Nos. 22O145 & 22O146

IN THE
Supreme Court of the United States

DELAWARE,

Plaintiff,

v.

PENNSYLVANIA AND WISCONSIN,

Defendants.

ARKANSAS, *et al.*,

Plaintiffs,

v.

DELAWARE,

Defendant.

On Exceptions To The Report Of The Special Master

EXCEPTIONS TO THE SECOND INTERIM REPORT OF THE SPECIAL MASTER BY THE STATE OF DELAWARE AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS TO REPORT OF THE SPECIAL MASTER

Plaintiff State of Delaware respectfully submits the following exceptions to the Second Interim Report of the Special Master issued on December 13, 2022:

1. Delaware takes partial exception to, and this Court should decline to adopt, the Special Master's report and recommendation to partially deny Delaware's request for summary judgment, and to grant partial summary judgment to Defendants, in part.

2. Delaware takes exception to, and this Court should decline to adopt, certain components of the Special Master's report and recommendation, including:

a. The Special Master's recommendation that agent checks are similar written instruments, and are not third party bank checks;

b. The Special Master's recommendation to remand the proceedings to evaluate whether to modify the common-law priority rules.

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EXCEPTIONS TO THE SECOND INTERM REPORT OF THE SPECIAL MASTER BY THE STATE OF DELAWARE AND BRIEF IN SUPPORT OF EXCEPTIONS

INTRODUCTION

After reviewing the parties' arguments before this Court, the Special Master "can no longer stand by" his initial recommendations. Second Report 1. His Second Interim Report concludes that "Delaware has decidedly better arguments." *Id*. at 10. Delaware appreciates the Special Master's careful consideration of the questions presented and urges the Court to adopt the Second Interim Report in large part.

That Report confirms a decades-long consensus. The Federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA) establishes rules for when States may escheat "a money order, traveler's check, or other similar written instrument (other than a third party bank check)." 12 U.S.C. § 2503. From 1974 to 2016, holders and States alike understood that the FDA targets two discrete instruments: money orders and traveler's checks. Everyone also agreed that the FDA does not apply to well-known bank checks, such as teller's checks, cashier's checks, and certified checks. For years, MoneyGram applied that settled consensus, and reported and remitted teller's checks and agent checks—which are bank checks—under the common law.

But nearly a decade ago, Defendants invented a new interpretation of the FDA and filed suits against Delaware and MoneyGram, seeking hundreds of millions of dollars. According to Defendants, the terms "money order" and "similar written instrument" in the FDA encompass *every* prepaid instrument issued since 1974. This interpretation ignores copious evidence on the meaning of the word "money order," fails to consider the significant differences between "money orders" and MoneyGram teller's checks and agent checks, and reads the "third party bank check" exception right out of the statute. As Delaware has argued—and as Judge Leval now agrees—Defendants' interpretation has no basis in the FDA's text, structure, history, or purpose. Defendants would call into question decades of previously escheated funds and spark interstate fights over everything from cashier's checks to gift certificates.

The Second Interim Report provides a path out of this thicket. As the Report explains, the FDA is a

narrow statute focused on two named instruments: money orders and traveler's checks. The FDA does not apply to bank checks. Bank checks, such as "cashier's checks, teller's checks, and certified checks," were all "well known" in 1974. Second Report 16. If "Congress had intended" these bank checks "to be covered" in the FDA, Congress "would have included them by name." *Id*.

There is a good reason the FDA did not include bank checks: They did not pose the unique escheatment concerns that motivated Congress to pass the FDA. The common-law primary rule provides for escheatment based on a debtor's record of creditor addresses. If no such record exists, the common-law secondary rule provides for escheatment based on the debtor's State of incorporation. In 1974, issuers and sellers did not record addresses for low-dollar money orders and traveler's checks. *See* 12 U.S.C. § 2501(1). The market for these instruments was also dominated by just two companies incorporated in one State. As a result of both facts, unclaimed money orders and traveler's checks escheated less evenly among the States. *See id*. § 2501(4). Congress worried that States might seek to pass laws requiring companies to record creditors' address, thereby increasing the cost of these low-dollar instruments for individual consumers. *Id*. § 2501(5).

By contrast, in 1974, banks recorded creditors' addresses on bank checks, *and* banks were incorporated across the country. Those two facts meant that unclaimed bank checks did not concentrate in one State under the common law. Sur-Reply 9-10. Moreover, bank checks are used by customers for much larger transactions or by banks to pay their own bills. Because the users of bank checks are less price

sensitive—and banks both were already collecting addresses for these products, and were incorporated in every State—Congress had little reason to worry that State address-recordation laws might cause a nominal increase in the price of bank checks.

