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Case Number 303,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, DEPARTMENT OF FINANCE,	)	
Plaintiff-below/Appellant,	)	No. 303, 2020
v.	)	On Appeal from the Court of Chancery of the State of Delaware
AT&T INC.,	)	
Defendant-below/Appellee.	)	C.A. No. 2019-0985-JTL

APPELLANT'S OPENING BRIEF

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Dated: October 29, 2020

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NATURE OF PROCEEDINGS

Plaintiff-Appellant State of Delaware, Department of Finance (the "State") issued an administrative subpoena to Appellee-Defendant AT&T, Inc. ("AT&T") on November 8, 2019 (the "Subpoena") pursuant to 12 *Del. C.* §1171(3). When AT&T failed to comply, the State brought this administrative subpoena enforcement action in the Court of Chancery pursuant to § 1171(4).

The trial court issued its opinion on July 10, 2020 (Ex. A, the "Opinion" (reported at *Dept. of Fin. v. AT&T, Inc.*, 2020 WL 3888310 (Del. Ch. July 10, 2020)). The Opinion applied *United States v. Powell*, 379 U.S. 48 (1964) and found that the Subpoena met the factors for enforcement of an administrative subpoena set forth by the United States Supreme Court in *Powell*.[1] Despite that finding, the trial court quashed the Subpoena in its entirety, finding that enforcing the Subpoena would be an "abuse of the Court's process."

The State sought reargument because the Court of Chancery exceeded the appropriate scope of review for an abuse of the court's process, misapprehended the factual record relating to Kelmar Associates LLC's ("Kelmar") compensation, and incorrectly created a presumption that Kelmar, the State's designated audit firm, would improperly seek documents to use in examinations for other States. The trial

[1] *See also U.S. v. Worley*, 347 Fed. App's 744 (3d Cir. 2009).

court denied the motion for reargument in an order dated July 30, 2020 (Ex. B, the "Order").

The Opinion requested the parties identify "any proceedings that are necessary to bring this action to a close at the trial level before such a[] [final] order can be entered." Opinion at *61. The State then submitted a proposed order for filing an amended complaint as a matter of right and further proceedings consistent with Court of Chancery Rule 15(a) (amendment as a matter of right), *Univar*, *McCarthy*, and the trial court's own opinion. (A0548-51.)

The trial court, however, declined to entertain further proceedings in an Order Denying Request for Further Proceedings dated August 14, 2020 (Ex. C, the "Final Judgment Order") and instead entered a two sentence Final Order and Judgment (Ex. D, the "Final Judgment"), as sought by AT&T.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in quashing the Subpoena in its entirety under an "abuse of process" standard, particularly after finding that the State had the statutory authority to seek the records at issue under the Delaware Escheat Law and the *Powell* factors.

2. The Court of Chancery erred in finding that the State's use of Kelmar to assist with the examination was an abuse of the court's process. First, the court erred in determining that Kelmar is compensated on a contingent basis based on a single reference to the "contingent-fee auditor" in AT&T's motion to quash. Second, even if Kelmar were compensated on a contingent basis, it would not be an abuse of process for the State to use Kelmar to assist with the examination.

3. The Court of Chancery erred in finding that the 2002 version of the Escheat Law applied to the Subpoena because the 2017 version of the Escheat Law was remedial in nature and applies retroactively, the statute of limitations is not a bar to the State's right to review records, and AT&T elected to take advantage of the benefits of the 2017 Escheat Law despite now seeking to apply the 2002 Escheat Law to its benefit.

4. The Court of Chancery erred in refusing to accept the State's reasonable modifications to the temporal scope of the documents requested in the

Subpoena, which were acknowledged by AT&T in written correspondence prior to this litigation and were stated on the record before the Court of Chancery.

5. The Court of Chancery erred in entering final judgment entirely quashing the Subpoena rather than allowing the State to amend its complaint as a matter of right and proceed under the Court of Chancery Rules, consistent with the Section 1171(4) action in *Univar* pending before Vice Chancellor Slights.

STATEMENT OF FACTS

I. The Escheat Law

As the trial court's Opinion explained:

> Escheat is a procedure by which "a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." *Texas v. New Jersey*, 379 U.S. 674, 675 (1965). Title 12, Chapter 11, Subchapter II of the Delaware Code, titled "Unclaimed Property," requires that a person holding property that meets certain requirements file a report identifying the property and escheat it to the State. *See* 12 *Del. C.* §§ 1130–1190 [the "Escheat Law."]
>
> The Escheat Law designates the Secretary of Finance (or the Secretary's delegate) as the "State Escheator." The Escheat Law charges the State Escheator with administering and enforcing the Escheat Law and authorizes the State Escheator to conduct examinations of companies' books and records to determine whether they have complied with the statutory requirements.[2]

The relevant section of the Escheat Law is as follows:

> **§ 1171 Examination to determine compliance with chapter.**
>
> The State Escheator, at reasonable times and on reasonable notice, may do any of the following:
>
> (1) Examine the records of a person or the records in the possession of an agent, representative, subsidiary, or affiliate of the person under

[2] Opinion at 1. *See also* 12 *Del. C.* § 1102 ("There shall be an Escheator of the State, who shall be the Secretary of Finance or the Secretary's delegate. The administration and enforcement of this chapter are vested in the Secretary of Finance or the Secretary's delegate."); 30 *Del. C.* § 363 ("The Secretary of Finance shall act as Escheator of the State under the provisions of Chapter 11 of Title 12."); *see also* 12 *Del. C.* § 1130(23) ("'State Escheator' means the person responsible for the administration and enforcement of this chapter, as established by § 1102 of this title and § 363 of Title 30.").

> examination in order to determine whether the person complied with this chapter.
>
> (2) Take testimony of a person, including the person's employee, agent, representative, subsidiary, or affiliate, to determine whether the person complied with this chapter.
>
> (3) Issue an administrative subpoena to require that the records specified in paragraph (1) of this section be made available for examination and that the testimony specified in paragraph (2) of this section be provided.
>
> (4) Bring an action in the Court of Chancery seeking enforcement of an administrative subpoena issued under paragraph (3) of this section, which the Court shall consider under procedures that will lead to an expeditious resolution of the action.[3]

The power of escheat is the power of the government to take possession of property whose true owner has not claimed it, such that "property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations."[4] In this sense, "[t]he public policy supporting escheat is vastly superior to any claim defendants have, as

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[3] Opinion at 5-6.

[4] *Stand. Oil Co. v. New Jersey, by Parsons*, 341 U.S. 428, 435–36 (1951); *see also Patronis v. United Ins. Co.*, 299 So.3d 1152, 1157-58 (Fla. 1st Dist. App. June 3, 2020) ("[U]nclaimed property laws are inherently remedial in nature and generally understood as advancing a state's strong interest in protecting . . . . the economic rights of consumers by providing means to reunite unclaimed property [] with its rightful and lawful owners. . . . the state is deemed the preferred custodian of escheatable funds (versus private companies), such that unclaimed property laws are distinctively and characteristically ones that further important regulatory interests[.]").

