



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STATE OF DELAWARE,
DEPARTMENT OF FINANCE,

Plaintiff,

v.

UNIVAR, INC.,

Defendant.

C.A. No. 2018-0884-JRS

**PLAINTIFF’S APPLICATION FOR
CERTIFICATION OF INTERLOCUTORY APPEAL**

Pursuant to Supreme Court Rule 42, Plaintiff State of Delaware, Department of Finance, by and through the State Escheator (“Plaintiff” or the “State”)¹ respectfully requests that this Court certify to the Delaware Supreme Court the interlocutory appeal of this Court’s order of April 18, 2019 (Exhibit A) and referenced transcript ruling of April 8, 2019 (Exhibit B) (together “Order”) granting Defendant Univar, Inc.’s Motion to Dismiss or, in the Alternative, Stay the Chancery Court Action (Dkt. 6).

The Order decides a substantial issue of material importance that merits appellate review before final judgment: whether this Court’s stay of an action brought by the State under the Delaware Escheats Law, 12 *Del. C.* §§ 1101 *et. seq.*

¹ “There shall be an Escheator of the State, who shall be the Secretary of Finance or the Secretary’s delegate. The administration and enforcement of this chapter are vested in the Secretary of Finance or the Secretary's delegate.” 12 *Del. C.* § 1102.

(the “Escheats Law”) to enforce an administrative subpoena, is contrary to the explicit legislative directive that the Court of Chancery “shall consider [such action] under procedures that will lead to an expeditious resolution of the action.” 12 *Del. C.* § 1171(4).

Plaintiff and its counsel have determined in good faith that this Application meets the criteria set forth in Rule 42(b)(iii) and subsections (A), (C) and (H) thereof.

PRELIMINARY STATEMENT

This case implicates the policy and authority of the State of Delaware to administer and enforce its Escheats Law.

The Delaware General Assembly has specifically directed that the State Escheator may “[b]ring an action in the Court of Chancery seeking enforcement of an administrative subpoena issued under paragraph (3) of this section, which the Court shall consider under procedures that will lead to an expeditious resolution of the action.” 12 *Del. C.* § 1171(4) (emphasis added).

Given this legislative mandate, the question of the circumstances under which this Court can refuse to consider an action brought under § 1171(4) is a substantial issue of material importance for the Supreme Court.

The fact that Defendant Univar, Inc. (“Univar”) attempts to evade this Court’s jurisdiction by bringing a contemporaneous action in the District Court—in which Univar is essentially only raising a subset of its affirmative defenses it may otherwise raise to the State’s subpoena enforcement action in this Court under § 1171(4)—is not a valid basis for the Court of Chancery to ignore the legislative mandate of § 1171(4) that this Court “shall” expeditiously resolve the State’s action. This is especially true when the Court of Chancery is fully capable of deciding whatever constitutional affirmative defenses to the subpoena Univar may raise. *See* Transcript at 47 (“Should the district court determine that it is best for

this Court to decide the constitutional issues as related to the State's subpoena to Univar in connection with this enforcement action, I will gladly entertain a motion to lift the stay here for that purpose.").

The practical effect of the Order granting Univar a stay is it (1) delays the State's ability to enforce the Escheats Law as to Univar, (2) defers to the District Court an action the General Assembly has specially directed the Court of Chancery to adjudicate, and (3) encourages recipients of a State Escheator subpoena to sidetrack and delay the mandated state enforcement process by filing suit in federal court.

BACKGROUND

In December 2015, the State issued a notice to Univar stating its intention to examine Univar's books and records to determine whether it had complied with the Escheats Law. Compl. ¶9. Univar received the State's first information request on September 23, 2016. *Id.* ¶10. Following nearly three years of forbearance by the State since the initiation of the exam, coupled with multiple attempts to persuade Univar to comply with the examination, on October 30, 2018, the State issued an administrative subpoena to Univar pursuant to 12 *Del. C.* § 1171(3) seeking production of the documents requested in the initial information request. *Id.* ¶13.

The subpoena had a return date of December 3, 2018. *Id.* Rather than comply with the subpoena or file a motion to quash in this Court by that date, Univar instead determined to assert some of its defenses to the subpoena by filing suit against the Delaware Secretary of Finance, the Delaware State Escheator, and the Assistant Director for the Delaware Department of Finance in the U.S. District Court for the District of Delaware (the "District Court Action"). *See* Univar Verified Complaint, C.A. No. 1:18-cv-01909-MN (D. Del. Dec. 3, 2018).

