

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

_____)	
OFFICE DEPOT, INC.; and NORTH)	
AMERICAN CARD AND COUPON)	
SERVICES, LLC;)	
)	
Plaintiffs,)	
)	
v.)	
)	
THOMAS COOK, in his capacity as the)	C.A. No. _____
Secretary of Finance for the State of)	
Delaware; DAVID M. GREGOR, in his)	
capacity as the State Escheator of the State of)	
Delaware; and MICHELLE M. WHITAKER)	
in her capacity as the Audit Manager for the)	
State of Delaware)	
)	
Defendants.)	
_____)	

**VERIFIED COMPLAINT FOR EQUITABLE, DECLARATORY,
INJUNCTIVE AND OTHER RELIEF**

Plaintiffs Office Depot, Inc. (“Office Depot”) and North American Card and Coupon Services, LLC (“NACCS”) (collectively “Plaintiffs”), for their claims against Defendants Thomas Cook, in his capacity as the Delaware Secretary of Finance (the “Secretary”), David M. Gregor, in his capacity as the Delaware State Escheator (the “State Escheator”), and Michelle M. Whitaker, in her capacity as the Delaware Abandoned Property Audit Manager (the “Audit Manager,” together with the Secretary and State Escheator, the “Defendants”), seek a declaratory judgment and preliminary and permanent injunctions, and allege as follows:

NATURE OF THE ACTION

1. This lawsuit presents a challenge to provisions of the Delaware escheat law, 12 *Del. C.* § 1101, *et seq.* (the “DUPL”) that authorizes the State Escheator to claim unclaimed property and to conduct examinations of companies’ books and records because it violates and is preempted by federal common law and violates the Fourth Amendment to the United States Constitution. Defendants have been conducting an examination of records to determine Plaintiffs’ compliance with the DUPL for more than three years through their designated agent, a contingent fee contract auditor Kelmar Associates, LLC (“Kelmar”), even though Delaware regulations say an audit should take only two years, 10 *De. Reg.* 699 (Oct. 1, 2006), and they seek to examine records concerning property with respect to which Delaware lacks standing to claim under federal common law “priority rules” established by the United States Supreme Court in *Texas v. New Jersey*, 379 U.S. 674 (1965), *Pennsylvania v. New York*, 407 U.S. 206, 216 n.8 (1972), and *Delaware v. New York*, 507 U.S. 490, 500 (1993) (collectively the “*Texas Cases*”), which preempt state escheat laws. Defendants rely on § 1155 of the DUPL by authorizing Kelmar to issue an information document request (“IDR”) to obtain voluminous, over broad and irrelevant information and documents from Plaintiffs, including documents concerning property under the jurisdiction of other states (not Delaware), including gift cards, gift certificates and merchandise credits issued by NACCS, a Virginia limited liability company, which, under federal law, Delaware lacks standing to claim by escheat. Although Plaintiffs produced documents sufficient to demonstrate that NACCS is outside of Delaware’s jurisdiction under the *Texas Cases*, in a January 26, 2016 letter, Kelmar informed Plaintiffs that their failure to comply fully with the IDR by February 19, 2016 “will result in [Defendants] referring the matter to the Attorney General’s Office for ... enforcement action” on February 22, 2016. *See* January 26,

2016 letter, attached as Exhibit A hereto. In a letter dated February 11, 2016, defendant Michelle Whitaker stated: “Failure to produce these records in a timely fashion may compel the State to enforce the applicable penalty provision as authorized by 12 Del. C. § 1159 as well as employ additional remedies under the State,” *see* February 11, 2016 letter attached as Exhibit B hereto, even though the DUPL does not authorize penalties for failure to comply with an IDR. On March 7, 2016, Office Depot, through counsel, objected to Ms. Whitaker’s letter. See March 7, 2016 letter attached as Exhibit C hereto. Then in an email dated June 24, 2016, Kelmar stated: “As a follow-up to my letter ... dated January 26, 2016, please be advised that this matter has been referred to the Delaware AG’s Office.” *See* June 24, 2016 email, attached as Exhibit D hereto. The DUPL does not provide for pre-compliance review of an IDR and Defendants have admitted that their only alternative is to file a lawsuit under the Delaware False Claims Act, 6 *Del. C.* § 1201(a)(7), which authorizes treble damages and recovery of attorneys’ fees.

2. Plaintiffs bring this application for a declaratory judgment and injunctive relief, pursuant to 28 U.S.C. §§ 2201 and 2202, against Defendants by way of Verified Complaint. Plaintiffs seek (a) a declaratory judgment that the DUPL facially violates and is preempted by the federal common law and infringes on Plaintiffs’ rights under the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV; and (b) to enjoin Defendants from enforcing the DUPL against Plaintiffs in a manner that violates federal common law, which preempts the DUPL, and the U.S. Constitution.

