THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THE STATE OF DELAWARE,	)	
	)	
Plaintiff, ex rel.,	)	
	)	
WILLIAM SEAN FRENCH,	)	
	)	C.A. No.: N13C-06-289 FSS [CCLD]
Plaintiff- Relator,	)	
	)	
v.	)	
	)	
CARD COMPLIANT LLC, *et al.*,	)	
	)	
Defendants.	)	

Submitted: July 2, 2015
Decided: November 23, 2015

MEMORANDUM OPINION AND ORDER

Upon Defendants' Motion to Dismiss – DENIED, in part, and GRANTED, in part.

SILVERMAN, J.

This civil case involves Delaware's False Claims and Reporting Act[1] and Delaware's escheat laws.[2] Reduced to its simplest terms, Delaware has a law requiring holders of unclaimed property, subject to escheat, such as unused gift cards proceeds, to report it and turn it over to the government for safekeeping in case the owner appears to claim it. Delaware has another law, generally imposing penalties for filing false reports to the government. If the Complaint pans out, Defendants concocted a scheme to transfer unclaimed money to a sham, non-Delaware company in order to keep it for themselves. In the process, they failed to file the required reports. Defendants argue what they did was lawful and if it was not, they cannot be liable because there is no harm in trying.

Ultimately, the outcome here turns on whether the Retailers can avoid escheat by using contracts with a non-Delaware company, creating the illusion that the non-Delaware company has assumed a Delaware Retailer's debt and is "holding" the Delaware company's abandoned property outside Delaware and the escheator's reach. This, even though, the abandoned property (the unused gift cards' proceeds) remains in Delaware and the Delaware Retailers remain liable for the debt.

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[1] 6 *Del. C.* § 1201 (2009).
[2] 12 *Del. C.* § § 1199, 1201.

Defendants move to dismiss under both Rule 9(b), arguing the Complaint is not plead with the required heightened particularity, and Rule 12(b)(6), arguing the State has failed to plead the DFCRA's required elements. Here, the court is trimming-back the Complaint, reducing the number of claims and defendants. Discovery will go forward to allow the State to explore the nature and scope of what this case involves. To decide these motions, the court has to review the "*Texas* cases,"[3] addressing escheat.

I.

Defendant CardFact, LLC was created in 2003. From 2007 to 2009, CardFact was operated out of William Sean French's home. In 2009, a competitor, Defendant CardCompliant, LLC bought CardFact. CardCompliant carried on CardFact's business as usual, while CardFact's original owners continued doing business under a new name, Vacation Properties United, Ltd. French worked as a sales and support representative for CardCompliant in 2010 and 2011.

CardCompliant established the 57 CardFact Defendants, which entered into contracts, the Card Services Agreements, with the Defendant Retailers. For convenience, the court will refer to CardCompliant and the 57 CardFact Defendants

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[3] *See Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Delaware v. New York*, 507 U.S. 490 (1993).

as "CardFact."

Under the CSAs, CardFact "issued" gift cards for the Retailers and "assumed liability" for gift cards already sold and to-be sold. The State alleges CardFact did not actually "issue" the gift cards, having limited, if any, involvement with gift-card manufacturing or selling. Instead, CardFact assured the Retailers "they would not have to change anything about the way they ran their gift card programs."[4] Allegedly, the extent of CardFact's involvement issuing gift cards was "ensuring that its name was mentioned on the card."[5] The State also alleges that CardFact pretended to hold the Retailers' money outside Delaware, when in reality that money remained with the Retailers in Delaware.

At oral argument, Defendants confirmed that the CSAs did not affect the consumers' relationship with the Retailers.[6] In other words, the Retailers sold and honored the gift cards used to purchase their respective products and services. For example, a Delaware restaurant enters into a CSA with CardFact, which is

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[4] Compl. ¶ 81.

[5] *Id.*

[6] *State v. Card Compliant, LLC*, N13C–06–289 FSS, at 12 (Del Super. June 26, 2015) (TRANSCRIPT):

> The Court: So as far as the creditor in this case is concerned this agreement between the retailer and CardFact is of no value. It's of no concern whatsoever. . . . The retailer will redeem it as if there was no agreement between the retailer and CardFact.
>
> Mr. Mitchelson: Yes.

incorporated outside Delaware. Under the CSA, CardFact "issues" the restaurant's gift cards. A customer then buys a $100 gift card from the restaurant. Under the CSA, CardFact "holds" that $100 (even though it never really leaves the restaurant's bank). A year later, the customer spends $50 on a meal. The restaurant honors the gift card, provides the dining experience, and then gets its $50 "from" CardFact through an accounting "true-up."

