. Diabetes is also a risk factor for heart disease and stroke, and a leading cause of kidney disease and blindness in

adults. Early detection can allow early treatment and management of both systemic and eye-related diabetic changes. *See* Shipp Aff., ¶ 17. One of the more debilitating eye-related outcomes associated with type 2 diabetes in adults is vision impairment, including blindness. Diabetes-related eye conditions include, but are not limited to, refractive changes, cataracts, diabetic retinopathy and glaucoma. Diabetic retinopathy is among the leading causes of preventable blindness in the United States. *See* Shipp Aff., ¶ 18. Most symptoms associated with diabetic eye disease progress slowly, and unnoticeably; therefore, comprehensive dilated eye examinations are necessary to diagnose, prevent and manage these conditions. *See* Shipp Aff., ¶ 19. Importantly, diabetic eye disease can be detected and diagnosed during a routine comprehensive dilated eye examination. *See* Shipp Aff., ¶ 20.

Opternative claims the ECCPL "effectively prohibits ophthalmologists from conducting Exams or writing prescriptions based on Opternative's Technology." It further claims that the ECCPL is mere economic protectionist legislation that violates the South Carolina Constitution.

LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). Even when the evidentiary facts are not disputed, if the conclusions to be drawn from them are, summary judgment should be denied. Summary judgment is not appropriate

when further inquiry into the facts is desirable to clarify the application of law. *Coker v. Cummings*, 381 S.C. 45, 49, 671 S.E.2d 383, 385 (2008).

Statutes are presumed constitutional, and a law that neither creates a suspect class nor abridges a fundamental right is given only minimal equal protection scrutiny. *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991). A statute is presumed constitutional and will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. *Sojourner v. Town of St. George*, 383 S.C. 171, 679 S.E.2d 182 (2009). Constitutional constructions of statutes are not only judicially preferred, they are mandated. *State v. McGirler*, 378 S.C. 320, 663 S.E.2d 15 (2008).

When the constitutionality of a statute is at issue, "every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." *South Carolina Dept. of Social Servs. v. Sarah W.*, 402 S.C. 324, 334, 741 S.E.2d 739, 745 (2013); *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013); *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 663 (2011). Accordingly, the burden is on the challenging party to prove the unconstitutionality of the statute. *Home Health Serv. v. S.C. Tax Comm'n*, 312 S.C. 324, 327, 440 S.E.2d 375, 377 (1994), citing *Gold v. South Carolina Board of Chiropractic Examiners*, 271 S.C. 74, 245 S.E.2d 117 (1978) (emphasis added).

Those attacking the rationality of a legislative classification have the burden to negative every conceivable basis which might support it. *FCC v. Beach Communications*, 508 U.S. 307 (1993); *accord McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012) (a classification is presumed reasonable and will remain valid unless and until the party making an equal protection

challenge proves beyond a reasonable doubt that there is no admissible hypothesis upon which it can be justified).

"In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009) (citing *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)). "'The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency.'" *Id.*

ARGUMENT

I. Defendants' Motion for Summary Judgment should be granted.

Defendants argue that Opternative has no standing to pursue its claims in this action and that the ECCPL is constitutional and supported by a rational basis. SCOPA adopts and incorporates by reference Defendants' arguments in support of its request for summary judgment. It offers the following additional arguments in favor of the ECCPL's constitutionality as further support for Defendants' motion.[1]

(A) Rational basis is the applicable standard.

The Parties do not dispute that the determination of whether the ECCPL violates the Equal Protection Clause turns upon the application of the rational basis test. *See* Plaintiff's Motion for Summary Judgment, p. 20; Defendants' Motion for Summary Judgment, p. 14-15. However, in its Motion Opternative argues that there is a distinction between South Carolina's articulation of the

[1] Because this case concerns a constitutional challenge that the parties are attempting to resolve by way of cross-motions for summary judgment, and because the burden of proving that a statute is unconstitutional falls squarely upon Opternative, SCOPA will devote most of the within memorandum upon the infirmities of Opternative's equal protection and due process arguments.

rational basis test and the federal courts' use of the test. Plaintiff's Motion for Summary Judgment, p. 20. SCOPA submits that no such distinction exists.

As Opternative acknowledges in its Motion, Courts generally analyze equal protection challenges under one of three standards: (1) rational basis, (2) intermediate scrutiny, or (3) strict scrutiny. *See* Plaintiff's Motion, p. 20. If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 596 S.E.2d 917 (2004). South Carolina's equal protection jurisprudence reveals no discernable difference between its application of the rational basis test to questions of equal protection under the South Carolina Constitution and the federal courts' use of the standard to measure equal protection under the United States Constitution. Simply put, under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Denene*, 359 S.C. at 85; *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013); *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 736 S.E.2d 651 (2012); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004); *Fraternal Order of Police v. South Carolina Dep't of Rev.*, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002); *Gary Concrete Prods., Inc. v. Riley*, 285 S.C. 498, 504, 331 S.E.2d 335, 339 (1985).

Likewise, the test for a substantive due process claim is "[w]hether [a statute] bears a reasonable relationship to any legitimate interest of government." *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000).

Opternative argues that South Carolina courts conduct a "robust review" of economic regulations (Plaintiff's Motion for Summary Judgment, p. 23). This assertion has no support in

South Carolina law. *See, e.g. pp. 6-7, infra.* Its attempt to draw parallels with how Texas courts have reviewed that state's constitution strains credulity and ignores dozens of South Carolina cases that consistently intermingle federal rational basis test enunciations with those arising under the South Carolina Constitution. *See, e.g., In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002); *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 736 S.E.2d 651 (2012); *State v. Thompson*, 349 S.C. 346, 563 S.E.2d 325 (2002).

Opternative relies heavily upon *Joseph v. SC Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016), to make its case that South Carolina's rational basis test is unique. *Joseph* involved a legislative classification that treated physical therapists differently from other healthcare providers and prohibited them, and only them, from being employed by physicians. The South Carolina Supreme Court concluded "there is no plausible reason as to why physical therapists are so different from other health care professionals . . . ." This finding was not the result of some heightened or "robust" review; the Court discerned the absence of a rational basis on the face of the statute itself, and none of the parties could offer a reasonable explanation for the classification in the course of the litigation. This result is consistent with modern rational basis review at the federal level, just as it comports with *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). *See, e.g., Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008); *Board of Trs. v. Garrett*, 531 U.S. 356 (2001).

(B) Opternative cannot prove beyond a reasonable doubt that the ECCPL violates the Equal Protection Clause.

(i) SCOPA's efforts to lobby for the ECCPL have no bearing upon the issues before the Court.

Opternative expends much of its brief to this Court recounting the efforts made by SCOPA and its affiliates to develop and lobby for the passage of legislation that eventually became the

ECCPL. SCOPA does not hide from the exercise of its constitutional rights to participate in the legislative process by urging members of the South Carolina General Assembly to pass laws that protect the health and safety of its members' patients, as it is incumbent upon its members to look after their patients' well-being. *See* Shipp Aff., ¶ 22, Robinson Aff., ¶ 14. SCOPA is justifiably proud of the campaign it pursued to enact the ECCPL, which was overwhelmingly embraced by both the House of Representatives and Senate, even despite Governor Haley's veto. Plaintiff's Motion for Summary Judgment, p. 1.

Regardless of how SCOPA and its members feel about the ECCPL, the resolution of the issues before the Court does not depend, and is not aided in any respect, by examining their involvement in the legislative process. Opternative's inclusion of this history in its Motion is a tellingly obvious attempt to divert the Court's attention away from the only real issue before it—whether the ECCPL bears some reasonable relationship to a salutary public purpose. It most certainly does.

(ii) **<u>The ECCPL is reasonably related to its legislative purpose.</u>**

The ECCPL protects the public health and welfare because it prevents citizens from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination. *See* Shipp Aff., ¶ 15; Robinson Aff., ¶ 15. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination. *See* Shipp Aff., ¶ 15; Robinson Aff., ¶ 15. The provisions of the ECCPL are reasonably necessary to protect and uphold the applicable standard of care eye care professionals in South Carolina, which requires them to use their medical judgment to determine whether their patients' complaints or symptoms pertaining to their eyesight or eye health are indicators of systemic or body-wide disease

processes or pathologies. They are likewise obliged to make such determinations even when the disease processes or pathologies are asymptomatic. *See* Robinson Aff., ¶ 14. Accordingly, because the South Carolina constitution grants the General Assembly the authority to legislate for the protection of the public health and welfare, and because the ECCPL does just that, this Court should leave the ECCPL intact.

Opternative argues that the ECCPL does nothing to protect the public health and safety, ignoring the evidence in the record to the contrary. For instance, it fails to acknowledge that one year prescriptions for corrective lenses are consistent with national optometric standards, *see* Shipp. Aff., ¶ 25, and with extant South Carolina and federal law concerning contact lenses. *See, e.g.*, S.C. Code Ann. § 37-25-10 *et seq.* (Rev. ed. 2015, as amended); 15 U.S.C. ch. 102 *et seq.*; 16 C.F.R. § 315.1. It likewise glosses over the fundamental requirement of the ECCPL—that corrective lens prescriptions must be based on more than just a refractive examination. *See* S.C. Code Ann. § 40-24-20 (Supp. 2016). This requirement establishes a baseline for corrective lens prescriptions, just as other laws and regulations establish minimum requirements in the healthcare context and otherwise. *See, e.g.*, S.C. Code Ann. § 40-33-32 (outlining minimum standards for licensure as a nurse); S.C. Code Ann. § 40-57-135 (establishing minimum standards for real estate brokers-in-charge management agreements); S.C. Code Ann. § 37-15-30 (setting minimum standards for using a contest as a ruse to promote the sale of goods, property or services). The ECCPL need not spell out what particular steps an optometrist or ophthalmologist needs to take during a comprehensive eye examination for it to survive rational basis scrutiny. Both the General Assembly and the common law have long recognized that the standard of care for professionals across a wide range of disciplines is too nuanced and fact-specific to be established by legislative act. *See, e.g.*, S.C. Code Ann. § 15-36-100 (Supp. 2016) (expert witness must attest to standard of care and its breach as a

prerequisite to bringing a claim for professional negligence); *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 758 S.E.2d 501 (2014) (expert testimony required in medical malpractice action).

Furthermore, there is nothing in the ECCPL that makes it illegal for ophthalmologists to rely upon Optemative's Technology in the course of treating a patient; it just proscribes writing prescriptions for patients based *solely* upon the refractive error that the Technology measures.

The ECCPL's legislative purpose is ostensibly to protect the public from receiving inadequate eye care. Because there is an identifiable risk that the law addresses (*see* Shipp Aff., ¶ 26; Robinson Aff., ¶¶ 12-13), Optemative cannot meet its evidentiary burden to overcome the presumption of constitutionality.

(iii) The ECCPL treats all ophthalmologists and optometrists alike under similar circumstances and conditions.

Unquestionably, the ECCPL creates a bright line rule for *all* ophthalmologists and optometrists to follow. This is not a case in which some ophthalmologists or optometrists are treated differently than others. *Compare Daniel v. Cruz*, 268 S.C. 11, 231 S.E.2d 293 (1977) (no reason to treat fortune tellers in one county differently from those in another). Nor are ophthalmologists and optometrists being treated differently from other health care providers, as the ECCPL only applies to conduct that falls within ophthalmologists and optometrists' scope of practice. *Compare Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016) (physical therapists treated differently than other healthcare providers); *Broome v. Trulock*, 270 S.C. 227, 241 S.E.2d 739 (1978) (different statutes of limitations for different professionals involved in making improvements to real property).

(iv) The classification in the ECCPL has a reasonable basis.

Optemative argues that there is "no evidence here that the ECCPL furthers a public health or safety purpose." It proposes scenarios in which the ECCPL could have better addressed the patient

health and safety purpose that drove the ECCPL to become law. In highlighting the ECCPL's alleged shortcomings, it purports to show how the law is nothing more than an economic protection measure. Plaintiff even goes so far as to say "where the evidence reveals no tendency in a law to serve its purported purpose, and there appear to be obvious means by which it might have done so, that law is arbitrary and cannot survive rational-basis review." Plaintiff's Motion for Summary Judgment, p. 30. This broad, self-serving statement is neither supported by the record nor rooted in South Carolina rational basis jurisprudence. In fact, this appears to be a subtle attempt to have this Court apply an intermediate level of scrutiny in a situation where that is unwarranted. *Cf. Clark v. Jeter*, 486 U.S. 456 (1988) (to withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective).

In *Joseph*, the Supreme Court held that the statute at issue "deprives physicians of the right to practice medicine in the best interest of their patients" by not being able to hire physical therapists. Opternative draws a parallel with that case, claiming the ECCPL deprives ophthalmologists of their right to practice medicine in the best interest of their patients. The comparison fails, because the ECCPL addresses a particular public health risk (*see* Shipp and Robinson Aff.s), whereas it was impossible to find any such risk to the public health and welfare that the statute in *Joseph* was allegedly designed to mitigate.

The text of the ECCPL in no way prevents ophthalmologists from using their medical judgment to write corrective lens prescriptions. If anything, it prevents Opternative and other similar healthcare technology providers from fulfilling a market desire for convenience *to the detriment of ophthalmologists' patients*. Unlike in *Joseph*, the ECCPL does not prevent ophthalmologists and optometrists from practicing medicine in best interest of their patients. To the contrary, the ECCPL prevents corrective lens prescriptions from being issued without an

examination that takes into consideration a patient's overall health. Addressing that risk is clearly within the General Assembly's constitutional prerogative, and the ECCPL clearly has a reasonable basis.

(C) Opternative cannot prove beyond a reasonable doubt that the ECCPL violates its right to substantive due process.

Although the analysis of Opternative's due process claim is largely identical to its equal protection claim, it is nonetheless clear that the ECCPL bears a reasonable relationship to the State's legitimate interest in protecting the eye and systemic health of South Carolina citizens. Whether couched in terms of "legitimacy" or "reasonableness," the ECCPL's utility in tackling traditional police power concerns easily survives rational basis scrutiny.

II. Alternatively, Opternative's Motion for Summary Judgment should be denied because it has stymied SCOPA's discovery efforts.

Opternative claims that it is entitled to summary judgment because "...the undisputed evidence reveals the ECCPL to be nothing more than a protectionist law designed to ban Opternative's Technology in order to protect South Carolina optometrists' outdated business model from competition, and protectionism is not a legitimate use of the state's police power." *See* Plaintiff's Motion, p. 20. Clearly, the evidence in the record disputes Opternative's assertion.[2]

If the Court is inclined to grant Opternative's Motion for Summary Judgment, SCOPA would submit that doing so at this stage of the litigation is premature, as Opternative has prevented SCOPA from obtaining the discovery it has sought, leaving SCOPA with no choice but to file a Motion to Compel. Given that procedural posture, SCOPA submits that summary judgment would be premature.

[2] Although SCOPA asserts that the evidence in the record disputes Opternative's constitutional claims, it does not contend that Opternative has adduced record evidence that would prevent the Court from granting Defendants' Motion for Summary Judgment.

CONCLUSION

For the above-stated reasons, SCOPA respectfully requests that this Court deny Plaintiff's grant Defendants' Motion for Summary Judgment, or, in the alternative, deny Opternative's Motion for Summary Judgment.

Respectfully submitted,

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Attorneys for Defendant-Intervenor SCOPA

October 2, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2016-CP-40-06276
Opternative, Inc.,	)	
Plaintiff,	)	
v.	)	**AFFIDAVIT OF MARK E. ROBINSON, M.D., M.P.H.**
	)	
South Carolina Board of Medical Examiners, South Carolina Department of Labor, Licensing and Regulation,	)	
	)	
Defendants,	)	
and	)	
	)	
South Carolina Optometric Physicians Association,	)	
	)	
Defendant-Intervenor.	)	

PERSONALLY appeared before me Mark E. Robinson, M.D., M.P.H., who deposes and states that the following is based upon his own personal knowledge, except those matters stated upon information and belief, and as to those matters he believes them to be true:

1. My name is Mark E. Robinson, M.D., M.P.H. I am over the age of 21 years, of sound mind, and have personal knowledge of matters set forth herein. I am authorized to make this Affidavit and have reviewed the allegations of the Plaintiff's Complaint in the above-captioned action and the provisions of the South Carolina Eye Care Consumer Protection Law ("ECCPL").

2. Presently, I am a Neuro-ophthalmologist practicing at Palmetto Health/University of South Carolina. I have held this position since 2015. Prior to this position, I was a practicing

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Ophthalmologist in the State of Virginia for six (6) years. I received my Bachelor of Science, Doctor of Medicine and Masters in Public Health from the University of North Carolina, Chapel Hill.

3. Ophthalmologists are medical doctors specializing in eye and vision care, who by study and training are qualified to diagnose and treat ocular diseases, perform eye exams and surgeries and prescribe lenses to correct vision problems.

4. Ophthalmologists who practice in South Carolina are licensed and regulated by the BME.

5. Opternative is a healthcare technology company that has produced certain technology which allows ophthalmologists and optometrists to collect refractive data and other information from patients using a computer ("Technology"). The Technology is designed to be used by a patient without having an ophthalmologist or optometrist in the room.

6. Opternative's Technology can be accessed by individuals through Opternative's website.

7. Opternative's Technology relies on an individual's subjective self-reporting to collect refractive data using a computer.

8. The use of Opternative's Technology does not constitute a comprehensive eye examination.

9. Opternative's Technology generates a set of data about a user and the user's ocular refractive error. This set of data is sent to a licensed ophthalmologist, who determines if a corrective lens prescription is appropriate.

10. Ophthalmologists conduct comprehensive eye examinations as part of their practice. Comprehensive eye examinations consist of, but are not limited to, the following: a

review of the patient's health history; measuring visual acuity, both aided and unaided; performing a slit lamp examination of the anterior segments of the eyes and eyelids; performing an internal ophthalmoscopic examination through a dilated pupil, including evaluation of the optic nerve head, macular and peripheral retina; performing a refraction; performing tonometry; evaluating pupils; performing confrontation visual field or similar screening field; performing other tests and procedures as indicated by the patient's chief complaint, case history or objective signs and symptoms discovered during the course of the eye examination; making a diagnosis and formulating a treatment plan.

11. Optemative's Technology collects information by soliciting a user's responses to questions and visual stimuli; it does not measure objective data about the user's eyes.

12. A contact lens is considered a medical device that can be used to correct vision, or for cosmetic or therapeutic reasons. A contact lens evaluation is a set of diagnostic tests and procedures performed in addition to a comprehensive eye examination. These tests and procedures include a measurement of the corneal curvature (keratometry or corneal topography) and an evaluation of the anterior segment and tear layer of the eye in relation to the contact lens fit.

13. Corneal irritation and contact lens over-wear increase the risk of a corneal infection. Corneal infections from contact lens wear are not rare and they can cause scarring and loss of vision. Corneal irritation and signs of contact lens over-wear can be detected on corneal examination. Also, a face-to-face visit with an eye care provider allows the provider to emphasize the importance of not over-wearing contact lenses and the importance of contact lens hygiene. A patient's symptoms may be minimal prior to an infection occurring. Optemative's Technology does not perform a corneal evaluation.

14. Ophthalmologists are under an affirmative obligation to look after the health and safety of their patients, which requires them to use their medical judgment to determine whether their patients' complaints or symptoms pertaining to their eyesight or eye health are indicators of systemic or body-wide disease processes or pathologies. They are likewise obliged to make such determinations even when the disease processes or pathologies are asymptomatic.

15. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination.

16. An ophthalmologist that conducts a comprehensive eye examination can detect and diagnose certain diseases of the eye, such as glaucoma, cataracts, macular degeneration, binocular vision disorders and corneal dystrophy. They can also detect diabetes, hypertension, hypercholesterolemia, auto-immune disorders and other systemic diseases.

17. The American Academy of Ophthalmology is a national organization of ophthalmologists that, among other things, helps set the standard of care for ophthalmologists nationwide.

18. The official American Academy of Ophthalmology policy regarding comprehensive eye health exams is that "The frequency of ocular examinations should be based on the presence of visual abnormalities and the probability of visual abnormalities developing." American Academy of Ophthalmology Policy Statement, available at https://www.aao.org/Assets/ff742943-87aa-421d-9461-c04f1dd29956/635609992584670000/frequency-of-ocular-exams-2015-pdf (last visited August 23, 2017).

19. The American Academy of Ophthalmology recommends that adults with no signs or risk factors for eye disease should receive a comprehensive medical eye evaluation at age 40 if they have not previously received one. For asymptomatic individuals or individuals without risk factors aged 40 to 54 years old, the Academy's recommended interval for evaluations is 2 to 4 years. For individuals aged 55 to 64 years old, the Academy's recommended interval for evaluations is 1 to 3 years.

20. It is my opinion to a reasonable degree of medical certainty that almost all practicing eye care providers are very rarely providing a refraction without an eye exam, unless they had previously given the patient an eye examination within the prior year. I cannot remember ever doing so myself. Although giving a refraction online in and of itself would be low risk, if it results in patients not obtaining an eye examination, at a population level, there will be a certain amount of disease that is missed. Also, as previously stated, contact lens wearers are at risk for corneal infections and eye examinations are helpful in reducing that risk.

FURTHER AFFIANT SAYETH NAUGHT.

Mark E. Robinson

Mark E. Robinson, M.D., M.P.H.

SWORN TO BEFORE ME THIS
2nd of September October 2017.

(Seal)
Notary Public for North Carolina
My Commission Expires: 12/3/17

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2016-CP-40-06276
Optemative, Inc.,	)	
Plaintiff,	)	
v.	)	**AFFIDAVIT OF DR. MELVIN DOUGLAS SHIPP**
	)	
South Carolina Board of Medical Examiners; South Carolina Department of Labor, Licensing and Regulation,	)	
Defendants,	)	
and	)	
South Carolina Optometric Physicians Association,	)	
Defendant-Intervenor.	)	

PERSONALLY appeared before me Dr. Melvin Douglas Shipp, who deposes and states that the following is based upon his own personal knowledge, except those matters stated upon information and belief, and as to those matters he believes them to be true:

1. My name is Dr. Melvin Douglas Shipp, OD, MPH, DrPH. I am over the age of 21 years, of sound mind, and have personal knowledge of matters set forth herein. I am authorized to make this Affidavit and have reviewed the allegations of the Plaintiff's Complaint, the Answer filed South Carolina Board of Medical Examiners ("BME") and South Carolina Department of Labor, Licensing and Regulation ("LLR") (collectively, "Defendants"), the Answer filed by Defendant-Intervenor South Carolina Optometric Physicians Association ("SCOPA") in the above-captioned action.

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2. I received my Bachelor of Science degree from Indiana University in May of 1970 and my Doctor of Optometry in May of 1972. I received my Master of Public Health degree from Harvard University in June of 1980 and my Doctor of Public Health at the University of Michigan in 1996. I have been licensed to practice Optometry since 1972. I have been teaching since 1976.

3. I was the Dean of The Ohio State University College of Optometry from 2004 to 2014. Prior to this appointment, I was a member of the faculty at the University of Alabama at Birmingham School of Optometry. While at UAB, I also served as Assistant Dean of Clinical Services and Director of Clinics.

4. I have served as a consultant, panelist, and reviewer for several federal institutions—notably, the Food and Drug Administration, the Health Resources and Services Administration, and the National Eye Institute (NEI) of the National Institutes of Health. I was a member of the NEI National Advisory Eye Council (1989-1993), and from 1990 to 1995, a member of the NEI Planning Committee for the National Eye Health Education Project (NEHEP), a nationwide program with the goal of preventing blindness through public and professional education programs. From 2011 to 2012, I served as President of the American Public Health Association, the world's largest and oldest public health association.

5. Presently, I am a Former Dean and Professor Emeritus. I have held this position since retiring from The Ohio State University College of Optometry in July of 2014.

6. Doctors of optometry are known as "optometrists." Optometrists are independent primary health care professionals for the eye. Optometrists examine, diagnose, treat, and manage diseases, injuries, and disorders of the visual system, the eye, and associated structures as well as identify related systemic conditions affecting the eye.

7. It is my understanding that Opternative is a healthcare technology company that has produced certain technology which allows ophthalmologists and optometrists to collect refractive data and other information from patients using a computer ("Technology"). The Technology is designed to be used by a patient without having an ophthalmologist or optometrist in the room.

8. It is my understanding that Opternative's Technology can be accessed by individuals through Opternative's website.

9. It is my understanding that Opternative's Technology relies on an individual's subjective self-reporting to collect refractive data using a computer.

10. Per the website, it is my understanding that the use of Opternative's Technology does not constitute a comprehensive eye examination.

11. It is my understanding that Opternative's Technology generates a set of data about a user and the user's ocular refractive error. This set of data is sent to a licensed ophthalmologist, who determines if a corrective lens prescription is appropriate.

12. It is my understanding that Opternative's Technology collects information by soliciting a user's responses to questions and visual stimuli; it does not measure objective data about the user's eyes or eye health.

13. It is my understanding that Opternative's Technology cannot detect or aid in diagnosing diseases of the eye or systemic diseases.

14. It is my understanding that Opternative's Technology does not perform a corneal examination and evaluation. A contact lens is considered a medical device that can be used to correct vision, or for cosmetic or therapeutic reasons. A contact lens evaluation is a set of diagnostic tests and procedures performed in addition to a comprehensive eye examination.

These tests and procedures include a measurement of the corneal curvature (keratometry or corneal topography) and an evaluation of the anterior segment and tear layer of the eye in relation to the contact lens fit. A poorly fit contact lens can cause irritation to the eyes. Continuing to wear the irritating contact lens for a prolonged time can create pain and cause scarring and vision loss for a patient. A patient may not have any symptoms from a poorly fit contact lens, but scarring and vision loss can develop nonetheless. Such consequences of a poorly fit contact lens can only be detected by a corneal evaluation.

15. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination. There is a risk that individuals may mistakenly believe that they have received an eye examination after receiving a prescription for spectacles or contact lenses from an ophthalmologist or optometrist following an Opternative examination. It is possible that some of those individuals may have an asymptomatic eye or systemic disease.

16. In addition to assessing eye and vision problems, an eye examination may be the first opportunity to detect diabetes and other health conditions. Examples include, high blood pressure, hypercholesterolemia, and certain inflammatory diseases.

17. Diabetes is currently the nation's 7th leading cause of death in the United States. Diabetes is also a risk factor for heart disease and stroke, and a leading cause of kidney disease and blindness in adults. Early detection can allow early treatment and management of both systemic and eye related diabetic changes.

18. One of the more debilitating eye related outcomes associated with type 2 diabetes in adults is vision impairment, including blindness. Diabetes related eye conditions include, but

are not limited to, refractive changes, cataracts, diabetic retinopathy, and glaucoma. Diabetic retinopathy is among the leading causes of preventable blindness in the United States.

19. Most symptoms associated with diabetic eye disease progress slowly, and unnoticeably, therefore, comprehensive dilated eye examinations are necessary to diagnose, prevent and manage these conditions.

20. Importantly, diabetic eye disease can be detected and diagnosed during a routine comprehensive dilated eye examination.

21. Optometrists are qualified to (and do) conduct comprehensive eye examinations. Comprehensive eye examinations consist of, but are not limited to, the following: a review of the patient's health history; measuring visual acuity, both aided and unaided; performing an examination with a slit lamp of the anterior segments of the eyes and eyelids; performing an internal ophthalmoscopic examination through a dilated pupil, including evaluation of the optic nerve head, macular and peripheral retina; performing a subjective refraction; performing tonometry; evaluating pupils; assessing ocular motility and eye alignment; performing confrontation visual field or similar screening field; performing other tests and procedures as indicated by the patient's chief complaint, case history or objective signs and symptoms discovered during the course of the eye examination; making a diagnosis and formulating a treatment plan; seeking consultation and/or making referrals for assessment/treatment to other health providers as appropriate.

22. Optometrists are under an affirmative obligation to look after the health and safety of their patients, which requires them to use their optometric judgment to determine whether their patients' complaints or symptoms pertaining to their eyesight or eye health are indicators of

systemic or body-wide disease processes or pathologies. They are likewise obliged to make such determinations even when the disease processes or pathologies are asymptomatic.

23. An optometrist that conducts a comprehensive eye exam can detect and diagnose certain diseases of the eye, such as glaucoma, cataracts, macular degeneration, binocular vision disorders and corneal dystrophy. They can also detect diabetes, hypertension, hypercholesterolemia, auto-immune disorders and other systemic diseases.

24. The American Optometric Association is a national organization of optometrists that, among other things, helps set the standard of care for optometrists nationwide.

25. The American Optometric Association recommends that adults between the ages of 18 and 64 who are asymptomatic and who are not considered "at risk" should have comprehensive eye examination every two years. Such patients who are 61 years old or older should have comprehensive eye examinations annually. Patients who are "at risk" meet one or more of the following conditions: (1) have diabetes, hypertension, or a family history of ocular disease; (2) work in occupations that are highly demanding visually or are particularly hazardous to the eye; (3) wear contact lenses; (4) have had eye surgery; or (5) have other health concerns or conditions. "At risk" patients between the ages of 18 and 60 years should have comprehensive eye examinations every one to two years, as recommended. Such "at risk" patients who are 61 years old or older should have comprehensive eye examinations annually, or as recommended.

26. It is my opinion, to a reasonable degree of certainty as an optometrist and a public health professional, that the South Carolina Eye Care Consumer Protection Law appropriately addresses the risk to public health that is created when members of the public are allowed to obtain corrective lenses merely by undergoing a refractive examination.

FURTHER AFFIANT SAYETH NAUGHT.

Dr. Melvin Douglas Shipp

SWORN BEFORE ME THIS
28th of September 2017.

(Seal)
Notary Public for Arizona
My Commission Expires:

BRANDON REISH
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Commission Expires
April 16, 2018

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2016-CP-40-06276
Opternative, Inc., Plaintiff, v. South Carolina Board of Medical Examiners and South Carolina Department of Labor, Licensing and Regulation, Defendant, and South Carolina Optometric Physicians Association, Defendant-Intervenor.	)	**CERTIFICATE OF SERVICE**

The undersigned does certify that on October 2, 2017, she did cause to have served via U.S. Mail a copy of Defendant-Intervenor's Memorandum of Law in Response to the Parties' Motions for Summary Judgment in the above-captioned action on the following:

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Victoria M. Cordoni

Victoria M. Cordoni

State of South Carolina County of Richland Opternative, Inc., Plaintiff, vs. South Carolina Board of Medical Examiners, et al., Defendants.	In the Court Of Common Pleas Case No.: 2016-CP-40-06276 Transcript of Record

October 4, 2017

Columbia, South Carolina

BEFORE:

The Honorable DeAndrea G. Benjamin, Judge

APPEARANCES:

Robert McNamara, Esquire
Joshua Windham, Esquire
Attorneys for the Plaintiff

Eugene Hamilton Matthews, Esquire
Kirby Darr Shealy, III, Esquire
Attorneys for the Defendants

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EXHIBITS

NO.	DESCRIPTION	ID	EVDS.
NONE			

1 Thereupon, the following proceedings were had,
2 THE COURT: All right. Is anyone here on
3 2016-CP-40-6276, Opternative?
4 MR. McNAMARA: Yes, Your Honor. Opternative.
5 That's us.
6 THE COURT: All right. And you all have requested a
7 motion for summary judgment. There's a motion for
8 summary judgment by the plaintiff and a motion for
9 summary judgment by the defense?
10 MR. MATTHEWS: Yes, Your Honor. Cross motions.
11 THE COURT: And the defendant has requested 30
12 minutes and the plaintiff has requested 15 minutes so 45
13 minutes.
14 MR. MATTHEWS: That will do.
15 THE COURT: All right. I assume the defendant's
16 motion is on here so I assume the defendant's motion was
17 filed first? I don't know.
18 MR. MATTHEWS: Yes, ma'am.
19 THE COURT: Yes. It was filed in July.
20 MR. MATTHEWS: Yes, ma'am.
21 THE COURT: If you would like to go first, I would
22 be glad to hear from you. Someone give me some
23 background.
24 MR. MATTHEWS: Thank you. Your Honor, Gene
25 Matthews. I'm representing two parties. The Department

1 of Labor, Licensing and Regulation and the South Carolina
2 Board of Medical Examiners. LLR, the party in interest,
3 to the extent that in South Carolina and many states the
4 statute, if the constitutionality of the statute is
5 challenged, one of the parties that you can bring a claim
6 against is the administrative agency that's in charge of
7 enforcing it and that's the case here.
8 The Board of Medical Examiners as you are aware
9 since 1993 has been a part of LLR and it's not really a
10 real party of interest although they have the board that
11 in some regards has been charged with enforcing the
12 ECCPL. That's the statute that the plaintiff wishes to
13 have declared unconstitutional and I'll refer to it as
14 the ECCPL. It's the Eye Care Consumer Protection Law
15 past relatively recently by the legislature. The law
16 itself is listed at length in, I think, every brief
17 that's before you.
18 The plaintiffs here, Opternative, Inc. is a company
19 that offers a certain technology and I'll let them
20 explain it in greater detail but essentially allows you
21 to take an eye test on the Internet and ophthalmologists
22 could in some other jurisdictions conceivably use that to
23 write a prescription and again I'm not going to step on
24 their toes on that. They can explain that in greater
25 detail.

1 Also, the defendant intervenor is the South Carolina
2 Optometric Physicians Association. They are an
3 association of optometrists and wanted to be heard on
4 this case as well. They have filed a motion as to, or a
5 response as to both motions.
6 As to the meat of the matter, the claim that the
7 plaintiff apparently brings is that the ECCPL is
8 protectionist legislation designed wholly to keep them
9 from doing business in South Carolina and I'm not going
10 to make their argument for them but in order for me to
11 make an argument you need to understand why they are
12 making the challenge. They say that under this law their
13 business model can't work and their business model is
14 they want optometrists or ophthalmologists to be able to
15 write a prescription based solely on the eye test that
16 you would take on the Internet or kiosk is one of the
17 terms that's used in the statute and the statute doesn't
18 permit that.
19 The statute says you have to have an eye exam.
20 Essentially what the statute specifically says is a
21 prescription for spectacles or contact lenses will not be
22 based solely on the refractive eye error of the human eye
23 or be generated by a kiosk. And the other part of the
24 law that's apparently at issue here is the prescription
25 must take into consideration medical findings made by

1 refractive errors discovered during the eye examination.
2 That statute established for LLR, that's how we get
3 brought in, is that violation of the statute constitutes
4 misconduct as provided for in sections 40-37-110 and
5 40-47-110.
6 Those statutes, as you are aware, Title 40 is the
7 professional occupations and licensing title and that's
8 what brings LLR to your doorstep because we have the duty
9 of enforcing it.
10 Now, to date we have not had the occasion to enforce
11 it. There's been no cause for the Board of Medical
12 Examiners or anyone else to bring a licensing before LLR
13 for violation of code. And, in fact, LLR is the first to
14 state we don't regulate Opternative at all. They're not
15 a licensed physician. They're not a licensed
16 professional to our knowledge other than if they violate
17 the Payment of Wages Act, we've got something to say to
18 them for another division but that's not even
19 professional occupations and licensing. That's just --
20 We have no -- There's not yet been an occasion for us to
21 do anything about the law. The reason we are here is
22 because we are standing in, I presume, in the place of
23 the Attorney General to defend the constitutionality of
24 the law. The plaintiff brings two separate challenges to
25 the law. One is substantive due process. The other is

1 equal protection. The substantive due process challenge
2 is a feat because the standards are pretty high. The
3 same thing with equal protection.
4 Now, as I understand, and again, they're gonna be
5 able to explain themselves in greater detail but as LLR
6 understands the challenge it's in paragraph 82 of their
7 complaint and I'll read from it, as a direct result of
8 the passage of the ECCPL South Carolina licensed
9 ophthalmologists are legally prohibited from working with
10 Opternative to provide corrective lens prescriptions for
11 South Carolina residents. And then in paragraph 84, as a
12 direct result of the passage of the ECCPL, Opternative
13 has ceased business operations in South Carolina. So
14 they state.
15 Now, again, when we come to standing, we first argue
16 that right now there's really no injury. Their counter
17 argument which is resourceful is to say you don't have to
18 force an ophthalmologist to violate the act in order for
19 us to have standing. Our response is, well, that's true
20 but before you even get there there's nothing now that
21 forbids a South Carolina licensed ophthalmologist from
22 using your technology. They just can't solely base a
23 prescription on that. You know, we don't really care and
24 I don't know if the legislature cared and I don't know if
25 the requirement care about the viability of their

1 business model. But in terms of the simple fact can a
2 South Carolina ophthalmologist use Opternative's
3 technology in the course of writing their prescription?
4 The answer appears to be of course it can. That's not
5 the sole reason. It can't be the sole reason or the sole
6 basis for writing the prescription. So our first
7 argument is, you know, we're sorry that the law doesn't
8 let you do business the way you want to but as a
9 practical matter LLR doesn't care whether an
10 ophthalmologist uses Opternative's technology. It just
11 can't be -- The law appears to indicate that it can't be
12 the sole basis for writing the prescription. And even
13 though they say, well, wait a minute. We suffered
14 injury, in fact, because our business model can't really
15 work under the ECCPL. And our response to that is, well,
16 business models aren't protected. So, you know, people
17 have to change business models from time to time. That's
18 not a problem. Whatever else it is, it's not in the
19 constitution. It doesn't make an injury in fact. On
20 page 8 of our brief we state nothing, in fact, nothing
21 appears to prevent South Carolina licensed
22 ophthalmologists from using their current technology to
23 assist his or her work. Rather, Opternative appears to
24 argue that it is at a competitive disadvantage because a
25 South Carolina licensed ophthalmologist cannot base a

1 prescription for glasses or contact lenses solely on the
2 refractive eye error of the human eye or regenerated by a
3 kiosk. Instead South Carolina licensed ophthalmologists
4 must also quote, "take into consideration medical
5 findings made in refracted error discovered in the eye
6 examination."
7 Now, I'm jumping ahead a little but if I were
8 sitting in your chair I'd be wondering, well, what's all
9 the fuss about? Why did South Carolina's legislature
10 make this decision? Defendant veering now from
11 substantive due process to rational basis. But there is
12 a connection. When you look at whether or not you can
13 make a substantive due process or protection claim, that
14 the two theories are distinct but in my view quite
15 similar. In this case substantive due process is based
16 on the allegation that ECCPL is protectionist legislation
17 that doesn't further any valid public health or safety
18 purpose.
19 Now, in order to make a substantive due process
20 claim in the State of South Carolina and under our state
21 constitution which is how the plaintiff is proceeding the
22 challenge is whether or not the statute or ordinance
23 bears a reasonable relationship to any legitimate
24 interest of government. We make that citing on page 13
25 of our brief. And, you know, the court cannot haul the

1 legislature into its chambers and interview each one and
2 figure out what their motives were. In part that
3 violates separation of powers. The courts review of the
4 legislature's actions is limited and it requires, again,
5 that's why the standard is quite high, whether or not the
6 statute or ordinance bears a reasonable relationship to
7 any legitimate interest of the government.
8 Now, again, on the bottom of page 13 of our brief
9 the defendant intervenor SCOPA in its answer to
10 interrogatories referenced the what I regard as the
11 rather obvious legitimate business interest and that is
12 again the ECCPL protects patients of ophthalmologists and
13 optometrists when wittingly putting their eye health at
14 risk by obtaining a prescription for corrective lenses
15 without a comprehensive eye examination. Certain
16 diseases of the eye or of the body may go undiagnosed if
17 patients merely elect to purchase corrective lenses using
18 remote eye refraction measurement tools without an in
19 person comprehensive eye examination. And again, SCOPA
20 asserts that this assertion to raise collective training,
21 collective experience and scope of its members.
22 Now, anticipating a couple of the questions you will
23 receive from opposing counsel, one would be, well, SCOPA
24 is our commercial opponent and, of course, they would
25 want this law because it protects their business model