The Second Interim Report applies the FDA to the facts of this case and makes three recommendations. Delaware agrees with the first recommendation, which largely resolves the parties' dispute, and takes exception to the second two recommendations.

First, the Second Interim Report concludes that MoneyGram teller's checks are just teller's checks. Like all teller's checks, MoneyGram teller's checks are drawn by a bank on a different bank. Teller's checks are extremely common bank checks not named in—and therefore not subject to—the FDA. Second Report 23-24. MoneyGram teller's checks comprise the bulk of the unclaimed funds at issue. Delaware agrees with this recommendation and will address Defendants' objections in its Reply.

Second, the Second Interim Report concludes that MoneyGram agent checks are "similar written instruments" and then examines whether those checks are exempt from the FDA as "third party bank checks." The Report proposes dividing agent checks into two categories. The Report finds that only MoneyGram is liable on some agent checks, which contain language indicating that the bank employee signs the check as MoneyGram's agent. Because the bank is not liable as a drawer on these instruments, the Report recommends finding that these checks are not bank checks and thus do not fall within the third party bank check exception. For other agent checks, the Special Master cannot determine whether the selling bank is liable as

a drawer. Those checks do not contain language stating that the bank employee signs the check as MoneyGram's agent. The Report recommends remanding the case for additional expert testimony or a trial with respect to whether these are bank checks exempt from the FDA. *Id*. at 24-27.

In this narrow respect, the Special Master is mistaken. The evidence is clear: Agent checks are not "similar written instruments." They are not "similar" to money orders and traveler's checks because banks almost never sell agent checks to retail customers. Instead, smaller banks use agent checks to pay their own bills—one of the two classic purposes of a bank check. Nothing indicates that the FDA encompasses instruments used to pay bank bills; these instruments are nothing like money orders or traveler's checks. And in the atypical case in which a bank sells an agent check to a retail customer, the customer is "asking for a bank check." Del.App.275. The Court should hold either that agent checks are not "similar written instruments"—and thus fall outside the FDA completely—or are exempt "third party bank checks."

Third, the Special Master recommends remanding for him to consider Pennsylvania's request to modify the common-law priority rules. The Court should deny Pennsylvania's request outright.

This Court has consistently rejected calls to depart from the common-law rules. *See Delaware* v. *New York*, 507 U.S. 490, 505-506 (1993); *Pennsylvania* v. *New York*, 407 U.S. 206, 214-215 (1972); *see also Texas* v. *New Jersey*, 379 U.S. 674, 679 (1965). This Court does not "devise new rules of law to apply to ever-developing new categories of facts." *Texas*, 379 U.S. at 679. The common-law rules work precisely because

they are predictable bright lines and apply to any kind of intangible property.

Moreover, the common law benefits rightful owners. Because the common law incentivizes States, and particularly Defendants, to require debtors to collect creditors' names and addresses, the common law would result in more unclaimed property being returned to its original owner. *See* Sur-Reply 22-23; *Taylor* v. *Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J., concurring in the denial of certiorari).

Perhaps most importantly, in this case, Defendants can solve their own complaint *through the common law*. Defendants can require banks that contract with MoneyGram to transmit creditor names and addresses to MoneyGram. Indeed, the *selling banks already record creditor addresses*; the informational hiccup here is that the selling banks have not been transmitting that information to MoneyGram. Del.App.599. Once Defendants enact regulations that close this informational gap, Defendants can escheat unclaimed MoneyGram teller's checks and agent checks prospectively under the common law.

Requiring Defendants to solve their complaint through legislation, not litigation, is fundamentally fair. For decades, Delaware accepted MoneyGram's unclaimed funds in good faith, based on this Court's precedent and the longstanding understanding of the FDA. The Court should adopt the Special Master's recommendations, with Delaware's proposed modifications, and end this litigation.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in a supplemental appendix to this brief. Second Supp. App. 1a-3a.

STATEMENT

Delaware's first Exceptions Brief details the facts and procedural history. *See* Del. First Exceptions 3-15. This statement reviews only those facts related to the Special Master's Second Interim Report.

A. Common Financial Products.

A "draft" is an order to pay money. *See* U.C.C. § 3-104(e); Del.App.367 (*Munn's*). A *drawer* orders payment and signs the draft. The drawer's signature makes the drawer liable for payment. A *drawee* is directed to make payment to a *payee*. *See* U.C.C. § 3-103(a)(4)-(5); Del.App.371 (*Munn's*). A draft is "drawn by" a drawer and is "drawn on" a drawee. *See, e.g.*, Del.App.364-365.

