

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

PLAINS ALL AMERICAN PIPELINE, L.P.,)

Plaintiff,)

v.)

RICHARD J. GEISENBERGER, in his)
capacity as the Secretary of Finance for the)
State of Delaware; JENNIFER R. HUDSON,)
in her capacity as the State Escheator of the)
State of Delaware; and MICHELLE M.)
SULLIVAN, in her capacity as the Audit)
Manager for the State of Delaware,)

Defendants.)
_____)

C.A. No. 1:15-CV-00468-RGA

**DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR
RENEWED MOTION TO DISMISS PLAINTIFF'S AS-APPLIED DUE
PROCESS CLAIM PURSUANT TO FED. R. CIV. P. 12(B)(6)**

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SUMMARY OF ARGUMENT

Plains argued to the Third Circuit that “submission to a biased adjudicator is itself constitutional injury, *irrespective of how that process actually plays out* and without need to wait for the biased adjudicator to rule.” Appellant’s Reply Brief at 20 (Exhibit A) (emphasis added). The Third Circuit adopted this position and opined that “[n]o further factual development is needed to address” Plains’ lone remaining claim premised on Delaware’s use of Kelmar as a contract unclaimed property examiner. Third Circuit Opinion at 22, D.I. 55-2. Now that the case has been remanded, however, Plains is asserting that it is “premature to decide” the question of whether Kelmar is a biased adjudicator. Plains’ Answering Brief at 1, D.I. 61. Plains states that its claim is “fact-intensive and circumstance specific.” *Id.* It says that its biased decision maker claim can be adjudicated “only after significant factual development.” *Id.* Plains wants discovery into “Kelmar’s role in the examination—not only as specified on the face of Delaware’s statutes and regulations, but also in *how the system has functioned in practice for many years, and will function with respect to Plains.*” *Id.* at 2.

Plains should not be permitted to argue to this Court that it is entitled to discovery regarding how Kelmar’s unclaimed property examinations “functioned in practice for many years, and will function with respect to Plains” when Plains represented to the Third Circuit that the very same claim for alleged constitutional injury exists “irrespective of how [Kelmar’s examination] actually plays out.” Plains’ biased adjudicator claim survived Defendants’ ripeness challenge because it was a claim that existed “irrespective” of how Kelmar’s process “actually plays out.” More importantly, the resolution of the merits of Plains’ claim does not require discovery into Kelmar’s process and can be resolved as a matter of law because Delaware’s Escheats Law and the Department of Finance Abandoned or Unclaimed Property Reporting and Examination Manual (“Escheats Regulations”) allocate all adjudicative functions in unclaimed

property examinations to the State and limit Kelmar's function to that of a non-judicial examiner. Consequently, this Court should grant the Delaware Defendants' Renewed Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and find that Plains has failed to state a claim for violation of its due process right to a neutral decision maker.¹

ARGUMENT

I. Whether Kelmar is Acting in An Adjudicative or Quasi-Judicial Capacity Is A Legal Question That Can Be Resolved on the Face of Delaware's Escheats Law

The determination of whether Kelmar exercises adjudicative authority is fundamentally a question of law. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247-48 (1980), for example, the Court looked solely to the operative regulations and the functions that the Labor Assistant Regional Administrator performed to determine if the Assistant Regional Administrator was acting in a adjudicative capacity. The 'discovery' in *Marshall* that Plains cites and which is referenced in the Supreme Court's decision, Plains' Answering Brief at 2 (citing *Marshall*, 446 U.S. at 240 [sic]), related exclusively to the issue of whether the assessment and allocation of civil penalties was so removed as to not create bias and did not go to the question of whether the Regional Administrator was acting in an adjudicative capacity. See *Jerrico, Inc. v. U.S. Dep't of Labor*, 1979 U.S. Dist. LEXIS 12548, at *6-9 (D.D.C. 1979), *rev'd sub nom. Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Similarly, in *Hortonville Joint Sch. Dist. v. Hortonville Educ. Assn.*, 426 U.S. 482, 495-96 (1976), the Supreme Court, in determining that a school board's decision to terminate striking teachers "was not an adjudicative decision," looked exclusively at

