IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE *EX REL.* ANTHONY HIGGINS, Plaintiff,	)	
v.	)	C.A. No. N11C-07-193 MMJ CCLD
SOURCEGAS, LLC, SOURCEGAS DISTRIBUTIONS, LLC and SOURCEGAS HOLDINGS, LLC, Defendants.	)	

Submitted: March 12, 2012
Decided: May 15, 2012

ON MOTION OF DEENDANTS SOURCEGAS, LLC, SOURCEGAS DISTRIBUTION, LLC and SOURCEGAS HOLDINGS, LLC TO DISMISS ALL CLAIMS ASSERTED AGAINST THEM IN THE COMPLAINT

GRANTED IN PART
DENIED IN PART

OPINION

Robert J. Katzenstein, Esquire, Michael P. Migliore, Esquire, Smith Katzenstein & Jenkins LLP, Wilmington, Delaware; OF COUNSEL, Mitchell R. Kreindler, Esquire, Kreindler & Associates, Houston, Texas; Sharon M. Gurak, Esquire, Kreindler & Associates, Valley Forge, Pennsylvania; Edward K. Black, Esquire (argued), Frank N. Broujos, Esquire, STATE OF DELAWARE DEPARTMENT OFJUSTICE, Wilmington, Delaware, Attorneys for Plaintiff

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JOHNSTON, J.

INTRODUCTION

Relator Anthony Higgins ("Higgins") filed suit against Defendants SourceGas Holdings, LLC ("SGH"), SourceGas, LLC ("SG") and SourceGas Distribution, LLC ("SGD") (collectively referred to as "Defendants"). The State of Delaware[1] subsequently intervened and proceeded with the suit. Higgins and the State (collectively referred to as "Plaintiffs") seek to impose civil liability under the Delaware False Claims and Reporting Act ("DFCRA") for Defendants' alleged violations of Delaware's unclaimed property laws.

Pursuant to Superior Court Rule of Civil Procedure 12(b)(6), Defendants moved to dismiss the Complaint. The Court held oral argument on the motion on March 12, 2012. The Motion to Dismiss is granted in part and denied in part.

FACTUAL BACKGROUND

Corporate Structure

For purposes of the pending motion, the following facts are set forth in the light most favorable to Plaintiffs, as the non-moving parties. SGH is a Delaware limited liability company, headquartered in Colorado. SGH is the

[1] In its analysis, the Court will use the terms "State," "Delaware," and "government" interchangeably when referring to the State of Delaware.

parent company of SG and SGD. SG,[2] through its wholly-owned subsidiary SGD, is a natural gas local distribution utility that services customers in Arkansas, Colorado, Nebraska, and Wyoming. SGD operates 17,700 miles of pipeline for the collection, servicing, delivery, distribution and transmission of natural gas to its nearly 420,000 customers in those states.

Acquisition of Kinder Morgan, Inc.

In 2006, SG entered into a purchase agreement with Kinder Morgan, Inc. ("Kinder Morgan"), an oil and gas pipeline company incorporated in Delaware.[3] Pursuant to the agreement, SG acquired Kinder Morgan's retail gas distribution and related utility business. SG also assumed Kinder Morgan's liabilities, which included unclaimed utility deposits, refunds, credits, and other unreimbursed funds due to customers of Kinder Morgan. By March 2007, SG had acquired all of the assets and liabilities of Kinder Morgan.

To facilitate the acquisition, Kinder Morgan formed SGD as an indirect subsidiary to serve as the operating entity for SG's newly-acquired gas business. Kinder Morgan then transferred all of its retail gas business to

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[2] SG is a wholly-owned subsidiary of SGH.

[3] Defendants refute this allegation, claiming that Kinder Morgan is incorporated in the State of Kansas.

SGD. Kinder Morgan subsequently sold its ownership interest in SGD to SG and SGH.

Alleged Violations

On August 18, 2008, Higgins was hired as a Transaction Tax Manager for SGD. Higgins' primary responsibilities included managing Defendants' sales and use taxes, personal property liabilities, franchise fees and general accounting issues. In time, Higgins assumed responsibility for unclaimed property.

Shortly after Higgins took on unclaimed property responsibilities, he discovered that accounts transferred to Defendants as a result of the Kinder Morgan acquisition contained unclaimed and uncashed utility deposits, or other utility customer payments, that were due back to customers. These accounts were entitled "KM Remittance," "San Antonio Remittance," "Suspense Debtor," and "Converted Balance from Dec. 2004."[4] Higgins alleges that the account entitled "Converted Balance from Dec. 2004" originally was called "Unclaimed Property Liability" before being renamed by Defendants.

[4] Higgins alleges that other accounts existed that were "unallocated and posed a liability to Delaware." Higgins, however, provides no additional information as to the names or contents of these other accounts.