A "check" means a draft drawn on a bank—*i.e.*, a bank is a drawee. *See* U.C.C. § 3-104(f); Del.App.369-370 (*Munn's*). Checks come in many different forms. Consumers use "personal checks" to transmit funds from checking accounts to payees. The consumer is the *drawer* and signs the check. The consumer's bank is the *drawee* ordered to make payment. Only the individual consumer is liable on the check. *See* U.C.C. § 3-401. Banks need not honor personal checks and may refuse to pay because a checkwriter lacks funds (and for other reasons).

In many situations, a payee requires a better guarantee that she will receive the money. Prepaid bank products—such as certified checks, cashier's checks, and teller's checks—provide that guarantee. These three products "collectively are known as bank checks" and are typically used to transfer large sums—for instance to buy a car or make a down payment on a house. Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective: A Plea*

for Revision of Articles 3 and 4 of the Uniform Commercial Code, 64 Minn. L. Rev. 275, 278, 280-281 (1980).

For a *certified check*, a consumer presents a personal check to a bank employee at a counter. The bank employee either transfers funds from the consumer's account to the bank's account or places a hold on the consumer's account. The bank employee signs the check to certify it, and that signature makes the bank liable on the check. *See* Del.App.368-369 (*Munn's*).

For a *cashier's check*, a consumer pays upfront and receives a prepaid check signed by a bank employee. The same bank is both the *drawer* liable on the instrument and the *drawee* ordered to make payment. *Id.* at 367 (*Munn's*); U.C.C. § 3-104(g).

A *teller's check* is a check that is drawn by a bank on a different bank, and it is similar to a cashier's check. U.C.C. § 3-104(h); Lawrence, *supra*, at 278, 333. Savings and loan associations originally developed teller's checks because historic regulations prevented them from providing "checking services." Lawrence, *supra*, at 333. Savings and loan associations used teller's checks "in situations where commercial banks would simply issue their own cashier's checks." *Id.* Today, those historic regulations no longer exist, but teller's checks remain in use by a variety of financial institutions.

Because a bank is clearly liable on certified checks, cashier's checks, and teller's checks, certain rules apply to these three bank checks. The Uniform Commercial Code automatically discharges obligations paid by these bank checks and imposes consequences when issuers fail to pay. U.C.C. §§ 3-310, 3-411. Because payment is assured, a depositor's bank must

make funds available the next day. *See* 12 C.F.R. § 229.10(c)(1)(v).

In addition to providing consumers a secure method of payment, bank checks serve another important function. Banks use bank checks as their own checks. *See* Lawrence, *supra*, at 340. For instance, many financial institutions use cashier's checks to pay their "own obligations." Del.App.367 (*Munn's*); *see* American Bankers Association Amicus Br. 9 (ABA Br.).

A variety of companies, including but not limited to some banks, sell other prepaid instruments. A *money order* operates as a substitute for a personal check and is typically used by consumers without bank accounts. *See* Del.App.373-376 (*Munn's*). Money orders are labeled "money order" and may be purchased at numerous retailers, including drug stores and supermarkets. They are generally used to pay small debts. The purchaser of a money order typically signs the money order herself, just like she would sign a personal check.

Traveler's checks are typically used by consumers when traveling as a substitute for personal checks (which may not be readily accepted when traveling) or for cash. *See id.* at 376-378 (*Munn's*). Traveler's checks are paid for upfront and signed twice by the purchaser: once when the consumer purchases the check and a second time when the consumer uses the check, as a means of verifying the consumer's identity and deterring theft. *See id.*; U.C.C. § 3-104(i).

B. Escheat Priority Rules.

Under the law of escheat, States may accept custody of unclaimed property. For real or tangible property, "only the State in which the property is located may escheat" the property. *Texas*, 379 U.S. at 677. But intangible property—such as a bank account—cannot

"be located on a map," and multiple States may have connections to that property. *Id*.

In *Texas* v. *New Jersey*, this Court established common-law rules to resolve interstate escheat disputes over intangible assets. *See id*. at 681-682. To apply the common-law rules, a holder of unclaimed property engages in a two-step process. The holder first identifies "the precise debtor-creditor relationship as defined by the law that creates the property at issue." *Delaware*, 507 U.S. at 499. A holder then applies priority rules: The common-law primary rule "gives the first opportunity to escheat to the State of 'the creditor's last known address as shown by the debtor's books and records.' " *Id*. at 499-500 (quoting *Texas*, 379 U.S. at 680-681). If "the debtor's records disclose no address for a creditor," the common-law secondary rule "awards the right to escheat to the State in which the debtor is incorporated." *Id*. at 500.