1 and hurts ours to which LLR responds we don't care. It's
2 frankly as an administrative agency we don't make calls
3 regarding whose business model is favored. We don't
4 care. But if we do get a statute that's otherwise
5 constitutional, it's our duty to enforce it so here we
6 are.
7 Now, in terms of whether or not there is a
8 legitimate interest in government, the South Carolina
9 courts frankly do have a history of, well, how do you
10 figure that out? And one is from Mitchell v. Owens, 1991
11 Supreme Court case. I don't know if it's cited but I
12 have it here. It talks about how do you figure that out.
13 Well, one would be, first of all, the statute --
14 THE COURT: What's the cite?
15 MR. MATTHEWS: It's 304S.C.23. I have a copy of the
16 case, if you like, if I may approach.
17 THE COURT: Yes.
18 MR. MATTHEWS: (Proffering.)
19 THE COURT: Thank you.
20 MR. MATTHEWS: Now, this was an equal protection
21 case but has the general principle that the statute
22 enacted pursuant to a legislative power is presumptively
23 constitutional. So your presumption when you arrive at
24 court is, well, this is constitutional. In reviewing a
25 challenge in this case challenging equal protection

1 grounds great deference is given to the classification
2 created and it will be sustained if supported by any
3 reasonable hypothesis and not plainly arbitrary.
4 Now, the idea, if the legislature has decided in its
5 wisdom that this statute is necessary to promote eye care
6 and requiring eye examinations beyond those of an
7 Internet interface or a kiosk of some type is in their
8 view not sufficient to promote good eye care in South
9 Carolina, LLR salutes and says great idea. Wish we
10 thought of it. If the legislature decides we don't want
11 this, good idea legislature. Wish we thought of it. The
12 board in LLR generally takes the law as we find it. And,
13 in fact, as I have stated before, we have not had the
14 occasion to enforce it yet. But if there is a reasonable
15 hypothesis that's not plainly arbitrary or in terms of
16 substantive due process does the statute or ordinance
17 bear reasonable relationship to any legitimate interest
18 of government? And I don't think it's an issue that eye
19 care generally, that the health care of our eyes, me
20 among them, is a legitimate government interest. Of
21 course it is.
22 The issue in terms of the business model. Well, no
23 one in South Carolina law, no one has an unfettered right
24 to pursue a business detrimental to the public health,
25 safety or welfare. If the legislature for reasons best

1 known to itself, there's evidence in the record supplied
2 by both Opternative and SCOPA on that point, of course,
3 Opternative said, well, we don't think there is. SCOPA
4 says of course there is. Legislature apparently found
5 that, yeah, we want people to have comprehensive eye
6 examinations. We want them to be examined by something
7 other than an Internet or kiosk before you can write a
8 prescription. Fair enough.
9 Now, when you get to the equal protection argument,
10 and again, I'll just summarize the substantive due
11 process. And, oh, by the way, there's not a procedural
12 due process claim here that anyone is aware of.
13 Substantive due process is how they pursue their claim.
14 Our position would be it appears uncontested that one,
15 undiagnosed diseases of the eye are legitimate health
16 care concerns of the state. Two, require in person
17 comprehensive eye examinations. May increase the chance
18 of detecting these diseases. That's a legitimate
19 concern. It's factually related. At that point in our
20 view the inquiry comes to an end.
21 Now, on equal protection claim, again, we're gonna
22 start with Mitchell v. Owens. Great deference is given
23 to the classification created and it will be sustained if
24 supported by any reasonable hypothesis and not plainly
25 arbitrary. As we understand Opternative's complaint the

1 classification is between ophthalmologists that want to
2 use Opternative's technology and those that don't. Or
3 it's not a discrimination against a minority. It's not a
4 bridge of the fundamental right at that point. And
5 again, we'll turn to a case cited by both us and the
6 other side under rational basis what test do you use. In
7 Joseph v. LLR the equal protection clause, rational basis
8 test is the court must determine whether the law treats
9 similarly situated entities differently. If so, whether
10 the legislative body has a rational basis for the
11 disparate treatment, and three, whether disparate
12 treatment bears a rational relationship to legitimate
13 government purpose. So very, very similar to the
14 substantive due process test.
15 And again, in our view if the legislature has
16 decided that it wants exams other than kiosks or Internet
17 based examinations to take place, you can use those,
18 that's fine, it just can't be the sole basis for the
19 prescription.
20 Now, whether or not there is such a thing as a class
21 of one wants to use their business model, one class
22 doesn't. Even if that's a class, it's still - there is a
23 does the law treat similarly situated entities
24 differently. Well, to the extent that one can use, if
25 you want to use the Opternative technology, one says yes,

1 our argument is they can still use it, it just can't be
2 the sole basis for their examination.
3 Second, if so, whether the legislative body has a
4 rational basis for the disparate treatment. We have
5 articulated it.
6 Three, whether the disparate treatment bears a
7 relationship to a legitimate government purpose.
8 Eye care is a legitimate government purpose.
9 The statutes or I should say the briefs before you
10 go into much greater detail but essentially in our view
11 when you boil it down to gravy that's what the fuss is
12 about. Of course, our argument is Opternative's motion
13 is interesting. It's resourceful. Do not be beguiled by
14 it. It goes into some detail about, as it must in order
15 to make its point, about the types of use, whether or not
16 you use federal law or South Carolina law to govern this.
17 The law that I quoted to you is all South Carolina law.
18 The standards that we use are all South Carolina law.
19 The one thing that is clear to LLR is it certainly
20 does appear that there is a commercial fight between
21 these folks and these folks and we don't care and frankly
22 neither should you. Did the legislature do something
23 that it didn't have a right to do? Yes. Is the wisdom
24 of the legislature at issue? No. It may have been a bad
25 idea but the way to handle that is the ballot box not the

1 court. I'm ready for any questions you may have.
2 THE COURT: I don't have any at this time.
3 MR. MATTHEWS: Thank you.
4 THE COURT: Anything, Mr. Shealy?
5 MR. SHEALY: Your Honor, if you will permit, what we
6 have filed -- Kirby Shealy representing the South
7 Carolina Optometric Physicians Association. We filed a
8 response to both motions adopting the arguments raised by
9 LLR but supplying some additional rationale and also
10 served two affidavits at the same time and we have
11 provided a copy of that, of all of that to your office.
12 Do you have that? I'm happy to hand up a copy.
13 THE COURT: Did you e-mail it?
14 MR. SHEALY: We e-mailed it. We e-mailed it to your
15 law clerk Monday night. I got a bounce back e-mail
16 saying she was out. So I e-mailed it to your assistant
17 but I'm happy to hand up a paper copy.
18 THE COURT: It may be up here. Thank you.
19 MR. SHEALY: Your Honor, just briefly, I would just
20 direct your attention to the two affidavits that were
21 attached to that response. One is from a professor of
22 optometry who also has a master's in public health.
23 Another is from here a local ophthalmologist who also has
24 a master's in public health. They both posit the
25 rationale that we have adopted is that if one obtains a

1 prescription for corrective lenses based solely upon the
2 refractive error of your eye with no other tests, it's
3 very convenient for folks. That's the market niche that
4 Opternative seeks to fill. But if somebody doesn't see
5 an optometrist or an ophthalmologist whose standard of
6 care requires them to perform other tests, they may not
7 be diagnosed with glaucoma, with diabetes, with
8 hypertension, with a whole host of things and so while
9 this law makes things, keeps things from being more
10 convenient for people, it sort of protects people from
11 themselves like other laws do. Often we want the most
12 convenient thing for ourselves but often that isn't in
13 our best interest and we are not in a position to know
14 that, only the professionals do.
15 So, Your Honor, we believe that this case clearly
16 meets the rational basis test under South Carolina law
17 for the reasons that Mr. Matthews has cited. I do want
18 to say, however, that of course you have cross motions
19 for summary judgment here. You can find for one side or
20 find for the other side or find for neither. If the
21 Court is convinced that the plaintiff has made a
22 compelling case that meets the standard, it has to prove
23 its case beyond a reasonable doubt under our constitution
24 of juris prudence.
25 We filed a motion to compel against Opternative for

1 failing to fully answer our discovery. One of the things
2 that we chiefly have been interested in is the way
3 Opternative has marketed its eye examination because the
4 concern is confusion among members of the public. You
5 undergo their test, their refractive exam and they say,
6 although we are taking it on faith that they say in the
7 course of the interface this is not a comprehensive eye
8 examination, but it takes 15, 20 minutes and a member of
9 the public once they go through all of that may think,
10 okay, I've had my eyes examined. And to the extent we
11 have asked them, okay, how have you marketed this? What
12 do you call it when you marketed it? And those questions
13 have not been responded to.
14 So if you are inclined to grant their motion, we
15 believe it's premature. However, we don't think you get
16 there because the rational basis test being what it is
17 and the standard being as high as it is we agree
18 completely with Mr. Matthews that this is not a case that
19 they can satisfy that standard based upon the record
20 that's before this court so we would ask that defendant's
21 motion for summary judgment being granted.
22 THE COURT: All right. Yes, sir.
23 MR. McNAMARA: Thank you, Your Honor. Robert
24 McNamara representing Opternative. With the Court's
25 indulgence I'll address the substantive aspects of the

1 cross motions and my colleague Mr. Windham will speak
2 briefly to the standing jurisdictional issues raised in
3 defendant's motion.
4 THE COURT: What's your last name again?
5 MR. McNAMARA: It's Robert McNamara. In short, Your
6 Honor, this case is a constitutional challenge to an
7 unusual South Carolina law written and lobbied for by one
8 group of South Carolina medical practitioners for the
9 purpose of restricting the practice of a different group
10 of South Carolina medical practitioners all with the end
11 of protecting the private profits of that first group and
12 this case is appropriate for resolution on summary
13 judgment because none of the material facts are in
14 dispute. What my client Opternative offers is what's
15 called an online refractive exam.
16 A refractive exam is what lets a doctor determine
17 your correct eye glass prescription and the traditional
18 refractive exam involves sitting in a chair looking at an
19 eye chart and reporting to someone when you see better or
20 worse under certain conditions and someone takes down
21 those responses. What Opternative does is take the human
22 being taking down the responses out of the equation and
23 lets you give those responses via smart phone, the
24 computer program compiles all of your responses and
25 e-mails them to an ophthalmologist who can review them at

1 his leisure and decide whether it's appropriate to write
2 a corrective lens prescription based on your responses,
3 your medical history and other information he has
4 available to him.
5 That model was functioning in South Carolina. It's
6 no longer functioning in the State of South Carolina but
7 it presents a serious threat to the business model not of
8 ophthalmologists but of optometrists. Most optometrists
9 including most optometrists in the State of South
10 Carolina, this is again undisputed, in addition to
11 providing medical services also sell eye glass frames in
12 their brick and mortar establishments and the optometry
13 profession has strongly resisted online eye exams. A
14 national organization called the American Optometric
15 Association wrote model legislation to address what they
16 called the Opternative issue.
17 Intervenor South Carolina Optometric Physicians
18 Association which is a chapter of the American Optometric
19 Association adapted that model of legislation for South
20 Carolina and successfully it lobbied it through the South
21 Carolina legislature including getting a reversal of then
22 Governor Haley's veto. Governor Haley vetoed the law as
23 a purely protectionist measure. The legislature overrode
24 that veto and there's very little question, it's
25 undisputed in the record that internal communications of

1 the South Carolina Optometric Physicians Association
2 consistently discussed the law as a means to ban
3 Opternative. In fact, representatives from intervenor
4 gave a presentation on their lobbying efforts to the
5 National Optometric group in which they characterized it
6 as a successful effort to ban Opternative. One of the
7 slides in the presentation is Opternative's logo with a
8 big red circle with a slash through it.
9 So that is where the law came from. The question
10 before the court is whether the law is constitutional.
11 And my friend Mr. Matthews is right, there's really only
12 one legitimate rationale for this law that's been
13 proffered. That comes in response to a contention
14 interrogatory we served on the parties. The intervenor
15 responds that the only public health or safety purpose
16 they contend is advanced by the ECCPL is that certain
17 diseases of the eye or of the body may go undiagnosed if
18 patients merely elect to purchase corrective lenses using
19 no eye refraction measurement tools without an in person
20 comprehensive eye examination.
21 That answer has been adopted by the defendant in
22 their own cross motion and so that is the only rationale
23 we are dealing with. The lesson of the retail services
24 case the South Carolina Supreme Court handed down earlier
25 this year is that the court only has to look at rationale

1 that's in the record. The court has no obligation to
2 hypothesize additional justifications for the law that
3 don't appear in the record.
4 And, again, there's no factual dispute about
5 comprehensive eye exams here. We freely concede the
6 comprehensive eye exams are good. That people should get
7 comprehensive eye exams. That comprehensive eye exams
8 can detect diseases and that that is good. It's good if
9 people get glaucoma diagnosed and we freely concede that
10 Opternative, for example, doesn't provide a glaucoma
11 test. It's not a substitute for a glaucoma test. The
12 only question is whether there's enough of a relationship
13 between that and what the law actually does and there
14 isn't under either the substantive due process test or
15 the equal protection test.
16 Under substantive due process in this state the
17 court is supposed to look for a reasonable relationship
18 between the government's asserted ends and the means the
19 government is using to achieve them and the problem the
20 state runs into here is that if the asserted end is
21 ensuring that people get a comprehensive eye examination,
22 the Eye Care Consumer Protection Law doesn't require a
23 comprehensive eye examination. Ophthalmologists are
24 entitled to use their medical discretion to decide
25 whether or not it's appropriate in any given

1 circumstances to write a corrective lens prescription.
2 So an ophthalmologist looks at the information he
3 has at his disposal and decides whether given this
4 information he can write a prescription or whether he
5 needs more information or in keeping with his medical
6 duties should conduct additional tests. That is left to
7 his discretion. The only thing the Eye Care Consumer
8 Protection Law adds to that process is that at least some
9 part of the information the ophthalmologist is looking at
10 when he's deciding whether to write the prescription has
11 to have been generated by a human, any human and any
12 information.
13 Defendant's 30(b)(6) designee I think summed it up
14 nicely when she said that the law requires quote "some
15 human involvement." It can be any human at any point in
16 the process looking for anything. The law doesn't
17 require an ophthalmologist to be in the same room as a
18 patient at any point. And that matters because while
19 comprehensive eye exams are important it's also
20 undisputed that ophthalmologists don't recommend annual
21 comprehensive eye exams for everyone. In fact, the
22 general recommendation is that by the time people are 40
23 they should receive at least one comprehensive eye
24 examination.
25 But corrective lens prescriptions expire under the

1 law in South Carolina after only one year so even though
2 an ophthalmologist -- I haven't gotten new glasses in two
3 years so an ophthalmologist would say I'm under 40, I
4 have had a comprehensive eye exam, I don't particularly
5 need to go to a doctor to get a comprehensive eye exam
6 but I can't get a new prescription without a doctor
7 writing me a prescription. It is perfectly legal for an
8 ophthalmologist to look at my relevant information and
9 say I'm going to update and see if your refractive error
10 has changed and I'm going to renew your prescription
11 because your glasses broke. There's no law against
12 writing a corrective lens prescription without a
13 comprehensive eye examination as long as the
14 circumstances warrant it.
15 In fact, Michael Zolnick, the optometrist who is the
16 primary architect of the Eye Care Consumer Protection Law
17 in South Carolina testified in deposition that he's
18 actually done that. That when the circumstances warrant
19 it, he has written a corrective lens prescription without
20 a full comprehensive eye exam. That was legal before the
21 Eye Care Consumer Protection Law, that is legal after the
22 Eye Care Consumer Protection Law so long as at some point
23 in the process the patient's responses are written down
24 on a clipboard by a human being instead of being
25 collected by automated software like Opternative

1 provides. Simply put, that doesn't bear a reasonable
2 relationship to ensuring that people get comprehensive
3 eye exams. That's true under South Carolina law and
4 frankly, Your Honor, that would be true as a matter of
5 the more permissive federal refractional basis test.
6 As we know from our briefs, even federal courts in
7 cases like the Craigmiles case out of the Sixth Circuit,
8 the St. Joseph Abbey case out of the Fifth Circuit have
9 made it clear that when the government has a more direct
10 path to achieve its end and has eschewed that regulatory
11 path in favor of a more indirect path, that fails even
12 the rational basis test. But that's what we have here.
13 A law that's about making sure people get a glaucoma test
14 would be expected to require people to get a glaucoma
15 test. Instead the law just requires some human do some
16 thing at some point. That bears very little relationship
17 to the public health. It does bear a fairly obvious
18 relationship to ensuring that people are available to be
19 sold eye glass frames during in person consultations. So
20 that's the substantive due process argument.
21 As to the equal protective argument with respect to
22 my friend Mr. Matthews I think he slightly misstated what
23 our equal protection claim is here, Your Honor. The
24 relevant class is not ophthalmologists who want to use
25 Opternative and ophthalmologists who don't. The

1 distinction the law draws is ophthalmologists prescribing
2 corrective lenses and literally any other medical doctor
3 in the state doing literally anything else. Under the
4 South Carolina telemedicine act passed just last year
5 it's presumptively legal for a South Carolina doctor to
6 use the telemedicine tools of their choice as long as
7 they're meeting the relevant standard of care that is
8 left to their discretion to ensure that they are properly
9 within the standard of care, that their patient
10 understands and gives informed consent to what the tool
11 can do and can't do, that is uniformly legal.
12 The only exception is ophthalmologists writing
13 corrective lens prescriptions. Just corrective lens
14 prescriptions. It would actually be perfectly legal for
15 an ophthalmologist to use telemedicine technology like
16 Opternative makes to diagnose occular cancer as long as
17 they didn't prescribe glasses based on the same
18 information. That is the distinction we are challenging
19 and South Carolina law tells us that that has to be based
20 on a real distinction between ophthalmologists
21 prescribing corrective lenses and all other medical
22 doctors and that distinction has to have a fair and
23 substantial relationship to whatever the legitimate end
24 is the government is pursuing.
25 But the only legitimate end advanced here is that

1 ophthalmologists can diagnose diseases if they see you in
2 person. So they can. But so, too, Your Honor, can other
3 doctors. That's what doctors do. They diagnose
4 diseases. The question is whether there is something
5 more dangerous. Whether there is some good reason to
6 restrict ophthalmologists' judgment in this way and not
7 any other medical doctor and there simply is nothing that
8 appears on the law, in the record or in any of the briefs
9 of the party that explains why ophthalmologists can't be
10 trusted and literally every other doctor can.
11 I think the best case to look at here is the Joseph
12 case Mr. Matthews mentioned. Joseph is another case
13 about health care professionals where the state was
14 restricting physical therapists from working directly for
15 physicians or receiving referrals from physicians.
16 THE COURT: What's the cite of that case?
17 MR. McNAMARA: The cite for that case, Your Honor,
18 is 417S.C.436 handed down in 2016. In Joseph the court
19 didn't say that the state is wrong to be concerned about
20 self referrals. In medicine the reason self referrals
21 can be regulated is that you don't want doctors referring
22 to their employees for their own personal profit instead
23 of for the patient's true needs and that's why there are
24 restrictions sometimes. The question the court asked is
25 why physical therapists? Any another health care

1 provider that can do this, physical therapists can't and
2 the plurality looked and found no explanation for what
3 was so special about physical therapists that they had to
4 be restricted as opposed to all other medical providers.
5 That's the same question we are asking the court to
6 ask here. What is so special about ophthalmologists
7 prescribing corrective lenses that they have to be
8 restricted and no other medical provider does. There is
9 no public health explanation on the record for that and
10 the only explanation that the record reveals is that when
11 ophthalmologists prescribe corrective lenses, they are
12 competing with the retail glasses sales business of brick
13 and mortar optometrists. That is not the legitimate end
14 of government and that renders the law unconstitutional
15 under both the substantive due process and the equal
16 protection tests.
17 If I could just briefly address Mr. Shealy's
18 suggestion that our motion is premature. Your Honor,
19 this case was filed last year, in October of last year.
20 The discovery responses that are the subject of the
21 motion to compel were served on the intervenors the first
22 week of June of this year. In August Judge Manning gave
23 the parties a month to wrap up discovery and file
24 dispositive motions by the first week in September. We
25 have met that deadline and the motion to compel was filed

1 two days ago. First, we would respectfully request the
2 schedule not be blown up because intervenor has sat on
3 their rights until two days ago. This case has been
4 pending for a year. It's here on cross motions between
5 the original parties. It should be adjudicated on those
6 cross motions. But second, there's nothing that could be
7 found in discovery that would go to the actual
8 justifications that have been raised by the parties.
9 Again, we freely concede that comprehensive eye
10 exams are good. We freely concede that Opternative is
11 not a tool that can be used to diagnose diseases like
12 glaucoma and to the extent there is a question about how
13 Opternative has advertised itself we freely admit that
14 Opternative has accurately referred to itself in the past
15 as a type of eye exam. In fact, intervenor sent us a
16 request for admission asking us to admit that and we have
17 admitted that. There is no need for further discovery on
18 that point. The only question is why an ophthalmologist
19 cannot be trusted to ensure that his patients have given
20 informed consent to the kind of treatment they are
21 getting and to the limitations of whatever telemedicine
22 tool they are using and other doctors can be trusted.
23 Opternative is a telemedicine tool like any other.
24 It is useful in some circumstances. It is not useful in
25 other circumstances. Ophthalmologists can think it's a

1 good idea to use in some circumstances and yet it would
2 be irresponsible to use it in other circumstances. But
3 that's true of any medical tool. There is no medical
4 tool telemedicine or otherwise that is perfect and that
5 is appropriate to use in every circumstance. The only
6 unusual thing is that Opternative is a telemedicine tool
7 that is banned in all circumstances. That an
8 ophthalmologist can't exercise his judgment to say that
9 here a computer program collecting this information is
10 enough instead of an unlicensed individual with a
11 clipboard. That is an unconstitutional distinction and
12 that is frankly why our motion should be granted.
13 THE COURT: What is your position to Mr. Matthews'
14 argument that the law does not does restrict
15 ophthalmologists from writing prescriptions based on use
16 of the technology but just says that it cannot be the
17 sole basis for the writing of a prescription? What is
18 your position on that?
19 MR. McNAMARA: I think that argument actually cuts
20 in our favor, Your Honor, because it is very effective as
21 a means of eliminating Opternative's business because
22 Opternative can't promise its customers that the
23 ophthalmologist writing a prescription is going to be in
24 their town, is going to be physically accessible to them.
25 They e-mail the information to a South Carolina licensed

1 ophthalmologist who has said he has time to review new
2 patients. He could be anywhere in the state. So
3 requiring human interaction is an excellent way of
4 destroying Opternative's business and has, in fact, done
5 that. There's evidence in the record that Opternative
6 used to operate in South Carolina, stopped solely because
7 of the Eye Care Consumer Protection Law and that South
8 Carolina licensed ophthalmologists would go back to
9 writing prescriptions using Opternative if this law were
10 struck down.
11 But I think it does a lot to undermine the asserted
12 rationale for the law. On the government's account the
13 only thing you would need to be able to use Opternative
14 is to use technology at home, drive across town to an
15 ophthalmologist's office, interact with a receptionist,
16 not with the ophthalmologist. The receptionist could ask
17 you, how are you feeling? Are your glasses doing okay?
18 Are you seeing all right? And that's human interaction.
19 The receptionist gives that information to the
20 ophthalmologist, the ophthalmologist can legally write
21 the prescription.
22 Now, that's a great way of practically banning
23 online eye exams because an online eye exam can't promise
24 to connect you with someone across town who is willing to
25 use the technology in taking in new patients. But it's a

1 terrible way of ensuring that the ophthalmologist
2 actually conducts an examination because it doesn't
3 require the ophthalmologist to conduct an examination.
4 So I don't think that that argument does much to
5 undermine our arguments but it does an excellent job of
6 illustrating exactly how little this law does for patient
7 health and exactly how much this law does for the
8 protectionist purposes that frankly the internal e-mails
9 of the South Carolina Optometric Physicians Association
10 indicate was its actual purpose.
11 THE COURT: Thank you.
12 MR. McNAMARA: If there is nothing else, Your Honor,
13 if I could briefly turn things over to Mr. Windham to
14 address standing.
15 THE COURT: Yes.
16 MR. WINDHAM: Good morning, Your Honor. Josh
17 Windham for the plaintiff. I just want to briefly
18 address, Mr. McNamara touched on our affirmative argument
19 for standing and I just want to briefly recount that and
20 address a few of Mr. Matthews' points.
21 Opternative clearly has standing in this case based
22 on three facts that are undisputed. The first is that
23 Opternative actually operated in South Carolina before
24 this law was passed. The second is that optometrists
25 drafted this law specifically to shut Opternative down in

1 the state and that's exactly what happened. And the
2 third is that if this law were shut down, Opternative
3 would immediately continue operating in South Carolina as
4 Mr. Bodie's affidavit reflects and as Dr. Chom's
5 affidavit reflects.
6 Now, that is textbook injury, causation and
7 redressability which is sufficient for standing, Your
8 Honor. Mr. Matthews offers a few points that I want to
9 just briefly touch on. The first is that he said
10 Opternative, there's no protected interest in a business
11 model, Your Honor. Well, that's just not true with all
12 due respect to Mr. Matthews. In the Brown case the
13 Supreme Court held that plaintiffs have a liberty
14 interest in quote "the individual's freedom to practice
15 his or her chosen profession." And that's exactly what
16 Opternative wants to do here. Opternative wants to offer
17 patients a way to use its computerized vision test to get
18 a prescription from home and that entire way of doing
19 business and that entire product has been banned from the
20 state.
21 Now, just two cases that kind of illustrate that
22 point as well, Your Honor. The first is that in the
23 Joseph case as Mr. McNamara touched on the physical
24 therapists there wanted to work for orthopedic surgeons.
25 They weren't allowed to and the court found that both the

1 therapists and the surgeons had an interest in practicing
2 business that way. And in the Joy Time Distributions
3 case which Mr. Matthews actually cites in his motion for
4 summary judgment there was a video gaming company that
5 wanted to operate the way it wanted to operate by
6 offering machines that allow customers to win money. The
7 Supreme Court found that the company Joy Time actually
8 had an interest in operating that way and therefore had a
9 standing in that case as well.
10 The second reason Mr. Matthews offers why
11 Opternative doesn't have standing is that the law doesn't
12 actually ban Opternative but that's just not right, Your
13 Honor. Opternative again offers a computerized vision
14 test for patients to get a prescription from home and
15 this law says that prescriptions can't be based solely on
16 automated testing devices as defendant's 30(b)(6)
17 designee confirmed that requires at least some human
18 involvement. Now, that's a clear ban on Opternative's
19 technology. Opternative wants to offer patients a way to
20 get a prescription online. They can't do that because of
21 this law. That's the injury here.
22 And finally, Mr. Matthews says there hasn't been any
23 enforcement and therefore Opternative hasn't suffered an
24 injury but again that's not right. Under the Declaratory
25 Judgments Act offers a way for plaintiffs to get a speedy

1 and inexpensive group to relief without having to first
2 suffer a violation of their rights? And as the Supreme
3 Court in the Joseph case confirmed, quote, "the only
4 viable avenue to seek redress and access our courts
5 cannot be solely through disregarding our laws." And
6 neither Opternative nor its partnering ophthalmologists
7 want to disregard the law here. That's why Opternative
8 is banned. That's why Opternative has suffered injury.
9 That's why Opternative has standing, Your Honor.
10 So in closing, again, all of that is sufficient for
11 standing, and plaintiff therefore requests that Your
12 Honor decide this case on its merits and grant
13 plaintiff's motion for summary judgment.
14 THE COURT: All right. Thank you. All right.
15 MR. MATTHEWS: Brief rebuttal, Your Honor.
16 THE COURT: Yes, sir.
17 MR. MATTHEWS: Thank you. Well, first of all, my
18 colleagues talk about Opternative's chosen profession. I
19 don't think there is anything in the record about what
20 profession that is. It's a business model and LLR's
21 position on the matter is instructive here. We regulate
22 professionals. Opternative is not one of the things we
23 regulate. Opternative is not a licensed professional in
24 South Carolina nor can it be unless it is a company that
25 becomes an ophthalmologist and I don't know if that's

1 even possible.

2 So what we are talking about here, and again, Joseph

3 is actually, and I'll agree with this, Joseph is

4 instructive. The differences here are stark. In Joseph

5 the petitioners were actual persons who were regulated by

6 LLR. Another big difference in Joseph is that their LLR

7 actually did something, it referenced, it issued a 2011

8 the equivalent of being a statement of how it's going to

9 proceed. So Joseph not only regarding a section

10 40-45-110, it also concerned an act of the board of

11 regulated physical therapists. That is as to standing.

12 The chosen profession part of this I again say

13 business models. The South Carolina constitution does

14 not protect business models. And I'll say this, too. I

15 think they have made the point for me here. The injury

16 with which they say they have suffered is not that

17 ophthalmologists no longer want to use them or no longer

18 can use them and since they don't want to if they can't

19 base their prescription solely on an Internet kiosk

20 review of an eye examination.

21 Now, with that being said, if I'm an

22 ophthalmologist, and again, this is not hypothetical, if

23 I'm an ophthalmologist regulated by the State of South

24 Carolina and I want to use Opternative's technology to

25 help me write prescriptions, then I can do that. Nothing

1 in South Carolina's law and nothing that LLR would do
2 under this law would permit it to do could allow them to
3 bring a complaint or allow anyone else to bring a
4 complaint against that ophthalmologist that the board
5 would then have to decide. If I'm an ophthalmologist
6 licensed in South Carolina and I tell my customers or I
7 tell my patients, you know what, this is good technology.
8 It makes things quicker. I can't write a prescription
9 solely based on that but if you come in and I'll take a
10 look at your eye, perfect. That will be fine. I'll do
11 that.
12 Now, is that the exact business model that
13 Opternative believes it has a constitutional right to?
14 No. It's not that model. But you can still use
15 Opternative technology. And the idea that there is
16 something about the business model that's sacrosanct is
17 just not true and our briefs are filled with cases where
18 somebody wants to do business a certain way and either a
19 law that is perfectly constitutional says no as long as
20 that law is based on some rational basis.
21 Now, they attack rational basis by saying there are
22 hypothetical ways that folks can get around the law and
23 not get an eye exam. Well, I presume it's possible for
24 persons to get around any law at any time anywhere if
25 they are creative enough. And I don't think the

1 legislature believes that this particular statute -- I
2 can't really speak for the legislature, but if you look
3 at any statute they pass, it is possible to work around
4 it. That does not make the statute unconstitutional.
5 In other words, if we look at what the purpose of
6 the statute is to promote eye health, protecting
7 patients, patients, not the ophthalmologists, not
8 optometrists and certainly not Opternative, to protect
9 patients of ophthalmologists and optometrists to
10 unwittingly put their eye care at risk by obtaining a
11 prescription for corrective lenses without a
12 comprehensive eye exam. Presumably odds are better if
13 you're in an office you're gonna get a comprehensive eye
14 exam. It's certainly the case if you do it over the
15 Internet for an ophthalmologist that's not even in your
16 hometown that they say is an inconvenience to drive. If
17 you want to drive from here to Oconee County to go get
18 your eye exam, good luck. No. The legislature says
19 that's not how we are going to do business here because
20 we think that's bad for eye health.
21 The legislature gets to make that call. And the
22 fact that the governor vetoed it and that the act, that
23 veto was overridden, overridden indicates the legislature
24 felt pretty good about it. Now, were they being foolish
25 or were they being wise? I don't know. But that's not

1 at issue for this Court. The Court has a very narrow
2 restricted view whether the statute or ordinance bears a
3 reasonable relationship to any legitimate interest of
4 government. Not is it a fool proof plan to ensure eye
5 health across the state. If there is such a plan, we
6 would be delighted to hear it.
7 Similarly, with regard to equal protection the
8 statute, the claim, the rule is clear. In reviewing the
9 statute challenging protection grounds great deference is
10 given to the classification created. We sustain as
11 supported by any reasonable hypothesis and not plainly
12 arbitrary. They overstate the case by saying all other
13 professions are free to use any other mode they want.
14 That's also not true. Just take a look at Title 40.
15 There are plenty, plenty, plenty of regulations of how
16 physicians do their work and how they apply standard of
17 care and this court sees it every day in the medical
18 malpractice claims that it reviews.
19 At a momentary glance at Title 40 will confirm that
20 not just for the physicians, not just with
21 ophthalmologists, not just with optometrists. With any
22 manner, with any manner of professional including I would
23 say the law, although we're not a Title 40 profession.
24 One thing that you should take today, one thing is
25 for sure. Opternative has no profession, at least not

1 one that we regulate. And I would say that this: Unlike
2 Joseph, there is not one ophthalmologist that's a
3 plaintiff here. It's a business trying to protect a
4 business model. To protect it it has a lot to say about
5 the greedy optometrists who want to protect their
6 business model. Well, look in a mirror. What's their
7 interest?
8 The one group I would say that has no business
9 interest in whether or not you rule for against is LLR.
10 We are the only ones here who don't have a dog in the
11 fight other than we have the duty, sad though it may be,
12 to defend the constitutionality of a statute that we have
13 the duty to enforce. That's why we are here.
14 THE COURT: Thank you. Any replies as to any
15 issues?
16 MR. SHEALY: Your Honor, just briefly. I do want to
17 make clear because the suggestion was made that this law
18 was passed at the behest of optometrists to regulate
19 ophthalmologists but it applies to both on its face and
20 what we are talking about is within the scope of practice
21 of both optometrist and ophthalmologists. I will also
22 just briefly say that the suggestion that there is an
23 issue created here with respect to telemedicine is
24 illusory because the telemedicine act is a means of
25 bringing a doctor to a patient using technology. What's

1 going on here is technology is interacting with a patient
2 and a doctor is a step removed from that. There is no
3 interaction between the doctor and the patient and that's
4 the problem.
5 If technology is developed that allows all of the
6 tests that would comprise a comprehensive eye examination
7 to be done remotely, then there's not an issue. The only
8 technology that's been developed that allows for some
9 sort of remote interaction is an eye refraction just
10 testing how far out of focus your eyes are. But in terms
11 of testing, the other tests that have to be done in a
12 comprehensive eye examination, that has to be done in
13 person. It can't be done otherwise and those are the
14 tests that reveal all manner of diseases of the eye and
15 of the whole body. So I just wanted to clarify those
16 things with you.
17 THE COURT: All right. Well, I am going to
18 obviously take this under advisement and I will accept
19 proposed orders from you all. You can e-mail those. My
20 law clerk is out. E-mail those to me. How much time do
21 you think you need?
22 MR. McNAMARA: We could submit by Monday, Your
23 Honor.
24 THE COURT: Well, I don't need them, that proposed
25 order that soon so you all don't have to stay up all

1 weekend working. I don't need them by Monday. Actually
2 I'll be on vacation next week so...
3 MR. MATTHEWS: 30 days, Your Honor?
4 THE COURT: You said 30. 20, 30 days?
5 MR. MATTHEWS: At your pleasure.
6 THE COURT: 20 days is fine.
7 MR. MATTHEWS: Thank you, Your Honor.
8 MR. McNAMARA: Thank you, Your Honor.
9 MR. SHEALY: Thank you, Your Honor.
10 MR. WINDHAM: Thank you, Your Honor.
11 THE COURT: Thank you.
12 WHEREUPON, THE HEARING WAS CONCLUDED.
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1 CERTIFICATE OF REPORTER
2 (STATE OF SOUTH CAROLINA)
3 (COUNTY OF LEXINGTON)
4
5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of Common Pleas in and for the
10 State of South Carolina on the 4th day of October, 2017.
11 I FURTHER CERTIFY that the forgoing 42 pages
12 constitute a true and accurate record of said proceedings.
13 I FURTHER CERTIFY that I am neither related, counsel
14 to, nor of interest to any party hereto.
15 IN WITNESS WHEREOF, I have hereunto set my hand at
16 Lexington County, this 9th day of November, 2017.
17
18
19 Steven E. LeBlanc, Sr., R.P.R.
20 Eleventh Circuit Court Reporter
State of South Carolina.
21
22
23
24
25

Opternative, Inc. v. S.C. Board of Medical Examiners et al.
(Civil Action No. 2016-CP-40-06276)

Affidavit of Joshua A. Windham
in Support of Opternative, Inc.'s Motion for Summary Judgment

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Opternative, Inc.,	)	Civil Action No. 2016-CP-40-06276
Plaintiff,	)	
vs.	)	**AFFIDAVIT OF JOSHUA A. WINDHAM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
South Carolina Board of Medical Examiners,	)	
and	)	
South Carolina Department of Labor, Licensing, and Regulation,	)	
Defendants,	)	
and	)	
South Carolina Optometric Physicians Association,	)	
Defendant-Intervenors.	)	

2017 SEP -6 PM 4:05

I, Joshua A. Windham, having been duly sworn, depose and say:

1. My name is Joshua A. Windham. I am over eighteen years of age and fully competent to make this declaration, which I make based on my own personal knowledge and experience.

2. I am an attorney at the Institute for Justice, which represents Plaintiff Opternative, Inc. ("Opternative") in the above-captioned action.

3. I submit this Affidavit in support of Plaintiff's Motion for Summary Judgment.

4. Attached as Exhibit 1 to this Affidavit is a true and correct copy of excerpts from the transcript of the deposition of South Carolina Optometric Physicians Association Vice President and Legislative Chair, Michael Zolman, which was taken on August 2, 2017.

5. Attached as Exhibit 2 to this Affidavit is a true and correct copy of an e-mail chain and attachments forwarded by Angelia Smith Owens with the subject line "FW: FW: Kiosks and Online Eye Exams," which was used by Plaintiff as an exhibit at the August 2, 2017 deposition of Michael Zolman.

6. Attached as Exhibit 3 to this Affidavit is a true and correct copy of an e-mail chain last responded to by Michael Zolman with the subject line "Re: URGENT: Senate OVERRIDES Gov. Haley's veto of our bill, 39-3," which was used by Plaintiff as an exhibit at the August 2, 2017 deposition of Michael Zolman.

7. Attached as Exhibit 4 to this Affidavit is a true and correct copy of an American Academy of Ophthalmology policy statement titled "Frequency of Ocular Examinations," which was used by Plaintiff as an exhibit at the August 2, 2017 deposition of Michael Zolman.

8. Attached as Exhibit 5 to this Affidavit is a true and correct copy of excerpts from the transcript of the deposition of South Carolina Optometric Physicians Association Executive Director, Jackie Rivers, which was taken on August 1, 2017.

9. Attached as Exhibit 6 to this Affidavit is a true and correct copy of an e-mail chain forwarded by Angelia Smith Owens with the subject line "Fwd: SCOPA's Bill – How to Reference," which was used by Plaintiff as an exhibit at the August 1, 2017 deposition of Jackie Rivers.

10. Attached as Exhibit 7 to this Affidavit is a true and correct copy of an e-mail chain last responded to by Jackie Rivers with the subject line "FW: AOA Update on Opternative," which was used by Plaintiff as an exhibit at the August 1, 2017 deposition of Jackie Rivers.

11. Attached as Exhibit 8 to this Affidavit is a true and correct copy of an e-mail chain last responded to by Michael Zolman with the subject line "Re: Meeting Monday," which was used by Plaintiff as an exhibit at the August 1, 2017 deposition of Jackie Rivers.

12. Attached as Exhibit 9 to this Affidavit is a true and correct copy of an e-mail chain last responded to by Jackie Rivers with the subject line "RE: AOA Letter of Support," which was used by Plaintiff as an exhibit at the August 1, 2017 deposition of Jackie Rivers.

13. Attached as Exhibit 10 to this Affidavit is a true and correct copy of an e-mail chain and attachments forwarded by Jackie Rivers with the subject line "Fwd: SCOPA – Powerpoint presentation for PC," which was used by Plaintiff as an exhibit at the August 1, 2017 deposition of Jackie Rivers.

14. Attached as Exhibit 11 to this Affidavit is a true and correct copy of excerpts from the transcript of the Rule 30(b)(6) deposition of the South Carolina Department of Labor, Licensing and Regulation and the South Carolina Board of Medical Examiners through their joint designee, Chief Advice Counsel for the Department of Labor, Licensing and Regulation, Darra Coleman, which was taken on August 3, 2017.