Cognizant of the potential for liability on the part of Defendants for failing to report this alleged unclaimed property, Higgins notified Defendants of his findings and urged them to fulfill their reporting obligations under Delaware law. Defendants refused to act. Consequently, no unclaimed property report was filed with Delaware in 2008.

In 2009, Defendants installed a new billing system which enabled Higgins to obtain detailed reports on unclaimed property. The system revealed numerous unclaimed customer utility deposits, refunds, credits, and other unreimbursed accounts, some dating back to 1992. Higgins, again, brought his findings to the attention of Defendants' upper management, but was rebuffed. Consequently, no unclaimed property report was filed with Delaware in 2009.

At some point in 2010, Higgins performed a detailed analysis to determine Defendants' total unclaimed property exposure. Higgins identified potential unclaimed property liability of over $500,000 for Delaware alone.[5]

Higgins was fired by SGD in November 2010. Higgins claims that his termination was "motivated by Defendants' desire to retaliate against

[5] Additionally, Higgins identified over $1.1 million in liability to 33 other states.

him for refusing to stand by silently and allow Defendants to continue ignoring their obligations to Delaware."

PROCEDURAL HISTORY

Higgins brought this *qui tam* action under the DFCRA,[6] asserting claims on behalf of the State. Count I of the Complaint alleges that Defendants knowingly made, used or caused to be made, false statements and records to conceal, avoid or decrease an obligation to pay money to Delaware in violation of 6 *Del. C.* § 1201(a)(7). Count II alleges that Defendants have possession, custody or control of property or money used or to be used by the State and, intending to defraud the State or willfully conceal the property, delivered or causes to be delivered, less property than the amount set forth on a receipt, all in violation of 6 *Del. C.* § 1201(a)(4).

Pursuant to 6 *Del. C.* § 1203(b)(2), Delaware conducted an investigation into the factual allegations and legal contentions made in Higgins' Complaint. The State elected to intervene in Higgins' lawsuit.

Defendants filed this Motion to Dismiss, arguing that: (1) the Complaint fails to allege any wrongdoing with respect to two of Defendants – SG and SGH; (2) the Complaint fails to meet the heightened pleading

[6] 6 *Del. C.* § 1201 *et seq.*

standard of Rule 9(b); and (3) Plaintiffs have failed to state valid claims under the DFCRA.

STANDARD OF REVIEW

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[7] When applying this standard, the Court will accept as true all non-conclusory, well-pleaded allegations.[8] In addition, every reasonable factual inference will be drawn in favor of the non-moving party.[9] If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.[10]

PARTIES' CONTENTIONS

Defendants' Arguments

Defendants first claim that Plaintiffs have failed to assert any allegations of wrongdoing by either SG or SGH, and therefore, these parties should be dismissed from the instant action.

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[7] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[8] *Id.*

[9] *Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

[10] *Spence*, 396 A.2d at 968.

Defendants next argue that Plaintiffs' Complaint fails to meet the heightened pleading standard of Superior Court Rule of Civil Procedure 9(b). According to Defendants, because the Complaint does not plead with particularity the circumstances constituting fraud, it should be dismissed.

Finally, Defendants contend that the Complaint fails to state valid claims under the DFCRA. Specifically, the Complaint does not allege that Defendants submitted a false or fraudulent claim to Delaware as required by Section 1201(a)(7). Additionally, the Complaint fails to state a claim under Section 1201(a)(4) because Plaintiffs do not allege that Defendants received a receipt or certificate from the State.

Plaintiffs' Arguments

In response, Plaintiffs claim that each of the Defendants is liable under the DFCRA. Plaintiffs seek to pierce the corporate veil, and hold SG and SGH liable as subsidiaries of SGD, the parent corporation.

Plaintiffs also argue that Rule 9(b) is inapplicable in the instant action. Plaintiffs claim that because the DFCRA explicitly states that "no proof of specific intent to defraud is required,"[11] the Complaint need not comply with Rule 9(b)'s heightened pleading standard. Alternatively, Plaintiffs argue

[11] 6 *Del. C.* § 1202(4)(c).

that if Rule 9(b) is applicable, the Complaint has met this standard by averring the specific scheme of fraud being committed by Defendants.

Lastly, Plaintiffs contend that the Complaint states valid claims under the DFCRA. Plaintiffs argue that, contrary to Defendants' assertion, Section 1201(a)(7) does not require the submission of a false claim to the State. Rather, the creation of an internal fraudulent document is sufficient under Section 1201(a)(7). Additionally, Plaintiffs claim that under Section 1201(a)(4), a certificate or receipt need not be issued by the State as a prerequisite for liability. According to Plaintiffs, Defendants' receipt and deposit of customer payments triggers Section 1201(a)(4).

