IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PLAINS ALL AMERICAN PIPELINE, L.P., Plaintiff, vs. THOMAS COOK, in his capacity as the Secretary of Finance for the State of Delaware; DAVID M. GREGOR, in his capacity as the State Escheator of the State of Delaware; MICHELLE M. WHITAKER, in her capacity as the Audit Manager for the State of Delaware and KELMAR ASSOCIATES, LLC, Defendants.	Civil Action No. 15-cv-00468-RGA

PLAINTIFF PLAINS ALL AMERICAN PIPELINE L.P.'S RESPONSE TO DEFENDANT KELMAR ASSOCIATES, LLC'S MOTION TO DISMISS

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NATURE AND STAGE OF PROCEEDINGS

Plaintiff Plains All American Pipeline, L.P. ("Plains") files this Response to the Motion to Dismiss Plains' Amended Complaint for Declaratory and Injunctive Relief (the "F.A.C." or "Complaint") [D.I. 21] filed by Defendant Kelmar Associates, LLC [D.I. 25] ("Kelmar," and together with Defendants Thomas Cook, David M. Gregor, and Michelle M. Whitaker, "Defendants"), and the Memorandum of Points and Authorities in Support of Kelmar's Motion ("K. Br.") [D.I. 26].

SUMMARY OF ARGUMENT

In addition to asserting Kelmar-specific arguments, Kelmar's motion to dismiss incorporates the motion to dismiss filed by Defendants Thomas Cook, David M. Gregor, and Michelle M. Whitaker (collectively, "Delaware"). For the reasons stated in Plains' response to that motion, hereby incorporated in full by reference, those arguments are without merit. Moreover, Kelmar's motion presents no valid independent basis for dismissing either Plains' direct claims against Kelmar, set forth in Counts I to VIII and X of the Complaint, or the conspiracy claim set forth in Count IX.

Plains has stated a claim that Kelmar has caused it both actual and imminent injury that is redressable by the relief sought in its Complaint. Kelmar is acting under color of Delaware law to deprive Plains of its constitutional rights. Kelmar and Delaware have issued an unconstitutional document request to Plains and will penalize Plains under Delaware law if it does not comply. A judgment against Kelmar would prevent Kelmar from subjecting Plains to an unconstitutional examination or from using the fruits of such an examination in audits it is conducting on behalf of other states. An injunction would also prevent Kelmar from utilizing its unconstitutional internal procedures and from conspiring with the states to conduct its unconstitutional multi-state audit. Thus, Plains' claims against Kelmar are justiciable.

Kelmar does not articulate any argument that Plains has not stated a claim of a conspiracy between Delaware and Kelmar. Plains has amply alleged that the Delaware audit constitutes such a conspiracy, as set forth in its response to Delaware's motion to dismiss. Instead, Kelmar contends that Plains has not stated a claim of a conspiracy between Kelmar and **other states**. *See* K. Br. at 6. But Plains has alleged extensive facts constituting a "hub-and-spoke"-type conspiracy involving Kelmar, Delaware, and numerous other states, with Kelmar and Delaware at the hub. Kelmar admits that it has been retained by Delaware and other states to conduct a multi-state audit. Plains alleges that this multi-state audit violates its Fourth and Fourteenth rights, and seeks its injunction. Plains alleges that Kelmar acted collectively with Delaware and other states in selecting Plains for the audit in a manner that violated Plains' right to equal protection of the laws. Plains has also alleged an actual deprivation of its rights, in that it has already been selected for and is currently being subjected to this illegal multi-state audit as a result of Kelmar's conspiracy with Delaware and other states. This is more than sufficient to state a claim that the multi-state audit constitutes a conspiracy with the states to violate Plains' constitutional rights.

Finally, the states are not necessary or indispensable parties to Plains' conspiracy claim or request for an injunction against Kelmar, and Kelmar has not met its burden to establish that Federal Rule of Civil Procedure 19 requires joinder of the states. Plains is not seeking to enjoin those states from carrying out audits pursuant to their own laws, or even from retaining Kelmar to conduct those audits. Rather, Plains seeks to enjoin Kelmar from acting in a quasi-judicial capacity to oversee a boundless and unconstitutional multi-state audit.