15. Attached as Exhibit 12 to this Affidavit is a true and correct copy of an e-mail from Peter Candela with the subject line "Re: S.1016 'EYE CARE CONSUMER PROTECTION LAW,'" which was used by Plaintiff at the August 3, 2017 deposition of Darra Coleman.

16. Attached as Exhibit 13 to this Affidavit is a true and correct copy of an e-mail chain last responded to by Michael Zolman with the subject line "Fw: Governor Haley's Decision on The Consumer Eye Care Protection Bill," which was produced by Defendant-Intervenor during discovery in this case at Bates Nos. SCOPA 001257–001258.

17. Attached as Exhibit 14 to this Affidavit is a true and correct copy of an e-mail chain last responded to by Mark Kelley with the subject line "Re: S 1016," which was produced by Defendant-Intervenor during discovery in this case at Bates Nos. SCOPA 000086–000087.

18. Attached as Exhibit 15 to this Affidavit is a true and correct copy of an excerpt from the May 3, 2016 testimony of Holly Beeson on behalf of the Department of Labor, Licensing and Regulation before the Board of Medical Examiners, which was produced by Defendants during discovery in this case at Bates Nos. LLR 00000455, 00000573–00000574, 00000721.

19. Attached as Exhibit 16 to this Affidavit is a true and correct copy of the May 16, 2016 statement of former South Carolina Governor Nikki Haley explaining her veto of the "Eye Care Consumer Protection Law" (R.178 and S.1016), which is a self-authenticating public document made available online at the South Carolina State Library's Digital Collections archive: http://dc.statelibrary.sc.gov/bitstream/handle/10827/21260/GOV_Veto_S_1016_2016-05-16.pdf?sequence=1&isAllowed=y (last visited on September 1, 2017).

20. Attached as Exhibit 17 to this Affidavit is a true and correct copy of Defendant-Intervenor South Carolina Optometric Physicians Association's Answer to Plaintiff's First Set of Interrogatories.

FURTHER AFFIANT SAYETH NOT.

Joshua A. Windham

SUBSCRIBED AND SWORN TO
before me this 5th day of September, 2017, by Joshua A. Windham.

Notary Signature

360350

Notary Number

Gretchen I. Embrey
Commonwealth of Virginia
Notary Public
Commission No. 360350
My Commission Expires 8/31/2021

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 1

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

OPTERNATIVE, INC.,

Plaintiff,

vs. CASE NO. 2016-CP-40-06276

SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS,

and

SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING and REGULATION,

Defendants.

DEPOSITION OF: DR. MICHAEL W. ZOLMAN

DATE: August 2, 2017

TIME: 9:30 a.m.

LOCATION: Magna Legal Services
960 Morrison Drive
Suite 200
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Jessica R. Dixon

JOB NUMBER: 332543

it is fair to assume you understood the question unless you say otherwise?
A. Correct.
Q. If you don't understand the question, I just ask that you let me know and I will try to clarify as well as I can.
A. Okay.
Q. When you received the notice in front of you, did you understand it was in regards to a lawsuit?
A. Yes, I did.
Q. And what, if anything, did you know about that lawsuit?
A. I knew there was a lawsuit against our state regarding the constitutionality of the law we had just passed as far as Eye Care Consumer Production.
Q. When you say "we," who are you referring to?
A. "We" as in the South Carolina Optometric Association -- Physician's Association.
Q. Okay. Can I call it SCOPA for short?
A. Yes, that's fine.
Q. How is SCOPA involved in passing the law?

A. We were the ones who initially were considering moving forward with such a law. And we consulted with ophthalmologists within our state. And so that was to the extent of us at least getting our bearings to move forward with such a law.
Q. I want to circle back to that a little bit later.
Did you do anything to prepare for this deposition today?
A. I reviewed emails that were sent back and forth to you in regards to this lawsuit.
Q. Did you talk to anybody at all?
A. Just our attorney.
Q. Anybody else?
A. Did I talk to anybody else regarding this? No one outside of our SCOPA Board of Directors.
Q. If you don't mind me asking, who did you talk to?
A. It was our current president, our president elect, and we had a brief board meeting, but not all members were there. But everyone that was on the board expect for two doctors. Dr. Campbell and Dr. Taylor.

Q. You mentioned a few positions of people on the board. Can you give me the names of the people?
A. Yes. So our current president, Jennifer Zolman. Our president elect is Dr. Johndra McNeely. And our -- the rest of our board of directors are -- they are director positions within our board.
Q. And you spoke to those people in preparation for today?
A. Not in preparation. Only in regards to that we had a deposition coming up.
Q. You mentioned a board meeting. When was that meeting?
A. That was -- I'd have to look at my calender. Two weeks ago. I'd have to look at my calendar.
Q. About two weeks ago?
A. Yes.
Q. At the board meeting did you discuss anything other than the deposition?
A. Yes, we did. Just normal affairs that we have during a meeting.
Q. I want to learn a bit more about you. What do you do for a living?

A. I'm an optometrist.
Q. Forgive the obtuseness of the question. But what, in general terms, is an optometrist?
A. So an optometrist is an eye care provider who provides care for patients seeking vision improvement and ocular health treatment and management.
Q. What kind of services do optometrists provide, generally?
A. We provide prescriptions for eye glasses, contact lenses. We provide care for any number of ocular pathology. That's in general what we do.
Q. So to break it into kind of two categories. So I understand it is corrective vision on the one hand. And pathology on the other?
A. Correct.
Q. Do you work primarily out of your office?
A. I do.
Q. Is that pretty typical in optometry in your experience?
A. Yes.
Q. As far as the corrective vision, the

1 prescriptions, and the other prong you mentioned
2 there, what -- how much of your time each day would
3 you say is devoted to each of those -- allocated?
4 A. Me, personally?
5 Q. Sure. Let's start with that.
6 A. My practice is literally -- it is
7 50/50, roughly. We have a lot of patients coming
8 in hoping to get improved vision. The other is
9 more specific for, you know, some kind of pathology
10 of the eye.
11 Q. When you say "50/50," are you talking
12 about just sort of the number of minutes each day
13 or do you mean number of appointments?
14 A. I would say number of appointments.
15 Q. And do you happen to know whether
16 others operate in a similar way?
17 A. Within optometry there is different
18 modes of practice. So some I know do a lot more
19 pathology management and treatment. And I know
20 there is others that deal more with the refractive
21 care and corrective vision.
22 Q. Would you say your practice model,
23 though, is fairly typical of the rest of the
24 profession?
25 A. It is hard to say because there is so

1 many different types of practices that are within
2 optometry nowadays. Is it typical? I would say
3 probably. I mean, yes. But again, there is so
4 many variations of what or how an optometrist
5 practices these days, though.
6 Q. Would you say the majority of optometry
7 have something like a 50/50 split between pathology
8 and corrective lens care?
9 A. I would not and I'm surely speculating,
10 because again, there is so many different types of
11 practices.
12 Q. Fair enough. Are you familiar with the
13 American Optometric Association?
14 A. Yes.
15 Q. So what is the AOA?
16 A. American Optometric Association is an
17 association that is formed of optometrists. It is
18 an organization that we feel sets the standard of
19 care for how an optometrist practices. Every state
20 is an affiliate of the American Optometry
21 Association. Well, every state has an association.
22 Each association is an affiliate of the American
23 Optometry Association.
24 Q. What does it mean to be an affiliate?
25 A. I guess, on a national level, that is

1 our organization. Each state then has its own
2 association which is an extension of the American
3 Optometric Association.
4 Q. You mentioned that the AOA sets the
5 standard of care for optometrists. Does the AOA do
6 anything else?
7 A. They advocate for patients. The AOA,
8 they are very involved in, I guess, properly
9 legislating for our profession to ensure that, you
10 know, patients receive proper care. They have a
11 lot of, I guess, outreach as far as providing means
12 to give access to care and to those who may have
13 difficulty affording care.
14 Q. Anything else?
15 A. I would say that is the majority of
16 what the AOA does.
17 Q. You said that the AOA engages in proper
18 legislation. Can you unpack that a bit. What is
19 proper legislation?
20 A. I guess, legislation is -- our
21 profession is a legislative profession. We can
22 only practice to the extent of our laws. There is
23 always legislation that is brought up from time to
24 time, both on a national and a state level that can
25 sometimes potentially jeopardize patient safety.

1 patient health care. And so the AOA works within
2 legislation to, I guess, maintain a certain
3 standard of care that does not lessen.
4 Q. It sounded like you are describing the
5 AOA when legislation comes up. When legislation
6 comes up, do they also propose legislation?
7 A. They do.
8 Q. Do you have any examples in mind on
9 what legislations they've proposed?
10 A. I don't recall within recent memory.
11 Q. When did you join the AOA?
12 A. I joined the AOA when I first was a
13 student in optometry school. So that would have
14 been 2002. I'm trying to remember how old I am
15 now.
16 Q. Is that one of those things where they
17 give you a membership through your enrollment?
18 A. No, you have to sign up for it. They
19 have what they call American Optometric Student's
20 Association, The AOSA, and they present and
21 describe what the AOA is and offer membership in
22 school. If I'm not mistaken, it is free to join.
23 And then after you graduate, you have the
24 opportunity to transition into a member of AOA.
25 Q. Why did you join, originally?

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A. To have a -- the message that they send is, you know, to strengthen the profession within numbers. To be as much as we can on the same page on any aspects of our care.
Q. What does it mean to strengthen the profession?
A. You know, strength in numbers. It is one thing to personally want to accomplish something. But you know, when you have a strength in numbers you can accomplish a lot more.
Q. By "accomplish," are you referring to legislation or any other efforts?
A. Any other efforts.
Q. Today, what is your role in the AOA?
A. Today, I'm simply a member of the AOA.
Q. Has that always been the case?
A. Yes.
Q. Have you ever had any other responsibilities instead of just being a paying member?
A. No.
Q. Not any leadership positions?
A. Not within the AOA.
Q. Have you ever been a speaker for any AOA conference or event or done any research for

the AOA?
A. I have not.
Q. Are you familiar with the State Government Relations Committee at the AOA?
A. I am.
Q. What is that committee?
A. That is a committee that works with individual states regarding regulations within the state.
Q. When you say "it works with states," do you mean affiliates?
A. Yes, affiliates.
Q. Can we call it the SGRC for short?
A. Yes.
Q. The SGRC works with SCOPA?
A. Yes.
Q. And that is to promote various legislative efforts and so forth?
A. Yes.
Q. Have you ever dealt with that committee in any capacity?
A. Through email, yes. We work with them specifically for any type of legislation that we may be considering.
Q. When you say "we," are you referring to

SCOPA?
A. Yes, SCOPA.
Q. That raises a good question. What is SCOPA? If you don't mind explaining that in short.
A. So the South Carolina Optometric Association is an association of optometrists who share the same, I guess, values as the AOA.
Q. Are there any differences at all?
A. I would say there could be differences of opinion, but there are no -- I mean, you can't be a member of SCOPA without being a member of the AOA.
Q. So just to be clear, are there any SCOPA members who are not members of the AOA?
A. No.
Q. Okay. And does that mean that SCOPA members as a general matter support the same legislative initiatives and same advocacy and same standard of care and all of that?
A. Correct.
Q. Okay. So I take it you are a SCOPA member?
A. I am a member.
Q. What is the reason you joined,

initially?
A. For the same reasons I joined the AOA.
Q. When did you join?
A. Upon graduation. So that would have been 2006.
Q. At the time you joined, did you hold any leadership positions at all?
A. At the time I joined, no.
Q. Do you hold any today?
A. I do.
Q. What are those?
A. I am currently the vice president of SCOPA as well as the legislative chair for SCOPA.
Q. How long have you held those positions for?
A. One year.
Q. So let's take each individually. So have you been a vice president for one year?
A. Yes.
Q. So you were not a vice president before 2015?
A. Not of SCOPA.
Q. Okay. And did you do any work on legislation before 2015?
A. I did.

Q. You did. Okay. Was that in your capacity as the legislative director?
A. In 2015, I was a co-legislative director.
Q. With whom were you a co-legislative director?
A. Dr. David Mckenzie.
Q. Was he also a member of the board?
A. He was at that time.
Q. Okay. Can you give me a timeline so I'm clear.
How long were you the legislative director or co-director?
A. I began from 2015 to 2016 -- I was the co-legislative chair. From 2016 to present, I'm the legislative chair.
Q. Okay. How did you end up in the legislative chair position?
A. I was asked by our current president.
Q. How did you end up in the co-legislative chair position?
A. I was asked by the then SCOPA president, Michael Campbell.
Q. Why did he ask you?
A. I don't know. He liked my smile. When

he became president he was a big advocate of putting -- as he says, the right people in the right seats on the bus. And for one reason or another, he thought I would do a good job in the legislative capacity and I accepted.
Q. So you don't have any sense of why he might have picked you?
A. I mean, I've been on the board for a while. We within our SCOPA board -- we have different directorship positions. And I had done several of those positions, and honestly, I don't know why he asked me to do it. But maybe he didn't know anyone else to do it or what the case may be. And I wanted to help my profession the best I could and so I accepted.
Q. Fair enough. How long were you on the board before he approached you?
A. I can't remember. I'm now going on my -- I don't recall exactly. Forth or fifth year on the board.
Q. So just help me do the math here. When would you have started on the board?
A. I would have started I believe in 2013. Yes, I believe that is correct.
Q. And you were tapped as legislative

co-chair in 2015? Is that January 1st or after that?
A. Our board starts a new cycle once a new president is elected. And that happens at our annual conference and that is usually in either late August or early September.
Q. So to the best of your recollection, you were probably appointed to the co-chair position sometime in late summer?
A. It would have been once Dr. Campbell became president which was in 2015. So would have been -- yes. I may be off a year here. I can't do the math in my head right now. But regardless, I was appointed or asked to do the position when Dr. Campbell became president.
Q. Which was in 2015?
A. Yes.
Q. Okay. What does your legislative responsibilities consist of?
A. I guess my capacity of legislative chair is I am responsible for being aware of any new legislation that may come up that has anything to do with vision or eye health and, let our board know of those new legislation or bills.
I'm also responsible for trying to

establish a grassroots effort. Making sure that our optometrists know their legislative people and making sure our optometrists know they are constituents of certain legislators within South Carolina.
Q. You mentioned monitoring legislation. How do you monitor?
A. We work with a law firm who monitors and tracks any new legislation that comes up, as well within the SGRC. They help monitor as well as any new legislation that comes up and that is based on key words.
Q. So the AOA's SGRC -- do they send you updates on legislation?
A. They do, and that is something they just recently started.
Q. When is the earliest they started?
A. That was 2016. Just last year.
Q. As far as SCOPA goes, do you get legislation for just South Carolina or nationwide?
A. We get updates based on -- it is specific to South Carolina.
Q. And you also mentioned grassroots efforts. Do you work with anybody -- SCOPA's leadership board, employees, so forth on the

grassroots stuff?
A. I do.
Q. Who do you work with?
A. Within, I guess, the structure of our legislative positions that we have. I am the chair and then I have an elect committee. Each local society that we have has a director for each of those societies. Some societies are larger than others. So some societies have more than one director.
Others are smaller and have just one director of their society. But I work with them to help establish grassroots efforts within the entire state.
Q. So just to get a sense of the hierarchy here. Is it fair to say there is the AOA nationwide and the AOA has got state affiliates, right? So SCOPA is a state affiliate. And then you've got more local societies that are affiliates of you?
A. Correct.
Q. Are those local societies also affiliates of you?
A. Correct. You cannot be a member of the local society without being a member of the AOA.

Q. And on the grassroots stuff still -- do you work with Ms. Rivers at all, Jackie Rivers?
A. Yes.
Q. What does she do on the grassroots?
A. She helps with, I guess, a lot of the recordkeeping. Knowing which legislators have what we consider key people and maintaining contact information so that we can easily assess those individuals.
Q. When you say "assess," what do you mean by that?
A. So if we needed to contact a legislator because of any number of reasons she would know who our key person is as well as the constituents.
Q. Is it fair to say she would know the right optometrist in the right area to contact the right legislator?
A. Yes.
Q. And does Ms. Rivers help at all on the legislative stuff?
A. She does.
Q. What does she do?
A. So she is very -- if we have -- say any events in Columbia, whether it is a caucus or helping distribute information to legislators --

she is oftentimes there to help us do that.
Q. When you say "helping distribute information to legislators," what do you mean?
A. So if there is any particular piece of information that we feel that we want them to understand as far as our point view or concerns, it is not uncommon that we would perhaps draft something to give to her to pass out to those legislators.
Q. And that is in the capacity of not just legislation that you are monitoring, but is it also true she helps out on legislations you propose?
A. Yes.
Q. Do you know what the Tim Burrow Legislative Award is?
A. Yes. That is an award that we give out to an optometrist who is a member of SCOPA who has demonstrated a certain amount of passion for legislative efforts, I would say.
Q. Have you ever won it?
A. I have.
Q. When did you win it?
A. I won it last year.
Q. Why did you win it?
A. I would assume it was because of the

work that I did to reorganize our grassroots efforts that, I guess, needed to be done, and try to organize our legislative grassroots a bit better. And perhaps even the work that I did with the Eye Care Consumer Protection Act.
Q. What is that law?
A. The Eye Care Consumer Protection Law is the one we passed just last year that helps to protect vision correction and eye health and maintain the standard of care for the citizens of South Carolina.
Q. Which standard of care does it maintain?
A. The standard of care it maintains is with, I guess, was long established as the way to conduct an eye examination.
Q. Since SCOPA has the same standard of care as the AOA, or at least takes it from the AOA, is it fair to say that the ECCPL, Eye Care Consumer Protection Law, comes from AOA?
A. Correct. We based our law on the model language that they provided.
MR. WINDHAM: So I'm asking the court reporter to mark this as Exhibit 2. Just take a minute to look over this for me.

1 status definition from the ECCPL?
2 A. I was.
3 Q. Is it fair to say that the first part
4 of that definition for the word "however" defines
5 visual status in the second part --
6 MR. SHEALY: Object to the form, but
7 you may answer.
8 THE WITNESS -- it is.
9 MR. WINDHAM: Okay.
10 BY MR. WINDHAM:
11 Q. Is it possible to get a visual status
12 without conducting an examination of the ocular
13 health of the patient?
14 MR. MATTHEWS: Object to form.
15 MR. SHEALY: Object to form.
16 THE WITNESS: Repeat the question
17 again.
18 MR. WINDHAM: Sure. Is it possible to
19 get an ocular status without getting the ocular
20 health of the patient?
21 MR. SHEALY: Object to form.
22 MR. MATTHEWS: Object to form.
23 THE WITNESS: Not that I know of.
24 BY MR. WINDHAM:
25 Q. So when you are describing a

1 comprehensive eye health exam as consisting of an
2 assessment of the ocular health of a patient and
3 individual status, do you mean those to be the same
4 thing?
5 MR. SHEALY: Object to the form.
6 MR. MATTHEWS: Same objection.
7 THE WITNESS: I'm sorry. Repeat that
8 again.
9 BY MR. WINDHAM:
10 Q. You described a comprehensive eye
11 health exam as consisting of an assessment of the
12 ocular health of a patient and the visual status.
13 Are those different?
14 A. They are different. I'm sorry. Yes.
15 Q. How are they different?
16 A. Once again, it is an assessment of more
17 of anatomy. And the other is, again, more of an
18 assessment of the visual acuity, accomodation of
19 amplitudes, and occular alignment.
20 Q. So the latter -- visual acuity,
21 alignment and so forth -- do you need to get an
22 ocular health profile to get those things?
23 A. Potentially. It depends on whether or
24 not there are any medical reasons for ocular
25 alignment not being, I guess, correct.

1 Q. How long does a comprehensive eye exam
2 take?
3 A. It varies depending on the provider
4 providing that care. I can say my office -- we
5 provide a slot of 30 minutes to do that.
6 Q. Does that exam include a visual status?
7 A. It does.
8 Q. Okay. Have you ever renewed or
9 adjusted a patient's corrective lens prescription
10 without conducting a comprehensive eye exam?
11 A. The only time was in a specific
12 situation where there was patient who was in a
13 nursing home facility who was unable to come to an
14 examination because of her limited mobility and
15 receiving treatment in that facility.
16 And she had broken her glasses. So we
17 documented the situation and that was the only time
18 I recall of updating a prescription without an
19 examination.
20 Q. Was that prescription accurate?
21 A. I can't say for certain because I
22 didn't perform a comprehensive eye examination.
23 But I wanted to be able to provide her with some
24 form of correction since she was unavailable to
25 physically come to the office so that we could, at

1 a very minimum, improve her quality of life.
2 Q. Was she a patient of yours?
3 A. She was.
4 Q. Is it fair to say that providing that
5 prescription improved her quality of life?
6 A. I would think so because she had a
7 family member reach out to us asking if we would
8 help in this particular situation.
9 Q. Did you ever feel like you were putting
10 her health at risk?
11 A. In that one instance, no.
12 Q. Did you feel you were violating any
13 standard of care?
14 A. In that instance, no.
15 Q. Have you ever been aware of any other
16 South Carolina eye health professional doing
17 anything similar?
18 A. I do not know.
19 Q. Still looking at Exhibit 2. Do you see
20 Paragraph 4, on the first page which starts with
21 "Kiosk means"...
22 A. Yes, I do.
23 Q. Could you just read that definition for
24 me?
25 A. "Kiosk means automated equipment or an

1 automated application, which is designed to be used
2 on a phone, computer, or internet-based device that
3 can be used in person or remotely to provide for
4 refractive data or information."
5 Q. What is your understanding of that
6 provision?
7 A. Exactly as it defines.
8 Q. Fair enough. Do you know who came up
9 with the language for this definition?
10 A. It would have been the AOA.
11 Q. Is this the same language of the AOA's
12 model legislation?
13 A. I would have to review that legislative
14 or the model language, but I believe that to be
15 true.
16 Q. The definition mentions refractive
17 data. What is refractive data?
18 A. Refractive data would be information
19 needed to improve an individual's eyesight or
20 vision, I should say.
21 Q. Let me ask you this: What does
22 "refractive" mean?
23 A. Refraction or refractive is just a
24 physics term that refers to bending light in a
25 certain manner.

1 Q. So refractive data refers to how light
2 bends in the eye, more or less?
3 A. Yes.
4 Q. I forgot to say if you need to take a
5 break just let me know. I know this can be a bit
6 tiresome.
7 A. Okay.
8 Q. As an optometrist, can you just walk me
9 through how you go about obtaining that information
10 about how light bends in the eye from a patient?
11 The refractive data.
12 A. There is a multitude of ways of doing
13 it. One way is using auto refractive -- an auto
14 refractor to give us a starting point to, I guess,
15 finalize what ultimately will become a prescription
16 after other measurements are taken.
17 Another way is by doing what is called
18 a refraction. And that is when we are basically
19 manually using light, and, I guess, assessing how
20 light bends based on lenses that we put in front of
21 an eye.
22 Q. What lenses? Are you referring to the
23 lenses in a phoropter?
24 A. A phoropter, yes.
25 Q. What is a phoropter?

1 A. A phoropter is a device we use that has
2 a multitude of lenses that allow us to determine
3 partially what a patient's prescription might
4 ultimately become.
5 Q. Can you just explain how a phoropter
6 works?
7 A. There is a number of dials that when
8 you turn will give a different lens. It will put a
9 different lens power in front of the eye.
10 Q. As an optometrist, do you turn the
11 dials yourself?
12 A. I do.
13 Q. And just paint a picture for me.
14 So when the patient is in your office
15 and you are using a phoropter, where is the patient
16 and what is the patient looking at?
17 A. The patient is sitting in an exam
18 chair. The phoropter is placed in front of the
19 patient so that are looking through the oculars of
20 the phoropter. They are facing an acuity chart and
21 I am between the patient and the acuity chart and
22 making adjustments to the phoropter based on
23 subjective information that I get from them.
24 Sometimes, though, I will also use a
25 retina scope and sit just off to the side of the

1 patient and shine light in through the oculars so I
2 can see how the light bends to help me further
3 assess what the prescription will ultimately
4 become.
5 Q. Is it fair to say that you use a
6 phoropter every time?
7 A. Yes.
8 Q. Okay. What images of the patient are
9 you looking at?
10 A. It depends on the patient, but the
11 majority of the times it is an acuity chart.
12 Q. What is an acuity chart?
13 A. It is chart that has different-sized
14 letters that we use to assess the visual acuity of
15 the patient.
16 Q. How is that chart displayed?
17 A. In my office we use an electronic
18 acuity chart that we have on the wall. We also
19 have different types of charts that we use
20 depending on the level of visual acuity the patient
21 may have. Because sometimes the visual acuity
22 might be so great they are unable to see the
23 biggest letter on that chart. In other cases we
24 have to use different charts.
25 Q. You said it is projected on that wall?

A. It is not projected. It is on a monitor.
Q. Is that on a computer monitoring screen?
A. It is on a computer monitor screen. We purchased this equipment from a vendor within the eye care field.
Q. How do you switch the images on the screen?
A. With a remote control.
Q. You just click in response to the patient's responses?
A. Correct.
Q. You call those subjective. What does that mean?
A. It is the patient's answer to questions I'm asking.
Q. Okay. What questions are you asking? Can you give me some examples.
A. For example, which image is more clear? Can you give me an idea of the quality of image that you are seeing? You know, are you seeing multiple images? Are you seeing double? These are all the questions that I might ask.
Q. So we are still talking about how to

get refractive data.
How does this process give you the refractive data?
A. It is going to give me information based on what the manifest refraction would be. That's one piece of information. We also take into account the subjective information that the patient gives us and we also look at, you know, eye alignment, accomodation of amplitudes to ultimately determine prescription.
Q. And this is all based on patient responses?
A. Not all.
Q. What's not based on the patient's responses?
A. Manifest refraction.
Q. Can you explain that?
A. Manifest refraction is a refraction that I'm not asking the patient anything. This is based on my training and what I see and how light bends based on a more manual refraction that I need to do.
Q. So you are gathering information at this point. Do you write the information down somewhere?

A. Yes.
Q. What do you write it on?
A. On my computer records.
Q. So you enter the information into like a form on the computer?
A. Yes.
Q. We are still talking about a kiosk. Is a phoropter a kiosk?
A. It is not.
Q. Why not?
A. Because it is not a phone. It is not a computer, and it is not an internet-based device used to help determine a refraction.
Q. Is that the only reason a phoropter is not a kiosk?
MR. SHEALY: Object to form.
MR. MATTHEWS: Object to form.
THE WITNESS: Again, kind of silly. I would have to say based on the definition of a kiosk. That is why a phoropter is not a kiosk.
BY MR. WINDHAM:
Q. Looking back at Page 2 of Exhibit 2. Do you see Paragraph C which starts "A prescription for spectacles"?
A. Yes.

Q. Could you read that provision for me?
A. "A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk."
Q. What is your understanding of that language?
A. That a prescription is not entirely based on refractive error of the human eye, and that it can't be generated by a kiosk.
Q. Do you know who came up with that language?
A. I do not. I would assume the AOA.
Q. Is it fair to say it came from the AOA's model legislation?
A. I would say so.
Q. Is it okay if I call it a Kiosk Restriction for short so we know what we are talking about?
A. I assume so, yes.
Q. Does the Kiosk Restriction prevent you from using a phoropter to renew or adjust a patient's previous corrective lens prescription?
MR. SHEALY: Object to the form.
MR. MATTHEWS: Same objection.

1 Ophthalmology recommends that an eye examination
2 should first be at the age of 40. I assume that to
3 be if I remember correctly.
4 Q. Based on your understanding, does the
5 AAO recommend that the patient receive a
6 comprehensive eye exam every single year?
7 A. I don't recall.
8 MR. WINDHAM: I'm asking the reporter
9 to mark this as Exhibit 3.
10 Q. I have just handed the witness what has
11 been marked as Exhibit 3.
12 Sir, do you recognize this document?
13 (PLF. EXH. NO. 3, Policy Statement,
14 Frequency of Ocular Examinations, was marked for
15 identification.)
16 A. I do not.
17 Q. Do you see at the top there where it
18 says this document is an American Academy of
19 Ophthalmology Policy statement regarding the
20 Frequency of Ocular Examinations?
21 A. I do see that.
22 Q. Do you see the paragraph towards the
23 bottom under the section titled "Evaluation," which
24 starts with adults with no signs?
25 A. I do.

1 Q. Would you do me a favor and read that
2 paragraph to yourself for me and let me know when
3 you finish?
4 A. Okay.
5 Q. Is it fair to say that this paragraph
6 recommends that patients receive a comprehensive
7 eye health exam at different intervals depending on
8 their age and health factors?
9 A. Yes.
10 Q. Are some of those intervals longer
11 every single year?
12 A. Yes.
13 Q. In fact, are there any of the
14 recommended intervals in that paragraph that are as
15 frequent as every single year?
16 A. Yes.
17 Q. Which?
18 A. For individuals 55 to 64, the
19 recommended intervals for evaluation is one to
20 three years. And for individuals 65 and older, the
21 American Academy of Ophthalmology recommends an
22 examination every one to two years, even if absent
23 of symptoms.
24 Q. Do you have any reason to doubt that
25 this is an inaccurate statement of the standard of

1 care among ophthalmologists for the recommended
2 frequency of eye health exams?
3 A. I do not. I'm not an ophthalmologist.
4 Q. Does the ECCPL govern ophthalmologists?
5 MR. MATTHEWS: Object to form. Please
6 answer.
7 MR. SHEALY: Object to form.
8 THE WITNESS: The Eye Care Consumer
9 Protection Law is the law in South Carolina which
10 both optometrists and ophthalmologists must abide
11 by.
12 BY MR. WINDHAM:
13 Q. So it is fair to say that
14 ophthalmologists have to comply with the ECCPL?
15 A. Correct.
16 Q. And you helped to get that law passed?
17 A. I did.
18 Q. Earlier we talked about your
19 legislative role on the SCOPA board and we touched
20 on the AOA's SGRC.
21 Do you recall attending a webinar in
22 2015 titled "Online Vision Screening,
23 Self-adjusting Glasses, and Kiosk and What ODs Need
24 to Know"?
25 A. I do.

1 Q. What do you remember about that
2 webinar?
3 A. That was probably one of my first real
4 introductions or first time online eye exams and
5 kiosks were becoming, I guess, a thing within the
6 eye care -- in the world of eye care.
7 Q. When you say "a thing," what do you
8 mean?
9 A. Well, it is new technology. I
10 previously did not know much about it until I was
11 made aware from this meeting.
12 Q. After you saw the webinar, did you do
13 anything based on that information?
14 A. Yes. I guess my initial concern was
15 that we needed to -- as a state organization be
16 aware of this coming technology and express some, I
17 guess, some thoughts or concerns to our SCOPA board
18 at the time that we should discuss this new
19 technology.
20 Q. Why was it important that the SCOPA
21 board be aware of the technology?
22 A. There is a number of reasons, but one
23 of the most concerning is we felt it was
24 undermining the standard of care for patient care.
25 MR. WINDHAM: I'm asking the court

reporter to mark this as Exhibit 4.
(PLF. EXH. NO. 4, Email Chain, was marked for identification.)
Q. I'll just give you a moment to look through this document, because I know it is big.
MR. MATTHEWS: I'll tell you what. While you are doing that I'm going to take a break.
MR. WINDHAM: Off the record.
(Off the record.)
BY MR. WINDHAM:
Q. So Dr. Zolman, we are looking at Exhibit 4, which I believe you had a chance to look at.
A. Yes.
Q. This is an email chain, correct?
A. It is.
Q. What is this email chain?
A. This is an email chain that, I guess, kind of started the whole idea of us getting together some kind of legislation, particularly as far as the Consumer Protection Eye Care is concerned.
Q. Do you see the first page there that starts at the very top, "From: Michael Zolman"?
A. Yes.

Q. Do you recognize that email?
A. I do.
Q. Did you send that email in response to the SCRG webinar we were just talking about?
A. I did.
Q. Why?
A. For a number of reasons that we had concerns about. Technology and how it potentially lowered the standard of care within our profession. And then I had made some, I guess, hypothetical remarks also within that email.
Q. What were those hypothetical remarks about?
A. Well, you know, just as far as what, I guess, potentially -- how it could potentially affect our profession on, I guess, a business front. You know, looking at -- you know, kind of reading over these remarks now, some are a bit farfetched.
And during this process, you know, I realized, you know, that is not the reason that we drafted the language anyway, because again it was drafted because of our concern for public health and safety.
Q. Is it fair to say in this email you

were concerned with how technology presented in the SGRC webinar might impact the business side of the optometry profession?
MR. MATTHEWS: Object to form.
MR. SHEALY: Object to form.
BY MR. WINDHAM:
Q. Is that a yes?
A. I would say, yes. Just based on my hypothetical.
Q. Do you see the line where you say that AOA's president, David Cockrell, believed 1-800 Contacts to be the single greatest threat to our profession?
A. Yes.
Q. In what sense do you understand him to be saying that 1-800 Contacts was a threat?
A. Because we had learned that they were looking for legislators that would potentially allow venders to change a contact lens prescription.
Q. You are doing some forecasting in this email.
Was it your understanding of President Cockrell's threat comment that it was a threat to the industry itself?

MR. MATTHEWS: Object to the form. Please answer.
MR. SHEALY: Object to the form.
THE WITNESS: It was more of a threat to patient safety.
BY MR. WINDHAM:
Q. When you wrote this email, was it your understanding that President Cockrell's remark referred to the business side of optometry?
A. No.
MR. SHEALY: Object to the form.
BY MR. WINDHAM:
Q. Do you see the line where you say "I feel the issue of kiosks and online eye exams are an even greater threat." It is in the same paragraph in the end.
A. I'm sorry. Yes, I do see that.
Q. What did you mean?
A. I thought that it is more of a threat because that potentially could affect a lot more patients than just a patient who wants to wear contact lenses.
Q. When you wrote this email, did you have any concern that kiosks or online eye exams would impact the business side of optometry?

A. At the time I had concerns, yes.
Q. When you wrote this email did you have Opternative in mind?
A. At the time Opternative was probably the most well-known of those online internet companies.
Q. Is it fair to say that you had Opternative in mind when you wrote this email?
MR. MATTHEWS: Object to form. Please answer.
THE WITNESS: They were one of them, yes.
BY MR. WINDHAM:
Q. Do you see the second to last paragraph there, the line where you say that "Total eye care is a $35,000,000,000 industry, $23,000,000,000 coming from glasses and CLs"?
A. I do.
Q. What are CLs?
A. Contact lenses.
Q. Based on that comment, is it fair to say when you wrote this email you believed that glasses and contact lens sales made up the majority of the revenue in this industry?
MR. SHEALY: Object to form.

MR. MATTHEWS: Same objection.
THE WITNESS: No.
BY MR. WINDHAM:
Q. Can you explain why?
A. Because not all practices generate their income based on glasses and contact lens sales.
Q. In the sentence we were talking about the $35,000,000,000 sentence. You refer to total eye care.
What is total eye care?
A. That is going to be both the, I guess -- the medical side of optometry as well as the vision side of optometry.
Q. And when you say that total eye care is a $35,000,000,000 industry, does that mean that the $35,000,000,000 is the total revenue of the industry?
A. I'm not certain. This is taken from the AOA presentation from the SGRC presentation.
Q. I'm just trying to make sense of your understanding of the language as you used it in this email.
A. I took that then to just like it says: Total eye care being a $35,000,000,000 industry as

far as, I guess, revenue generated.
Q. The $23,000,000,000 coming from glasses and CL sales in this sentence -- is that the majority of a $35,000,000,000 industry you are referring to?
A. Yes.
Q. In this email, did you forward anything along to the board?
A. I believe I did. It was just a -- I believe it was an actual webinar or the presentation that the SGRC gave us.
Q. And that included the AOA's model legislation, right?
A. Correct.
Q. Did you make any recommendations to the board in this email?
A. That we discussed.
Q. Did the board do anything based on that recommendation?
A. We discussed.
Q. Do you see on the first page the email from Wayne Cannon?
A. Yes, I do.
Q. What is Wayne Cannon saying in that email?

A. He said "The SCOPA board voted to evaluate the passing of a consumer protection legislation. The AOA suggested bill is attached for your review. We will need to meet soon to evaluate our strategy."
Q. So the SCOPA board actually held a vote and as an organization committed to pursuing Consumer Production Legislation?
MR. MATTHEWS: Object to the form.
THE WITNESS: We did.
BY MR. WINDHAM:
Q. Did that happen based on the email that you sent?
MR. SHEALY: Object to form.
THE WITNESS: I don't know if it was solely based on the email I sent.
BY MR. WINDHAM:
Q. Do you think your email inspired your vote to the board?
MR. SHEALY: Object to form.
THE WITNESS: I would hope so.
BY MR. WINDHAM:
Q. Fair enough. Was the FCCPL intended to prevent the use of Opternative to write corrective lens prescriptions?

1 MR. MATTHEWS: Object to form.
2 MR. SHEALY: Object to form.
3 A. No.
4 Q. Was the ECCPL intended to prevent the
5 use of online eye exams?
6 A. No.
7 Q. All right.
8 MR. WINDHAM: I'm asking the court
9 reporter to mark this as Exhibit 5.
10 (PLF. EXH. NO. 5, Email Chain, was
11 marked for identification.)
12 BY MR. WINDHAM:
13 Q. Just take a minute to go through that
14 and let me know if you recognize it.
15 A. I do.
16 Q. What is this email chain?
17 A. This is an email chain it looks like
18 that involved myself, our lobbyist at the time, a
19 few other board members, regarding meeting the
20 senate and house staff regarding the Eye Care
21 Consumer Protection Act.
22 Q. Was this during the legislative
23 process?
24 A. Yes.
25 Q. What was being discussed in the email

1 chain itself?
2 A. Looks as if this is just us discussing,
3 or trying to work on, I guess, language.
4 Q. When you say "us" do you mean the board
5 and your lobbyist?
6 A. Yes, I do.
7 Q. On Page 3 at the bottom right. It says
8 SCOPA 000811?
9 A. Yes.
10 Q. Do you see the line that reads -- it is
11 the last paragraph of the email there. Do you see
12 the line that reads "I feel if there are no
13 penalties, then nothing has really been
14 accomplished in preventing online eye exams, which
15 is the main concern for the future"?
16 A. I'm sorry. I don't see where.
17 Q. That is fair. So in the middle of
18 SCOPA 000811, there is a paragraph that starts with
19 "Perhaps we would be more successful"?
20 A. "Working with LER"?
21 Q. Yes. Do you see where it says "I feel
22 if there are no penalties, then nothing has really
23 been accomplished in preventing online eye exams,
24 which is the main concern for the future"?
25 A. I do see that.

1 Q. Based on that language is it fair to
2 say the ECCPL was intended to prevent the use of
3 online eye exams?
4 MR. SHEALY: Object to the form.
5 THE WITNESS: Yes. But the reason for
6 that was because it neglects the ocular health
7 examination. So it puts the public at risk.
8 BY MR. WINDHAM:
9 Q. How do online eye exams do that?
10 A. Because it is not a comprehensive eye
11 exam.
12 Q. Okay. So just to be clear, an online
13 eye exam that doesn't involve a comprehensive eye
14 exam puts patients at risk?
15 MR. SHEALY: Object to the form. You
16 may answer.
17 THE WITNESS: Well, the problem is the
18 term "eye exam." It is online. You are not
19 getting an eye exam. And that is the deception
20 that we are concerned about to the public as it is
21 being marketed as such.
22 BY MR. WINDHAM:
23 Q. So are you familiar with the company
24 Opternative?
25 A. To some degree.

