EFiled: Dec 15 2020 04:48PM EST
Filing ID 66186776
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 REPLY BRIEF

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Melanie K. Sharp (No. 2501)
Martin S. Lessner (No. 3109)
Mary F. Dugan (No. 4704)
Michael A. Laukaitis II (No. 6432)
1000 North King Street
Wilmington, DE 19801

Counsel for Plaintiff-below/Appellant

Dated: December 15, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

PRELIMINARY STATEMENT

Plaintiff-Appellant (the "State") demonstrated in its Opening Brief ("OB") seven points essential to this appeal:

(1) the State properly issued an administrative subpoena to Defendant-Appellee AT&T (the "Subpoena") pursuant to 12 *Del. C.* §1171(3);

(2) AT&T refused to comply with the Subpoena;

(3) the State properly brought an action in the Court of Chancery by filing a Verified Complaint (the "Complaint") seeking enforcement of the Subpoena pursuant to §1171(4);

(4) AT&T did not answer the Complaint or move to dismiss, but instead filed a "Motion to Stay, or in the alternative, to Quash or Modify Plaintiff's Administrative Subpoena";

(5) In the Opinion, the trial court correctly determined:

(a) the proper legal framework governing an action to enforce the Subpoena was 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." (OB, Ex. A (the "Opinion") at 31 (citing Vice Chancellor Slights' earlier decision in *Univar*) (emphasis added).)

(b) the legal standard for enforcement of the Subpoena is analogous to the legal standard for enforcement of a grand jury subpoena. (Opinion at 29-30 (citing, *inter alia*, *In re Hawkins*, 123 A.2d 113, 115 (Del. 1956)).)

(c) the State established its authority to issue the Subpoena by showing that the State's investigation regarding AT&T's compliance with the Escheat Law is pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the agency's possession, and that the administrative steps required by the statute have been followed. (Opinion at 31-45 (citing, *inter alia*, *U.S. v. Powell*, 379 U.S. 48, 57 (1964)).)

(d) judicial review of administrative subpoenas is strictly limited. Opinion at 31.

(6) the trial court erred, as a matter of law, in granting the motion to quash based on the "abuse of the court's process" standard governing enforcement of administrative subpoenas, and;

(7) the trial court erred, as a matter of law, in making its' "final act in the case" the granting of a AT&T's motion to quash based on "abuse of the Court's process," even though AT&T had not filed an Answer or a motion to dismiss. By contrast, a court can issue a final order for compliance with a subpoena after denying a motion to quash.

In its Answering Brief ("AB"), AT&T does not dispute the first five points above.

Regarding the last two points, AT&T cites no cases with facts remotely similar to the instant case, where a government agency brought a statutorily authorized action by filing a complaint in the statutorily authorized court, where the court then held that the government agency established its authority to issue an administrative subpoena or grand jury subpoena, and yet where the same court then granted a motion to quash the subpoena in its entirety as an "abuse of the court's process," and, furthermore, the same court then terminated the statutory enforcement action in a manner contrary to that court's own rules. And the State is aware of no such cases.

Regarding point (6) (the "abuse of the court's process" error), the Opinion as it stands today puts Delaware law fundamentally at odds with the long established law on the deferential standard governing enforcement of administrative or grand jury subpoenas. For example, the State's Opening Brief cited the recent highly-publicized cases where President Trump filed an action in federal court seeking to enjoin enforcement of a grand jury subpoena. *See Trump v. Vance*, 2020 WL 4861980 (S.D.N.Y. Aug. 20, 2020) *aff'd*, 977 F.3d 198 (2d Cir. 2020).

AT&T concedes that the *Trump* courts "engaged in an analysis almost identical to the Chancery Court's process in this case." (AB at 14.) Thus, the polar

opposite legal decision reached by the *Trump* courts—as compared to Opinion here—simply cannot be reconciled. One of these two courts committed legal error, and on this appeal it should be concluded that it was the Court of Chancery.

Regarding point (7) (the final judgment terminating the enforcement action), the Opening Brief demonstrated that the trial court erred in entering a final judgment after granting a "motion to quash" rather than allowing the State to amend its complaint as a matter of right and proceed under the Court of Chancery Rules. (OB at 37-42.)