COUNTERSTATEMENT OF FACTS

Plains is seeking a declaration that Kelmar, an auditor, agent, and/or co-conspirator engaged by the State of Delaware and a number of other states, has subjected, and continues to

subject, Plains to a multi-state unclaimed property audit that, among other things, infringes on Plains' right under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures; deprives Plains of its substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution; and has violated Plains' Fourteenth Amendment right to equal protection of the laws. Plains seeks to enjoin Kelmar and Delaware from further violating its constitutional rights.

I. The Relationship Between Kelmar and Delaware

Over the past five years, the State of Delaware and Kelmar, which is retained by Delaware on a contingent fee, have transformed Delaware's Abandoned and Unclaimed Property Law ("DUPL") from a statute originally designed to protect property holders by transferring actual unclaimed property to the State to be held in trust for the benefit of the actual owner, to a statute that merely provides a source of revenue for the State's General Fund. F.A.C. ¶ 14. Rather than focus on specific, identified property that has not been claimed by its actual owner, Defendants instead require large companies, like Plains, to submit to wide-ranging, lengthy audits going back to 1981. *Id.*

In these audits, Kelmar first determines the size of the target company to determine how much revenue it may be able to collect, and second, goes back almost 35 years in time to try to confiscate what it can because it is paid a contingent fee based on the size of the confiscation. *Id*. ¶ 14. The more liability that Kelmar is able to impose upon a target company, the more it gets paid.

Delaware and Kelmar have extensive ties. In June 2014, Delaware had 375 pending unclaimed property audits; Kelmar was handling 300 of those audits. *Id*. ¶ 55. Moreover, the last two Delaware State Escheators are now employed by Kelmar, and Delaware's last State Escheator, Mark Udinski, is now a managing director at Kelmar. *Id*. ¶ 55.

Delaware and Kelmar have each benefited handsomely from their relationship. "Unclaimed property" is now the State's third largest source of revenue, bringing in approximately $475 million in the last fiscal year. *Id*. ¶ 48. Since 2013, the Delaware Department of Finance has paid Kelmar in excess of $100 million. *Id*. ¶ 44. Of all the revenue that Kelmar collects in Delaware's general ledger audits, 80-85% comes from so-called "estimation" of companies' liability, rather than actual unclaimed property. *Id*. ¶¶ 49, 116.

Kelmar has developed its own audit procedures, none of which have been promulgated by any governmental authority. *Id*. ¶ 115. Kelmar contends that its estimation procedures and methods are "proprietary." *Id*.

II. The Delaware Audit

In a letter dated October 22, 2014, Defendant Whitaker notified Plains that Delaware, through Kelmar, would be conducting an examination of Plains' "books and records," and the "books and records" of Plains' "Subsidiaries and Related Entities." The letter states that Kelmar will meet with Plains and that Plains should have documents ready for Kelmar to inspect at that meeting. *Id*. ¶ 53.

On or about November 21, 2015, Kelmar sent Plains a copy of Kelmar's Exam Orientation Process Guide ("Exam Guide").[1] This Exam Guide has not been adopted as a regulation or statute in Delaware or any other jurisdiction. In the Exam Guide, Kelmar purports to "broadly construe[]" the term "related entity" for purposes of its audit demands. *Id*. ¶ 56.

On November 24, 2014, Kelmar sent Plains a copy of its Confidentiality & Non-Disclosure Agreement ("NDA"), which it insisted that Plains sign. F.A.C. ¶¶ 57, 70. The NDA

[1] Plains objects to Kelmar's suggestion that the Court may take judicial notice of the contents of its Exam Guide. K. Br. at 2. The Exam Guide is a self-serving document created by Kelmar. While the Court may take judicial notice that such a document exists, it is plainly an inappropriate use of judicial notice to credit the truth of adjudicative facts stated in documents created by a party. *See* FED. R. EVID. 201(b); *Rivera v. Philip Morris, Inc*., 395 F.3d 1142, 1151 (9th Cir. 2010).

gives Kelmar express permission to share Plains' confidential information with other states that join the audit. *Id.* Plains objected to Kelmar's use of information obtained pursuant to a Delaware audit in audits conducted on behalf of other states. *Id.* ¶ 61. Delaware rejected Plains' objection. *Id.* ¶¶ 62, 71. Plains also requested that Delaware sign a confidentiality agreement, but Delaware refused to do so, erroneously contending that sufficient protections for Plains' data exist under Delaware law. *Id.* ¶ 70. In reality, Delaware law only protects (1) the amount of unclaimed property and (2) "the terms of or supporting documentation related to any annual filing, unclaimed property voluntary self-disclosure agreement, or settlement agreement resulting from the reporting of any unclaimed property pursuant to this chapter." DEL. CODE tit. 12, § 1141(b). The statute does not, for example, protect Plains' tax returns or bank records, which are incontrovertibly confidential.