3. Plaintiffs also bring this action pursuant to 42 U.S.C. § 1983 to enjoin Defendants’ deprivation of Plaintiff’s rights, privileges and immunities as guaranteed by the Constitution of the United States.

4. Any action by Defendants to enforce the IDRs and assess penalties and interest is unlawful and should be enjoined preliminarily and permanently, because, *inter alia*:

a. The DUPL violates and is preempted by the federal common law established in the *Texas Cases*, by authorizing the State Escheator to claim purported unclaimed property (*i.e.*, unredeemed gift cards, gift certificates and merchandise credits) that Delaware lacks standing to claim under federal law. *See New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 392 (3d Cir. 2012).

b. The DUPL facially violates the Fourth Amendment protection against unlawful search and seizure by authorizing the State Escheator to search Plaintiffs' confidential, privileged and proprietary records without any reasonable basis for such a search, and assessing penalties for reasonably refusing to comply, without providing a procedure for pre-compliance review. *See City of Los Angeles California v. Patel*, 135 S.Ct. 2443 (2015); and

c. Defendants are enforcing the DUPL in a manner that violates and is preempted by federal common law.

THE PARTIES

5. Plaintiff Office Depot, founded in 1986, is a corporation organized under the laws of the State of Delaware, with its principal place of business in Boca Raton, Florida. Office Depot is an office supplies retail organization with approximately 2,000 stores, e-commerce sites and a business-to-business sales organization.

6. Plaintiff NACCS is a limited liability company organized on May 10, 2002 under the laws of the State of Virginia with its principle place of business in Boca Raton, Florida. Office Depot is the sole member of NACCS. NACCS is an issuer of stored value gift cards. The Limited Liability Agreement of North American Card and Coupon Services, LLC provides: "By

virtue of its status as the Member, the Member shall not be personally liable for the debts, obligations or liabilities of the Company, including, but not limited to a judgment, decree or order of a court.”

7. Thomas Cook is the Delaware Secretary of Finance, located at Carvel State Office Building, 820 North French Street, Wilmington, Delaware. The Delaware Escheat Law provides that “[t]here shall be an Escheator of the State, who shall be the Secretary of Finance or the Secretary’s delegate. The administration and enforcement of [the Delaware Escheat Law] are vested in the Secretary of Finance or the Secretary’s delegate.” *See* 12 *Del. C.* § 1102.

8. David M. Gregor is the Secretary’s delegate as the Delaware State Escheator, located at Carvel State Office building, 820 North French Street, Wilmington, Delaware. “The State Escheator may make such rules and regulations as the Escheator may deem necessary to enforce [the Delaware Escheator Law].” *Id.* § 1154.

9. Michelle M. Whitaker is the Delaware Abandoned Property Audit Manager and reports directly to, and under the direction of, the State Escheator. If the Audit Manager concludes that a person has under reported unclaimed property to Delaware, the Audit Manager may issue a statement of findings and request for payment, which becomes a final determination of liability, including interest and penalties, after 60 days and is then subject to enforcement by the State Escheator. *Id.* § 1156(a).

JURISDICTION AND VENUE

10. The Court has jurisdiction under 28 U.S.C. § 1331, as the case presents a controversy arising under the laws and Constitution of the United States. Jurisdiction over claims for declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1) and (2) because Defendants reside in the district and a substantial part of the events giving rise to the claim occurred in this district.

ALLEGATIONS

LEGAL BACKGROUND

Delaware Escheat Law

12. Each of the 50 states and the District of Columbia has unclaimed property laws pursuant to which the states hold property that is unclaimed by the owners as custodians until the owners claim such property.

13. Delaware regulates the reporting and collection of unclaimed and abandoned property pursuant to the DUPL. The DUPL is found in Title 12 of the Delaware Code governing Decedents' Estates and Fiduciary Relations.

14. In Delaware, unclaimed or abandoned property is "property against which the full period of dormancy has run." *Id.* § 1998(1). The "period of dormancy" in Delaware is five years. *Id.* § 1198(9)a.

15. A "holder" of unclaimed property is any person having "possession, custody or control of the property of another person ... and every other legal entity incorporated or created under the laws of [Delaware] or doing business in [Delaware]." 12 *Del. C.* § 1198(7).

16. An "owner" of property under the DUPL is "any person holding or possessing property by virtue of title or ownership." *Id.*

17. The DUPL requires a holder to report and pay unclaimed property on or before March 1 for property that has reached the full dormancy period as of the previous December 31.

18. The State Escheator may assess interest and penalties for noncompliance (*i.e.*, for failure to file a report, failure to pay unclaimed property and filing a fraudulent report). *See* 12 *Del. C.* § 1159.

19. The State Escheator may “at reasonable times and upon reasonable notice examine the records of any person or business association or organization to determine whether the person has complied with any provision of [the DUPL].” *Id.* § 1155.

20. The State Escheator also “may by summons require the attendance of any person having knowledge in the premises, and may take testimony and require proof material for the investigation with the power to administer oaths to such person or persons.” *Id.*

21. No provision of the DUPL authorizes the State Escheator to enforce a summons in any independent administrative or court proceeding and/or issue a summons for the production of documents.

22. Regulations promulgated by the Delaware Department of Finance, 10 De. Reg. 699 (Oct. 1, 2006), provide the manner in which the State Escheator may conduct examinations pursuant to 12 *Del. C.* § 1155. Pursuant to those regulations:

The State expects the Holder’s cooperation and anticipates ... the time to complete a typical audit should not exceed twelve (12) months. ... Interest and penalty may be assessed pursuant to § 1159During the examination, the auditor will review all necessary books and records, interview key personnel and review relevant policies and procedures related to abandoned property. During the examination, the auditor may make subsequent requests to the Holder for additional books and records as required to complete the audit.

23. There is no procedure for pre-compliance independent review during an examination, other than to “contact the State directly to address issues or related to the audit.”

10 De. Reg 699. (Oct. 1, 2006).

24. When companies object to information requests, Ms. Whitaker, the Audit Manager, regularly threatens to assess penalties and/or interest for the failure of the company to “cooperate.” Ms. Whitaker did that here in her February 11, 2016 letter. See Exhibit B hereto.

25. As of 2014, approximately 90% of unclaimed property audits conducted for Delaware was being conducted by Kelmar. Kelmar was created in October 2001 and has conducted unclaimed property audits on behalf of Defendants and their predecessors since shortly thereafter under long term contracts pursuant to which Kelmar’s compensation has been made contingent upon and limited by the amount of unclaimed property liability companies pay as a result of the audits.

26. Delaware paid Kelmar \$207,217,260 in fees in 2004 through 2014.

The Federal Common Law

27. A state in which unclaimed tangible property is located has jurisdiction to claim that property by escheat. But, unlike tangible property, intangible property “is not physical matter which can be located on a map,” and, thus, potentially gives rise to conflicting claims by different states. *Delaware*, 507 U.S. at 498.

28. Therefore, in *Texas*, 379 U.S. at 677, the Supreme Court exercised its original jurisdiction over disputes between states to establish a set of “priority rules” to settle the issue of which state has standing to claim unclaimed intangible property.

29. The priority rule analysis is a three step process. First, a court must “determine the precise debtor-creditor relationship as defined by the law that creates the property at issue.” *See Delaware*, 507 U.S. at 499. “Second, because the property interest in any debt belongs to the creditor rather than the debtor, the primary rule gives the first opportunity to escheat to the State of ‘the creditor’s last known address as shown by the debtor’s books and records.’” *See id.* at

499-500 (*quoting Texas*, 379 U.S. at 680-681). “Finally, if the primary rule fails because the debtor’s records disclose no address for a creditor ... , the secondary rule awards the right to escheat to the State in which the debtor is incorporated.” *Id.* at 500.

30. In *Texas v. New Jersey*, the Supreme Court stated that it was creating federal common law to prevent against potential multiple liability, which would violate substantive due process, and was specifically creating the priority rules to create a uniform rule that was easy to apply, would not raise factual or legal issues, and would allocate escheats to the states in a manner that was fair in that it tended to distribute escheats among the states in the proportion of the commercial activities of their residents.

31. The priority rules are federal common law that preempts state escheat laws. *See Pennsylvania*, 407 U.S. at 216 n.8; *N.J. Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012); *Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 755 F.Supp. 2d 556, 608 (D.N.J. 2011), *aff’d sub nom N.J. Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012).

FACTUAL ALLEGATIONS

32. On February 22, 2001, Office Depot and the State of Delaware entered into a Voluntary Self Disclosure Agreement. Pursuant to that agreement, Office Depot made a payment to the State and the State released Office Depot from any “claims, demands, interest, penalties, actions or causes of action the STATE may have” against Office Depot for reporting and paying abandoned property required by DUPL for report years due before March 1, 2000, which covers property arising through December 31, 1994.

33. Thereafter, Office Depot filed a report of unclaimed property in Delaware each year, starting with the report due on or before March 1, 2001.

34. Prior to 2002, Office Depot issued its own gift certificates and gift cards and in the unclaimed property reports due March 1, 2001 and March 1, 2002, Office Depot reported and paid to Delaware, *inter alia*, unredeemed gift certificates issued by Office Depot for which addresses of purchasers and recipients were not obtained.

35. NACCS, a Virginia limited liability company, came into existence on May 10, 2002. NACCS issues gift cards, gift certificates and merchandise credits.

36. Effective August 1, 2002, NACCS and Office Depot became parties to a Gift Card, Gift Certificate, and Merchandise Credit Agreement pursuant to which, *inter alia*, NACCS appointed Office Depot as agent to NACCS on a nonexclusive basis to promote and sell NACCS's gift cards, gift certificates and merchandise credits using trademarks and trade names owned by Office Depot in exchange for a 1% commission. Pursuant to the agreement, Office Depot agreed to accept the gift cards, gift certificates and merchandise credits as tender for the purchase of merchandise and services at Office Depot retail stores.

37. Pursuant to a Conveyance Agreement dated December 30, 2002, NACCS acquired the assets and assumed the liabilities of Office Depot's gift card and gift certificate business.

38. NACCS retains a bank account in its own name and enters into contracts with third parties in its own name.

39. On February 6, 2013, the State of Delaware commenced an examination of Office Depot's compliance with the DUPL. The then Delaware State Escheator sent a letter to Office Depot stating:

“[T]he State of Delaware intends to examine the books and records of Office Depot Inc., its Subsidiaries & Related Entities, Office Depot Inc. (sic) to determine compliance with the Delaware Escheat laws. The examination will relate to all property subject to escheat pursuant to Subchapter IV, Title 12, Delaware Code. Furthermore, unclaimed property is reported to the State pursuant to Subchapter IV, Title 12, and Delaware Code. (sic) As well as the

priority rules and other provisions set forth in the United States Supreme Court case *Texas v. New Jersey*, 379 U.S. 674 ... and reaffirmed by *Delaware v. New York*, 507 U.S. 490 ... (1993).”

He further stated that the examination would be conducted by “Kelmar Associates on behalf of the State of Delaware.”

40. Kelmar requested voluminous detailed financial records for periods back to 1995, including documents concerning property under the jurisdiction of other states, not Delaware. However, Office Depot objected to producing documents related to years with respect to which the six-year statute of limitations in 12 *Del. C.* § 1156 barred Defendants from enforcing the DUPL against Office Depot.

41. In an April 22, 2014 letter, Kelmar notified Office Depot that the entities that “will be the primary focus of this examination” were Office Depot and The Office Club, Inc.

42. On June 10, 2014, Kelmar issued its “Stored Value Card Initial Request” asking Plaintiffs to confirm that NACCS issued gift cards that were sold through Office Depot retail stores and identifying any third party administrators of such stored value cards; Plaintiffs provided a complete response.

43. Even though NACCS was not within the scope of the audit and is a Virginia limited liability company that does not obtain the names or addresses of purchasers or recipients of gift cards, gift certificates and/or merchandise credits, on September 3, 2014 Kelmar issued a request for “Additional Information on North American Card and Coupon Services, LLC” and a “Second Stored Value Card Request,” acknowledging receipt of the information requested in its Initial Request and requesting the production of extensive detailed information to be produced within thirty days (on October 3, 2014) related to NACCS’s gift card, gift certificate, and merchandise credit business, including, *inter alia*:

- a. copies of current and historical contracts and service agreements, including exhibits, addendums and amendments, between Office Depot and NACCS;
- b. Copies of written policies and procedures relating to the administration and treatment of stored value cards, or a detailed narrative describing such administration both currently and historically, including information systems and database maintenance, card activation process, application of any service charges, card deactivation or devaluation process, tracking and reporting of unused or unredeemed card balances as unclaimed property, and any other relevant policies, procedures or process relating to the administration and treatment of stored value cards;
- c. a description of all current and historical reports that are run or can be generated that will show, by period (month and year), the number of cards activated, the dollar value of cards activated, the number of cards activated that have a remaining balance and the dollar value of cards activated that still have a balance.
- d. all general ledger account numbers;
- e. complete general ledger account descriptions;
- f. beginning of year balance for each general ledger account for each year;
- g. cumulative posted credits and cumulative posted debits for each general ledger account for each year;
- h. end of the year balance for each general ledger account for each year;
- i. a narrative describing how gift card proceeds and any unused card balances are accounted for on the books and records of Office Depot and NACCS;
- j. all documents and communications concerning or relating to the decision to form NACCS in 2002, including without limitation all documents and communications concerning the reasons for organizing NACCS in Virginia, all documents and communications concerning any analyses or discussions of any potential benefits, including cost savings and increased earning, that could be derived from organizing NACCS in Virginia, all documents and communications concerning any analyses or discussions of any

potential benefits, including cost savings and increased earnings, that could be derived from organizing NACCS outside of Delaware, and all documents filed with Virginia and drafts thereof;

- k. all documents and communications concerning or relating to the governance structure of NACCS including, but not limited to, any documents in the custody of managers, members, partners, officers, directors, and/or board of directors;
- l. all documents and communications explaining or describing the role of each officer of NACCS;
- m. all Articles of Organization for NACCS, and any amendments thereof;
- n. all operating agreements relating to NACCS, and any amendments thereof;
- o. all bylaws of NACCS, and any amendments thereof;
- p. all annual reports of NACCS filed with any jurisdiction;
- q. all state, local and federal tax filings of NACCS;
- r. all minutes of any meeting of the directors, members, partners, officers, and/or managers of NACCS;
- s. “all documents and communications” explaining or describing the capital structure of NACCS;
- t. “any agreements and contracts” between or among Office Depot and NACCS “including, but not limited to,” cash-pooling agreements, administrative services agreements, assignment and assumption agreements or any other agreements used to transfer assets and liabilities from Office Depot to NACCS, agreements concerning the provision of payroll to any real or purported employee of NACCS, real estate agreements, leases and purchase agreements;
- q. “any agreements and contracts for NACCS, with any vendors, suppliers, distributors, manufacturers and/or transaction processors, including but not limited to” manufacture of gift cards, purchase of stored value cards from suppliers, distribution or shipment of stored value cards to Office Depot stores, third party distribution networks that market stored value cards, transaction processing or posting services at point of sale terminals;

r. any bank records evidencing payroll payments made by NACCS.

44. Plaintiffs responded by producing, *inter alia*, NACCS's Limited Liability Agreement to demonstrate that NACCS was domesticated in Virginia, and all of NACCS's general ledger account numbers, descriptions, cumulative posted debits and credits to each general ledger account, and ending general ledger balances for all years, which enabled Kelmar to determine if any general ledger accounts not related to the issuance of gift cards, gift certificates and/or merchandise credits might be potential accounts containing unclaimed property. Plaintiffs also informed Kelmar that names and/or addresses of purchasers or recipients of the gift cards, gift certificates and/or merchandise credits were not obtained. However, Plaintiffs objected to producing any additional information concerning NACCS gift cards, gift certificates and/or merchandise credits because Delaware lacks standing to claim them even if they were unclaimed property under the priority rules in the *Texas Cases*.

45. Kelmar also requested copies of unclaimed property reports filed in all states for the entire audit period (*i.e.*, back to 1995). Office Depot objected to producing copies of unclaimed property filings in states not participating in the examination.

46. Even though Delaware has a 30-year document retention policy and thus should have had copies of Office Depot's filings in Delaware, Office Depot produced copies of each unclaimed property filing it filed in Delaware starting with the Voluntary Disclosure Agreement executed in February 2001 which released Office Depot from its reporting and payment requirements under the DUPL for reports filed prior to March 1, 2000 relating to transactions through 1994 (which were dormant as of December 31, 1999).

47. Office Depot also produced a schedule summarizing, by year, the total unclaimed property escheated to each state not participating in the examination.

48. Office Depot asked Kelmar to explain the justification for requesting copies of the actual unclaimed property reports filed in non-participating states, which are voluminous. In an email dated July 9, 2015, Kelmar, on behalf of Defendants, responded, in part, that “if the State requests that estimation be performed to determine the unclaimed property liability for the period where records do not exist (the pre-Base Period), all Base Period filings will be included in the estimation calculation as holder-identified unclaimed property liability” Office Depot questioned Delaware’s authority to do so under federal and constitutional law. Indeed, subsequently, on June 28, 2016, the federal court in Delaware ruled that doing so is one aspect of Defendants’ overall conduct in enforcing the DUPL that “shocks the conscience” in violation of a company’s right to substantive due process. *See Temple-Inland Inc. v. Cook, et al*, C.A. 14-654-GMS, Memorandum Opinion (D. Del. June 28, 2016), available at www.ded.uscourts.gov/judges-info/opinions (last visited July 12, 2016).

49. On September 15, 2015, Kelmar sent a “Stored Value Card Detailed Records Request requesting voluminous detailed information concerning NACCS’s gift cards, gift certificates and merchandise credits business. A copy of the September 15, 2015 letter is attached as Exhibit E hereto. In it, Kelmar stated that “this document request seeks ... reports covering the company’s historical SVC programs *irrespective of the card ‘issuer’* being Office Depot, Inc., North America Card and Coupon Services, LLC or any other party.” Exhibit E (emphasis added). Further, “[n]otwithstanding your stated objections and positions related to Office Depot’s Stored Value Cards (SVCs), the State of Delaware is continuing its ongoing examination of Office Depot’s SVC data to determine and quantify if any unclaimed property is due and owing to the State.”

50. On January 26, 2016, Kelmar sent a letter to Office Depot (attached as Exhibit A hereto) stating:

This letter is a follow-up to Kelmar's Stored Value Card Detailed Records Request dated September 15, 2015 addressed to you. Kelmar has informed the Delaware Office of Unclaimed Property ("Office") that Office Depot has not provided any responsive information to date. The Office has indicated that Office Depot's continued failure to provide the requested information will result in the Office referring the matter to the Attorney General's Office for consideration of enforcement action.

51. Kelmar set a deadline for Office Depot to respond by February 19, 2016, or "Kelmar will be reporting ... to the Office on Monday, February 22, 2016."

52. On information and belief, other companies being audited by Kelmar on behalf of Delaware were sent similar letters on January 26, 2016 because they refused to produce records relating to gift cards issued by non-Delaware special purpose entities that do not obtain names and addresses of gift card purchasers or recipients. Indeed, Marathon Petroleum Corporation received an almost identical letter on January 26, 2016 and filed a lawsuit similar to this one on February 11, 2016 in the United States District Court for the District of Delaware captioned *Marathon Petroleum Corporation, et al. v. Thomas Cook, et al.*, C.A. 1:16-cv-00080-LPS (D. Del.). Exhibit A to that complaint is the almost identical January 26, 2016 letter bearing the same date.

53. The Delaware Attorney General currently is prosecuting a lawsuit against eighty-six defendants, including seventeen Delaware incorporated companies, under the Delaware False Claims Act, 6 *Del. C.* § 1201(a)(7), seeking treble damages and attorneys' fees and costs, for failure of the Delaware incorporated entities to escheat unredeemed gift cards issued by third-party special purpose entities organized in other states. *See Delaware v. Card Compliant, LLC, et al.*, C.A. No. N13C-06-289 FSS, Memorandum Opinion and Order at 6, 21 (Del. Superior Nov. 23, 2015).

54. However, in *N.J. Retail Merchants v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012), the U.S. Court of Appeals for the Third Circuit upheld a preliminary injunction against New Jersey enjoining the state from enforcing an amendment to the New Jersey unclaimed property law that authorized New Jersey to claim by escheat unredeemed gift cards that were issued by special purpose entities organized in other states, just like NACCS here.

55. Then on February 11, 2016, defendant Michelle Whitaker sent a letter to Office Depot listing several other documents that Office Depot had not produced in the examination, including copies of the unclaimed property reports filed in other states for transaction years 1995 and forward. See Exhibit B hereto. In the letter, Ms. Whitaker stated: “On 4/22/14, Kelmar requested Office Depot provide all annual unclaimed property reports *regardless of jurisdiction* for transaction years 1995 and forward.” (emphasis added). She further stated:

The State considers Office Depot’s failure to produce records when they are requested to be a refusal to cooperate with the statutorily permitted examination. As a result, the State formally requests that the outstanding information in this regard be made available to Kelmar within thirty (30) days from the date of this letter. Failure to produce these records in a timely fashion may compel the State to enforce the applicable penalty provision as authorized by 12 Del. C. § 1159 as well as employ additional remedies under the Statute.

56. Because the DUPL does not provide for pre-compliance review of information requests, in a March 7, 2016 letter to Michelle Whitaker, Plaintiffs’ counsel, Diane Green-Kelly, objected to the requests for the voluminous, irrelevant information, explaining that such information is not relevant to whether Office Depot has complied with the DUPL. She stated that Defendants are barred by the statute of limitations in 12 *Del. C.* § 1158 from assessing any deficiencies for most periods for which records were requested and thus the information is not relevant, and most of the information sought concerns property for which Delaware lacks standing to claim under the priority rules in the *Texas Cases*. A copy of the March 7, 2016 letter is attached as Exhibit C hereto.

57. Three months later, on June 24, 2016, Kelmar sent Plaintiffs an email stating: “As a follow-up to my letter addressed to Robert Amicone dated January 26, 2016, please be advised that this matter has been referred to the Delaware AG’s Office.” A copy of the email is attached as Exhibit D hereto.

58. Although the DUPL authorizes the State Escheator to issue a summons to compel testimony and require proof material to an investigation under oath, it does not *require* a summons, it does not authorize a summons for the production of documents, and the DUPL does not provide for court or independent administrative pre-compliance review, including any procedure for review of an assessment of penalties or interest, until the audit is completed and penalties and interest have already been assessed. *See 12 Del. C. § 1156.*

59. The administrative review process in 12 *Del. C. § 1156* authorizes only reviews of a final determination of liability by the Audit Manager, including interest and penalties:

[T]he holder may file with the Audit Manager a written protest of the statement of findings and request for payment in which the holder shall set forth the property type or types and amount of abandoned or unclaimed property protested, and the specific grounds upon which the protest is based. The protest is intended to allow the holder to have its objections *to the final request for payment* reconsidered in the first instance internally within the Department of Finance by the Audit Manager as a means of expediting resolution of any dispute.

12 *Del. C. § 1156(b)* (emphasis added).

60. Although a company can ultimately appeal the Audit Manager’s and Secretary of Finance’s final determination of liability to the Delaware Court of Chancery after exhausting administrative remedies, that court’s “review shall be limited to whether the ... determination was supported by substantial evidence on the record.” Therefore, pursuant to 12 *Del. C. § 1156*, Plaintiffs’ federal preemption and Constitutional claims are outside the scope of any Court of Chancery review.

61. Further, there is no provision in the DUPL that authorizes the State Escheator to obtain enforcement of a summons in a court of law, even though the Delaware General Assembly granted such authority to other administrators enforcing different parts of the Delaware Code, such as tax laws and securities laws. *See* 30 *Del. C.* § 559; 20 *Del. C.* § 4837(e)(4); 29 *Del. C.* §4805(b)(15).

62. Although, prior to 1990, the DUPL authorized the State Escheator to seek enforcement in the Court of Chancery, the Delaware General Assembly repealed that statute – formerly 12 *Del. C.* § 1209 – in 1990 and replaced it with 12 *Del. C.* § 1155, which does not contain such authority.

63. Therefore, there is no procedure whereby a holder can have its objections to the scope of Defendants’ audit and information requests resolved before penalties and interest have already been assessed.

64. The information Defendants are requiring Plaintiffs to turn over to Kelmar is highly confidential, competitive, and proprietary information. Pursuant to its contract with Delaware, Kelmar is required to maintain the audit files, but Kelmar cannot ensure the information will remain confidential. Indeed, the federal court in New Jersey ordered another Delaware contract auditor, Verus Financial, to turn over its unclaimed property audit file concerning Prudential Financial Services in connection with a securities class action lawsuit filed against that company in *City of Sterling Heights General Employee Retirement System v. Prudential Financial, Inc.*, C.A. 12-5275, Order (D. N.J. Apr. 30, 2015) (denying Verus Financial’s motion to quash subpoena). If Plaintiffs are required to produce the requested documents to Kelmar, even though they are not relevant to Plaintiff’s compliance with DUPL, they will be waiving the confidentiality protections otherwise afforded by 12 *Del. C.* § 1141, which makes it a

misdemeanor subject to fines and jail time for the State to disclose information provided by a company in connection with its unclaimed property reporting.

65. Further, the audit has been ongoing for more than three years and the information requests create uncertainty regarding the scope of Defendants' authority to claim property by escheat that the *Texas Cases* do not permit. Because Virginia does not require the escheat of unredeemed gift cards, NACCS operates its business knowing that as long as it continues to honor gift cards, gift certificates and merchandise credits presented for redemption indefinitely, funds from unredeemed gift cards remain available for use in NACCS's operations until claimed by recipients of gift cards, gift certificates and merchandise credits and funds, in part, its operations.

66. The threat of injury is sufficient to disrupt Plaintiffs' operations and exposes Plaintiffs to penalties and interest such that they should not "have to await the consummation of the threatened injury to [seek] preventive relief." *See Delaware v. Bennett*, 697 F.Supp. 1366, 1371 (D. Del. 1988).

67. Plaintiffs' lawsuit is ripe for judicial determination because (a) it raises purely legal questions concerning federal preemption and whether the DUPL is facially unconstitutional; (b) Defendants have already turned the matter over to the Delaware Attorney General for enforcement action, *see Delaware v. Bennett*, 697 F.Supp. 1366, 1370 (D. Del. 1988); (c) the controversy has a direct, continuing and immediate impact on Plaintiffs because the threat of injury, including continually accruing penalties and interest, is enough to disrupt Plaintiffs' businesses, due to the uncertainty of what is escheatable to Delaware and the scope of Plaintiffs' reporting obligations under the DUPL (despite the *Texas Cases*); and (d) an order by this Court declaring that Delaware cannot claim NACCS's unredeemed gift cards and enjoining Defendants

from enforcing the information requests concerning NACCS's gift cards, gift certificates and merchandise credits would expedite a final resolution of the dispute and not merely impede or frustrate Defendants' enforcement of the DUPL. *See id.*

68. Further, nothing in the DUPL and/or the Delaware Administrative Procedures Act, 29 *Del. C.* §§ 10101-10161, precludes this action.

COUNT I

(Facial Violation of And Preemption by Federal Common Law)

69. Plaintiffs repeat and reallege the foregoing paragraphs as if fully set forth herein.

70. The Supreme Court established the federal common law governing a state's authority to escheat intangible unclaimed property and stated expressly that the federal law preempts state law. The priority rules preempt state escheat laws in the Third Circuit.

71. Federal common law grants authority to escheat to the state of the creditor's last known address. If the debtor lacks addresses of the creditor, the debtor's state of incorporation has authority to claim the unclaimed intangible property.

72. NACCS is a Virginia limited liability company with principal places of business in Florida. It does not obtain the names and addresses of purchasers or recipients of gift cards, gift certificates and/or merchandise credits it issues. Therefore, only Virginia has standing to claim unredeemed gift cards, gift certificates and/or merchandise credits under the secondary rule of the priority rules. Virginia exempts such property from the reporting requirement.

73. The Third Circuit held that New Jersey's attempt to claim such property (as Delaware attempts to do here) violated and was preempted by the *Texas Cases* ruling that "[t]he ability to escheat necessarily entails the ability not to escheat. ... When fashioning the priority rules, the Supreme Court did not intend [to] ... give states the right to override other states'

sovereign decisions regarding the exercise of custodial escheat ... [and] [s]uch conflict ... would stand as an obstacle to executing the purpose of the federal law.” *N.J. Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374 395 (3d Cir. 2012) (internal citations omitted).

74. Similarly, the DUPL violates the federal common law and is preempted to the extent it authorizes the escheat of gift cards, gift certificates and merchandise credits issued by NACCS.

75. The Third Circuit also has held that “if it is evident that the result of a process must lead to conflict preemption, it would defy logic to hold that the process itself cannot be preempted.” *NE Hub Partners, L.P. v. CGN Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001). Defendants’ audit of property Delaware lacks standing to claim under federal common law is thus preempted.

76. Plaintiffs respectfully request that the Court enter an order declaring that the DUPL violates and is preempted by federal common law to the extent it authorizes Delaware to claim NACCS unredeemed gift cards, gift certificates and merchandise credits and enjoin Defendants from enforcing the DUPL against them.

COUNT II

(Facial Violation of the Fourth Amendment To The United States Constitution)

77. Plaintiffs repeat and reallege the foregoing paragraphs as if fully set forth herein.

78. The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things.” U.S. Const., amend IV.

79. The Fourth Amendment protects corporations, as well as individuals, from illegal searches and seizures. *See City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015); *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

80. The DUPL authorizes the State Escheator to examine books and records, take testimony and obtain proof under oath to determine compliance with the DUPL, but does not *require* the issuance of a summons and does not provide any procedure for pre-compliance review by a court or through an independent administrative process.

81. Further, although the DUPL authorizes the State Escheator to issue a summons to compel testimony relevant to Plaintiffs' compliance with the DUPL, Defendants have not issued a summons or threatened to issue a summons. But even if a summons was issued, the DUPL does not authorize the State Escheator to issue a summons for the production of documents and/or enforce a summons in a court of law or other independent administrative procedure or process.

82. Consequently, Plaintiffs would have to incur the cost of complying with the IDRs, and suffer significantly increased liability, as well as interest and penalties, *before* their objections can be heard and resolved.

83. Here, Defendants have turned over to the Delaware Attorney General for enforcement the matter of Plaintiffs' refusal to comply with Defendants' IDRs that seek documents and information not relevant to a determination of whether Plaintiff has complied with the DUPL. Defendants have admitted that in the absence of authority to enforce a summons, their only alternative is to file a lawsuit under the False Claims Act.

84. Further, Plaintiffs are faced with uncertainty concerning the operation of Plaintiffs' businesses until Defendants' audit concludes. The audit has been ongoing for more than three

years already and is not concluded. The document requests create uncertainty regarding whether NACCS is required to escheat to Delaware, even though it is a Virginia limited liability company that does not obtain addresses for recipients of gift cards, gift certificates and/or merchandise credits it issues. Because of a lack of pre-compliance review, Plaintiffs face the uncertainty of whether Office Depot or NACCS is responsible for escheating to Delaware unredeemed gift cards, gift certificates and/or merchandise credits issued by NACCS, even though Delaware lacks standing to claim the unredeemed gift cards, gift certificates and/or merchandise credits under federal law.

85. In addition, because penalties and interest are calculated as a percentage of the amount of unreported unclaimed property, if Plaintiffs are required to wait to resolve the federal preemption and Constitutional issues they raise until a final determination of liability is made, which must include any penalties and interest, those penalties and interest will continue to accrue until a final determination of liability is made.

86. The audit has already gone on for more than three years; because there is no statutory limit on how long Defendants may conduct an examination, they and Kelmar can manipulate the process to maximize Plaintiffs' liability by simply refusing to conclude the audit until the liability accumulates, thereby allowing Defendants to assess ever increasing interest and penalties that will provide revenue to Delaware that no owner can reclaim, even if the unredeemed gift cards, gift certificates and/or merchandise credits are escheated.

87. Defendants' practice of using property Delaware lacks standing to claim under the priority rules to estimate a liability to Delaware is one aspect of Defendants' overall conduct that one court already held in another case "shocks the conscience." *See Temple-Inland Inc. v. Cook*, C.A. 1:14-cv-00654-GMS, Memorandum Opinion at 33 (D. Del. June 28, 2016).

88. Therefore, the DUPL violates the Fourth Amendment to the United States Constitution. *See City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015).

89. Plaintiffs respectfully request that the Court enter an order declaring that the DUPL violates the Fourth Amendment to the United States Constitution, and enjoining Defendants from enforcing the IDR requests against them.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter an order:

A. Declaring that the DUPL violates and is preempted by the federal common law established in the *Texas Cases* to the extent it authorizes Delaware to take custody of unclaimed property where the owner's address is in another state and/or where the holder is not domesticated in Delaware and lacks an owner's address;

B. Declaring that the DUPL violates the Fourth Amendment to the United States Constitution;

C. Enjoining each Defendant, preliminarily and permanently, from enforcing the IDR against Plaintiffs;

D. Enjoining each Defendant from assessing penalties or interest against Plaintiffs;
and

E. Awarding such other and further relief as the Court deems just and equitable.

Dated: July 15, 2016

Respectfully submitted,

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