[mere] holder[s]" of unclaimed property.[5] This Court can take notice of the fact that the State Escheator has returned over $300 million to the rightful owners of unclaimed property in just the last three years.[6]

II. The State's Examination of AT&T

On January 12, 2012, the State issued a Notice of Examination to AT&T, indicating the State's intent to examine AT&T's books and records to determine its compliance with Delaware Escheat Law. (A0018.) Subsequently, in furtherance of the examination, Kelmar, the State's agent for the examination, sent initial information requests to AT&T. (*Id.*) On or about December 11, 2017, AT&T notified the State Escheator of its intent to enter the expedited examination program pursuant to 12 *Del. C.* § 1172(c)(1). (*Id.*)

Kelmar, on behalf of the State, reviewed the records and information provided by AT&T and followed up with additional requests "to focus the expedited examination and to determine the property held by AT&T" that needed to be escheated to Delaware. (A0019.) More particularly, Kelmar, on behalf of the State, sought documents from AT&T dated between 2008 and 2015, involving two categories of information: the Disbursements Requests and the Rebates Requests.

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[5] *State v. Chubb Corp.*, 570 A.2d 1313, 1317 (N.J. Super. Ch. Div. 1989).

[6] DELAWARE OFFICE OF UNCLAIMED PROPERTY, https://unclaimedproperty.delaware.gov/ (last visited Oct. 29, 2020).

(A0184 ("In accordance with our call and Ms. Mayrack's correspondence dated November 21, 2019, Delaware's revised request for documents is limited to 2008 and forward."; "That is, Delaware is not requesting data for periods prior to 2008, nor is it requesting that AT&T confirm whether it can access or research such data.").) The purpose of the Disbursements Request was to evaluate the number of unclaimed checks disbursed from certain AT&T bank accounts in the years between 2008 and 2015. (Opinion at 4.) AT&T's records for all check disbursements will show the extent of Delaware-related disbursement activity, a necessary inquiry for the State to properly examine property that may be reportable to Delaware and to validate the completeness of AT&T's records. The Rebates Requests asked AT&T to identify general ledger accounts that tracked rebate accrual over a specified time period and to identify the third-parties that AT&T used to issue rebates to its consumers. (Opinion at 1.) All of the requested documents are in existence and readily available; the State is not requesting AT&T to create new documents for the examination.

On or about December 11, 2017, AT&T notified the State Escheator of its intent to enter the State's expedited examination program pursuant to 12 *Del. C.* § 1172(c)(1), which provided AT&T certain benefits in exchange for expedition of AT&T's responses to examination requests. (A0018.) The State and AT&T agreed to a work plan for the expedited examination. (A0019.)

Ultimately, AT&T refused to produce documents, violating its own work plan with the State. As a result, the State issued a letter on October 31, 2019, pursuant to 12 *Del C.* § 1172(c)(4), terminating the expedited examination and asking AT&T to produce documents responsive to the two disputed categories of information, the Disbursements Requests and the Rebates Requests. (A0020; A0057-65.) The letter advised that failure to do so could lead to the issuance of an administrative subpoena. (A0020; A0058.)

After AT&T again failed to respond, on November 8, 2019 the State, pursuant to its authority in 12 *Del. C.* § 1171(3), issued the Subpoena seeking the production of documents responsive to the two categories of information, and specifying that AT&T should produce all documents by December 9, 2019. (A0021; A0068-83.) Following the issuance of the Subpoena, AT&T and the State conferred regarding the scope of the outstanding requests and Subpoena. Despite this communication, AT&T never produced any documents nor committed to a schedule for doing so. (A0021.)

Instead, on December 6, 2019—three days before the Subpoena's return date—AT&T filed an action in the United States District Court for the District of Delaware challenging the constitutionality of the Escheat Law (the "Federal Action"), calling into question whether AT&T ever intended to comply with the Subpoena and whether it had been negotiating in good faith. (A0021.) On

December 9, 2019, the return date of the Subpoena, the State filed a Verified Complaint against AT&T in the Delaware Court of Chancery (the "Chancery Action") pursuant to 12 *Del. C.* § 1171(4). The Chancery Action seeks an Order requiring AT&T to comply with the Subpoena. (A0023.)

ARGUMENT

I. The Court of Chancery Erred in Considering the Breadth of the Subpoena as an Abuse of the Court's Process

A. Question Presented

Did the Court of Chancery err by analyzing the breadth of the Subpoena when considering whether the Subpoena was an abuse of the court's process? This issue was preserved below. (A0419-24.)

B. Scope of Review

The Supreme Court will overturn trial court findings that are not supported by the record or are not the product of an orderly and logical deductive process.[7]

The trial court's "interpretation and application of … a question of law … must be reviewed *de novo* on appeal."[8]

C. Merits of Argument

1. The State's Authority to Issue Subpoenas and Enforcement under *Powell*

The State may issue an administrative subpoena to determine a person's compliance with the Escheat Law.[9] "In order to determine whether an item is

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[7] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

[8] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 524 (Del. 1999).

[9] 12 *Del. C.* § 1171(3). As discussed *infra*, the State possessed the power to issue an administrative subpoena even before the express provision contained in Section 1171(3) was added in the 2017 Escheat Law amendments.

relevant, a reviewing court must compare the challenged request with the stated purpose of the inquiry."[10] "When the legislature gives an administrative agency the power to subpoena, it has given the agency 'a power of inquisition' that is 'analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'"[11]

In fact, "a subpoena may be enforced where it recites the agency's statutory duties, and the 'statutes themselves alert the parties to the purpose of the investigation.'"[12] Therefore, the power to investigate possible wrongdoing is

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[10] *Matter of Atty. Gen.'s Investigative Demand to Michael Malemed*, 493 A.2d 972, 977 (Del. Super. 1985).

[11] Opinion at 14 (quoting *U.S. v. Morton Salt Co.* 338 U.S. 632, 642-643 (1950)); *see also Dept. of Fin. v. Univar, Inc.*, 2020 WL 2569703, at *4 (Del. Ch. May 21, 2020) ("Any gap that might exist in the regulations can easily be filled by the well-developed common law standards in Delaware for enforcing subpoenas."); *see also Trump v. Vance*, 2020 WL 4861980, at *11 (S.D.N.Y. Aug. 20, 2020) ("To this end, a grand jury can 'investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'"); *see also State Water Resources Control Bd. v. Baldwin & Sons, Inc.*, 258 Cal. Rptr. 3d 425, 436 (Cal. App. 4th Dist. 2020) ("[A]n agency's administrative investigations are similar to a grand jury proceeding.").

