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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CORRECTED ANSWERING BRIEF OF DEFENDANT-BELOW/APPELLEE AT&T INC.

Dated: December 8, 2020

OF COUNSEL:

REED SMITH LLP
Sara A. Lima
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Telephone: (215) 851-8872
Fax: (215) 851-1420

REED SMITH LLP
Brian M. Rostocki (No. 4599)
Benjamin P. Chapple (No. 5871)
1201 Market Street, Suite 1500
Wilmington, DE 19801
Telephone: 302) 778-7500
Fax: (302) 778-7575

Counsel for Defendant-Below/Appellee AT&T Inc.

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Defendant-Below/Appellee AT&T Inc. ("AT&T") submits this Answering brief in opposition to the Opening Brief ("OB") filed by Plaintiff-Below/Appellant State of Delaware, Department of Finance (the "Department").

NATURE OF PROCEEDINGS

On December 6, 2019, AT&T Capital Services, Inc. and several affiliates filed a Complaint in the United States District Court for the District of Delaware against Richard J. Geisenberger, in his capacity as the Secretary of Finance for the State of Delaware, Brenda R. Mayrack, in her capacity as the State Escheator of the State of Delaware, and Michelle M. (Whitaker) Sullivan, in her capacity as the Assistant Director for the Department of Finance for the State of Delaware (the "District Court Action"). The Complaint in the District Court Action related to an administrative subpoena issued to AT&T on behalf of itself and several affiliates (the "Subpoena") and a related audit by the Department.

Thereafter, on December 10, 2019, the Department filed a Verified Complaint (the "Complaint") in the Delaware Court of Chancery to enforce the Subpoena issued to AT&T. (A0015-23). AT&T responded by filing a Motion to Stay, or in the Alternative, to Quash or Modify the Subpoena (the "Motion to Quash"). (A0086-87). On July 10, 2020, the Chancery Court issued its opinion granting AT&T's Motion to Quash (the "Opinion") and quashing the Subpoena in its entirety. (*See* OB, Ex. A). In the Opinion, the Chancery Court stated that it "could have

permitted the Department to supplement the record with an additional explanation as to why the subpoena should be enforced, [but] the Department eschewed that opportunity, insisting that it wanted the court to issue a final, appealable order." (*Id.* at 3). The Chancery Court instructed the parties to "submit a final order, agreed as to form, that implements this ruling," unless there were "proceedings that are necessary to bring this action to a close at the trial level before such an order can be entered." (*See* OB, Ex. A at 61).

The Department sought reargument on the Motion to Quash, on grounds that the Chancery Court "misapprehended the law or facts", and the Chancery Court denied the Department's Motion on July 30, 2020. (OB, Ex. B at ¶¶ 7(i), 8). The parties were unable to agree on the language of the proposed final order, and submitted competing orders on August 13, 2020. The Department's proposed order set out a schedule for restarting the litigation from the beginning. That is, under the Department's proposal, it would file an amended Complaint, relitigating the enforceability of the exact same Subpoena. (*See* OB, Ex C. at ¶ 3).

On August 14, 2020, the Chancery Court issued an order denying the Department's request for further proceedings, and on the same day, issued a Final Order and Judgment. (*See* OB, Ex. C). The Chancery Court criticized the Department's proposed order for purporting to be "in accord with the Opinion," calling it a "mischaracterization of the Opinion." (*Id*. at ¶ 4). The Final Order also

explained that the Department's repeated insistence that it wanted an immediate decision that would result in a final, appealable order had been, itself, a misrepresentation. (*Id.*). The Chancery Court further explained that the concluding paragraph of its Opinion, querying whether any "proceedings that are necessary to bring this action to a close at the trial level before [a final] order can be entered," was designed to reference such outstanding issues as an application for attorneys' fees and expenses or an award of costs–and not to invite a "full do-over" of the Chancery Court proceedings. (*Id.* at ¶ 2). As such, the Chancery Court rejected the Department's request for further proceedings and entered the Final Order and Judgment on August 14, 2020. (*See* OB, Exs. C, D).

In a minute entry dated July 28, 2020, the judge in the District Court Action stayed those proceedings pending the outcome of the Chancery Court's decision on the enforceability of the Subpoena, and directed the parties to file a joint letter within two weeks of the Chancery Court's decision. *See AT&T Capital Services, Inc., et al v. Geisenberger, et al*, C.A. No. 1:19-cv-02238 (D. Del. Dec 06, 2019). On August 14, 2020, the parties informed the District Court of the Chancery Court's Order denying the motion for reargument, Order denying request for further proceedings, and Final Order and Judgment. *Id.* The District Court Action remains stayed.

SUMMARY OF ARGUMENT

1. AT&T denies Paragraph 1 of the Department's Summary of Argument. As a matter of law, the Chancery Court has the discretion to determine whether the enforcement of an agency subpoena would constitute an abuse of the Court's process. *See* 12 *Del. C.* § 1171(4) (court shall consider state escheator's enforcement action); *see also Chao v. Koresko*, 2005 WL 2521886 (3d Cir. Oct. 12, 2005) (it is within the court's discretion to find that enforcement of a particular subpoena would constitute an abuse of the court's process). Here, the Chancery Court afforded substantial latitude to the Department, but properly considered whether the Subpoena was reasonable and issued pursuant to a legitimate purpose. The Chancery Court did not err in taking into account the expansive scope of the Subpoena and "bareboned allegations" in the Complaint as one factor in finding that the Department issued the Subpoena pursuant to an improper purpose. The two separate Opinions issued by the Chancery Court reflect that it thoughtfully grounded its decision on several factors, all of which are supported by substantial authority.

2. AT&T denies Paragraph 2 of the Department's Summary of Argument. The Chancery Court grounded its finding that the Department's agreement with its auditor created a "pernicious incentive" in facts of record. It based its finding on public information, the opinions of several other courts reviewing the same contract between the same parties, and a copy of the relevant agreement in place when the

Subpoena was issued. It also considered the Department's failure to respond to express allegations of the auditor's illegitimate purpose. Further, as the Chancery Court addressed in its Order Denying Motion For Reargument, the agreement was only one finding that supported its abuse-of-process conclusion, and it was not dispositive.