In 1974, Congress enacted the FDA in response to this Court's decision applying the common-law rules to the escheat of Western Union money orders. *See Pennsylvania*, 407 U.S. at 215. The FDA modified the common-law priority rules for a "money order, traveler's check, or other similar written instrument (other than a third party bank check)." 12 U.S.C. § 2503. Like the common-law, the FDA has a primary rule and a secondary rule. Under the FDA primary rule, the State of purchase may take custody of the unclaimed funds if the books and records of the institution "directly liable" for the instrument "show the State in which" the instrument "was purchased." *Id*. § 2503(1). If "the books and records" "do not show" the State of purchase, the FDA secondary rule allows the State of the institution's "principal place of business" to escheat the unclaimed funds. *Id*. § 2503(2).

C. Factual Background.

MoneyGram provides various products and services for transferring money. This case concerns two parts of MoneyGram's business.

MoneyGram sells money orders. Money orders are marketed directly to consumers and are sold at 17,500 retailers across the country—including chains like CVS and Walmart, local "mom and pop stores," and some financial institutions. Del.App.242, 330. Regardless of where it is sold, *every* MoneyGram money order is labeled "money order." *See id*. at 270, 326. A consumer purchasing a MoneyGram money order signs it. MoneyGram is designated as the "drawer/issuer." The back of every money order contains "limited recourse" language that limits MoneyGram's liability on the instrument. *See id.* at 213, 244.

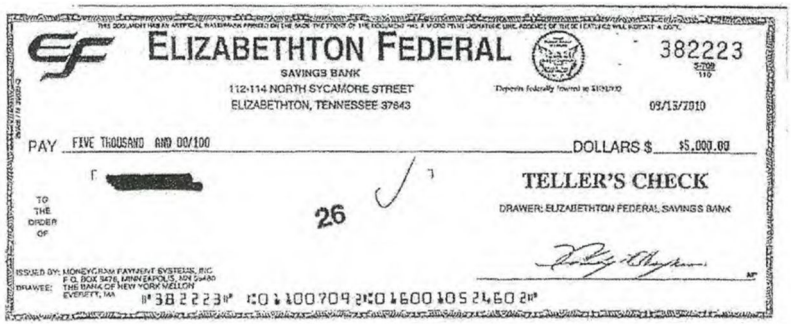
Since the late 1970s, MoneyGram has also provided an "official check service." This service allows smaller financial institutions to outsource their bank check operations. As part of its official check service, MoneyGram provides financial institutions with a range of administrative services, including daily reconciliation, assistance with the inventory of blank checks, real time information about check status, legal compliance, and other data processing. *Id*. at 312-321. By outsourcing these behind-the-scenes tasks, smaller financial institutions reduce their overhead. *Id*. at 242, 315. This case involves the escheatment of two types of official checks, *teller's checks* and *agent checks*.

MoneyGram teller's checks are the bank's teller's checks, processed through MoneyGram. Banks sell teller's checks to customers who have accounts at the bank and require a "check drawn on a bank." *Id*. at

330. Like all teller's checks, MoneyGram teller's checks are drawn by a bank on a different bank. The selling bank's employee signs every teller's check on behalf of the bank as the *drawer*. A different clearing bank processes the teller's check and is the *drawee*. *Id.* at 259, 326. The selling bank records creditor information for teller's checks. *Id*. at 599.

In addition, MoneyGram is listed as the "issuer" of the teller's check. Under the modern Uniform Commercial Code, the term "issuer" is synonymous with "drawer." U.C.C. § 3-105(c). That means MoneyGram teller's checks have two drawers, the selling bank and MoneyGram.

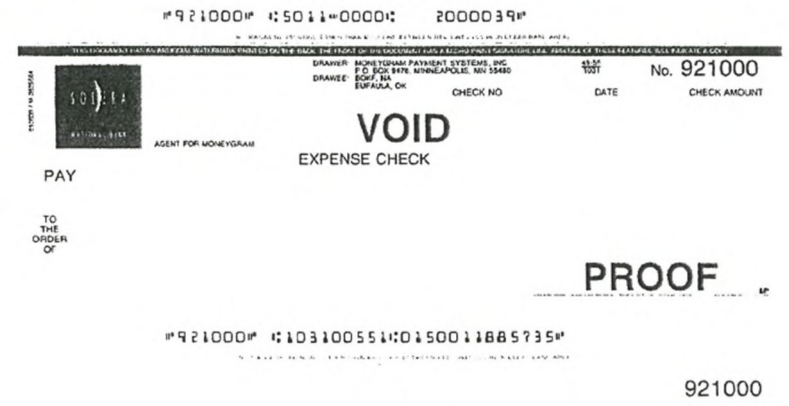
Here is an example of a teller's check, labeled "teller's check." Immediately below that label, the selling bank, Elizabethton Federal, is listed as the drawer. In the lower-left corner, MoneyGram is identified as the issuer, and the Bank of New York Mellon is identified as the drawee.



Del.App.297.