[12] *U.S. v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166-67, 170 (3d Cir. 1986). (quoting *FTC v. Carter*, 636 F.2d 781, 787 (D.C. Cir. 1980)); *see also In re Blue Hen Country Network, Inc.*, 314 A.2d 197, 200 (Del. Super. 1973) ("The purpose stated by the Attorney General is the enforcement of the Delaware laws and [that] is a proper purpose under the statute.").

"necessarily broad."[13] In particular here, the State Escheator has a statutory grant of broad subpoena power similar to that granted to the Attorney General to investigate criminal activity, which is enforceable by an action brought in state court and is even broader than the investigatory power of a grand jury.[14]

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[13] *Blue Hen*, 314 A.2d at 200 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)); *see also Trump*, 2020 WL 4861980, at *12 ("[C]ourts have held that a grand jury's subpoena 'enjoys a presumption of validity.'"); *id.* at *11 (The grand jury's "investigatory powers are necessarily broad."); *id.* ("The grand jury can hardly be expected to be able to designate or call for what its exact [evidentiary] needs may ultimately turn out to be and must be allowed to collect not only material that bears directly on whether a crime was committed but also material that may shed 'possible light on seemingly related aspects whose significance [the grand jury] is seeking to uncover.'"); *Trump v. Vance*, 2020 WL 5924199, at *9 (2d Cir. Oct. 7, 2020) ("Complex financial and corporate investigations are broad by default. A grand jury 'has a right to a fair margin of reach and material in seeking information, not merely direct but also as a matter of possible light on seemingly related aspects whose significance it is seeking to uncover.'").

[14] *See Johnson v. State*, 983 A.2d 904, 920-21 (Del. 2009) (discussing "statutory grant of power . . . to 'confer upon the Attorney General, in the investigation of crime and other matters of public concern, powers similar to those inherent in grand juries'" and citing *Blue Hen* for the proposition that such a subpoena need only be "reasonable" in the sense that it "specify the materials to be produced with reasonable particularity, . . . require the production only of materials relevant to the investigation, and . . . not cover an unreasonable amount of time"); *Whitehurst v. State*, 83 A.3d 362, 368 (Del. 2013) ("Subpoenas, unlike search warrants, do not require the State to show probable cause. They only require reasonableness."); *Matter of Acierno*, 582 A.2d 934 (Del. 1990) ("While we have compared [the Attorney General's] investigatory powers to those of the Grand Jury, they are considerably broader because they are not limited to the power of presentment.") (citing *In re Hawkins*, 123 A.2d 113 (Del. 1956); *In re Henry C. Eastburn & Son, Inc.*, 147 A.2d 921 (Del. 1959) and *In re McGowen*, 303 A.2d 645 (Del. 1973)); *see also Blue Hen*, 314 A.2d at 200 ("Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its

Given this broad subpoena power, the law regarding enforcement of administrative subpoenas is well established: the trial court can issue a final appealable order enforcing an administrative subpoena if the government makes a *prima facie* showing of the four *Powell* factors—*i.e.*, "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [State's] possession, and that the administrative steps required by the Code have been followed"—and the defendant does not demonstrate inapplicability of one of the *Powell* elements or an "abuse of the Court's process."[15] A person challenging a subpoena bears a high burden that must be supported by evidence.[16] Additionally, a court may only quash

investigative powers are necessarily broad," and breadth of subpoena power does not render subpoena unconstitutional or the subpoena's purpose improper).

[15] *Worley*, 347 Fed. App'x at 746 (emphasis added); *see also* Opinion at 29-32.

[16] *Trump*, 2020 WL 4861980, at *12 ("Accordingly, as discussed below, the party challenging a grand jury subpoena as overbroad or issued in bad faith must come forward with more than mere 'speculat[ion]' and 'bare assertions' of impropriety."); *Acosta v. Xcel Commc'ns of S. Alabama, Inc.*, 2019 WL 1370869, at *5 (S.D. Ala. Mar. 26, 2019) ("Respondent offers only naked speculation that WHD has an axe to grind against it" which was insufficient to overcome a *prima facie* showing as to all four *Powell* factors).

a subpoena in its entirety when the subpoena is wildly overbroad or irrelevant, which is not the case in this action.[17]

2. The Court of Chancery Erred in Relying on the Subpoena's Alleged Over-Breadth in Quashing the Subpoena in its Entirety as an "Abuse of the Court's Process"

The authorities recited above offer no grounds for the trial court to consider the breadth of a subpoena in its "abuse of the court's process" analysis. There certainly is no basis for finding that the alleged breadth of a subpoena may somehow overcome satisfaction of all four *Powell* factors.[18] The Court of Chancery should have determined only whether the State Escheator had the authority to inquire into the issues underlying the Subpoena, whether the information sought was too indefinite, and whether the information was "reasonably relevant to the authorized inquiry."[19] In short, the State's authority to investigate is expansive, and a court

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[17] *Trump*, 2020 WL 4861980, at *12 ("[A person challenging a subpoena] must show that 'the documents are so unrelated to the subject of inquiry as to make it obvious that their production would be futile as an aid to the' Grand Jury's investigation.").

[18] *Westinghouse*, 788 F.2d at 171 (finding administrative subpoena that "require[s] production of close to 80% of [the company's] internal audit reports" and records for "business segments which perform *no* government work, but whose costs are pooled together with audit groups who audit segments with government contracts" was not unreasonably broad).

[19] *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007); *In re Grand Jury Proc.*, 971 F.3d 40, 54 (2d Cir. 2020) ("Thus, a grand jury subpoena is unreasonably broad only if there is no reasonable possibility that the category of materials the [g]overnment seeks will produce information relevant to the general subject of the grand jury's investigation.") (internal quotation omitted).

should only restrict that authority based on evidence of bad faith, not concerns about the precise contours of the investigation.

Here, the Court of Chancery properly determined that the document requests in the Subpoena fell within the State's broad authority under the Escheat Law and *Powell*. For example, the court found that: (1) the statute of limitations does not apply as a bar to the Subpoena (Opinion at 46-47); (2) AT&T's last-known address argument is inapplicable to enforcement of the Subpoena (Opinion at 50-51); and (3) records of cleared, stopped, and cancelled checks "fall[] within the authority granted to the State Escheator…" (Opinion at 25, 53.) The court therefore correctly found that the *Powell* factors were satisfied. (Opinion 34-56.)[20]

Having found that the *Powell* factors were met, the trial court next considered whether enforcement of the Subpoena would nonetheless be an abuse of the court's process. In doing so, the Court analyzed and criticized the alleged breadth of the Subpoena's document requests, erroneously relying on precisely the same challenges to the Subpoena that it rejected in considering the *Powell* factors. (*See, e.g.*, Opinion at 57 (finding request for documents outside statute of limitations

[20] *SmithKline Corp. v. Staats*, 668 F.2d 201, 207 (3d Cir. 1981) ("We believe that a demand letter issued by GAO pursuant to its statutory authority, under the continuing and intense pressure of United States senators, may not, without more, be resisted on the ground that GAO sought the information for an improper purpose.").