¹ David M. Gregor has left employment with the State of Delaware, and on October 3, 2017, Jennifer R. Noel was named as Delaware State Escheator. Moreover, effective October 13, 2017, Ms. Noel's name will change to Jennifer R. Hudson. Finally, Delaware Audit Manager Michelle M. Whitaker's name has changed to Michelle M. Sullivan. Pursuant to Fed. R. Civ. P. 25(d), Ms. Hudson is "automatically substituted as a party," and the case caption should be further changed to reflect Ms. Sullivan's new name. Defendants have amended the caption to reflect these changes.

the statutory powers granted to the school board. In the present case, Delaware's Escheats Law, 12 *Del. C.* §§ 1130 *et seq.*, and related Escheats Regulations, 12 *Del. Admin. C.* § 104, specifically prescribe that the State oversee the unclaimed property examination and make the final determination of an unclaimed property liability. Therefore, Plains cannot, as a matter of law, state a claim for violation of its due process right to a neutral decision maker and none of the cases cited by Plains to support its contention that Kelmar is a biased adjudicator hold to the contrary.

First, Plains cites to *Omnipoint Corp. v. Zoning Hearing Bd. Of Pine Grove Tp.*, 181 F.3d 403 (3d Cir. 1999). Plains' Answering Brief at 7. In *Omnipoint*, the Third Circuit, in determining whether to apply the 'substantial evidence standard' to an appeal of a Pennsylvania township zoning board's denial of a license application in violation of the Telecommunications Act, found that the township "zoning board has a dual role, partly legislative and partly quasi-judicial" under Pennsylvania state law and that it acted in its quasi-judicial role in denying a license application. 181 F.3d at 409 (citation omitted). Here, unlike in *Omnipoint*, there is no Delaware state law declaring that Kelmar acts in a quasi-judicial capacity. To the contrary, the Delaware's Escheats Law and Escheat Regulations circumscribes Kelmar's authority to that of gathering and analyzing facts for the purposes of preparing a report. 12 *Del. C.* § 1179(a). Moreover, and unlike in *Omnipoint*, Kelmar cannot grant or deny a license or, in the words of Plains, "make[] findings that deprive a person of property" because the State alone makes a finding of unclaimed property. Plains' Answering Brief at 7; 12 *Del. C.* § 1179(a); 12 *Del. Admin. C.* 104-2.24.1. *Omnipoint* does not support the contention that Kelmar is an adjudicator.

Second, Plains argues (i) that the Court should apply the Third Circuit's three-part inquiry "used when determining whether a job function of a public official ... is quasi-judicial in

nature” for the purposes of assessing a quasi-judicial absolute immunity defense, *Church of Universal Love & Music v. Fayette Country*, 2008 U.S. Dist. LEXIS 65564, at *49-50 (W.D. Pa. 2008) (citing *Dotzel v. Ashbridge*, 438 F.3d 320 (3d Cir. 2006)), to the question of whether Kelmar exercises adjudicative authority and (ii) that these three factors “all involve an assessment of the facts concerning the actual operation of the administrative process.” Plains’ Answering Brief at 7-8. Plains cites no authority for this proposition nor does Plains explain why a test designed to evaluate the applicability of an absolute immunity defense to actions taken by a public official should be used as the basis to argue that discovery is needed to evaluate whether a state contractor has adjudicative authority.² In any event, the three *Dotzel* quasi-judicial immunity factors ask whether the decision maker “resolves disputes on the merits,” risks being “subject to numerous damages actions,” and “adjudicate[s] disputes against a backdrop of multiple [constitutional] safeguards.” 438 F.3d at 325 (citation omitted). In the present instance, the second factor is entirely inapplicable. As for the first and third factors, Delaware’s Escheats Law and Escheats Regulations make clear that Kelmar does not “resolve disputes on the merits” and therefore Kelmar cannot “adjudicate disputes.” There is nothing in *Universal Love* or *Dotzel* that supports the contention that Kelmar exercises adjudicative authority or the position that this is a factual issue requiring discovery. Kelmar’s authority is a purely a question of law and does not involve an inquiry into the facts of a particular examination.

² Plains asserts that *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 618 (1993) is an example of a case where “private parties exercising delegated government functions [were evaluated] on the same basis as government actors.” Plains’ Answering Brief at 9. To the contrary, *Concrete Pipe* found that the trustees, like the FLSA administrators in *Marshall*, were acting “**only in an enforcement capacity**.” 508 U.S. at 619. Thus Defendants’ point stands: Defendants have not found a single due process case in which the allegedly biased decision maker at issue is a private party retained by a State to perform services pursuant to a contract.