The trial court's holding is not only erroneous, but is in conflict with Vice Chancellor Slights' holding in *State of Delaware v. Univar, Inc*., C.A. No. 2018-0884-JRS (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, and the State to bring a Motion for Judgment on Pleadings under Court of Chancery Rule 12(c)).

ARGUMENT

I. HAVING REJECTED AT&T'S CLAIM THAT THE SUBPOENA EXCEEDED THE STATE'S AUTHORITY, THE COURT ERRED IN HOLDING THE SAME CLAIM ESTABLISHED AN ABUSE OF THE COURT'S PROCESS

As discussed in the State's Opening Brief, the State may issue an administrative subpoena to determine a person's compliance with the Escheat Law; *Powell* provides the framework for a court to examine an administrative subpoena, under which the government is entitled to a presumption of validity of its broad investigative powers; a court will enforce an administrative subpoena if the government makes a *prima facie* showing of the four *Powell* factors and the defendant does not demonstrate an "abuse of the Court's process;" and the legal standard for enforcement is analogous to the legal standard for enforcement of a grand jury subpoena. (OB at 11-15.) AT&T's Answering brief does not dispute the above cited law. (*See* AB at 12-13.)

The Court of Chancery erred as matter of law in holding that the alleged excessive temporal and subject matter breadth of the subpoena constituted an "abuse of the court's process" justifying the quashing of an authorized subpoena that the trial court held met the *Powell* elements. (OB at 11-19 (citing cases distinguishing analysis of the *Powell* factors and analysis of abuse of the court's process); Opinion at 25, 46-47, 50-51, 53.)

A. The Opinion Conflicts with *Trump v. Vance*

AT&T spends many paragraphs futilely attempting to reconcile the opposite holdings on similar subpoena defenses between *Trump* and the trial court's Opinion (AB 13-16). The cases cannot be reconciled, because on similar allegations of excessive breadth and bad faith, the *Trump* court dismissed the challenge to the grand jury subpoena under F.R.C.P. 12(b)(6) as a matter of law, in stark contrast to the Opinion which quashed the Subpoena in its entirety as an "abuse of the court's process."

Trump had argued that the Mazars subpoena was overbroad and issued for an improper purpose (in bad faith), much as AT&T argues here. In its Answering Brief, AT&T concedes that the *Trump* court "engaged in an analysis almost identical to the Chancery Court's process in this case." (AB at 14.)

The *Trump* courts conducted a detailed analysis of the law governing enforcement of grand jury subpoenas, and conducted two separate analyses—one regarding overbreadth and one regarding allegations of improper purpose. The court concluded that Trump failed to state a claim under F.R.C.P. 12(b)(6). Thus, the *Trump* courts dismissed as a matter of law Trump's complaint to enjoin enforcement of the subpoena on the grounds of "overbreadth" and "bad faith," where Trump alleged the Mazars subpoena sought information in a complex financial investigation not limited to hush money payments, it had an out-of-state reach, it sought

information over a nine-year period, it was duplicative of a Congressional subpoena, and it was issued for partisan political purposes.

In stark contrast, the Opinion here quashed the Subpoena in its entirety as an "abuse of the court's process," based on the trial court's (erroneous) conclusion that as a matter of law the Subpoena was overbroad and issued in bad faith. The unsupported grounds that led to the trial court's granting the motion to quash are similar to the grounds that the *Trump* court found failed to even state a claim. For example, finding the time period covered by the Subpoena was too "expansive" and aimed at "pursuing information about property that [the State] knows it cannot recover," finding no "rational basis" provided for examining "records of all checks" during the requested time period, and that the State's compensation arrangement with its agent Kelmar "potentially creates pernicious incentive for Kelmar to serve broad information requests and engage in expansive audits that impose substantial burdens on companies, thereby inducing settlements that generate income for Kelmar." (Opinion at 57-59). This overbreadth analysis is internally inconsistent because this relates to the *Powell* factors—which the Court of Chancery found supported enforcing the Subpoena. (Opinion at 34-56.)