DISCUSSION

I. Relevant Statutory Authority

Before addressing the merits of Defendants' Motion to Dismiss, the Court will briefly summarize the relevant statutory authority.

A. Delaware's Unclaimed Property Law[12]

Pursuant to 12 *Del. C.* § 1197, all property deemed abandoned shall descend to the State as an escheat. Property is deemed abandoned after a specified dormancy period.[13] Here, the alleged unclaimed property that is

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[12] 12 *Del. C.* § 1197 *et seq.*

[13] 12 *Del. C.* § 1198(1).

the subject of this litigation must have been dormant for a full and continuous period of 5 years "during which [the] owner has ceased, failed or neglected to exercise dominion or control over [the] property or to assert a right of ownership or possession…."[14]

In order for unclaimed property to escheat to Delaware, as opposed to another State, the property must: (1) be located in Delaware; (2) have been owned by a person whose last known address was in Delaware; or (3) be held by a business incorporated under the laws of the Delaware if the owner's identity and address are unknown.[15]

Section 1199 requires that the holder of abandoned property file an annual report with the State Escheator by March 1 of each year, identifying all such property as of December 31 of the previous year.[16] The report must provide: (1) the name and last known address of the owner of the abandoned property; (2) a description of the property; (3) the date when the property became payable, demandable or returnable; and (4) the date of the last transaction with the owner with respect to the property.[17]

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[14] 12 *Del. C.* § 1198(9)(a).

[15] *Texas v. New Jersey*, 379 U.S. 674, 681-82 (1965).

[16] 12 *Del. C.* § 1199(a).

[17] 12 *Del. C.* § 1199(a)(1)-(4).

Section 1199 further provides that if the holder is a successor to other persons who previously held the property, the report must identify all known names and addresses of each previous holder.[18]

B. Delaware False Claims and Reporting Act

<u>*Introduction*</u>

In 2000, the Legislature enacted the Delaware False Claims and Reporting Act ("DFCRA")[19] to protect government funds and property from fraudulent claims.[20] The DFCRA imposes civil liability for a broad range of conduct that may result in financial loss to the government. Damages under the DFCRA are intended to provide restitution to the government of money taken from it by fraud.[21]

A DFCRA action may be commenced in one of two ways. The Attorney General, after conducting a diligent investigation, may bring a civil action against the alleged false claimant.[22] Alternatively, a private party may bring a *qui tam* civil action "on behalf of the party bringing suit and for

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[18] 12 *Del. C.* § 1199(e).

[19] 6 *Del. C.* § 1201 *et seq.*

[20] H.B. 543, 140th Gen. Assem., Reg. Sess. (Del. 2000).

[21] *Id.*

[22] 6 *Del. C.* § 1203(a).

the Government" against the alleged false claimant, "in the name of the Government."[23] Should a private party institute a DFCRA action, as here, the Attorney General may intervene and proceed with the action if a determination is made that there is substantial evidence of a violation.[24]

A person who violates the DFCRA is liable to the State for a civil penalty of not less than $5,500 but no more than $11,000 per false claim, regardless of whether the State sustained damages.[25] If the State can prove that the false claim caused it damages, then it may recover treble damages.[26]

The Court notes, at the outset, that there is a dearth of Delaware authority interpreting the DFCRA. Because the DFCRA is modeled after the federal False Claims Act ("FCA"),[27] the Court will look to the FCA's legislative history, as well as federal case law, for guidance in interpreting the DFCRA.[28]

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[23] 6 *Del. C.* § 1203(b).

[24] 6 *Del. C.* § 1203(b)(2).

[25] 6 *Del. C.* § 1201(a).

[26] *Id.*

[27] 31 U.S.C. § 3729 *et seq*.

[28] On May 20, 2009, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub.L. No. 111–21, 123 Stat. 1617 (2009), which amended the FCA and re-numbered its subsections. Delaware did not adopt these amendments; therefore, the Court will refer to the pre-2009 version of the FCA.

Heightened Pleading Standard

The DFCRA, like its federal counterpart, is an anti-fraud statute.[29] Therefore, all claims brought under the DFCRA are subject to the heightened pleading requirements of Rule 9(b).[30] Pursuant to Rule 9(b), a plaintiff alleging fraud must state with particularity the circumstances constituting fraud. That is, the plaintiff must provide the "who, what, when, where, and how of the alleged fraud."[31]

In requiring a plaintiff to plead with particularity, Rule 9(b) operates to: (1) provide defendants with enough notice to prepare a defense; (2) prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs about which they had no prior knowledge; and (3) preserve a defendant's reputation and goodwill against baseless claims.[32]

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[29] *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). *See also U.S. ex rel. Gross v. AIDS Research Alliance – Chicago*, 415 F.3d 601, 604 (7th Cir. 2005); *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309 (11th Cir. 2002); *U.S. ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir.1999); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir.1999); *U.S. ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196 (D.C.Cir.1995).