A. Delaware's Escheats Law and Related Escheats Regulations Explicitly Reserve All Adjudicative Decisions to the State and Circumscribe Kelmar's Role to That of A Non-Judicial Examiner

Delaware's newly enacted Escheats Law and the subsequently adopted Escheats Regulations establish that Kelmar serves exclusively in a non-judicial examiner capacity when conducting an unclaimed property examination. The statute and the regulations make it clear that (i) Delaware retains oversight over unclaimed property examinations, *see e.g.* 12 Del. Admin. C. § 104-2.13.4, (ii) that Holders have the right to have an advocate during the examination process and the right to directly contact the State to address any concerns regarding the examination during the examination process, *see e.g.* 12 Del. Admin. C. § 104-2.13, 12 Del. Admin. C. § 104-2.17.9, and (iii) that the State makes all of the final decisions regarding the instigation and scope of an unclaimed property examination and, at the conclusion of the examination, the imposition of an unclaimed property liability, *see e.g.* 12 Del. Admin. C. § 104-2.12.1, 12 Del. Admin. C. § 104-2.16.3, 12 Del. Admin. C. § 104-2.19.2, 12 *Del. C.* § 1179(a).³ Finally, if a Holder is dissatisfied with the State Escheator's finding of liability, the Holder may appeal the State Escheator's finding in the Delaware Court of Chancery. 12 *Del. C.* § 1179(b).

First, under the new Escheats Law, at the conclusion of the examination and after reviewing the examiner's report, the State alone makes the determination that a Holder has not reported or has underreported the amount of unclaimed property due to the State. 12 *Del. C.* § 1179(a); 12 Del. Admin. C. 104-2.24.1. After the State makes a determination of an unclaimed property liability, the State issues a statement of findings and request for payment to the Holder. 12 *Del. C.* § 1179(a); 12 Del. Admin. C. § 104-2.24.1. A Holder may then appeal the State

³ The Delaware Defendants refer the Court to Section I.B.1 of their Opening Memorandum in Support of Their Renewed Motion Dismiss for additional discussion regarding the Escheats Law provisions related to the powers of the State in unclaimed property examinations. D.I. 60.

Escheator's findings to the Court of Chancery. 12 *Del. C.* § 1179(b). Delaware's Escheats Law could not be more clear: it is the State and not Kelmar that makes a determination of unclaimed property liability, it is the State and not Kelmar that imposes an unclaimed property liability on a Holder, and Delaware courts have jurisdiction to review the State's determination.

Second, and perhaps more importantly, under the State's new Escheats Regulations, which were published in final form on October 1, 2017 and which became final only on October 11, 2017, the State sets out a procedure for unclaimed property examinations which demonstrates that Kelmar is acting only in a non-judicial examiner capacity and that the State retains all quasi-judicial authority. The regulations provide as follows:

- The State's Abandoned Property Audit Manager – not Kelmar – possesses the authority to begin an examination, 12 *Del. Admin. C.* § 104-2.12.1, and no third-party auditor can commence an examination without approval from the Department of Finance. 12 *Del. Admin. C.* § 104-2.12.2.
- The State Escheator has the sole authority to approve the form of a confidentiality agreement between a third-party Auditor and a Holder. 12 *Del. Admin. C.* § 104-2.11.1.
- The State Escheator – not Kelmar – possesses the authority to resolve an examination via negotiation and settlement. 12 *Del. Admin. C.* § 104-2.11.2.
- The State “shall conduct periodic reviews of the Auditors’ conduct, processes, and procedures to ensure that the Auditors are complying with security protocols, record retention and destruction requirements, and all applicable statutes and regulations.” 12 *Del. Admin. C.* § 104-2.13.4.
- The State Audit Manager will help facilitate completion of the examination if the length of examination exceeds 24 months. 12 *Del. Admin. C.* § 104-2.15.4.
- The State determines the scope of which related entities and subsidiaries are to be included in the examination. 12 *Del. Admin. C.* § 104-2.16.3.
- The State approves the form of outreach letters mailed during the course of the examination. 12 *Del. Admin. C.* § 104-2.17.7.
- The State decides whether to bifurcate or divide the examination by property type and year. 12 *Del. Admin. C.* § 104-2.17.8.
- The Delaware Audit Manager has sole authority to discuss a “Base Period” with the Holder should estimation prove necessary. In the absence of agreement, “the State Escheator [and not the third-party auditor] shall possess the sole authority to make a

reasonable determination for the Base Period in order to prepare an estimate.” 12 Del. Admin. C. § 104-2.18.2.1.

