SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA ex rel. KEN ELDER,

Plaintiff-Relator,

v.

JPMORGAN CHASE BANK, N.A.,

Defendant.

STATE OF CALIFORNIA ex rel. KEN ELDER,

Plaintiff-Relator,

v.

U.S. BANK, N.A.,

Defendant.

Case Nos. CGC-19-579144
and
CGC-19-581373

ORDER ON DEFENDANTS' DEMURRERS TO RELATOR'S SECOND AMENDED COMPLAINTS

Defendants' demurrers to Relator's Second Amended Complaints in these two related cases came on for hearing before this Court on October 4, 2021. Relator, Defendants, and the People of the State of California as real party in interest appeared through their counsel of record. Having considered the parties' written submissions, including the supplemental briefs filed following the hearing, and the oral argument of counsel presented at the hearing, the Court overrules the demurrers in their entirety.

I. BACKGROUND

A. Escheatment

Escheat is a procedure "whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." (*Texas v. New Jersey* (1965) 379 U.S. 674, 675.) California's Unclaimed Property Law, Code Civ. Proc. §§ 1500-1582 ("UPL"), originally enacted in 1959, regulates the escheatment of abandoned property to the State of California.[1] As a general rule, unless otherwise provided by statute, intangible personal property escheats to California if "[t]he last known address . . . of the apparent owner is in this state." (Code Civ. Proc. § 1510(a),(b)(1).)

Section 1511 supplies a different, place of purchase rule for certain written financial instruments:

> Any sum payable on a money order, travelers check, or other similar written instrument (other than a third-party bank check) on which a business association is directly liable escheats to this state under this chapter if the conditions for escheat stated in Section 1513 exist and if . . . (1) The books and records of such business association show that such money order, travelers check, or other similar written instrument was purchased in this state . . . .

(Code Civ. Proc. § 1511(a).) Similarly, section 1513(a)(4) provides that property held or owing by a business association that escheats to the State includes:

> Any sum payable on any other written instrument on which a banking or financial organization is directly liable, including, by way of illustration but not of limitation, any draft, cashier's check, teller's check, or certified check, that has been outstanding for more

[1] The UPL does not actually provide for permanent escheatment of property to the State; rather, "escheat" means the State has title to possess and use the property while also being indefinitely obligated to pay any valid claim for the property. (Code Civ. Proc. §§ 1300(c), 1501.5(a); *Morris v. Chiang* (2008) 163 Cal.App.4th 753, 757-758.)

than three years from the date it was payable . . . .

(Code Civ. Proc. § 1513(a)(4).)[2] Thus, the UPL expressly provides that uncashed cashier's checks purchased in California escheat to the State if they have remained outstanding three years after issuance.

Section 1530 of the UPL requires "[e]very person holding funds or other property escheated to this state" to file annual reports with the Controller (before November 1 of each year), setting forth "[t]he name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of value of at least twenty-five dollars ($25)" subject to escheatment as of the prior June 30 or fiscal yearend; the amount appearing from the records to be due; the date when the property became payable, and the date of the last transaction with the owner with respect to the property, among other information. (§ 1530(a),(b)(2),(5),(6).) Section 1532 requires holders of escheated property to remit to the Controller all unclaimed funds listed in their reports no later than the following June 30. (§ 1532(a).)

The UPL codifies the federal priority rules for escheatment in state law. (See Legislative Comm. Comment foll. § 1510 ["Subdivisions (a), (b), and (c) of Section 1510 describe types of abandoned intangible property that this state may claim under the rules stated in Texas v. New Jersey."].) Under those rules, unclaimed intangible personal property generally is subject to escheat by the state of the last known address of the owner as shown by the books and records of the holder. (*Texas v. New Jersey* (1965) 379 U.S. 674, 681-682.) Where the holder's books and records do not show the owner's last address, the property is generally subject to escheat by the state of the holder's domicile. (*Id.* at 682; see also *Delaware v. New York* (1993) 507 U.S. 490, 504-507 [unclaimed securities distributions held by intermediary banks, brokers, and depositories for beneficial owners who cannot be identified or located are subject to escheat in the state in which the intermediary is incorporated].)

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[2] A "business association" is defined to include a "banking organization," which in turn includes "any national or state bank." (Code Civ. Proc. § 1501(b),(c).) It is undisputed that the Defendant banks are "banking organizations" within the meaning of the UPL.

As an exception to this federal common law rule, escheatment of certain written financial instruments is governed by the Disposition of Abandoned Money Orders and Traveler's Checks Act ("Federal Disposition Act" or "FDA"), 12 U.S.C. § 2503. The FDA establishes a place of purchase rule for escheatment of any sum payable on "a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable":

> If the books and records of such banking or financial organization or business association show the State in which such money order, traveler's check, or similar written instrument was purchased, that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum.