1 Q. Do you know how Opternative markets its
2 technology?
3 A. They do it a number of ways. They --
4 at one point were marketing as that they are able
5 to do a faster eye examination then the, I guess --
6 the standard eye examination that you get from an
7 optometrist or ophthalmologist.
8 Q. So this chain of emails, you are
9 working on amended language to the ECCPL and you
10 say that the goal in the paragraph we just
11 discussed is preventing online eye exams. Did
12 Opternative advertise itself at this time as
13 providing an online eye exam?
14 MR. MATTHEWS: Object to form.
15 A. I don't recall.
16 Q. If there was a company that had
17 Opternative's same business model, that did not
18 advertise itself as providing an online exam, would
19 you have tried to prevent that company from
20 operating with this bill?
21 MR. MATTHEWS: Object to form.
22 MR. SHEALY: Object to form.
23 THE WITNESS: If they maintain the same
24 standard of care of what they can get from an eye
25 care professional and what we consider the standard

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of care for eye exams then, no.
BY MR. WINDHAM:
Q. Can you just walk me through that a bit.
How could a company with the same business model of Opternative comply with this law?
MR. SHEALY: Object to the form.
MR. MATTHEWS: Object to the form.
THE WITNESS: They would have to meet the same standard of care of what an eye professional does in his office.
(PLF. EXH. NO. 6, Email Chain, was marked for identification.)
BY MR. WINDHAM:
Q. I'm handing the witness what's been marked as Exhibit 6. Just take a minute to look through that for me and let me know when you have finished.
A. Okay.
Q. Do you recognize this email chain?
A. I do.
Q. Can you just describe generally what it is?
A. This is an email chain that I'm trying to put everything in reference to when it happened.

This is when it looks like we just overrode the governor's veto.
Q. When you say "we," you mean SCOPA?
A. Yes, SCOPA.
Q. Can you turn to the last page of Exhibit 6. Do you see the line in the middle of the page that starts with "It is with the utmost pleasure"?
A. I do.
Q. Do you see where it says "It is with the utmost pleasure to announce that today, Opternative and 'eye exam' kiosks are now PROHIBITED BY LAW in the great state of SC!"
A. I do.
Q. What does that mean?
A. That means that based on the way Opternative conducts their business that they are prohibited by law in South Carolina because they don't meet the standard of care.
Q. Do you see the line in the next paragraph where it says "This is what organized Optometry looks like at it's best! It took grassroots efforts of all of you contacting your legislators to make this happen as well as the tireless of your SCOPA Board of Directors working

in conjunction with AOA to make this possible."
A. I do.
Q. What does that mean?
A. Exactly what it sounds like. We work very hard on a grassroots efforts to get legislation brought about working with AOA in order to ensure public safety in regards to vision and eye care.
Q. Was this email sent out to the SCOPA membership?
A. Yes.
Q. Was this after Governor Haley's veto?
A. Yes.
Q. What does the line above your name at the bottom of the email mean?
A. "'Good-bye Opternative.'"
Q. What does that mean?
A. It means that they are no longer able to conduct their business within our state, which we felt was potentially harmful to the eye care and vision safety of our citizens.
Q. Earlier you testified that patients coming in for corrective lenses constitutes about 50/50 of your daily appointments?
A. In my personal practice.

Q. In a typical day at the office after you test those patients' vision, where do they walk after the appointment?
A. Repeat the question.
Q. After a patient comes in for a corrective lens and you do the testing we talked about earlier, where do they walk out of your office?
A. After the exam is over?
Q. Correct.
A. They are free to purchase glasses if they are so inclined.
Q. Where would they do that?
A. Either in our office or anywhere they choose that sells glasses.
Q. Are the eyeglasses on display in your office?
A. Frames are.
Q. How many?
A. In my office, I think I have roughly 500.
Q. Have you or anyone in your office ever attempted to sell those frames?
A. Yes.
Q. How often do you attempt those sales?

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A. Any time a patient could benefit from either improved vision or if there has not been a change in prescription. They may be scratched or damaged.

Q. Is it fair to say that when you write a prescription for new lenses, whether glasses or contacts or lenses -- is that when you make a sale?

A. Every so often.

Q. I'm just trying to nail down whether you do it every time or not.

A. Not if they already have some place they currently go to purchase their glassware elsewhere.

Q. Do you do it most of the time?

A. I'd say most of the time.

Q. If online eye exams like Opternative's were allowed in South Carolina and became commercially popular, how would they impact those glasses sales?

MR. SHEALY: Object to the form.

THE WITNESS: Well, any time you have increased competition there is a likelihood of sales dropping, but competition is not always bad.

BY MR. WINDHAM:

Q. In that situation where online eye

exams became popular, how would they impact your overall revenue stream at your practice?

MR. SHEALY: Object to the form.

MR. MATTHEWS: Object to the form.

THE WITNESS: Well, initially it would go down, but if there is undiagnosed health concerns that get missed and visual impairments become increased then revenue would go up because now I'm seeing more pathology.

In chronic care patients that have any number of eye diseases that need to be monitored more closely would then cause sales to go up -- revenue to go up.

BY MR. WINDHAM:

Q. I just have a few more questions.

A. Sure.

Q. Do you know the revenue percentage from frame sales at your practice?

A. I do not. I would have to review that information.

Q. Do you have a sense of whether it constitutes a majority of your revenue?

A. It is not a majority in my practice.

Q. So earlier we talked about the actual eye exam process, especially for corrective lenses

and you using an auto refractor and you also taking other measurements.

Can you just explain what those other measurements are?

A. The other measurements are potentially a manifest refraction. One that is not based on an auto refractor. We also measure ocular alignment. We also measure accommodation depending on complaints of the patient.

Q. You said you use a phoropter every time you are writing a prescription for corrective lenses. Do you use a manifest every time?

A. Not every time.

MR. MATTHEWS: Okay. Nothing further.

EXAMINATION

BY MR. MATTHEWS:

Q. Dr. Zolman, did you ever meet with any person from LLR during your advocacy in this bill?

A. We did.

Q. Did you specifically?

A. I don't recall.

Q. Okay. Do you remember who it was?

A. I don't recall the name.

Q. Okay. Right now, you as an optometrist, you are subject to regulation by the

Board of Optometry?

A. That is correct.

Q. Do you know if Opternative is?

A. I do not know.

Q. Well, let me ask you this. If you wanted to use the technology that Opternative offers and conduct a more comprehensive exam to address your concerns about eye care, you could do that, could you?

A. I could.

Q. You could write a prescription using Opternative's technology as long as you conduct an eye exam?

A. That is correct.

Q. So as of this moment, Opternative in your view, can conduct business in South Carolina and still be in compliance with the ECCPL?

A. That would be true.

Q. Okay. Well, Exhibit 4 that these gentleman handed you. On the bottom of the second page. First sentence reads "I don't need to tell any of you that this is potentially a huge threat to our profession but more importantly to the general public. Think of all the glaucoma, ARMD, Diabetic retinopathy, Cataracts, amblyopia, (the

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1 list goes on and on) that would be missed."
2 I noticed when you -- when I say "you,"
3 I mean the SCOPA. When it answered interrogatories
4 it listed as the reason "It believed supported the
5 legislation was as following: The ECCPL protects
6 patients of opthamologists, optometrists, and put
7 in there I helped by obtaining a prescription for
8 corrective lenses without a comprehensive eye
9 examination.
10 Certain diseases of the eye or the body
11 may go undiagnosed without if patients merely elect
12 to purchase corrective lenses using remote eye
13 refraction eye measurement tools without an
14 in-person comprehensive eye exam."
15 Do you stand by that answer?
16 A. I do.
17 Q. Is that the reason you believe the
18 legislature passed the law and overrode the
19 governor's veto?
20 A. I do.
21 Q. Okay. But you didn't vote for it
22 because you're not a legislator?
23 A. That's right.
24 Q. Yesterday we determined about 130 some
25 odd legislators voted for that legislation one way

1 or the other.
2 Do you know any of them?
3 A. I do.
4 Q. Okay. How many?
5 A. Me, personally, I know -- I would say
6 two relatively well.
7 Q. Okay. Did they tell you why they voted
8 for the law?
9 A. They did not.
10 Q. Okay. So you don't really know why
11 they voted for the law, do you?
12 A. No.
13 Q. Okay. You know why they advocated for
14 the law?
15 A. I know why they advocated for the law.
16 I don't know why they voted for the law.
17 Q. You advocated the law because you
18 thought it would protect patient health?
19 A. Correct.
20 MR. MATTHEWS: Okay. Thank you very
21 much.
22 MR. SHEALY: I have no questions.
23 MR. WINDHAM: I think that's all.
24 (The deposition was concluded at 11:29
25 a.m.)

1 STATE OF SOUTH CAROLINA
2 COUNTY OF BERKELEY
3
4 CERTIFICATE OF REPORTER
5
6 I, Jessica R. Dixon and Notary Public
7 for the State of South Carolina at Large, do hereby
8 certify that the foregoing transcript of Michael
9 Zolman, Q.D. was taken by me and transcribed by me
10 and is a true, accurate, and complete record.
11 I further certify that I am neither
12 related to nor counsel for any party to the cause
13 pending or interested in the events thereof.
14 In witness whereof, I have hereunto set
15 my hand this 2nd day of August, 2017 at Charleston,
16 South Carolina.
17
18
19
20 _____
Jessica R. Dixon
21 Court Reporter
My Commission Expires:
22 01/27/2027
23
24
25

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AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 2

From: Angelia Smith Owens <angelia@kmso.net>
Sent: Monday, June 20, 2016 1:44 PM
To: Jackie Rivers
Subject: FW: FW: Kiosks and Online Eye Exams
Attachments: Consumer Protection in Eye Care Act Final (2).docx; Online Vision Screening Self-adjusting Glasses and Kiosks. final (1).pdf

This is the first email I found. Looks like Dr. Zolman emailed the Board in March, but this wasn't forwarded to me and Mark until May. We worked with Ron Scott over the summer and fall on language. Let me know if you need anything else. Thanks!

From: Wayne Cannon [mailto:wmcannon15@gmail.com]
Sent: Thursday, May 21, 2015 8:30 AM
To: Angelia Smith Owens
Subject: Fwd: FW: Kiosks and Online Eye Exams

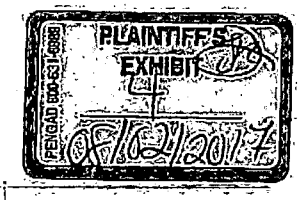
The SCOPA board voted to evaluate the passing of a consumer protection leg. The AOA suggested bill is attached for your review. We will need to meet soon to evaluate our strategy.

---------- Forwarded message ----------
From: "Jackie Rivers" <jrivers@sceyedoctors.com>
Date: May 20, 2015 6:49 PM
Subject: FW: Kiosks and Online Eye Exams
To: "Anna Balderson" <abalderson@sceyedoctors.com>, "Bob Branch (jeyes4us@yahoo.com)" <jeyes4us@yahoo.com>, "David McKenzie" <drdavid@mckenzieeyecare.com>, "Jennie Smith Zolman" <jenniesmithod@yahoo.com>, "Johndra McNeely" <uptownnw@yahoo.com>, "Mike Campbell (mcamp16035@aol.com)" <mcamp16035@aol.com>, "Mike Zolman" <focusedeyedoc@yahoo.com>, "Pete Smith" <smithforhouse@gmail.com>, "Ted Newman" <tnewman123@bellsouth.net>, "Wayne Cannon" <wmcannon15@gmail.com>
Cc:

All, below is the e-mail sent out by Dr. Mike Zolman with his thoughts and the info the Consumer Protection in Eye Care Act and another presentation from the AOA.

Passing along so everyone can get reacquainted with the info.

Thanks!!



From: Michael Zolman
Sent: 3/19/2015 12:15 PM
To: Bob Branch; Wayne Cannon; Jennie Smith; Michael Campbell; David McKenzie; Johndra McNeely; Ted Newman
Cc: Jackie Rivers; Anna Balderson
Subject: Kiosks and Online Eye Exams

It was great seeing everyone last weekend at our Spring Convention!

I thought we had a productive board meeting but as ya'll know, we ran short on time and didn't have time to bring up New Business. I wanted to bring up some new business that I feel is of utmost importance to our profession and one that we need to address quickly and attack aggressively. That is the issue of kiosks and online eye exams.

At the HOD at SECO, AOA President David Cockrell stated that the single biggest threat to our profession he feels is 1-800 seeking legislation to be able to 'change' a doctor's CL prescription to a proprietary brand of their choosing. He felt this way because this could set a precedent for other retailers to propose similar type legislation on our profession. While this is certainly a big threat, I feel the issue of kiosks and online eye exams are an even greater threat. Here's why:

As of now, Self-Refracting Kiosks currently exist and are being heavily marketed in Europe and Asia. The patient puts in a few dollars, the kiosk 'interacts' with the pt to determine the refraction and a prescription for glasses (or CL) is generated for the pt to take to the nearest optical or the pt can order the glasses or CL online from the kiosk and then have them sent directly to the patient's house. No exam needed, no doctor needed. In the US though, there has to be a doctor's signature in order to have a valid prescription. But what would happen when you combine a Self-Refracting Kiosk with Telemedicine? It would only take one sellout OD or ophthalmologist to approve of countless prescriptions generated from self-refracting kiosks and forego the exam altogether.

Now play this forward when the self-refracting/telemedicine kiosk becomes popular and known to the public. Who would be interested in this technology? I think it is reasonable for every Walmart, Lenscrafters, Costco, Pearl, Sears, JCPenney, America's Best, Eyeglass World.....(the list goes on and would likely include every commercial retail optical).....would have great interest in this technology. Our colleagues in commercial practices would be at great risk of becoming irrelevant in that practice model. Why? In the eyes of a commercial retail corporation, which would be more cost effective?.....paying ~$50,000 to $100,00 for this technology that takes up less than 10 square/feet of space and can generate prescription in only a few minutes; or, guaranteeing an Optometrist an annual salary, paying for 1-3 lanes of equipment, paying for the office space, paying for the staff and maintaining a contract with an optometrist to ensure he is there 6 days a week so that he can generate a prescription at the end of a 20 minute eye exam? Both scenarios generate prescriptions for the optical but the kiosk could do it for much much less and more quickly. Plus, theoretically by way of telemedicine, one OD could oversee prescriptions for countless kiosk locations vs these locations needing to hire multiple ODs to generate prescriptions. The savings would be huge. And as much as we like to think that patients would not do this because there is no health evaluation of the eyes by a doctor, how many patients do we see daily who really come in just wanting a new prescription for glasses and/or contacts? This would allow the patient to 'skip going to the doctor' and allow them to get what they want. This holds true for online eye exams as well.

I know this sounds a bit far fetched right now and Im not typically 'the sky is falling' kind of guy but I think there is some real validity to this possibility and could be a reality in the not so distance future. Plus, with total eye care being a 35 BILLION DOLLAR industry, 23 BILLION coming from glasses and CL sales, the financial incentive is certainly there to eliminate the need to have an OD to generate a prescription in the eyes of a retailer.

I don't need to tell any of you that this is potentially a huge threat to our profession but more importantly to the general public. Think of all the glaucoma, ARMD, Diabetic retinopathy, Cataracts, amblyopia, (the list goes on and on) that would be missed. Fortunately, the AOA is on the ball and recently drafted a bill that can be modified on a state-by-state basis to prevent this but it is up to the individual state to modify it and then introduce it to their state legislation. The bill is called The Consumer Protection in Eye Care Act. We will need to go through our current practice act to make sure the two complement each other but I think this is something we definitely want to do.

I have attached the draft bill from the AOA as well as some information from the AOA that Jackie gathered for us. Please review it.

I would like to open this up for discussion and get everyone's feedback. And provided there is no one on the board outright against this bill, I would like to make a motion that we work together and consult with our lobbyist and attorney to discuss what we need to do to get this bill ready so that we can present this to the SC legislature first thing next January when congress is back in session.

I would like for SC to be one of the first states to make this bill a law instead of one of the last!!! Let's prevent a fire instead of putting out a fire later. Let's be the state that has the legislation that all the other states wish they had!!!

What does everyone think?

Michael W. Zolman, OD

Infinity Eye Care and Low Vision Rehabilitation Center

325 Folly Rd., Suite #109

Charleston, SC 29412

P: 843.795.6464

F: 843.795.6433

www.myinfinityeyecare.com

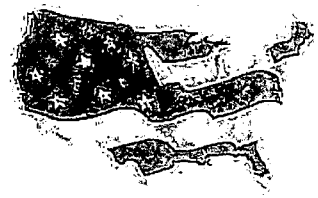
SGRC Webinar

Online Vision Screening, Self-adjusting Glasses and Kiosks and What ODs Need to Know

American Optometric Association

Introduction

State Government Relations



State Government Relations Committee:

- Deanna S. Alexander, OD, Chair
- Lee Ann Barrett, OD
- Michael Bennett, OD
- Matt Burchett, OD
- Chris Colburn, OD
- Michael G. Horstman
- Steve Langsford, OD
- Gary L. Robbins
- James D. Sandefur, OD
- Roger R. Seelye, OD
- John B. Whitlow, OD
- Paul Zerbinopoulos, OD
- Brian Reuwer, Staff
- Kristen Skiles, Staff

Agenda for Tonight

- Introduction of Speakers and Topic by Deanna Alexander, SGRC Chair
- Background on the Issue – Drs. Alexander, Zerbinopoulos, Seelye and Steele.
- Recommendations for State Affiliates – Dr. Alexander
- Review of the "Consumer Protection in Eye Care Act" – Mr. Reuwer
- Questions – All Panelists

Panelists

- Deanna Alexander, OD – Legislative Chair, Colorado and SGRC Chair
- Paul Zerbinopoulos, OD – Legislative Chair, Rhode Island and SGRC Member
- Roger Seelye, OD – Legislative Chair, Michigan and SGRC Member
- Zack Steele, OD – President-Elect, Alabama Optometric Association
- Brian Reuwer – Staff AOA

BACKGROUND

American Optometric Association

Kiosks

- A lot of concern among the profession because of a proposed law in Utah that could possibly legalize self-refracting kiosks.
- In addition, Rite-Aid and CVS have tested eyeglass selling kiosks (with existing prescription).
- With online retailors setting up brick and mortar stores and more companies looking to get into eyeglass sales, it's a bet that further technological developments will be made to subvert the eye exam to sell more glasses.

Direct-to-Consumer Eye Care

1 800 CONTACTS®

eyeconic.com

glasses.com by 1 800 CONTACTS

Coastal.com THE BETTER WAY TO BUY EYEWEAR

WARBY PARKER

American Optometric Association

Direct-to-Consumer Eye Care

- Rite Aid Pharmacy seeks to build 800 "Wellness Stores" within it's existing pharmacies by 2014
- Vision Center – a new, easy-to-use, interactive kiosk that allows customers to conveniently order prescription glasses and contact lenses online for home delivery and offers eyeglass frames to try on.
- Technology developed by DB Vision

Direct-to-Consumer Eye Care

American Optometric Association

SCOPA 000164

SoloHealth Kiosk

- Measures blood pressure
- Measures visual acuity
- Recommends exam if acuity is below a "standard."
- 1000 units deployed in WalMart and Sam's Club stores
- FDA Approval for measurement of blood pressure.

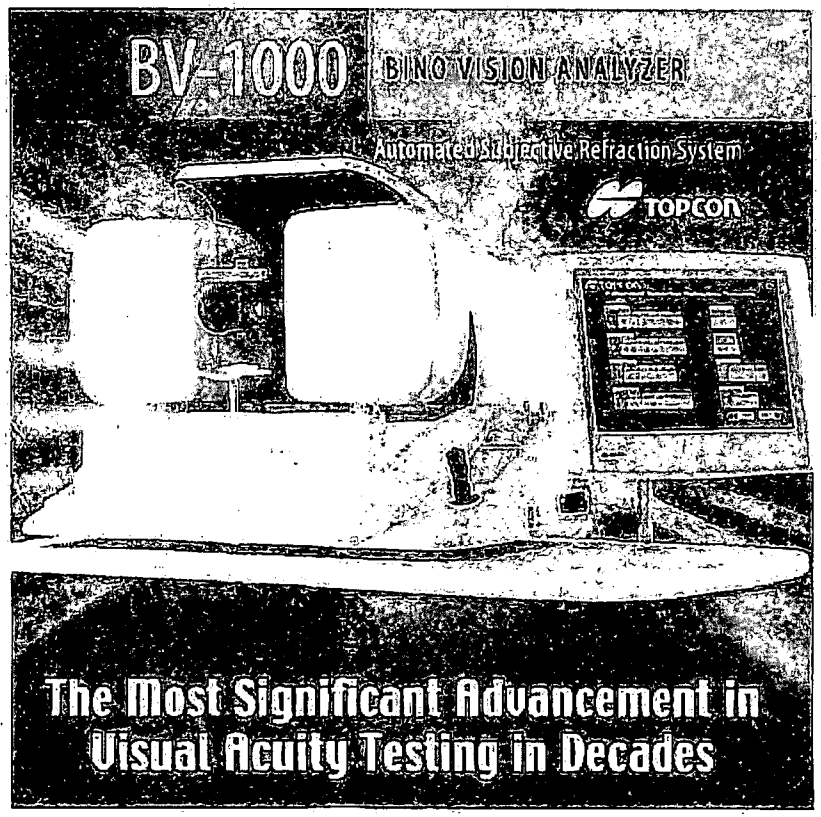
American Optometric Association

What About a Subjective Refraction?

- Automated Subjective Refractors: Do they really exist?

American Optometric Association

Automated Subjective Refractor



- Topcon BV-1000
- Released in 2002
- Peer reviewed in 2003
- Marketed heavily in Europe and Asia

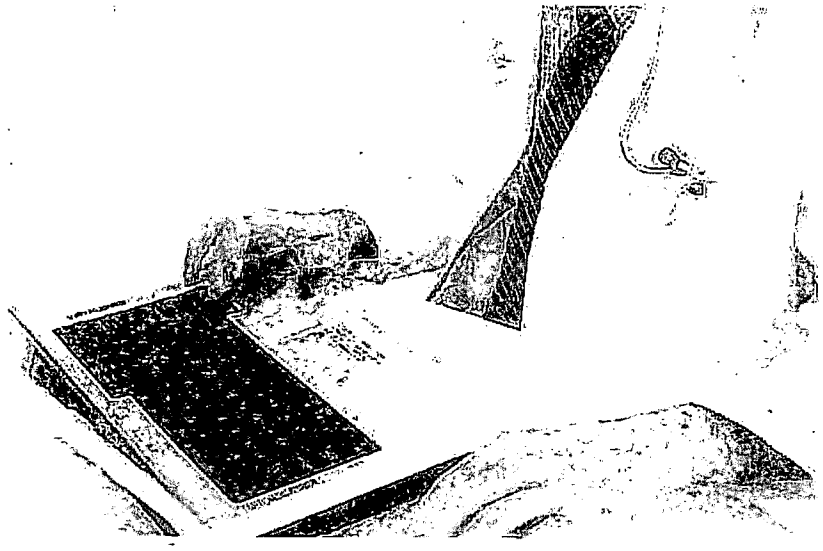
American Optometric Association

Topcon BV-1000

- Uses patient-guided voice prompts to perform complete binocular subjective refraction
- Unit has two joystick controls (for right or left-handed use) and a button for making responses to various questions
- Measures objective refraction, binocularity, subjective refraction, alignment, binocular balance, and near addition
- Peer reviewed study in 2003 in *Optometry and Vision Science*

Online Eye Exams

- Kiosks aren't the only changes coming. Several companies are developing virtual eye exams that will allow people to skip "going to the doctor."



EyeNetra

October 15, 2010

Cell Phones as Eye Doctors

A prototype device provides access to full-service optometry in your pocket.

Netra is an inexpensive and easy-to-attach add-on for self-testing eyesight quickly, easily, and accurately with a mobile phone.
Credit: Andy Ryan, MIT Media Lab

It won't be long before most people are carrying high-end scientific equipment around in their pockets at all times, said Ramesh Raskar, an associate professor at the MIT Media Lab and the leader of the Camera Culture group there. That equipment comes in the form of smart phones, and Raskar believes this development "will change everything."

Speaking at the 25th anniversary celebration for the Media Lab, Raskar outlined how he wants to take advantage of the increasingly sophisticated power of today's mobile devices. He said it dawned on him that the 300 dpi resolution on a smart phone screen made it the rival of expensive, specialized devices.

One of his group's first experiments is the prototype of Netra, a system that can identify problems with a person's eyesight using only a smartphone, software, and inexpensive optical add-ons. The system, Raskar said, could help people who can't afford or get access to full-service optometry.

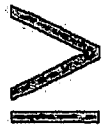
- EyeNetra is developing a product called Netra that would allow people to do self-eye exams using their cell phone and a "$2 piece of plastic."
- This is intended for the third world where medical access is an issue but it could easily be deployed in the US

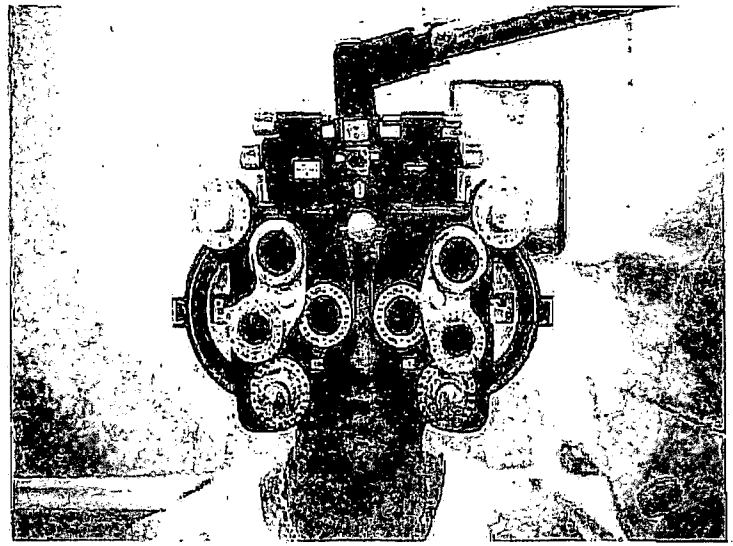
Opternative

- AOA became aware of an effort by Opternative to market an online eye exam.
- After consulting with the Illinois Optometric Association, the AOA sent a letter to Opternative explaining that their proposed eye exam would not meet the requirements for an eye exam under the Illinois optometric practice act.
  - And the AOA issued a statement calling for people to get an in-person eye exam before getting a prescription.
  - That statement is on the AOA website here: http://www.aoa.org/newsroom/american-optometric-association-cautions-consumers-about-claims-of-online-eye-exams

OPTERNATIVE

Reinventing Refraction





OPTERNATIVE

Launch Plan

Launching 2014

Direct to consumer solution

Online optical retail solution

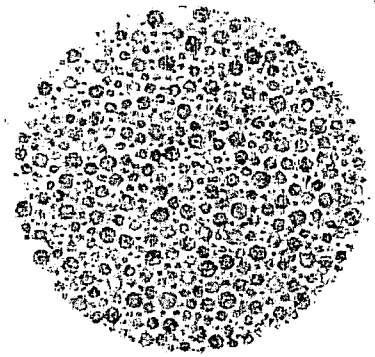
$30-40 per exam

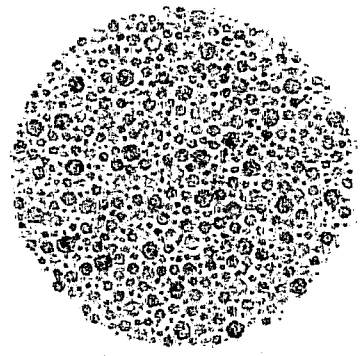
American Optometric Association

OPTERNATIVE

MENU

Directions





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Previous Next

Adjustable Eyeglasses Sold DTC

- Companies are developing products that would allow patients to adjust glasses without a current RX.
- Primarily the technology uses:
  - Alvarez Lens Technology
  - Fluid-Injection, Variable Focus Lens Technology
- Companies maintain that these are simply readers and that they are intended to be a back up pair of glasses
- While many of these products are sold through optometry offices, several of them are sold directly to consumers on the internet.

FREE SHIP TO STORE OR HOME ON OVER 500,000 ITEMS! NEED IT NOW? BUY ONLINE AND PICK UP IN STORE!

Adlens Continuously Adjustable Work Glasses

Model # US01-1005-GY Internet # 204387532

☆☆☆☆ (19) Write a Review

$19.95 / each

PRODUCT SOLD : Online Only
Item cannot be shipped to the following state(s): GU,PR,VI

Quantity: 1

Ship to Home
Free with $45 Order
Est. Arrival Date: JUN 4 - JUN 6

Ship to Store
Free

ADD TO CART

ADD TO LIST

Product Overview | Specifications | Customer Reviews | Shipping Options

PRODUCT OVERVIEW

Don't want to get your expensive glasses broken or covered in dust-no worries, buy a pair of Work Glasses instead. Instant vision for anyone who needs a pair of glasses in a hurry. Work Glasses is a brand of variable focus glasses designed for use as a temporary spare pair. Instantly customizable for your vision correction. Simply turn each dial to glide the overlapping lenses to create different vision viewing distances in seconds: near, intermediate or far. They are easily adjustable for a wide range of [illegible]

- Continuously adjustable for near, intermediate and distance tasks
- One size fits all, a spare pair for whoever is in need
- No tools required
- Complies with all relevant product safety and performance requirements
- Light weight, durable and easy to clean
- Fits easily into a pocket
- Can be worn indoors and outdoors

CUSTOMERS WHO VIEWED THIS ITEM PURCHASED...

$6.20

Cordova Opticor Safety Glasses Frameless Design One Piece

Add to Cart

$17.97

Why are We Discussing Any of This???

- The total vision care market, as defined by The Vision Council's VisionWatch survey, reached $35.47 billion in the 12-month period, and includes dollars spent at retail at all retail types at any retail location and spent on the sale of either spectacle lenses (including Rx Sun), frames, contact lenses, plano sunglasses, OTC readers or revenue earned by refractive surgery or eye examinations.
- The report shows an increase in Rx spectacle lens sales of 6.0 percent to <u>$10.85 billion</u> in that 12-month period, while frame sales at retail rose 2.7 percent in dollars to <u>$8.77 billion</u> during the year ending June. Contact lens sales, in dollars, climbed 5.9 percent to $4.1 billion in that period.

Can We Fight This and Protect Our Patients?

YES!!!

American Optometric Association

Suggested Actions For State Affiliates

- Pass the "Consumer Protection in Eye Care Act"
- Add autorefractors to the definition of the practice of optometry
  - Only 7 states specifically have this language
- Give the Board of Optometry (and/or Opticianry) authority to investigate non-licensed professionals
  - About half the state boards have this authority
- A requirement for glasses RX is specifically included in the law to dispense
  - Most states have this requirement but some do not
- ODs should be included in the state telemedicine act
  - Most states have a telemedicine act but not all include ODs

State Responses

- Alabama Experience
- Michigan Experience

AOA Model Legislation

CONSUMER PROTECTION IN EYE CARE ACT

American Optometric Association

What Does the Model Bill Do?

- The model language will be written to amend a state's Public Health Act:
- In states without a public health code, the affiliates will have to find a way to enforce the law through the practice act or a standalone law.

Section 1 - Definitions

- "**Contact Lenses**" means any lens placed directly on the surface of the eye, regardless of whether or not it is intended to correct a visual defect. Contact lens includes, but is not limited to all cosmetic, therapeutic, and corrective lenses.

- "**Department**" means the Department of Health or the department that handles licensure.

- "**Dispense**" means the act of furnishing a pair of spectacles or contact lenses to a patient.

Definitions

- "Eye Examination or evaluation" means an assessment of the ocular health and visual status of a patient that does not consist solely of objective refractive data or information generated by an automated testing device, including an autorefractor, in order to establish a medical diagnosis or for the establishment of a refractive error.

- "Kiosk" means automated equipment or application designed to be used on a phone, computer or internet based device that can be used either in-person or remotely to conduct an eye examination or evaluation as defined in this Act.

Definitions

- "**Online Eye Examination**" means an online vision screening of visual performance measuring visual acuity, contrast, and color vision.

- "**Over the counter spectacles**" means eyeglasses or lenses for the correction of vision that may be sold by any person, firm or corporation at retail without a prescription.

- "**Prescription**" means a provider's handwritten or electronic order as defined in this act, based on an eye examination or evaluation that corrects refractive error.

Definitions

- "Provider" means an individual licensed under the medical or Osteopathic Practice an Act or the Optometric Practice Act.

- "Spectacles" means an optical instrument or device worn or used by an individual that has one or more lenses designed to correct or enhance vision addressing the visual needs of the individual wearer and are commonly known as glasses, including spectacles that may be adjusted by the wearer to achieve different types or levels of visual correction or enhancement.

- "Spectacles" exclude optical instruments or devices not intended to correct or enhance vision or are sold without consideration of the visual status of the individual who will use the optical instrument or device.

Section 2 – Consumer Protections

Prescription Lenses

- No person in this state may dispense spectacles or contact lenses to a patient without a valid prescription from a provider.
- A prescription for spectacles or contact lens may not be made based on telemedicine services or based solely on the refractive error of the human eye generated by a kiosk.
- An expiration date on spectacles of not less than one year from the date of examination by the licensee or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient.
- Providers must release a spectacle prescription upon request from a patient and that prescription will include medical findings and any refractive error discovered during the examination.

Kiosk Language

- The kiosk is approved by the United States Food and Drug Administration for the intended use;
- The kiosk is designed and operated in a manner that provides any accommodation required by the federal Americans with Disabilities Act;
- The kiosk and accompanying technology used for the collection and transmission of information and data, including photographs and scans, gathers and transmits protected health information in compliance with the federal Health Insurance Portability and Accountability Act;
- The procedure for which the kiosk is used has a recognized Current Procedural Terminology (CPT) code;

Kiosk Language (continued)

- The physical location of the kiosk prominently displays the name and state license number of the individual who will read and interpret the diagnostic information and data, including photographs and scans;
- Diagnostic information and data, including photographs and scans, gathered by the automated equipment is read and interpreted by a provider; and
- The owner or lessee of the automated equipment maintains liability insurance in an amount adequate to cover claims made by individuals diagnosed or treated based on information and data, including photographs and scans, generated by the automated equipment.

Over the Counter Spectacles

- Over the counter spectacles shall have the following language attached to each pair of spectacles displayed or offered for sale and in at least ten point bold type permanently affixed in plain view to the top of any point of sale display or, if there is no display, in the area of sale:

"ATTENTION: READY-TO-WEAR NON-PRESCRIPTION GLASSES ARE NOT INTENDED TO REPLACE PRESCRIBED CORRECTIVE LENSES OR EXAMINATIONS BY AN EYE CARE PROFESSIONAL. CONTINUOUS EYE CHECK-UPS ARE NECESSARY TO DETERMINE YOUR EYE HEALTH STATUS AND VISION NEEDS."

- The lenses in such glasses shall be of uniform focus power in each eye, *shall not be adjustable* and shall not exceed 2.75 diopters.

Section 3 – Enforcement and Violations

- A person or governmental entity that believes a violation of this part or a rule promulgated under this part has occurred or has been attempted may make an allegation of that fact to the department in writing.

- If, upon reviewing an allegation, the department determines there is a reasonable basis to believe the existence of a violation or attempted violation of this part or a rule promulgated under this part, the department shall investigate.

- The department may hold hearings and administer oaths and order testimony to be taken at a hearing or by deposition conducted pursuant to the administrative procedures act and shall report its findings to the department.

Enforcement and Violations

- The department may proceed if it is determined that a violation of this law has occurred.
- Nothing in this section shall require the department to wait until human harm has occurred to initiate an investigation.
- The department, upon finding after notice and an opportunity for a hearing that a person has violated or attempted to violate any provision of this part, may impose an administrative fine of not more than $1,000.00 for each violation of this part. If the department finds that a violation or attempted violation occurred and did not result in significant harm to human health, the department may issue a warning instead of imposing an administrative fine.

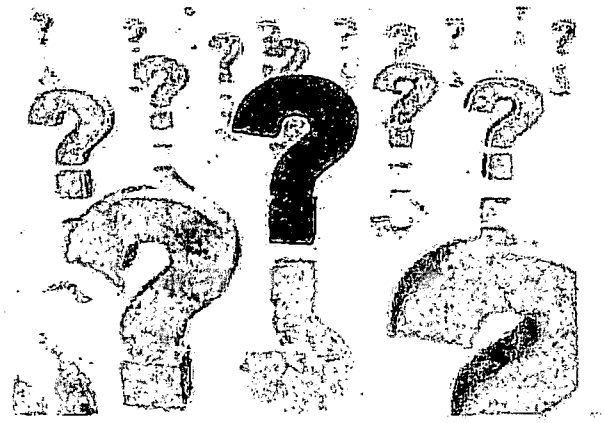
Enforcement and Violations

- The department shall advise the attorney general of the failure of a person to pay an administrative fine imposed under this section. The attorney general may bring an action in a court of competent jurisdiction for the failure to pay an administrative fine imposed under this section.

- At the request of the department, the attorney general may file a civil action seeking an injunction or other appropriate relief in the name of the people of the state to enforce this act and the rules promulgated under this act. The court may impose on any person who violates this part or attempts to violate this part a civil fine of not more than $5,000.00 for each violation or attempted violation. In addition, the attorney general may bring an action in circuit court to recover the reasonable costs of the investigation from any person who violated this part or attempted to violate this part.

- The department may promulgate rules under the administrative procedures act that it determines necessary to implement, administer, and enforce this section.

Questions From the Audience



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SCOPA 000195
R. 309

AFFIDAVIT OF JOSHUA WINDHAM

EXHIBIT 3

From: Michael Zolman <focusedeyedoc@yahoo.com>
Sent: Thursday, May 19, 2016 8:05 AM
To: Jackie Rivers
Subject: Re: URGENT: Senate OVERRIDES Gov. Haley's veto of our bill, 39-3

Can you send it out now? Im getting so many questions from members right now bc they heard about the override in the senate yesterday

Sent from my iPhone

On May 19, 2016, at 6:00 AM, Jackie Rivers <jrivers@sceyedoctors.com> wrote:

> Will do!! I'll have it pushed put before 8:30!! I don't think Anna sent me the video link out il double check. Won't hold the email up for it though. Great message! Super excited about today!!!
>
> Sent from my iPhone
>
> On May 19, 2016, at 2:11 AM, Michael Zolman <focusedeyedoc@yahoo.com> wrote:
>
> > Hi Jackie,
> >
> > Can you please send the following and attach 1. The OD/Congressman spreadsheet (for those who STILL dont know who their legislator is) 2. Our letter of concern and rebuttal 3. our talking points, 4. J&J letter 5. Anna's video (if she has it. If not, dont worry about it) 6. Senate score card from yesterday.
> >
> > Let's keep our fingers crossed!
> >
> > Dear Colleagues,
> >
> > Feels good doesn't it?
> >
> > The Senate voted to override Governor Haley's veto of our bill, S1016 yesterday afternoon! All of your calls, emails and faxes to your senators paid off. Senator Cleary proposed the vote and did an EXCELLENT job explaining the importance of the override. Please contact Senator Cleary, as well as your senator, to thank them for their support!
> >
> > Also, as a welcomed surprise and much appreciated showing of industry support, the president of Johnson & Johnson, Peter Menziuso, personally contacted our SCOPA office a few days ago after hearing about Gov. Haley vetoing our bill to prevent online eye exams and 'eye exam' kiosks. He offered Johnson & Johnson's full support to SCOPA to help override the governor's veto. Without question or hesitation, he personally wrote a very powerful advocacy letter from Johnson & Johnson to accompany our Letter of Concern and Veto Rebuttal to the Senate. A big THANK YOU is in order to J&J for their tremendous support of our bill His letter is attached for your review.
> >
> > With yesterday's override in the Senate, our efforts are beginning to attract A LOT of press and is becoming a story of national interest. It is easy to want to celebrate this victory; but now is not the time. With the good comes the bad. We now know that Opternative has stepped up their efforts

PLAINTIFF'S EXHIBIT 3 PENGAD 800-631-6989

and have lobbyists on the hill contacting House members encouraging them to sustain the governor's veto.