Meanwhile, CardFact "holds" the remaining $50 debt until the customer returns to the restaurant, if ever. And, since CardFact is a non-Delaware company, it, along with the unused money, avoids the escheator. According to the State, however, the customer's $100 never left the restaurant. It only went onto CardFact's books, with the restaurant having merely paid a small "service" fee to CardFact for acting as a front.

II.

On June 28, 2013, French brought this *qui tam* action under Delaware's False Claims and Reporting Act,[7] asserting two claims on Delaware's behalf. Count One, under § 1201(a)(7), alleges: "Defendants knowingly made, used, or caused to be made or used, false statements and records to conceal, avoid, or decrease an obligation to pay or transmit money to the Government." Count Two, under §

[7] 6 *Del. C.* § 1201 (2009).

1201(a)(4), alleges "Defendants . . . intending to deceive the Government or wilfully conceal the property, delivered or caused to be delivered less property than the amount for which they have a receipt." The State elected to intervene March 26, 2014.[8]

The case was removed to federal court where Defendants filed a motion to dismiss. Before it was addressed, the case was remanded. On February 4, 2015, Defendants were granted leave to refile their motion to dismiss here. Briefing was completed April 16, 2015. Oral argument was June 26, 2015. The transcript was lodged July 2, 2015.

III.

Under Rule 12(b)(6), the court determines whether a plaintiff has stated a claim upon which relief can be granted. The court accepts as true all factual allegations in the complaint and will deny the motion unless a plaintiff could not recover under any reasonably conceivable circumstances.[9] The court is "deciding if the plaintiff is entitled to offer evidence to support the claims," not "whether a plaintiff will ultimately prevail."[10]

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[8] *Id.* § 1203(b)(2).

[9] *See Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Slaughter v. AON Consulting, Inc.*, No. CIV.A. 10C–09–001FSS, 2012 WL 1415772, *1 (Del. Super. Jan. 31, 2012).

[10] *Est. of Chance v. First Corr. Med. Inc.*, No. CIV 05–449–SLR, 2006 WL 2711483, *5 (D. Del. Sept. 21, 2006) (citing *Lake v. Arnold,* 112 F.3d 682 (3d Cir.1997)).

IV.

Over time, through a triad known as the *Texas* cases,[11] the United States Supreme Court has established rules for determining, among competing States, which is allowed to escheat abandoned property. Under the primary rule, the escheat right belongs to "the State of the last known address of the creditor, as shown by the debtor's books and records."[12] If there is no address recorded or if the creditor's State does not provide for escheating the property, then the secondary rule provides that the right to escheat belongs to "the debtor's State of corporate domicile."[13] According to the Third Circuit, these rules apply not only to disputes between States, but also to disputes between private parties and States.[14]

Here, it is assumed that the unused gift card owners' addresses were not recorded, so the primary rule is not implicated. Under the secondary rule, only the debtor's state of incorporation, or organization as explained below, has the right to escheat. Therefore, Delaware can escheat money from unused gift cards, but only from Delaware companies.

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[11] *See Texas v. New Jersey*, 379 U.S. 674; *Pennsylvania v. New York*, 407 U.S. 206; *Delaware v. New York*, 507 U.S. 490 .

[12] *Texas v. New Jersey*, 379 U.S. at 631.

[13] . . . provided that another State could later escheat the property under the primary rule. *Id.*

[14] *See Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff,* 755 F.Supp.2d 556, 608 (D.N.J. 2011), *aff'd sub nom New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012).

V.

The State claims Defendants concocted this scheme entirely to avoid their escheat obligations to Delaware. As previously presented, Defendants allegedly used sham contracts (the CSAs) between the Retailers and CardFact pretending to move escheatable money out of Delaware. As a result, Defendants unlawfully avoided Delaware's escheat laws, and in the process, violated Delaware's False Claims and Reporting Act.