The second instrument at issue are MoneyGram agent checks. MoneyGram's corporate witness explained that agent checks "aren't often used to issue checks for customers." Del.App.275. Instead, agent checks primarily serve as a bank's own checks. Here

is an example of an agent check used to pay a bank's bills, aptly labeled an "expense check":



Del.App.298.

A bank employee signs every agent check. There are two varieties of agent checks. Agent checks like the one above designate MoneyGram as a drawer and contain language designating the bank as MoneyGram's "agent." Other agent checks designate MoneyGram as a drawer but do not contain language designating the bank as MoneyGram's "agent." Second Report 24-26.

In 2005, MoneyGram reincorporated in Delaware. MoneyGram reports and remits all money orders to the State of purchase under the FDA. MoneyGram reports and remits all teller's checks and agent checks to Delaware under the common law.

D. Procedural History.

1. The Special Master's First Interim Report.

In 2016, Pennsylvania and Wisconsin sued MoneyGram and Delaware's escheator in federal district court, alleging that MoneyGram agent checks and teller's checks constitute "money orders" and "similar written instruments" subject to the FDA. In response, Delaware sought to file an original bill in

this Court, because this "Court is the sole forum in which Delaware may enforce its rights." Del.App.191. Shortly thereafter, 20 other States requested to file a bill against Delaware.

This Court granted both bills and appointed Hon. Pierre Leval as Special Master. The parties stipulated to Delaware as "Plaintiff" and the other States as "Defendants." *Id*. at 199-204. The Special Master bifurcated proceedings into liability and damages phases. The liability phase addresses solely "the question which State or States are entitled to escheat" the products at issue. *Id*. at 206.

The parties crossed-moved for partial summary judgment. Delaware argued that MoneyGram teller's checks and agent checks are not "money orders" under Section 2503 because they are not labeled "money order" and are not typically purchased or used like money orders. *Id*. at 37. Defendant States disagreed, arguing that the term "money order" was broad enough to cover all prepaid orders to pay money. *Id*. at 40.

The Special Master issued a Draft First Interim Report that agreed with Defendants' position. *Id.* at 98-188. The Special Master concluded that the term "money order" sweeps in *any* "prepaid draft" that is "used by a purchaser to safely transmit money to a named payee"—which would include nearly any order to pay money, from a money order to a traveler's check to a bank check (and potentially even products like prepaid cards or gift certificates). *Id.* at 135-136. In exceptions to the Draft Interim Report, Delaware pointed out that the Special Master's interpretation was overbroad in light of the text of Section 2503, which uses distinct terms for specific instruments—

"money order" and "traveler's check"—and thus does not cover *every prepaid draft*. *Id*. at 54-55.

The Special Master then issued the First Interim Report, which acknowledged that the definition of "money order" embraced by the Draft Interim Report was "indeed broad, and might perhaps be subject to narrowing refinement." *Id*. at 55. Rather than determining what "narrowing refinement" was required, however, the First Interim Report did not adopt any definition of "money order." *See id.* at 55-56. Nonetheless, the Special Master concluded that MoneyGram teller's checks and agent checks are either "money orders" or "similar written instruments" for "substantially the same" reasons they are "money orders." *Id*. at 61, 64-65.

The First Interim Report concluded that a "third party bank check" included *only* "an ordinary personal check drawn on a checking account," and that MoneyGram teller's checks and agent checks thus did not qualify. *Id*. at 76, 80. Although the Special Master found this definition not "completely satisfying," he concluded that it was "the most likely * * * meaning intended by Congress" because the Hunt Commission's report on banking written two years prior to the FDA's enactment had used the term "third party payment services" to describe financial instruments that included personal checks (among other financial instruments). *Id*. at 76-77. The Special Master thus determined that MoneyGram teller's checks and agent checks should be escheated under the FDA.

2. Delaware's Exceptions In This Court.

Delaware filed exceptions to the First Interim Report and this Court held oral argument on October 3, 2022.

Delaware argued that in 1974—and today—the term "money order" had a settled meaning. A "money order" referred to a prepaid instrument typically used by consumers without bank accounts in lieu of a personal check. This definition is supported by historical sources, including dictionaries and encyclopedias, industry publications, legal treatises, law review articles, and other contemporary legislation. Del. First Exceptions 18-31. These sources debunk Defendants' sweeping definition of a money order as *any* prepaid draft. MoneyGram teller's checks and agent checks are not money orders. Teller's checks are bank checks sold to customers with bank accounts for large transactions. Agent checks are primarily used by banks to pay their own bills. *Id*. at 34-35.