- The State Escheator has the sole discretion to determine the aging criteria for outstanding and voided checks. 12 Del. Admin. C. § 104-2.18.6.
- All sampling, projection, and estimation techniques used by the Auditor must “be in a method **approved by the State prior to use.**” 12 Del. Admin. C. § 104-2.19.2 (emphasis added).
- The State shall permit the Holder to comment on or suggest an alternative [estimation] technique to the State. *Id.*
- If the Holder does not have 7-8 years of complete searchable records, the State and the Holder may discuss the circumstances and use an alternative data set with fewer years. 12 Del. Admin. C. § 104-2.20.1.
- The Holder “has the right to contact the State directly to address issues arising from or related to the examination, including the right to report alleged misconduct, unethical behavior, or lack of professionalism on the part of the Auditor.” 12 Del. Admin. C. § 104-2.17.9.

As the above makes clear, the statutory and regulatory framework that empowers the State to use contract unclaimed property examiners also explicitly limits the role of the contract examiner – in this instance Kelmar – to that of a non-judicial examiner that gathers and analyzes facts in order to prepare a report of the examination. The State retains oversight throughout the unclaimed property examination process, including addressing any Holder concerns raised to the State, and, after review of the contract examiner’s report, makes the final decision regarding whether unreported unclaimed property exists and, if it exists, the amount of the unclaimed property owed to the State.⁴ Kelmar cannot, as a matter of law, act in a quasi-judicial capacity in

⁴ Plains erroneously contends that it is entitled to discovery to determine if the State Escheator “rubber-stamps” Kelmar’s report because the statute and regulations do not provide a “process” for the State Escheator to make a finding of liability after Kelmar completes its examination. Plains’ Answering Brief at 12. First, Plains’ “rubber-stamping” contention ignores the State’s involvement in, and oversight over, Kelmar’s examination process. Second, Delaware’s Escheats Law explicitly provides that the State Escheator must “examine” Kelmar’s report before the State Escheator makes a finding of unclaimed property liability. 12 Del. C. § 1179(a). The State is certainly not required to provide a “process” for its internal review of a report prepared at its direction and with its involvement that the State then uses when making a finding of unclaimed property liability.

an unclaimed property audit as Delaware's Escheats Law and related Escheats Regulations stand today. Thus, absent presuming that the Delaware Defendants and Kelmar will violate the law, which this Court cannot do, *see e.g. Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (holding "[w]ithout a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline'" (citation omitted)), there is no plausible inference that Defendants have inflicted a legally cognizable harm on Plains by the use of Kelmar as an examiner, given Delaware's current unclaimed property law and regulations. This Court should dismiss Plains' claim that Delaware's use of Kelmar unconstitutionally denied Plains of its due process right to a neutral decision maker as a matter of law under Fed. R. Civ. P. 12(b)(6).

B. Plains Has Not and Cannot As A Matter of Law Allege Any Quasi-Judicial Decisions Taken By Kelmar

Plains' First Amended Complaint ("F.A.C.") alleges four quasi-judicial determinations that Kelmar supposedly makes during the course of an unclaimed property examination to support its due process claim. *See* F.A.C. ¶ 113⁵. Contrary to Plains' assertions, Kelmar cannot, consistent with Delaware law, make any of the determinations Plains alleges. First, while Kelmar prepares the initial requests for information in an unclaimed property examination, only the State Escheator has the power to compel which documents *must* be produced – not Kelmar.