would be an abuse of the court's process)[21]; Opinion at 57-58 (finding that seeking records with last-known addresses outside Delaware would be an abuse of the court's process)[22]; Opinion at 58 (finding that requiring records for all checks would be an abuse of the court's process).[23])

This analysis was erroneous and had no basis in *Powell* or any other law. The breadth of the subpoena is its own factor under the *Powell* standard. *Powell* requires the agency to show "that the investigation will be conducted pursuant to a legitimate purpose [and] the inquiry may be relevant to the purpose..."[24] Therefore, the court considers relevance and breadth of the materials sought by the subpoena during the *Powell* analysis, before the court even considers whether enforcing the subpoena would be an "abuse of the process." The "abuse of process" inquiry looks only to the purpose of the Subpoena, attempting to determine whether the subpoena is issued

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[21] The Court applied the incorrect statute of limitation and, even so, failed to accept properly modified requests that limited the Subpoena to AT&T's documents from 2008 and later. *See infra* Sections III, IV.

[22] The Court erred because "the *Texas* cases do not prevent Delaware from initiating an inquiry to determine the true holder of abandoned property. . . and Delaware may seek information that will assist it in making that determination." *Office Depot, Inc. v. Sec'y of Fin. for Delaware*, 710 Fed. App'x 59, 60 (3d Cir. 2018) (citing *Marathon Petroleum Corp. v. Sec'y of Fin. for Delaware*, 876 F.3d 481, 499 (3d Cir. 2017)).

[23] Yet, as noted *infra*, the Court repeatedly noted that it needed further development of the factual record to make a proper determination on the enforceability of the subpoena.

[24] *Worley*, 347 Fed. App'x at 746.

in bad faith, not to its breadth.[25] Breadth of the Subpoena should not have been evaluated as part of the abuse-of-process analysis—least of all after the court had determined already that the Subpoena met the *Powell* factors, including that its alleged breadth was a legitimate exercise of the State's investigatory power.

As noted by the trial court, this is an issue of first impression in Delaware. (Opinion at 3, 13; Order at 15.) Other courts, however, have found that "a court's process is abused only if the subpoena is 'issued for an improper purpose, such as to harass [an investigation's target] or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.'"[26] The person challenging the subpoena bears the heavy burden of proving bad faith, which cannot be shown unless the subject of the subpoena can

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[25] *Powell*, 379 U.S. at 58 ("Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."); *U.S. v. LaSalle Nat. Bank*, 437 U.S. 298, 314 (1978).

[26] *In re Admin. Subpoena*, 289 F.3d 843, 846 (6th Cir. 2001) (quoting *Powell*, 379 U.S. at 58); *SmithKline*, 668 F.2d at 208 n.5 ("Although [*Wheeling-Pittsburgh*] was called to counsels' attention at oral argument, SmithKline does not contend that this case is controlling in the present circumstances. Indeed, SmithKline does not allege that GAO is acting in bad faith in seeking access to the information. [*Wheeling-Pittsburgh* defined] agency bad faith as 'a conscious decision by an agency to pursue a groundless allegation without hope of proving that allegation'"); *U.S. v. Comely*, 890 F.2d 539, 543 (1st Cir. 1989) (considering whether abuse of the court's process would occur, the court explained that, "[i]n the absence of firm evidence of bad faith, it is not our role to intrude into the investigative agency's function.").

show "that the agency, in an institutional sense, acted in bad faith when it issued the subpoena."[27]

The Court of Chancery therefore erred in considering the breadth of the Subpoena to determine there was an abuse of the court's process after it had already determined that the Subpoena was not overbroad under the *Powell* factors. There is no evidence that the State issued the Subpoena in bad faith, so the court should have found there was no abuse of process.

[27] *In re Admin. Subpoena*, 289 F.3d at 846; *E.E.O.C. v. A.E. Staley Mfg. Co.*, 711 F.2d 780, 788 (7th Cir. 1983), cert. denied, 466 U.S. 936 (1984) (in evaluating whether enforcement constitutes abuse of the court's process, "absent a showing that there has been wrongful conduct by the government, some improper purpose by the government, or that the subpoena is intended solely to serve purposes outside of the purview of the jurisdiction of the issuing agency, the district court should enforce a subpoena"); *Doe v. U.S.*, 253 F.3d 256, 271-72 (6th Cir. 2001) (DOJ administrative subpoena met the *Powell* elements and enforcement would not constitute an abuse of the court's process; "Doe has not met his 'heavy' burden of showing institutional bad faith in this case."). (A0421-22.)

II. The Court of Chancery Erred in Finding that Involvement of the State's Agent, Kelmar, in the Examination Was an Abuse of the Court's Process

A. Question Presented

Did the Court of Chancery err by relying on its own unsupported and incorrect conclusion and analysis that Kelmar is compensated contingently and therefore stands to benefit from a broader subpoena, constituting an abuse of the court's process? The issue was preserved below. (A0414-16.)

B. Scope of Review

See Argument Section I.B.

C. Merits of Argument

The Court of Chancery erred in determining that Kelmar is paid contingently, in refusing to consider evidence to the contrary, and in finding that contingency payment has any bearing on the abuse-of-process analysis.

1. Kelmar Will Not Be Compensated on a Contingent Basis

The Court of Chancery determined that Kelmar has a contingency fee arrangement with the State based upon a single phrase in the Preliminary Statement of AT&T's Motion to Quash, which states conclusory that the State uses a "contingent-fee auditor, Kelmar Associates LLC." (A0101; Opinion at 59; Order ¶¶ 3-4.) AT&T offered no citation in support of this alleged "fact." And there was no discussion of Kelmar or Kelmar's "abuse" by the trial court or parties during the

oral argument. (*See generally* A0441-0515.) The entire Kelmar issue was created by the Vice Chancellor and presented to the parties for the first time in the Opinion. When this Vice Chancellor has done something similar in the past, the Supreme Court has reversed.[28]

As the State explained in its Motion for Reargument, Kelmar will not receive any payment on a contingent basis for the AT&T examination; all payments to Kelmar for this examination are made on an hourly basis. (A0414; A0427-0439; A0286; A0294-95.)[29] The Court of Chancery erred in rejecting this fact and instead relying on AT&T's supposition, particularly in the context of a motion to quash,

[28] *See Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 130 (Del. 2019) (holding that "[b]ecause the Court of Chancery's decision . . . was rooted in an erroneous factual finding that lacked record support, we . . . reverse the Court of Chancery's judgment."); *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 24 (Del. 2017) (reversing the Court of Chancery's decision to afford no weight to the deal price in an appraisal action because the record, and "established principles of corporate finance" did not support the premises on which the Court of Chancery based its decision); *see also Pyott v. Louisiana Mun. Police Employees' Ret. System*, 74 A.3d 612, 614 (Del. 2013) (reversing trial court's presumption where the record lacked the support for the factual premise on which the court's finding was based).