[30] Super. Ct. Civ. R. 9(b).

[31] *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997).

[32] *In re Benzene Litig.*, 2007 WL 625054, at *6 (Del. Super.).

Not Common Law Fraud

Rule 9(b)'s heightened pleading standard, as it pertains to the DFCRA and common law fraud, requires a plaintiff to plead with particularity the circumstances constituting fraud. However, because the elements of a common law fraud claim are distinguishable from the elements of an FCA claim, the degree of particularity required for each claim differs.[33]

A *prima facie* case of common law fraud requires a plaintiff to plead both reliance and damages.[34] These elements "are intertwined with the misrepresentation and heighten the need for attention to the misrepresentation itself."[35] Therefore, a plaintiff must plead the precise contents of the misrepresentation when alleging a claim of common law fraud.[36]

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[33] *U.S. ex rel. Grubbs v. Kanneganti,* 565 F.3d 180, 189 (5th Cir. 2009).

[34] The elements of common law fraud include: (1) a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Id.* at 188

[35] *Id.* at 189.

[36] *Id.* at 188-90.

The FCA, on the other hand, lacks the elements of reliance and damages.[37] Because the FCA was enacted to protect the government from monetary injury, even unsuccessful false or fraudulent claims are subject to liability.[38]

II. All Claims Dismissed Against SG and SGH

The Court finds that Plaintiffs have failed to state a valid claim against SG and SGH. The Complaint is devoid of any allegations of wrongdoing on the part of SG and SGH. The only reference to these entities is contained in the "Introduction" section of the Complaint where Plaintiffs set forth the corporate structure of Defendants.

The Court further finds Plaintiffs' attempt to pierce the corporate veil unavailing. "Courts in Delaware will ignore the separate corporate existence of a subsidiary and attribute its activities in Delaware only if the subsidiary is the alter ego or a mere instrumentality of the parent."[39] A subsidiary corporation may be deemed the alter ego of the parent corporation "where a corporate parent exercises complete domination and control over the

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[37] *Id.* at 189.

[38] *Id.*

[39] *Grasty v. Michail*, 2004 WL 396388, at *1 (Del. Super.).

subsidiary."[40] "Generally, a corporate parent will only be held liable for the obligations of its subsidiaries 'upon a showing of fraud or some inequity.'"[41]

It is well-settled that this Court lacks jurisdiction to pierce the corporate veil.[42] As an equitable remedy, the Court of Chancery has sole jurisdiction over actions to pierce the corporate veil.[43]

Even if this Court had jurisdiction to pierce the corporate veil, Plaintiffs have failed to allege facts sufficient to demonstrate a *prima facie* case that SG and SGH were the alter egos of SGD. Therefore, all claims against SG and SGH must be dismissed.

III. Section 1201(a)(7) Claim

Section 1201(a)(7) imposes liability if a person "knowingly makes, uses, or 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."[44] Claims brought under this subsection are termed "reverse

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[40] *Id.* (citing *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F.Supp. 260, 266 (D. Del. 1989)).

[41] *Grasty*, 2004 WL 396388, at *1 (citing *Mobil*, 718 F.Supp. at 268).

[42] *Sonne v. Sacks,* 314 A.2d 194, 197 (Del. 1973); *Mktg. Prods. Mgmt., LLC v. HealthandBeautyDirect.com*, 2004 WL 249581, at *3 (Del. Super.); *Fountain v. Colonial Chevrolet Co*., 1988 WL 40019, at *10 (Del. Super.).

[43] *HealthandBeautyDirect.com*, 2004 WL 249581, at *3.

[44] Section 1201(a)(7)'s federal counterpart imposes liability against a person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or

false claims" because the "defendant's action does not result in improper payment by the government to the defendant, but instead results in no payment to the government when a payment is obligated."[45]

To state a claim under Section 1201(a)(7), the plaintiff must allege that: (1) the defendant had an obligation to pay money to the government; (2) the defendant made or used a false statement to avoid or decrease that obligation; (3) the false statement was material; and (4) the defendant knew that the statement or record was false.[46]

A. *Presentment Not a Requirement Under Section 1201(a)(7)*

Defendants, however, urge the Court to impose an additional requirement for claims brought under Section 1201(a)(7) – presentment. Defendants argue that a fraudulent claim must be presented or submitted to the State before liability attaches under Section 1201(a)(7). Because the record is devoid of any evidence to suggest that a fraudulent claim actually

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knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7).