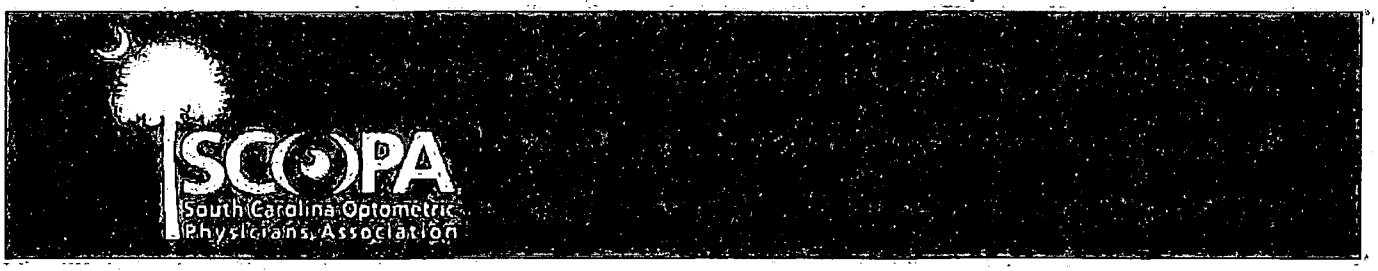
We must work quickly as the vote to override Haley's veto will **VERY LIKELY HAPPEN TODAY!!!** Please call your House Representative **NOW!**

We've taken our bill all the way to the finish line once already....only to be punched in the mouth by the governor. We've fought to get it back to the finish line and now this is our opportunity to punch back! Let's send a loud and clear message to the House of Representative letting them know what the sound of passionate, organized Optometry sounds like! Let's show Governor Haley what this 'small group of eye care professionals' can do when we are ignored and she puts the safety of our patients at risk.

Please call your House Representative now!

Fight Optometry Fight!
Michael W. Zolman, OD
SCOPA co-legislative director
Infinity Eye Care and Low Vision Rehabilitation Center
325 Folly Rd., Suite #109
Charleston, SC 29412
P: 843.795.6464
F: 843.795.6433
www.myinfinityeyecare.com

From: Michael Zolman <scoa@ciclt.net>
Sent: Thursday, May 19, 2016 8:53 AM
To: Jackie Rivers
Subject: S.1016 Update - Success in the Senate - PUSH in the House



May 19, 2016

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The Senate voted to override Governor Haley's veto of our bill, S1016 yesterday afternoon! All of your calls, emails and faxes to your senators paid off. Senator Cleary proposed the vote and did an EXCELLENT job explaining the importance of the override. Please contact Senator Cleary, as well as your senator, to thank them for their support!

Also, as a welcomed surprise and much appreciated showing of industry support, the president of Johnson & Johnson, Peter Menziuso, personally contacted our SCOPA office a few days ago after hearing about Gov. Haley vetoing our bill to prevent online eye exams and 'eye exam' kiosks. He offered Johnson & Johnson's full support to SCOPA to help override the governor's veto. Without question or hesitation, he personally wrote a very powerful advocacy letter from Johnson & Johnson to accompany our Letter of Concern and Veto Rebuttal to the Senate. A big THANK YOU is in order to J&J for their tremendous support of our bill. **Click here to review his letter.**

With yesterday's override in the Senate, our efforts are beginning to attract A LOT of press and is becoming a story of national interest. It is easy to want to celebrate this victory, but now is not the time. With the good comes the bad. We now know that Opternative has stepped up their efforts and have lobbyists on the hill contacting House members encouraging them to sustain the governor's veto.

We must work quickly as the vote to override Haley's veto will **VERY LIKELY HAPPEN TODAY!!!** Please call your House Representative **NOW!** **Click here to reveiw a list of legislators, if needed. Also, you can click here for a copy of the revised talking points that were distributed yesterday.**

For your quick reference, **click here for a copy of our letter of concern and rebuttal that has been distributed to all House members.** They will receive another copy of this, including the letter from J&J on the House floor this morning.

We've taken our bill all the way to the finish line once already....only to be punched in the mouth by the governor. We've fought to get it back to the finish line and now this is our opportunity to punch back! Let's send a loud and clear message to the House of Representative letting them know what the sound of passionate, organized Optometry sounds like! Let's show

Governor Haley what this 'small group of eye care professionals' can do when we are ignored and she puts the safety of our patients at risk.

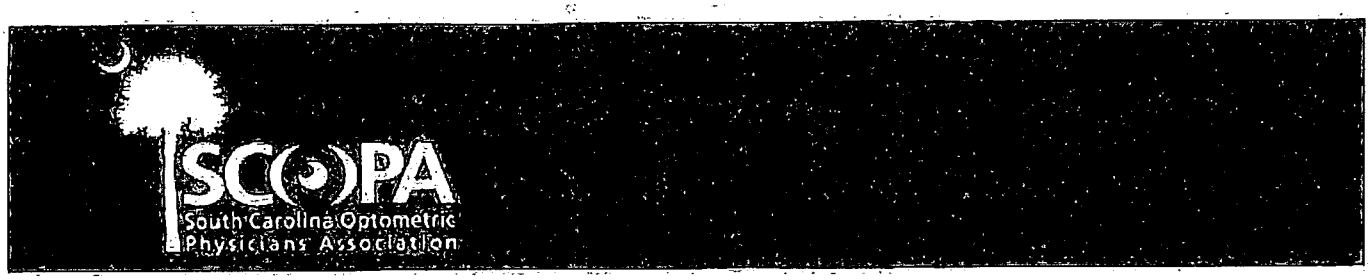
Please call your House Representative now!

Fight Optometry Fight!

Michael W. Zolman, OD
SCOPA co-legislative director
Infinity Eye Care and Low Vision Rehabilitation Center
325 Folly Rd., Suite #109
Charleston, SC 29412
P: 843.795.6464
F: 843.795.6433
www.myinfinityeyecare.com

Click Here to OptOut of receiving future emails from this person or organization.

From: Michael Zolman <scoa@ciclt.net>
Sent: Thursday, May 19, 2016 2:20 PM
To: Jackie Rivers
Subject: It's a GREAT day in SC



May 19, 2016

Dear Colleagues,

It's a **GREAT** day in South Carolina!

It's with the utmost pleasure to announce that today, Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!

Both the SC House and Senate voted to override Governor Haley's veto of our bill S1016. This is what organized Optometry looks like at it's best! It took the grassroots efforts of all of you contacting your legislators to make this happen as well the tireless efforts of your SCOPA Board of Directors working in conjunction with AOA to make this possible. Johnson & Johnson also deserves praise for their full support of our bill by reaching out to our legislators and lobbying with us as well. Call your legislators, tell them you love 'em.....except for Rep. Jonathon Hill. **Click here to see the vote count**.

You should be so proud of your efforts and standing up for what is right in order to ensure the vision, eye health and general health of their patients. It's been a pleasure being a part of this process!

Good-bye Opternative!

Michael W. Zolman, OD
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AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 4

AMERICAN ACADEMY® OF OPHTHALMOLOGY
The Eye M.D. Association

POLICY STATEMENT

Frequency of Ocular Examinations

Policy

The frequency of ocular examinations should be based on the presence of visual abnormalities and the probability of visual abnormalities developing. Individuals who have ocular symptoms require prompt examinations. Individuals who do not have symptoms but who are at high risk of developing ocular abnormalities related to systemic diseases, such as diabetes mellitus and hypertension or who have a family history of eye disease, require periodic comprehensive eye examinations to prevent or minimize visual loss. The frequency of examinations depends on an individual's age, specific condition, and the likelihood of finding abnormalities on examination. Adults who have no symptoms, and who are at low risk, should receive an initial comprehensive eye examination by an ophthalmologist and follow a schedule of periodic assessment designed to detect ocular disease.

Background

There are several times in an individual's lifetime when an ocular examination is extremely important. Certain infectious, congenital, and hereditary eye diseases may be manifest at birth, and since they create a risk to vision if undetected, a screening in the newborn is justified. Infants who have detected abnormalities as well as infants with risk factors, such as systemic diseases or a family history of certain conditions, should be referred for a comprehensive eye examination by an ophthalmologist.

Children should receive age-appropriate eye health and vision screenings throughout childhood because different childhood eye problems may be detected at each visit and new problems can arise. The goal is to identify and treat preventable visual impairment at the earliest feasible age. The elements of vision screening vary depending on the age and level of cooperation of the child. Instrument-based screening is first recommended between 6–12 months of age and until a child is able to cooperate for subjective visual acuity testing as stated in the Academy's Pediatric Eye Evaluation, Preferred Practice Pattern® guidelines. The ophthalmologist should be aware there is a trade-off in terms of false positives and false negatives with instrument-based technology as data are analyzed on the basis of preset refractive error criteria to determine whether a child passes or fails.[1] Amblyopia is estimated to occur at a rate of 1–3% in children aged 6–72 months,[2, 3] and may lead to functional blindness if undetected by autorefractors or photoscreening. Therefore any child with an abnormal subjective visual acuity assessment, or one who has not been successfully tested by age 3,[1] should be referred for a comprehensive eye examination by an ophthalmologist.

The major abnormality among school-age children is the unrecognized development and progression of myopic refractive error, and individuals in this age group should be examined during primary health care visits. Myopia can develop in individuals in their 20s, and it can progress in those whose refractive error did not stabilize in the teenage years. In the young adult the rate of development of other significant eye disease is low, but it increases steadily after the age of 40.

Evaluation

Adults with no signs or risk factors for eye disease should receive a comprehensive medical eye evaluation at age 40 if they have not previously received one.[4] Before the onset of

PLAINTIFF'S EXHIBIT 3
08/09/2017
R. Sitt

presbyopia (at approximately age 40), the majority of American adults experience no changing refractive error or significant ocular disease and routine eye examinations are not indicated. For asymptomatic individuals or individuals without risk factors, who are 40 to 54 years old, and who have had a comprehensive eye examination, the recommended interval for evaluations is 2 to 4 years. For individuals aged 55 to 64 years old, the recommended interval for evaluations is 1 to 3 years. For individuals 65 years old or older, the American Academy of Ophthalmology recommends an examination every 1 to 2 years, even in the absence of symptoms.[5]

Note that an eye examination is warranted if ocular symptoms, visual changes, or injury are involved. Also, for individuals at higher risk for certain diseases, such as African-Americans and Hispanics who are at higher risk for glaucoma, comprehensive eye examinations should be considered every 2 to 4 years for those under age 40, every 1 to 3 years for those aged 40 to 54, and every 1 to 2 years for those aged 55 to 64, even in the absence of visual or ocular symptoms.[4, 6, 7, 8, 9, 10, 11]

Recommendations

1. Infants at high risk, such as those with the potential for retinopathy of prematurity and those with a family history of retinoblastoma, childhood cataracts, childhood glaucoma, or metabolic and genetic disease, should have a comprehensive examination by an ophthalmologist as soon as medically feasible.

2. Children should have an assessment for eye problems in the newborn period and then at all subsequent routine health supervision visits. The elements of the assessment vary with the age of the child. Abnormalities present at birth, such as opacities of the ocular media (e.g., congenital cataract) or ptosis, may have profound effects on normal vision development in an infant. By age 3 to 3 1/2 years, the child will generally cooperate enough for fairly accurate assessment of visual acuity and ocular alignment.[1] He or she should have these assessed by a pediatrician or other medical practitioner.[12] Any abnormalities or the inability to test are criteria for referral to an ophthalmologist.

3. School-age children should be evaluated regularly for visual acuity and ocular alignment (approximately every 1 to 2 years) during primary health care visits, in schools, or at public screenings. Note the choice and arrangement of optotypes (letters, numbers, symbols) on an eye chart can significantly affect the visual acuity score obtained. Preferred optoypes are standardized and validated.[1]

4. Individuals who develop diabetes mellitus type 1 should be examined by an ophthalmologist 5 years after disease onset and at least yearly thereafter.[13, 14] Individuals who develop diabetes mellitus type 2 should be examined at the time of diagnosis and at least yearly thereafter.[15] Women with type 1 or type 2 diabetes should receive a comprehensive eye examination before conception and then early in the first trimester of pregnancy. Recommended intervals for subsequent examinations depend upon the level of retinopathy.[16-18]

5. Adults with no signs or risk factors for eye disease should receive a baseline comprehensive eye evaluation at age 40.[4] Individuals without risk factors aged 40 to 54 should be examined by an ophthalmologist every 2 to 4 years. Individuals without risk factors aged 55 to 64 should be examined by an ophthalmologist every 1 to 3 years.[4, 5]

6. Individuals without risk factors 65 years old or older should have an examination performed by an ophthalmologist every 1 to 2 years as the incidence of unrecognized

ocular disease increases with age.[4, 5]

7. The frequency of ocular examinations in the presence of acute or chronic disease will vary widely with intervals ranging from hours to several months, depending on the risks involved, response to treatment, and potential for the disease to progress.

8. Any individual at higher risk for developing disease, based on ocular and medical history, family history, age, or race should have periodic examinations determined by the particular risks, even if no symptoms are present.

9. A routine comprehensive annual adult eye examination in individuals under the age of 40 unnecessarily escalates the cost of eye care and is not indicated except as described above.

Summary

In summary, the frequency of ocular examinations should depend on the individual's age, race, past ocular history, medical history, family history of eye disease, and the types of symptoms or ocular findings encountered. If significant ocular disease is detected, the frequency of examination will depend on the severity of the condition, the response to therapy or surgery, and the potential for detecting progression of the abnormality.

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Approvals
American Academy of Ophthalmology, Board of Directors, February 1983

Revised and Approved by:

American Academy of Ophthalmology, Board of Directors: September 1990, February 2000, February 2005, November 2009, February 2015

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AFFIDAVIT OF JOSHUA WINDHAM

EXHIBIT 5

1 STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND
3 OPTERNATIVE, INC.,
4 Plaintiff,
5 vs. CASE NO. 2016-CP-40-06276
6 SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS,
SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING
7 AND REGULATION,
8 Defendants,
9 SOUTH CAROLINA OPTOMETRIC PHYSICIANS ASSOCIATION,
10 Defendant-Intervenor.
11
DEPOSITION OF: JACKIE RIVERS
12
DATE: August 1, 2017
13
TIME: 9:32 AM
14
LOCATION: Nelson, Mullins, Riley &
15 Scarborough
1320 Main Street, 17th Floor
16 Columbia, SC
17 TAKEN BY: Counsel for the Plaintiff
18 REPORTED BY: AMY R. COPE,
Court Reporter
19
20
A. WILLIAM ROBERTS, JR., & ASSOCIATES
21
Fast, Accurate & Friendly
22
Charleston, SC (843) 722-8414 | Hilton Head, SC (843) 785-3263 | Columbia, SC (803) 731-5224
23
24 Greenville, SC (864) 234-7030 | Myrtle Beach, SC (843) 839-3376 | Charlotte, NC (704) 573-3919
25

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1 BY MR. MCNAMARA:
2 Q. Does your -- has your role at SCOPA
3 required you to develop any kind of relationship
4 with government officials or regulators, such that
5 in your professional capacity you would be able to
6 identify who those people are?
7 A. Yes.
8 Q. Okay. Does SCOPA employ any lobbyists?
9 A. Yes.
10 Q. How many lobbyists does SCOPA employ?
11 A. We have one firm and there are two
12 lobbyists.
13 Q. And who are those lobbyists?
14 A. Mark Kelly and Angelia Smith Owens.
15 Q. And is Angelia Smith Owen's first name
16 spelled A-N-G-E-L-I-A?
17 A. Yes.
18 Q. Some of what I'm getting at is just
19 identifying who people are whose names show up in
20 e-mails; that's all we're doing.
21 A. Yes.
22 Q. And as long as we're -- sorry, going
23 back to SCOPA's lobbyists. Who is responsible for
24 hiring SCOPA's lobbyist firm?
25 A. Our Board of Directors.

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1 Q. Okay. Is there a particular person the
2 lobbying firm reports to?
3 A. Mike Zolman, our legislative director.
4 Q. And is the position of legislative
5 director a volunteer position at SCOPA?
6 A. Yes.
7 Q. Do you in your role have any
8 communication with SCOPA's lobbyists?
9 A. Yes.
10 Q. How frequently?
11 A. Well, it depends on what we have going
12 on in the office. So it could be weekly or more
13 often.
14 Q. Okay. As a general proposition, does
15 your role at SCOPA require you to be aware of all
16 of SCOPA's lobbying activities?
17 A. Yes.
18 Q. Okay. And there's just a couple of
19 other identification questions I'd like to ask.
20 Are you familiar with a woman named Holly Beason?
21 A. Yes.
22 Q. Who is Holly Beason?
23 A. Holly Beason is an attorney that works
24 at LLR, I believe.
25 Q. In what capacity, to the extent you

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1 know?
2 A. I'm not sure.
3 Q. Okay. Let's try it from this angle:
4 Why do you know who Holly Beason is?
5 A. Holly Beason was someone who was at the
6 table when we were going for our Consumer
7 Protection Bill, Eye Care Consumer Protection Bill.
8 Q. Okay. When you say at the table, what
9 do you mean?
10 A. At meetings that we had at the
11 State House.
12 Q. Okay. And are you familiar with
13 someone named Peter Candela?
14 A. Yes.
15 Q. And who is Peter Candela?
16 A. Peter Candela is one of our members and
17 is also on the Board of Examiners for the
18 South Carolina Board of Examiners in Optometry.
19 Q. How many members of the Board of
20 Examiners for the South Carolina Board of Examiners
21 in Optometry are also members of SCOPA?
22 A. All of the optometrists that are on the
23 Board are members.
24 Q. Okay. Is anyone else on the Board a
25 member of SCOPA?

Page 21

1 A. No.
2 Q. Okay. You also testified that one of
3 your roles at SCOPA is to promote the profession of
4 optometry; what does that mean?
5 A. We share information on social media
6 about the importance of eye exams or safety issues
7 and things like that. We also partner with other
8 community organizations to be visible in the
9 community. And we do a lot of activities in
10 providing eye care.
11 Q. When you say partner with other
12 organizations to be visible in the community, what
13 does that mean?
14 A. Well, we work with organizations like
15 the Special Olympics and provide vision exams for
16 the athletes that come through. We also work with
17 the United Way of the Midlands and have an eye care
18 clinic that we provide volunteer optometrists to
19 see patients in certain underserved communities.
20 Q. And we talked at the beginning that you
21 are here testifying pursuant to a lawsuit, right?
22 A. Yes.
23 Q. What, if anything, do you know about
24 that lawsuit?
25 A. I know that it is a lawsuit to

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1 determine the constitutionality of the Eye Care
2 Consumer Protection Bill that we passed.
3 Q. Okay.
4 MR. MCNAMARA: Just so we have
5 something concrete to talk about, I'm going to ask
6 the court reporter to mark this as Exhibit 2.
7 (PLF. EXH. 2, S.C. Code Ann. 40-24-10,
8 was marked for identification.)
9 BY MR. MCNAMARA:
10 Q. All right. Ms. Rivers, I'm handing you
11 a document that's been stamped as Exhibit 2 in this
12 deposition. Do you recognize this document?
13 A. No.
14 Q. That's okay, I can do this a different
15 way. So I'll just represent to you that I've
16 handed to you a section of the South Carolina Code
17 taken from what is called the Eye Care Consumer
18 Protection Act, which is Chapter 24 of Title 40 of
19 the South Carolina Code. A couple of times now
20 you've said the Eye Care Consumer Bill or the Eye
21 Care Consumer Bill that we've passed, when you say
22 the Eye Care Consumer Bill that we've passed, do
23 you mean the Eye Care Consumer Protection Act that
24 is encoded in Chapter 24 of Title 40 of the
25 South Carolina Code?

Page 23

1 MR. SHEALY: Object to the form, but
2 you may answer.
3 THE WITNESS: Yes.
4 BY MR. MCNAMARA:
5 Q. Okay. Just so we're referring to the
6 same thing when we talk about this, if I talk about
7 the Eye Care Consumer Protection Law or ECCPL, will
8 you understand what I mean?
9 A. Yes.
10 Q. And so your understanding of the
11 lawsuit is it's a challenge to the ECCPL?
12 A. Yes.
13 Q. And the ECCPL is a bill that SCOPA
14 passed?
15 A. Yes.
16 MR. MATTHEWS: Object to the form.
17 MR. SHEALY: Object to the form.
18 BY MR. MCNAMARA:
19 Q. When did you first learn about this
20 lawsuit?
21 A. I don't recall.
22 Q. Do you remember how you first learned
23 about this lawsuit?
24 A. No.
25 Q. Okay. Do you recall if you first

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1 learned about this lawsuit from the American
2 Optometric Association?
3 A. No.
4 Q. No, you don't recall, or no, you did
5 not learn about it from the American Optometric
6 Association?
7 A. No, I do not recall.
8 Q. Are you aware that SCOPA is an
9 intervening party in this lawsuit?
10 A. Yes.
11 Q. And when did you become aware of that?
12 A. When our Board voted to intervene.
13 MR. MCNAMARA: I'm going to go ahead
14 and ask the court reporter to mark this as
15 Exhibit 3.
16 (PLF. EXH. 3, E-mails between
17 Jackie Rivers, Peter Candela, April Koon and
18 others, dated October 20th, 2016, Bates stamped LLR
19 00001784 and 1785, was marked for identification.)
20 BY MR. MCNAMARA:
21 Q. And the court reporter has handed you a
22 document that's been stamped as Exhibit 3. If you
23 wouldn't mind taking a minute to look at it.
24 A. Uh-huh.
25 Q. Do you recognize this document?

Page 25

1 A. I recognize that this is an e-mail that
2 I sent, yes.
3 Q. Okay. And what is the nature of this
4 e-mail?
5 A. This appears to be an e-mail that I
6 received from the AOA that included a press release
7 about the lawsuit.
8 Q. Having seen this e-mail, does that
9 refresh your recollection about how you first
10 learned about this lawsuit?
11 A. This doesn't indicate that this was the
12 first time I'd heard about the lawsuit, this just
13 shows that Daniel Carey was letting me know about
14 it.
15 Q. I was just asking: Having seen this
16 e-mail, does it refresh your recollection about how
17 you first learned about this lawsuit, whether it
18 was this e-mail or something else?
19 A. Yes.
20 Q. Do you remember how you first learned
21 about the lawsuit?
22 A. No. This doesn't indicate that this
23 was the first time I learned about it, this just
24 indicates that Daniel was letting me know about it.
25 Q. Okay. So having seen this e-mail, you

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1 just still don't remember if you had heard --
2 A. If this was the first time or not,
3 yeah.
4 Q. That's perfectly fine. And if you see
5 in the bottom third of the page that has the number
6 1784 in the bottom corner.
7 A. Uh-huh.
8 Q. There's a quotation from an e-mail from
9 you saying Dr. Cannon recommended contacting the
10 AG's Office.
11 A. Uh-huh.
12 (Court reporter seeks clarification).
13 A. Yes.
14 Q. Is that an e-mail you sent as well?
15 A. Yes.
16 Q. Okay. Who is Dr. Cannon?
17 A. Dr. Cannon is a past president of our
18 Board of Directors and a member of our organization
19 and also serves as our PAC Board chair.
20 Q. Okay. And I see you forwarded this
21 e-mail to Peter Candela and April Koon?
22 A. (Nods head up and down).
23 Q. We talked about Peter Candela before;
24 who is April Koon?
25 A. April is the administrator at LLR that

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1 works with the Board of Examiners.
2 Q. And what does that mean?
3 A. She's our administrative person. She's
4 my staff contact for the Board.
5 Q. Okay. In your role at SCOPA -- strike
6 that.
7 Has your time at SCOPA given you, for
8 example, any sense of what a South Carolina
9 optometrist usually charges for an eye exam?
10 A. No.
11 Q. Do South Carolina optometrists ever
12 give eye exams for free, to your knowledge?
13 A. Yes.
14 Q. Is that a common occurrence?
15 MR. MATTHEWS: Object to the form.
16 Please answer.
17 THE WITNESS: It's been my experience
18 when I've found that there's someone in need in the
19 community that requires an eye exam that it's not a
20 problem for me to find someone who would be willing
21 to see them.
22 BY MR. MCNAMARA:
23 Q. Are you aware of any South Carolina
24 optometrists who give eye exams for free,
25 regardless of whether the person needing the exam

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1 is indigent?
2 A. I don't know.
3 Q. Okay. You just don't know either way?
4 A. I don't know either way.
5 Q. Are there any optometrists in
6 South Carolina who also sell eyeglass frames in the
7 course of their business?
8 A. Yes.
9 Q. Do you have a sense of how many?
10 A. No.
11 Q. Do you have a sense of whether that's
12 an unusual business practice?
13 A. No.
14 Q. Is it fair to say that many
15 South Carolina optometrists sell eyeglass frames?
16 MR. SHEALY: Object to the form. You
17 may answer.
18 THE WITNESS: Yes.
19 BY MR. MCNAMARA:
20 Q. Is it fair to say that most
21 South Carolina optometrists sell eyeglass frames?
22 A. Yes.
23 Q. To your knowledge, do optometrists
24 conduct a comprehensive eye health exam every
25 single time they write a corrective lens

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1 prescription?
2 MR. SHEALY: Object to the form. You
3 may answer.
4 THE WITNESS: Say it one more time,
5 please.
6 BY MR. MCNAMARA:
7 Q. To your knowledge, do optometrists
8 conduct a comprehensive eye health exam every
9 single time they write a corrective lens
10 prescription?
11 MR. SHEALY: Object to the form.
12 THE WITNESS: Yes.
13 BY MR. MCNAMARA:
14 Q. How do you know that?
15 A. Through my interaction with the
16 members, it's my impression that the majority of
17 them do that. It's just part of their standard of
18 care.
19 Q. Okay. So it's your impression that a
20 majority of South Carolina optometrists conduct a
21 comprehensive eye health exam every time they write
22 a corrective lens prescription?
23 A. Yes.
24 MR. SHEALY: Object to the form.
25 BY MR. MCNAMARA:

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1 Q. I know sometimes I'm just restating
2 what you said; I'm just trying to make sure I
3 understand and that we have a clear written record.
4 What steps, if any, does SCOPA take to
5 ensure that optometrists conduct a comprehensive
6 eye health exam every single time they write a
7 corrective lens prescription?
8 MR. SHEALY: Object to the form. You
9 may answer.
10 THE WITNESS: Well, again, we – we
11 promote that as a standard of care for patients.
12 BY MR. MCNAMARA:
13 Q. Anything else?
14 A. Excuse me?
15 Q. Anything else?
16 A. No.
17 Q. Okay. And just to get back to your
18 knowledge of optometrist's behavior, have you or
19 has SCOPA conducted a survey of South Carolina
20 optometrists to determine whether in fact, or how
21 many of them, in fact, conduct a comprehensive eye
22 health exam every single time they write a
23 corrective lens prescription?
24 MR. SHEALY: Object to the form. You
25 may answer.

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1 THE WITNESS: No, we have not done a
2 survey.
3 BY MR. MCNAMARA:
4 Q. Have you talked to individual
5 optometrists about whether they conduct a
6 comprehensive eye health exam every time they write
7 a corrective lens prescription?
8 MR. SHEALY: Object to the form. You
9 may answer.
10 THE WITNESS: Yes.
11 BY MR. MCNAMARA:
12 Q. Roughly how many optometrists have you
13 talked to on that subject?
14 A. I'm not sure.
15 Q. More than ten or fewer than ten?
16 A. I would say more than ten.
17 Q. More than 40 or fewer than 40?
18 A. More than 40.
19 Q. More than 100 or fewer than 100?
20 A. Fewer than 100.
21 Q. Okay, zeroing in. And so you testified
22 earlier that your impression is that most
23 South Carolina licensed optometrists do a
24 comprehensive eye health exam every time they write
25 a corrective lens prescription, right?

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1 MR. SHEALY: Object to the form.
2 THE WITNESS: Yes.
3 BY MR. MCNAMARA:
4 Q. Is the basis of that testimony these 40
5 to 100 conversations you've had on this topic with
6 optometrists?
7 A. Yes.
8 Q. Is that sense you have based on
9 anything else in addition to those conversations?
10 A. Well, again, it's based on the
11 information, and again, the type of quality of
12 care, their code of ethics that we know that they
13 take when they become licensed optometrists. And
14 it's how we communicate with our members, you know,
15 and the type of information that we're sharing with
16 them in terms of how they're providing high-quality
17 care to their patients.
18 Q. Okay. So your testimony is based on
19 these conversations with optometrists, an
20 optometrist's code of ethics, and on SCOPA's own
21 advocacy; is that a fair summary?
22 A. Yes. And I may add to that, also the
23 type of continuing education that we provide to
24 them through the association that we do twice a
25 year.

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1 Q. Is it based on anything else?
2 A. No.
3 Q. Okay. It's not, for example, based on
4 firsthand observation of optometrists in their
5 practice?
6 A. Well, the optometrists that I see, the
7 optometrists that care for me do always provide a
8 comprehensive eye exam when I'm in their office.
9 So I could say it's also based on personal
10 experience.
11 Q. Have you ever asked your optometrists
12 not to provide a full comprehensive eye health exam
13 and just update your prescription?
14 A. No.
15 Q. So we've talked a bit about the Eye
16 Care Consumer Protection Law or the ECCPL, right?
17 A. Yes.
18 Q. What do you know about the ECCPL?
19 A. I know that it's a law that establishes
20 the parameters of in-person eye exams, so that
21 we're putting the patients in the chair in front of
22 the doctor, so that they can be given a
23 comprehensive eye exam.
24 Q. So I just want to be clear, the ECCPL
25 itself is obviously a law that has been passed by

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1 the South Carolina legislature as part of the South
2 Carolina Code, but it also had earlier drafts and
3 iterations. So I want to ask at what point did you
4 first become aware of any draft bill that would
5 eventually become the ECCPL?
6 MR. MATTHEWS: Object to the form.
7 Please answer.
8 MR. SHEALY: Object to the form.
9 THE WITNESS: I don't recall.
10 BY MR. MCNAMARA:
11 Q. Okay. Were you involved in the process
12 of drafting the ECCPL?
13 A. Not the actual language itself, no. I
14 mostly just passed along the drafts to make sure
15 the people that needed to review it got their
16 copies.
17 Q. Okay. Where did the language of the
18 ECCPL come from?
19 A. The original draft language came from
20 the American Optometric Association.
21 Q. Do you know how the language -- so let
22 me get the chain first before I ask how it
23 happened. You say the original draft language that
24 became the ECCPL, came from the American Optometric
25 Association. Did SCOPA then generate a draft based

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1 on that language?
2 A. Yes.
3 Q. Okay. Do you know, if you know, do you
4 know how the language from the American Optometric
5 Association first made its way to SCOPA?
6 A. I can't remember specifically; other
7 than I'll say that the American Optometric
8 Association, in their role, they identify key
9 issues that states may need to be aware of. So it
10 could have been at one of our national meetings or
11 it could have just been shared via e-mail.
12 Q. Was there a person or a group of people
13 at SCOPA responsible for drafting the language that
14 became the ECCPL?
15 A. Yes.
16 Q. And was that a single person or was it
17 a group?
18 A. It was a group.
19 Q. Okay. Who were the members of the
20 group of people at SCOPA responsible for drafting
21 the language of the ECCPL?
22 A. I recall Phillip Flynn, William Cannon,
23 Bob Branch, there could have been others that I'm
24 not recalling.
25 Q. Okay. And who are those three people?

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1 A. Former board members.
2 Q. Were they former board members at the
3 time they were a member of the group within SCOPA
4 that was drafting the language that became the
5 ECCPL?
6 MR. MATTHEWS: Object to the form.
7 Please answer.
8 MR. SHEALY: Object to the form.
9 THE WITNESS: I believe all but
10 Phillip Flynn were current board members.
11 BY MR. MCNAMARA:
12 Q. Do you know why Phillip Flynn, as a
13 former board member, was active with current board
14 members in drafting legislative language?
15 A. Because he was involved with -- and
16 still is involved with -- well, he works on
17 third-party areas now, but he was involved with
18 legislative activities at that time.
19 Q. So even though he was a former SCOPA
20 board member, he was still working with SCOPA on
21 legislative activities?
22 A. Uh-huh.
23 (Court reporter seeks clarification).
24 A. Yes.
25 Q. And you say at that time, what time do

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1 you mean?
2 A. When we started working on and
3 considering going for the legislation.
4 Q. Roughly when did SCOPA start working on
5 the legislation that became the ECCPL?
6 A. I don't remember specifically.
7 Q. Do you remember if it was before or
8 after 2014?
9 A. It was probably around that time.
10 Q. Around 2014?
11 A. Yeah.
12 Q. Okay. And once SCOPA drafted the
13 language that became the ECCPL, what happened with
14 that language next?
15 MR. MATTHEWS: Object to the form.
16 Please answer.
17 MR. SHEALY: Object to the form.
18 THE WITNESS: I'm not sure how to
19 answer that question.
20 BY MR. MCNAMARA:
21 Q. Let's just -- is it fair to say that
22 the purpose in SCOPA drafting the legislative
23 language that became the ECCPL was that SCOPA
24 wanted the ECCPL to become law?
25 A. Yeah.

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1 MR. SHEALY: Object to the form.
2 MR. MATTHEWS: Same objection. Please
3 answer.
4 THE WITNESS: Yes.
5 BY MR. MCNAMARA:
6 Q. Once SCOPA had drafted legislative
7 language, what steps, if any, did SCOPA take to
8 help ensure that its legislative language would
9 become law?
10 A. At that point, I would say that we
11 started mobilizing our grassroots efforts so that
12 we could -- our members could begin having dialogue
13 with legislators about what we hope to accomplish
14 with the bill.
15 Q. And you've testified that there was a
16 group within the scope of drafting legislative
17 language that included Phillip Flynn and others, at
18 what point did that legislative language make its
19 way to you?
20 A. I don't remember.
21 Q. Okay. You testified earlier that your
22 role in the ECCPL was primarily passing legislative
23 language on. Between whom were you passing
24 legislative language?
25 A. Well, depending upon what stage things

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1 were in, it could have been our Board, the group
2 that was working on the legislation, our lobbyists,
3 the AOA.
4 Q. Anyone else?
5 A. Not that I can recall.
6 Q. Okay. At what point in the process was
7 SCOPA's legislative language first sent to a member
8 of the South Carolina legislature, if ever?
9 A. I don't remember.
10 Q. Okay. Would you have been the person
11 who shared legislative language with South Carolina
12 legislators or would that have come through SCOPA's
13 lobbyists?
14 A. That would have gone through our
15 lobbyists.
16 Q. Okay. Did you have any direct contact
17 with South Carolina legislators about the bill that
18 eventually became the ECCPL?
19 A. No.
20 Q. Did you have any direct contact with
21 any South Carolina government official about the
22 bill that eventually became the ECCPL?
23 A. I'm not sure what might constitute a
24 government official.
25 Q. Anyone in the employ of the State of

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1 South Carolina?
2 A. Then I guess I would say yes.
3 Q. And who were those government
4 officials?
5 A. I was considering -- I was thinking of
6 the members of the Board of Examiners.
7 Q. Outside of the members of Board of
8 Examiners, who are also members of SCOPA, as we've
9 learned, did you have contact with any other
10 South Carolina government officials about the bill
11 that eventually became the ECCPL?
12 A. Would employees of the LLR be
13 considered government officials?
14 Q. Yes.
15 A. Then yes.
16 Q. Who at LLR did you have contact with?
17 A. Well, April Koon. I believe I had some
18 discussions with Holly Beason at some point.
19 Q. What was the nature of your discussions
20 with Holly Beason?
21 A. The -- in one of the versions of the
22 bill, there was some discussion about the role of
23 LLR. And during the course of teasing out what
24 that part of the law might look like, I remember I
25 had some discussions with her about that.

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1 Q. Okay. Do you remember any other
2 discussions with Holly Beason?
3 A. I don't recall any others.
4 Q. What was the nature of your discussions
5 with April Koon?
6 A. Just keeping her in the loop as a --
7 the administrator for the Board, if I were talking
8 with her board members.
9 Q. Did you discuss the bill that
10 eventually became the ECCPL with any employees at
11 the LLR, other than April Koon or Holly Beason?
12 A. I don't believe so, no.
13 Q. So to the best of your knowledge, the
14 employees at LLR who were involved with and aware
15 of the efforts surrounding the bill that became the
16 ECCPL, were April Koon and Holly Beason?
17 A. To the best of my knowledge, yes.
18 Q. Okay. Did you speak with any
19 government employees, outside of your board members
20 and outside of LLR, regarding the bill that
21 eventually became the ECCPL?
22 A. Not that I can recall.
23 MR. MATTHEWS: Robert, I need to go
24 feed a meter in about 20 minutes.
25 (Off-the-record conference.)

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1 (A recess transpired.)
2 BY MR. MCNAMARA:
3 Q. So we've been discussing the
4 legislation that eventually became the ECCPL. Do
5 you know what South Carolina legislator first
6 introduced the ECCPL?
7 A. I do not remember.
8 Q. Okay. Are you familiar with the
9 South Carolina legislator named Dr. Long?
10 A. Yes.
11 Q. Who is Dr. Long?
12 A. She is a former member of the House of
13 Representatives and is an optometrist.
14 Q. Okay. Is Dr. Long a member of SCOPA?
15 A. Yes.
16 Q. Do you know roughly how long Dr. Long
17 has been a member of SCOPA?
18 A. More than 15 years.
19 Q. Okay. So long before the ECCPL was
20 introduced?
21 A. Yes.
22 Q. Okay. We've talked about the drafting
23 of the legislative language that became the ECCPL.
24 Were you involved in any discussions about how best
25 to communicate about the legislative language that

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1 eventually became the ECCPL?
2 MR. SHEALY: Object to the form.
3 THE WITNESS: No.
4 BY MR. MCNAMARA:
5 Q. Did you ever have discussions about how
6 best to talk about the proposed bill?
7 A. Yes.
8 Q. And with whom did you have those
9 discussions?
10 A. I would say that probably would have
11 been Mike Zolman.
12 Q. Anyone else?
13 A. I can't remember, but there could have
14 been others. I know that we did have some talking
15 points that we did develop for the bill.
16 Q. Okay. You say we had some talking
17 points that we developed for the bill, who is we in
18 that sentence?
19 A. Well, that would have been me and
20 Mike Zolman. I'm sure there's -- there's a lot of
21 correspondence that went back and forth about this
22 bill. I'm sure at some point we shared with the
23 AOA, there could have been some others.
24 Q. Okay.
25 MR. MCNAMARA: I'm going to ask the

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1 court reporter to mark this as Exhibit 4.
2 (PLF. EXH. 4, E-mails between Jackie
3 Rivers and Mike Zolman and others, dated January
4 19th, 2016, Bates stamped SCOPA 000667, was marked
5 for identification.)
6 BY MR. MCNAMARA:
7 Q. Ms. Rivers, I've handed you a document
8 that's marked as Exhibit 4. This appears to be an
9 e-mail forward, but I want to draw your attention
10 to the bottom half of the document where it says,
11 begin forwarded message; do you recognize that
12 portion of this document?
13 A. What part of this are you referencing?
14 Q. I'm referencing everything after, begin
15 forwarded message, where it says from
16 Jackie Rivers.
17 A. Oh, yes.
18 Q. Do you recognize that portion of this
19 document?
20 A. Yes.
21 Q. What is it?
22 A. This is -- the bottom half portion
23 would have been an e-mail correspondence to our
24 Board of Directors at that time.
25 Q. Did you actually send these e-mails?

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1 A. Yes.
2 Q. Okay. I want to draw your attention to
3 the bottom e-mail on the page that's been marked as
4 Exhibit 4. Do you see where it says: All,
5 Dr. Campbell asked me to let everyone know that it
6 will be very important once our bill gets dropped
7 and we start talking with legislators and
8 encouraging members to do the same, that we refer
9 to bill as the Eye Care Consumer Protection Law?
10 A. Uh-huh.
11 (Court reporter seeks clarification.)
12 A. Yes.
13 Q. Who is Dr. Campbell?
14 A. That is Dr. Mike Campbell, and he was
15 our board president at the time.
16 Q. And do you see the last sentence of
17 that e-mail says -- or I guess the second to the
18 last sentence of that e-mail that says: This is
19 also a recommendation from the AOA as well?
20 A. Yes.
21 Q. Do you recall who at the AOA made this
22 recommendation?
23 A. No.
24 Q. Okay. From your recollection is there
25 a limited universe of people it could have been?