Thus, while the analysis may have been similar, the polar opposite legal decision reached by the *Trump* court—as compared to the Opinion—simply cannot

be reconciled. One of these two courts committed legal error, and on this appeal it should be concluded that it was the Court of Chancery.

B. The Breadth Of Subpoena Met The *Powell* Factors And Thus Cannot Be An "Abuse Of The Court's Process"

Besides failing to distinguish *Trump*, AT&T's reliance on *Powell*, *In re Pennell*, *Chao*, and *Aero Mayflower* does not support its position. (AB at 17.) In *Powell*, the court noted that enforcement of a subpoena would be an abuse of the court's process if the subpoena was "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."[1] AT&T does not allege an improper purpose for the State's examination. In *Pennell*, the court considered certain factors about the reasonableness of the subpoena to rebut the claim of abuse of the court's process, where the subject of the subpoena argued that the subpoena was issued for an improper purpose—*to preview the testimony of a defense witness in the case*.[2] Similarly, AT&T's reliance on *U.S. Aero Mayflower Transit Co., Inc.*, does not support its position. (AB at 17.) In fact, that court noted that it cannot inquire "into the agency's reasons for issuing the subpoena" except

[1] *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

[2] *See In re Pennell*, 583 A.2d 971, 973 (Del. Super. 1989).

"upon an adequate showing that the agency is acting in bad faith or for an improper purpose."[3] Here, AT&T makes no such showing, and the Court of Chancery made no such finding because it found that the Subpoena was reasonably related to the State's investigative authority. (OB at 16 (citing Opinion at 34-56).)

AT&T misreads the holding in *Marathon*, which did not address abuse of the court's process but rather the ripeness of a company's federal preemption claim. The *Marathon* court simply noted that the State's requests for documents may be shown to be "so obviously pretextual or insatiable…[that] [d]etermining the difference between a state's legitimate inquiry into a parent-subsidiary relationship, on the one hand, and, on the other, an abusive process designed to force a monetary settlement, may not always be a simple matter."[4] Finally, AT&T and the Court of Chancery's reliance on *In re Blue Hen* is misplaced. (AB at 16; Opinion at 39, 58.) In *Blue Hen*, the court did not analyze the reasonableness of the requests as an abuse of the court's process. (OB at 13.)[5] Finally, the *Chao* court actually found that the subpoenas at issue were *not* an abuse of the court's process. *Chao v. Koresko*, 2005 WL 2521886, at *3 (3d Cir. Oct. 12, 2005).

---

[3] *U.S. v. Aero Mayflower Transit Co., Inc.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987) (analyzing abuse of process where subject alleged that the subpoena was issued to aid another government agency).

[4] *Marathon Petroleum Corp. v. Sec. of Fin. for Delaware*, 876 F.3d 481, 501 (3d Cir. 2017).

[5] 314 A.2d 197, 200-01 (Del. Super. 1973).

C. At Most, Any Alleged Overbreadth Of The Subpoena Imposed On The State A Duty To Justify Its Breadth -- Which The State Did -- And In Any Event Was Not An "Abuse Of The Court's Process"

Even if the Court of Chancery were permitted to consider the breadth of the Subpoena in its abuse of the court's process analysis, it must afford the State great deference, which it did not do in this case. (OB at 11-15.)

1. Complying With The Subpoena Is Not Overly Burdensome To AT&T.

Given the scope of AT&T's vendors and customers, an enforceable subpoena requiring production of the Disbursement Requests (i.e., electronic records of millions of checks and payables) already on AT&T's computer, which were already in an electronic format ready to produce, is not burdensome or excessive.[6] For example, AT&T has already produced four months of this category of data per year from 2008 forward (the timeframe sought by the State). It is more burdensome for AT&T to sift through to produce an incomplete subset rather than produce all documents with the touch of a button. AT&T's incomplete production runs contrary to the law; the regulated party cannot be the regulator. (OB at 35.) The State

[6] *See Trump v. Vance*, 2020 WL 5924199, at *9 (2d Cir. Oct. 7, 2020) ("Complex financial and corporate investigations are broad by default."); *U.S. v. Westinghouse Elec. Corp.*, 788 F.2d 164, 171 (3d Cir. 1986) (administrative subpoena requiring 80% of the company's internal audit reports and other business records was not unreasonably broad).

therefore met any burden it arguably had to justify the scope of the Subpoena compared to its burden.

2. The Role of Kelmar

In a single line on page 7 of its preliminary statement to its opening brief on its Motion to Quash, AT&T described Kelmar as the State's "contingent-fee auditor." After that, there was no mention of the word "contingent-fee" in all the parties briefing or at the hearing, nor any discussion of the State's compensation arrangement with Kelmar.

The Court of Chancery erred by relying on that single reference — unverified and unsupported — as a significant factor supporting its holding that an otherwise authorized Subpoena was an "abuse of the Court's process."

Kelmar (the State's agent for the AT&T examination) will not and has not received any contingent compensation in this examination. (A0414; A0427-0439; OB at 21.) The fact that the State entered into hourly fee arrangement with Kelmar starting in January 2020 does not change the fact that Kelmar has not and will not be paid a contingent fee under either contract because they would not be paid under the old contract until the conclusion of the examination. AT&T is incorrect to state otherwise. (AB at 20; *See also* AB at 24; Opinion at 59; A0015-A0082.)

Even though Kelmar was on a contingent-fee contract prior to January 2020 (thus at the time of service of the Subpoena), such a compensation arrangement did

not and would not compromise the examination of AT&T.[7] First, the use of a contingent fee auditor is not a *per se* abuse of the court's process. (OB at 24-26.) Second, despite any suggestion to the contrary, the State has full control and authority over its agent Kelmar. (OB at 24-25.)

As discussed in the Opening Brief, any "facts" regarding Kelmar's compensation were not drawn from the Complaint, were not admitted to by the State, and were not based on a proper record. Furthermore, the Court of Chancery's holding that the State's compensation arrangement with Kelmar was a significant factor making the Subpoena an "abuse of the Court's process" was not briefed by the parties or raised at oral argument. The State never addressed the unsupported phrase "contingency-fee auditor" used in one line of AT&T's brief simply because Kelmar's compensation arrangement was never an issue in the case until the State read the Opinion. Thus, to the extent the trial court based its "abuse of the court's process" holding on this, the trial court should at least have raised the issue at oral argument, and given the parties a chance to discuss or an opportunity to make a showing on the issue.

[7] Further, how other states compensate Kelmar (AB at 20) is irrelevant to this examination.

3. The Statute of Limitations Issue and the 2002 Escheat Law

The 2017 Escheat Law applies to the enforcement of the Subpoena, which was issued on November 8, 2019, and seeks records within the look-back period (10 years prior to the date of dormancy). (OB at 27 n. 34.) The 2017 Escheat Law explicitly applies to "the person under examination"[8] and sets procedures that apply to holders whose examination began prior to its enactment.[9] The Court of Chancery erred in rejecting the State's position that the 2017 Escheat Law applied to the look-back period, any future determination of AT&T's compliance with the Escheat Law, or future determination (if any) of AT&T's unreported unclaimed property due and owning. (A0214-17; A0376-77; A0385-87; A0400)

The 2017 Escheat Law applies because it was enacted before the State issued the Subpoena, it explicitly applies to examinations initiated before the 2017 Escheat Law was enacted, and because the amendments that created the 2017 Escheat Law were remedial in nature. (OB at 28-30.) While there are no Delaware cases addressing this issue, the State's citation to *Patronis* is intended to provide guidance

[8] § 1171.

[9] *See* OB at 28; §§ 1172-73.

to this Court in the context of unclaimed property law.[10] In *Patronis*, the Court found that statutory changes, even lengthening the amount of time a holder was required to hold funds, are remedial.[11] The same ruling is appropriate here. [12]

Here, AT&T has already produced some (albeit incomplete) records for the Disbursement Requests, for roughly one month per quarter of the requested timeframe. AT&T, having acknowledged the applicability of the very timeframe at issue with its own production (even though the Court of Chancery did not acknowledge it), cannot now argue that the application of this timeframe causes prejudice to AT&T.[13] Furthermore, AT&T invoked the application of the 2017 Escheat Law for its own benefit by choosing to participate in an expedited examination. (OB at 31; A0018-19.) That AT&T did not cooperate with its own

---

[10] *Patronis v. United Ins. Co. of Am.*, 299 So. 3d 1152, 1158-59 (Fla. 1st Dist. App. 2020) at 1158-59; *see also Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996) (applying statute of limitations retroactively as a procedural law change).

[11] *Patronis*, 299 So. 3d at 1158-59.

[12] *See also Am. Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 581 (D.N.J. 2010), *order clarified* (Jan. 14, 2011) ("Regardless, the ability of the State to reunite property with its owner has little bearing on the time frame when the State determines to escheat. Rather, … *the Unclaimed Property Act is remedial legislation* which should be given a liberal construction in favor of *protecting property owners*. Therefore, since the State's ability to escheat is rooted in consumer protection, the State is a better custodian for abandoned property than any private holder.") (emphasis added).

[13] In fact, AT&T has a team of personnel dedicated to complying with state unclaimed property laws. (A0222.)

commitment to produce all requested records, thus necessitating the termination of AT&T from the expedited program, does not alter the fact that AT&T affirmatively elected the application of the 2017 Escheat Law. (OB at 31; A0028-58; A0172.)

The "remedial" nature of the 2017 Escheat Law is clear on its face, and is bolstered by AT&T's desire to opt into it (at least until the Court of Chancery's Opinion) (OB at 29-30.) AT&T even complains in its Answering Brief that the State has terminated AT&T from the expedited examination program. (AB at 32-34.) In fact, AT&T has sued to vindicate that dismissal in District Court. (A0243-44; A0253; A0257; A0259-60; A0271).[14]

AT&T's cited case law is inapposite. *A.W. Financial Services* concerned stockholders, so the court's concern focused on the owner of the property and not the holder.[15] Similarly, *Country Mut. Ins. Co. v. Knight* found that the section relied

[14] D.R.E. 201(b) (codifying Delaware's judicial notice doctrine).

[15] Compare *A.W. Fin. Services, S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1120 (Del. 2009) (emphasis added) with *Patronis*, 299 So. 3d at 1158; *see also 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).

on by the government whereby a holder is protected from paying twice on funds, did not bestow a new remedy on the holder.[16]

AT&T seeks to confuse and conflate the issue of statute of limitations with the lookback period for the examination of a holder's (in this case, AT&T's) records. Even if the 2002 Escheat Law applies to this examination, the State is still entitled to the records it seeks because the statute of limitations set forth in the 2002 Escheat Law is not a bar to the State's right to review records.[17] (OB at 27-28, 30-31; *see also* A0375-77.)

The Court acknowledged that the State's examination to determine AT&T's compliance with the Escheat Law is not controlled by any limitation on the State's ultimate determination of the amount (if any) of any unclaimed property AT&T holds that may be due and owing. *See* Opinion at 45-47 (citing *Powell*, 379 U.S. at 49; *EEOC v. Delaware State Police*, 618 F. Supp. 451 (D. Del. 1985)). *See also* (OB at 13 n. 13.) Even AT&T acknowledged the same. (*See* AB at 15 (citing *Trump* (allowing the government to review records pre-dating the relevant time by five years)).)[18]

---

[16] 240 N.E.2d 612, 615 (Ill. 1968).

[17] § 1140 (2012); § 1155 (2012)

[18] *Trump*, 2020 WL 4861980, at *24 ("[T]he grand jury's scope of inquiry is not limited to events which may themselves result in criminal prosecution, but is properly concerned with any evidence which may afford valuable leads for

Even under the 2002 Escheat Law, there was no limit on the escheatment of property for years in which a holder did not file a report.[19] Some AT&T entities may have filed reports for certain time periods, but AT&T does not argue its filing history is complete and accurate for all legal entities, property types, and years at issue in the Subpoena. Such a contention would not be supported by the record below. As there is no limitation relating to years in which the holder does not file a report, the 2002 Escheat Law does not bar the State's right to seek the escheatment of property improperly held by AT&T for those years. And even if it did, the application of the 2002 Escheat Law on this point does not limit the State's right to seek records for the entirety of the examination lookback period from AT&T to move this examination forward. (OB at 30-31.)

Finally, AT&T's argument relying on the District Court's ruling in *Temple-Inland* is a red herring under the facts of this case, as AT&T acknowledges with its own actions. AT&T has already produced documents responsive to the Disbursement Requests for roughly one month per quarter of the requested timeframe, beginning in 2008. Any suggestion that AT&T does not have any records is simply not true, as evidenced by the incomplete months AT&T produced.

---

investigation of suspected criminal activity during the limitations period") (citation omitted).

[19] § 1158(a) (2014).

(AB at 9; OB at 33-35.) AT&T thus cannot rely on *Temple-Inland* to argue that the State is seeking to impose an unfair penalty or "surprise" on AT&T following the amendment of the Escheat Law to require records retention.

4. The State's Proposed Modifications of the Subpoena's Document Requests

Apart from a denial in its Summary of Argument (AB at 5-6) and the bare assertion that the trial court was correct (AB at 36), AT&T does not address the State's argument (or any of the cases cited in support thereof) that the court erred by rejecting the State's explanation and modification of the Subpoena's Document Requests. (OB at 32-36.)

AT&T does not seriously dispute the State's modification of the Subpoena, acknowledging that the State affirmed "at oral argument that it now only intends to request records back to 2008 for the Disbursement Requests." (AB at 35.) Contrary to AT&T's contention (*see* AB at 35), the State also made clear below that the State had modified its Rebates Request to seek records back to 1998 rather than 1992. (*See* A0184; A0416-19; A0478.) AT&T understood these document requests and the temporal limitations.[20] The State's representations regarding modification of the Subpoena—which was provided at oral argument at the request of the Vice

[20] AT&T's own previous production makes clear that AT&T has documents readily available for 2008 forward, because AT&T produced certain incomplete check disbursement records for that time period. (A0418-19.)

Chancellor and in response to AT&T's proclaimed "surprise"—referred back to the State's previous conversations and correspondence with AT&T (A0419) and is binding upon the State.

AT&T's silence in the face of the State's argument on these points speaks to a global defect in AT&T's reasoning in this appeal, and in the Opinion: What, exactly, is in "The Record," and what was therefore appropriate for the Court of Chancery to find an abuse of the court's process? The State filed the Complaint. AT&T responded with only a Motion to Quash. The Court of Chancery erred by accepting AT&T's unsupported, unverified statements in its Motion to Quash while excluding the details provided by the State in briefing and argument in support of the Complaint. AT&T does not respond to the State's argument on this point because the Court of Chancery's error was to AT&T's benefit.

II. 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

The Opening Brief demonstrated that the trial court erred in entering a final judgment after granting a "motion to quash" rather than allowing the State to amend its Complaint as a matter of right and proceed under the Court of Chancery Rules. (OB at 37-42.)

The trial court's holding is not only erroneous, but is in direct conflict with Vice Chancellor Slights' holding in *Univar* 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, and the State to bring a Motion for Judgment on Pleadings under Court of Chancery Rule 12(c).

In its Answering Brief, AT&T cites no authority (and the State is aware of none) for refusing to allow a party to amend its Complaint as a matter of right under Court of Chancery Rule 15(a).[21]

In its Answering Brief, AT&T cites no authority (and the State is aware of none) where a government agency brought a statutorily authorized action by filing a

[21] *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."). Court of Chancery Rule 15(aaa) is not applicable to a motion to quash.

complaint in the statutorily authorized court, the defendant did not answer or move to dismiss but rather filed a motion to quash, and on that record the court granted the motion to quash and terminated the action in a manner contrary to that court's own rules.[22]

The trial court appears to have taken an improper "up-or-down outcome" or "baseball arbitration" approach at the complaint stage in quashing the Subpoena entirely and terminating the enforcement action. (*See* A0471-72 (The Court: if parties feel the Court will "blue-pencil" to carve back and force reasonableness then "[t]here's less of an incentive to be reasonable then if you're essentially going to face an up-or-down outcome").) *Contra In re Blue Hen*, 314 A.2d at 202 (denying motion to quash and ordering compliance with administrative subpoena except for one category of records for which "the Attorney General shall submit justification"); *Gonsalves v. Straight Arrow Publishers*, 701 A.2d 357, 362 (Del. 1997) (noting the trial court's "statutory obligation to engage in an independent valuation exercise" and requiring the court to eschew a baseball arbitration approach to solve the problem of addressing widely disparate "expert" opinions about value).

[22] AT&T's reliance on *Salvatorie Studios, Intern. v. Mako's, Inc*., (AB at 38) does not support its position because it involved a discovery subpoena issued under F.R.C.P. 26 and not the procedures for an administrative subpoena. 2001 WL 913945, at *1 (S.D.N.Y. Aug. 14, 2001).

AT&T tries to distinguish *Univar* by arguing that "both cases presented the Chancery Court with the same substantive question on the basis of the pleadings." (AB at 39) (emphasis added). That is simply incorrect. Unlike an answer to a complaint, it is undisputed that a motion to quash is not a pleading under Court of Chancery Rules. (Opinion at 20 (motion to quash is not a motion to dismiss, but is analogous to protective order filed in response to a Rule 45 subpoena).)

AT&T argues that the "Chancery Court properly quashed the Subpoena and effectively dismissed the Complaint" because the State had somehow agreed to that at oral argument. (AB at 37 (emphasis added).) But AT&T's argument, and the assertion in the Opinion on which it is based—that the State agreed that the action could be terminated in its entirety upon the granting of a motion to quash without AT&T filing an Answer—is simply incorrect. (Opinion at 24-25, 28.) The State argued that the complaint stated a *prima facia* case for enforcing the Subpoena in a final appealable order.[23] The State is not aware of any case holding a complaint to enforce an administrative subpoena actually established a *prima facia* case for dismissing a complaint as an "abuse of the court's process."

As the trial court recognized, the procedural posture of the case was AT&T's own doing: "[A Section 1171(4) proceeding] is governed by the Court of Chancery

[23] *See In re Hawkins*, 123 A.2d 113, 114 (Del. 1956) (appeal of trial court order denying motion to quash and directing compliance with subpoena).

rules. . . . A party confronted with a complaint ordinarily responds by filing an answer or a motion to dismiss. AT&T filed a [motion to stay] and also included a motion to quash or modify." (Opinion at 20.) That is the procedural posture the State found itself in at the June 3, 2020 hearing, which was prior to the June 23, 2020 ruling in *Univar* holding that the proper procedure in a Section 1171(4) proceeding was for the defendant to file an answer.

As a reading of the transcript pages cited by the trial court will show, the trial court incorrectly held that the State had agreed at oral argument that its enforcement action complaint could be effectively dismissed on the grant of motion to quash. At the hearing, in response to the Vice Chancellor's question about the "procedural posture of this case," counsel for the State was referring to what should happen procedurally after the denial of the motion to quash made in response to the Complaint:

> — "the procedures that go with enforcement of an administrative [subpoena] should be followed [and noting Vice Chancellor Slights' *Univar* May 21, 2020 ruling]." (A0437-38.)
>
> — "the Court should enter judgment enforcing the Administrative Subpoena as the final act in this case following a denial of ATT's Motion to Quash." (A0474 (emphasis added); A0388.)

— "I hope I've answered your questions on the procedural posture of this case and that this should be a final, appealable order that comes out after today's argument. The standard is deferential. We meet the standard with all the [Subpoena] requests." (A0501 (emphasis added).)

Furthermore, the *Gertner* case cited by the trial court (Opinion at 27-28) does not support its holding that even where the State has established its authority to issue the Subpoena under the *Powell* elements, the trial court can nevertheless terminate the action on a motion to quash as an "abuse of the court's process" based only on the State's complaint and supporting submissions. *See U.S. v. Gertner*, 65 F.3d 963, 973 (1st Cir. 1995) (denying enforcement of IRS summons [subpoena] because the IRS did not follow the prescribed statutory procedure for service of a "John Doe" summons).

CONCLUSION

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

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Martin S. Lessner
Melanie K. Sharp (No. 2501)
Martin S. Lessner (No. 3109)
Mary F. Dugan (No. 4704)
Michael A. Laukaitis II (No. 6432)
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6600

Counsel for Plaintiff-below/Appellant

Dated: December 15, 2020