As it was clear that Univar had no intention to comply with the subpoena, on December 7, 2018, the State filed a Complaint in this Court seeking enforcement pursuant to § 1171(4). (Dkt. 1).

In the District Court, on January 11, 2019, the named Delaware State defendants moved to dismiss Univar’s complaint pursuant to Fed. R. Civ. P. 12(b)(1), on the grounds that the District Court should abstain and decline jurisdiction in favor of this Chancery action.² This motion is fully briefed, but the District Court has not proceeded to hear argument or rule, perhaps because the District Court is allowing the Court of Chancery to go first. Transcript at 37-38.

In this Court, rather than defend, Univar moved to dismiss or, in the alternative, to stay this action in favor of the District Court Action. (Dkt. 6). Univar’s briefing raised no substantive defenses; instead, it argued that, under the *McWane* doctrine, the “first filed” District Court Action should proceed instead, and it raised a standalone *forum non conveniens* argument. At oral argument, this Court disposed of (and Univar abandoned) these arguments, acknowledging that 1) the enforcement of the State’s administrative subpoena is solely within the power of the Court of Chancery; 2) the parties in the two actions are different; 3) *McWane* does not apply; 4) there can be no colorable argument that the doctrine of *forum non conveniens* applies where the two courts are only blocks away from one another; and 5) if the District Court Action proceeds beyond the State’s motion to dismiss now pending before that court, the eventual resolution of the District Court

² In the alternative, in case the District Court were to reach the merits of Univar’s claims, the State defendants also moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

Action will require interpretation of the Delaware law as a matter of first impression by a federal court. *See* Transcript at 8:23-9:17, 9:21-10:7, 43:19-44:21.

Despite rejecting each of Univar's briefed arguments, the Court granted Univar's motion, on the basis of the (unbriefed) argument that the Court's inherent authority to control its docket permits it to issue a stay in this circumstance. *See id.* at 44:22-46:4. The Court's Order stays this action even though the District Court has not yet ruled on whether it should abstain and decline jurisdiction in favor of this Chancery action; leaves to the District Court the first opportunity to consider and interpret Delaware law; and imposes additional delay in the State's effort to enforce the Escheats Law against Univar, contrary to the plain language of the operative statute:

. . . which the Court shall consider under procedures that will lead to an **expeditious** resolution of the action.

12 *Del C.* § 1171(4) (emphasis added). The Court's Order also provides a roadmap for any other holder of Delaware unclaimed property to evade enforcement of an administrative subpoena by filing suit in District Court, therefore bogging down the process by which the State enforces its Escheats Law. For each of these reasons, the Order merits interlocutory appellate review.

ARGUMENT

This Court may certify an interlocutory appeal when its ruling “decides a substantial issue of material importance that merits appellate review.” Supreme Court Rule 42(b)(i). This Court also must consider whether the Order satisfies one or more of the factors listed in Rule 42(b)(iii) and identify whether and why the likely benefits outweigh the probable costs, such that interlocutory review is in the interests of justice. This Court’s Order granting a stay satisfies Rule 42(b)(i) & (iii) criteria for certifying an interlocutory appeal. *See ANR Pipeline Co. v. Shell Oil Co.*, 525 A.2d 991, 992 (Del. 1987) (accepting interlocutory appeal of Court of Chancery order granting stay in favor of Louisiana litigation; directing Court of Chancery to reconsider its order staying the Delaware action in the “interests of justice”); *later proceeding*, 1987 WL 11901, at *2 (Del. Ch. May 28, 1987) (upon reconsideration, the Court of Chancery reports to Supreme Court that it is now “not moved to delay the exercise of its jurisdiction.”); *later proceeding*, 526 A.2d 930 (Del. 1987) (ordering matter to proceed in Chancery).

I. The Order Decides A Substantial Issue Of Material Importance, Involves A Question Of Delaware Law Resolved For The First Time, And Determines The Constitutionality Or Application Of A Statute Of This State. (Rule 42(B)(i)&(iii)(A)&(C))

The Order involves a question of law resolved for the first time in this State of whether the Court should stay enforcement of a subpoena proceeding, when the legislature has directed the Court of Chancery to hear the subpoena proceeding

expeditiously. The Order also results in the District Court, rather than this Court, having the first opportunity to determine the constitutionality, construction, and application of the Escheats Law, even though the plain language of the statute at issue vests jurisdiction for enforcement actions in the Court of Chancery and requires expeditious consideration by the Court. Thus, under Rule 42(b)(i) and (iii) subsections (A) and (C), interlocutory review is warranted.