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1 A. I would say, yes, it would have been, I
2 guess, a limited universe of the group that came up
3 with, don't refer to this bill as a kiosk bill, or
4 any state that's going for legislation like this,
5 it's not just a kiosk bill.
6 **Q. About how many people at the AOA were**
7 **you in communication with about this bill?**
8 A. I'd say less than ten people.
9 **Q. Okay. Why was it important not to**
10 **refer to the bill as the kiosk bill?**
11 A. Because it affected – it would affect
12 more than just a kiosk that might be set up in a
13 mall or another location.
14 **Q. Why did you want this bill to be not**
15 **about telemedicine?**
16 A. Because it's not a telemedicine bill.
17 **Q. Why is that important?**
18 A. Well, it's my personal opinion that
19 there is a role and a place for telemedicine,
20 especially in a state like ours, with a lot of
21 rural areas.
22 **Q. Okay. Is it a fair statement to say**
23 **that the bill that eventually became the ECCPL was**
24 **primarily pushed by the optometrists?**
25 MR. SHEALY: Object to the form. You

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1 may answer.
2 THE WITNESS: Yes.
3 BY MR. MCNAMARA:
4 **Q. Were you involved in any discussions**
5 **within SCOPA about the substance of the bill that**
6 **became the ECCPL?**
7 A. I would say I was involved in a
8 capacity of just being looped in so I could be
9 aware of the communication, but I did not have any
10 involvement in drafting the language.
11 **Q. So is it fair to say that you were**
12 **aware of SCOPA's internal discussions about the**
13 **substance of the bill that became the ECCPL, even**
14 **if you, yourself, didn't express any opinions about**
15 **what that language should be?**
16 A. Yes.
17 **Q. Okay. Why does the ECCPL not simply**
18 **require a provider to conduct a comprehensive eye**
19 **health exam before writing a prescription for**
20 **corrective lenses?**
21 MR. SHEALY: Object to the form.
22 THE WITNESS: Can you ask that question
23 again?
24 BY MR. MCNAMARA:
25 **Q. Why doesn't the ECCPL simply require**

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1 **providers to conduct a comprehensive eye health**
2 **exam before writing a prescription for corrective**
3 **lenses?**
4 MR. SHEALY: Object to the form. You
5 may answer.
6 THE WITNESS: It is providing for a
7 comprehensive in-person eye exam before a
8 prescription is written.
9 BY MR. MCNAMARA:
10 **Q. Is it your understanding that the ECCPL**
11 **mandates, for example, a glaucoma examination**
12 **before any corrective lens prescription can be**
13 **written?**
14 MR. SHEALY: Object to the form, but
15 you may answer.
16 THE WITNESS: It is my understanding,
17 again, I'm not an optometrist, that during the
18 course of providing a comprehensive eye exam, that
19 things of that nature, the overall assessment of
20 the health of the eye, can be assessed, so things
21 like glaucoma could be determined.
22 BY MR. MCNAMARA:
23 **Q. You say they could be determined, do**
24 **you know if it's mandatory that they be determined?**
25 MR. SHEALY: Object to the form, but

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1 you may answer.
2 THE WITNESS: I don't know, I'm not an
3 optometrist.
4 BY MR. MCNAMARA:
5 **Q. Okay. Was there ever any discussion**
6 **regarding the bill that eventually became the ECCPL**
7 **to the effect that the bill should regulate simply**
8 **optometrists and not ophthalmologists?**
9 A. No.
10 **Q. No one ever suggested that the bill**
11 **just regulate optometrists?**
12 A. Not that I can recall.
13 MR. MCNAMARA: I'm going to ask the
14 court reporter to mark this as Exhibit 5.
15 (PLF. EXH. 5, E-mail correspondence
16 between Michael Zolman and Jackie Rivers and
17 others, dated March 1, 2016, Bates stamped SCOPA
18 000469 and 470, was marked for identification.)
19 BY MR. MCNAMARA:
20 **Q. Ms. Rivers, I have handed you a**
21 **document that has been stamped as Exhibit 5. Do**
22 **you recognize this document?**
23 A. Yes.
24 **Q. What is this document?**
25 A. Well, let's see, this appears to be

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1 regarding some edits to the bill.
2 Q. And when you say, the bill, you mean
3 the bill that became the ECCPL?
4 A. Yes.
5 Q. This appears to be -- this appears to
6 be an e-mail from Michael Zolman between you and
7 several others; did you receive this e-mail?
8 A. Well, I'm on the distribution, so I'
9 assume I did.
10 Q. And on the face of it, it appears to be
11 quoting an e-mail you sent. Did you send that
12 e-mail?
13 A. Yes.
14 Q. Okay. And in your e-mail you seem to
15 be passing along an e-mail from someone named
16 Catherine Hendricks?
17 A. Yes.
18 Q. Who is Catherine Hendricks?
19 A. Catherine Hendricks works for the AOA,
20 the American Optometrics Association.
21 Q. And what does -- sorry.
22 A. I was just going to say her official
23 title here, she works for state government
24 relations, she's the manager.
25 Q. Okay. And to the extent you know, what

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1 is her role as a state government relations
2 manager?
3 A. I can speak to what my role has been
4 with her and she's one that I consult with if I
5 have a question or need information about
6 legislative issues.
7 Q. Okay. And it seems from this e-mail
8 that you're passing along feedback from the AOA
9 regarding the proposed amendment from Opternative?
10 A. It appears to be the case.
11 Q. What is the proposed bill from
12 Opternative?
13 A. Yeah, I'm not sure. I don't recall.
14 Q. So the first full sentence of
15 Ms. Hendricks' e-mail says: Removing MDs basically
16 makes the bill moot?
17 A. Uh-huh.
18 (Court reporter seeks clarification).
19 A. Yes.
20 Q. Was this an e-mail regarding a proposal
21 to remove MDs from the bill that eventually became
22 the ECCPL?
23 A. Yes. And I believe that might have
24 been what the proposed edit from Opternative may
25 have been, to remove the MDs.

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1 Q. Why would removing MDs from the bill
2 make it moot?
3 MR. SHEALY: Object to the form, but
4 you may answer.
5 THE WITNESS: Because it would still
6 create an avenue potentially for someone to give
7 themselves a refraction utilizing technology that
8 removes them out of the doctor's office.
9 BY MR. MCNAMARA:
10 Q. And actually, if I can direct your
11 attention to the second page of this e-mail. Do
12 you mind just reading the last two e-mails before
13 we're done, I think it may refresh your
14 recollection about what Opternative's proposal was.
15 A. Which part do you think is going to
16 remind me, the e-mail from Robert Adams?
17 Q. Yes.
18 A. It looks like they're proposing to
19 delete the South Carolina Board of Medical
20 Examiners.
21 Q. Okay. So having reviewed that, does
22 that refresh recollection about your earlier
23 testimony about what proposed amendment from
24 Opternative you were talking about in this e-mail?
25 A. No.

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1 Q. Okay, that's fine. Do you remember
2 when you first learned about the possibility or
3 practice of online-only eye exams?
4 MR. SHEALY: Object to the form, but
5 you may answer.
6 THE WITNESS: No.
7 BY MR. MCNAMARA:
8 Q. Are you aware, as you sit here today,
9 that there are businesses in the world that purport
10 to provide online-only eye exams?
11 MR. SHEALY: Object to the form, but
12 you can answer.
13 THE WITNESS: Yes, I'm aware that
14 there's other technologies out there that can do
15 that, yes.
16 BY MR. MCNAMARA:
17 Q. Okay. Are you familiar with a company
18 called Opternative?
19 A. Yes.
20 Q. When did you first hear about the
21 company Opternative?
22 A. I'm not sure.
23 Q. Do you remember how you first heard
24 about the company Opternative?
25 A. Not specifically.

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1 Q. Okay.
2 MR. MCNAMARA: I'm going to ask the
3 court reporter to mark this as Exhibit 6.
4 (PLF. EXH. 6, E-mail correspondence
5 between Jackie Rivers and Angelia Smith Owens and
6 others, dated March 13 and 17th, 2016 and April 1,
7 2016, Bates stamped SCOPA 000501 through 504, was
8 marked for identification.)
9 BY MR. MCNAMARA:
10 Q. I've handed you a document that's been
11 marked as Exhibit 6. Do you recognize this
12 document?
13 A. Yes.
14 Q. What is this document?
15 A. This is an original communication that
16 was sent out to all state executive directors from
17 the American Optometric Association.
18 Q. And when it was sent to state executive
19 directors, are you a member of the e-mail list in
20 the e-mail from Brian Reuwer called state executive
21 directors?
22 A. Yes.
23 Q. Okay. So you got this directly?
24 A. Yes.
25 Q. What is the nature of this update?

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1 A. To inform state executive directors
2 about Opternative and online eye exams.
3 Q. So at least as early at 2014, the AOA
4 was notifying you about developments in the world
5 of online eye exams?
6 A. Yes.
7 Q. Was the effort to pass the ECCPL
8 prompted by a desire to ban online eye exams?
9 MR. SHEALY: Object to the form. You
10 may answer.
11 THE WITNESS: The purpose of our bill
12 was to protect the consumers, patients in
13 South Carolina to ensure that they get an in-person
14 comprehensive eye exam.
15 BY MR. MCNAMARA:
16 Q. Was the effort to pass the ECCPL
17 prompted by the existence of businesses offering
18 online eye exams?
19 MR. SHEALY: Object to the form.
20 MR. MATTHEWS: Same objection, please
21 answer.
22 THE WITNESS: Yes.
23 BY MR. MCNAMARA:
24 Q. Did the effort to pass the ECCPL come
25 about before or after SCOPA learned about the

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1 existence of online eye exams?
2 MR. SHEALY: Object to the form. You
3 may answer.
4 THE WITNESS: After.
5 BY MR. MCNAMARA:
6 Q. Were there ever internal discussions at
7 SCOPA about the importance of discussing the ECCPL
8 as if it were not an effort to ban Opternative?
9 MR. SHEALY: Object to the form. You
10 may answer.
11 THE WITNESS: Yes.
12 BY MR. MCNAMARA:
13 Q. What was the nature of those
14 discussions?
15 A. The nature of the discussion was what
16 obligations the association or practitioners had to
17 protect consumers to ensure that they have --
18 receive comprehensive eye exams.
19 Q. Was that the only reason put forward in
20 internal discussions to talk about the bill that
21 way?
22 A. I would say that our discussions
23 primarily centered around accomplishing that.
24 MR. MCNAMARA: I'm going to ask the
25 court reporter to mark this as Exhibit 7.

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1 (PLF. EXH. 7, E-mail correspondence
2 between Mike Zolman, Jackie Rivers and others,
3 dated May 17th, 2016, Bates stamped SCOPA 001257
4 through 1259, was marked for identification.)
5 BY MR. MCNAMARA:
6 Q. I've handed you a document that the
7 court reporter has labeled as Exhibit 7. Do you
8 recognize this document?
9 A. Yes.
10 Q. What is this?
11 A. This was a document that was sent out
12 to our members after our governor vetoed our bill
13 and asking them to help us with an override.
14 Q. Okay. And if I can direct your
15 attention to page 2 of this, it has in the bottom
16 right-hand corner SCOPA 1258.
17 A. Uh-huh. Yes.
18 Q. Do you see the bolded text that says,
19 what you need to do, in the middle of the page?
20 A. Yes.
21 Q. You said this was sent out to SCOPA's
22 members. So is the, you, in this sentence SCOPA's
23 members?
24 A. Yes.
25 Q. If you can go to the second paragraph

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1 after that bolded text, the paragraph that begins,
2 we do not, can you just read that sentence for me,
3 please?
4 A. Sure. We do not want to make this an
5 anti-Opternative argument as legislators frown upon
6 legislation that singles out and restricts a
7 specific business. We must maintain the argument
8 that this bill protects the consumer from false and
9 misleading claims that an eye exam is as well as
10 that it – what an eye exam is, as well as that it
11 protects our citizens from unproven technology and
12 that anything less jeopardizes consumer health
13 care.
14 Q. Thank you very much. When the ECCPL
15 passed, did SCOPA or its members celebrate the
16 passage as a victory over Opternative?
17 MR. SHEALY: Object to the form. You
18 may answer.
19 THE WITNESS: We celebrated it as a
20 victory in general for the protection and safety of
21 our citizens.
22 MR. MCNAMARA: I'm going to ask the
23 court reporter to mark this as Exhibit 8.
24 (PLF. EXH. 8, E-mail correspondence
25 between Jackie Rivers, Catherine Hendricks, and

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1 Daniel Carey, dated May 18th and 19th, 2016, Bates
2 stamped SCOPA 000116 and 117, was marked for
3 identification.)
4 BY MR. MCNAMARA:
5 Q. Ms. Rivers, I'm handing you a document
6 that has been labeled Exhibit 8 to this deposition.
7 Do you recognize this document?
8 A. Yes.
9 Q. What is this document?
10 A. This is a document – well, the subject
11 line says, AOA letter of support, so I assume we
12 received a letter from the AOA to support our
13 efforts; it looks like it was distributed to the
14 Senate.
15 Q. Do you see roughly a little more than a
16 third of the way down the page, it says: On
17 May 18th, 2016 at 5:21 PM Jackie Rivers wrote?
18 A. Yes, I see that.
19 Q. What was happening on May 18th, 2016?
20 A. I believe that was when we got our
21 override in the Senate maybe.
22 Q. So is this quoting an e-mail you wrote
23 in response to the Senate vote to override
24 Governor Haley's veto?
25 A. It appears to be.

Page 60

1 Q. And would you mind just reading into
2 the record your May 18th, 2016 e-mail?
3 A. The one where I said yes?
4 Q. Yes, ma'am.
5 A. The Board was here, so we were all able
6 to watch it together. Take that, Opternative.
7 Q. Thank you, you can set that aside.
8 MR. MCNAMARA: I'm going to ask the
9 court reporter to mark this as Exhibit 9.
10 (PLF. EXH. 9, E-mail correspondence
11 from Jackie Rivers to penfields, dated June 27th,
12 2016, Bates stamped SCOPA 000196 through 203, was
13 marked for identification.)
14 BY MR. MCNAMARA:
15 Q. We're almost done. Okay. Ms. Rivers,
16 the court reporter is handing you a document that's
17 been labeled as Exhibit 9. And this appears to be
18 an e-mail with an attachment, so I want to take it
19 in two phases, so we identify everything. Looking
20 just at the first page, do you recognize the first
21 page?
22 A. Yes.
23 Q. And what is that?
24 A. This is an e-mail where I sent
25 Dr. Chris Wroten a presentation that we were asked

Page 61

1 to give at a President's Council of the American
2 Optometrics Association.
3 Q. And who is Chris Wroten?
4 A. He is an optometrist in Louisiana and
5 is the moderator for those meetings.
6 Q. Okay. And what is the nature of the
7 presentation scope you were asked to give?
8 A. We were asked to give an overview of
9 how we got our law passed, our Consumer Eye Care
10 Protection Bill.
11 Q. And when you say how we got our law
12 passed, you're referring to the Eye Care Consumer
13 Protection Law –
14 A. Yes.
15 Q. – or the ECCPL?
16 A. Yes.
17 Q. At any point you're referring to a
18 different law, please just say that so I can stop
19 breaking it down. And the rest of this exhibit
20 was that an attachment to this e-mail?
21 A. Yes.
22 Q. And what is that attachment?
23 A. This is the copy of the presentation
24 that we gave.
25 Q. Okay.

CERTIFICATE OF REPORTER

I, Amy R. Cope, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 15th day of August, 2017 at Columbia, Richland County, South Carolina.

Amy R. Cope, Court Reporter
My Commission expires
May 12, 2018.

I N D E X

WITNESS/EXAMINATION	Page	Line
JACKIE RIVERS	3	3
EXAMINATION	3	5
BY MR. MCNAMARA		
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BY MR. MATTHEWS		
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REQUESTED INFORMATION INDEX

(No Information Requested)

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PLF. EXH. 1, Notice of Deposition	3	1
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	Page	Line
PLF. EXH. 3, E-mails between Jackie Rivers, Peter Candela, April Koon and others, dated October 20th, 2016, Bates stamped LLR 00001784 and 1785	24	16
PLF. EXH. 4, E-mails between Jackie Rivers and Mike Zolman and others, dated January 19th, 2016, Bates stamped SCOPA 000667	44	2
PLF. EXH. 5, E-mail correspondence between Michael Zolman and Jackie Rivers and others, dated March 1, 2016, Bates stamped SCOPA 000469 and 470	49	15
PLF. EXH. 6, E-mail correspondence between Jackie Rivers and Angelia Smith Owens and others, dated March 13 and 17th, 2016 and April 1, 2016, Bates stamped SCOPA 000501 through 504	54	4
PLF. EXH. 7, E-mail correspondence between Mike	57	1

	Page	Line
Zolman, Jackie Rivers and others, dated May 17th, 2016, Bates stamped SCOPA 001257 through 1259		
PLF. EXH. 8, E-mail correspondence between Jackie Rivers, Catherine Hendricks, and Daniel Carey, dated May 18th and 19th, 2016, Bates stamped SCOPA 000116 and 117	58	24
PLF. EXH. 9, E-mail correspondence from Jackie Rivers to penfields, dated June 27th, 2016, Bates stamped SCOPA 000196 through 203	60	10

AFFIDAVIT OF JOSHUA WINDHAM

EXHIBIT 6

From: angelia@kmso.net
Sent: Tuesday, January 19, 2016 5:18 PM
To: Angelia Smith Owens
Subject: Fwd: SCOPA's Bill - How to Reference

Angelia Smith Owens
Kelley, McCain & Smith Owens, LLC
803.608.4800 cell
803.254.1110 office
Angelia@kmso.net

Begin forwarded message:

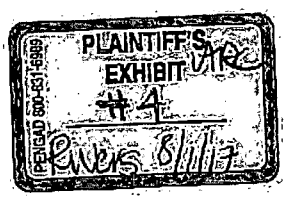
From: Jackie Rivers <jrivers@sceyedoctors.com>
Date: January 19, 2016 at 1:26:43 PM EST
To: "repmkelley@aol.com" <repmkelley@aol.com>, Angelia Smith Owens <angelia@kmso.net>, Philip Flynn <pdflynn@hotmail.com>, Wayne Cannon <wmcannon15@gmail.com>
Cc: Mike Campbell <mcamp16035@aol.com>, Jennie Smith Zolman <jenniesmithod@yahoo.com>
Subject: FW: SCOPA's Bill - How to Reference

Hi all!! Please see message below from Dr. Campbell. Dr. Jennie Zolman asked me to be sure that I sent you this message as well. Wanna try and keep us all on the same page. Thanks!!

From: Jackie Rivers
Sent: Tuesday, January 19, 2016 11:40 AM
To: Anna Balderson <abalderson@sceyedoctors.com>; Bob Branch <jeyes4us@yahoo.com>; David McKenzie <drdavid@mckenzieeyecare.com>; Jennie Smith Zolman <jenniesmithod@yahoo.com>; Johndra McNeely <uptownnw@yahoo.com>; Justine O'Dell <justinejodell@gmail.com>; Mike Campbell <mcamp16035@aol.com>; Mike Zolman <focusedeyedoc@yahoo.com>; Pete Smith <smithforhouse@gmail.com>; Ted Newman <tnewman123@bellsouth.net>
Subject: SCOPA's Bill - How to Reference

All, Dr. Campbell asked me to let everyone know that it will be very important, once our bill gets dropped and we start talking with legislators and encouraging members to do the same that we refer to the bill as the Eye Care Consumer Protection Law. It will be important that we not refer to this bill as the "kiosk" bill. We want this bill to be about ensuring the safety and wellbeing of the public and not telemedicine. This is also a recommendation from the AOA as well.

Thanks!



AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 7

From: Jackie Rivers <jrivers@sceyedoctors.com>
Sent: Tuesday, April 01, 2014 11:59 AM
To: Angelia Smith Owens
Subject: FW: AOA Update on Opternative
Attachments: AOA warns public about online eye exams.pdf

Hey – is this what you were talking about?

From: Jackie Rivers
Sent: Monday, March 17, 2014 3:38 PM
To: 'Angelia Smith Owens'; 'Mark Kelly'
Cc: Wayne Cannon; 'jvaught@vaughteye.com'; 'David McKenzie'
Subject: FW: AOA Update on Opternative

Good afternoon Angelia and Mark. Dr. Cannon asked me to forward you this update on Opternative, just so you all are in the loop on what's going on with this online "eye exam" website that is supposed to be live this summer.

I've attached the article as a pdf. Crazy concept, hard to believe it's being put in place!

From: Reuwer, Brian [mailto:BReuwer@AOA.ORG]
Sent: Thursday, March 13, 2014 2:52 PM
To: State Executive Directors
Cc: Hymes, Jon; Brauns, Renee; Frawley, Jennifer A.; Skiles, Kristen
Subject: AOA Update on Opternative

Good afternoon,

I want to send you a quick update on AOA actions on the Opternative issue, which is the online "eye exam" website that is supposed to be live this summer. The AOA has written an article that was published this morning on aoa.org/news that describes a little more detail on our response which you may want to share with your members. In addition, you might find the article in the Chicago Tribune interesting as well, while Opternative did not comment on our letter, I think the story shows insight into how they will likely respond back to us.

From an SGRC perspective, we are investigating what legal justifications they may use once the program goes live plus the wider issue of the introduction of kiosks in your state. Once we have completed this review, we will make recommendations to state affiliates about suggested strategies to stop this from operating in your state.

If you have any questions about the article or anything else associated with Opternative or kiosks please do not hesitate to contact me.

Brian

http://www.aoa.org/news/advocacy/aoa-warns-public-about-online-eye-exams
http://bluesky.chicagotribune.com/originals/chi-opternative-aoa-warning-dangers-bsi-20140312,0,0.story

Brian Reuwer
Associate Director, State Government Relations
American Optometric Association

1505 Prince St. Suite 300
Alexandria, VA 22314
Phone - 703-837-1343
Cell - 517-290-3532
BReuwer@aoa.org

***Click here** to view a 99-second video on the historic AOA SUPER ADVOCACY CONFERENCE 2013, and for information on attending next year's meeting.*

AOA warns public about online eye exams

The AOA is warning consumers about possible risks associated with online refractive eye exams.

Such online sites tout convenience. But any alleged advantages come with risks, the AOA cautions. In a statement, AOA President Mitchell T. Munson, O.D., says the association has received an increasing number of questions about the safety and validity of this type of online test.

The AOA contends that such tests are no substitute for an in-person comprehensive eye exam by an optometrist or ophthalmologist.

"We believe that claiming to have performed an eye exam without physically examining a patient is offering misleading information and may contribute to a patient believing—incorrectly—that his or her eye health needs have been met," Dr. Munson says.

The value of in-person exams

One such website says its online refraction test is only available to those between the ages of 18 and 40 who are in good health—meaning people with no history of conditions such as hypertension, cataracts, glaucoma or diabetes.

An online exam has the potential to miss critical, underlying health problems.

But what if patients don't know they have these diseases?

Diabetes, for example, affects more than 8 percent of the U.S. population, but roughly 7 million people are unaware that they have this condition, according to estimates from the Centers for Disease Control and Prevention.

Like diabetes, most systemic conditions are asymptomatic in their earliest and most treatable stages.

These are precisely the types of chronic conditions an OD can diagnose and manage during a comprehensive eye exam, the AOA maintains. A recent study by UnitedHealthcare supports the role ODs play in identifying chronic health issues.

An online exam has the potential to miss critical, underlying health problems, says Beth Kneib, O.D., director of the AOA Clinical Resources Group.

"If you look at refraction only, you're not personally looking in the patient's eye, you're not examining their eye health, you're not looking at their history or observing medical conditions firsthand," she says.

Perhaps a patient is having a shift in vision because of cataracts and isn't aware of it. "And they could be getting better treatment by having the cataract addressed. Maybe they have diabetes and

they have fluctuating vision, and they don't know their glucose is causing their decreased vision if they're just getting lens prescriptions over the Internet," Dr. Kneib says.

Dr. Munson cautions that any delay in intervention in such cases could result in progressive vision damage and more costly and intensive treatments down the road.

"Consumers with chronic conditions such as diabetes or hypertension may be at significant risk regarding proper diagnosis and treatment of potentially sight-threatening diseases if they are not properly evaluated by an eye doctor," Dr. Munson says.

The AOA is calling for a thorough evaluation of online eye-testing sites, and how they might affect patient health. The AOA also plans to monitor these sites and play an active role in fact-checking their claims.

March 13, 2014

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 8

From: Michael Zolman <focusedeyedoc@yahoo.com>
Sent: Tuesday, March 01, 2016 11:32 AM
To: Jackie Rivers; Mike Campbell; Philip Flynn; Pete Smith; Kirby D. Shealy III
Cc: Anna Balderson
Subject: Re: Meeting Monday

[redacted]

Michael W. Zolman, OD

Infinity Eye Care and Low Vision Rehabilitation Center
325 Folly Rd., Suite #109
Charleston, SC 29412

P: 843.795.6464
F: 843.795.6433
www.myinfinityeyecare.com

On Tuesday, March 1, 2016 10:51 AM, Jackie Rivers <jrivers@sceyedoctors.com> wrote:

All – wanted to pass along the feedback from the AOA regarding the proposed amendment from Opternative:

Kirby, I neglected to include you in the forward this morning. In case you need it I've attached a copy of the bill from yesterday.

Thanks!

From: Hendricks, Catherine [mailto:CHendricks@AOA.ORG]
Sent: Tuesday, March 01, 2016 10:50 AM
To: Jackie Rivers <jrivers@sceyedoctors.com>; Carey, Daniel <DCarey@AOA.ORG>
Subject: RE: Meeting Monday

Hi Jackie,

Removing MDs basically makes the bill moot. Continue talking about patient safety, the medical device aspects (contacts deprive the cornea of oxygen and must be monitored for signs of wear), and the cost of emergency room treatment (CDC report) for keratitis.

If you sponsor is willing to run with it as is, do it. Give them the ground support and ammo to move it.

Thank you!

Catherine Hendricks
Manager, State Government Relations

703-837-1017 office
703-739-9497 FAX
AMERICAN OPTOMETRIC ASSOCIATION

From: Jackie Rivers [mailto:jrivers@sceyedoctors.com]
Sent: Tuesday, March 01, 2016 10:36 AM
To: Carey, Daniel <DCarey@AOA.ORG>; Hendricks, Catherine <CHendricks@AOA.ORG>
Subject: FW: Meeting Monday

Hi Daniel and Catherine! Wanted to share with you the proposed edit from Opternative. I've attached the latest version of our bill.

From: Angelia Smith Owens [mailto:angelia@kmso.net]
Sent: Tuesday, March 01, 2016 10:30 AM
To: Michael Campbell <mcamp16035@aol.com>; Jackie Rivers <jrivers@sceyedoctors.com>
Cc: 'Mark Kelley' <mark@kmso.net>
Subject: FW: Meeting Monday

FYI from Opternative's lobbyist. His reference isn't clear, but I believe he means they want to revise definition of provider, which is (7) in Julie's amendment from last week and (11) in the bill as introduced. (Jackie please forward)

From: Adams, Robert [mailto:RAdams@mwcllc.com]
Sent: Tuesday, March 01, 2016 10:16 AM
To: Julie Price
Cc: Stokes-Murray, Lynn (LStokes-Murray@MCNAIR.NET); Puhlasky, Jason J. (Jason@parkerpoeconsulting.com); JCNicholson@scmedical.org; kkent@hsbcopperdome.com; 'Bruning, Shannon' (SBruning@mcnair.net); ronscott11@aol.com; Damon Jeter (djeter@jetcorpconsulting.com); benhomeyer@1101publicaffairs.com; Mark Kelley; 'Angelia Smith Owens'; Ron Scott; Boan, William D.; Phillips, Katherine A.; 'rebecca.leach@llr.sc.gov'; Boan, William D.
Subject: RE: Meeting Monday

Group –

I apologize for this, but Billy and I have received new instructions from our client, Opternative, which are different than what I communicated to you in yesterday's meeting.

We would like to make a change to section (11), striking every word after Optometry:

The following would be deleted:

"or the South Carolina Board of Medical Examiners."

Again, we apologize for any confusion this may have caused.

Thanks,
Robert

Robert Adams
SVP Government Relations - State
McGuireWoods Consulting LLC
1301 Gervais Street

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 9

From: Jackie Rivers
Sent: Thursday, May 19, 2016 8:35 AM
To: Hendricks, Catherine; Daniel Carey
Subject: RE: AOA Letter of Support

Importance: High

Hey Catherine...we think the House will take it up this morning at 10:30. Here's a link:
http://www.scstatehouse.gov/video/videopage.php?chamber=H&AUDIO=0

From: Hendricks, Catherine [mailto:CHendricks@AOA.ORG]
Sent: Wednesday, May 18, 2016 5:36 PM
To: Jackie Rivers
Subject: Re: AOA Letter of Support

Let us know when the House will take it up and we'll watch online. This is pretty exciting!
Catherine

Sent from my iPhone

On May 18, 2016, at 5:21 PM, Jackie Rivers <jrivers@sceyedoctors.com> wrote:

> Yes!!!! The board was here so we were all able to watch it together...take that Opternative!!!!!!
>
> ---
>
> **From:** Hendricks, Catherine [mailto:CHendricks@AOA.ORG]
> **Sent:** Wednesday, May 18, 2016 4:54 PM
> **To:** Jackie Rivers <jrivers@sceyedoctors.com>
> **Cc:** Deanna Alexander <deealex1@aol.com>; Carey, Daniel <DCarey@AOA.ORG>; zkloomis@gmail.com
> **Subject:** FW: AOA Letter of Support
>
> So you guys crushed it in the Senate! Do you think you will need/want a letter of support for the House?
>
> Catherine Hendricks
> Manager, State Government Relations
> 703-837-1017 office
> 703-739-9497 FAX
>
> ---
>
> **From:** Hendricks, Catherine
> **Sent:** Wednesday, May 18, 2016 4:51 PM
> **To:** Rivers, Jackie Exec Dir <JRivers@sceyedoctors.com>
> **Cc:** Deanna Alexander <deealex1@aol.com>; Carey, Daniel <DCarey@AOA.ORG>; zkloomis@gmail.com
> **Subject:** AOA Letter of Support
>
> Hi Jackie,

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 10

From: Jackie Rivers
Sent: Monday, June 27, 2016 1:59 PM
To: penfields@penfields.com
Subject: Fwd: SCOPA - Powerpoint presentation for PC
Attachments: Optometry at its finest!v2.pptx

Sent from my iPhone

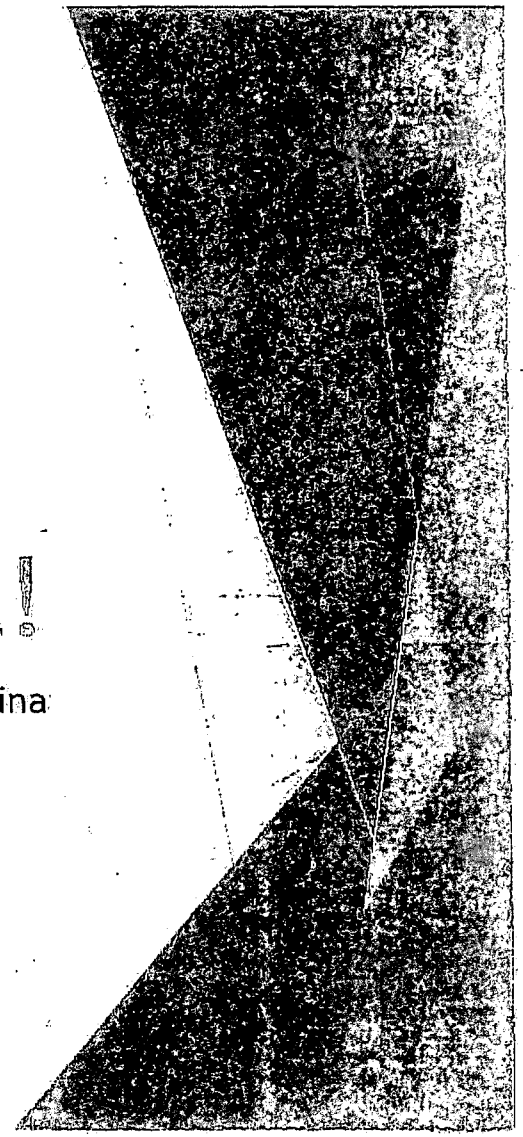
Begin forwarded message:

> **From:** "Jackie Rivers" <jrivers@sceyedoctors.com>
> **To:** "penfields10@pensfields.com" <penfields10@pensfields.com>
> **Subject: Fwd: SCOPA - Powerpoint presentation for PC**

> Sent from my iPhone
>
> Begin forwarded message:
>
> From: "Jackie Rivers" <jrivers@sceyedoctors.com<mailto:jrivers@sceyedoctors.com>>
> To: "Chris Wroten" <cwroten@od.sco.edu<mailto:cwroten@od.sco.edu>>
> Subject: SCOPA - Powerpoint presentation for PC
>
> Hi Dr. Wroten! Our presentation is attached. I will also have a copy with me if needed. There shouldn't be any changes made but...☺
>
> Jackie Rivers
> Executive Director
> SC Optometric Physicians Association
> 2730 Devine Street
> Columbia, SC 29205
> 803-799-6721 toll free 877-799-6721
> fax: 803-799-1064
> www.sceyedoctors.com<http://www.sceyedoctors.com><http://www.sceyedoctors.com/>
>
> [cid:16%253aX%253aRgAAAABLMiP7M5b4TqzD7PJzhgdiBwDa0nOsEjiBTqW3srFcjyEbAAAAAAEKAADa0nOsEjiBTqW3srFcjyEbAACaf8UyAAAJ%253aEACPBitetQixT4mR9GeF0c2B]

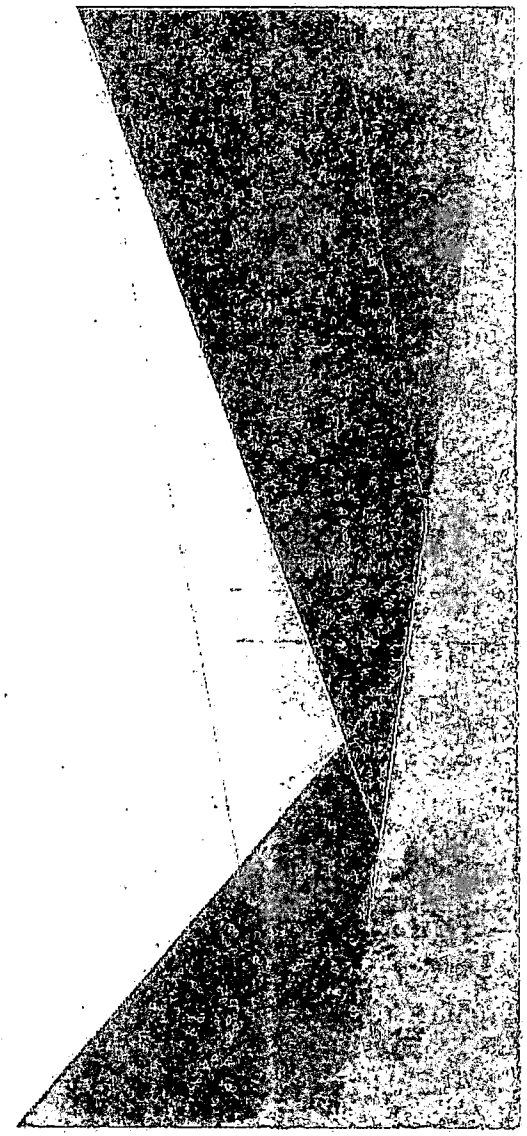
Optometry at its finest!

It was a GREAT day in South Carolina



Our Recipe for Success?

- Great Grassroots
- Great team and a great plan
- Great implementation
- Perseverance!



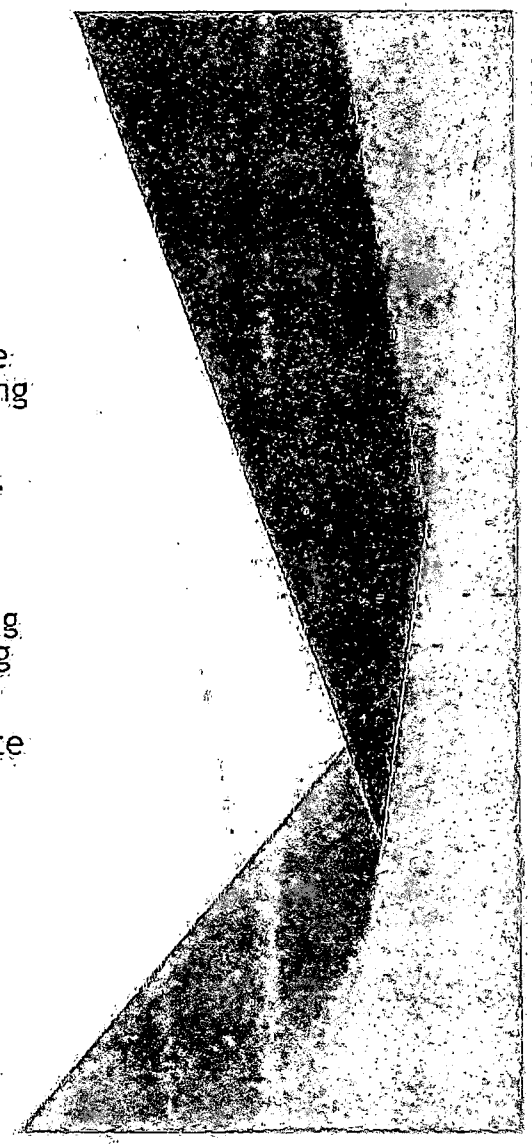
What worked for us?

- Being Politically Active.
- Being visible in the community: SC Mission events, Special Olympics, WellPartners Dental and Eye Clinic, numerous community health fair events some of which were at the invitation of legislators for their underserved constituents.
- SCOPA board members were engaged.
- Being an election year where the entire House and Senate are up for re-election.
- SCOPA lobbyist, members and Ophthalmology Executive Director/Lawyer quietly met over the summer and fall to agree on language for the legislation.
- Companion bills were introduced: S.1016 and H.4728.
- Having great primary sponsors.
- Numerous co-sponsors for both bills.
- Several group meetings with House and Senate staff, agency legislative liaisons, ophthalmology representatives.
- A great lobbying team that knew the system, members and procedures and was able to push and get ahead of bill issues.

Some Highpoints:

- S.1016 was introduced by Senator Cleary on January 21st.
- January - April: worked closely with legislative staff, attended and testified at numerous subcommittee and full committee hearings. Working with state house staff proved to be crucial - having them involved helped us tremendously in being able to move quickly through legislative process and calendar.
- March: Opternative hired a lobbying firm and their efforts to kill our bill began.
- On April 26th the bill was passed out of the Senate by a vote of 40 - 1.
- On April 27th the bill was introduced and had it's first read in the House. It was referred to and recalled from committee on the same day! Due in part to having state house staff involved but also because of Representative (Dr.) Deborah Long being a respected member of the SC House.
- On April 28th the bill received its second reading in the house; had a roll call vote of 100-1 and was given unanimous consent for the third reading the following legislative day.
- The bill was ratified on May 11th - vetoed by Gov. Haley on May 16th

SCOPA members went to work!



The Veto...

Representative Deborah Long and our lobbying team met with the Governor's Chief of Staff. WE knew the arguments and that we would likely see a veto.

In the words of Governor Nikki Haley

"Today, I am vetoing and returning without my approval, R.178, S.1016, a bill that requires prescription from a licensed optometrist or ophthalmologist to receive glasses or contacts based on an in-person comprehensive eye examination. I am vetoing this bill because it uses health practice mandates to stifle competition for the benefit of a single industry, effectively banning eye care kiosks statewide."