(12 U.S.C. § 2503(1).) If the place of purchase does not appear in the books and records of the banking organization, "the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, until another State shall demonstrate by written evidence that it is the State of purchase." (12 U.S.C. § 2503(2).) UPL Section 1511 implements this rule under California law. (See Law Rev. Comm. Comment foll. § 1511 ["Section 1511 adopts the rules provided in federal legislation which determines which state is entitled to escheat sums payable on money orders, travelers checks, and similar written instruments."].)

B. Relator's Allegations

Plaintiff-Relator Kenneth Elder alleges that the Defendant banks have failed to escheat tens of millions of dollars owing on unclaimed cashier's checks to the State of California. Defendants have represented to state authorities that these unclaimed cashier's checks, purchased at bank branches in California, are subject to escheatment in Ohio. Defendants allegedly take the position that they do not have a record of the addresses of the payees on the cashier's checks that they issue, so the checks escheat to Ohio—the banks' state of corporate domicile. Relator alleges that this position violates the UPL because the UPL requires cashier's checks purchased in

California to escheat to California.

Relator further alleges that many cashier's checks escheated to Ohio were made out to California institutions and government bodies. For example, JPMorgan Chase Bank has reported as subject to escheatment in Ohio checks made out to the State Bar of California, the California Franchise Tax board, the City of Chico, California, Girl Scouts San Diego, the San Francisco Opera Orchestra, and other similar payees with clear connections to California. Similarly, U.S. Bank has reported as subject to escheatment in Ohio checks made out to the Los Angeles Superior Court, the California Association of Realtors, California Police Youth Charities, and other similar payees. Relator further claims that, for some subset of the cashier's checks, Defendants know the address of the payee because the check's purchaser is also the payee. Relator claims to have identified individuals who resided in California, purchased a cashier's check made out to themselves at Chase Bank branches in California, and later had the amount owing on that check escheated to Ohio.

Relator contends that escheatment to Ohio benefits Defendants because Ohio's escheatment law is much more favorable for property holders than California's escheatment law. Ohio requires escheatment after five years, while California requires escheatment after three years. Ohio allows property holders to satisfy their payment obligations by paying only 10% of the aggregate funds they report owing, while California requires escheatment of the full amount owed. Ohio also exempts business-to-business transactions from escheatment.

C. Procedural History

Relator originally filed these cases in this Court on September 10, 2019 and December 9, 2019, respectively. After the Attorney General declined to intervene in either case, Relator amended the complaints. After the amended complaints were unsealed and served, Defendants removed the cases to the U.S. District Court for the Northern District of California. By order filed March 31, 2021, the District Court (Hon. Charles R. Breyer) granted Relator's motion to remand the cases to this court, holding that it lacked subject matter jurisdiction over the actions because the complaints do not necessarily raise federal questions, and because the extension of federal question jurisdiction to the cases would disrupt the balance of federal and state judicial

responsibilities.

Defendants demurred to the SAC, and the Court held an initial hearing on the demurrers on October 4, 2021. At that hearing, the Attorney's General Office on behalf of the People as real party in interest appeared to contest the portion of the Court's tentative ruling sustaining Defendants' demurrers on the ground that Relator did not allege that the Controller gave Defendants notice of violation under section 1576(c). Following the hearing, the court permitted the parties including the Attorney General's office to file supplemental briefs. Having taken the matter under submission on November 1, 2021, when the last of those briefs was filed, the Court now issues the instant order.

II. DISCUSSION

The SAC is brought under California's False Claims Act, Gov. Code §§ 12650-12656 ("FCA" or the "Act"), which allows private citizens to bring actions as relators (or "qui tam plaintiffs") to recover sums owed to the State of California. (Gov. Code § 12652(c)(1).)[3] Relator alleges that Defendant banks violated three different provisions of the FCA:

(1) § 12651(a)(4), which provides that a person violates the Act who "[h]as possession, custody, or control of public property or money used to be used by the state . . . and knowingly delivers or causes to be delivered less than all of that property."

(2) § 12651(a)(7), which provides that a person violates the Act who "knowingly conceals or knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state." and

(3) § 12651(a)(7), which also provides a person violates the Act who "[k]nowingly makes, uses or causes to be made a false record or statement material to an obligation to pay or transmit money or property to the state."

Relator seeks to recover treble damages, civil penalties, a relator's fee, attorney's fees and costs, and other relief. Defendants demur on multiple grounds, each of which is addressed in turn below.

[3] Unless otherwise indicated, all further statutory references in this order to the FCA are to the Government Code, and to the UPL are to the Code of Civil Procedure.

A. **Prior Notice by the Controller Is Not A Statutory Prerequisite to Suit.**

Defendants argue first that prior notice of a violation by the State Controller's Office is a prerequisite to a finding that a property holder violated the UPL, and that because Relator does not allege that any such notice was provided here to either Defendant, the SAC is barred as a matter of law. In its tentative ruling sustaining Defendants' demurrers, the Court agreed with this argument. Having considered the parties' supplemental briefing on the issue, including the statement of interest filed by the Attorney General, the Court has reconsidered its prior tentative ruling.[4]

Section 1576 of the UPL, entitled "Punishment for failure to render report or deliver escheated property," prescribes monetary fines to be paid by any person who "willfully" fails to render any report or to pay or deliver escheated property to the Controller. (§ 1576(a),(b).) Subdivision (c) of that statute provides,

> No person shall be considered to have willfully failed to report, pay, or deliver escheated property to the Controller as required under this chapter unless he or she has failed to respond within a reasonable time after notification by certified mail by the Controller's office of his or her failure to act.

Thus, "Penalties for willful failure to report under the UPL may only be imposed *after* the Controller has given notice by certified mail of the violation and the violator has failed to respond." (*State of California ex rel. Bowen v. Bank of America Corp.* (2005) 126 Cal.App.4th 225, 235.)

Defendants' argument is based principally on *Bowen*, which they contend is "controlling." There, as here, a *qui tam* plaintiff filed a whistleblower action against defendant banks for allegedly failing to report certain fees (reconveyance fees charged to borrowers in connection with real estate transactions) as escheated property under the False Claims Act. Plaintiff alleged that defendants' failure to report the fees in order to conceal an obligation to deliver escheated

[4] Although the Court considered certifying the issue for interlocutory review under Code of Civil Procedure section 166.1, it now concludes that such certification is not warranted.

property to the state constituted reverse false claims violations prohibited by section 12651(a)(7).[5] The court framed the issue before it as whether defendants had a specific legal "obligation" within the meaning of the FCA to refund the reconveyance fees at issue, explaining that in order to give rise to reverse false claims liability, a plaintiff "must demonstrate that defendants' obligation was sufficiently certain to give rise to an action of debt at common law." (126 Cal.App.4th at 241 (citation and quotations omitted).)[6] It quoted, with emphasis, a federal court decision construing the parallel provision of the federal False Claims Act:[7] "*A defendant risks liability when making a false statement to conceal, avoid or decrease obligations such as his prior acknowledgment of indebtedness, a final court or administrative judgment that the defendant owes money or property to the government, or a contractual duty to pay or transmit money or property to the government.*" (*Id.*, quoting *American Textile Mfrs. Institute v. The Limited* (6th Cir. 1999) 190 F.3d 729, 736.) The court held that because defendants' obligation to refund the reconveyance fees was neither liquidated nor certain, the trial court had properly sustained defendants' demurrer without leave to amend. (*Id.* at 242-243.) The court explained that neither defendant lenders' contracts with borrowers nor Civil Code section 2941, which governs such reconveyance fees, necessarily required them to refund the fees. As a result, the court concluded, "defendants' contractual breaches or statutory violations—the charging of improper reconveyance fees or the failure to record reconveyances—would not, without more, create a liquidated and certain obligation to refund the reconveyance fees." (*Id.* at 243.)

In the "Conclusion" section of its opinion, the *Bowen* court included a sentence containing the following emphasized observations:

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[5] A "reverse" false claim is one that, rather than comprising a demand for payment by the government, comprises use of a false record or statement to conceal or decrease an obligation to pay the government. (See *State ex rel. Bartlett v. Miller* (2016) 243 Cal.App.4th 1398, 1406 fn. 4; *State of California ex rel. McCann v. Bank of America* (2011) 191 Cal.App.4th 897, 903 [distinguishing between traditional and reverse false claims].)

[6] The FCA defines "obligation" in pertinent part as "an established duty, . . . , arising . . . from statute or regulation." (Gov. Code § 12650(b)(5).)

[7] Because the California False Claims Act is patterned after the federal False Claims Act as amended in 1986, California courts look to precedent construing the federal act. (*State v. Altus Finance, SA* (2005) 36 Cal.4th 1284, 1299; *Fassberg Constr. Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 735.)

> In this case, plaintiff not only lacked standing to pursue a breach of contract claim or a class action to recover the disputed reconveyance fees, *he sought to use the UPL as the hook for imposing reverse false claims liability for violations that are not even punishable under the UPL unless the violator is given notice and an opportunity to correct the alleged violations. Despite the lack of any allegation that defendants received such notice from the Controller*, plaintiff contends defendants' obligation to refund the reconveyance fees was both liquidated and certain because plaintiff is seeking only the disgorgement of the reconveyance fees. Plaintiff's waiver of other damages, however, fails to establish that an enforceable obligation to refund the fees existed when the allegedly false reports were filed.

(*Id.* at 245-246 (emphasis added).) Defendants' position is based heavily on the emphasized language. As Plaintiff and the Attorney General convincingly argue, however, that language was not necessary to the *Bowen* court's holding. Nowhere in the body of the *Bowen* opinion did that court address (or even mention) section 1576, much less base its holding on whether the defendant banks had received notice from the Controller. The emphasized language therefore must be disregarded as mere nonbinding dictum. (See, e.g., *Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1236, fn. 2 [declining to follow statements that were unnecessary to the decision in a prior case as nonbinding dictum]; *Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61 ["Only statements necessary to the decision are binding precedents; explanatory observations are not binding precedent."].)

The same is true as to two later decisions that referred in passing to the *Bowen* court's observation, but did not adopt it. (See *State of California ex rel. Grayson v. Pacific Bell Telephone Co.* (2006) 142 Cal.App.4th 741, 746 [deciding case on basis of public disclosure bar: "We need not consider the potential implications of a collision between the notice provisions of the UPL and a reverse false claim action under the FCA because, in this case, the jurisdictional bar contained in the FCA precludes plaintiff's *qui tam* complaint"]; *State of California ex rel. McCann v. Bank of America, N.A.* (2011) 191 Cal.App.4th 897, 914 fn. 18 ["The parties have not raised here, and did not raise in the trial court, the significance, if any, of the failure of the Controller to make any demand upon [Bank of America] under Code of Civil Procedure section 1576, subdivision (c) for either reporting or delivery of the sums Appellants contend are subject to escheat."].) "It is axiomatic that cases are not authority for propositions that are not

considered." (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.)

Even more significantly, not only is *Bowen*'s discussion dicta,[8] Defendants' position misreads the FCA. The notice requirement imposed by section 1576 is a prerequisite only to the Controller's imposition of monetary fines for "willful" violations of the UPL. Defendants emphasize that section 1576, entitled "Violation of Chapter," appears in Article 6 of the UPL, entitled "Compliance and Enforcement." However, the UPL authorizes the Controller to bring an action for a judicial determination that particular property is subject to escheat by the state and to enforce the delivery of property to the Controller, without regard to whether the defendant's failure to deliver the property was willful or merely negligent. (§ 1572(a)(2),(3).) Nothing in the UPL provides that the Controller must provide prior written notification to a property holder before bringing such a suit. Thus, holders of property have a statutory obligation to comply with the UPL's reporting and delivery requirements that, if violated, can serve as the basis for a FCA action, regardless of whether the holders' violation of those requirements is willful.

In addition, as the Attorney General correctly emphasizes, monetary fines under section 1576 are not the only remedy available to the State for violations of the UPL. First, section 1532 imposes a two percent civil penalty when funds required to be paid electronically are paid by other means. (§ 1532(g).) Second, any person who fails to report, pay, or deliver unclaimed property as required, unless that failure is due to reasonable cause, is required to pay to the Controller interest at the rate of 12 percent on the property from the date the property should have been reported, paid, or delivered. (§ 1577.) Third, any business association that sells travelers checks, money orders, or other similar written instruments in California and willfully fails to maintain a record of those purchases is liable for a civil penalty of $500 for each day it fails to

[8] Moreover, the *Bowen* case involved only an alleged reverse false claim violation under § 12651(a)(7). Thus, the dicta in that case does not apply to Plaintiff's claims under § 12651(a)(4).

comply. (§ 1581.)[9]

Nor is it a necessary element of a claim under the FCA that a defendant have willfully disregarded its prohibitions; to the contrary, the two provisions which Plaintiffs invoke prohibit "knowing[]" violations. (§§ 12651(a)(4), (a)(7).) The FCA states that "knowing" and "knowingly" mean that a person, with respect to information, "does any of the following: (A) has actual knowledge of the information. (B) Acts in deliberate ignorance of the truth or falsity of the information. (C) Acts in reckless disregard of the truth or falsity of the information." (§ 12650(b)(3).)[10] "Proof of specific intent to defraud is not required." (*Id.*; see *San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc.* (2014) 224 Cal.App.4th 627, 645-646 [trial court erred in concluding that plaintiffs could not establish the knowledge element of their FCA claim where there were disputed issues of fact as to whether defendant acted with at least reckless disregard of the alleged falsity of its implied certification that it had complied with contract with school district].) That standard is different than the "willful" violations addressed by section 1576, which by definition encompasses only violations of which a defendant has actual knowledge by virtue of the written notice from the Controller.

Further, applying the *Bowen* dicta to preclude reverse false claims based on a defendant utilizing a false report to *conceal* its obligation to pay escheated funds to the State would have the perverse effect of rewarding defendants who deliberately defraud the State. If a defendant knowingly submits false reports, and the Controller is not otherwise made aware that it has understated or concealed its obligation to deliver funds to the State, by definition the Controller *could not* provide written notification to the defendant of its failure to comply. Such a result would severely undermine the FCA, the core purpose of which, like the federal FCA on which it

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[9] Significantly in light of Relator's allegations here, the Legislative Committee Comment to this provision notes that "[t]he amount of the civil penalty imposed by subdivision (c) for willful failure to maintain the required record reflects the substantial amount of money that might be lost to California if a record is not maintained. Absent any record, the money would escheat to the state where the business association is domiciled." (Legis. Comm. Comment foll. § 1581.)

[10] The definition is identical to that set forth in the federal False Claims Act. (31 U.S.C. § 3729(b)(1).) This statutory definition requires at least deliberate ignorance or reckless disregard. (*U.S. ex rel. Hagood v. Sonoma County Water Agency* (9th Cir. 1991) 929 F.2d 1416, 1421 ["Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence."].)

was based, is "to encourage suits by individuals with valuable knowledge of fraud *unknown to the government.*" (*U.S. ex rel. Winkelman v. CVS Caremark Corp.* (1st Cir. 2016) 827 F.3d 201, 210 (emphasis added); *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 499 [legislative purpose of CFCA is "to encourage private persons to disclose and prosecute fraudulent claims made to governmental agencies"].) And it would contravene the legislative directive that the FCA "shall be liberally construed and applied to promote the public interest." (§ 12655(c); see also *City of Hawthorne vex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1677 ["the Act must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies"].)

Finally, to the extent that Defendants' argument is directed to whether they may be subject to monetary penalties under section 1576 for an alleged reverse false claims violation, it is not properly raised at the pleading stage. A demurrer "cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047; see also, e.g., *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 384-385, disapproved on other grounds, *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175 [demurrer was not appropriate vehicle to challenge portions of hybrid causes of action seeking civil penalties where plaintiffs also sought unpaid wages and statutory penalties].)

B. Relator's California Law Claims Are Not Preempted.

Next, Defendants argue that because Relator disavowed reliance on federal law in connection with his motion to remand in federal court, he cannot state a claim under California law. The Court disagrees. As discussed above,[11] in enacting the UPL, the Legislature expressly codified the federal priority rules for escheatment in state law, including the general last known address rule set forth in *Texas v. New Jersey* and UPL section 1510, and the place of purchase rule for certain written financial instruments set forth in the FDA and UPL sections 1511 and 1513. That Relator's claims are based on California state law does not preclude Relator from stating a claim, since the rules set forth in the UPL are consistent with federal law.

[11] See pp. 2-4, *supra.*

In any event, Relator expressly alleges that Defendants violated *both* the last known address rule *and* the specialized place of purchase rule for certain written financial instruments. (JPM SAC ¶¶ 19, 47; USB SAC ¶¶ 15, 31.) As Judge Breyer observed, in light of that allegation, Defendants cannot assert a federal preemption defense:

> Relator claims that Defendants have failed to escheat cashier's checks to the State of California even when the check's payee is also the purchaser and Defendants' records show the payee/purchaser to reside in California. For this subset of checks, no federal preemption defense is available.

(RJN, Ex. 1 at 9.) A second district court recently reached precisely the same conclusion in remanding a closely similar action brought by the same relator in Illinois against Defendant U.S. Bank. (*Illinois ex rel. Elder v. U.S. Bank N.A.* (N.D. Ill. Oct. 22, 2021) 2021 WL 4942041, at *3 ["while the question of which federal escheatment rule applies will need to be addressed, Elder's claims do not ultimately depend on its resolution. Under these circumstances, the complaint does not 'necessarily raise' a federal question"].)[12] Thus, Defendants' demurrer is defective under the principle discussed above that a demurrer cannot be sustained to part of a cause of action. (*Kong*, 108 Cal.App.4th at 1047.)