On November 25, 2014, Kelmar sent Plains its initial document requests. The requests reveal that Kelmar's objective in the audit is to first determine which of Plains' subsidiaries and affiliates will be the most lucrative audit targets. In its Exam Guide, Kelmar refers to this phase of the audit as "Entity and Property Type Scoping." Notably, none of the information that Kelmar is requesting has any particular nexus to the State of Delaware. Among other things, Kelmar asks for Federal tax returns, tax detail for all states, income statements, balance sheets, and information regarding Plains' corporate organization. *Id.* ¶ 58. The only valid purpose of a Delaware audit is to determine compliance with Delaware law, not the law of other states. Yet much of the information Kelmar has already sought from Plains is completely irrelevant to a Delaware audit. *Id.* ¶ 45.

On December 23, 2014, Plains sent Kelmar an email asking to evaluate Kelmar's data security procedures and controls, so that Plains could better evaluate Kelmar's proposed NDA.

Id. ¶ 59. Kelmar refused Plains' request, contending that none of its "client" states require accommodation of Plains' concerns—"*While we appreciate that Plains All American Pipeline may have concerns about data security, Kelmar will not provide the reports requested nor will Kelmar be subjected to an audit by Plains All American Pipeline. Our client states simply do not require that Kelmar undergo such a review where the audit is not a voluntary engagement and Kelmar is not a vendor of your choosing*."

III. The Multi-State Audit

After Delaware initiated its audit, between October 31, 2014 and January 31, 2015, Kelmar solicited at least an additional twelve states to join the audit: Alaska, Minnesota, Idaho, Wisconsin, New Hampshire, California, Connecticut, Arizona, Massachusetts, Pennsylvania, South Dakota and Illinois. Each of these states sent Plains a letter notifying it that Kelmar would be conducting the audit as the state's agent. *Id*. ¶ 55. Kelmar will receive a contingency fee for monies it collects from Plains on behalf of these other states. *Id*. ¶ 46.

It is clear that the states auditing Plains have already given Kelmar complete control and do not intend to have any involvement in the audit. For example, Plains sent letters to Connecticut, Wisconsin, and South Dakota objecting to unconstitutional aspects of their audits and later received nearly identical responses from each of the three states. *Id*. ¶ 67. The obvious inference is that Kelmar wrote these letters.

The multi-state nature of the audit presents constitutional problems that would not arise in a single-state audit. For example, some of the states that purport to join Kelmar's audit have such insufficient contacts with Plains that their exercise of personal jurisdiction over Plains would be unconstitutional. *Id*. ¶ 67. Kelmar has no constitutional authority to share documents obtained pursuant to a Delaware audit with states that do not have jurisdiction over Plains. The multi-state audit also allows Kelmar to circumvent procedural protections that may be afforded

in other states by utilizing information obtained pursuant to the Delaware audit. In other words, Kelmar would not be able to obtain some of the material it has requested under the procedural rules of the other states. Delaware gives Kelmar wide latitude, allowing Kelmar to direct the audit as it is progressing; lead the opening conference; make the document requests; do the preliminary "scoping"; and decide what entities should be audited. *Id*. ¶ 66. No Delaware statute or regulation acts as a check or control on this self-interested private entity's actions as an agent of Delaware, and there is no procedure under Delaware law or regulations to obtain any type of review of any of Kelmar's actions, including Kelmar's document requests. *Id*., *see also id*. ¶ 47. Procedural protections afforded by laws of other states are meaningless when Kelmar can get all the information it wants through Delaware's audit and use it in audits conducted on behalf of other states. This unreasonable multi-state search and seizure infringes on Plains' rights under the Fourth Amendment and deprives Plains of its substantive and procedural due process rights under the Fourteenth Amendment.

There is also a constitutional problem with how Plains was selected for an audit. Delaware and Kelmar look for revenue-rich targets for their audits, not because there is any particular reason to suspect that such companies hold unclaimed property, but because revenues drive Kelmar's contingent fee recovery and Delaware's "estimated" unclaimed property assessments. *Id*. ¶¶ 14, 23, 44, 48-49, 51, 58, 68-69, 148-150. Kelmar has recruited multiple states to join in its audit of Plains in the absence of any basis to suspect Plains of wrongdoing or neutral basis for Plains' selection as a target. *Id*. ¶¶ 24, 68. Kelmar's actions in recruiting states to band together (*i.e.*, conspire) to select Plains because it is a potentially lucrative audit victim have violated Plains' right to equal protection of the laws.[2] *Id*. ¶¶ 68-69, 150, 153.