This Court erred by staying the Chancery Court Action in deference to the District Court, for three reasons.

First and foremost, 12 *Del. C.* § 1171 requires the Court to consider this matter expeditiously. The legislature’s mandate leaves no room for voluntarily deferring to another court (who may not even retain the case) instead of promptly resolving this action. The Court of Chancery alone was given that task.

Second, a Delaware state court, not a federal court, should review a Delaware statute as a matter of first impression. *See Jehovah’s Witnesses in State of Wash. v. King Cty. Hosp. Unit No. 1 (Harborview)*, 278 F. Supp. 488, 505 (W.D. Wash. 1967), *aff’d*, 390 U.S. 598 (1968) (“Where the constitutionality of a state statute, as in the instant case, is involved, there are sound reasons why any uncertainty as to its meaning should first be resolved by the state.”); *see also Conrad v. City & Cty. Of Denver*, 656 P.2d 662, 667 (Colo. 1982) (“[T]he constitutional sufficiency of Denver’s Christmas display is dependent in important

part on factual determinations. These must be based on the record in the proceeding before us. Therefore, we conclude that we should proceed to decide the issue under our state constitution without awaiting the decision of the federal court on whether Denver’s display comports with First Amendment requirements.”). Specifically in this context, the Third Circuit has agreed, stating

We are also cognizant of the availability of state law remedies if Delaware does make a formal demand for documents. In light of recent amendments to Delaware’s abandoned property [Escheat] laws, there are some unanswered questions that bear on the audit. As a matter of comity, it would be well if Delaware had the opportunity to address those issues in the first instance. So, even if this challenge were ripe, we might ‘decline jurisdiction over a declaratory judgment action’ to allow the state court system an opportunity to resolve those questions of state law.³

Third, even though Univar argued otherwise, this Court is equally capable of addressing federal (and, of course, state) constitutional arguments.⁴

During oral argument, the Court seemed persuaded by Univar’s unsupported contention that the District Court had already grappled with the construction of the

³ *Marathon Petroleum Corp. v. Sec’y of Fin. for Del.*, 876 F.3d 481, 497-98 (3d Cir. 2017) (citing *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 137 (3d Cir. 2014) (concluding that it was not abuse of discretion for the district court to decline jurisdiction over a declaratory judgment action because state law issues “peculiarly within the purview of the [state] court system” were raised)).

⁴ This Court has a storied tradition of doing so. In the modern era, the most notable example is *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952), in which then-Chancellor Seitz ordered the desegregation of the Delaware public schools on federal constitutional grounds.

Escheats Law and therefore was better suited than this Court to take the first pass at the issues raised in this case. Transcript at 19:17-20:3. But it is simply not true that the current iteration of the Escheats Law has already been interpreted by the District Court. The Third Circuit’s 2017 ruling in *Marathon* makes that clear. This Court also echoed the (incorrect) statements of Univar’s counsel suggesting that the constitutionality of the Escheats Law is already fully briefed and “teed up” for resolution before the District Court. Transcript at 46:3-4. Not so. The District Court is in exactly the same position as the Court of Chancery was on the date of oral argument—presented with a fully-briefed motion to dismiss or stay. To the extent this Court based its ruling on Univar’s statements to the contrary, that reliance constitutes error. *See Gen. Motors Corp. v. Grenier*, 981 A.2d 524, 526 (Del. 2009) (reversing a motion ruling under an abuse of discretion standard where “the motion judge erred in his findings of fact supporting his legal conclusions”).⁵

II. Interlocutory Review of the Order Serves the Considerations of Justice. (Rule 42(B)(iii)(H))

A. The Court Should Not Endorse Univar’s Pattern of Delay

This Court’s grant of a stay is prejudicial to the State: the stay gives Univar a further delay of an action seeking to enforce its obligations under the Escheats Law. The examination of Univar has been pending since December 2015. Compl.

⁵ To the extent Univar’s *Rooker-Feldman* argument may have influenced the Court’s decision, *see* Transcript at 11:16-12:6, that argument was wrong. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291-92 (2005).

¶9. The initial records request has been pending since September 2016. *Id.* ¶10. The administrative subpoena has been pending since October 2018. *Id.* ¶13. Despite the State’s considerable efforts to negotiate a path for cooperation with the examination, Univar continued to stonewall right up until the filing of the District Court Action. The statutory remedy available to the State to overcome Univar’s intransigence is to

[b]ring an action in the Court of Chancery seeking enforcement of an administrative subpoena issued under paragraph (3) of this section, which the Court **shall** consider under procedures that will lead to an expeditious resolution of the action

12 *Del. C.* § 1171 (emphasis added).