[45] *U.S. ex rel. Marcy v. Rowan Companies, Inc.*, 2006 WL 2414349, at *12 (E.D. La.) (citing *U.S. ex rel. Bain v. Ga. Gulf Corp.*, 386 F.3d 648, 653 (5th Cir. 2004)). *See also U.S. ex rel. American Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 1997 WL 33421319, at *7 n.5 (S.D. Ohio) ("A 'reverse false claim' refers generally to a false statement made to conceal, avoid or decrease an obligation to pay money to the government, as contrasted with a false statement made to obtain money from the government.").

[46] *U.S. v. Bourseau*, 531 F.3d 1159, 1164-71 (9th Cir. 2008); *U.S. ex rel. Ramadoss v. Caremark Inc.*, 586 F.Supp.2d 668, 685 (W.D. Tex. 2008).

was submitted to the government, Defendants contend that the claim should be dismissed.

The FCA's "presentment" requirement compels a relator to establish that the defendants presented a false or fraudulent claim to the government to induce payment.[47] The scope and application of the FCA's presentment requirement has been the subject of considerable debate among the courts.

Section 3729(a)(1),[48] like Section 1201(a)(1) of the DFCRA,[49] is the only subsection explicitly requiring presentment. Yet a number of courts have made presentment a central element for other, if not all, claims alleging FCA violations.[50] In *United States ex rel. Clausen v. Laboratory*

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[47] *U.S. Dep't of Transp. ex rel. Arnold v. CMC Eng'g*, 564 F.3d 673, 677 (3d Cir. 2009).

[48] 31 U.S.C. § 3729(a)(1) (imposing liability if a person "knowingly *presents, or causes to be presented*, a false or fraudulent claim for payment or approval") (emphasis added).

[49] 6 *Del. C.* § 1201(a)(1) (imposing liability if a person "knowingly *presents, or causes to be presented* to an officer or employee of the Government a false or fraudulent claim for payment or approval") (emphasis assed).

[50] *Sanderson v. HCA- The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006) ("The False Claims Act, 31 U.S.C. § 3729 *et seq.*, makes illegal the submission of false or fraudulent claims to the federal government."); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006) ("Liability under the FCA requires a false claim—a defendant's presentation of a false or fraudulent claim to the government is a central element of every False Claims Act case.") (internal quotations omitted); *U.S. ex rel. Quinn v. Omnicare, Inc.*, 382 F.3d 432, 438 (3d Cir. 2004) (finding presentment an essential element under subsections (a)(1) and (a)(2) of the FCA); *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("Without the presentment of such a claim, … there is simply no actionable damage to the public fisc as required under the [FCA]."); *Harrison v. Westinghouse Savannah River, Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (holding that a central question in [FCA] cases is whether the defendant ever presented a false or fraudulent claim to the government). *But see U.S.*

Corporation of America, Inc,[51] the Eleventh Circuit held that "[w]ithout the presentment of [] a claim, … there is simply no actionable damage to the public fisc as required under the FCA."[52] Therefore, a plaintiff bringing suit under any subsection of Section 3729(a) must offer "some indicia of reliability" that an actual false claim for payment has been submitted to the government.[53]

The Sixth Circuit also consistently has dismissed FCA claims when the complaint failed to allege presentment of a false claim.[54] According to the court, in *qui tam* actions, Rule 9(b)'s heightened pleading standard demands that a plaintiff's complaint identify the "specific claims that were submitted to the United States or identify the dates on which those claims were presented to the government."[55]

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ex rel. Bahrani v. Conagra, Inc., 465 F.3d 1189, 1207 (10th Cir. 2006) (finding that presentment is not required for claims brought under subsection (a)(7)); *U.S. ex rel. Romano v. New York- Presbyterian Hosp*., 2008 WL 904730, at *4 (S.D.N.Y.) ("There is no 'presentment' requirement preventing liability from being imposed under § 3729(a)(2)."); *U.S. ex rel. Koch v. Koch Indus., Inc*., 57 F.Supp.2d 1122, 1144-45 (N.D. Okla. 1999) (finding no presentment requirement in Section 3729(a)(7)).

[51] 290 F.3d 1301 (11th Cir. 2002).

[52] *Id.* at 1311.

[53] *Id.*

[54] *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc*., 501 F.3d 493, 504 (6th Cir. 2007); *Sanderson*, 447 F.3d at 876-77; *Yuhasz v. Brush Wellman, Inc*., 341 F.3d 559, 563-64 (6th Cir. 2003).

[55] *Sanderson*, 447 F.3d at 877.