She doesn't stop there...

"...optometrists argue that kiosks create an uneven playing filed because licensed providers cannot take advantage of this technology and charge patients for its use in a medical practice...send a bill to my desk that allows for the expanded use of automatic vision evaluation in all medical settings, and I will sign it.

The Override!

ready. set. go!

We had our members prepared with a message to contradict the Governor's veto. We asked SCOPA members to again reach out to their legislators explaining why the Governor was wrong and asked them to override.

They listened!

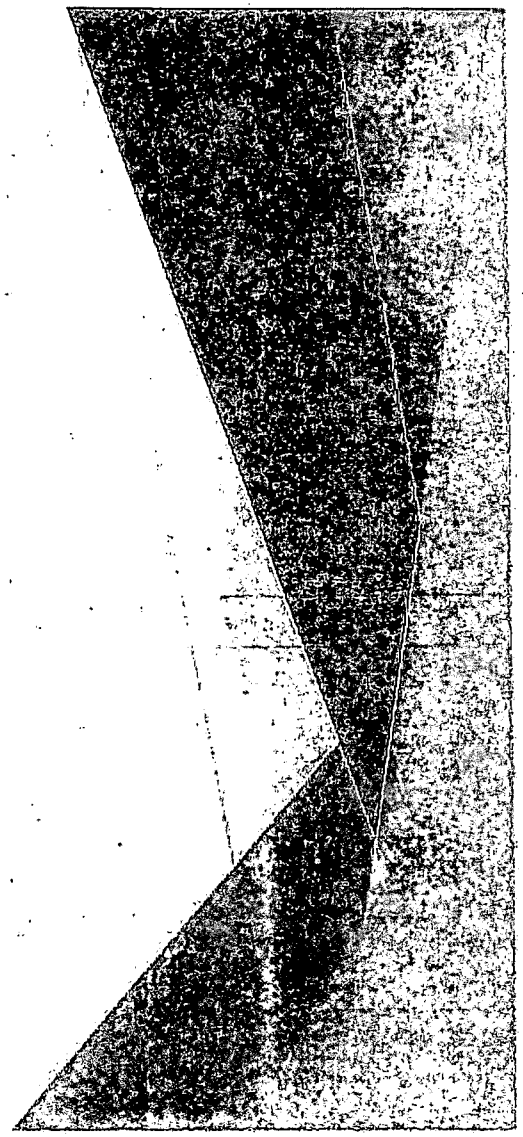
We had a little help from our friends

AMERICAN OPTOMETRIC ASSOCIATION

Johnson & Johnson
VISION CARE, INC.

The Results...

The Senate	The House
39 Yeas	98 Yeas
3 Nays	3 Nays



AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 11

1 STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND
3 OPTERNATIVE, INC.,
4 Plaintiff,
5 vs. CASE NO. 2016-CP-40-06276
6 SOUTH CAROLINA BOARD OF MEDICAL
EXAMINERS, and SOUTH CAROLINA
7 DEPARTMENT OF LABOR, LICENSING
AND REGULATION,
8
Defendants,
9
and
10
SOUTH CAROLINA OPTOMETRIC PHYSICIANS
11 ASSOCIATION,
12 Intervener
Defendant.
13
30(B)(6) DEPOSITION OF: DARRA COLEMAN, ESQ.
14
DATE: August 3, 2017
15
TIME: 9:32 a.m.
16
LOCATION: Nelson, Mullins, Riley &
17 Scarborough
1320 Main Street
18 Columbia, SC
19 TAKEN BY: Counsel for the Plaintiff
20 REPORTED BY: Janice N. Shepherd, RPR
21
A. WILLIAM ROBERTS, JR., & ASSOCIATES
22 Fast, Accurate & Friendly
23 Charleston, SC (843) 722-8414 | Hilton Head, SC (843) 785-3236 | Myrtle Beach, SC (843) 839-3376
24
Columbia, SC (803) 731-5224 | Greenville, SC (864) 234-7030 | Charlotte, NC (704) 573-3919
25

Page 6

1 MR. McNAMARA: I'm just going to ask
2 the court reporter to mark this as Exhibit 1.
3 (PLF. EXH. 1, Five-page 7/11/17 Notices
4 of Deposition, was marked for identification.)
5 BY MR. McNAMARA:
6 Q. Ms. Coleman, the court reporter has
7 placed in front of you a document marked as Exhibit
8 1. Do you recognize this document?
9 A. Yes.
10 Q. What is this document?
11 A. This is the Notice of Deposition for
12 30(b)(6) Designee for LLR.
13 Q. And is it your understanding that
14 you're appearing here pursuant to a notice to the
15 Department of Labor, Licensing and Regulation and
16 also to a notice to the South Carolina Board of
17 Medical Examiners?
18 A. Yes, sir, it is.
19 Q. And it's your understanding that your
20 testimony today is going to be on behalf of those
21 groups as an entity?
22 A. Yes.
23 Q. And so when I ask you questions, I'm
24 not just asking about your personal knowledge; I'm
25 asking about the knowledge of those two entities.

Page 7

1 A. I understand.
2 Q. I think for the most part, we kind of
3 treat those entities as one. If I ask you a
4 question about whether you have any information on
5 a particular topic, I'll be referring to both of
6 them. If necessary, if we need to talk about LLR
7 or about the Board, I'll ask specifically about
8 those. Does that make sense?
9 A. Yes.
10 Q. Is it okay if I call them LLR and the
11 Board?
12 A. Yes.
13 Q. I want to make sure everyone knows what
14 we're talking about. What, if anything, did you do
15 to prepare for today's deposition?
16 A. I reviewed some of the documentation
17 that has been previously produced in discovery. I
18 reviewed some of the pleadings, and I also met with
19 counsel.
20 Q. Did you speak with anyone other than
21 counsel about the deposition?
22 A. I spoke with our general counsel who
23 participated in the preparatory meeting with our
24 outside counsel.
25 Q. Okay. I don't want to ask you about

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1 anything you said to your attorneys. Outside of a
2 meeting with an attorney, did you talk to anyone?
3 A. No.
4 Q. Okay. You say you reviewed some of the
5 documentation that had been produced in discovery?
6 A. Yes.
7 Q. Do you remember what that was?
8 A. Some exhibits that had been marked in
9 the depositions conducted earlier this week. In
10 all honesty, I glanced at them. I did not study
11 them, so I could not identify them by Bates number.
12 But those generally are the documents. I know, I'm
13 falling down on the job already that I can't
14 identify them by Bates number.
15 Q. The record will reflect laughter.
16 A. Yes.
17 Q. Did you look at any documents outside
18 of that?
19 A. No, not outside the pleadings and those
20 documents identified.
21 Q. Okay. Are you currently employed?
22 A. Yes.
23 Q. And what is your job?
24 A. I'm chief advice counsel for the South
25 Carolina Department of Labor, Licensing and

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1 Regulation.
2 Q. What does that mean?
3 A. I am part of the legal services team
4 within the division of administration for the
5 agency, and it is my job to manage the team of
6 attorneys who deliver in-house legal services to
7 all of our 40 boards, plus the additional programs
8 and divisions.
9 Additionally, I am directly responsible
10 for the conduct of special projects, the
11 development of advisory opinions, position
12 statements, and other special projects as
13 designated by other general counsel or the director
14 of the agency.
15 Q. And you yourself are an attorney?
16 A. Yes.
17 Q. And you're aware that you're appearing
18 here today in the course of a lawsuit; is that
19 right?
20 A. Yes.
21 Q. What, if anything, do you know about
22 that lawsuit?
23 A. Only what's in the pleadings.
24 Q. And you're testifying today on behalf
25 of the South Carolina Board of Medical Examiners?

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1 A. Yes.
2 **Q. What is that board?**
3 A. That is the board under South Carolina
4 law with exclusive authority to license and
5 otherwise regulate physicians, physician
6 assistants. We also have the acupuncture committee
7 and respiratory care therapists who fall under the
8 jurisdiction of the Board of Medical Examiners.
9 **Q. When you say the jurisdiction of the**
10 **Board includes physicians, does the category of**
11 **physicians include ophthalmologists?**
12 A. Yes, it would include all physicians.
13 **Q. Okay. Does the Board have any role in**
14 **enforcing the laws and regulations of South**
15 **Carolina?**
16 A. Yes.
17 **Q. What is that role?**
18 A. We are governed by the statutory
19 authority given to us by the legislature in the
20 Medical Practice Act, which is in Chapter 47 of
21 Title 40. And typically the Board is charged with
22 making licensure decisions as well as disciplinary
23 decisions in cases that are presented to the agency
24 pursuant to the Medical Practice Act.
25 **Q. And how does a case become presented to**

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1 **the agency?**
2 A. If it is an application review, that's
3 where someone has applied for licensure, but for
4 whatever reason, it cannot be approved at the staff
5 level. That may be due to disciplinary matters.
6 It may be due to a history of medical malpractice
7 claims. There may be questions about whether the
8 education presented is acceptable. There may be
9 issues regarding their passage of certain tests
10 that are designated in the Medical Practice Act.
11 For disciplinary matters, we are a
12 complaint-driven process. So the way the complaint
13 process begins is that anyone can file a complaint.
14 That complaint comes in and is reviewed by a
15 complaint analyst. The complaint analyst is not a
16 member of the Medical Board's administrative team
17 but works directly with the Office of
18 Investigations and Enforcement. We have a lot of
19 acronyms. I'll just call that OIE.
20 So the complaint analyst is the
21 frontline reviewer, and their job is to compare the
22 allegations with the relevant Practice Act and
23 regulations. So if the allegations, if proven
24 true, would constitute a violation of either the
25 Practice Act or the regulations, they would then

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1 forward that over to the investigative team, and
2 the lead investigator would open a file. They
3 would assign an investigative file number.
4 From there, the investigator, the chief
5 investigator, assigns an investigator to run with
6 that investigation. It's my understanding they
7 typically initiate contact with the complainant
8 within a number of days to ascertain any additional
9 information or clarification that might be
10 necessary before they reach out to the respondent.
11 After gathering information from the
12 complainant, they can then identify additional
13 third-party sources of information that they may
14 need to communicate with as well. They follow up
15 with the respondent. They identify for the
16 respondent the core components of the complaint
17 made against them. The respondent has an
18 opportunity to fully respond to the investigation.
19 Once the investigation is complete, the
20 investigator handling the case prepares a summary
21 that is reviewed by the chief investigator. If the
22 chief investigator is satisfied that the
23 investigation conducted is sufficient, it is then
24 presented to the IRC, which is the Investigative
25 Review Committee.

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1 The IRC is comprised of the prosecuting
2 attorney, typically, as well as the prosecuting
3 attorney's supervisor, the investigator assigned to
4 the case, the supervising investigator, and most
5 importantly, professional members. The
6 administrator for the Board also usually sits in on
7 the IRC.
8 The IRC's job is to review all the
9 evidence that's been gathered to date and to
10 determine whether or not, after weighing all the
11 evidence, they believe that a violation of the
12 Practice Act or the regulations has occurred. The
13 IRC then makes a recommendation that is presented
14 anonymously to the Medical Board.
15 The Medical Board meets quarterly. So
16 the way that it is presented for all of the cases
17 that have been reviewed by the IRC within that
18 period of time, since the last meeting, they are
19 categorized as cases either recommended for
20 dismissal, dismissal with a letter of caution, or
21 issuance of a formal complaint.
22 The only information that the Board
23 members are provided is the investigative file
24 number, the initial allegations that came in on
25 that informal complaint, as well as the rationale

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1 for the recommendation. No identifying information
2 is provided. There is no geographical reference,
3 no identification of the practice or employer of
4 the licensee so as to avoid any potential bias or
5 prejudice at that stage.
6 The Board puts all of those
7 recommendations from the IRC to a vote. If a
8 formal complaint is recommended, then that
9 transfers the case from OIE to the Office of
10 Disciplinary Counsel, which is another division of
11 legal services within the agency charged with
12 prosecuting all of the cases.
13 And we have within our agency what we
14 would consider a Chinese wall. My team does not
15 participate in the investigative process, and,
16 similarly, ODC does not have the attorney-client
17 relationship that we have with all the boards.
18 Once a case is turned over to ODC, ODC
19 can either attempt to negotiate stipulations of
20 fact and/or stipulations of a fact constitute a
21 violation of the Medical Practice Act, or they can
22 simply move forward with an evidentiary hearing.
23 By statute, the Medical Board has a
24 panel that includes a lay member as well as
25 physician licensees who conduct the initial

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1 evidentiary hearing. That panel is prohibited by
2 statute from recommending sanctions. They only
3 make determinations of fact and determine whether
4 or not in their opinion those facts constitute a
5 violation of the law. They are also charged with
6 identification of any mitigating or escalating
7 factors. That report is then presented to the
8 Medical Board.
9 Typically where there is a stipulation
10 of fact, you can bypass the evidentiary hearing and
11 come straight to the Board for what we call a final
12 order hearing, at which point, depending upon how
13 the case is postured, the Board will resolve any
14 issues of fact, establish conclusions of law, and
15 if necessary, impose sanctions.
16 So that is a very long-winded version
17 of the disciplinary process.
18 **Q. I appreciate the thoroughness. So you**
19 **say it's a complaint-driven process and that anyone**
20 **can file a complaint?**
21 A. Yes.
22 **Q. So the complaint doesn't have to come**
23 **from a member of a regulated profession or an**
24 **injured party. It's literally anyone in the**
25 **universe?**

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1 A. Correct.
2 **Q. Okay. Do you have a sense of**
3 **approximately how long the process takes in between**
4 **the filing of the complaint and when the case**
5 **reaches the IRC?**
6 A. It's really dependent upon the
7 complexity of the case and also whether there are
8 other complicating factors. For example, if there
9 is a pending criminal investigation, typically we
10 would forbear moving forward in our process until
11 the criminal charges have been resolved.
12 One source of a number of our
13 healthcare complaints does come from DHEC where the
14 Bureau of Drug Control is housed. So in our
15 diversion cases, it is not uncommon to have a
16 physician who has been arrested, and we would try
17 to coordinate with DHEC and any other law
18 enforcement entities that might be involved.
19 If, for example, it is a significant
20 case where it's going through either the Court of
21 General Sessions at state court, the state court
22 level, or if it's a federal court matter, we would
23 wait until that matter is totally resolved.
24 So we could have a case, in theory,
25 that is not complex that could be fully resolved

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1 within a 12-month span of time. But it's also
2 likely that we could have a case not resolved for a
3 number of years, depending on the other
4 complicating factors.
5 **Q. Just for the record, you used the**
6 **acronym DHEC?**
7 A. Yes, sir.
8 **Q. Can you tell us what that is?**
9 A. Yes, sir. That's the South Carolina
10 Department of Health and Environmental Control.
11 **Q. And you say it's theoretically possible**
12 **to have a relatively not complex case be wrapped up**
13 **in 12 months?**
14 A. In theory, if it's very
15 straightforward, yes, sir. The typical
16 investigative period is 60 to 180 days. We have
17 target investigation cycle goals for each board,
18 and it varies. But within the healthcare boards,
19 I've noticed probably the greatest variability.
20 And, again, if you had a very, very open and shut
21 diversion case where there was no law enforcement
22 involvement, I think it would be -- and the parties
23 stipulated to the facts, stipulated to the
24 violation constituted by the facts, in theory, yes,
25 it could be resolved within 12 months.

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1 Q. And just to be clear, when you say a
2 case could be resolved in 12 months, you're saying
3 that within 12 months, the case could move from the
4 filing of the complaint to the final determination
5 of sanctions. Is that right?
6 A. Under those circumstances where there
7 is no question of fact, no question that a
8 violation of law has occurred, and there are no
9 complicating factors, such as a pending criminal
10 investigation or mental health treatment or other
11 issues beyond our control.
12 Q. And you keep qualifying this as in
13 theory. Is it fair to infer from that that 12
14 months is about the fastest this process could move
15 between complaint and final determination of
16 sanctions?
17 MR. MATTHEWS: Object to the form.
18 Please answer.
19 THE WITNESS: As indicated, it's very
20 difficult, because every case stands on its own
21 merits. The availability of witnesses, the
22 personal circumstances of the licensee involved in
23 the investigation all bear on how long the entire
24 process takes. So in all fairness, it's difficult
25 for me to tell you with any certainty the fastest

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1 I'm giving you my best estimate in order to go
2 through the investigative process, the
3 prosecutorial process, and then presentation to the
4 Board at the quarterly meetings.
5 For example, if you looked at our
6 agenda for the meeting next week, we have three
7 solid days, and the last appearance is scheduled
8 for 6:00 on Wednesday night. We start at 8:00 on
9 Monday morning, and it is not uncommon for us to
10 run until 9:00 or 10:00 at night. So it depends on
11 how quickly the cases can be presented to the
12 Board. But in theory, if there is no dispute, no
13 complicating factors, a case could be presented to
14 the Medical Board for final determination in 12
15 months.
16 BY MR. McNAMARA:
17 Q. In theory, could a case be presented to
18 the Medical Board for final determination in
19 substantially less than 12 months?
20 A. No, I would not say so. Because of the
21 processes that have to unfold, I would not say that
22 that would be a realistic expectation. But of
23 course anything is possible.
24 Q. That's fair. Do you have an estimate
25 of what proportion of complaints are actually

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1 resolved within 12 months?
2 A. We have that data available. I did not
3 pull that because that wasn't something included in
4 the notice. But we do capture that data. We
5 capture, as I understand it, the average life cycle
6 of a case.
7 Q. I won't hold you to specific numbers.
8 As you sit here today, could you give a reasonable
9 range of what proportion of complaints are resolved
10 within 12 months?
11 A. No, I couldn't.
12 Q. Do you know if it's more than half or
13 less than half?
14 A. I would say it's not more than half. I
15 would say it would actually probably be a very
16 small percentage of the cases due to the
17 complicating factors that I've already identified.
18 Q. Okay. Would you say it is less than 10
19 percent?
20 A. I can't quantify that. We do have
21 objective data available, and I would certainly
22 defer to that. But I'm not the keeper of that
23 information. We would have to have our department
24 of technology and security glean that information
25 for us. But the agency does keep track

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1 Q. But it's fair to say then that you
2 would be very surprised if that data showed that
3 even as many as half of complaints are resolved
4 within 12 months?
5 A. For the Medical Board?
6 Q. Yes.
7 A. Yes, I would be surprised. But, again,
8 I don't manage that data, and I didn't research
9 that prior to today.
10 Q. Okay. So you say the three
11 recommendations the Medical Board can make are
12 dismissal, dismissal with letter of caution, and a
13 formal complaint. Do I have that right?
14 A. Yes.
15 Q. On what basis does the Medical Board
16 make the determination which of the three is
17 appropriate?
18 A. Well, the IRC is the entity that
19 actually puts forth the recommendation. And as I
20 mentioned earlier, they weigh the evidence that's
21 been gathered as part of the investigative process
22 with the allegations that are presented. And in
23 certain cases, they have the benefit of an expert
24 reviewer's opinion. In some of the more
25 complicated cases, you would expect to have at

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our response when we are contacted by licensees who have a standard of care question. We do not give prospective advice to anyone. We encourage them to confer with counsel. We do, however, provide the law where there is an objective reference available that is responsive to the subject matter of their question.

So a response to an ophthalmologist asking should I do X, Y, or Z would include the disclaimer that we cannot provide legal advice regarding a proposed course of conduct. However, we would refer them to the statute and encourage them to the retain personal legal counsel.

Q. So if an ophthalmologist contacted BME asking whether he should write a prescription based on certain information in light of the ECCPL, he would get back essentially the objective language of the code, but he wouldn't get anything else?

A. Correct. At the staff level, we don't have the ability to bind the Medical Board. Additionally, we've outlined a very detailed disciplinary process, and only the Medical Board has the jurisdiction to measure someone's conduct after all the evidence has been gathered and presented.

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Q. And so the BME and BME staff doesn't provide this kind of advice because it doesn't have any way to short circuit the complaint investigation process and bind the Board to a conclusion?

A. Correct. But we would always provide the law if it's responsive to a question presented. So, for example, we are often presented with questions relating to supervision. Since the Telemedicine Act passed, we've received a number of questions relating to the implementation of telemedicine policies, and we follow that same practice.

Q. If an ophthalmologist refrained from violating the ECCPL out of concern that he would receive a complaint or potentially draw penalties, would that be unreasonable?

MR. MATTHEWS: Object to the form.

THE WITNESS: I don't think that I can answer that question. I'm not sure that I understand how either the agency or the BME would be able to dictate what's reasonable or unreasonable for an ophthalmologist or any other practitioner.

BY MR. McNAMARA:

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Q. I'm not asking for a legal conclusion. Do you just as a human being have a sense of what the words reasonable and unreasonable mean?

A. Of course.

MR. MATTHEWS: Object to form. Please answer.

THE WITNESS: Yes, I understand those words.

BY MR. McNAMARA:

Q. Do you believe that a practitioner who refrains from violating a law out of concern that he will be penalized for violating that law is acting unreasonably in your sense of that term?

MR. MATTHEWS: Object to form.

THE WITNESS: I do not believe that it is ever unreasonable to forbear against violating a law. That is what we would expect of law abiding citizens and licensees. And actually adherence to state and federal law is required. Failure to do so is identified as a grounds for finding misconduct.

However, there are a number of considerations that individual practitioners must weigh when they're deciding whether to engage in a particular practice or not.

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So using your example, an ophthalmologist may choose to use the Opternative tools as part of their practice, or they may choose not to without regard to this law. But that determination would be outside of the scope or knowledge of either the agency or the Board of Medical Examiners.

BY MR. McNAMARA:

Q. Does either LLR or the Board provide input on draft legislation in South Carolina?

A. When asked, yes.

Q. When asked by whom?

A. Either legislative staff or individual legislators. As a general rule, we do not provide testimony unless we are invited to appear. It is very common that we are asked to provide a statement of economic impact from legislative staff relating to proposed legislation. It is also not uncommon for us to be to offer guidance regarding potential regulatory burdens that may flow from a legislative initiative.

Q. And you say you provide input when asked. Does that refer to both LLR and the Board?

A. Yes. We are prohibited from lobbying, and only a handful of our boards have statutory

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1 authority to make recommendations regarding
2 legislation. The Medical Board is not one of those
3 boards. And so we are very careful to remember
4 what our role is. We are a regulatory
5 administrative agency. So we are charged with
6 taking the law that's given to us. If either a
7 legislator or staff asks us for factual
8 information, we are certainly happy to provide
9 that.
10 **Q. And that's actually my question. If a**
11 **legislator has a question and directs it to the**
12 **Board of Medicine, does the Board of Medicine**
13 **provide the information, or does that have to go**
14 **through LLR because of restrictions on the Board?**
15 A. Typically that request would come
16 through LLR. But if it is something that requires
17 feedback from the Board -- so, for example, the
18 agency is an administrative agency, but we do not
19 have clinical expertise. And so a really good
20 example that I can provide to you did not come to
21 the Medical Board, but it came to the Board of
22 Pharmacy relating to medical marijuana. The
23 legislature asked for the Board of Pharmacy to
24 prepare a letter stating its position on the
25 proposed medical marijuana legislation. And that

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1 request would have been coordinated internally
2 between our legislative liaison, who is Rebecca
3 Leach, the administrator for the Board, and then
4 the Board itself.
5 It's not common that that happen, but
6 it does happen where a specific response is
7 requested from the Board itself.
8 **Q. And just so I'm clear how the example**
9 **fits in, you said earlier that some boards are**
10 **authorized to make legislative proposals and that**
11 **the Medical Board is not one of those?**
12 A. Correct.
13 **Q. Is the Pharmacy Board one of those?**
14 A. No.
15 **Q. Okay. So the example is analogous in**
16 **that sense?**
17 A. Yes, yes. But an example of one of our
18 boards having that statutory authority
19 independently of an invitation from the legislature
20 is our Real Estate Commission. So if you wanted to
21 look at our practice acts in comparison to see the
22 difference for yourself, that is one example that I
23 can identify for you.
24 **Q. Okay. Great. Thank you. Do staffers**
25 **at either LLR or the Board monitor proposed or**

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1 **pending legislation that would affect the areas**
2 **they regulate?**
3 A. Yes. The Office of Communications is
4 directly responsible for monitoring all legislation
5 that affects regulated professions, and that is
6 under the supervision of Holly Beeson. Ms. Leach,
7 who I referred to a few moments ago, works on
8 Ms. Beeson's team. They are responsible for
9 reporting out to the boards the status of
10 legislation as it goes through the process. If
11 there are committee meetings that are coming up
12 where either testimony has been requested or where
13 they are planning to attend to observe, they will
14 usually let either the Board president, or if the
15 Board has a designated contact person for
16 legislative purposes, that person would be
17 notified.
18 **Q. Okay. And you mentioned Holly Beeson?**
19 A. Yes, sir.
20 **Q. What's her job title?**
21 A. She is special counsel to the Office of
22 the Director, and she is an attorney. She is
23 responsible for the supervision of the Office of
24 Communications, which includes our legislative
25 affairs.

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1 **Q. So would Holly Beeson be the person**
2 **within LLR most knowledgeable about pending**
3 **legislation and the legislative process with**
4 **respect to any particular bill?**
5 A. Yes, she and Ms. Leach typically.
6 **Q. Okay. Anyone else?**
7 A. They provide that information. Also my
8 team monitors legislative initiatives that are
9 directly impacting our boards. For example, one of
10 the attorneys who previously worked on my team,
11 Donnell Jennings, was the advice counsel for the
12 Board of Nursing, and we've had the Enhanced Nurse
13 Licensure Compact going through the legislative
14 process. So both Donnell and Rebecca and Holly
15 would all be monitoring that legislative
16 From the advice counsel perspective, we
17 are monitoring the legislative process if there is
18 an anticipation that we're going to have to change
19 regulations or if it's something that will
20 immediately impact some aspect of the Practice Act
21 so that the boards are not given a nasty surprise
22 at the end of a legislative session. But the
23 Office of Communications is responsible on behalf
24 of the agency for tracking all legislation.
25 Did that make sense?

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1 Q. That did make sense. I was trying to
2 think if we need to clarify the record the fact
3 that it's called the Office of Communications
4 doesn't mean it's solely concerned with public
5 relations. But --
6 A. No, but that is part of what they do.
7 They also handle all the Freedom of Information
8 requests that come in. Our ombudsman is within the
9 Office of Communications. So if reporters have
10 inquiries, if other governmental entities have
11 questions, we try to funnel all of those through
12 the Office of Communications, and then they ferret
13 out aspects of the matter as appropriate to other
14 parts of the agency.
15 Q. Okay. So you've discussed your
16 relationship with the legislative process as it
17 relates to the legislature and individual
18 legislators. Is there anything different about
19 your relationship to the legislative process as it
20 relates to the Governor's Office?
21 A. No, sir. If we are given a request by
22 the Governor's Office to provide information or
23 feedback, whether it's anticipated regulatory
24 impact or something specific, I mean, either the
25 legislature or the Governor's Office could receive

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1 a call from a constituent who has a concern, and
2 then they call LLR for clarification.
3 Q. Does staffers at LLR or the Board ever
4 have meetings with outside groups about pending
5 legislature?
6 A. Yes.
7 Q. When would that occur?
8 A. When invited.
9 Q. Are there any rules governing meetings
10 with outside groups about pending legislation?
11 A. Not that I'm aware of. As public
12 employees, we are all governed by the code of
13 conduct and also by the State Ethics Act. We are
14 absolutely not to engage in any lobbying activity.
15 But other than those guidelines, I'm unaware of any
16 rules or other policies that might be responsive to
17 your question.
18 Q. Is it true as a general proposition
19 that an outside group that asked for a meeting with
20 LLR staff about pending legislation would get such
21 a meeting?
22 MR. MATTHEWS: Object to form. Please
23 answer.
24 THE WITNESS: I would say typically,
25 yes. And I just want to clarify, for the reasons

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1 previously identified. So if an outside entity
2 reached out to LLR and said we would like to talk
3 to you about the regulatory impact of this proposed
4 legislation, we would always say yes to that,
5 because part of our mission is education. If an
6 outside entity contacted us and said we would like
7 for LLR to lobby or to advocate for a particular
8 position, that request would be met with greater
9 scrutiny, obviously.
10 BY MR. McNAMARA:
11 Q. I'm not suggesting any impropriety.
12 I'm asking, as for example at the federal level, if
13 a group requests a meeting with the OMB about a
14 pending regulation, by executive order, the OMB has
15 to have that meeting. I'm trying to explore
16 whether there is a similar policy, or it sounds
17 like just as general proposition, the meetings are
18 taken as a matter of unwritten policy. Is that
19 fair?
20 A. Yes, but we are in the South, so I
21 would say it's probably a matter of courtesy, but
22 also in furtherance of our mission, which is to
23 educate and to be transparent and to make sure that
24 folks understand what it is that we do.
25 As a regulatory entity, we do have a

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1 unique insight. We have an ability through our
2 disciplinary cases to identify weaknesses and
3 temptations and considerations that folks outside
4 of that process probably do not have the benefit
5 of.
6 Q. Do LLR or the Board ever take positions
7 on pending legislation?
8 MR. MATTHEWS: Object to form. Please
9 answer.
10 THE WITNESS: The agency, if asked,
11 might take a position. But, typically, no. The
12 Board of Medical Examiners, as I mentioned earlier,
13 does not have the statutory authority to either
14 endorse or oppose pending legislation. However,
15 they -- if they're called to testify and they're
16 asked to identify concerns or identify potential
17 regulatory burdens, certainly they would do that.
18 BY MR. McNAMARA:
19 Q. One more for the terminology, when you
20 say the agency, are you referring to LLR?
21 A. Yes, sir. The one and only, yes, sir.
22 Q. I've had many situations where the
23 whole deposition is actually talking about a noun
24 we never defined.
25 A. No, sir.

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1 Q. Did LLR take a position on the ECCPL?
2 A. To the best of my knowledge, no.
3 Q. Was LLR asked to take a position on the
4 ECCPL?
5 A. To the best of my knowledge, no.
6 MR. McNAMARA: I'm going to ask the
7 court reporter to mark this as Exhibit 3.
8 (PLF. EXH. 3, Two-page 5/16/16 E-mail
9 String, Bates Stamp LLR 00002621 and 00002622, was
10 marked for identification.)
11 BY MR. McNAMARA:
12 Q. I've handed you a document that's been
13 marked as Exhibit 3. Have you ever seen this
14 document before?
15 A. If I have, I don't remember it. This
16 was not one of the documents that I reviewed in
17 preparation for today.
18 Q. Okay. This appears to be an e-mail
19 from someone named Peter Candela?
20 A. Yes, sir.
21 Q. Can you tell me who that is?
22 A. Yes, sir, he's an optometrist licensed
23 in South Carolina. And in 2016, he would have been
24 president of the Board of Examiners of Optometry.
25 Q. And it appears to be sent to someone

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1 named Donnell Jennings, who I think you mentioned
2 earlier?
3 A. Yes, sir, he's an advice attorney, and
4 at this time he was the advice attorney assigned to
5 the Board of Optometry.
6 Q. And there are three people in the CC
7 line. One is Holly Beeson. Is that the Holly
8 Beeson we discussed earlier?
9 A. Yes, sir.
10 Q. And one is Rebecca Leach?
11 A. Yes, sir.
12 Q. Who is Rebecca Leach?
13 A. She is the legislative liaison who
14 works under Ms. Beeson's supervision.
15 Q. And April Koon?
16 A. Yes, sir, she is the administrator for
17 the Board of Optometry.
18 Q. So this then is an e-mail from the then
19 president of the Board of Examiners in Optometry to
20 attorneys and staff members within LLR. Is that
21 true?
22 A. Yes.
23 Q. Can you just look at the operative text
24 of Dr. Candela's e-mail where it says: Although I
25 have sent a letter from the Optometry Board to

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1 Governor Haley in support of her hopeful signature,
2 if someone has a direct contact with the governor,
3 please pass along that we strongly support this
4 bill and hope that she signs it into law.
5 Do you see that?
6 A. Yes.
7 Q. I assume from your testimony that the
8 Board of Medicine didn't send a similar letter to
9 the governor?
10 A. That's correct.
11 Q. Is it unusual for boards to send
12 letters to the governor in support of her signing
13 bills?
14 MR. MATTHEWS: Object to form. Please
15 answer.
16 THE WITNESS: Again, I would have to go
17 back to my earlier testimony, which is feedback is
18 solicited occasionally. In this instance, I don't
19 know the background regarding the preparation of
20 the letter. I simply don't have that information.
21 If the Governor's Office asked for feedback, it
22 would not be atypical for a board to generate that.
23 Is that something that happens frequently?
24 Probably not.
25 BY MR. McNAMARA:

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1 Q. Do you know if LLR staff or attorneys
2 complied with Dr. Candela's request?
3 A. Meaning to identify a direct contact in
4 the Governor's Office?
5 Q. To please pass along that we strongly
6 support this bill and hope that she signs it into
7 law.
8 A. Yes, sir. I don't have that knowledge.
9 Q. Okay. Would it have been inappropriate
10 had one of them done so?
11 A. Again, I don't know the context. I
12 don't know the background. I think if the
13 Governor's Office had asked for the Board's
14 feedback regarding the impact of pending
15 legislation, it would have been proper for that
16 information to have been communicated. But without
17 having the benefit of the context, I really can't
18 answer that question.
19 Q. Okay. So as you sit here today, you
20 have no way of knowing whether Dr. Candela's
21 request was complied with or not?
22 A. No, sir, I don't.
23 Q. Okay. You can set Exhibit 3 aside.
24 A. Thank you.
25 MR. McNAMARA: I'm going to ask the

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1 court reporter to mark this as Exhibit 4.
2 (PLF. EXH. 4, Four-page E-mail String,
3 Bates Stamp LLR 00002777 Through 00002780, was
4 marked for identification.)
5 THE WITNESS: Thank you.
6 BY MR. McNAMARA:
7 **Q. And I've placed in front of you a**
8 **document the court reporter has labeled as Exhibit**
9 **4.**
10 A. Yes, sir.
11 **Q. Do you recognize this document?**
12 A. Yes, sir. This is an e-mail that I did
13 review prior to today's deposition.
14 **Q. What is this document?**
15 A. This appears to be an e-mail -- let
16 me -- it looks like an e-mail thread that began on
17 February 3rd of 2016 between the Governor's Office
18 and Richele Taylor, who was then our director, and
19 continuing through February 16th of 2016; and at
20 that point, the e-mail that's on the first page is
21 actually from Holly Beeson responding to David
22 Glaccum with CC Josh Baker and Richele Taylor.
23 **Q. Who is David Glaccum?**
24 A. I don't know him personally, but I
25 understand that he was employed in the Governor's

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1 Office at that time.
2 **Q. Do you know in what capacity?**
3 A. No, sir.
4 MR. MATTHEWS: Well, no offense, but it
5 says Policy Advisor.
6 BY MR. McNAMARA:
7 **Q. That's where I was going.**
8 A. Well, I'm sorry. I can read.
9 **Q. On page 4 of this document, if you look**
10 **at his e-mail signature, it says: Policy Advisor,**
11 **Office of Nikki R. Haley?**
12 A. Yes.
13 **Q. Is that true, to the best of your**
14 **recollection?**
15 A. I have no independent knowledge to
16 contradict that, so I would assume he is the policy
17 advisor.
18 **Q. Fair enough. Referring to the e-mail**
19 **on the first page, the e-mail from Holly Beeson --**
20 A. Yes, sir.
21 **Q. -- why would an e-mail like this be**
22 **sent?**
23 MR. MATTHEWS: Object to the form.
24 Please answer.
25 THE WITNESS: Yes, sir. Where the

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1 Governor's Office or a legislator asked for
2 background or context on pending legislation, this
3 is the type of e-mail that would be generated. And
4 it looks like there are three separate pieces of
5 legislation that Ms. Beeson is discussing, one
6 related to mobile barbershops, two relating to the
7 Eye Care Consumer Protection Act, and then finally
8 to a bill concerning hearing aids.
9 BY MR. McNAMARA:
10 **Q. So when you testified earlier that in**
11 **response to inquiries from the Governor's Office,**
12 **LLR would generate information and commentary, is**
13 **this an example of that process?**
14 A. Yes, sir. And if you go to
15 Mr. Glaccum's e-mail of February 9th, it says: If
16 passed, would any of the below bills restrict the
17 practice that is not currently regulated (such as
18 mobile barbershops), or protect a specific
19 constituency (like eye doctors prescribing
20 glasses)? Could you also please provide feedback
21 on Senate 167 regarding hearing aids?
22 So that inquiry was presented to the
23 director. She then asked Ms. Beeson to provide the
24 background, which is what her e-mail does or
25 attempts to do.

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1 **Q. Okay. Great. I just want to direct**
2 **your attention to the paragraph in the middle of**
3 **the page beginning: Both sides of the**
4 **anti-competition argument are clearer.**
5 A. Yes, sir.
6 **Q. If you want to take a moment just to**
7 **read that to yourself.**
8 A. Yes, sir.
9 **Q. Okay. Is it fair to summarize this**
10 **paragraph by saying that Ms. Beeson believed that**
11 **the ECCPL could be construed as economic**
12 **protectionism, but that the advocates for the bill**
13 **argued that there was a health and safety**
14 **justification for the bill?**
15 A. Those were the two perspectives
16 identified, yes.
17 **Q. Okay. I didn't want to read the whole**
18 **thing into the record.**
19 A. Thank you.
20 **Q. So that's a fair summary. Did LLR take**
21 **any steps to verify the health and safety arguments**
22 **of the proponents of the bill?**
23 A. To my knowledge, no. We would not have
24 been charged with that.
25 **Q. So you would not expect Ms. Beeson to**

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1 have investigated the truth of those assertions
2 before writing this e-mail?
3 A. No. And to be candid with you, I'm not
4 sure how much of an investigation would be
5 necessary to verify the public safety consideration
6 identified.
7 Q. Are defendants aware of any factual
8 evidence that the Eye Car Consumer Protection Law
9 protects the public health or safety?
10 MR. MATTHEWS: Objection. Do you mean
11 these defendants? We're not SCOPA.
12 BY MR. McNAMARA:
13 Q. Sorry, the named defendants as distinct
14 from intervenor defendants, the parties you're
15 testifying on behalf of.
16 A. Neither the agency nor the Medical
17 Board have been presented an opportunity to
18 evaluate the statute as implemented in any way. So
19 I don't think that either the agency or the Medical
20 Board is in a position to articulate an opinion on
21 that.
22 Q. I'm not asking for the Board's opinion.
23 I'm asking if there is evidence in the Board's
24 possession tending to show that the ECCPL actually
25 protects the public health or safety.