Delaware also argued that teller's checks and agent checks are not "other similar written instruments." The FDA's phrase "other similar written instrument" does not sweep in bank checks, such as teller's checks and agent checks. Instead, the FDA specifically targeted money orders and traveler's checks because those two instruments posed unique escheat concerns not shared by bank checks. *See* Sur-Reply 10.

Additionally, Delaware explained that both teller's checks and agent checks are exempt from the FDA as third party bank checks. Both MoneyGram teller's checks and agent checks serve the classic purposes of bank checks. Like all bank checks, teller's checks and agent checks are signed by bank employees. And both teller's checks and agent checks are paid through third parties, namely MoneyGram and the selling bank that acts as the drawee. *See* Del. First Exceptions 36-42.

Delaware also argued that ruling for Delaware would be fair. Banks selling the disputed MoneyGram instruments record creditors' addresses. That means Defendants can solve their own complaint. States can enact simple laws that require banks to transmit creditor information they already record to MoneyGram. At that point, MoneyGram would report funds from abandoned teller's checks and agent checks prospectively under the common-law primary rule, which directs the funds to the State of the creditor's last known address. *See* Sur-Reply 12-13, 23.

For their part, Defendants argued that a "money order" means any prepaid draft. Defs.' First Reply 24-26. According to Defendants, because both MoneyGram teller's checks and agent checks are prepaid drafts, they are money orders. *Id*. at 27-28. In response to Delaware's concerns that Defendants' sweeping definition of "money order" would include cashier's checks and lead to countless disputes over previously escheated funds, Defendants argued that "the Court need not address" whether "cashier's checks" fall within the FDA "because none are at issue here." *Id*. at 38-39.

In the alternative, Defendants argued that both teller's checks and agent checks are similar written instruments, because MoneyGram itself does not collect creditor information (although banks that contract with MoneyGram for official check services record creditor information). *Id*. at 42. Defendants argued that a "third party bank check" meant either a bank check indorsed to a new payee—a definition the Special Master rejected—or, as the Special Master had initially concluded, an ordinary personal or business check. *Id*. at 44-47.

Two *amici curiae* filed briefs. The American Bankers Association explained that since 1974, banks have understood the FDA "to be narrow, and to be inapplicable" to "cashier's checks." ABA Br. 2. However, in recent years, numerous *qui tam* relators have embraced Defendants' sweeping interpretation of the FDA and alleged that banks have been incorrectly escheating cashier's checks under the common law. *Id.* at 11 & n.3. That has led to increased litigation and uncertainty over the FDA's scope. The Unclaimed Property Professionals Organization (UPPO) filed a brief supporting Defendants' sweeping approach to the FDA. UPPO recommends remanding this matter for the Special Master to reconsider the status of *every* financial instrument escheated since 1974. UPPO Br. 19.

3. The Special Master's Second Interim Report.

Three weeks after this Court heard oral argument, the Special Master told the parties that he could no longer stand by his initial Report. The Special Master outlined his thinking, received expedited briefing, released a Draft Second Interim Report, and held oral argument. The Special Master then issued his Second Interim Report. The Second Interim Report reverses the Special Master's prior recommendations and agrees with Delaware in nearly every respect.

Mostly importantly, the Special Master has concluded that the FDA does not apply to bank checks, including cashier's checks, teller's checks, and certified checks. According to the Special Master,

> [B]ank checks were so well known that it can be assumed with confidence that if Congress had intended to include them within the scope of the bill, it would have mentioned them by

> name. The fact that the bill focused on money orders and traveler's checks without mention of cashier's checks or teller's checks (or certified checks) gives strong assurance that Congress did not intend that they be covered, regardless of their similarities to money order and traveler's checks.

Second Report 17.

The Special Master explained that Defendants' broad definition of a money order is wrong. A money order is defined by "adjectival, customary differences in the intended purpose and usual manner of treatment." *Id*. at 3. "Money orders are designed to serve persons who do not have bank accounts" and are "typically used for small payments." *Id*. at 4, 5. The Special Master concluded that the instruments at issue in this case do not meet that definition. Those instruments "are sold primarily to the selling bank's customers" and are used "for larger purchases," such as "purchases of cars or houses." *Id*. As a result, no one would refer to teller's checks or agent checks "as 'money orders' regardless of the absence of differences in the legal rights and obligations inhering in the instruments." *Id*. at 3-4.

The Special Master concluded that teller's checks and agent checks are similar written instruments, although he did not define that term. The Special Master acknowledged, however, that both teller's checks and agent checks might be so dissimilar to money orders that they might not constitute similar written instruments at all. *Id*. at 5 n.4.

When it came to defining the meaning of "third party bank check," the Special Master declared that "Delaware has decidedly better arguments." *Id*. at 10. The

Special Master recommended excluding cashier's checks, teller's checks, and certified checks from the FDA by defining the FDA's third party bank check exclusion to apply if an instrument "is issued by a bank as *drawer* (or otherwise in a capacity that renders the bank liable)," and is designed to make payment to a third party. *Id*. at 6.

Citing Defendants' expert, the Special Master stated that a " 'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank." *Id*. at 13 (citing Defs.App.212). Meanwhile, the "third party" language refers to bank checks "designed to be used for making payments to a third party." *Id*. at 19. The Special Master explained that his "reading" of the phrase "third party" is essentially the same as Defendants'. *Id*. at 19-20.

The Special Master concluded that the Department of the Treasury likely proposed the third party bank check exception during the FDA's passage to ensure the FDA did not accidentally encompass "prepaid cashier's checks and teller's checks." *Id*. at 15. "The language of the bill gave no clue *how similar* an instrument needed to be to money orders and traveler's checks in order to come within the Act's prescriptions." *Id*. at 16. The third party bank check exception ensured that "States, upon observing similarities of cashier's checks and teller's checks to money orders and traveler's checks," could not claim the FDA applied to well-known bank checks. *Id*. at 15.

Construing the statute to exclude bank checks carries a key advantage. If "Congress disagrees" "or finds the outcome inequitable," Defendants "have sufficient voting power in Congress to overturn or nullify the Court's ruling for future escheats." *Id*. at 22 n.12.

In light of his revised interpretation of the FDA, the Special Master makes three recommendations:

First, the Special Master recommends the Court hold that MoneyGram teller's checks "are indeed teller's checks drawn by the selling banks." *Id*. at 24. MoneyGram teller's checks are thus third party bank checks expressly exempt from the FDA. *Id*. Teller's checks represent the bulk of the funds at issue in this case.

Second, the Special Master recommends differentiating between two types of agent checks. One type of agent check—which the Special Master refers to as "so-labeled agent checks"—"expressly identifies MoneyGram as the drawer" and contains language stating that the bank signs the check as MoneyGram's agent. *Id*. The Special Master recommends holding that only MoneyGram is liable on so-labeled agent checks. Therefore, according to the Special Master, these agent checks are subject to the FDA because they are similar written instruments and not third party bank checks. *Id*. at 25.

Another type of agent check does not contain language stating that the bank signs the check as MoneyGram's agent, but still identifies MoneyGram as the drawer. The Special Master refers to these instruments as "unlabeled agent checks." *Id*. at 25. He concludes there is "a genuine issue of material fact on the question of whether the selling bank is a drawer of, and thus liable on," unlabeled agent checks. *Id*. at 26. The Special Master recommends remanding for "further expert testimony" or a "trial." *Id*. at 26-27. If the bank is liable on an unlabeled agent check, under the Special Master's approach, the agent check would be a "third party bank check" and would thus escheat

under the common law. If the bank is not liable, under the Special Master's approach, the agent check would be a "similar written instrument" but not a "third party bank check," and thus would escheat under the FDA.

Third, Pennsylvania had argued that, in the event the Court held that teller's checks and agent checks did not escheat under the FDA, the Court should modify the common-law priority rules to allow the State of purchase to take custody of teller's checks and agent checks. Because the First Interim Report recommended ruling for Defendants based on the FDA, the Special Master initially recommended denying Pennsylvania's claim as moot. Del.App.94. In the Second Interim Report, the Special Master now recommends the Court remand Pennsylvania's claim to him. Second Report 27.

These exceptions follow.

SUMMARY OF ARGUMENT

I. Delaware agrees in large part with the Special Master's interpretation of the FDA. The FDA does not abolish the common law for all prepaid drafts, as Defendants argue. Instead, the FDA targets money orders and traveler's checks because those two specific instruments posed unique escheat public policy concerns in 1974. They were low-dollar instruments for which creditors' addresses were not regularly recorded, and which were issued by two companies. As a result, those two instruments escheated unevenly under this Court's common-law rules. Congress crafted the FDA to more evenly distribute abandoned money orders and traveler's checks among the States, and thereby prevent increases in the relative cost of those

instruments due to potential state address-recordation laws.

As the Special Master correctly concluded, the FDA does not name bank checks—such as cashier's checks, teller's checks, and certified checks—because the FDA does not apply to these products. In 1974, bank checks did not pose the same policy concerns as money orders and traveler's checks.

The Special Master erred, however, in applying the FDA to agent checks. *Agent checks are rarely sold to individuals*. Instead, agent checks serve as bank checks used to pay bank bills—one of the two core functions of bank checks. On infrequent occasions, banks sometimes sell agent checks to customers "asking for a bank check" for a larger transaction. Del.App.275. Agent checks are thus modern substitutes for a financial institution's bank checks. They are not money orders or similar instruments, and fall outside the FDA's scope.