In 2008, the United States Supreme Court clarified, to some extent, the scope of the presentment requirement. In *Allison Engine Co. v. United States ex rel. Sanders*,[56] the Court held that unlike Section 3729(a)(1), claims brought under subsections (a)(2)[57] and (a)(3)[58] need not show that a false claim actually was submitted to the government.[59] The Court noted that the inclusion of an express presentment requirement in subsection (a)(1), combined with the absence of similar language in subsections (a)(2) and (a)(3), indicated that Congress did not intend to include a presentment requirement in those subsections.[60]

Though the Supreme Court only addressed the applicability of the presentment requirement to subsections (a)(1), (a)(2), and (a)(3) of Section 3729, subsequent decisions have relied upon *Allison Engine* to further limit

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[56] 553 U.S. 662 (2008).

[57] 31 U.S.C. § 3729(a)(2) (imposing liability if a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim").

[58] 31 U.S.C. § 3729(a)(3) (imposing liability if a person conspires to defraud the government by getting a false claim paid).

[59] *Allison Engine*, 553 U.S. at 671-73.

[60] *Id.* at 671; s*ee also Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.") (internal quotation marks omitted).

application of the presentment requirement.[61] For instance, in *United States v. Bourseau*,[62] the Ninth Circuit held that presentment of a false claim to the government is not an element of a subsection (a)(7) violation.[63] The court noted that subsection (a)(7) uses the same "makes, uses, or causes to be made or used" language found in (a)(2).[64] Relying on *Allison Engine's* rationale, the *Bourseau* court held that subsection (a)(7) does not require presentment of a false claim.[65]

This Court finds that "presentment" is not an element of subsection (a)(7). The plain language of subsection (a)(7) requires a defendant to make or use a false record or statement in order to conceal, avoid or decrease an obligation to pay the government. There is no presentment language in

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[61] *See, e.g., U.S. ex rel. Matheny v. Medco Health Solutions, Inc.,* 671 F.3d 1217, 1224 n.12 (11th Cir. 2012) (finding presentment is not an essential element in a cause of action brought under subsection (a)(7)); *U.S. v. Bourseau*, 531 F.3d 1159, 1169 (9th Cir. 2008) (same); *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*¸ 2009 WL 1457036, at *9 (D. Ariz.) (same); *U.S. ex rel. Ramadoss v. Caremark, Inc.*¸ 586 F.Supp.2d 668, 684-85 (W.D. Tex. 2008) (same). Notably, some courts have interpreted *Allison Engine* to dispense with the presentment requirement altogether except in cases alleging violations of subsection (a)(1). *See, e.g., U.S. ex rel. Gagne v. City of Worcester*, 565 F.3d 40, 46 n.7 (1st Cir. 2009); *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 n.28 (5th Cir. 2009).

[62] 531 F.3d 1159.

[63] *Id.* at 1169.

[64] *Id.*

[65] *Id*.

subsection (a)(7) and the Court declines to read such a requirement into this subsection.

Not requiring presentment is consistent with the FCA's legislative history, which states that subsection (a)(7) was added to make it clear that "an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act *as if he had submitted a false claim to receive money*."[66] Therefore, under subsection (a)(7), liability may be imposed against those who fraudulently *attempt* to reduce an obligation owed to the government.

B. Rule 9(b) Particularity Requirement Met for Some Allegations

In order to state a valid claim under Section 1201(a)(7), the complaint must not only allege that the defendant owed an obligation to the government, but must also include allegations that the defendant knowingly made or used a false record or statement to conceal or avoid that obligation.[67]

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[66] *U.S. ex rel. Koch v. Koch Indus., Inc*., 57 F.Supp.2d 1122, 1145 (N.D. Okla. 1999) (citing S.Rep. 345, 99th Cong., 2d Sess., p. 18, reprinted in 1986 U.S.C.C.A.N. 5266 (July 28, 1986)) (emphasis added).

[67] *See U.S. ex rel. Marcy v. Rowan Cos*., 2006 WL 2414349, at *16 (E.D. La.).

In the Complaint, Plaintiffs identify four of Defendants' accounts that allegedly held unclaimed property creating a liability to Delaware.[68] These accounts, entitled "KM Remittance," "San Antonio Remittance," "Suspense Debtor," and "Converted Balance from Dec. 2004," all were transferred to Defendants as a result of the Kinder Morgan acquisition.

Plaintiffs, however, only allege that one of these accounts was "reclassified and renamed" by Defendants in an attempt to conceal the true nature of the funds. Plaintiffs contend that the account entitled "Converted Balance from Dec. 2004" originally was named "Unclaimed Property Liability." Plaintiffs claim that this account alone held $175,853.64 in funds that could not be traced back to a particular customer. Therefore, the money in this account created an obligation to Delaware

The Court finds that with respect to the allegations regarding the account entitled "Converted Balance from Dec. 2004," Plaintiffs have stated a valid claim under Section 1201(a)(7). Plaintiffs allege that Defendants owed an obligation to the State and that Defendants made or used a false record to avoid or conceal that obligation. Therefore, the Complaint satisfies Rule 9(b)'s particularity requirement.