C. **The Statutory Language Is Not Fatally Ambiguous.**

Defendants also argue that Relator cannot state a claim because the statutory language "similar written instruments" is ambiguous. The Court disagrees. As discussed above, UPL section 1513 expressly lists cashier's checks among the written instruments to which it applies. Section 1513 unambiguously applies. It is of no moment even if, as Defendants argue, the issue

[12] In contrast, in another related case filed by Relator in Illinois and removed to federal court, the court denied Relator's motion to remand. (*Illinois ex rel. Elder v. JPMorgan Chase Bank, N.A.* (N.D. Ill. Aug. 3, 2021), 2021 WL 3367155.) The complaint in that case, however, explicitly relied on the FDA. (See *id.* at *4 ["Relator lists a federal statute as a reason why defendant owes money to the State of Illinois," citing allegation in complaint].)

may not have been finally resolved as a matter of federal law under the FDA.[13] In any event, as discussed above, Relator alleges that Defendants have violated *both* priority rules established by federal and state law. Thus, the demurrers run afoul of the rule cited above that a demurrer does not lie to a portion of a cause of action. At best, Defendants' argument raises factual issues that cannot be resolved on demurrer.

D. The Court Cannot Conclude On Demurrer that the Action Is Precluded By The Public Disclosure Bar.

Defendants argue next that Relator's action is precluded by the public disclosure bar under the FCA. Defendants' argument raises factual issues that cannot be decided as a matter of law on demurrer.

The public disclosure bar is embodied in Government Code section 12652(d)(3), which states that the court "shall dismiss an action or claim under this section . . . if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in any of the following: (i) A criminal, civil, or administrative hearing in which the state or prosecuting authority of a political subdivision or their agents are a party. (ii) A report, hearing, audit, or investigation of the Legislature, the state, or governing body of a political subdivision. (iii) The news media." (Gov. § 12652(d)(3)(A).) However, this restriction "shall not apply if . . . the person bringing the action is an original source of the information." (§ 12652(d)(3)(B).) "Original source" is defined as an individual who either "(i) Prior to a public disclosure under subparagraph (A), has voluntarily disclosed to the state or political subdivision the information on which allegations or transactions in a claim are based. [or] (ii) Has knowledge that is independent of, and materially adds to, the publicly disclosed allegations or transactions, and has voluntarily

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[13] Defendants misplace their reliance on the U.S. Supreme Court litigation in the so-called MoneyGram case (*Delaware v. Pennsylvania and Wisconsin*, Nos. 22O145 & 22O146). The Disputed Instruments involved in that case are Agent Checks and Teller's Checks issued by MoneyGram, not cashier's checks, and the issue before the Special Master in that case is whether such instruments constitute "money orders" or "other similar written instruments" within the meaning of the FDA. Thus, the case does not involve, and will not decide, whether cashier's checks are "other similar written instruments" under the FDA. (See First Interim Report of Special Master (July 23, 2021) at 55-56 [Report "concludes that the Disputed Instruments are 'money orders' under the FDA, leaving substantially open whether other instruments falling within the Defendants' broad definition should also be so classified"].)

provided the information to the state or political subdivision before filing an action under this section." (§ 12652(d)(3)(C).)

Like the corresponding provision of the federal False Claims Act, this provision authorizes dismissal of "*qui tam* actions that do not assist the government in ferreting out fraud because the fraudulent allegations or transactions are already in the public domain." (*Grayson*, 142 Cal.App.4th at 748.) "Where there has been a public disclosure the governmental authority is 'already in a position to vindicate society's interests, and a qui tam action would serve no purpose.'" (*Id.* (citation omitted).) "The . . . bar is triggered whenever a plaintiff files a qui tam complaint containing allegations or describing transactions 'substantially similar' to those already in the public domain so that the publicly available information is already sufficient to place the government on notice of the alleged fraud. The fraud, however, need not be explicitly alleged to constitute public disclosure. Of course, whether or not the Government was actually pursuing the allegations at issue in this case is irrelevant to the question of whether said allegations were 'publicly disclosed' for purposes of the FCA. All that is required is a finding that the publicly disclosed allegations were sufficient to put the government on notice of the alleged FCA violations." (*Id.* (citations and quotations omitted).)[14]

Thus, in determining whether a complaint surmounts the bar, a court "must determine first whether the allegations or transactions described . . . are substantially similar to information already in the public domain and, if so, secondly whether the relator is an original source of the information exposing the fraud." (*Id.* at 749.) On demurrer, of course, a court is "limited to plaintiff's allegations. Thus, we must search the face of the complaint for allegations that suggest the alleged fraud is based upon information already in the public domain. In other words, does the complaint sabotage itself?" (*Id.*) On demurrer, a court may also rely upon matters properly subject to judicial notice, including documents such as newspaper articles, but only for the limited

[14] *Grayson* referred to § 12652(d)(3) as a "jurisdictional" bar. Like the parallel provision of the federal False Claims Act, 31 U.S.C. § 3730(e)(4), the prior version of that statute was explicitly phrased as a jurisdictional bar, but was subsequently amended to provide grounds for dismissal. (See *U.S. ex rel. Osheroff v. Humana Inc.* (11th Cir. 2015) 776 F.3d 805, 809-811.) The amendment to § 12652(d)(3) conforming it to the federal FCA became effective on January 1, 2013. (Stats. 2012, ch. 647 (AB 2492); see *State ex rel. Bartlett v. Miller* (2016) 243 Cal.App.4th 1398, 1403 fn. 3.)

purpose of determining which statements the documents contain, not for determining the truth of those statements. (*State ex rel. Bartlett v. Miller* (2016) 243 Cal.App.4th 1398, 1408 [court must accept as true all facts properly pleaded and judicially noticed].)[15]

Defendants' demurrers fail at the first step: they do not point to allegations or judicially noticeable documents sufficient to support a conclusion that the alleged fraud is substantially similar to information already in the public domain. Defendants rely solely upon a single online article dating to 2019 in which an Ohio newspaper's personal finance columnist responded to a question from a reader seeking advice on what to do after learning that a large ($18,600) cashier's check she had held onto for decades would no longer be honored by the issuing bank. (JPM RJN, Ex. 13; U.S. Bank RJN, Ex. G.) The columnist advised the reader, among other things, that if a bank does not know the address of the owner, it may escheat such unclaimed funds to the state in which it was established. Nothing in that brief column contains any reference to any facts or allegations from which a reader might infer that fraud has been committed by Defendants in their reporting of unclaimed cashier's checks. (Cf. *Mao's Kitchen, Inc. v. Mundy* (2012) 209 Cal.App.4th 132, 147 ["On the basis of plain meaning, and at the risk of belabored illustration, if X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed" (citation and quotations omitted)].) The article on which Defendants rely thus does not remotely establish that Relator's allegations that Defendants have been failing to report to California millions of dollars in unclaimed cashier's checks, but instead have been improperly reporting those funds to a different state that allegedly is not entitled to them, are "substantially similar" to information in the public domain. (See *id.* at 147-152 [reversing summary judgment where there was no public disclosure of the information critical to *qui tam* plaintiff's claims, despite news media reports that addressed aspects of those claims]; see also *State ex rel. Bartlett*

[15] Both Relator and Defendants have filed requests for judicial notice of extensive materials not properly considered by the Court on demurrer, including pleadings in cases pending in other courts. Except as expressly referred to in this order, the Court denies those requests for judicial notice as either improper or irrelevant to the issues to be decided.

v. Miller (2016) 243 Cal.App.4th 1398, 1408-1414 [reversing dismissal of *qui tam* complaint under CFCA for failure to escheat certain fees as precluded by the public disclosure bar].[16]

Because Defendants' demurrers fail at the first step, the Court does not reach the distinct, and arguably more difficult, question of whether Relator is an original source of the information. (See *Grayson*, 124 Cal.App.4th at 755 ["Having determined the allegations or transactions upon which the qui tam complaint is based were in the public domain before the complaint was filed, we must next determine whether the court has jurisdiction because plaintiff is an original source of the information."].)

E. **The SAC Pleads Fraud With Sufficient Particularity.**

Defendants also argue that Relator fails to plead fraud with the particularity required by the FCA. The Court is unpersuaded.

"As in any action sounding in fraud, the allegations of a [CFCA] complaint must be pleaded with particularity. The complaint must plead the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." (*State of California ex rel. McCann v. Bank of America, N.A.* (2011) 191 Cal.App.4th 897, 906 (citation and quotations omitted).) Thus, in *McCann*, the trial court sustained defendant bank's demurrer to a *qui tam* complaint alleging that the bank had defrauded the State by failing to pay over unclaimed property under the UPL consisting of unidentified credits resulting from irregularities in the check clearing process, where, among other things, the complaint did "'not specify any particular amount or original claimant or owners.'" (*Id.* at 906.) Relators acknowledged they were unable to identify any presenting bank to whom unidentified credits were due, or the domicile of those presenting banks. (*Id.* at 907-908.) As a result, "[w]hile [relators] identified a *practice* they alleged to be fraudulent (i.e., failure to investigate unidentified credits and to then credit them to presenting banks), they still fail . . . to allege the

[16] Compare *State of California ex rel. Standard Elevator Co., Inc. v. West Bay Builders, Inc.* (2011) 197 Cal.App.4th 963, 968, 976-978 [affirming summary judgment for defendant general contractor based on undisputed evidence that allegations in subcontractor's CFCA complaint were not new assertions of fraud but "a repetition of information publicly disclosed in prior civil litigation"]; *Grayson*, 142 Cal.App.4th at 750-752 ["the qui tam complaint substantially repeats what the public already knows, and as a result, the public disclosure rule bars the action"].

existence of any legal obligation for [defendant bank] to do otherwise, or to directly identify an amount or account—a liquidated and certain obligation—due to any specified presenting bank (in California or elsewhere) that would be subject to escheat under the UPL." (*Id.* at 909-910.) "Whether viewed as a lack of pleading specificity, or a substantive defect in failure to allege a necessary element of their cause of action, it is fatal to the complaint in either instance." (*Id.* at 910.)[17]

In stark contrast to *McCann*, Relator's amended complaints expressly allege the existence and source of Defendants' obligation to escheat unclaimed cashier's checks and directly identify Defendants' alleged misrepresentations and the amounts of unclaimed funds involved by year, to the point of listing numerous specific cashier's checks with names of payees in lengthy exhibits. "This is enough." (*Armenta ex rel. City of Burbank v. Mueller* (2006) 142 Cal.App.4th 636, 644 [amended complaint under CFCA that was "thick with detail" concerning the fraudulent scheme did not lack adequate particularity].) Defendants' further argument that the amended complaints are deficient because they do not identify by name the specific executives who submitted the unclaimed property reports to the State of California on their behalf is groundless. "[T]he requirement of specificity is relaxed when the allegations indicate that the defendant must necessarily possess full information concerning the facts of the controversy or when the facts lie more in the knowledge of the defendant." (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167 (citation and quotations omitted).)

F. **Defendants' Due Process and Indispensable Party Arguments Lack Merit.**

Finally, Defendants argue briefly that the State of Ohio is an indispensable party and that due process "concerns" warrant dismissal of the actions. These arguments are unpersuasive. None of the cases cited by Defendants arose under the federal or state FCA. (Cf. *United States v. McLeod* (9th Cir. 1983) 721 F.2d 282, 285 [rejecting defendant's argument that third party was an

[17] Relator contends that the requirement of pleading fraud with particularity does not apply to his claim under § 12651(a)(4), which applies where a person who has possession of money to be used by the state "knowingly" delivers less than all of that property. Because the Court finds that the particularity requirement was met, it need not reach this issue. The Court notes that the claims in *McCann* were brought under § 12651(a)(7) [knowingly using a false record to avoid or decrease an obligation owed to the State] and § 12651(a)(8) [failing to disclose an inadvertently submitted false claim].) (191 Cal.App.4th at 904 & fn. 6.)

indispensable party to False Claims Act case].) Nor is there any indication on the face of the pleadings or materials properly subject to judicial notice that the State of Ohio has even asserted a competing claim to the unclaimed funds at issue. Defendants therefore do not make any convincing showing that Ohio's presence is indispensable to resolving the factual and legal issues posed by the amended complaints. In any event, the argument cannot be resolved on demurrer because, as noted above, Relator alleges that Defendants failed to remit unclaimed funds to the State of California even when they knew the purchasers' California addresses, and because given the longer dormancy period in Ohio, not all of the contested funds have been reported to or turned over to Ohio. Again, "a demurrer does not lie to a portion of a cause of action." (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.)

CONCLUSION

For the foregoing reasons, Defendants' demurrers are overruled in their entirety.

IT IS SO ORDERED.

Dated: December 13, 2021

Honorable Ethan P. Schulman
Judge of the Superior Court

CGC-19-579144 KEN ELDER V. J.P. MORGAN CHASE N.A.

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on December 13, 2021 I electronically served the foregoing order on the following counsel of record by causing a copy thereof to be sent by email to the email addresses indicated below.

Date: December 13, 2021 By: SEAN KANE

DAVID S. GOLUB, ESQ.
dgolub@sgtlaw.com
SILVER GOLUB & TEITELL LLP
184 ATLANTIC STREET
STAMFORD, CT 06901

MICHAEL S. DEVORKIN. ESQ.
mdevorkin@golenbock.com
GOLENBOCK EISEMAN ASSOR
711 THIRD AVENUE
NEW YORK, NY 10017

BRENDAN RUDDY, ESQ.
brendan.ruddy@doj.ca.gov
OFFICE OF THE ATTORNEY GENERAL
455 GOLDEN GATE AVENUE, SUITE
SAN FRANCISCO, CALIFORNIA 94102

DOUGLAS W. BARUCH, ESQ.
douglas.baruch@morganlewis.com
JOSEPH E. FLOREN, ESQ.
joseph.floren@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1111 PENNSYLVANIA AVE. NW
WASHINGTON, DC 20004