3. AT&T denies Paragraph 3 of the Department's Summary of Argument. The Chancery Court correctly applied the 2002 statute of limitations and determined that the Subpoena sought information related to transactions made sixteen years beyond the Department's power of enforcement. In doing so, the Chancery Court was careful to distinguish between the Department's authority to investigate and its authority to enforce demands for production. The Chancery Court correctly applied Delaware's presumption that a statute has prospective effect, especially because the legislature did not expressly make the new statute retroactive and reopening closed years would impact AT&T's vested rights. Likewise, the Chancery Court properly concluded that AT&T did not "elect" to apply the longer statute of limitations.

4. AT&T denies Paragraph 4 of the Department's Summary of Argument. The Chancery Court appropriately rejected the Department's belated attempt, made first at oral argument, to verbally revise the date scope of its Subpoena. The Subpoena speaks for itself—it expressly demands records, including disbursement-related accounts payable records, "[b]eginning with June 1992 and ending with

March 2017." Further, the Department's belated attempt at revision only addresses one of the two document requests in the Subpoena. Thus, there is no basis to alter the Chancery Court's findings as to the expansive time period covered by the Subpoena.

5. AT&T denies Paragraph 5 of the Department's Summary of Argument. The Chancery Court had no obligation to allow the Department to restart the case through an amended Complaint. The Chancery Court, in its discretion, did offer the Department the opportunity to bolster the allegations of the Complaint, but the Department declined, insisting on a final, appealable order. The Department's belated remorse expressed after the Chancery Court's unfavorable decision is not a basis for a do-over. This is especially true where the Department has full authority to issue a new request and, if necessary, seek enforcement of a new subpoena. Thus, the Chancery Court properly entered final judgment and denied the Department's request for further proceedings.

STATEMENT OF FACTS

On January 12, 2012, the State initiated an unclaimed property audit of "AT&T, Inc., its Subsidiaries & Related Entities" (the "Audit"). (A0026). The Audit notice instructed that the "review will be conducted by Kelmar Associates" on behalf of the State, that Kelmar (the Department's third-party private audit firm) would contact AT&T, and that Kelmar would issue a document request. (*Id.*). The contract in place between the State and Kelmar at the time the audit commenced through the time that this litigation commenced provided that Kelmar received compensation by the State based on a percentage of the total audit findings. (A0534; *see also* OB, Ex. A at 59, OB, Ex. B at ¶ 3(d)). While Kelmar conducted its audit of AT&T on behalf of Delaware, Kelmar represented several other states by which it was compensated on a contingent-fee basis. (A0522); (B001-056).

In its brief, the Department boasts that it has returned over $300 million of unclaimed property to "rightful owners" over the past three years (which averages to $100 million returned per year). (OB at 7). That fact is not included in the record, and it paints a misleading picture. The Department reported unclaimed property *receipts* of $554 million in 2019 alone. (https://finance.delaware.gov/financial-reports/delaware-fiscal-notebook/ (Section 7 at 185), last visited 11/24/20). According to the math, therefore, Delaware returns less than one fifth of the funds it receives. Further, Delaware pays a substantial fee to private audit firms. In 2019,

the Department paid $24.2 million to Kelmar. (*See* http://checkbook.delaware.gov). This amount is separate from any fees that Kelmar earned from other states for conducting audits on behalf of those states and Delaware simultaneously. (*See* https://www.kelmarassoc.com/).

With respect to this Audit, it is undisputed that AT&T sought to cooperate with Kelmar and had responded to several prior document requests from Kelmar over the six years before the Department filed this action. (A0019; OB at 7). The Department commenced this litigation on two of many document demands issued by Kelmar to AT&T. AT&T had objected to those two requests. Those requests are known throughout the litigation as the "Rebates Request," dated October 30, 2014, and the "Disbursements Request," dated January 17, 2018 and August 24, 2018. (A0074-82). The Disbursements Request sought information concerning every check AT&T (or dozens of affiliates) had issued since June 1992 to any payee in any state, including voided checks, stopped checks, and paid checks. (A0147). Similarly, the Rebates Request demanded details regarding every expense ever recorded to AT&T's general expense account since 1992. (*Id.*).

The Department represents in its brief to this Court that AT&T "refused to produce documents" in response to the Disbursements and Rebates Requests. (OB at 9). Yet, in its Complaint and elsewhere in its Brief, the State concedes that AT&T had provided documents, although characterizing the production as "insufficient."

(A0019). Neither of the Department's representations is true.

For the Disbursement Request, AT&T provided payment data for every quarter-end month (four months per year) for approximately eight years. This amounted to over 10.5 million lines of information and reflected spend of over $16 billion. (A0106-07). For the Rebates Request, AT&T provided schedules of data and detailed in writing how it maintains information that may be responsive to the request. (A0107). AT&T continues to maintain that the records produced to date, which include years of AT&T's unclaimed property reports to Delaware, are sufficient for the Department to proceed with its audit to determine AT&T's unclaimed property compliance. The Department has not indicated any reasonable justification as to why they are not.

While claiming that AT&T "refused to provide documents", the Department also falsely asserts that all of the requested rebate records "are in existence and readily available." (OB at 8). There is no support for this contention in the record of the proceedings below; the Department never alleged it in its Complaint, and this Court should disregard it. The Department also asserts that AT&T "violated its own work plan with the State." (*Id.* at 9). This too is false. Kelmar and AT&T agreed to a general work plan under which AT&T would provide "reasonable" responses to "reasonable" requests. (A0172). The work plan did not reference any specific documents that Kelmar would request, and AT&T did not agree to provide specific

documents, especially those requested in the Disbursements and Rebates Requests, to which AT&T previously had objected. (*Id.*). As the Chancery Court acknowledged, "[i]n agreeing to the Work Plan, AT&T reserved its rights, 'including but not limited to any rights to challenge the audit process or to requests modifications to the plan as the audit progresses.'" (*Id*.).

On November 9, 2019, the Department issued the Subpoena, demanding the documents identified in the Rebates and Disbursement Requests, by attaching those requests, in full, to the Subpoena. (A0140-57).

Contrary to the document requests themselves, the Department now represents that, "Kelmar, on behalf of the State, sought documents from AT&T dated between 2008 and 2015." (OB at 7). As stated above, and contrary to the Department's recent assertions, the Subpoena expressly demands quarterly records, including disbursement-related accounts payable records, "[b]eginning with June 1992 and ending with March 2017." (A0140-57).

The Department further suggests that AT&T's "own correspondence…notes that the requests were limited to 2008 and forward." (OB at 33). However, in the correspondence it references, AT&T had asked the Department to confirm whether it was limiting its request back to 2008, without any conditions or disclaimers, which the Department declined to do. (A0511). Ultimately, the Subpoena for records back to 1992 belies any representation that the State is not seeking records back to 1992.