As mentioned above, the State brought two claims under the 2009 Delaware False Claims and Reporting Act: Count One under § 1201(a)(7) and Count Two under § 1201(a)(4).

Section 1201(a)(4) applies to:

> (a) Any person who: . . . (4) has . . . control of property or money . . . to be used[] by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; . . .

Section 1201(a)(7) applies to:

> (a) Any person who: . . . (7) knowingly . . . causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government . . . .

The State's DFCRA claims stem from the obligations created in

Delaware's escheat statute, 12 *Del. C.* §§ 1199 and 1201:

> Section 1199. Report by holders of abandoned property, states:
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> (a) Every holder of . . . property, tangible or intangible, deemed abandoned . . . shall file . . . a report with respect to such property. . . .
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> (e) If the person holding property deemed abandoned is a successor to other persons who previously held the property for the owner . . . the person holding the property shall file with the report all prior known names and addresses of each holder of the property.
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> Section 1201. Payment or delivery of abandoned property, states:
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> (a) . . . every holder of abandoned property specified in the report, shall pay or deliver to the State Escheator all abandoned property specified in the report . . . .

One overarching concept bears emphasis. The property at issue does not belong to the Retailers, much less CardFact. They do not even have a residual claim to it. The purpose of escheat is to put seemingly abandoned property in the safest place possible to protect it for its owner. And, if the property is truly abandoned, then it can be put to public good, rather than become profit to a lucky business.

VI.

There were 91 Defendants. Three are non-existent: CardFact XX, Inc., CardFact XXII, Inc., and CARDCO DC, Inc. The State requested that The Factoring Company and Liability Factoring, LLC be dismissed without prejudice. The

remaining 86 Defendants fall into five groups: (1) CardFact, including CardCompliant and 57 CardFact entities; (2) the Retailers who signed the CSAs, including 17 corporations and 6 limited liability companies; (3) Vacation Properties United, Ltd., formerly CardFact, Ltd.; (4) three corporations whose non-Delaware affiliates entered into CSAs; and (5) the National Restaurant Association, which had a marketing agreement with CardFact. Before Defendant-specific arguments, the court will address the arguments generally applicable to all Defendants.

Defendants argue the Complaint should be dismissed for five main reasons. Count One fails because: (1) under the CSAs, the Retailers are not the relevant debtors, therefore Delaware's escheat laws do not apply; (2) no liquidated obligation exists until the administrative escheat process is exhausted; (3) the Complaint fails to allege a "false record or statement;" and (4) the Complaint fails to allege that Defendants "knowingly" violated the DFCRA. Count Two fails because the State has not identified a government-issued certificate or receipt.

A.

First, Defendants argue that CardFact, non-Delaware companies, are the relevant debtors, and therefore, Delaware's escheat laws do not apply to them. Defendants argue the Retailers were free to enter into the CSAs, delegating the Retailers' obligations to the customer, since debts are frequently delegated.

Furthermore, after delegation, CardFact was principally liable to the customer. Therefore, according to Defendants, for escheat purposes, the only relevant relationship is the one the CSAs created between CardFact and the customer. Moreover, Defendants insist most gift cards were issued after the CSAs, so there was no delegation.

The State agrees that debts are delegable. But, these debts involve personal services and without the express consent from the party to whom the debt is owed–the customer–that delegation means nothing to the escheator. According to the State, CardFact and the Retailers need the customer's consent for CardFact to assume the Retailer's debt. Without consent, the Retailers remain the relevant debtors, and the relevant debtor-creditor relationship, vital to the *Texas* cases, is between the Retailer and customer. And, for now, the facts surrounding any post-CSA are undetermined. For example, it remains to be seen whether the customers agreed to do business with CardFact rather than the specific Retailer.

Second, Defendants argue that for various reasons, before this court can find a DFCRA violation, the State escheator must go through an administrative process to adjudicate liability. For one, Defendants argue that by skipping that

process, the court is undermining the government's regulatory procedures.[15] Two, and more to the point, until an administrative judgement determines their liability, Defendants argue they have no liquidated obligation to transfer escheatable money to the State. Defendants maintain that the escheat process merely begins with reporting abandoned property. Then, the State escheator initiates the administrative proceeding to determine those reports' accuracy. According to Defendants, the CSAs created, at the very least, a question as to whether the unused gift cards were escheatable property. As such, the State escheator must first adjudicate that question and establish a liquidated obligation.