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[68] In their Complaint, Plaintiffs make a fleeting reference to "additional types of accounts with customer credits… that were unallocated and presented a liability to Delaware." Such a vague and conclusory allegation is wholly insufficient under Rule 9(b)'s particularity standard, and will not be considered by the Court.

The Court finds that the allegations concerning the remaining three accounts, however, do not state a valid claim under Section 1201(a)(7). Plaintiffs do not allege the existence of an essential element of subsection (a)(7) – a false record or statement. Accordingly, the remainder of the Court's analysis will focus solely on the alleged unclaimed property contained in the account entitled "Converted Balance from Dec. 2004."

C. Interstate Dispute Regarding Unclaimed Property

If Defendants are in possession of abandoned property, legal and factual questions arise as to whether Delaware or Kansas is entitled to such property. In *Texas v. New Jersey*,[69] the United States Supreme Court established priority rules to resolve interstate conflicts over unclaimed property. The Court held that tangible property escheats to the state in which it is located.[70] For intangible property, the Court devised two rules. First, under the primary rule, unclaimed property escheats to the state of the creditor's last known address as shown by the debtor's books and records. Second, if the primary rule fails because the debtor's records do not disclose the creditor's address or because creditor's last known address is in a state whose laws do not provide for escheat, then the secondary rule provides that

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[69] 379 U.S. 674 (1965).

[70] *Id.* at 677.

unclaimed property escheats to the state in which the debtor is incorporated.[71]

It is undisputed that the alleged unclaimed property at issue falls under the secondary rule. The parties agree that the creditors, and their addresses, are unknown. It is equally undisputed that the alleged unclaimed property at issue here was held in Kinder Morgan's account before being transferred to Defendants in March 2007.

The parties, however, dispute whether Defendants owe an obligation to Delaware. Defendants contend that Kinder Morgan is incorporated in Kansas, and therefore, Defendants owe no escheat obligation to Delaware for property held prior to March 2007. According to Defendants, even if Kinder Morgan had been delinquent in its escheat reporting obligations prior to its acquisition by Defendants, that liability does not pass to Defendants. Instead, any liability that may have arisen prior to March 2007 is owed to Kansas.

Plaintiffs refute this contention, arguing that Kinder Morgan is a Delaware corporation.[72] Plaintiffs contend that regardless of Kinder

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[71] *Id.* at 680-82.

[72] In support of this argument, Plaintiffs direct the Court to the Kansas Secretary of State website, which reveals that there is no Kansas corporation entitled "Kinder Morgan, Inc." There is, however, a Delaware corporation named "Kinder Morgan, Inc." that was formed on August 23, 2006 and remains in good standing.

Morgan's state of incorporation, Defendants, as successor holders of unclaimed property, have a reporting obligation to Delaware. Plaintiffs further argue that all unclaimed property in Defendants' accounts escheats to Delaware.

The Court finds that a question of fact exists as to whether Kinder Morgan is a Delaware corporation or a Kansas corporation. If Kinder Morgan is, in fact, a Kansas corporation, any unclaimed property that was transferred to Defendants *may* create a liability to Kansas. If, however, Kinder Morgan is a Delaware corporation, Defendants *may* owe an obligation to Delaware. Therefore, Kinder Morgan's state of incorporation must be determined before the Court can consider any potential unclaimed property liability.[73]

D. Question of Law Regarding Defendants' Reporting Obligations

If Kinder Morgan is a Kansas corporation, a question of law exists as to when Defendants' reporting obligations to Delaware arise. Defendants contend that any reporting obligation that they may have to Delaware does not arise until March 2013. According to Defendants, the acquisition of Kinder Morgan's accounts in 2006 "restarted" the period of dormancy.

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[73] If Kinder Morgan is incorporated in Kansas, then the State of Kansas may be an indispensable party such that joinder is required under Superior Court Rule of Civil Procedure 19.

Therefore, Defendants claim that they have no reporting obligations to Delaware until the five-year dormancy period runs.

In response, Plaintiffs argue that the property at issue already was abandoned upon its transfer to Defendants. Therefore, under 12 *Del. C.* § 1199, Defendants, as successor holders of abandoned property, have an obligation to file a report with Delaware before March 1 of each year.

Under Delaware's unclaimed property law, property is deemed "abandoned" after a five-year dormancy period.[74] Once a full period of dormancy has run, a holder of unclaimed property must file a report with Delaware on or before March 1 of every year.[75]

In defining the "period of dormancy," Section 1198 provides, in pertinent part:

> A full period of dormancy shall be deemed to have run with respect to any property that is otherwise reportable and payable to this State that a holder in accordance with the laws of the jurisdiction wherein the holder is located, is obligated or required to report and pay over such property to the other jurisdiction because of a shorter period of dormancy or reporting period.[76]

The Court finds the language of Section 1198 to be unclear. It appears to the Court that certain language is missing.