[29] Although the contract allows for contingency-fee payments for escheatable property relating to securities in a company, no such potential liability would be available in this case. (Order at 4 n.1 (acknowledging this provision).)

which is not a proper procedural vehicle for unverified injection of matters outside of the pleadings.[30]

Despite the unfair surprise to the State from the trial court's reliance on AT&T's speculation, the Kelmar contract was in the record before the Court of Chancery. In its Motion for Reargument, the State pointed to the contract and its hourly payment structure. (A0414 (citing A0286).) The court, however, refused to consider this uncontroverted evidence, insisting instead that AT&T's single statement in its preliminary statement referring to Kelmar as "contingent fee", with no accompanying record citation or legal argument, was a "clear assertion" that the State should have known to respond to in briefing. (Order ¶ 3(b).) But the State should not have been required to correct every misstatement made by AT&T in its brief. Instead, the State focused on rebutting the arguments actually advanced by AT&T. This was far from a "tactical decision," as the court believed. (*Id.* at ¶ 3(b).)

The trial court therefore erroneously based its ruling on a "fact" that is patently false and contradicted by the record before the court. The court compounded the error by refusing to consider the evidence in the record to which the State pointed on reargument and instead defensively blaming the State for not responding sooner

[30] *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 2020 WL 5417547, at *7–8 (Del. Sept. 10, 2020); *Ricketts v. Brown*, 2017 WL 6550431, at *1 (Del. Super. Ct. Dec. 20, 2017) (deciding both a motion to dismiss and a motion to quash based on the same record).

to arguments that were not made by AT&T and were raised by the court only in its Opinion.

Moreover, rather than allow the State to disprove the patently-false premise on which this belated argument was based, the Vice Chancellor instead looked to *unrelated cases, from years prior, involving third parties and different compensation methods*.[31] These cases have no bearing on the facts at issue in this case.

These errors pervade the trial court's Opinion, which repeatedly speculates that contingent compensation provides perverse incentives for Kelmar. In guessing at Kelmar's "incentives," the court relied on the *Temple-Inland* case, which is not factually similar in any regard other than that it implicated the pre-2017 Escheat Law. (Opinion at 59-60.) And the court even concluded, based on its mere conjecture, that the State and Kelmar would violate applicable confidentiality

[31] Order at 2-3 (citing cases decided prior to the new contract and involving states other than Delaware). *See also Marathon*, 876 F.3d at 486 (noting that Kelmar has a contingency fee arrangement for the examination of ***Marathon Petroleum Corporation*** and its subsidiary, ***Speedway, LLC***); *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 545 (3d Cir. 2017) ("Kelmar has been vested with responsibility for conducting the ***Plains*** audit" but saying nothing about a contingent fee); *Univar, Inc. v. Geisenberger*, 409 F. Supp. 3d 273, 276 (D. Del. 2019) (addressing examination of ***Univar, Inc.***); *Temple-Inland, Inc. v. Cook*, 192 F. Supp. 3d 527, 534 (D. Del. 2016) (noting that Kelmar audited bank accounts of plaintiff ***Temple-Inland, Inc.***); *Fid. & Guar. Life Ins. Co. v. Frerichs*, 2017 WL 4863318, at *6 (C.D. Ill. Sept. 5, 2017) (claiming that Kelmar has a pecuniary interest in the outcome of the Audit **[*of Fidelity*]** because it will be paid a contingency fee[.]"); *Fid. & Guar. Life Ins. Co. v. Chiang*, 2014 WL 6090559, at *8 (E.D. Cal. Nov. 13, 2014) (stating that Kelmar has a contingent fee arrangement to audit ***Fidelity***).

obligations. (*Id.* at 59-60.) The court did so despite the fact that those obligations arise from a binding statute, 12 *Del. C.* § 1189, and the State repeatedly assured AT&T and the court that it and Kelmar would abide by the requirements of that statute. (*Id.* at 58-60.)

None of these conclusions is supported by the record in this case. The Court of Chancery's Opinion should be reversed.

2. Even if Kelmar's Compensation Were Contingent, that Would Not Be an Abuse of Process

Further, the Court of Chancery erred in finding a contingency-fee arrangement alone would be an abuse of process. The court falsely characterized the State's arrangement with its agent, Kelmar, as the State having "lent the State Escheator's investigatory authority to Kelmar to use as it sees fit." (Opinion at 59.) In fact, the State maintains control over the examination procedure at all times and does not hand over the reins to Kelmar. The contract between the State and Kelmar, as the State pointed out to the court, evidences the State's continued control and oversight of the examination. Just a few examples from the Kelmar Contract include:

> It is understood by the parties that Kelmar shall not commence an examination on behalf of Delaware without first obtaining the State's written consent.
>
> …

> The State Escheator shall approve all sampling, projection, and estimation techniques prior use by Kelmar during the course of any assigned unclaimed property examination.
>
> …
>
> At the end of each month, Kelmar shall provide the State with a Work In Progress Report (hereinafter "WIP") of all examinations assigned… Kelmar shall also provide reports on as needed basis at the request of the State, which reports shall contain all information required by the State.

(A0427-29 at §§ I.A.6, I.A.10, I.A.11, and I.C.1.) There is no abuse of process because the State, not Kelmar, ultimately oversees, manages, and controls the examination in all respects, so Kelmar could not corrupt the process even if it was so motivated (which it is not).

Moreover, even if, *arguendo*, Kelmar were contingent-paid, the trial court still erred in finding, *sua sponte*, that Kelmar had a corrupt motivation. Contingency fee contracts are a commonly-used, valid exercise of public policy.[32] Indeed, in this

[32] *See, e.g.*, *Fid. & Guar. Life Ins. Co. v. Frerichs*, 2017 WL 5007192, at *6 (C.D. Ill. Nov. 2, 2017) (rejecting company's claim that "the Treasurer's contingent-fee arrangement with Kelmar … gives Kelmar a financial interest in the audit proceedings" and violates procedural due process); *In re Panera Bread Co.*, 2020 WL 506684, at *32 (Del. Ch. Jan. 31, 2020), *judgment entered sub nom. In re Appraisal of Panera Bread Co.* (Del. Ch. 2020) (explaining that contingency fees in the merger context "are standard in financial advisor agreements and seldom create a conflict of interest"); *In re Smurfit–Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 (Del. Ch. May 20, 2011, revised May 24, 2011) (holding that "a sales process is not unreasonable under *Revlon* merely because a special committee is advised by a financial advisor who might receive a large contingent success fee"); *Chiang*, 2014 WL 6090559, at *8 (finding that controller's use of a

very context, holders of unclaimed property have argued that an audit firm retained on an *hourly* basis would be compromised because it would have an incentive to engage in endless investigation in order to drive up hours billed to the State.[33] No matter how the State conducts its examinations, holders of unclaimed property will find a reason to complain because it is the holders, not Kelmar, who have a compromised incentive—to retain possession of funds and property that do not belong to them.