The Court’s imposition of a stay runs contrary to the plain language of the statute which requires “expeditious resolution.”⁶ It is error to read the timing provision out of the statute; it cannot be true that the Court’s discretionary power to control its docket can override the plain language of the statute. *See Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 29 (1940) (“The statute is explicit and mandatory and the District Court has no discretion to act contrary to its terms.”).

⁶ *See Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977) (“[A] court must tread carefully in granting a stay of proceedings, since a party has a right to a determination of its rights and liabilities without undue delay A court should be particularly hesitant when, as here, the stay will disrupt a statutory or administrative timetable.”).

B. The Court Should Not Encourage Future Subpoena Recipients to Resist Compliance By Filing Parallel Federal Litigation

As noted during oral argument, the Order provides the framework for any future recipient of a state administrative subpoena to circumvent this Court's (or, arguably, any other state court's) enforcement of a subpoena by filing parallel litigation in the District Court. The State of Delaware relies on its ability to enforce the Escheats Law, and its statutory right of enforcement will be unduly delayed if enforcement may be diverted by an objector's filing of a separate action in federal court. The Order may have serious unintended consequences to the State, as administrative subpoenas are utilized in other contexts.⁷ Undue delay in the enforcement of administrative subpoenas could have far reaching effects, leading to unjust results and causing public harm.

C. The Court Should Not Have Relied On Arguments Never Raised By Univar

Univar submitted 66 pages of briefing in support of its Motion to Dismiss or Stay, arguing that the *McWane* doctrine and the doctrine of *forum non conveniens* applied. The Court rejected both doctrines as inapplicable, *see* Transcript at 44:10-21, and instead granted a stay by relying on a doctrine raised by the Court itself, without giving either party the opportunity to thoughtfully address the issue:

⁷ *See, e.g., 29 Del. C. §§ 2504(4) and 2508(a).*

Isn't what you are asking me to do is more exercise my inherent authority to manage my docket to sequence litigation in a way that makes sense

Transcript at 9:9-12.

After establishing that none of Univar's arguments could prevail, the Court erred by offering a replacement argument for Univar that none of the parties had briefed or argued. *Cf. Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc.*, 2019 WL 1614026, at *7 (Del. Apr. 16, 2019) (holding that a post-trial ruling on a lack of a developed record presented by the parties was an abuse of discretion). In the interest of justice, the Order should be submitted for appellate review.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court grant this application for certification of the Court's Order of April 18, 2019 for interlocutory appeal.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ Martin S. Lessner

Melanie K. Sharp (No. 2501)

Martin S. Lessner (No. 3109)

Mary F. Dugan (No. 4704)

James M. Deal (No. 6601)

1000 North King Street

Wilmington, DE 19801

Telephone: (302) 571-6600

Email:

msharp@ycst.com

mlessner@ycst.com

mdugan@ycst.com
jdeal@ycst.com

STATE OF DELAWARE,
DEPARTMENT OF JUSTICE
Caroline Lee Cross (No. 3489)
Elizabeth R. McFarlan (No. 3759)
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
Telephone: (302) 577-8400
Facsimile: (302) 577-5866
Email: caroline.cross@delaware.gov

LOEB & LOEB LLP
Steven S. Rosenthal (*Pro Hac Vice*)
Tiffany R. Moseley (*Pro Hac Vice*)
John David Taliaferro (*Pro Hac Vice*)
901 New York Avenue NW
Suite 300 East
Washington, DC 20001
Telephone: (202) 618-5000
Facsimile: (202) 618-5001
Email:
srosenthal@loeb.com
tmoseley@loeb.com
jtaliaferro@loeb.com

Attorneys for State of Delaware, Department of Finance

Dated: April 18, 2019

Word Count: 2,963

CERTIFICATE OF SERVICE

I, James M. Deal, Esquire, hereby certify that on April 18, 2019, I caused a copy of *Plaintiff's Application for Certification of Interlocutory Appeal, Exhibits A – C thereto and [Proposed] Order Granting Leave to Appeal from Interlocutory Order* to be served on the following counsel of record in the manner indicated below:

BY FILE & SERVEXPRESS

Michael P. Kelly, Esquire
David A. White, Esquire
Matthew J. Rifino, Esquire
McCarter English LLP
Renaissance Centre
405 North King Street, Suite 800
Wilmington, DE 19801

/s/ James M. Deal

James M. Deal (No. 6601)