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[74] 12 *Del. C.* §§ 1198(1), (9)(a).

[75] 12 *Del. C.* § 1199(a).

[76] 12 *Del. C.* § 1198(9)(b).

Looking to another subpart of Section 1198(9)(b),[77] it appears to the Court that this provision should read:

> A full period of dormancy shall be deemed to have run with respect to any property that is otherwise reportable and payable to this State ***at the time*** that a holder in accordance with the laws of the jurisdiction wherein the holder is located, is obligated or required to report and pay over such property to the other jurisdiction because of a shorter period of dormancy or reporting period.

With this insertion, the property would be deemed abandoned in Delaware if another jurisdiction, by virtue of a shorter dormancy period, already has deemed the property abandoned.

At this juncture, however, the Court declines to read such language into the statute. It is the function of the Court to interpret statutory law on the basis of what the Legislature has written, and not what the Legislature *might* have written.[78] The Court finds that a question of law exists as to the proper interpretation of Section 1198. Because the specific issue was neither raised nor addressed by the parties, it is appropriate to permit additional

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[77] 12 *Del. C.* § 1198(9)(b) ("A full period of dormancy shall be deemed to have run with respect to any dividends or other distributions held for or owing to an owner *at the time* a period of dormancy shall have run with respect to the intangible ownership interest in a corporation partnership, statutory or common law trust, limited liability company, or other entity to which such dividend or other distribution attaches.") (emphasis added).

[78] *U.S. v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952); *see also Am. Booksellers Ass'n, Inc. v. McAuliffe*, 533 F.Supp. 50, 58 (D.C. Ga. 1981) ("This court could not change the meaning of the Act without changing the language entirely. Rewriting a statute is not the province of the judiciary.")

briefing and argument before the Court makes a final decision applying the statute in this case. This appears to be an issue of first impression in Delaware.

IV. Section 1201(a)(4) Claim

Section 1201(a)(4) imposes liability on any person who "has possession, custody or control of property or money used or 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."[79]

Courts have interpreted the essential elements of Section 3729(a)(4) to include: (1) possession, custody, or control of property or money used, or to be used, by the government; (2) delivery of less property than the amount for which the person receives a certificate or receipt; and (3) intent to defraud or willfully to conceal the property.[80]

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[79] Section 1201(a)(4)'s federal counterpart imposes liability against a person who "has possession, custody, or control of property or money used, or 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." 31 U.S.C. § 3729(a)(4).

[80] *U.S. ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 681 (10th Cir. 1998).

The plain language of subsection (a)(4)[81] clearly suggests that the certificate or receipt be created by the State,[82] and "have some connection or relationship to [] [D]efendant[s'] return of property."[83] "In other words, the certificate or receipt must indicate how much property [D]efendant[s] allegedly returned to the government."[84]

In the instant action, Plaintiffs have not alleged that Defendants received any type of certificate or receipt from the State. Plaintiffs' Complaint is devoid of any reference whatsoever to a receipt or certificate being issued by the State. Therefore, Plaintiffs' Section 1201(a)(4) claim lacks the specificity required by Rule 9(b), and must be dismissed.

CONCLUSION

The Court finds that Plaintiffs' Complaint fails to state valid claims against SG and SGH. Therefore, all claims against SG and SGH must be dismissed.

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[81] In their briefing, Plaintiffs rely on the amended version of the FCA, which dispenses with subsection (a)(7)'s "certificate or receipt" language. Because Delaware did not adopt the 2009 amendments, this reliance is misplaced.

[82] *U.S. ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F.Supp.2d 28, 36 (D.D.C. 2003); *Dyncorp*, 136 F.3d at 681; *U.S. ex rel. Cooper v. Gentiva Health Servs., Inc.*, 2003 WL 22495607, at *12 n.14 (W.D. Pa.).

[83] *Dyncorp*, 136 F.3d at 681.

[84] *Id.*.

The Court further rules that certain of Plaintiffs' allegations concerning the Section 1201(a)(7) claim meet Rule 9(b)'s heightened pleading standard. However, a factual question exists regarding whether the alleged unclaimed property escheats to Delaware. Additionally, a question of law exists as to when Defendants' reporting obligations to Delaware arise. Because there appear to be issues of first impression that cannot be resolved at this stage of the proceedings, Defendants' Motion to Dismiss the Section 1201(a)(7) claims against SGD must be denied.

With respect to the Section 1201(a)(4) claim, the Court finds that Plaintiffs' Complaint fails to meet Rule 9(b)'s particularity requirement. Therefore, this claim must be dismissed.

THEREFORE, Defendants' Motion to Dismiss All Claims is hereby **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston