



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STAPLES, INC. )  
 )  
 Plaintiff/Counterclaim )  
 Defendant, )  
 )  
 v. ) C.A. No. 5447-VCS  
 )  
 THOMAS COOK, in his capacity as the )  
 Secretary of Finance for the State of )  
 Delaware; PATRICK T. CARTER, in his )  
 capacity as the Director of the Division of )  
 Revenue for the State of Delaware; MARK )  
 UDINSKI, in his capacity as the Director/ )  
 State Escheator of the State of Delaware )  
 and the DEPARTMENT OF FINANCE, )  
 DIVISION OF REVENUE FOR THE )  
 STATE OF DELAWARE, )  
 )  
 Defendants/Counterclaim )  
 Plaintiffs. )

**VERIFIED SUPPLEMENTAL COUNTERCLAIM**

Pursuant to Court of Chancery Rule 13(d), Counterclaim Plaintiff Mark Udinski in his official capacity as the Director/State Escheator of the State of Delaware (the “State Escheator”), as designated by the Secretary of Finance of the State of Delaware, brings the following Supplemental Counterclaim against Plaintiff and Counterclaim Defendant Staples, Inc. (“Staples” or the “Company”) under the State’s Escheat Statute, 12 *Del. C.* §§ 1101-1224 (the “Escheat Statute”), arising from Staples’ failure to comply with the State’s examination request for certain categories of unclaimed property.

## **THE PARTIES**

1. Counterclaim Plaintiff Mark Udinski has been designated by the Secretary of Finance of the State of Delaware as the State Escheator under 12 *Del. C.* § 1102.

2. The Department of Finance oversees and regulates the administration of the Escheat Statute, including the examination of holders under the Escheat Statute, the payment by holders of abandoned or unclaimed property and the payment of claims to owners of abandoned or unclaimed property.

3. Counterclaim Defendant Staples is a Delaware corporation.

## **JURISDICTION**

4. The Court of Chancery has jurisdiction over this matter pursuant to 12 *Del. C.* § 1156(a).

## **FACTUAL ALLEGATIONS**

### **A. THE STATE'S AND HOLDERS' OBLIGATIONS UNDER DELAWARE LAW**

5. Under the Escheat Statute, the State Escheator is charged with collecting abandoned or unclaimed property.

6. Abandoned or unclaimed property is property for which an owner has ceased, failed, or neglected to exercise dominion or control over, assert a right of ownership or possession, or make presentment and demand for payment and satisfaction, or done any other act in relation to such property for a period of five (5) years. 12 *Del. C.* § 1198(7) - (9)(a).

7. Holders of abandoned or unclaimed property are required to file with the State Escheator a report identifying such property held by March 1 of the year following the year in which such property became abandoned or unclaimed. 12 *Del. C.* § 1199(a).

8. Holders are further required to pay to the State Escheator all abandoned or unclaimed property identified in a report on or before the date such report is due. 12 *Del. C.* § 1201(a).

9. If the State Escheator determines that a holder's report is incorrect, the State Escheator is required to notify the holder of such deficiency. 12 *Del. C.* § 1158(a).

10. For reports filed or due on or after July 22, 2002, the State Escheator is required to notify a holder of such deficiency within three (3) years; if the deficiency is 25% or more of the abandoned or unclaimed property identified in the holder's report, the State Escheator must notify the holder of the deficiency within six (6) years. *Id.*

11. There is no statute of limitations for reports filed or required to be filed prior to July 22, 2002. 73 *Del. Laws, c.* 417, §§ 1, 6.

**B. STAPLES' VOLUNTARY SELF DISCLOSURE AGREEMENT WITH THE STATE**

12. In or about 2000, Delaware offered a voluntary disclosure program to holders of abandoned or unclaimed property that had not complied with the Escheat Statute

13. In response, Staples entered into a Voluntary Self Disclosure Agreement ("VDA") with the State under which Staples paid the State approximately \$137,000 in past due unclaimed property.

14. Paragraph 2 of Staples' VDA released the Company from all claims by the State for "reporting years *before* March 1, 2000." (emphasis added).

15. Consistent with paragraph 2, paragraph 3 of Staples' VDA released the Company from reporting requirements for "property identified through December 31, 1994."

16. Thus, the VDA, by its express terms, did not release Staples from claims related to abandoned or unclaimed property for years 1995 forward. That is, the VDA did not release Staples from any obligation to report and pay to the State property in its possession that remained unclaimed from the entirety of calendar year 1995 forward, which Staples would be required to be report and pay to the State beginning March 1, 2001.

**C. THE STATE’S EXAMINATION OF STAPLES**

17. By letter dated October 19, 2005, the State notified Staples that it would be performing an unclaimed property examination (*i.e.*, an audit).

18. Beginning in October, 2005 the State’s auditor, Kelmar Associates, LLC (“Kelmar”) initiated an examination to determine Staples’ compliance with the Escheat Statute.

19. In March 2010, the State completed its examination of Staples with respect to two categories of unclaimed property – accounts payable (“AP”) and payroll (“PR”). On March 31, 2010, the State Escheator sent Staples a letter requesting payment of \$3,155,541.71, plus \$807,208.58 in interest pursuant to 12 *Del. C.* § 1159(d), for a total of \$3,962,750.29. On April 30, 2010, rather than remitting payment to the State, Staples commenced the instant litigation by filing its Verified Complaint for Equitable, Declaratory, Injunctive and Other Relief (the “Complaint”). On July 14, 2010, the State answered the Complaint and the State Escheator asserted a counterclaim (the “Counterclaim”) seeking an order that Staples pay an adjusted amount of unpaid liability and interest pursuant to the Escheat Statute.

20. Subsequent to the commencement of this litigation and the filing of the Counterclaim, the State continued its examination of Staples as to other categories of

unclaimed property, namely gift certificates and merchandise credits (collectively “GC/MC”), accounts receivable credits (“AR Credits”) and rebates. Staples, however, has obstructed the examination process with respect to these property categories by, *inter alia*, failing to provide documents or information necessary for the State to conduct its examination and/or providing inaccurate or incomplete information to the State. Accordingly, the State brings this Supplemental Counterclaim as to these three categories of property under the Escheat Statute.

**D. GIFT CERTIFICATES AND MERCHANDISE CREDITS**

21. Gift certificates and merchandise credits are a category of property that includes unclaimed gift certificates purchased by customers and unclaimed store credit issued to customers.

22. As set forth below, despite repeated requests for information, Staples has refused to provide the State with necessary documents and instead has produced mostly summary documentation, with limited supporting detailed documentation for limited time periods, which is insufficient for the State to effectively examine Staples’ compliance with the Escheat Statute for gift certificates and merchandise credits. Further, rather than cooperate fully with the examination process, Staples has hidden behind its incorrect assertion that the VDA precludes the State from examining this category of property.

23. On or around September 26, 2006, Kelmar made a written request to Staples seeking general information about Staples’ gift certificate and gift card programs, including a description of Staples’ procedures, if any, for tracking unclaimed property related to these programs.

24. On October 19, 2006, Staples responded that since 2000, gift cards and gift certificates sold by Staples have been issued by Staples Value LLC, a Virginia

corporation. Staples further responded that it believed all gift certificates issued prior to 2000 were either included in the VDA, or that any escheatable amounts for GC/MC were already agreed upon as part of the VDA process.

25. Staples' assertion that the State had agreed to all escheatable amounts for GC/MC is incorrect because the express terms of the VDA limit the agreement to "property identified through December 31, 1994."

26. In April 2007, Kelmar reviewed the general ledger accounts for each Staples entity within the scope of the examination and requested that Staples provide additional information regarding the function of specific accounts, such as the general ledger account titled "A/L MERCH CREDITS – GIFT CERTIFIC." In August 2007, based on descriptions provided by Staples, Kelmar requested additional information, including detail from transactions in certain accounts.

27. In October 2007, Staples responded by providing excerpts from the VDA along with post-VDA filings with handwritten notes containing "Estimates Due per 2000 Settlement."

28. In March 2008, Kelmar requested an informal meeting to discuss property categories other than GC/MC.

29. At the March 2008 meeting, Staples' counsel – Jennifer Borden ("Ms. Borden") of Holland & Knight LLP – asserted that Staples' VDA covered abandoned or unclaimed GC/MC amounts through 1999, and thus precluded Kelmar or the State from examining any GC/MC records through that year.