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1 MR. MATTHEWS: Object to the form.
2 THE WITNESS: As indicated -- and I
3 apologize if my response was inartful -- if we have
4 not been presented with an opportunity to evaluate
5 the implementation of any law, we would not have
6 evidence regarding that impact on the public
7 safety.
8 BY MR. McNAMARA:
9 Q. So part of what I'm doing in this
10 deposition is trying to determine what the entities
11 know to see if there needs to be further
12 investigation, as, for example, if Ms. Beeson
13 conducted a six-month study that perhaps we need to
14 know about. So I'm not suggesting that the Board
15 should and ought to have evidence. I'm trying to
16 determine what exists.
17 A. I understand. And I want to be
18 perfectly clear. We have had no disciplinary
19 matters, to my knowledge, we have had no
20 complaints, even at the beginning of that
21 disciplinary process, relating to the
22 implementation or enforcement of this statutory
23 provision. So to the best of my knowledge, we
24 would have no evidence within our possession
25 relating to the impact on public safety of the

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1 ECCPL.
2 Q. All right. You say you haven't
3 received any complaints under the ECCPL. Prior to
4 the passage of the ECCPL, had the Board received
5 any complaints about online eye exams, kiosks, or
6 other matters regulated by the ECCPL?
7 A. To the best of my knowledge, no. I've
8 been with the agency since 2012, and I don't sit in
9 on every disciplinary proceeding conducted, but I'm
10 unaware of any such issue coming before the Medical
11 Board.
12 Q. Okay. Prior to the passage of the
13 ECCPL, was the Board of Medical Examiners aware of
14 a company called Opternative, Incorporated?
15 A. Yes.
16 Q. How so?
17 A. I have to tell you, I am not sure. In
18 reviewing the documentation, there was an e-mail
19 that I sent to Dr. Stephen Gardner, who is the
20 president of the Medical Board, that had what
21 appeared to be a press release regarding
22 Opternative attached. And that was immediately
23 prior to the August 2015 Medical Board meeting. I
24 don't remember the context in which the Opternative
25 press release came into my possession. But that

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1 was at the same time that we were developing an
2 advisory opinion regarding telemedicine. We had
3 already issued an advisory opinion regarding the
4 establishment of the physician-patient relationship
5 as a prerequisite for prescribing, which a lot of
6 people had viewed as the Medical Board's guidance
7 on telepractice in South Carolina.
8 So prior to that August meeting, we
9 were developing a separate policy that was
10 explicitly entitled Telemedicine. And the e-mail
11 that I sent to Dr. Gardner had a telemedicine
12 piece, and it also had the press release attached.
13 But there is nothing in the e-mail to indicate
14 where it came from or how that was in my
15 possession, and I don't have an independent
16 recollection.
17 Q. Just because I hate to do things in the
18 abstract, we'll just mark that e-mail.
19 A. Sure.
20 MR. McNAMARA: It's unfair to make
21 people testify about things not in front of them.
22 I'm going to ask the court reporter to mark this
23 document as Exhibit 5.
24 (PLF. EXH. 5, One-page 8/2/15 E-mail
25 From Darra Coleman to Stephen R. Gardner MD, Bates

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that time. Teladoc was invited to return, and they did not. So the Medical Board did not pursue any action against Teladoc. We assumed that they had abandoned the pursuit of telepractice in South Carolina. And we knew that they were very engaged in other parts of the country.

In 2015, toward the end, we were put on notice that Teladoc had made some changes internally, and they were interested in pursuing legislation. So Teladoc retained lobbyists who were driving the Telemedicine Act. And once that was filed, the Medical Board had this policy. We had this history of three years at that time of working with telemedicine issues. And so the legislature essentially adopted and codified what the Medical Board had been utilizing.

They did add some additional restrictions. So, for example, they added the restriction that a licensee may not prescribe a C2 or C3 without express prior authorization by the Medical Board. They added a prohibition on agents that can induce abortion. And then they clarified the Medical Board's prior prohibition against the use of telemedicine for the prescription of lifestyle drugs to exclude birth control, which the

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Medical Board felt should also be excluded. I think there was some objection regarding the characterization of birth control as a lifestyle medication. The legislature retained the specific examples of ED drugs and hormone replacement therapy.

So with those few tweaks, what essentially became the law, or the Telemedicine Act, was what the Medical Board had already developed.

Q. In 2015? Beginning in 2015?

A. Well, actually, beginning with the advisory opinions relating to the establishment of the physician-patient relationship in 2012, and then the clear separate telemedicine policy in 2015.

Q. Okay. Just to return quickly to your August 2nd, 2015, e-mail, if you'll look at your last paragraph, it says: Please let me know your thoughts on the telemedicine policy which is basically cut and pasted from the NC policy. We agree the Opternative and county detention facility compliance challenges are best discussed in executive session only.

A. Yes, sir.

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Q. It sounds from your testimony that the fact that those are phrased in independent sentences should not be taken as an implication that the telemedicine policy was not being discussed in executive session?

A. Oh, absolutely not, right, because we were discussing that in executive session. And under the Freedom of Information Act, as you're aware, there are very few reasons why we can go into executive session. One is for the benefit of legal counsel, which was the purpose of the executive session discussion.

Q. Okay. I appreciate that. You can set that e-mail aside.

A. Thank you.

Q. Does the ECCPL require an ophthalmologist to conduct any particular tests before writing a corrective lens prescription?

MR. MATTHEWS: Object to form. Please answer.

THE WITNESS: It refers to medical findings and refractive error. So it does require an eye exam, but I'm not sure what other diagnostic methodologies might be relied upon to develop the medical findings. There is no explicit

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requirement, other than at least the refractive error, because that's specifically called out.

BY MR. McNAMARA:

Q. Okay. So the ECCPL doesn't require the ophthalmologist to find any specific information other than refractive error before writing a corrective lens prescription?

A. Well, it does. I mean, it requires them to consider medical findings. But what I'm saying is, on the face of the statute itself, it doesn't identify diagnostic methodologies that have to be employed in order to develop the medical findings.

Q. Does it specify what those medical findings must be?

A. No, sir.

Q. Okay. So is it fair to say that the ECCPL leaves it to an ophthalmologist's professional judgment exactly what diagnostic methodologies and exactly what medical information he needs before writing a prescription?

A. That would be my understanding, yes, sir.

Q. Is that generally in keeping with how South Carolina regulates medical doctors?

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1 MR. MATTHEWS: Object to the form.
2 THE WITNESS: If your question is
3 asking whether great deference is given to the
4 clinical expertise of the physician based upon the
5 patient and the comprehensive evidence presented, I
6 would say, yes, that there is considerable
7 deference given to the clinical judgment of the
8 physician who is evaluating the patient, so long as
9 the conduct of that physician comports with general
10 standards of care.
11 BY MR. McNAMARA:
12 **Q. Does the ECCPL require an**
13 **ophthalmologist to physically examine a patient**
14 **before prescribing a corrective lens?**
15 A. It refers to an eye examination. But
16 it doesn't say how the eye examination is to be
17 conducted.
18 **Q. So nothing in the ECCPL prevents an**
19 **ophthalmologist from having a nurse or another**
20 **assistant gather the visual information he needs to**
21 **write the prescription?**
22 A. I don't see that prohibition here. But,
23 in complete candor, I'm not familiar with what an
24 ophthalmologist would typically do.
25 **Q. But at least as far as the ECCPL goes,**

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1 **that's not part of it?**
2 A. No, sir, it's not.
3 **Q. Does the ECCPL prohibit an**
4 **ophthalmologist from writing a prescription if all**
5 **of the information he's basing it on is collected**
6 **by a computer rather than being collected by a**
7 **nurse or a human assistant?**
8 MR. MATTHEWS: Object to the form.
9 Please answer.
10 THE WITNESS: It doesn't appear to
11 restrict it in that way. It does say that you
12 can't base the prescription solely on the
13 refractive eye error of the human eye or be
14 generated by a kiosk. So there is, at least in my
15 reading, some expectation that there will be some
16 type of human involvement. It doesn't specify by
17 whom. And in South Carolina, we do use a number of
18 physician extenders.
19 BY MR. McNAMARA:
20 **Q. What is a physician extender?**
21 A. A physician extender can be a midlevel,
22 such as a nurse practitioner or a physician
23 assistant. It can be another licensed
24 professional, such as an RN or an LPN, or in some
25 instances, it can actually be unlicensed

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1 professionals, such as a medical assistant or a
2 certified nurse assistant.
3 **Q. Is the use of medical extenders left to**
4 **the discretion of the physician, or are there**
5 **specific areas in which extenders are allowed to**
6 **practice or not practice?**
7 A. No, typically, the delegation authority
8 is within the physician's determination, so long as
9 it comports with the scope of practice identified
10 for those physician extenders.
11 So, for example, the practice of
12 licensed practical nursing is defined. The
13 practice of registered nursing is defined. A prn
14 practice is also defined. And although there are
15 not specific tasks or duties that are identified in
16 statute, certainly I think the general parameters
17 are there. There are minimal educational
18 requirements and credentialing requirements for
19 PAs. We also have specificity requiring
20 supervision by the physician.
21 And so I think that so long as the
22 physician complies with the statutory and
23 regulatory guidance governing the scope of
24 practice, it is well within his or her discretion
25 to delegate tasks.

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DARRA COLEMAN, ESQ. - 30(B)(6) - EX. BY MR. MATTHEWS

1 **Q. Has either LLR or the Board adopted any**
2 **policies of any kind regarding the enforcement of**
3 **the ECCPL?**
4 A. No, sir.
5 **Q. So it follows from that that neither**
6 **the agency nor the Board have adopted the policy**
7 **that it will not enforce the ECCPL?**
8 A. We don't have the luxury of not
9 enforcing law, and so we would not need a policy to
10 support that proposition. But we have not had any
11 issues providing an opportunity for interpretation
12 or application of the law.
13 **Q. So neither LLR nor the Board has the**
14 **authority to refrain from enforcing a South**
15 **Carolina statute?**
16 A. No.
17 MR. McNAMARA: Okay. Off the record.
18 (A recess transpired.)
19 MR. McNAMARA: Back on the record.
20 Thank you very much for your time, ma'am. I have
21 no further questions. Any cross from anyone?
22 EXAMINATION
23 BY MR. MATTHEWS:
24 **Q. Yeah, just one or two. If you look at**
25 **Exhibit 2, you received some questions about eye**

1 examinations and kiosks?
2 A. Yes, sir.
3 Q. Okay. Is it fair to say that those are
4 defined in the act itself?
5 A. Yes, sir, in 40-24-10, subparagraph
6 (4), the word kiosk is defined.
7 Q. And in (3), what an eye examination
8 means?
9 A. Yes, sir.
10 Q. Okay. So the Board and LLR would rely
11 on those definitions to determine what a kiosk was
12 and what an eye examination meant?
13 A. Yes, sir.
14 MR. MATTHEWS: Thanks so much. Nothing
15 further.
16 EXAMINATION
17 BY MR. McNAMARA:
18 Q. And just so I'm clear, just so the
19 record is clear, when you were answering questions
20 about the ECCPL earlier in the deposition, you had
21 the ECCPL in front of you; is that right?
22 A. Yes, sir.
23 Q. I understood you were referring to it
24 when you answered those questions?
25 A. Yes, sir. And if I may, if there is

1 any question, medical findings, which is what I
2 spoke to earlier, is not one of the defined terms.
3 So eye examination and kiosk and all the other
4 defined terms were certainly intended to be
5 included as defined by the legislature. But when I
6 expressed that medical findings was not quantified
7 or spelled out, that's independent, obviously, of
8 the defined terms.
9 MR. McNAMARA: Right. Nothing further
10 from us.
11 MS. TATE: Nothing further.
12 MR. McNAMARA: Thank you very much,
13 ma'am.
14 THE WITNESS: Okay. Thank you.
15 (The witness, after having been advised
16 of her right to read and sign this transcript,
17 waives that right.)
18 (The deposition was concluded at 11:03
19 a.m.)
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER
2
3 I, Janice N. Shepherd, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.
8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.
11 Witness my hand, I have hereunto
12 affixed my official seal this 9th day of August,
13 2017, at Charleston, Charleston County, South
14 Carolina.
15
16
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18
19
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21
22
23
24 Janice N. Shepherd, RPR, CSR
My Commission expires
October 10, 2024
25

JANICE N. SHEPHERD NOTARY PUBLIC SOUTH CAROLINA

Janice N. Shepherd

1 I N D E X
2
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4 | DARRA COLEMAN, ESQ. | 4 | 1 |
5 | EXAMINATION | 4 | 4 |
6 | BY MR. McNAMARA | | |
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11 | CERTIFICATE OF REPORTER | 72 | 1 |
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15 REQUESTED INFORMATION INDEX
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17 (No Information Requested)
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24 | PLF. EXH. 1, Five-page 7/11/17 | 6 | 3 |
25 | Notices of Deposition | | |

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 12

From: Peter Candela <pkcandela@gmail.com>
Sent: Monday, May 16, 2016 2:59 PM
To: Donnell Jennings
Cc: Holly Beeson; Rebecca Leach; April Koon
Subject: Re: S.1016 "EYE CARE CONSUMER PROTECTION LAW"

***** SCDLLR NOTICE *** This email is from an external email address. Please use caution when deciding whether to open any attachments or when clicking links inside the email.**

Although I have sent a letter from the Optometry board to Gov Haley in support of her hopeful signature, if someone has a direct contact to the Gov, please pass a long that we strongly support this bill and hope that she signs it in to law.
Sincerely,
Dr. Candela

Sent from my iPhone

On May 16, 2016, at 2:13 PM, Donnell Jennings <Donnell.Jennings@llr.sc.gov> wrote:

Holly:

At your earliest convenience, please provide a status update on Senate bill 1016 aka the "EYE CARE CONSUMER PROTECTION LAW". It has passed both houses and awaits a final decision by the governor.

Thank you.

Donnell G. Jennings
Assistant Advice Counsel
Office of Advice Counsel
SC Department of Labor, Licensing and Regulation
110 Centerview Dr.
P.O. Box 11329
Columbia, SC 29211-1329
803-896-4199 (direct dial)
donnell.jennings@llr.sc.gov

<image001.png>
Website: www.llr.state.sc.us

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AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 13

From: Michael Zolman <focusedeyedoc@yahoo.com>
Sent: Tuesday, May 17, 2016 11:16 PM
To: Mike Campbell; Jackie Rivers; Anna Balderson; Jennie Smith; Ted Newman; David McKenzie; Johndra McNeely; Pete Smith; Bob Branch; Justine O'Dell; Mark Kelley; Angelia Smith Owens
Subject: Fw: Governor Haley's Decision on The Consumer Eye Care Protection Bill

Excellent information....especially coming from someone close to Sen. Leatherman

Michael W. Zolman, OD

Infinity Eye Care and Low Vision Rehabilitation Center
325 Folly Rd., Suite #109
Charleston, SC 29412

P: 843.795.6464
F: 843.795.6433
www.myinfinityeyecare.com

On Tuesday, May 17, 2016 8:31 PM, christy wallace <bcbcwallace@yahoo.com> wrote:

Dr. Zolman, I spoke with a representative today from Jay Jordan's office and he also met with Senator Hugh Leatherman's campaign manager. He says he will keep me posted as things move forward but that it looks really good right now that this veto will be over-ridden by the senate and the house. I will update you if I hear more from him. Thanks for your hard work! Dr. Christy Wallace Florence

On Tuesday, May 17, 2016 7:44 AM, Michael Zolman <scoa@ciclt.net> wrote:

May 17, 2016
Dear Colleagues,

It comes with great concern and disappointment to inform you that Governor Haley has **VETOED** our bill, S.1016 - The Consumer Eye Care Protection Bill. Despite all of our support for her in the past.....Despite all of our phone calls, emails and faxes asking her to support our bill....Despite our bill UNANIMOUSLY passing both the House and Senate, she has decided to stand alone in the SC government and veto our bill. Governor Haley apparently is more concerned with not preventing technology, regardless if it has been proven or not and regardless of the potential harm it could cause, than protecting the safety of her citizens. She is singling out OPTOMETRY as being self

serving and being 'just a small group of eye care professionals'. (**Please click here to review her official explanation of her veto**).

But this fight is not over and **WE WILL NOT GO DOWN WITHOUT A FIGHT!** We have a plan and a very good chance to still make our bill a law. We will VETO her veto but we need your help to do so!

Here's how this works:

The Senate and House will have a chance to vote to override her veto. It takes 2/3 of those voting to override her veto in the Senate and if so it will go to the House for the same 2/3 vote. It only needs one vote in the Senate and House to bring up the chance to override the governor's veto and to get the process started, which we are confident we will get. Once the Senate votes, if the Senate does not get 2/3 then the bill is dead and will not go to the House. If the governor's veto is overridden in the Senate the bill comes to the House and if it fails to get the 2/3 vote in the House then the bill also dies. But, if it is overridden in the Senate and the House, then the bill becomes law.

Remember, our bill originally passed UNANIMOUSLY in both the House and Senate so we feel we have a good chance to be successful with overriding the governors veto. Make no mistake though, the governor has her 'people' in both the House and Senate that will do whatever she asks them to do (although we believe this number to be relatively small). So what was once a 'yea' vote could become a 'nay' vote if your Senator does not get your feedback.

What YOU need to do:

Call your Senator TODAY! Since our bill was first introduced in the Senate, it must get 2/3 majority first before moving to the House. **Click here to access a spreadsheet that will tell you who your senator is**. (Scroll through to find your society and name and senator's contact information). Tell your senator you are asking for their support to override the governors veto of S.1016. Tell them this bill is crucial for maintaining the standard of healthcare in our state and that it is to prevent UNTESTED, NON-FDA APPROVED technology that puts the vision, eye health and general health care of their constituents at risk. Tell them this bill is EXTREMELY IMPORTANT to the SC Optometric Physicians Association and SC Medical Association, (the only groups of eye care professionals), and most importantly the citizens of SC.

We do NOT want to make this an anti-Opternative arguement as Legislators frown upon legislation that singles out and restricts a specific business. We must maintain the argument that this bill protects the consumer from false and misleading claims to what an eye exam is as well as that it protects our citizens from unproven technology and that anything less jeopardizes consumers health care.

Once we get 2/3rds vote in the Senate, we will let you know and then we will proceed to do the same for the House but first we must focus our attention on the Senate.

Also, remember this is an election year. A lot of legislators are up for re-election and want your vote. Your voice will be heard a lot more clearly than the governors but will not be heard at all if you do not call.

Do not let apathy kill this bill.
Do not let Governor Haley trivialize and demean our profession to Congress.
Do not let Governor Haley have the final say as to what is acceptable for your patients.

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 14

From: Mark Kelley <mark@kmso.net>
Sent: Wednesday, May 18, 2016 9:33 AM
To: Jackie Rivers
Subject: Re: S 1016

Got it

Sent from my iPhone

On May 18, 2016, at 8:50 AM, Jackie Rivers <jrivers@sceyedoctors.com> wrote:

Dr. Zolman, Angelia and Mark...response from Senator Scott below

From: Peter Candela [mailto:pkcandela@gmail.com]
Sent: Wednesday, May 18, 2016 8:48 AM
To: Jackie Rivers <jrivers@sceyedoctors.com>
Subject: Fwd: S 1016

Just a heads up. I forwarded this email to Dr Campbell also.
Thanks.
Dr C

Sent from my iPhone

Begin forwarded message:

From: <jscottbyos@aol.com>
Date: May 17, 2016 at 10:17:07 PM EDT
To: Peter and Kari Candela <pkcandela@gmail.com>
Subject: Re: S 1016

Hi Peter,

So sorry to miss your call. Left floor of Senate and went straight to Finance. I will work tomorrow to get support to override S1016.

Be well with the healing of your eye.

John

From: Peter and Kari Candela
Sent: Tuesday, May 17, 2016 4:54 PM
To: Senator John Scot/M

Hi John. Sorry for the phone tag today. Just got back from Cincinnati for my eye surgery. It's been a process.

I am deeply concerned with Governor Haley's veto of this bill. When she speaks of stifling new technology to benefit a single industry, it shows she just does not truly understand the danger to the public allowing internet/kiosk refractions and the sale of glasses/contact lenses from them. Ophthalmology and optometry are NOT looking to "block new technologies" as we are on the forefront of creating new technologies that help our patients. Buying cheap glasses over the internet or at kiosks is not "new technology", it's a recipe for public injury.
The public's perception will be they will not need to get their eyes examined in person by a licensed physician, optometrist or ophthalmologist. I do not sell product in my practice so there is no financial reason why I am supporting this bill. I truly believe as we have seen with the sale of contact lenses in beauty shops and the like, the public will ultimately be harmed.
Both ophthalmology and optometry were together in full support for this bill. Both the House and Senate voted unanimously in support of this bill. I as current president of the South Carolina Board of Examiners in Optometry sent the Governor a letter from the board stating our unanimous support for this bill and how it would protect the citizens of our great state.
I ask that you continue to encourage your colleagues in the House and Senate to override the Governors veto.

Sincerely,
Peter

Peter V. Candela, OD, LTC, BSC, SCANG

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 15

STATE OF SOUTH CAROLINA
DEPARTMENT OF LABOR, LICENSING AND REGULATION
BEFORE THE MEDICAL BOARD OF EXAMINERS

IN THE MATTER OF	)	
	)	
BOARD BUSINESS/DISCUSSIONS	)	
	)	TRANSCRIPT
	)	
	)	
	)	
	)	
	)	

Given before Tina F. Behles, Nationally Certified Court Reporter and Notary Public in and for the State of South Carolina, on Monday, May 2, 2016 through Tuesday, May 3, 2016 at the offices of The South Carolina Department of Labor, Licensing and Regulation, 110 Centerview Drive, Columbia, South Carolina.

Reported by:
Tina F. Behles, CVR-M

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1 But I'm very hopeful that we will get
2 statutory telemedical legislation here. It'll
3 make our job a lot easier and we can, more or
4 less, as a board put that one to rest as a
5 discussion topic.
6 The problem is gonna be auditing and
7 enforcing the role of advanced practitioners
8 who are involved in the telemedical field.
9 And I can speak to that later to some of my
10 board members. Thank you. Go ahead, please.
11 MS. BEESON: There was also a House version of that
12 telemedicine bill. It did not advance beyond
13 the 3M Committee. It is word for word the
14 same version as the Senate Bill prior to its
15 most recent amendment. I think it was just
16 simply getting it in the correct format for
17 the, the way legislative counsel would draft
18 it. So just, you know, that's out there.
19 The Eye Care Consumer Protection Law.
20 That is -- actually that has been ratified on
21 Friday. And that pertains to the dispensing
22 of spectacles or contact lenses. The bill
23 says a person in this state may not dispense
24 spectacles or contact lenses to a patient
25 without a valid prescription from a provider.

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R. 382
LLR 00000573

1 This was pushed largely by the optometrist
2 community and it, it arises out of the use of
3 kiosks. So that just, be on the lookout for
4 that bill.
5 We did not -- because it crossed over
6 into the ophthalmologist community as well as
7 the optometrists, we encouraged that it not be
8 added to either practice act, so it's in a
9 stand-alone chapter, Chapter 24 or Title 40
10 now. It's the only thing in there so far as
11 we can tell, so that's what that bill does ---
12 DR. GARDNER: --- ophthalmology didn't -- I guess
13 they approved it then? More or less.
14 MS. BEESON: I think they worked very closely with
15 the optometrists. I think there were a number
16 of meetings. We attended them. A number of
17 work sessions. But they, they worked out
18 something they could live with.
19 DR. GARDNER: Less rancorous than the prescription
20 part we did last year.
21 MS. BEESON: There were 14 abortion bills so far as
22 I could tell this year. One survived
23 crossover. That was House Bill 3114, the
24 South Carolina Pain Capable Unborn Child
25 Protection Act. At the end of 2015, it was in

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R. 383
LLR 00000574

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

Be it known that I, Tina F. Behles, Nationally Certified Court Reporter and Notary Public in and for the State of South Carolina, took the foregoing discussion on Monday, May 2, 2016 through Tuesday, May 3, 2016 at offices of the South Carolina Department of Labor Licensing and Regulation, 110 Centerview Drive, Columbia, South Carolina;

That the foregoing 266 pages constitute a true and accurate transcription of the motions made at that time to the best of my skill and ability;

I further certify that I am not counsel or kin to any of the parties to this cause of action, nor am I interested in any manner of its outcome.

In witness whereof, I have hereunto set my hand and seal this 3rd day of June 2016.

/s/ Tina F. Behles [digitally signed]

Tina F. Behles, CVR-M
Notary Public for South Carolina
My commission expires January 13, 2020

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AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 16

State of South Carolina
Office of the Governor

NIKKI R. HALEY
GOVERNOR

1205 PENDLETON STREET
COLUMBIA 29201

May 16, 2016

The Honorable Henry D. McMaster
President of the Senate
Statehouse, Second Floor
Columbia, South Carolina 29201

Dear Mr. President and Members of the Senate,

Today, I am vetoing and returning without my approval, R.178, S.1016, a bill that requires prescriptions from a licensed optometrist or ophthalmologist to receive glasses or contacts based on an in-person comprehensive eye examination. **I am vetoing this bill because it uses health practice mandates to stifle competition for the benefit of a single industry,** effectively banning eye care kiosks statewide.

During my administration, South Carolina has expanded access to healthcare, including mental health services, to rural and underserved regions of our state using telemedicine. Unfortunately, a small group of eye care professionals are seeking to block new technologies that expand low-cost access to vision correction services, using two basic arguments.

First, advocates state that kiosks pose a public health risk, which is simply untrue. Individuals can, and should, continue to see their doctor for comprehensive medical exams, and these kiosks do not offer medical evaluations or advice. Second, optometrists argue that kiosks create an uneven playing field because licensed providers cannot take advantage of this technology and charge patients for its use in a medical practice. The answer to this problem is not to ban a new technology, but rather to expand its use. **Send a bill to my desk that allows for the expanded use of automatic vision evaluations in all medical settings, and I will sign it.**

If allowed to become law, South Carolina would become the eighth state to impose such a ban, putting us on the leading edge of protectionism, not innovation. This is the wrong message to send to the business community. **I urge you to continue promoting South Carolina's use of innovative technologies to expand access to medical care and sustain this veto.**

My very best,

Nikki R. Haley

AFFIDAVIT OF JOSHUA A. WINDHAM

EXHIBIT 17

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2016-CP-40-06276
Opternative, Inc., Plaintiff, v. South Carolina Board of Medical Examiners, South Carolina Department of Labor, Licensing and Regulation, Defendants, and South Carolina Optometric Physicians Association, Defendant-Intervenor.	)	**DEFENDANT-INTERVENOR SOUTH CAROLINA OPTOMETRIC PHYSICIANS ASSOCIATION'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

TO: MILES E. COLEMAN, ESQUIRE; WILLIAM C. WOOD, JR., ESQUIRE; ROBERT J. MCNAMARA, ESQUIRE; AND JOSHUA A. WINDHAM, ESQUIRE; ATTORNEYS FOR PLAINTIFF OPTERNATIVE, INC.:

Pursuant to Rules 26 and 33 of the *South Carolina Rules of Civil Procedure*, Defendant-Intervenor South Carolina Optometric Physicians Association ("Defendant" or "SCOPA"), by and through its undersigned attorneys, hereby answers Plaintiff Opternative, Inc.'s ("Plaintiff" or "Opternative") First Set of Interrogatories to South Carolina Optometric Physicians Association, dated March 3, 2017.

In setting forth answers thereto, Defendant does not waive the attorney-client, work product, or any other privilege or immunity from disclosure which may attach to information called for herein or responsive to the Interrogatories. Defendant does not concede the relevance or materiality of the Interrogatories, and the subject matters to which the Interrogatories refer. These answers are

submitted by the Defendant subject to, and without in any way waiving or intending to waive, but on the contrary intending to reserve and reserving:

A. All questions as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose of any of the documents referred to or answers given, or the subject matter thereof in any subsequent proceeding in, or the trial of, this action or any other action or proceeding;

B. The right to object to other discovery procedures involving or relating to the subject matter of the Interrogatories; and

C. The right at any time to revise, correct, add to or clarify any of the answers set forth herein or documents referred to herein.

ANSWERS

Defendant-Intervenor South Carolina Optometric Physicians Association hereby answers Plaintiff Optemative, Inc.'s First Set of Interrogatories, dated March 3, 2017, as follows:

1. Identify the public health or safety purpose you contend is advanced by the ECCPL, and explain specifically how you contend the ECCPL is tailored to achieve that purpose.

ANSWER: The ECCPL protects patients of ophthalmologists and optometrists from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination.

2. Identify any factual evidence – including, but not limited to, legislative evidence, scientific studies, investigations, interviews, or testimony – that you believe supports the assertion that the ECCPL actually advanced the public health or safety purpose identified in Interrogatory No. 1. For each piece of evidence identified, please provide a brief summary. If you can identify no such evidence, please state that.

ANSWER: See answer to interrogatory number one (1). Defendant-Intervenor anticipates offering expert testimony from one or more of the following witnesses to testify regarding diseases of the eye or other health conditions that can go undiagnosed without a comprehensive eye examination:

Michele Donovan, OD

Visionary Eye Center, Inc.
2015 Sam Rittenberg Blvd
Charleston, SC 29407
(843) 763-2247

Jennifer Smith Zolman, OD
Draisin Vision Group
President, SCOPA Board
1470 Tobias Gadson Blvd., Suite 115
Charleston, SC 29407

Melvin D. Shipp, OD, MPH, DrPH
2104 North 167th LN
Goodyear, AZ 85395

Mark Robinson, M.D.

3. To the extent your response to any Request in the Requests for Admission served simultaneously with these Interrogatories is anything other than an unqualified "Admit," state the entire basis for your denial of any aspect of that Request and cite any relevant documents on which you base your denial.

ANSWER: See "Denied as Stated" Responses to Plaintiff's Requests for Admission.

With respect to Request for Admission Number 6, Defendant-Intervenor is informed and believes that customary professional standards for both optometrists and ophthalmologists require that a comprehensive eye examination be performed prior to writing a prescription for corrective lenses.

With respect to Request for Admission Number 12, Defendant-Intervenor is informed and believes the ECCPL protects patients of ophthalmologists and optometrists from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination. This belief derives from the collective training and clinical experience of Defendant-Intervenor's members. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination.

With respect to Request for Admission Number 13, Defendant-Intervenor's response is based upon the collective experience of its members, many of whom do not sell any lenses or frames at all.

With respect to Request for Admission Number 16, Defendant-Intervenor would show that it lobbied for the passage of the ECCPL, rather than the AOA.

With respect to Request for Admission Number 18, Defendant-Intervenor would show that it decided to lobby for the passage of the ECCPL without any particular encouragement or prompting by the AOA.

4. Identify each and every person Defendant-Intervenor intends to have offer testimony in this case, and describe the substance of the anticipated testimony. For each person identified, please provide their full name, current address, and a brief description of their credentials to testify on the matter indicated.

ANSWER: See answer to Interrogatory Number 2.

5. Identify each and every person consulted in the preparation of answers to these Interrogatories, indicating for which Interrogatory they were consulted. For each person identified, please provide their full name, current address, phone number, and job position or title.

ANSWER: Defendant-Intervenor consulted with the individuals identified in Interrogatory Number 2, along with members of Defendant-Intervenor's board of directors.

6. Identify each and every document referred to or examined in the preparation of your answers to these Interrogatories, indicating for which Interrogatory each document was referred to or examined.

ANSWER: None.

Kirby D. Shealy III
Justine M. Tate
ADAMS AND REESE LLP
1501 Main Street, Fifth Floor
Post Office Box 2285 (29201)
Columbia, South Carolina 29202
Telephone: 803-212-4966
Facsimile: 803-779-4749
kirby.shealy@arlaw.com
justine.tate@arlaw.com

Attorneys for Defendant-Intervenor South Carolina Optometric Physicians Association

May 1, 2017.

Opternative, Inc. v. S.C. Board of Medical Examiners et al.
(Civil Action No. 2016-CP-40-06276)

Affidavit of Daniel Bodde
in Support of Opternative, Inc.'s Motion for Summary Judgment

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Opternative, Inc., Plaintiff, vs. South Carolina Board of Medical Examiners, and South Carolina Department of Labor, Licensing, and Regulation, Defendants, and South Carolina Optometric Physicians Association, Defendant-Intervenors.	)	Civil Action No. 2016-CP-40-06276 **AFFIDAVIT OF DANIEL BODDE**

I, Daniel Bodde, having been duly sworn, depose and say:

1. My name is Daniel Bodde. I am over eighteen years of age, and I am competent to testify as to the matters contained herein. The information below is based on my own personal knowledge and experience.

2. I am (and at all times relevant to this affidavit have been) the Chief Marketing Officer for Plaintiff Opternative, Inc. ("Opternative"), and in that capacity I have personal knowledge of Opternative's history, its operations, and its Technology. Throughout this

affidavit, references to Opternative's Technology are references to the Technology as it existed when this case was filed on October 24, 2016.

3. Opternative is a healthcare-technology company that offers qualifying customers the ability to obtain a corrective-lens prescription from the comfort of their own homes using a smart phone and a computer. Specifically, Opternative allows customers to obtain a first-time prescription for eyeglasses, to renew or update their previous prescription for eyeglasses, or to renew or update their previous prescription for contact lenses.

4. Opternative was founded in 2012 out of the sincere belief that corrective-lens prescriptions should be affordable and accessible for everyone. The company was founded by Steven Lee, a practicing optometrist who had conducted over 20,000 refractive tests. Steven's experience was that the traditional, brick-and-mortar model for obtaining corrective-lens prescriptions was needlessly inconvenient and expensive for patients—especially those just looking to renew or update their previous prescriptions. The company knew there must be a way for patients to obtain that simple care without having to physically travel to an optometrist's office every single time they wanted a new prescription.

5. Traditional, brick-and-mortar refractive tests rely on patient-self reporting. An individual sits in a chair and reports to the administering optometrist or ophthalmologist what they perceive as they are shown a series of images using a phoropter (a mechanical device that switches multiple lenses in front of a patient's eyes). Traditional refractive tests are subjective, in that they rely on the patient's self-reporting what they see, as distinct from objective tests that physically measure the patient's eyes.

6. Opternative's Technology relies on the same subjective, self-reporting principle as traditional refractive tests. The way our Technology works is that customers start by visiting the Opternative website and providing detailed information about their existing prescription and relevant medical history. The Technology then prompts customers with a series of written and audio questions that guide them through a vision assessment. Customers next view various individually-calibrated images on a computer screen and use a smartphone to self-report subjective responses to what they perceive. The Technology then automatically records those responses and compiles refractive data which, together with the customer's previous-prescription and medical-history information, the Technology electronically sends to a state-licensed ophthalmologist.

7. Importantly, Opternative's users are *not* guaranteed a prescription. Ophthalmologists are medical doctors who specialize in total eye care, which includes not only corrective-vision and ocular-pathological care, but also overall eye-health assessments and surgeries. Accordingly, the ophthalmologists who review the information generated by our Technology only write prescriptions where, in their *medical judgment*, it would be appropriate to do so.

8. Opternative also imposes front-end screening requirements to filter out people for whom ophthalmologists will not write prescriptions based on the Technology. Only otherwise-healthy customers between the ages of 18 and 50 are eligible for a prescription, and customers are prohibited from using Opternative's Technology four years in a row without first certifying that they have received a comprehensive eye-health examination. Both before and after customers use the Technology, they are made aware of the fact that it is not a comprehensive

eye-health examination. Messages to that effect, which also reinforce the importance of periodic comprehensive eye-health examinations, are included on Opternative's website, in the Terms and Conditions a customer must accept when using the Technology itself. If a participating ophthalmologist decides that, in his medical judgment, it would not be appropriate for him to write a prescription based on the information collected by Opternative's Technology, we also provide the non-qualifying customer with contact information for local eye care professionals who can conduct an in-person examination.

9. We also display the following notice on our website at www.opternative.com:

> Opternative **is not a replacement** for a comprehensive eye examination. Our licensed Ophthalmologists use Opternative's on-line technology to evaluate a patient's visual acuity and a portion of the ocular health profile, diagnose refractive error, and issue a prescription for corrective eyewear, where clinically appropriate. Our services are limited to patients between the ages of 18 and 50 who are in good health. All examinations are conducted and all prescriptions are issued based on the independent clinical judgment of an ophthalmologist. Because our services are not a replacement for an eye health examination, we encourage everyone to obtain a comprehensive eye health exam at least once every 2 years. We prohibit patients from taking an Opternative exam more than 4 consecutive years without certifying that they have received a comprehensive eye health exam first. If you need helping finding an eye care professional near you, please contact us at info@opternative.com.

10. Since our Technology officially went live in 2014, we have experienced a genuine demand for our services. Opternative now successfully operates in 39 states, has helped tens of thousands satisfied customers obtain corrective-lens prescriptions they needed, and would like to expand access to care in South Carolina, too.

11. In fact, prior to the passage of the "Eye Care Consumer Protection Law" (ECCPL) in May of 2016, Opternative *was* successfully operating in South Carolina, and many

South Carolinians actually *did* receive corrective-lens prescriptions from a South Carolina-licensed ophthalmologist who used his medical judgment to write a prescription based on information generated by our Technology.

12. But Opternative's understanding was (and still is) that the ECCPL forbids South Carolina-licensed ophthalmologists from writing corrective-lens prescriptions based solely on information electronically compiled by automated testing devices, including Opternative's Technology. Insofar as Opternative's Technology automatically records users' responses (rather than having those responses written down by a human being), our understanding (and the understanding of all the South Carolina-licensed ophthalmologists we were in contact with) was that the ECCPL barred the use of Opternative's Technology to write prescriptions.

13. Thus, immediately after the passage of the ECCPL, South Carolina-licensed ophthalmologists refused to write prescriptions based on Opternative's Technology, and Opternative was unable to find ophthalmologists willing to risk violating the law and potentially incurring penalties or even losing their license, as a result. Because ophthalmologists' willingness to use information generated by our Technology to write corrective-lens prescriptions is at the core of our business model, Opternative was forced to cease operations in South Carolina.

14. However, Opternative is currently in contact with South Carolina-licensed ophthalmologists who would continue using our Technology to write corrective-lens prescriptions (according to their medical judgment) if the barrier of the ECCPL were removed. The ECCPL is thus the only thing standing between Opternative and continued operations in

South Carolina. In the absence of the ECCPL—or should it be struck down in this case—Opternative would immediately continue operating in South Carolina.

FURTHER AFFIANT SAYETH NOT.

Daniel Bodde

SWORN to and subscribed before me

This 1 day of September, 2017

Notary Public for the State of Minnesota

My Commission Expires: 01/31/22

DIANE C SUM
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31 2022

Opternative, Inc. v. S.C. Board of Medical Examiners et al.
(Civil Action No. 2016-CP-40-06276)

Affidavit of Edward Chaum, MD
in Support of Opternative, Inc.'s Motion for Summary Judgment

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Opternative, Inc.,	)	Civil Action No. 2016-CP-40-06276
Plaintiff,	)	
vs.	)	**AFFIDAVIT FOR EDWARD CHAUM, MD**
South Carolina Board of Medical Examiners,	)	
and	)	
South Carolina Department of Labor, Licensing, and Regulation,	)	
Defendants.	)	

I, Edward Chaum, MD, having been duly sworn, depose and say:

1. My name is Edward Chaum. I am over eighteen years of age, and I am competent to testify as to the matters contained herein. The below information is based on my own personal knowledge and experience.

2. I am a South Carolina-licensed ophthalmologist. Prior to May 2016, I used information electronically compiled by the online service "Opternative" to assist me in providing prescriptions for corrective lenses for multiple individual patients.

3. South Carolina's "Eye Care Consumer Protection Law" (ECCPL) went into effect in May of 2016. My understanding was and is that the ECCPL forbids South Carolina-licensed ophthalmologists from writing prescriptions for glasses and contact lenses based on information electronically compiled by services like Opternative. Once the ECCPL went into effect, I promptly stopped using Opternative's technology for this purpose and do not currently provide prescriptions for corrective lenses or contact lenses in South Carolina.

4. In my personal and professional opinion, Opternative's technology providing online subjective refractions has been validated in broad clinical use across the country and provides meaningful access to personalized refractive care for appropriately selected patients. The development, maturation, and validation of these types of new technologies for patient-centered access and care are actively supported in written opinions by my professional society, the American Academy of Ophthalmology. Should the law in South Carolina change to permit their use for the benefit of patients in the state, I would support the reintroduction of this and other similar technologies to improve patient access for their refractive needs

FURTHER AFFIANT SAYETH NOT.

Edward Chaum, MD PhD

SWORN to and subscribed before me

This 31st day of ~~July~~ August, 2017

Notary Public for the State of Tennessee

My Commission Expires: 2/23/19

DEBRA K. TRAPP
STATE OF TENNESSEE NOTARY PUBLIC
SHELBY COUNTY
MY COMMISSION EXPIRES 2-23-2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000326
Civil Action No. 2016-CP-40-06276

Opternative, Inc., ... Appellant,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation, ... Respondents,

and

South Carolina Optometric Physicians Association, ... Respondent.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH, LLP
INSTITUTE FOR JUSTICE

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Attorneys for Appellant