Next, Defendants maintain that because the State skipped the administrative process, Defendants' escheat liability depends on this litigation's outcome. And therefore, if Defendants are found to have violated the DFCRA in this proceeding, the obligation on which Defendants' false claims liability was based will have been established in the same proceeding. Defendants argue this court is precluded from "establish[ing] both an 'obligation' and false claims liability based

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[15] Defs.' Principal Opening Br. 18, Feb. 24, 2015 (citing *United States ex rel. Nelson v. Sanford-Brown, Ltd.*, 30 F.Supp.3d 806 (2014) (citing *United States ex rel. Connor v. Salina Regional Health Center, Inc.*, 543 F.3d 1211, 1222 (10th Cir. 2008) ("It would thus be curious to read the [False Claims Act], a statute intended to protect the government's fiscal interests, to undermine the government's own regulatory procedures.")).

on that obligation in the same action."[16] Defendants rely on *United States v. Q International Courier, Inc.*,[17] where the Eighth Circuit found no liability based on the DFCRA's federal counter-part's "plain language . . . to release the Postal Service from an obligation, not to impose an obligation on anyone to pay postage."[18]

In response, the State maintains that Defendants misunderstand the process. Basically, Defendants are arguing, in circular fashion, that they have no obligation to report until the State proves one. Defendants' obligations, however, are not established by an adjudicative judgment. Instead, an administrative judgment formally recognizes already established obligations, beginning with Defendants' reporting any abandoned property. The purpose of the administrative procedures, on which Defendants so heavily rely, is to confirm the accuracy of Defendants' statements and payments and to impose fines and penalties in addition to the already existing escheat obligations.

Third, Defendants move for dismissal arguing the Complaint fails to identify a "false record or statement," which is required under (a)(7). Defendants further argue that the State does not specify "which of [the CSAs, credit memos,

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[16] Defs.' Principal Opening Br. 15, Feb. 24, 2015 (citing *United States ex rel. S. Prawer & Co. v. Verrill & Dana*, 962 F.Supp. 206, 209 (D. Me. 1997)).
[17] 131 F.3d 770, 773–74 (8th Cir. 1997).
[18] *Q Int'l Courier, Inc.*, 131 F.3d at 773.

invoices and yearly true ups, and related documents] are false and what makes them false" with Rule 9(b) particularity. Moreover, according to Defendants, the "absence of a report is, by definition, not a false report," so the State cannot base its claim on failing to file accurate reports.

The State responds that the CSAs and company books were "false records," shams used to conceal escheatable property. Additionally, the State argues that Delaware's escheat law does not distinguish between those who file a false report and those who create a similar false impression by failing to file any report.[19] Therefore, the State easily equates filing no report at all to filing a false report.

Fourth, Defendants argue that the State has not sufficiently alleged that Defendants "knowingly" made or used false records or statements to avoid their escheat obligations. According to Defendants, they could not have knowingly violated the DFCRA, as their understanding of Delaware's escheat laws, even if wrong, was objectively reasonable. Basically, Defendants argue a good-faith exception to their obligation to be accurate.

In response, the State argues that Defendants' reasonable interpretation of the law does not preclude liability. "Knowingly" merely requires that Defendants

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[19] *See* 12 *Del. C.* § 1158(b): "If no report is filed, or if a false or fraudulent report is filed with the intent to evade the obligation to pay over abandoned property, a notice of deficiency in payment may be mailed to the holder at any time."

knew they were filing and what their filing said, or knew they were not filing anything; "knowingly" does not mean Defendants knew they were breaking the law. Nowhere does the DFCRA "require actual knowledge" or "intent to defraud."[20]

Finally, Defendants contend all claims under Count Two must be dismissed because the State has failed to point to any government-issued certificate or receipt. Defendants argue (a)(4) requires that the certificate or receipt be State-created and have some connection to Defendants' return of property. Defendants rely on *State ex rel. Higgins v. SourceGas, LLC,* holding that because "Plaintiffs' Complaint [was] devoid of any reference whatsoever to a receipt or certificate being issued by the State[,]" Plaintiffs' § 1201(a)(4) claims "must be dismissed."[21] The State simply "disagrees" with *Higgins*, contending true-ups issued between the party Defendants and Defendants' SEC filings suffice for (a)(4)'s purposes.