Thus, there is no *per se* abuse of process if a court enforces a subpoena involving a contingent-fee auditor. But here, the court and AT&T's contention that Kelmar is such a contingent-fee agent of the State is not even accurate. The Court of Chancery's decision erred in both regards.

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third-party contingent-fee auditor for enforcement of escheat law did not violate due process).

[33] *See* Unclaimed Property Task Force, Meeting Minutes (August 2014) (reflecting discussion of complaints about outside auditors, including complaints about the hourly fee model by holders who claimed "that the examination was being dragged out to inflate billable hours"), available at http://comments.regulations.delaware.gov/LIS/TaskForces.nsf/bc9dc5dcf86f0ff885257e0e005b200f/43e4710bb1de80c285257cfa00767029/$FILE/SCR%2059%20Task%20Force%20Final%20Report-12-23-2014.pdf.

III. The Court of Chancery Erred in Applying the 2002 Escheat Law to Find an Abuse of Process

A. Question Presented

Did the Court of Chancery err in determining that the statute of limitations of the 2002 Escheat Law applied to the Subpoena (issued in November 2019), even though the statute of limitations of the 2017 Escheat Law was a procedural change and AT&T took advantage of benefits that existed only under the 2017 Escheat Law? This issue was preserved below. (A0214-17; A0376-77; A0386-87.)

B. Scope of Review

See Argument Section I.B.

C. Merits of Argument

The trial court erred in finding that the statute of limitations in the 2017 Escheat Law did not apply to the Subpoena, which was issued on November 8, 2019.[34] The court instead found that the 2002 Escheat Law's statute of limitations applied because the examination process began in 2012. (Opinion at 44-45.) This finding, in *dicta* offered by the court to support quashing the subpoena as an abuse of process, was erroneous for all the reasons discussed above with respect to the

[34] The State only seeks check information dating back to 2008. The State does seek information relating to Rebates Requests information dating back to 1998. However, under the current Statute of Limitations, the information sought back to 1998 would be proper—encompassing the 10-year statute of limitations plus the dormancy period. (A0478-79.)

State Escheator's broad investigatory power under *Powell*. The court also erred, as discussed herein, because: (1) the 2017 changes to the Escheat Law apply to all examinations pending after their enactment, (2) the statute of limitations is not a bar to the State's right to review records, which existed even prior to 2012, and (3) AT&T elected to be bound by the 2017 Escheat Law.

1. The Changes to the Escheat Law Were Retroactive

Under Section 1171, the Escheat Law applies on its face to examinations that are ongoing at the time of enactment. 12 *Del. C.* § 1171 (applies to "the person under examination"). Section 1172 establishes rules and procedures for conducting an examination, and Section 1173 prescribes the procedures for the voluntary property reporting program.[35] Sections 1172(b) and Section 1172(c) explicitly set out procedures available to persons subject to examination under the Escheat Law prior to July 22, 2015, and February 2, 2017, respectively.[36]

[35] *See* 12 *Del. C.* §§ 1172-73.

[36] *See also* 12 *Del. Admin. C.* § 104-2.3 ("The effective date of these Regulations shall be the date they are adopted, and the standards contained therein shall apply to all examinations commenced after that date. To the extent practical, the Regulations *shall apply to any ongoing examinations that commenced prior to the effective date of these Regulations*") (emphasis added).

Generally, courts will not apply a new statute of limitations retroactively to a substantive law, but will do so with respect to procedural law changes.[37] (A0216-17.) The new Escheat Law applies to examinations ongoing upon enactment because the changes made by the legislature were remedial. The intent of the amendments was to ensure that a holder who has failed to report and remit unclaimed property and has failed to retain records will still escheat that property to the State. This function is remedial. In fact, "unclaimed property laws are inherently remedial in nature" and may be applied retroactively.[38]

Here, AT&T—a mere holder of unclaimed property—challenges the effect of the Escheat Law on its own interests. But this is the wrong way to view the analysis. Escheat "liability" does not affect AT&T retroactively because any unclaimed property at issue does not belong to AT&T. The legitimate interests at issue in the

[37] *See Holland v. Zarif*, 794 A.2d 1254, 1268 (Del. Ch. 2002) (citing *Stop & Shop Cos. v. Gonzales*, 619 A.2d 896, 898 (Del. 1993) (when a statute may be deemed remedial legislation, the court is required to accord it a broad construction to accommodate the legislative will); *Smith v. Doe*, 538 U.S. 84, 94 (2003); *see also A.W. Financial Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1120 (Del. 2009) (citation omitted) (recognizing a statutory amendment is remedial and can apply retroactively if it relates to the State's "practice, procedure or remedies"); *Hyatt v. Northrop Corp.*, 883 F. Supp. 484, 486 (C.D. Cal. 1995), *aff'd sub nom. U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996) (applying statute of limitations retroactively as a procedural law change).

[38] *Patronis v. United Ins. Co.*, 2020 WL 2897023, at *3 (Fla. 1st Dist. App. June 3, 2020) (amendments to escheat law are "remedial/procedural and thereby operate retroactively").

examination are the interests of the ultimate owners of unclaimed property in being reunited with their property—an inherently remedial concern.[39]

2. The Statute of Limitations Is Not a Bar to The State's Right to Review Records

The trial court's *dicta* about the applicable statute of limitations is not a basis to find "abuse" because the court agreed that the statute of limitations is not a bright line bar on the State's authority to conduct an investigation based on the running of the statute of limitations. (Opinion at 45-47 (citing *Powell*, 379 U.S. at 49; *EEOC v. Delaware State Police*, 618 F. Supp. 451 (D. Del. 1985)).) Therefore, even if the State were not able to escheat certain property based on the statute of limitations, the State still would be entitled to review documents related to that property because the

[39] *See, e.g.*, *Am. Exp. Travel Related Services, Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 371 n.7 (3d Cir. 2012) (permitting retroactive application of statute because "Chapter 25 does not impose any further liability on [the company]. It only requires that issuers like [the company] turn over property owned by the travelers check owners to State custody."); *id.* at 371 ("[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.") (internal quotations omitted).

statute of limitations is not a bar to reviewing records.[40] This is particularly true when reviewing complex financial records.[41]

3. AT&T Elected To Be Bound by the 2017 Escheat Law

Further, AT&T's election to participate in an expedited examination, albeit without fully cooperating with the State as required, was an election to be bound by the 2017 Escheat Law. AT&T cannot elect to participate in a program created by a new law in hopes of preventing or reducing any potential interest or penalties, yet, at the same time, argue that it is not bound by that same law.[42]

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[40] *Trump*, 2020 WL 4861980, at *24 ("[E]ven if 'some of the requested records are so old as to be beyond the potentially applicable statute of limitations,' that 'does not render the subpoena unreasonable.' Thus, the 'subpoena need not be limited to calling for records from a period within the statute of limitations.'") (internal citations omitted), *aff'd*, 20-2766, 2020 WL 5924199 (2d Cir. Oct. 7, 2020).