[2] Kelmar alleges that it does not choose which companies to examine, although it admits that it provides "client states with potential examination subjects." K. Br. at 2. Kelmar also contends that Delaware choses audit targets

Although Kelmar obediently does Delaware's bidding, it is not acting solely in Delaware's interest. It is motivated by the contingency fees it reaps when audit targets pay unclaimed property assessments. *Id.* ¶ 46. Furthermore, in serving "client" states other than Delaware in a single "multi-state" audit, Kelmar is acting outside the scope of its agency with Delaware. *Id.* ¶¶ 45, 67, 154.

ARGUMENT

I. Plains' Claims against Kelmar are Ripe, and Plains Has Standing

Kelmar contends that a claim based on a "mere decision to initiate an audit" is not ripe, for the reasons set forth in Delaware's Motion to Dismiss. For the same reasons set forth in Plains' response to that motion, Plains' claims are ripe.

Kelmar also contends that Plains does not have standing to pursue claims against Kelmar. K. Br. at 7-9. Kelmar's argument is based entirely on one case, *Young America Corp. v. Affiliated Computer Services (ACS), Inc.*, 424 F.3d 840 (8th Cir. 2005). In that case, the subject of a multistate unclaimed property audit sued just the private auditing firm, not any of the states for which the auditing firm was an agent. *Id.* at 842. The states sent the plaintiff letters advising that they had each retained the defendant to conduct the audit. *Id.* Nothing further had occurred. The court found that the plaintiff did not have standing to sue the auditor because (1) there was no threat of enforcement of the audit letters, and the auditing firm specifically had not attempted to enforce the audit demand; (2) the auditing firm had not issued a subpoena to the plaintiff; (3) the plaintiff's alleged injuries would not be redressed because the states would not be bound by the judgment. *Id.* at 844-45. The holding in *Young* does not apply here.

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based on compliance history. *Id.* at 3. The means by which Plains and other companies were selected as audit targets, and Kelmar's involvement therein, present questions of fact inappropriate for resolution on a Rule 12(b)(6) motion to dismiss.

First, as explained in Plains' response to Delaware's Motion to Dismiss, Plains has sufficiently alleged injury in fact. Unlike the case in *Young America*, the situation in Delaware has progressed beyond a letter notifying Plains of an examination. Kelmar—as Delaware's agent—has actually issued a document request, and the constitutionality of this request is at the heart of many of Plains' claims. F.A.C. ¶¶ 19, 58, 64, 75, 81, 86-91. If Plains refuses to cooperate with whatever unreasonable demands Kelmar makes on behalf of Delaware, Plains will be punished, both by Kelmar and Delaware, through the use of estimation. *Id*. ¶¶ 19, 73, 76. Delaware has attempted to escape responsibility by alleging that it has not issued a subpoena to Plains, and Kelmar is attempting to escape responsibility by alleging that it cannot enforce any request or subpoena that it issues. But these are not two independent actions: they are the two halves of a vise, and Plains is in the middle. Kelmar's actions in this audit process injure Plains just as much as Delaware's actions, and there is a direct link between Kelmar's actions and Plains' injury. This is not merely a theoretical problem, as was the case in *Young*.

Second, Plains has alleged that its injury is fairly traceable to Kelmar. Specifically, Kelmar is Delaware's agent with respect to the Delaware audit. *Id*. ¶ 14. Delaware has delegated responsibility to Kelmar for demanding and examining documents, selecting which Plains entities to audit, determining whether Plains' records are sufficient, and determining whether and how to apply estimation. *Id*. ¶ 113. Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. Kelmar is acting under the color of Delaware law to directly deprive Plains of its constitutional rights. Kelmar cannot avoid liability by putting the

blame on Delaware: Kelmar is actively involved in the deprivation of rights. F.A.C. ¶ 66; *see also* ¶¶ 67-69, 81, 83. Even where a government agency has ultimate responsibility, a government contractor acting under color of state law—carrying out duties delegated by the government agency—can be liable for its own actions in violating a citizen's constitutional rights. *See, e.g., Natale v. Camden County Correctional Facility*, 318 F.3d 575, 580-81 (3d Cir. 2003); *Staples v. Virginia Dep't of Corrections*, 904 F. Supp. 487, 490-91 (E.D. Va. 1995).