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[20] *See* 6 *Del. C.* § 1202(3): Knowingly means: "actual knowledge of the information; . . . deliberate ignorance of the truth or falsity of information; or . . . reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required."

[21] *State ex rel. Higgins v. SourceGas, LLC,* C.A. No. N11C–07–193 MMJ, 2012 WL 1721783, *10 (Del. Super. May 15, 2012) (internal quotations and brackets omitted) (citing *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 681 (10th Cir. 1998)).

B.

Delaware authority interpreting the DFCRA is scant.[22] Since the DFCRA is modeled after the federal False Claims Act,[23] the court will look to federal case law for guidance.[24] As an initial matter, the court will address Defendants' argument regarding Count Two's claims under (a)(4). The court will then address the (a)(7) arguments applicable to all Defendants, followed by Defendants' individual arguments.

The State's (a)(4) allegations, concerning certificates and receipts, fail for the same reasons the relator's argument in *United States ex rel. Aakhus v. Dyncorp, Inc.* failed.[25] In *DynCorp*, "employees created internal receiving records each time they received an item of [government] property."[26] *DynCorp* holds that (a)(4) requires that "the certificate or receipts . . . be created by the government."[27]

Here, the true-ups and SEC filings, which are internal documents, are not State-created and have no connection to Defendants' returning government property. In fact, the State's entire case is based on Defendants having not returned government

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[22] *See Higgins*, 2012 WL 1721783, at *4; *State Dep't of Labor-Div. of Unemployment Ins. v. Pasquale*, C.A. No. N15C–04–238 RRC, 2015 WL 5461540, *3 (Del. Super. Sept. 17, 2015).
[23] 31 U.S.C. § 3729.
[24] *See Higgins*, 2012 WL 1721783, at *4; *Pasquale*, 2015 WL 5461540, at *3.
[25] 136 F.3d 676, 681 (10th Cir. 1998).
[26] *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 681 (10th Cir. 1998).
[27] *Dyncorp, Inc.*, 136 F.3d at 681; *see also*, *Higgins*, 2012 WL 1721783, at *4.

property. Moreover, the State agrees "this case fits more neatly into the (a)(7) language."[28] Accordingly, there is no claim under (a)(4), and Count Two will be dismissed.

With respect to Count One, under (a)(7), even if the CSAs were not shams, the court must determine the relevant debtor. To do so, the court has considered the current relationships between the parties, the law governing debtor-creditor relationships, and the escheat laws. Echoing the special master's recommendation rejected in *Delaware v. New York*, Defendants here wish to "use [] the term 'debtor' as 'shorthand' to identify parties with 'debtor attributes' rather than the obligor of the debt."[29] The United States Supreme Court explained that defining "debtor" as Defendants wish "would convert a term rich with prescriptive legal content into little more than a description of bookkeeping phenomena."[30] The Supreme Court further explained that, "funds held by a debtor become subject to escheat because the debtor has no interest in the funds.'"[31] Finally, *Delaware v. New York* holds: "Charters, bylaws, and contracts of deposit do not give a bank the right to retain abandoned deposits, and a law requiring the delivery of such deposits to the State

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[28] *State v. Card Compliant, LLC*, N13C–06–289 FSS, at 68 (Del Super. June 26, 2015) (TRANSCRIPT).
[29] *Delaware v. New York*, 507 U.S. at 501.
[30] *Id.* at 502.
[31] *Id.*

affects no property interest belonging to the bank."[32] Here, that means the CSAs do not give the Retailers the right to retain unused gift cards, much less transfer them away from their rightful owners.

For motion to dismiss purposes, the court must assume that the customers did not consent to the Retailers' delegating to CardFact the Retailers' obligation to provide a product or service on their gift cards' presentation. As such, CardFact and the Retailers cannot contract amongst themselves to avoid obligations to their customers (or Delaware). The only relationship involving the creditor (the customer) is the one between the creditor and the Retailers, in contrast to the Retailers' relationship with CardFact. Because the creditor-Retailer relationship is the relevant relationship, the Delaware-based Retailers are the relevant debtors for escheat purposes. Again, that is true even if the Retailers and CardFact have their CSAs.

Similarly, Defendants' liquidated obligation argument fails. The CSAs neither give Defendants the right to retain abandoned property, nor do they suspend Defendants' obligations to the State indefinitely until, if ever, the State initiates the administrative process and the process has run its course, presumably through an appeal to the United States Supreme Court if Defendants are losing.

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[32] *Id.*

Moreover, this is not like *United States v. Q International Courier, Inc.*[33] because the court is not springing anything on Defendants in this proceeding.[34] Under the escheat statute, Defendants have a present and well-established obligation not only to report unused gift card balances,[35] but also to pay those balances to the State.[36] The obligations exist independent of any administrative process. Eventually, the obligations will have to become liquid, but requiring the State to go through an administrative process before the obligations are "liquidated" and, therefore, reportable, defeats 12 *Del. C.* § 1201's purpose. Defendants' argument boils down to their claim that they have no obligation to report these funds until the States proves they have one. In other words: "Catch us if you can."

Furthermore, skipping the administrative process does not undermine regulatory procedure. The court will determine generally whether fraud was committed under the DFCRA, which is not a specialized task requiring agency help.[37]

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[33] *Q Int'l Courier, Inc.*, 131 F.3d at 773.

[34] *See Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 737 (6th Cir. 1999) (pointing out a statute may "impose a duty to pay or transmit property, and breaches of such a duty might expose a defendant to liability under the reverse false claims provision.").

[35] *See* 12 *Del. C.* § 1199: "Every holder of funds . . . tangible or intangible, deemed abandoned under this subchapter shall file with the State Escheator . . . ."

[36] *See* 12 *Del. C.* § 1201(a): "[e]very holder of abandoned property shall pay or deliver to the State Escheator all abandoned property specified in the report . . . ."

[37] *See United States ex rel. Taylor v. Gabelli*, 345 F.Supp.2d 340, 352–53 (S.D. N.Y. 2004) ("A determination as to whether defendants acted with the requisite intent for a finding of liability under the Act does not require 'technical,' agency-specific expertise."); *United States ex rel. Johnson v. Shell Oil Co.*, 34 F.Supp.2d 429 (E.D. Tex. 1998) (rejecting Relator's arguments that

Although Defendants challenge the "false record" allegations' particularity, they are sufficient for Rule 9(b) purposes. The DFCRA is subject to Rule 9(b)'s heightened pleading requirements.[38] But, Rule 9(b) is, and must remain, "context specific and flexible" to achieve DFCRA's remedial purpose.[39] Accordingly, Rule 9(b) is satisfied if the Complaint alleges "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[40] Here, the CSAs, credit memos, invoices, yearly true-ups, and company books, recited in the Complaint, coupled with Defendants' alleged failure to file escheat reports and the State's detailed allegations of a specific scheme, create a strong inference that false reports (including not filing required reports) were submitted to the State.[41]

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administrative remedies must be exhausted before the United States can bring a False Claims Act case to the court) (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 919 (5th Cir. 1983) (referring to an administrative body those cases requiring specialized or expert knowledge of an agency is appropriate)).

[38] *See Higgins*, 2012 WL 1721783, at *5 (citing *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 (5th Cir. 2009)).

[39] *Grubbs*, 565 F.3d at 190 ("We reach for a workable construction of Rule 9(b) with complaints under the False Claims Act; that is, one that effectuates Rule 9(b) without stymieing legitimate efforts to expose fraud."); *see also, Foglia v. Renal Ventures Mgmt.*, LLC, 754 F.3d 153, 156–57 (3d Cir. 2014) (deciding to follow the Fifth Circuit's approach to Rule 9(b) and the False Claims Act–since it is compatible with the court's earlier ruling in *Wilkins*–after a lengthy discussion of the circuit split).

[40] *Foglia*, 754 F.3d at 157–58 (citing *Grubbs*, 565 F.3d at 190).

[41] *See* 12 *Del. C.* § 1158(b): "If no report is filed, or if a false or fraudulent report is filed with the intent to evade the obligation to pay over abandoned property, a notice of deficiency in payment may be mailed to the holder at any time."

VII.

A.

Turning to Defendant-specific arguments, beginning with the limited liability companies, Defendants Apple American Group, LLC, Hanna Andersson, LLC, Skip Barber Racing School, LLC, Tesoro Refining and Marketing Co., LLC, Pamida Stores Operating Co., LLC, and Shopko Stores Operating Co., LLC move to dismiss, alleging that each one's principal place of business is outside Delaware. These LLC Defendants argue that most states, in accordance with *Texas v. New Jersey*'s holding that the secondary right to escheat belongs to a corporation's state of domicile, apply the principal place of business test for limited liability companies.

In response, the State concedes the facts, but argues that no Supreme Court case holds that LLCs, or any other entity, should be treated differently than corporations. The State maintains that the Supreme Court's use of "domicile" was function-driven. *Texas v. New Jersey*'s subject matter was a couple of corporations. Moreover, the State argues that the Supreme Court expressly rejected an escheat rule based on a company's principal place of business, as that would "raise in every case the sometimes difficult question of where a company's 'main office' or 'principal

place of business' . . . is located."[42] In *Delaware v. New York*, the Supreme Court affirmed the need for clarity and certainty by reiterating that state of incorporation controls.[43] The State argues that having to determine an LLC's principal place of business would involve the sort of confusion and dispute the Supreme Court condemned in the *Texas* cases. Like a corporation's site of incorporation, an LLC's State of organization is certain, and not subject to dispute.

In accordance with the *Texas* cases and Delaware law, the court finds that Delaware's escheat laws apply to LLC's organized in Delaware.[44] Since it is undisputed that the six, LLC Defendants were organized under Delaware law, their Motion to Dismiss will be denied.

B.

Three Delaware Defendants, California Pizza Kitchen, Inc., Wolverine World Wide, Inc., and HomeAway.com, Inc., move for dismissal because they never signed a CSA. The State does not dispute that, arguing instead that each Defendant's

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[42] *Texas v. New Jersey*, 379 U.S. at 679.

[43] *Delaware v. New York*, 507 U.S. at 506 ("Although 'a general inquiry into where the principal executive office is located [may] see[m] neither burdensome [n]or complex," we cannot embrace a "rule leaving so much for decision on a case-by-case basis.'") (citing *Texas v. New Jersey*, 379 U.S. at 680).

[44] *See* 12 *Del. C.* § 1198: (7) "Holder" means . . . and every other legal entity incorporated or created under the laws of this State or doing business in this State. . . ."

wholly-owned, non-Delaware, subsidiary entered into a CSA with CardFact. Raising it for the first time in its response brief, the State argues that these Defendants are liable as parent corporations because their subsidiaries acted as their agents.

The Complaint alleges nothing from which to hold these parent-corporation Defendants liable, e.g. no basis for successor liability, etc. Without allegations, beyond conclusory statements of successor liability or an agency relationship, these claims fail on their face. Accordingly, as to these three Defendants, their Motion to Dismiss for failure to state a claim will be granted.

C.

Pantry, Inc. moves to dismiss under 6 *Del. C.* § 1206(b) (2009). Section 1206(b) provides that no "party [may] bring an action under this chapter which is substantially based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government is already a party." Defendants argue that an escheat audit is an administrative proceeding. And, Pantry was audited by Kelmar Associates LLC, at the direction of the State escheator, before May 2011. Defendants argue the State is now attempting to relitigate the allegations that were the subject of that audit.

The State responds that there was no administrative proceeding because the parties never ended-up in the Court of Chancery. And, even if there was, § 1206(b) only bars the transactions Kelmar examined during its audit. Therefore, the State can properly go after abandoned property having become dormant after the 2011 audit.

It is undisputed that Kelmar conducted an audit, during which Pantry provided Kelmar with Pantry's CSA with CardFact. Nothing has changed, except more unused Pantry gift cards have become dormant due only to time's passage. Section 1206(b) bars not only "transactions," but also "allegations" that were the subject of Kelmar's audit. Since the Complaint and Kelmar's audit are substantially based upon the same allegations, even property becoming dormant after the audit cannot be the subject of State action now. If the auditor has given Pantry a bye, that is between the escheator and the auditor. (The final judgment here may change Pantry's obligations prospectively.) Meanwhile, Pantry's Motion to Dismiss will be granted.

D.

Defendant National Restaurant Association moves to dismiss, contending its alleged involvement in the so-called scheme was too tangential to support a claim under the DFCRA. The NRA maintains the only allegation against it is that it entered

into a marketing arrangement, allowing CardFact to market its services to NRA members for a fee.

In response, the State argues that the Complaint alleges the NRA "knowingly assisted" and "engaged in a conspiracy to violate Delaware law" and that "the NRA's conspiracy with CardFact was specifically designed to cause the Delaware Defendants to violate the Delaware" escheat laws.

The NRA was never a party to a CSA. While it can be said that the NRA's advertising, and so on, was a contributing factor to this alleged scheme, it cannot be said that but for what the NRA did, the fraud would not have occurred. At worst, the NRA is an aider and abettor. But, the 2009 version of the DFCRA, applicable here, has no conspiracy provision.[45] Accordingly, the State's claims against the NRA must fail, and its Motion to Dismiss will be granted.

E.

Defendant Vacation Properties United, Ltd. moves for dismissal for three reasons. One, VPU contends the Complaint fails Rule 9(b) because (i) the Complaint makes allegations against "Card Services Defendants," a term never defined, and then makes allegations against "CardFact," defined to include VPU, two dismissed parties,

[45] *Compare* 6 *Del. C.* § 1201(2009) *with*, 6 *Del. C.* § 1201(a): "Any person who: . . . Conspires to commit a violation of paragraph (a)(1), (2), (4), (5), (6) or (7) of this section; . . ."

and 24 non-party companies; and (ii) since the Complaint fails to clarify which allegations apply to which parties, some allegations may have nothing to do with VPU. Two, VPU argues that the State never alleges that VPU is a "holder" of the unused gift card funds, so Delaware's escheat laws do not apply to VPU. Lastly, VPU argues that there is no personal jurisdiction because VPU neither executed nor performed the CSAs in Delaware, and merely contracting with a Delaware entity is not enough to confer jurisdiction.

In response, the State maintains that the Complaint is sufficiently specific because one, the Complaint "explains that CardFact, Ltd. changed its name to VPU in 2009" and "differentiates VPU's conduct from each of the other Defendant's involvement in the scheme." And two, the State can "aggregate the conduct of multiple defendants if the plaintiff's allegations elsewhere designate the nature of the defendants' relationship to a particular scheme and identify the defendants' role."

Next, the State points out that Delaware's escheat laws reach anyone who "[k]nowingly makes, uses, or causes to be made or used a false record or statement."[46] Finally, the State argues that if "defendant's conduct and connection with the forum State are such that [defendant] should reasonably anticipate being haled into court

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[46] 12 *Del. C.* § 1201(a)(7).

here," then personal jurisdiction is proper.[47] Since VPU, formerly CardFact, solicited Delaware companies to use CardFact's "services" and entered into contracts with Delaware entities for the purpose of diverting money away from Delaware, the court has jurisdiction over VPU.

As previously explained, although DFCRA is subject to Rule 9(b)'s heightened pleading requirement, the particularity required is context specific. While VPU is correct, the Complaint fails to define some terms, the Complaint sufficiently explains CardFact's role, and therefore VPU's role, in this alleged scheme. But for CardFact, the scheme could not have worked. And as to jurisdiction, the State alleges more than VPU's entering into contracts with Delaware companies. Based on VPU's admitted conduct with Delaware companies, VPU should have reasonably anticipated being haled into court here, eventually. Accordingly, VPU's Motion to Dismiss will be denied.

VIII.

The Factoring Company and Liability Factoring LLC are **DISMISSED** without prejudice. Defendants Pantry, Inc., California Pizza Kitchen, Inc., Wolverine World Wide, Inc., HomeAway.com, Inc., and National Restaurant Association's

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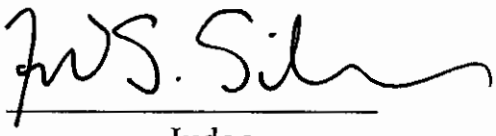
[47] *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Motion to Dismiss is **GRANTED**. The remaining Defendants' Motion to Dismiss is **GRANTED, in part**, as to Count Two, and **DENIED, in part**, as to Count One.

IT IS SO ORDERED.



Judge

cc: Prothonotary (Civil)
Counsel of Record