30. Ms. Borden also claimed that the VDA covered any other abandoned or unclaimed property through December 31, 1995.

31. Subsequent to the March 2008 meeting, Kelmar provided Staples its VDA, which demonstrated that Staples was only released for claims related to abandoned or unclaimed property identified through December 31, 1994.

32. Nevertheless, Staples' counsel continued to assert that Staples' VDA precluded an examination of GC/MC through 1999.

33. On or around June 30, 2008, Kelmar requested all of Staples' GC/MC data for January 1, 1995 forward, including information concerning all gift certificates and merchandise credits issued, redeemed and outstanding.

34. By September 2008, approximately three months after Kelmar's request for GC/MC records, Staples had failed to provide the requested GC/MC data.

35. Accordingly, on or around September 19, 2008, Kelmar and Staples' representatives conducted a conference call, at which time Kelmar went through outstanding document requests, including the outstanding GC/MC records request.

36. During the call, Staples' counsel, Ms. Borden, indicated that she was unsure whether the requested GC/MC information was available, but in any event was unsure whether it was appropriate to provide the information to Kelmar and the State.

37. Later that day, Ms. Borden sent a letter to Delaware Deputy Attorney General ("AG") J. Patrick Hurley, asserting, among other things, that Staples' VDA precluded Delaware from reviewing GC/MC records through 1999.

38. Ms. Borden's letter requested that the State "concur with [Staples'] conclusion and advise Kelmar of its statutory inability to review the time periods which were previously resolved with the state."

39. In response, Deputy AG Hurley sent a letter to Ms. Borden reiterating the State's position that Staples' VDA only released Staples from claims related to abandoned or unclaimed property through December 31, 1994, and that neither the VDA nor any statute of limitations precluded the State's examination.

40. Ms. Borden responded to Deputy AG Hurley's letter approximately six months later, on April 7, 2009, reiterating Staples' position and stating that "[a]ll available documents have been, and will continue to be produced."

41. In June 2009, Kelmar sent Staples a document called a "task management report" in which Kelmar reiterated its June 2008 request. In July 2009, more than a year after Kelmar's June 2008 request, Staples produced only a one-page chart of gift cards sold between October 23, 1999 and December 9, 2000, and a one-page report of Staples' costs of goods sold for the years 1995 to 2000.

42. On August 18, 2009, Kelmar informed Staples via email that Kelmar would need to use "gift card (stored value card) data" (as opposed to pre-2000 gift certificate data) in order to estimate liability for periods where Staples did not have sufficient information, and requested that Staples provide "all available data regarding total gift cards, merchandise credit cards and any other stored value cards sold, redeemed, partially redeemed and outstanding for all periods."

43. In December 2009, Staples provided only a one-page spreadsheet that covered only the period from November 2000 to October 2002. In response, Kelmar reiterated its request for all available GC/MC data.

44. In January 2010, Staples responded that some of the information Kelmar sought was only available from an unnamed Staples vendor, and that obtaining this data

would require “considerable expense” and was “not feasible.” Staples subsequently identified this vendor as a company called Stored Value Solutions (“SVS”).

45. Between February and August 2010, Kelmar made repeated requests that Staples provide all available GC/MC data.

46. In September 2010, Staples provided a one-page summary of merchandise credits from 1990 through 2000 with no supporting documentation.

47. Between September and November 2010, Kelmar repeatedly asked Staples for documentation supporting the summary Staples produced in September.

48. Despite Kelmar’s repeated requests, Staples has not produced documentation supporting the one-page summary Staples produced in September, 2010. Staples has only provided limited information, such as merely identifying categories of merchandise credits including “charitable contributions,” and has failed to provide sufficient documentation for Kelmar to conduct its examination. Thus, Staples has unjustifiably obstructed the State’s efforts to examine Staples’ compliance with its obligations under the Escheat Statute with respect to gift certificates and merchandise credits.

49. Accordingly, Staples has caused unreasonable delay, and/or otherwise failed to fully comply with the State’s request for an examination of Staples’ unclaimed gift certificates and merchandise credits.

**E. ACCOUNTS RECEIVABLE CREDITS**

50. AR Credits is a category of property that includes amounts that Staples’ customers can offset against money owed to Staples, including but not limited to customer overpayments, credit memos and remittances.

51. As set forth below, despite repeated requests for information, Staples has provided incorrect and/or incomplete documentation that has prohibited the State from examining Staples' compliance with the Escheat Statute for AR Credits.

52. On or around September 26, 2006, Kelmar made a written request asking Staples to complete a flowchart of accounts receivable information for each entity that would be included in the examination, in order to give Kelmar a general understanding of how Staples handles customer overpayments and unidentified remittances. The flowchart requested information regarding Staples' process for applying customer payments to customer accounts.

53. In November 2006, Staples provided an accounts receivable flowchart for only one entity, a Staples subsidiary called Staples Contract & Commercial ("C&C").

54. In January and February 2007, Kelmar requested that Staples provide flowcharts for all the Staples entities included in the scope of the examination.

55. In March 2007, Staples responded that only two entities within the scope of the examination have AR Credits, namely C&C and another Staples subsidiary called Quill Corp. ("Quill").

56. On or around April 25, 2007, Kelmar requested aging reports for these two entities – *i.e.* reports demonstrating the length of time a customer's credit balance has been outstanding or unused – and a flowchart for Quill. In June 2007, Staples responded to this request.

57. In July 2007, Staples admitted that the aging reports it provided to Kelmar were incomplete, and agreed to provide more responsive reports.

58. In August 2007, Staples provided updated aging reports for C&C to Kelmar, but acknowledged that the previous reports were missing key data and that even the updated reports remained incomplete.

59. During a conference call in October 2007, between Kelmar and Staples, Staples reaffirmed that the information provided to Kelmar for C&C was missing substantial data. Kelmar and Staples agreed that Staples would provide additional information for C&C and Quill by October 15, 2007 and October 17, 2007, respectively.

60. On October 30, 2007, Staples provided additional information for each of the two entities, but significant credit information for each entity was still missing because Staples provided information only for AR Credits that were unused or outstanding as of January 2007.

61. On March 17, 2008, Staples met with Kelmar and, based on Staples' insistence that no additional information was available, Kelmar selected 40 separate and distinct customer credit balances from each entity for Staples to research, as to the disposition of these balances.

62. In June and July 2008, Staples confirmed that most of the customer credit balances for both entities were ultimately taken into Staples' income through a "bad debt" account. In other words, Staples was accounting for these unclaimed amounts as income to Staples. Based on this information, Kelmar then requested all available detail for the amounts classified as "bad debt."

63. In December 2008 and January 2009, Staples provided information regarding the bad debt account for Quill, but for certain years Staples provided only lump sum amounts, not the level of detail Kelmar needed for the examination. In April 2009,

Staples informed Kelmar that information for C&C had been “purged” but that Staples would investigate further.

64. After repeated requests by Kelmar for additional information, in February 2010 the State directly requested that Staples produce additional information regarding C&C. Between March and May 2010 – more than three years after the original request - Staples provided six additional years of data for C&C concerning amounts that had been classified as “bad debt.”

65. Kelmar analyzed the data for C&C and Quill, and in September 2010, Kelmar asked Staples to confirm the matching of related customers in order to provide Staples with the maximum possible benefit of all applicable offsets for each customer. In other words, Kelmar wanted to be sure that the net credit balance for each customer was appropriately reduced by any amounts due to Staples from that customer. Staples responded that the data it had provided for certain years for C&C was incorrect in that the amounts identified by Staples as debits were actually credits, and vice versa. As a result, Kelmar was forced to re-do its analysis substituting the C&C credits for debits and vice versa.

66. After re-doing the analysis with the correct data, on or around December 15, 2010, Kelmar provided Staples with a statistically sampled pool of customer credit balances from the C&C and Quill bad debt accounts for Staples to research. In addition, Kelmar informed Staples that it would provide a preliminary Report of Examination on February 15, 2011, and that the State would request payment on or around March 15, 2011.

67. On February 15, 2011, Staples sent a letter to Kelmar stating that the data it had provided for both entities was once again incorrect and incomplete. This information caused Kelmar to inform the State that all the AR Credit matching work it had done would need to be re-done from the beginning. To date, Staples has failed to produce correct accounting records that would allow Kelmar to re-do its analysis.

68. Accordingly, Staples has caused unreasonable delay, and/or otherwise failed to fully comply with the State's request for an examination of Staples' unclaimed AR Credits.

**F. REBATES**

69. Rebates include customer incentive programs and other similar programs that benefit Staples customers.

70. As set forth below, despite repeated requests for information, Staples has failed to provide sufficient documentation for the State to effectively examine Staples' compliance with the Escheat Statute for rebates.

71. On or around September 26, 2006, Kelmar made a written request to Staples seeking general information about Staples' customer rebate and customer incentive programs, including a description of Staples' procedures, if any, for tracking unclaimed property related to these programs.

72. In October 2006, Staples responded that it offered no rebates prior to 2002 and therefore believed that no rebates were escheatable.

73. In January 2007, Staples acknowledged that it did in fact offer rebates prior to 2002 and identified a manufacturer rebate program administered for Staples by a company called Parago f/k/a How2HQ.com.

74. In April 2007, Kelmar requested additional information concerning rebates from Staples, including descriptions of certain general ledger accounts and information concerning a Quill rebate bank account with BankOne that Staples previously identified in October 2006 and claimed was inactive.

75. In August 2007, based on account descriptions provided by Staples, Kelmar requested from Staples additional information related to certain accounts, such as a more detailed description of the account's function and some transaction detail for certain periods. In October 2007, Staples complied with Kelmar's requests.

76. In November 2007, Kelmar made a general determination that the Staples rebates were excluded from review based on the terms of a 1999 rebate management agreement between Staples and Parago/How2HQ.com indicating that Staples was not liable for rebates. Up to this time, Staples had provided no other rebate management agreements, even though Staples had numerous agreements with Parago/How2HQ.com, subsequent to the 1999 agreement it provided, that contained materially different terms.

77. In February 2011, Kelmar reexamined the property category of rebates in connection with a routine review of the open portions of the Staples examination, and questioned internally whether the 1999 agreement, now over a decade old, might still be in effect.

78. On March 3, 2011, Kelmar reiterated its original request that Staples provide information on its current and historical rebates programs, and further requested copies of any contracts between Staples and any rebate program administrator or participating vendor or manufacturer.

79. On March 14, 2011, Staples provided documents that were asked for but never provided in 2007, and that included additional agreements with Parago from the years 2000 to 2006. In addition, Staples did not include copies of any agreements between Staples and any vendors or manufacturers who participated in a rebate program.

80. On March 22, 2011, Kelmar informed Staples in writing that Staples' response was incomplete for failing to provide agreements with any vendors or manufacturers who participated in a rebate program

81. Accordingly, Staples has caused unreasonable delay, and/or otherwise failed to fully comply with the State's request for an examination of Staples' unclaimed rebates by not producing all rebate management agreements in a timely fashion and not producing any contracts with any vendors or manufacturers who are involved in programs that provide rebates to Staples customers.

### **CAUSES OF ACTION**

#### **SUPPLEMENTAL COUNTERCLAIM COUNT I (Statutory Cause of Action to Enforce the State's Examination Pursuant to 12 Del. C. § 1155)**

82. The State Escheator reasserts and incorporates paragraphs 1 through 81 of the Verified Amended Counterclaim as if set forth fully herein.

83. Section 1155 of Title 12 of the Delaware Code provides that the State Escheator may "at reasonable times and upon reasonable notice examine the records of any person or business association or organization to determine whether the person has complied with" the Escheat Statute.

84. As explained above, the State Escheator, and others acting on behalf of the State, have made repeated requests that Staples provide documentation to permit an

examination of Staples unclaimed property for the categories of gift certificates and merchandise credits, accounts receivable credits and rebates.

85. Staples has refused to fully comply with the State Escheator's requests.

86. Accordingly, the State Escheator seeks an Order, pursuant to Section 1155, compelling Staples to comply with the State's examination of Staples' unclaimed gift certificates and merchandise credits, accounts receivable credits and rebates.

87. The State Escheator has no adequate remedy at law.

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**WHEREFORE**, the State Escheator prays for judgment as follows:

- (i) for an order requiring Staples to fully comply with the State's examination requests pursuant to Section 1155; and
- (ii) for such other and further relief as may be just and proper.

DATED: April 6, 2011

GRANT & EISENHOFER P.A.

/s/ Michael J. Barry

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