Third, Plains' injury is redressable through an injunction against Kelmar. Plains does not contend that states other than Delaware would be bound by a judgment in this case. But a judgment against Kelmar would address the Kelmar-specific injuries alleged by Plains. A judgment that the Delaware procedures were unconstitutional would, of course, prevent Kelmar from pursuing its unlawful examination or using the fruits of such an examination in audits it conducts on behalf of other states. Plains has also sought a declaration that the use of Kelmar's own audit procedures violates Plains' constitutional rights, (F.A.C. ¶ 56, Prayer for Relief ¶ 1), and an injunction against Kelmar's use of those procedures would remedy Plains' injury to the extent that some constitutional version of the examination proceeds in Delaware. In addition, Kelmar and Delaware have different—but equally insufficient—protections for confidential information. *Id.* ¶¶ 57, 59. To protect its property interest in its confidential business information, Plains needs injunctive relief against both the Delaware Defendants and Kelmar.

Further, Plains has sought an injunction to prohibit Kelmar from conspiring with other states to violate Plains' constitutional rights. *Id.* ¶¶ 153, 155. Part of Plains' complaint is that Kelmar is using discriminatory criteria to actively solicit states who otherwise had no interest in examining Plains to not only conduct an audit but to conduct it using unconstitutional procedures

that violate Plains' rights.[3] F.A.C. ¶¶ 56, 150. This injury is clearly redressable by an injunction against Kelmar, the party who is conducting the multi-state audit. Kelmar argues that the states might then engage another auditor to conduct a multi-state audit (K. Br. at 8), but cites to no authority suggesting that the fact that another person may later engage in a separate constitutional violation somehow deprives a plaintiff of standing to complain that a party has violated its rights. Enjoining Kelmar from its wrongful and unconstitutional activity would prevent Kelmar from engaging in future harm to Plains. The requirements for standing are satisfied here.

II. Plains Has Stated a Claim for Conspiracy.

Kelmar next argues that Plains has not adequately alleged that its selection for the multi-state examination caused an actual deprivation of its rights, or resulted from a conspiratorial agreement in violation of § 1983. K. Br. at 9-13. Neither argument is meritorious.

Plains alleges a "hub and spoke"-type conspiracy, with Kelmar and Delaware at the hub and at least twelve other states joining the conspiracy as the spokes. F.A.C. ¶¶ 55, 67. Plains has amply alleged facts supporting an actual deprivation of its constitutional rights by both Delaware and Kelmar. Plains alleges that Delaware and Kelmar look for revenue-rich audit targets (*id*. ¶ 148), and that Defendants unconstitutionally selected Plains on this basis. *Id*. ¶¶ 24, 68-69, 82, 85, 94, 148-150, 153. Moreover, Plains has stated actual deprivations of its Fourth Amendment and due process rights arising out of the pending Delaware audit, in that Plains is currently being subjected to an unconstitutional search and seizure that is being conducted by a quasi-judicial private entity without any procedural protections or statutory standards. *Id*. ¶¶ 46-47, 66, 78-93, 98. 113-116; *see* Plains' Response to Delaware's Motion to Dismiss, Part IX.

[3] Plains has voluntarily submitted to unclaimed property audits in the past, conducted by other states, that did not involve Kelmar, and Plains has no objection to constitutional audits of its unclaimed property compliance. Plains believes that Kelmar is the root cause of the unconstitutional practices that have sprouted in recent years.

Instead of focusing on the allegations of an actual deprivation caused by the joint conduct of Kelmar and Delaware, Kelmar contends that Plains has failed to state a claim of "an actual deprivation of Plains' rights caused by **[the] other States**." *See* K. Br. at 10-11 (emphasis added). Kelmar misstates the law with its argument that, in order to state a claim that the states conspired, Plains needs to allege that each state directly caused an actual deprivation of its rights. Not one case cited by Kelmar holds that **each** of the parties to a conspiratorial agreement has to individually cause an actual deprivation of rights. It is enough that one party caused a deprivation of rights and other parties agreed to join the conspiracy. *See, e.g., Singer v. Wadman*, 595 S. Supp. 188, 271-72 (D. Utah 1982) ("Under a conspiracy theory, [a conspirator's] participation need not extend to each act leading to a deprivation of a right, but it must at least extend to the conspiracy itself, which in turn, must cause the deprivation."); *cf. Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978) (holding that a conspiracy can be the "cause" of a deprivation of rights). Causation is satisfied under § 1983 where the defendant could reasonably foresee the consequences of its actions. *See Warner v. Orange County Dep't. of Probation*, 115 F.3d 1068, 1071 (2d Cir. 1996).

Plains has adequately alleged the states' agreement to join a conspiracy that has resulted and continues to result in actual deprivation of Plains' rights. Plains alleges that Delaware and Kelmar caused actual deprivations of its rights in, among other things, selecting Plains for an audit because Plains is a potentially lucrative victim, then recruiting states to enter agreements to join in this expedition, which violated Plains' Fourth Amendment rights and right to equal protection of the laws. F.A.C. ¶¶ 24, 55, 68-69, 82, 85, 94, 148-150, 153.[4] Plains alleges the

[4] Kelmar argues that the multi-state audit does not violate the Equal Protection Clause. K. Br. at 11-12. Kelmar misrepresents Plains' Equal Protection claim, which is not based on the **existence** of the multi-state audit but on the **discriminatory means** by which Plains was selected for this audit. F.A.C. ¶¶ 148-150. As discussed in Plains' Response to Delaware's Motion to Dismiss, Part VIII, Defendants offer no justification for their alleged

states **agreed** to target Plains, and have "band[ed] together" and ceded control to Kelmar. *See id.* ¶¶ 55, 67, 69. In addition, as described in the Counterstatement of Facts, Plains has stated claims of actual deprivation of its rights arising out of the multi-state nature of the audit. Kelmar and Delaware have each insisted that Plains sign an NDA that would allow Kelmar to share information with all of the conspirator states, which supports an inference that Defendants have already conspired to give this information to the states. *Id.* ¶ 59, 70. Some of the states who have joined Kelmar's audit have such insufficient contacts with Plains that their exercise of personal jurisdiction over Plains is unconstitutional. *Id.* ¶ 67. Furthermore, the multi-state audit is providing a means for Kelmar and the states to circumvent procedural protections that may be afforded in other states by utilizing information unconstitutionally obtained pursuant to the Delaware audit. *See id.* ¶¶ 47, 66-67. In numerous respects, this unreasonable multi-state search and seizure is infringing on Plains' rights under the Fourth Amendment to the United States Constitution and depriving Plains of its substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution. *Id.* ¶¶ 47, 57, 60, 66-68, 70, 92, 98, 101, 103, 110, 112, 114-115, 153. These facts are more than sufficient to state a claim that the conspiracy among Kelmar, Delaware, and the states that resulted in Plains' selection for a multi-state audit has caused in an actual deprivation of Plains' constitutional rights.

Relying on *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 178-79 (3d Cir. 2010), Kelmar next argues that Plains has failed to state a § 1983 conspiracy

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discriminatory focus on Plains. Instead, Kelmar contends that the states selected Plains based on "administrative efficiency" or to simply to exercise their power of escheat. K. Br. at 12. However, the issue of why Plains was targeted is one of fact.

To the extent Kelmar is attempting to argue that the multi-state audit does not violate the Due Process Clause because "administrative efficiency" in taking custody of unclaimed property is a legitimate interest (K. Br. at 12), such an argument must fail on a motion to dismiss because there are serious questions of fact about the constitutionality of the states using an unreviewable multi-state audit to circumvent procedural protections and jurisdictional requirements, as described in the Counterstatement of Facts. Moreover, Kelmar does not even mention Plains' claim of a conspiracy to violate the Fourth Amendment, which is not subject to a rational basis review.

claim because Plains supposedly failed to allege an agreement with sufficient particularity. *See* K. Br. at 12. First, as set forth in Plains' Response to Delaware's Motion to Dismiss, Plains has amply alleged a conspiratorial agreement between Kelmar and Delaware. Moreover, Plains has alleged a conspiracy between Kelmar, Delaware, and the other states in far more detailed terms than those articulated by the plaintiffs in *Great Western*. *See* 615 F.3d at 178-79 (finding that the plaintiff had not alleged any factual contentions regarding the defendants). Specifically, Plains has alleged both a time period for the conspiracy and the members of the conspiracy: that "between October 31, 2014 and January 31, 2015, Kelmar solicited an additional twelve states to join Delaware's audit of Plains: Alaska, Minnesota, Idaho, Wisconsin, New Hampshire, California, Connecticut, Arizona, Massachusetts, Pennsylvania, South Dakota, and Illinois." F.A.C. ¶ 55. Plains alleges the goal of the conspiracy: that Kelmar actively solicited these states, which it refers to as "clients" and which otherwise had no interest in examining Plains, to not only conduct an audit, but to conduct it using unconstitutional selection criterion and procedures in violation of Plains' rights, including Plains' Fourth and Fourteenth Amendment rights. *Id.* ¶¶ 24, 45, 47, 57, 60, 66-70, 92, 98, 101, 103, 110, 112, 114-115, 150, 153. Plains has also alleged that Kelmar is acting outside of its scope as agent for each state in collectively "representing" twelve states, and that Kelmar receives contingent fees for the revenues it collects. *Id.* ¶¶ 45, 46, 67, 114, 153, 154. And Plains has alleged facts suggesting that the other states involved in the audit have already abdicated control to Kelmar and do not intend to have any involvement in the audit. *Id.* ¶ 67; *see also id.* ¶ 59 (quoting letter in which Kelmar refused to discuss its data protection measures with Kelmar because the states do not require it to do so).

Courts have emphasized that a § 1983 conspiracy can be proved by circumstantial evidence because "conspirators rarely formulate their plans in ways susceptible of proof by

direct evidence." *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979); *accord Bacon v. U.S*, 127 F.2d 985, 986 (10th Cir. 1942). Here, **there is direct evidence**: Kelmar's contracts with at least twelve states, including Delaware, to perform an unconstitutional multi-state audit of Plains. Kelmar freely admits to the existence of those contracts in its own filings. K. Br. at 1 ("Kelmar…is a private auditing firm that has been retained by Delaware and other States…."); *see also id*. at 12, 14. As described above, Plains has alleged that the multi-state audit, and the means by which Plains was targeted for this audit, are unconstitutional in several respects. The unconstitutional consequences of the multi-state audit are foreseeable. Plains has thus pleaded more than sufficient factual detail to allege a conspiratorial agreement among Kelmar, Delaware, and the other states. *See Grider*, 618 F.3d at 1260.

III. Plains' Claims Relating to the Multi-State Audit Should Not Be Dismissed

Kelmar's request that the Court dismiss Plains' claims relating to the multi-state audit for failure to join "necessary parties" pursuant to Federal Rule of Civil Procedure 12(b)(7) (K. Br. at 13-14) fundamentally misinterprets Federal Rule of Civil Procedure 19. It also unintentionally highlights the constitutional deficiencies in Kelmar's multi-state audit.

Rule 12(b)(7) mandates dismissal where persons required to be joined pursuant to Rule 19 have not been joined. FED. R. CIV. P. 12(b)(7). As the Third Circuit has explained, a Rule 19 inquiry is bifurcated. *Culinary Servs. of Delaware Valley, Inc. v. Borough of Yardley, Pa.*, 385 Fed. App'x 135, 145 (3d Cir. 2010). A court must first determine, under Rule 19(a)(1), whether the absent parties are "necessary." *Id.*

"[I]it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). Rule 19(a)(1) requires joinder of "[a] person who is subject to service of process" only when one of several criterion are met: (A) if "the court cannot accord complete relief among existing parties" in the person's absence, or (B)

if the missing "person claims an interest relating to the subject of the action" and his absence may "(i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." FED. R. CIV. P. 19(a)(1).

Here, Kelmar has not met its burden to establish the application of Rule 19(a). Kelmar fails to make any arguments regarding the effect of an injunction on the **existing named** parties to this action, and does not contend that joinder is required under Rule 19(a)(1)(A) or Rule 19(a)(1)(B)(ii). *See* K. Br. at 13 & n.9; *Culinary Servs.*, 385 Fed. App'x at 145 (explaining that Rule 19(a)(1)(A) is "limited to considerations of whether the court can grant complete relief to persons **already named**," and Rule 19(a)(1)(B)(ii) "focuses on the obligations of **named parties,** not absent parties" (emphasis added)). Instead, Kelmar contends that Rule 19(a)(2)(i) applies. *Id.* at 13 n.9. However, no state has come forward to intervene or "claim[] an interest relating to the subject of the action." FED. R. CIV. P. 19(a)(2). Rule 19(a)(2), together with Rule 24(a)(2), permit joinder of a party who "claims an interest" in a lawsuit. *See* FED. R. CIV. P. 24(a)(2); *International Union of Elevator Constructors, AFL-CIO v. Regional Elevator Co.*, 847 F. Supp. 2d 691700 (D. Del. 2012) ("'Rule 19(a) applies when the unjoined party "*claims an interest* relating to the subject of the action....' In this case, the [unjoined party has] not claimed any interest in the pending action."). On its face, Rule 19(a)(2)(i) does not apply.[5]

Because the other states to the audit are not "necessary" parties, the Court need not reach the question of whether the other states are "indispensable." It is only where a court determines that a person meets the criteria of Rule 19(a)(1)(A) or (B), but cannot be joined (typically because joinder would destroy subject matter jurisdiction or the court lacks personal jurisdiction

[5] Kelmar's reliance on *Steel Valley Authority v. Union Switch & Signal Division*, 809 F.2d 1006 (3d Cir. 1987) and *Crouse-Hinds Company v. Internorth, Inc.*, 634 F.2d 690 (2d Cir. 1980) is misplaced. In those cases, the party seeking joinder met the requirements for Rule 19.

over the missing person), that the court turns to Rule 19(b) to evaluate whether dismissal is warranted. *Askew v. Sherriff of Cook Cty.*, 568 F.3d 632, 634 (7th Cir. 2009). "A holding that joinder is compulsory under Rule 19(a) is a necessary predicate to the district court's discretionary determination under Rule 19(b)." *Culinary Servs.*, 385 Fed. App'x at 145. Nevertheless, it is clear that Kelmar has not met its Rule 19(b) burden. Rule 19(b) sets forth a balancing test in which the court considers factors including "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; or (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Kelmar does not even mention these factors, much less attempt to establish that these factors favor dismissal. Kelmar is not interested in offering ideas that would lessen the prejudice it asserts on behalf of the states, or in demonstrating that Plains would have an adequate remedy in some other forum. To the contrary, it is apparent that Kelmar seeks dismissal precisely because dismissal will leave Plains with no recourse by which to challenge the multi-state audit. *See* K. Br. at 14 (contending that the Court simply "lacks the power to...enjoin the Multistate Examination").[6]

Last, relying on *Zenith Radio Corporation v. Hazeltine Research Inc.*, 395 U.S. 100, 111-12 (1969), and *Doctors Associates Inc. v. Duree*, 191 F.3d 297, 304 (2nd Cir. 1999), Kelmar argues that, because this Court does not have personal jurisdiction over the other states involved in this audit, this Court has no authority to enjoin those states from proceeding with audits. K. Br. at 14. Those cases held that injunctions were not enforceable against persons who were not

[6] Kelmar concedes that there appears to be "no basis upon which this Court could exercise personal jurisdiction over the nonparty States participating in the Multistate Examination." K. Br. at 14. Indeed, it is difficult to imagine any district court successfully obtaining service of process on multiple nonresident state escheators.

parties to the underlying proceedings. Kelmar's argument is inapposite; unlike the plaintiffs in *Zenith* and *Doctors Associates*, Plains is not seeking to enjoin any persons who are not before the Court. Kelmar also argues that the court does not have the power to indirectly enjoin the states by enjoining Kelmar, but its reliance on *Doctors Associates* is misleading. The court in *Doctors Associates* did not hold that an injunction against an agent cannot issue where it would indirectly affect the principal's rights. The court merely held that "it does not necessarily follow that th[e] fact [that an injunction may issue against servants] would justify extending the injunction beyond the enjoined [servants] to their…principals" who are not parties to the suit. *Doctors Associates*, 191 F.3d at 304. Unlike the plaintiff in *Doctors Associates*, Plains is not arguing that the fact that Kelmar is a servant of the states justifies enjoining nonparty states.

Kelmar's motion thus presents no valid basis for dismissing any claims relating to the multi-state audit.

CONCLUSION

Plains' claims against Kelmar are ripe for review, and Plains has standing to bring them. Plains has stated a plausible claim that Kelmar and Delaware conspired to deprive it of its constitutional rights, and that Kelmar recruited multiple states to join in this conspiracy, causing actual deprivations of Plains' Fourth Amendment right to be free from unreasonable searches and seizures and its Fourteenth Amendment rights to procedural and substantive due process and equal protection of the laws. Kelmar has not met its burden to show that Plains' claims relating to the multi-state audit require joinder of the states pursuant to Rule 19. Dismissal is not proper.

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