ARGUMENT

I. The Chancery Court May Consider the Breadth of a Subpoena in Determining Whether it was Issued for an Improper Purpose.

A. Question Presented

May the Chancery Court take into account that an administrative subpoena seeks to obtain a vast amount of irrelevant data in determining whether the agency's purpose is illegitimate?

B. Scope of Review

"The standard of appellate review with regard to the Court of Chancery's factual findings is deferential." *See Kahn v. Lynch Commc'n Sys., Inc*., 638 A.2d 1110, 1114 (Del. 1994). This Court will not set aside factual findings of the Chancery Court "unless they are clearly erroneous or not the product of a logical and orderly deductive process." *Id.* So long as the Chancery Court's findings and conclusions "are supported by the record and the product of an orderly and logical deductive process, they will be accepted." *See SV Inv. Partners, LLC v. ThoughtWorks, Inc.,* 37 A.3d 205, 210 (Del. 2011).

Although an interpretation and application of a question of law should be reviewed *de novo* on appeal, *see M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 524 (Del. 1999), this Court will review the Chancery Court's denial of a party's request for a subpoena for abuse of discretion. *See Burns v. State*, 968 A.2d 1012, 1024 (Del. 2009); *see also McClane Co. v. EEOC*, 137 S.Ct. 1159, 1167–68 (2017)

(explaining abuse of discretion is the proper standard of review for an appellate court reviewing a Chancery Court's decision regarding whether to enforce an administrative subpoena).

The Chancery Court has the discretion to determine whether the court's enforcement of an agency subpoena would constitute an abuse of the court's process. *See* 12 *Del. C.* § 1171(4) (court shall consider State Escheator's enforcement action); *see also Chao*, 2005 WL 2521886, at *1 (it is within the court's discretion to find that enforcement of a particular subpoena would constitute an abuse of the court's process). Finally, whether to grant a motion for leave to amend a complaint falls squarely within the discretion of the trial court. While leave to amend should be granted freely when justice requires it, it is always, however, a discretionary matter with the trial judge, and is reviewable on appeal solely for abuse of discretion. *See Bokat v. Getty Oil Co.,* 262 A.2d 246, 251 (Del. 1970).

C. Merits of Argument

The Chancery Court did not err in taking into account the Subpoena's expansive scope and the enforcement action Complaint's "bareboned allegations" as one factor in finding that the Department issued the Subpoena pursuant to an improper purpose. The Chancery Court acknowledged that the Department's subpoena authority is broad. But broad is not unlimited and unfettered, as the Chancery Court held. The law not only permits, but requires, an inquiry as to

whether the subpoena is so expansive and so untethered to the underlying investigation as to reflect an improper purpose of the agency issuing it. The Chancery Court undertook that fact-specific inquiry, held oral argument, invited justification from the Department, and ultimately agreed with AT&T that enforcement of the Subpoena would constitute an abuse of process.

In its brief, the Department continues to propose an expansive view of its own authority, implying without support that its scope is "considerably broader" than that of a grand jury investigating criminal activity. (*See* OB at 13). As argued below, Delaware law circumscribes the Department's authority, permitting it to "examine the records of a person…in order to determine whether the person complied with [Delaware's unclaimed property law]." 12 *Del. C.* § 1171. The Department's authority is limited to enforcement of a particular obligation, not broad investigation as to any improper activity. Arguably, therefore, it does not match the "extremely broad nature of grand jury investigations." *See Trump v. Vance*, 977 F.3d 198 *6 (2d Cir. 2020).

Nevertheless, the Chancery Court actually did analyze the Department's Subpoena in accordance with the standards of grand jury subpoenas, as the Department advocates. (OB, Ex. A (characterizing agency authority as "necessarily broad" and judicial review as "strictly limited")). Further, as the Department argues it should have, the Chancery Court deftly distinguished between the Department's

authority to investigate and its authority to bring an enforcement action, acknowledging the Department's authority to investigate beyond the confines of what it can enforce. (*Id*. at 34). The Department's cited cases, in fact, support the Chancery Court's analysis.

Perhaps the most noticeable authority on which the Department relies is the decision involving President Trump's objection to a subpoena issued by the Manhattan District Attorney. *See Trump v. Vance*, 2020 WL 4861980 (S.D.N.Y. Aug. 20, 2020) *aff'd*, 977 F.3d 198 (2d Cir. 2020). The subpoena sought the President's financial documents from the Mazars accounting firm. *Id.* at 1. President Trump alleged the subpoena was overbroad. *Id.* at 24-29. The court disagreed, deferring to the broad powers of the government. In doing so, the court engaged in an analysis almost identical to the Chancery Court's process in this case.

To determine if the subpoena's time frame was reasonable, the court considered "the type and extent of the investigation; the materiality of the subject matter to the type of investigation; the particularity with which the documents are described; the good faith of the party" asking for the documents; and "a showing of the need" for the time frame in question. *Id.* at 25. When determining whether the geographic scope was overbroad, the court analyzed whether the records requested were "so unrelated to the subject of [the grand jury's] inquiry as to make it obvious that their production would be futile as an aid to the grand jury's investigation." *Id.*

at 27. Finally, to support that a subpoena is improper, the court explained the subpoena has to "seek[] material clearly unrelated to its legitimate aim" or "call[] for an unduly burdensome production," or that "facts suggest [an] improper motive." *Id*.

The subpoena issued in the Trump case requested documentation back to 2011— five years prior to 2016, the year that Trump claimed (without support) was at issue before the grand jury. Here, the State is requesting that AT&T provide records dating back to 1992, sixteen years prior to the year that the Department lawfully may assess. The District Attorney had authority to prosecute crimes against an entity outside the State of New York. The court in *Trump*, therefore, concluded that there was "nothing suspect" regarding requests for information related to these entities. *See* 977 F.3d at 211. Here, the Chancery Court noted that because the Department can only enforce demands related to property reportable to Delaware, the Subpoena encompassed a "broad request for information concerning property that does not fall into any escheatable category." (OB, Ex. A at 51). In short, in *Trump*, the court agreed with the District Attorney that there appeared to be a legitimate purpose for reasonable requests whereas, here, the Chancery Court found no valid purpose for requests that were unreasonable. In particular, the Chancery Court noted that the Subpoena was "expansive, both as to the time period it covers and the subject matter it embraces"; sought information "about property that [the

Department] knows it cannot recover"; represented "a massive request for information"; and would "sweep in a vast amount of irrelevant data." (*Id*. at 57).

Thus, the Chancery Court engaged in the proper analysis here. Further, while the "authorities demonstrate that an agency does not inherently exceed its authority by failing to provide…a justification for its information requests," the general rule does not "mean that an agency can *never* be required to…provide some explanation before a court will enforce the Subpoena." (*Id*. at 37-38). In particular, "when an agency makes so broad a request, it should anticipate having to proffer some justification." (*Id*. at 58) citing *In Re Blue Hen Country Network, Inc.*, 314 A.2d 197 (Del. Super. 1973), the Chancery Court held:

> [A] court can take into account the fact that an agency has not provided an explanation or a justification when evaluating whether it should be an abuse of the court's process to enforce a subpoena. If an agency has served a wide-ranging request, and if the responding party has raised valid concerns about the request then as in *Blue Hen*, some form of explanation or justification may be warranted before a court will enforce the subpoena. (*Id*. at 39).

Throughout the litigation, however, the Department steadfastly refused to provide the Chancery Court with any explanation for its requests. (OB, Ex. B at ¶ 7(g)).

The Department's refusal to provide justification for its exceedingly broad requests appropriately weighed against enforcement. That the Department has authority to demand a large volume of data does not mean it is necessarily doing so

for a proper purpose. For that very reason, even if a subpoena falls within the scope of the agency's general authority, the Chancery Court must undertake a second inquiry—whether enforcement would constitute an abuse of the Court's authority.[1]

The Chancery Court properly acknowledged in its Opinion that "one factor that can suggest abuse is if the agency appears to be 'pursuing a claim it knows it cannot win' on the merits." (OB, Ex. A at 56 (citing *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 127 (3d Cir. 1981)). An exceedingly broad subpoena, issued with no legitimate explanation, obliges a consideration of the agency's intent. The cases that the Department cites, contrary to its argument, support that a court may consider the scope of the requests in determining whether they are issued for a proper purpose. In other words, the scope of a request must fall within the agency's authority *and* support that the agency does not seek them for an improper purpose.

Indeed, the United States Court of Appeals for the Third Circuit has affirmed the necessity for an abuse of process inquiry in regard to Delaware unclaimed

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[1] *See United States v. Powell,* 379 U.S. 48, 58 (1964) (enforcement of subpoena would abuse the court's power if it were "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."); *In re Pennell*, 583 A.2d 971 (Del. Super. Ct. 1989) (appearance of improper motive coupled with lack of valid justification supports abuse of process finding); *U.S. v. Aero Mayflower Transit Co., Inc*., 831 F.2d 1142, 1146 (D.C. Cir. 1987) (issuance of subpoena to further a purpose not within agency's statutory authority can be basis for abuse of process finding); *Chao*, 2005 WL 2521886, at *1 (it is within the court's discretion to find that enforcement of a particular subpoena would constitute an abuse of the court's process).

property audits. It has instructed that "[d]etermining the difference between a state's legitimate inquiry on the one hand, and, on the other, an abusive process designed to force a monetary settlement, may not always be a simple matter….Hard or not, though, it will have to be done." *See Marathon Petroleum Corp. v. Sec'y of Fin.*, 876 F.3d. 481, 501 (3d Cir. 2017). The *Marathon* court noted that a finding of abuse was appropriate where the agency's demands for information are "so obviously pretextual or insatiable" as to extend "beyond a legitimate inquiry." *Id*. Moreover, since the Chancery Court issued its Opinion in this case, Vice Chancellor Slights has endorsed Vice Chancellor Laster's holding that an abuse-of-process inquiry "necessarily involves a consideration of reasonableness, such as whether the requests are specified with 'reasonable particularity,' 'are relevant to the investigation' and do not 'cover an unreasonable amount of time.'" *See State of Delaware, Dept. of Fin. v. Univar, Inc.*, 2020 WL 6334420 at *6, n.48.

The Department argues that it offered a justification for seeking "all check disbursements" in its requests, but the Chancery Court misunderstood it. (OB at 35). It claims that a complete universe of records will "show the extent of Delaware-related disbursement activity" and allow the Department to "validate the completeness of AT&T's records." (*Id*. at 8). The Chancery Court understood this argument, but found it to be no "justification" at all. Rather, the purported rationale for the unlimited request appeared to be a blatant pretext with "no limiting

principle", especially in light of the Department's ability to achieve the stated goals in other ways and in light of the financial incentives of the Department's third-party auditor. (OB, Ex. A at 58). Ultimately, the Chancery Court noted that the sheer expansiveness of the requests, coupled with the lack of any "rational basis for seeking [the information]" were but two factors supporting its determination that enforcement would be abusive. (*Id.*). It also looked to other factors, including the "larger picture" of the Department's enforcement tactics with respect to unclaimed property audits. (*Id.* at 58-60). The Chancery Court's finding in this regard warrants deference. (*Id.* at 60-61).

II. The Chancery Court Properly Considered Kelmar's Financial Incentives as Part of its Abuse-of-Process Analysis.

A. Question Presented

Did the Chancery Court err in finding that the auditor's contract, in place when the Department issued and moved to enforce the Subpoena, provided a pernicious incentive to the auditor to issue unreasonably expansive requests?

B. Scope of Review

See Argument I.B.

C. Merits of Argument

The Department boldly argues the Chancery Court "based its ruling" on a "fact" that "is patently false." (OB at 22). The Department derides the Chancery Court's findings as errors, guesses, and speculation, (*Id*. at 23), and it asserts that Kelmar "will not receive any payment on a contingent basis for the AT&T examination." (*Id*. at 21). While the Department's allegation is "misleading" with respect to Delaware's own arrangement with Kelmar, (*see* OB, Ex. B at ¶ 3(c)), it appears to be outright false in light of the multi-state nature of the audit. The Department and its counsel are fully aware that Kelmar has contracted to receive contingent fees from other states related to its audit of AT&T. AT&T presented copies of Kelmar's contracts with Michigan and Tennessee, two of the states participating in the multi-state audit, in the proceedings below. (*See* B001-B056).

Further, the Chancery Court's finding was accurate and based on facts of

record—Delaware had agreed to compensate Kelmar on a contingent-fee basis *during the relevant time period*, including when it prepared the document requests, when the Department issued the Subpoena, and when the Department filed its enforcement action. (*See* A0534). That is, the Chancery Court correctly found that the Department *did* compensate Kelmar in part based on a "percentage of the amount of abandoned property that the State recovered." (*Id*.; *see also* OB, Ex. B at ¶ 3(d)).

The Department argues the Chancery Court should have based its finding of fact on a new contract, executed by the Department and Kelmar on December 31, 2019. (OB at 21 (citing A0414, A0427-39, A0286, A0294-95)). In other words, the Department contends that the Chancery Court should have analyzed its motive for issuing the Subpoena by reference to a contract executed *after* Kelmar issued the document requests, *after* the Department reissued them in full as part of its administrative subpoena, *after* the Department initiated its Subpoena enforcement action, and *after* AT&T filed litigation in federal court. The Department does not contest, because it cannot, that the agreement in place between the Department and Kelmar for all relevant periods, did in fact include a contingent-fee component.

Instead, the Department challenges the Chancery Court's basis for its concern, arguing it relied entirely on "AT&T's supposition" in finding that Kelmar, which drafted the document requests, may have been motivated by a contingent fee. (OB at 21). Inconsistently, the Department laments that the Chancery Court also relied

on court decisions that recognized this fact. (OB at 23). The Chancery Court's recognition of this history is appropriate—the cited cases all relate to unclaimed property audits conducted by Kelmar on behalf of the Department (the very same parties), during the same time frame, and thus, presumably pursuant to the same State contract as the one relevant here.[2] Thus, judicial notice of this publically-known fee arrangement was well founded.[3]

The Department also complains the "entire Kelmar issue was created by the Vice Chancellor and presented to the parties for the first time in the Opinion." (OB at 21). Once again contradicting its own argument, the Department makes this assertion *while* simultaneously acknowledging that AT&T had raised the issue in its original brief. (*Id.* at 22). It attempts to reconcile these two opposed positions by minimizing AT&T's argument in its brief, suggesting it was a "single" and "preliminary statement", disputing that it was "actually advanced by AT&T", and

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[2] *See, e.g., Marathon*, 876 F.3d at 486; *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 545 n.7 (3d Cir. 2017); *Univar, Inc. v. Geisenberger*, 409 F. Supp. 3d 273,282 (D. Del. 2019). While the audit in the *Marathon* case commenced prior to the 2010 contract applicable to this case, the court in that action acknowledged that Kelmar was compensated based on a contingent fee. *See Marathon*, 876 F.3d at 486.

[3] *See Cohen v. Teichman*, 2019 WL 7424513, at *5 (Del. Ch. Dec. 31, 2019) ("Rule 202(a) requires that this Court take judicial notice of 'the Constitution, common law, case law and statutes of this State,' and permits this Court to take judicial notice of 'the common law, case law and statutes of the United States and every state, territory and jurisdiction of the United States.'") (quoting D.R.E. 202(a)).

implying that the State had no reason to "have known to respond to [it] in briefing." *Id.* Yet, the specificity and gravity of AT&T's assertion undermines the Department's position. In its response to the Department's Complaint, AT&T stated:

> In this way, Plaintiff, through its contingent-fee auditor, Kelmar Associates LLC, forces Delaware-incorporated entities to make improper monetary payments to end the audit, inflating Kelmar's fee. Such is the purpose of the demand here.

(A0101). In its Reply Brief, AT&T further explained:

> The State's document demands are calculated to require AT&T to provide a database of transactions that is too large to defend in order to pressure it to abandon the cost of disproving the existence of unclaimed property and pay a sum wholly divorced from the requirements of the law to satisfy the audit. (A0351).

Notably, the Department did not respond to nor in any way seek to correct what it now claims is a falsehood. Rather, the Department insisted that the purpose for the requests did not matter, that the Department "need not justify the relevance of the materials sought," (A0213), that in issuing subpoenas, the "State will necessarily seek and obtain information regarding property of a broader scope than the property ultimately determined to be escheatable", (A0220), and that the "State does not believe that discovery or other proceedings are necessary" (A0199). In other words, the Department maintained that "the court must give blanket deference to the state agency, because anything else would be 'substituting the Court's

judgment for the State's.'" (OB, Ex. B at ¶ 7).

Only after the Chancery Court issued its sixty-one page decision, laying out the various reasons why the facts supported that the Subpoena was not enforceable, did the Department change its course. In its Motion for Reargument, the Department for the first time asserted that Kelmar is not (now) compensated contingently—based on a recently-executed, new agreement that was not in place during the relevant time period. (A0414).

Regardless of the fact that the operative arrangement is in the public domain, Kelmar's fee arrangement was not a dispositive factor in the Chancery Court's Opinion. Rather, this was just one of several factors that led to the determination that enforcing the Subpoena would constitute an abuse of the court's process. (*See* OB, Ex. A at 57 (holding, "a combination of factors supports a finding that to enforce the Subpoena would be an abuse of this court's process."); *accord*, OB, Ex. B at ¶ 3(f)). According to the Chancery Court, it "would have reached the same conclusion regarding the Subpoena even if Kelmar had not been contingently compensated during the events giving rise to this case." (OB, Ex. B at 7).

Thus, the Department's discussion about the use of contingent-fee agreements in general, and its argument that there is no "per se abuse of process if a court enforces a subpoena involving a contingent-fee auditor", is irrelevant. (OB at 26). The Chancery Court did not hold that there was.

To the contrary, the Chancery Court expressed concern with the Department's apparent lack of material involvement in preparing these document demands underlying this Subpoena. Noting that Kelmar drafted the requests, which appeared on Kelmar's letterhead, the Chancery Court found that the Department had eschewed its investigatory power and delegated the audit function to Kelmar with insufficient oversight. (OB, Ex. A at 59). The Department's inability to articulate any justification for the expansive requests—even when given several opportunities to do so—supported that conclusion. The Chancery Court noted, "The Department might have good explanations on these points, but it eschewed the opportunity to provide them," leaving the Chancery Court with the "bare allegations of the complaint." (*Id.*).

In addition to the fee arrangement and the Department's apparent delegation of authority, the Chancery Court also raised concerns about Kelmar's simultaneous representation of multiple other states auditing AT&T. Indeed, this arrangement provides a potential motivation for Kelmar's broad requests, which cover records wholly irrelevant to any property that could be escheatable to Delaware. (OB, Ex. A at 60). The pursuit of such records is helpful to Kelmar only in its efforts to recover property for other states, but it serves no legitimate purpose in Delaware's audit. (*Id.*).

All of these findings contributed to concern about the "larger picture" of

Delaware's unclaimed property enforcement program and the Chancery Court's ultimate decision that enforcement would constitute an abuse of the Chancery Court's process. The particulars of Kelmar's compensation arrangement were grounded in the record. Moreover, they were not independently dispositive. The Chancery Court appropriately considered the fee arrangement in place at the relevant time, along with the several other unrebutted factors, to support its well-reasoned decision that the Subpoena is not enforceable.

III. The Chancery Court Did Not Misapply the Statute of Limitations.

A. Question Presented

Did the Chancery Court err when, in evaluating whether enforcement of the Subpoena would constitute abuse of the Chancery Court's process, the Chancery Court considered that the Subpoena covered sixteen years prior to when the statute of limitations would bar the State from recovering escheatable property, such that the State appeared to be "pursuing information about property it knows it cannot recover"?

B. Scope of Review

See Argument I.B.

C. Merits of Argument

The Chancery Court did not err in concluding that the Department's Subpoena demanded information related to property issued sixteen years outside the statute of limitations. Further, the Chancery Court correctly acknowledged that, while the Department is permitted to investigate beyond what it can enforce, the extreme extent to which it sought to do so contributed to an abuse of process finding. *See Univar*, 2020 WL 6334420 at *8, in which Vice Chancellor Slights agreed with Vice Chancellor Laster's analysis ("While the statute of limitations issue can certainly prove relevant in assessing whether the State abused the court's process, it is not determinative as to the relevancy of the State's request."). Delaware's historical statute of limitations for unclaimed property required the Department to issue a

formal deficiency notice within three years from the date a holder filed a report with the State, and did not toll the limitations period when the Department commenced an audit. 12 *Del. C.* § 1158(a) (2016). This was the statute in place when the Department commenced its audit, and it bars the Department from enforcing any deficiency against AT&T for reporting periods prior to 2014.

The Department correctly points out that in the 2017 Escheat Law, the Delaware General Assembly extended the statute of limitations for unclaimed property examinations to ten years. 12 *Del. C.* § 1172(h). The Department argued below that the legislature intended that change to have retroactive effect, despite the legislation's silence on retroactivity. The Chancery Court correctly rejected this argument.

Delaware law has long applied a presumption against retroactivity, which provides that a statute has prospective effect unless retroactivity is "plainly and unmistakably so provided by the statute."[4] The Chancery Court noted that "[n]othing in the [2017 Escheat Law] or the legislative history indicates that the General Assembly intended for the retroactive application of the New Statute of

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[4] OB, Ex. A at 44 (quoting *Chrysler Corp. v. State*, 457 A.2d 345, 351 (Del. 1983)) (internal quotations omitted); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (presumption against retroactivity favors considerations of fairness in defendants having opportunity to know what the law is and to confirm their conduct accordingly); *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994) (same); *Hughes Aircraft Co. v. Schumer*, 520 U.S. 939, 947 (1997) (same).

Limitations [in the 2017 Escheat Law] . . . . Instead, the effective date [ ] suggests the opposite." (OB, Ex. A at 44). Based on this, the Chancery Court correctly concluded that the historical three-year statute of limitations applied to the Department's audit of AT&T rather than the amended ten-year statute of limitations that became effective in 2017. (*Id*.).

The Department now frames the 2017 Escheat Law as "remedial" legislation. (OB at 29-30). The Department did not present this argument in the Chancery Court and the Department has not explained why "the interests of justice" would require this Court to consider this argument. *See* Del. Sup. Ct. Rule 8. Therefore, this Court should decline to address this newly-raised argument.

Even if the Court were to consider the Department's belated argument, the 2017 Escheat Law was not remedial legislation. First, the Department's brief does not provide any grounds for a finding that the 2017 Escheat Law was remedial. It relies on out-of-context dicta from *Patronis v. United Insurance Company,* a Florida intermediate appellate decision that stated, without citation or support, that "unclaimed property laws are inherently remedial in nature." (OB at 29 (citing *Patronis v. United Ins. Co.*, 299 So.3d 1152 (Fla. 1st Dist. App. June 3, 2020)). *Patronis* is inapposite to this case. There, the Florida Legislature had expressly stated that "[t]he amendments made by this act are remedial in nature and apply retroactively." *See* 299 So.3d at 1155. A majority of the court's panel found that

retroactivity in that circumstance was consistent with the state constitution on its face, but acknowledged that application to a specific holder could violate the state constitution. *Id.* at 1159–1161. Here, there was no such affirmative expression of legislative intent.

Second, "a statutory amendment is remedial" such that it may be applied retroactively only "if it relates to practice, procedure or remedies and does not affect substantive or vested rights." *See Hubbard v. Hibbard Brown & Co.*, 633 A.3d 345 (Del. 1993). However, retroactive application of the 2017 Escheat Law would alter AT&T's substantive or vested rights. The statute of limitations in effect before the 2017 law change allowed the Department three years from the date a holder filed a report to assess any deficiency in the holder's reporting. That statute did not toll the limitations period when the Department commences an audit. 12 *Del. C.* § 1158(a) (2016). Thus, by the time the legislature enacted the new law, the pre-2017 statute had run for report years 2014 and prior, barring the Department from enforcing any deficiency against AT&T for those years.

Where the Department's limitations period has run, rights to any unreported property substantively vest with the holder. *See A.W. Financial, S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1120 (Del. 2009) ("The 2008 amendment to the Escheat Statute, which shortened the period of dormancy from five to three years, affects a substantive right, not 'practice, procedure or remedies'….Stated

differently, retroactive application would facilitate the taking of property without due process, which is a substantive right.'"); *accord, Country Mutual Ins. v. Knight*, 40 Ill. 2d 423, 427-28 (1968) (a vested property interest exists in any property against which the statute of limitations has run). This vesting of rights makes sense from a policy perspective because, once the limitations period had run, AT&T was no longer obligated to maintain records in order to defend its rights to particular property on audit. *See Temple-Inland v. Cook*, 192 F.Supp. 3d 527, 543-44; *see also Kreiger v. U.S.*, 539 F.2d 317, 322 (3rd Cir. 1976) (statute of limitations protect defendants from the unfair surprise of state claims); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 173-74 (4th Cir. 2010) (retroactivity "would reach back to alter the legal consequences of those events taking place before the statute went into effect").

The Department counters that the extended look back does not impact AT&T's vested rights because the audit only seeks to recover property indisputably owed to third parties. Yet, this very case arose because AT&T disputed that presumption. And this appeal stems from the Chancery Court's finding that the Department is not, in fact, limiting the purview of its Audit to information that could reflect property owed to third parties. Rather, the Department is seeking

"information about property that it knows it cannot recover." (OB, Ex. A at 57).[5] AT&T has argued throughout the litigation that Kelmar, on behalf of the Department, has designed the audit process to pressure settlements that include the company's ***own*** property, not just property owed to third parties. That pressure includes auditing for years in which AT&T no longer maintains records and demanding property to which AT&T cannot prove its entitlement.

In considering the Department's motives, the Chancery Court took notice of the holding in *Temple-Inland*. (OB, Ex. A at 5). There, the United States District Court for the District of Delaware found that, by attempting to audit unclaimed property outside of the statutory lookback, the State increased its demand merely because the company no longer had records to defend the audit. (OB, Ex. A at 6 (citing *Temple-Inland* (finding substantive due process violations in part because the Department "(i) waited 22 years to audit plaintiff, (ii) exploited loopholes in the statute of limitations; (iii) never properly notified holders regarding the need to maintain unclaimed property records longer than is standard; (iv) failed to articulate

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[5] The finding was not limited only to the requests for information sixteen years beyond the statute of limitations, but also applied to the Department's broad information requests concerning property that, if reportable at all, would only be reportable to states other than Delaware. (OB, Ex. A at 50) (citing *Nellius v. Tampax*, *Inc*., 394 A.2d 233 (Del. Ch. 1978)). The Department also sought extensive information regarding voided checks, transactions that do not on their face appear to be owed to any third party. (OB, Ex. A at 53) (confirming that State Escheator bears the burden to show that a check was improperly voided because it was unclaimed).

any legitimate state interest in retroactively applying [the Delaware statute that permitted the use of estimation] except to raise revenue…")). In particular, by encouraging companies to purge old records on the one hand, and then "auditing" those periods on the other, the *Temple-Inland* court held the Department was playing a "game of gotcha that shocks the conscience". *See* 192 F. Supp. 3d at 550.

In 2016, after the *Temple-Inland* decision, the Delaware legislature amended the law to impose a new, longer statute of limitations. *See* 12 *Del. C.* §1156. Yet, the legislature did not extend the period retroactively. If the General Assembly had intended for the statute of limitations to revive expired claims, it could have expressly done so. *See Enterprise Mortg. Acceptance Co., LLC v. Enterprise Mortg. Acceptance Co.*, 391 F.3d 401, 408–10 (2d Cir. 2004). Instead, as the Chancery Court found, the effective date of the new legislation indicated the legislature intended a prospective effect only. (OB, Ex. A at 44). The Chancery Court noted further that its interpretation was consistent with the Department's own prior arguments concerning prior amendments to the same statute. (*Id.*) (discussing Department's position regarding 2002 amendment to statute of limitations).

In sum, the Department argues that the Chancery Court erred in declining to apply a longer statute of limitations retroactively, to an audit that had commenced four years before the *Temple-Inland* decision and almost five years before the law change. (OB at 28-29). In doing so, it shows disregard for the legislature's intent

and the historical context of the change.

The Department also argues that, even if the new statute is not retroactive, it still should apply in this case. It posits that the Chancery Court erred in failing to find that, in electing to participate in the Department's "expedited audit program", AT&T somehow elected to reopen closed years. (OB at 31). The main obstacle to this argument is the law. Neither the statute nor the regulations provide any basis to conclude that in participating, AT&T was opening years already time barred from assessment. 12 *Del. C.* §1172(c). Notably, the Department has now expelled AT&T from participation in the program. (OB, Ex. A at 8; A0172). The Department has not explained whether or why, under its interpretation, the new statute should apply even where AT&T is not receiving any benefit from the expedited program.

Further, the Department's reliance on non-binding cases is unavailing. Those cases involved express provisions within the applicable law. The parties in those cases asked the court to ignore those express provisions, while applying other provisions in the same statute. *See Harper v. United States*, 2019 WL 4229755 at *1 (S.D. Cal. Aug. 2, 2019) (finding taxpayer's refund petition defective because it failed to comply with express Internal Revenue Service regulations); *Hampton v. University of Maryland*, 674 A.2d 145, 150 (Md. Spec. App. 1996) (rejecting appellant's argument that the court may selectively apply specific portions of the statute while ignoring others). Here, there is no provision in the 2017 statute

indicating that the new limitations period applies to the expedited audit program.

In fact, the statute itself supports the contrary. The statute distinguishes between the look back for the expedited audit program and that of the alternative, the Secretary of State voluntary disclosure program. The Secretary of State's program has a "look back period" of 10 years. 12 *Del. C.* § 1172(b). In contrast, the expedited examination program, in which AT&T elected to participate, is silent with respect to any revised look back. 12 *Del. C.* § 1172(c). The Department's argument that AT&T somehow unwittingly agreed to open periods outside the statute of limitations is simply a new "game of gotcha."

Lastly, the Department's recent concessions at argument demonstrate its acknowledgement that the historic limitations period applies here. Even though the Subpoena covered periods back to 1992, it conceded at oral argument that it now only intends to request records back to 2008 *for the Disbursement Request*.[6] (OB at 34). The Chancery Court acknowledged the Department's belated representation in its Opinion and in its Denial of Reargument. (*See* OB, Ex. A at 43, FN 7; OB, Ex. B at ¶ 5). The Chancery Court focused its Opinion on the scope of the Subpoena as attached to the Complaint. The Department's oral modification to a portion of the Subpoena at oral argument provides no basis for concluding that the Chancery Court

[6] Confusingly, the Department does not so limit the time period for its Rebates Request.

erred in applying the appropriate limitations period to the document demands within the Subpoena that the Department seeks to enforce. Simply put, the Chancery Court appropriately applied the statute of limitations in effect prior to 2017. In finding the Department's enforcement action would be limited back to 2008, it correctly concluded that the Subpoena's request for records back to 1992 appeared extreme. (OB, Ex. A at 57).

IV. The Chancery Court Properly Entered Final Judgment After Granting AT&T's Motion to Quash and Denying the State's Request for Further Proceedings.

A. Question Presented

Did the Chancery Court err in entering final judgment and terminating the enforcement proceeding under 12 *Del. C.* § 1171(4) upon holding the Subpoena should be quashed, after inviting the State to "supplement the record with an additional explanation as to why the subpoena should be enforced" and the State "eschewed that opportunity, insisting that it wanted the court to issue a final, appealable order"?

B. Scope of Review

See Argument I.B.

C. Merits of Argument

The Chancery Court properly quashed the Subpoena and effectively dismissed the Complaint before entering the Final Order and Judgment after affording the State significant opportunity to justify enforcement of the Subpoena. (*See* OB, Ex. D). The Chancery Court's Opinion explained that "[g]iven the Department's position [*viz*., its insistence on a decision that would result in a final, appealable order and its refusal to provide further information to the [trial] court about the reasons for its request]," the Opinion "evaluates the Department's application to enforce the Subpoena based solely on the allegations of the complaint." (OB, Ex. A at 28). There is no dispute the Department "eschewed th[e] opportunity" to provide support

for enforcement of the Subpoena, including electing not to amend its Complaint when faced with AT&T's Motion to Quash and the Chancery Court's invitation to provide further justification. Now the Department wants a complete do-over.

The Department mistakenly argues "the Chancery Court cited no authority … for refusing to allow the State to amend its Complaint …" before quashing the Subpoena and entering the Final Order and Judgment. (*See* OB at 40-41). However, the Chancery Court cited the Department's repeated rejection of the Court's invitation to provide additional information and support to justify enforcement of the Subpoena. (*See* A0474-A0477, A0479-A0482, A0501; OB, Ex. A at 3, 28; OB, Ex. C ¶ 5).

The Department does not identify any authority demonstrating (or even indicating) that the Chancery Court should have permitted the State leave to amend its Complaint in a situation such as this, nor does it explain how a party can amend a Complaint seeking to enforce a Subpoena that has been quashed in its entirety. As a result of the Chancery Court's decision, the Subpoena is a nullity. The ability to issue a new subpoena, which perhaps the Department could pursue, is distinct from the ability to revive or reinstate a quashed one. *Cf. Salvatorie Studios, Intern. v. Mako's, Inc.*, 2001 WL 913945, at *1 (S.D.N.Y. Aug. 14, 2001) (quashing subpoena with leave to reissue the subpoena for information relevant and material to the allegations and claims at issue in the proceedings).

Finally, the Department's reliance on *State of Delaware v. Univar*, C.A. No. 2018-0884-JRS (Del. Ch. June 23, 2020) (Transcript), which cited the Third Circuit's decision in *United States v. McCarthy*, 514 F.2d 368 (3d Cir. 1975), is misplaced. First, both the *Univar* court and the Chancery Court in this case acknowledged that Delaware courts had not previously "articulated the legal framework" that governs the Department's action for enforcement. *See Univar*, 2020 WL 2569703 at n. 47; OB, Ex. A at 29. Second, the *Univar* case unfolded through a different procedural context. In *Univar*, after several procedural issues were resolved, the Department had moved for judgment on the pleadings, arguing in favor of enforcement of the subpoena. *See Univar*, 2020 WL 6334420 at *3. Here, AT&T did not raise a ripeness argument as Univar did, but rather argued against enforceability of the Subpoena in its motion to quash (which it had filed before any decision was issued in *Univar*).

Ultimately, both cases presented the Chancery Court with the same substantive question on the basis of the pleadings. The Chancery Court in *Univar* found that the records that the Department had requested in its subpoena were reasonable. In particular, the requests were stated with particularity, of "limited scope" and pertained to a single tax year. *See Univar*, 2020 WL 2569703 at *8-9 (expressly distinguishing the decision in *AT&T* and finding that the subpoena at issue in *Univar* "complies with our law and is enforceable."). Further, the Chancery Court

in *Univar* distinguished the requests at issue in AT&T's case, recognizing that "the examination at issue in AT&T had progressed significantly further than the State's examination of Univar" and that AT&T had already responded to the requests that Univar was challenging. *Id.* at *9. Reacting to Univar's concern that it would be subjected to the "overly broad and irrelevant Kelmar-inspired requests that were imposed on AT&T," the *Univar* court warned, "For what it is worth, should the State issue to Univar the kind of subpoena it directed to AT&T, and then seek to enforce that subpoena in the same posture it presented the AT&T subpoena to Vice Chancellor Laster, it will likely meet the same result." *Id.* at n. 85.

Finally, the Chancery Court in this action has explained over several pages in the Opinion that it was not applying the *McCarthy* framework because the Department had rejected that framework. The Department insisted, "AT&T's motion to quash must result in a final, appealable order" and had expressly declined the Court's invitation to provide additional justification for the subpoena. (*See* OB, Ex. A at 22-28).

It is well within the Chancery Court's discretion to decide a motion for leave to amend a complaint. *See Bokat*, 262 A.2d at 251. Notably, the Department did not move to file an amended complaint, but rather argues the Chancery Court erred because it did not accept its proposed form of order, in which it provided itself the right to file an amended complaint. (OB at 40). Before the Court issued its decision,

the Department expressly rejected such a process. (*See* OB, Ex. A at 28 (noting that though it may have permitted the Department to provide additional justification, "the Department rejected that route, insisting that it wanted a final, appealable order")). The Department cannot expressly reject the *McCarthy* procedures in the first instance (with "repeated insistence that it wanted an immediate decision that would result in a final, appealable order") (OB, Ex. C at ¶ 4) and then seek to reinstate the case once the Court proceeds in the very manner the Department has requested:

> The Opinion only contemplated [the parties following the *McCarthy* procedures] "if it becomes necessary to enforce" a new subpoena. It cannot be known whether enforcement will be necessary unless and until (i) the Department issues a new subpoena, (ii) AT&T resists some aspect of the new subpoena, and (iii) the parties reach an impasse over the new subpoena. At that point, the Department will have to decide whether to file a new complaint that would commence a new action seeking to enforce the new subpoena and describing the facts giving rise to the need for enforcement. Only then will the *McCarthy* procedures become pertinent.

(*Id.*, Ex. C ¶ 6). The Chancery Court's decision is well-grounded in both legal and factual support, without error, let alone error requiring reversal as the Department requests.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that the Court affirm the Court of Chancery's Final Order.

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REED SMITH LLP

/s/ Brian M. Rostocki
Brian M. Rostocki (No. 4599)
Benjamin P. Chapple (No. 5871)
1201 Market Street, Suite 1500
Wilmington, DE 19801
Telephone: (302) 778-7500
Fax: (302) 778-7575

Counsel for Defendant-Below/Appellee AT&T Inc.

OF COUNSEL:

REED SMITH LLP
Sara A. Lima
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Telephone: (215) 851-8872
Fax: (215) 851-1420