[41] *Id.* at *25 ("Investigating financial criminal activity such as filing false business records can be particularly complex, and determining whether or not there is any evidence that such a crime has been committed may require information from years before and after any single transaction of interest.").

[42] *See, e.g.*, *Harper v. U.S.*, 2019 WL 4229755, at *1 (S.D. Cal. Aug. 2, 2019) ("Either the statutes and regulations apply in their entirety or they do not. Plaintiffs cannot pick and choose the statutes and regulations they want to comply with and ignore the others."); *Hampton v. Univ. of Maryland at Baltimore*, 674 A.2d 145, 150 (Md. Spec. App. 1996) (same).

IV. The Court of Chancery Erred in Rejecting the State's Proposed Modifications of the Subpoena's Document Requests

A. Question Presented

Did the Court of Chancery err in refusing to accept the State's reasonable temporal modifications of the Subpoena that would have alleviated the court's (unfounded) concerns with the Subpoena? This issue was preserved below. (A0548-51.)

B. Scope of Review

See Argument Section I.B.

C. Merits of Argument

The trial court also erred in rejecting the State's modification to the dates of the Subpoena. Although the Subpoena originally referred to bank records going back to the 1990s, the State made it clear to both AT&T and the court that it was only seeking documents for 2008 forward. This was confirmed in writing between the parties and reiterated on the record during the oral argument. (A0181 ("In our October correspondence, we stated that AT&T would provide four months of data – one month for each quarter – for each year back to 2008 for the identified accounts"); A0478 ("MR. LESSNER: Okay. Sure, Your Honor. And let me just -- as a factual matter, the subpoena here, which is requesting the payment -- the payment information, the check information, only goes from 2008 to 2015. So all this talk about going back to 1992 is factually incorrect.") (emphasis added).)

In fact, it is clear that AT&T understood that the requests only sought documents from 2008 forward because AT&T self-selected an initial production of documents from 2008 through 2015. (A0483 (Mr. Lessner: "So for 2008 through 2015, instead of giving us [the State] all of the records in electronic format, they [AT&T] have given us one month per quarter. They have self-selected one month per quarter to give us the records.") (emphasis added).) In fact, AT&T's own correspondence with the State on November 27, 2019 notes that the requests were limited to 2008 and forward. (A0184 ("In accordance with our call and Ms. Mayrack's correspondence dated November 21, 2019, Delaware's revised request for documents is limited to 2008 and forward.").)[43]

Thus, AT&T clearly was not "surprised" at oral argument by the State's concession that it seeks only records from 2008 forward. Instead, AT&T seeks to take advantage of that concession when producing documents, but argue as if the concession does not exist when moving to quash.

This type of modification should be common practice to allow parties to work towards resolution of disputed subpoenas. For example, if AT&T agreed to produce

[43] In fact, this is not the only way in which the State narrowed the scope of its request over the course of the examination. The State also significantly reduced the number of accounts at issue. (A0502 (subpoena limited to five AT&T bank accounts).)

some documents in the course of discussion (prior to or during the suit), the parties should be able to rely on such representations and modifications.[44]

Moreover, even if the trial court incorrectly believed that this temporal limitation was not already agreed upon by the parties prior to litigation, the court should not have rejected the State's representation that it sought only bank records from 2008 forward. When a party makes a concession during oral argument, particularly one that is against the party's legitimate interests in carrying out its statutory duties, the parties and the court should be able to rely on that concession.[45] The court should have accepted the State's representation and concession that it did not seek documents prior to 2008.[46] These modifications of the Subpoena, which

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[44] *See Patriot Natl. Ins. Group v. Oriska Ins. Co.*, 2013 WL 12154552, at *2 (S.D. Fla. Oct. 29, 2013) (recognizing and accepting plaintiff's representation that they "would be willing to limit their subpoena" and that they "remain willing to accept the limited initial production to determine whether additional documents are necessary"); *Pepsi-Cola Bottling Co. v. Pepsico, Inc.*, 282 A.2d 643, 648 (Del. Ch. 1971) ("[A] written agreement may be modified by a subsequent (written or) oral agreement and that this modification may be shown by writings or by words or by conduct or by all three.").

[45] *Petrea & Son Oil Co. v. Moore*, 442 A.2d 75, 77 n.2 (Del. 1982) (stating that the Court would not discuss "whether the lifting of a snow-covered truck cab constituted 'unusual exertion' . . . in light of appellant's concession of that issue at oral argument"); *Brandywine River Properties, LLC v. Maffett*, 2007 WL 2894053, at *1-2, n.4 (Del. Ch. Sept. 28, 2007) (accepting the defendants' concession at post-trial oral argument and in motion for reargument even where doing so resulted in the "unhappy result that [Plaintiff] gains a windfall…").

[46] *In re Whispering Oaks Residential Care Facility, L.L.C.*, 2011 WL 13188242, at *2 (E.D. Mo. Sept. 7, 2011) (government modifying subpoena date range during oral

were offered prior to litigation and on the record during litigation, adequately addressed AT&T's concerns and should not have been rejected. (A0222 (inviting modification of Subpoena, if necessary).)

The Court of Chancery also erred in not accepting (or not understanding) the documents sought to be examined to determine AT&T's compliance, and instead quashing the subpoena its entirety as "an abuse of the court's process"). (Opinion at 60; A0551.) The State made clear in its Complaint, briefing, and argument that the documents sought to be examined were needed in order to reconcile the records and amounts from the general ledger and account statements, particularly where the holder self-selected the documents to hand over to the State. (*See* A0483; A0220-21 (citing *Fryzel v. Chicago Title & Tr. Co.*, 527 N.E.2d 1025, 1029–30 (Ill. App. Ct. 1st Dist. 1988) ("Barring a proper investigation by the Director here would remove a holder of property from the scope of the Act solely on the basis of his own assertions and thereby allow the regulated to become the regulator.")).)[47]

In any event, to the extent the Court of Chancery determined that the State did not provide satisfactory support for the documents to be examined, it should have allowed the State to supplement the record as provided in *Blue Hen*, which the court

argument), *aff'd sub nom. U.S. v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813 (8th Cir. 2012).

[47] *See Trump*, 2020 WL 4861980, at *12 ("[T]he opponent of a grand jury subpoena 'is not entitled to set limits to the investigation that the grand jury may conduct.'").

cited for this very proposition. (*See* Opinion at 24-25 (quoting *Blue Hen*, 314 A.2d 197 (Del. Super. 1973)).) This is particularly true here, where "[t]here is nothing to suggest that these are anything but run-of-the-mill documents typically relevant to" an Escheat Law compliance investigation.[48]

[48] *See Trump*, 2020 WL 5924199, at *8.