⁵ Plains' attempt in its Answering Brief to argue that it alleged actions that Kelmar takes that "are sufficiently adjudicative to trigger due process" at ¶ 58 and ¶ 66 of its F.A.C is unavailing. Plains' Answering Brief at 4. At ¶ 58, Plains details information Kelmar sought from Plains' affiliates and subsidiaries in an initial information request, but under the new Escheats Regulations the State – not Kelmar – determines the scope of which related entities and subsidiaries are to be included in the examination. 12 Del. Admin. C. § 104-2.16.3. With regard to ¶ 66, it contains a litany of actions Kelmar takes which fall into two categories: (1) actions which are reserved to the exclusive power of the State under the new Escheats Regulations (*e.g.* 12 Del. Admin. C. § 104-2.16.3 (which entities to audit), 12 Del. Admin. C. § 104-2.20.1 (the "insufficiency" of records), 12 Del. Admin. C. § 104-2.19.2 (approval of estimation methodology)) or (2) non-adjudicatory actions any examiner must take (*e.g.* Kelmar leads the opening examination conference, makes document requests, and prepares a report).

12 *Del. C.* § 1171 . Second, which of Plains’ subsidiaries and related entities will be audited is a determination made only by the State – not Kelmar. 12 *Del. Admin. C.* § 104-2.16.3. Third, the “insufficiency” of Holder’s older records and alternatives are discussed between the State and Holder. 12 *Del. Admin. C.* § 104-2.20.1. Fourth, Kelmar’s method of estimation must be approved by the State prior to its use in an examination, the State determines the base period to be used in the estimation, and the Holder may discuss alternate estimation techniques with the State. 12 *Del. Admin. C.* § 104-2.19.2; 12 *Del. Admin. C.* § 104-2.18.2.1.

To be clear, Delaware Defendants are not making a factual argument regarding what Kelmar does or does not do – the argument is a legal argument: Kelmar cannot make the allegedly adjudicative decisions Plains cites in its F.A.C as a matter of law under the plain terms of Delaware’s new Escheats Law and Escheats Regulations. Thus, Plains cannot succeed on its pending due process claim as a matter of law. Additionally, allowing Plains to amend its Complaint will not cure the defect in Plains’ claim since Delaware’s Escheats Law and related Escheats Regulations prevent by their very terms the contract examiner from acting in a quasi-judicial capacity.⁶

II. Even If This Court Were To Consider How Kelmar “Actually” Functions In An Examination, Discovery Would Be Futile

Plains’ contention that it should be allowed discovery on “how [Kelmar’s examination] has functioned in practice for many years, and will function with respect to Plains,” Plains’ Answering Brief at 2, should be denied for two additional reasons. First, for the reasons explained above, whatever evidence may be available about past Kelmar examination practice is no longer relevant to unclaimed property examinations that will go forward under the new

⁶ Even if Delaware’s Escheats Law did permit Kelmar to make the decisions alleged by Plains, which it clearly does not, the decisions alleged by Plains are not judicial or quasi-judicial decisions but instead investigatory. *See* Defendants’ Opening Memorandum in Support of Their Renewed Motion to Dismiss Section I.B.2.

Delaware Escheats Law and Escheats Regulations. The new Escheats Law and Escheats Regulations significantly curtail Kelmar's discretion in unclaimed property examinations and explicitly retain all arguably adjudicatory authority in those examinations to the State. Thus, any evidence regarding actions Kelmar is alleged to have taken under a prior version of the Escheats Law and its related regulations is entirely inapplicable to Plains' claim given the change in the law.

Second, there is no relevant discovery to be obtained. As of the filing of this brief, no unclaimed property examinations have proceeded under the new Escheats Law and Escheats Regulations. In short, there are no facts regarding how Kelmar "function[s] in practice ... and will function with respect to Plains" under the new Escheats Law and Escheats Regulations that will govern the unclaimed property examination of Plains. Discovery in this matter is futile. Discovery cannot be sought about actions that have yet to happen. Therefore, the only possible information that this Court could have before it with respect to Plains' claim is the new Escheats Law and the new Escheats Regulations, neither of which support Plains' claim. Plains has thus failed to state an as-applied procedural due process claim based on the allegation that it "was required to submit a dispute to a self-interested party" and the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).⁷

CONCLUSION

For the foregoing reasons, Defendants' Renewed Motion to Dismiss Plaintiff's As-Applied Due Process Claim should be granted.

⁷ If Plains were to succeed in showing that Kelmar is acting in a quasi-judicial capacity, any suit would be limited to seeking injunctive relief, since any person acting in a judicial or quasi-judicial capacity is absolutely immune to damages or attorney fees liability under § 1983. *See Pierson v. Ray*, 386 U.S. 547 (1967).

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