V. The Court of Chancery Erred In Terminating A Section 1171(4) Administrative Subpoena Enforcement Action By Granting AT&T's "Motion To Quash," And Denying The State's Request To Proceed Under The Court Of Chancery Rules.

A. Question Presented

Did the Court of Chancery err in entering a final judgment rather than allowing the State to amend its complaint as counseled by the Court of Chancery Rules and *McCarthy*, the very case the court advised the parties to follow for further proceedings? This issue was preserved below. (A0548-51.)

B. Scope of Review

See Argument Section I.B.

C. Merits of Argument

The following facts and law are undisputed:

(1) This is a statutorily authorized proceeding brought by the State Escheator in the Court of Chancery to enforce an administrative subpoena. (Opinion at 11-12; *see also* 12 *Del. C.* § 1171(4).);

(2) In *State of Delaware v. Univar, Inc*., C.A. No 2018-0884-JRS (Del. Ch.) ("Univar"), Vice Chancellor Slights held that the proper procedure for enforcement of an administrative subpoena under § 1171(4) is for the State to file a Complaint, the Defendant to file an Answer to the Complaint, the State to bring a Motion for Judgment on Pleadings under Court of Chancery Rule 12(c), and for a tight schedule

for briefing and a hearing on the Motion for Judgment on the Pleadings. (A0548-51.) *See Univar*, Mem. Op. (Oct. 29, 2020) (in Section 1171(4) proceeding, granting State's Motion for Judgment on the Pleadings enforcing administrative subpoena);

(3) The forgoing procedure in *Univar* is explicitly based on *U.S. v. McCarthy*, 514 F.2d 368 (3d Cir. 1975) (Seitz, C.J.) ("*McCarthy*"). (A0548-51.);

(4) The trial court cited *Univar* for the legal framework governing a section 1171(4) enforcement action: "This court has not previously articulated the legal framework that governs an action to enforce an administrative subpoena under the Escheat Law. As Vice Chancellor Slights recently suggested, the proper course is to look to the "well-developed common law standards in Delaware for enforcing subpoenas," including the "abundant authority with respect to the parameters for enforcement of administrative subpoenas generally." (Opinion at 29.);

(4) The trial court held that *McCarthy* is the preferred procedure for an administrative subpoena enforcement action. (Opinion at 25-29, 33, 61.);

(5) The trial court held that this action was governed by the Court of Chancery Rules. (Opinion at 20.);

(6) The trial court held that "AT&T, however, did not respond to the complaint as a defendant normally would, such as by filing an answer or by moving to dismiss on grounds set forth in Court of Chancery Rule 12." (Opinion at 12, 20-28.);

(7) The trial court held that "Under the Court of Chancery Rules, a motion to quash or modify is not a motion to dismiss. It is a discovery motion analogous to a motion for a protective order that is filed in response to a subpoena issued pursuant to Court of Chancery Rule 45." (Opinion at 20 (emphasis added).);

(8) The trial court stated: "If there are any proceedings that are necessary to bring this action to a close at the trial level before such an [final] order can be entered, then the parties shall submit a joint letter identifying the issues and proposing a path forward." (Opinion at 61.); and

(9) The State then submitted a proposed order for filing an amended complaint and further proceedings consistent with the Court of Chancery Rules, Rule 15(a) (amendment as a matter of right), *Univar*, *McCarthy*, and the trial court's own opinion. (A0548-51.)

The trial court thus laid out a procedural path forward for the parties, then refused to allow the State to take that path. Instead, the trial court erred by entering the following two-line "Final Order and Judgment" (Ex. D):

> 1. The administrative subpoena issued to AT&T Inc. on November 8, 2019, is QUASHED.
>
> 2. This order is intended to be the trial court's final act in the case.

In entering this "Final Order" the trial court cited no authority (and the State is aware of none) for refusing to allow the State to amend its Complaint as a matter of right under Court of Chancery Rule 15(a).[49] This refusal is even more erroneous given the trial court's self-created (with no record support and not argued by the parties) allegations and conclusion that Kelmar "furthering its own interests" made enforcing the administrative subpoena an "abuse of the court's process." (Opinion at 59-60; *see also* A0551.)

In entering this "Final Order" the trial court cited no authority (and the State is aware of none) for dismissing a statutory Court of Chancery proceeding based on

[49] *See* Del. Ch. Ct. R. 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served…"); *Peterson Steels v. Seidmon*, 188 F.2d 193, 194 (7th Cir. 1951) ("As defendants had not served a responsive pleading, plaintiff was entitled to file his amended complaint as a matter of course and was not required to ask leave of court; it was error, however, to deny such leave when the request was made.").

a "Motion to Quash." (*See* Opinion at 20 (a motion to quash is not a motion to dismiss); A0550.)

In entering this "Final Order" the trial court cited no authority (and the State is aware of none) dismissing an enforcement action and quashing an administrative subpoena in its entirety without a holding that the subpoena is "not even minimally tailored to the government's investigatory goals."[50] Here, it is undisputed that the administrative subpoena is directly related to the State Escheator's statutorily authorized investigation into AT&T's compliance with the Escheat Law. (*See, e.g.*, Opinion at 37 ("Section 1171 does not require the State Escheator to have any purpose for seeking documents beyond "determin[ing] whether the person complied with [the Escheat Law]. . . . an agency does not inherently exceed its authority by failing to provide an explanation for its investigation or a justification for its information requests."); Opinion at 39-47 (State Escheator has authority to examine records of rebates and checks for years that AT&T argues would be barred from assessment by statute of limitations; "AT&T's bright-line argument that the statute of limitations bars the Department from investigating those years runs contrary to

[50] *In re Grand Jury Subpoena JK-15*, 828 F.3d 1083, 1086 (9th Cir. 2016); *see also Trump*, 2020 WL 5924199, at *10 (rejecting President Trump's argument that District Attorney's subpoena for tax returns was "not properly tailored to the needs of the District Attorney's investigation" because it "largely tracks the language of a subpoena issued by the House oversight committee").

precedent"; "under AT&T's reasoning, the State Escheator could sue to recover checks or rebates issued before 1994, because AT&T did not start filing reports until 1999"); Opinion at 47-51 (State Escheater has legitimate reasons to examine checks issued to parties with addresses in other states); Opinion at 53 ("The State Escheator has broad authority to examine AT&T's records to determine compliance with the Escheat Law, including the authority to determine if AT&T is properly voiding checks"); Opinion at 56 ("The request to query an electronic database and export the information into a usable format such as an Excel spreadsheet does not exceed the authority granted to the State Escheator."); A0502 (subpoena limited to five AT&T bank accounts).)

In sum, the trial court erred in not allowing the State to file an amended complaint and then proceed under the Court of Chancery Rules as contemplated in *Univar* and *McCarthy*.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court reverse the Court of Chancery and direct entry of an Order enforcing the State's Subpoena.

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