Alternatively, this Court should exempt agent checks from the FDA as "third party bank checks." The Special Master correctly defines a "third party bank check" as a bank check designed to make payment to a third party. And the Special Master is on firm footing in defining a "bank check" as including checks on which a bank is liable, such as cashier's checks, teller's checks, and certified checks. But the Special Master's definition of "bank check" is underinclusive. The plain meaning of the term "bank check" also includes instruments banks used to pay their own bills—*i.e.* the *bank's* own *check*. Historically and today, bank checks served two distinct and different purposes. Bank checks serve as secure cash substitutes for consumers (which requires a bank's liability),

and as the bank's own checks. The Court should thus expand the Special Master's definition of "bank check" to include all checks designed to pay a bank's own bills—such as agent checks—in addition to those checks on which a bank bears liability. That definition includes agent checks, which are primarily used by banks to pay their own bills (and are only infrequently sold to consumers asking for "bank checks").

If this Court has any doubt about the FDA's meaning, the Court should interpret the FDA narrowly due to any of three tie-breaking principles. *First*, statutes in derogation of the common law are narrowly construed, even when they expressly modify the common law to some degree. *Second*, this Court prefers an easily administrable escheatment regime. Giving the FDA a narrow interpretation will prevent disrupting decades-old escheatment practices. By contrast, giving the FDA a sweeping scope could require redistributing funds dating back to 1974, would create uncertainty about when to apply competing common-law or FDA rules, and risks undermining the common-law framework that has successfully governed this area for nearly sixty years. *Third*, ruling for Delaware is fundamentally fair. The banks selling the products at issue *record* creditor addresses. Defendants can thus solve their complaint by passing simple laws that require the selling banks to transmit the information they already collect to MoneyGram.

II. Pennsylvania asks this Court to change the common-law priority rules to incorporate a place-of-purchase rule. This Court should not remand this matter for the Special Master to consider Pennsylvania's claim. Instead, this Court can and should deny Pennsylvania's position outright. This Court has thrice rejected requests to vary the common-law priority rules

to fit particular facts. A "heavy burden" "attends a request 'to reconsider not one but [three] prior decisions' " of this Court. *Delaware*, 507 U.S. at 506.

Pennsylvania cannot meet that heavy burden. The common-law rules provide a durable framework for escheatment. Pennsylvania would throw those rules into doubt and enmesh this Court in countless future disputes over all kinds of unclaimed property. This Court should not "decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." *Texas*, 379 U.S. at 679.

The existing common-law rules are also fairer than Pennsylvania's proposed replacement. The common law results in more creditors' addresses being recorded and more property being reunited with its rightful owner. Maintaining the common law preserves Delaware's good-faith reliance on this Court's precedent and the FDA's plain language. Meanwhile, Defendants can solve their complaint themselves on a prospective basis through legislation.

ARGUMENT

I. AGENT CHECKS ARE NOT SUBJECT TO THE FDA.

The Special Master's core conclusion is correct: The FDA does not apply to bank checks. If Congress "had intended to include" bank checks within the FDA, Congress "would have mentioned them by name." Second Report 17. Instead, the FDA targets two low-dollar retail products sold to and purchased by consumers, which posed unique policy concerns in 1974. The FDA thus does not apply to well-known bank checks, such as teller's checks.

That same reasoning also explains why the FDA does not apply to MoneyGram agent checks. Agent checks serve primarily as bank checks used to pay a bank's own bills—which are not subject to the FDA. Agent checks are rarely sold to retail consumers, and even then, agent checks are sold to customers seeking a "bank check" for a larger transaction. Del.App.275. As a result, agent checks are neither money orders nor similar written instruments.

A. Agent Checks Are Not Money Orders.

1. As the Special Master correctly concluded, a "money order" has a very specific definition: a low-dollar instrument sold by a variety of retail outlets and typically used as a substitute for a personal check by those without bank accounts. *See* Second Report 4-5 (citing *Munn's Encyclopedia of Banking and Finance*, *Compton's Encyclopedia*, and *The Law Of Bank Deposits*); Del.App.385 (*1956 ABA Report*), 511 (*1972 American Express brief*). Issuers typically impose limits on a money order's amount. Del.App.374 (*Munn's*), 380 (*Compton's*), 389 (*1956 ABA Report*).

In 1974, Congress was acutely aware "that many low-income families use money orders instead of checking accounts to pay their bills, because they are readily available and because of their low cost." Del.App.580. Congress passed the FDA to avoid "cumbersome recordkeeping requirements that would drive up the cost of" money orders. *Id*.

Today, money orders possess the same "adjectival, customary" attributes as in 1974. Second Report 3. MoneyGram is one the largest issuers of money orders. MoneyGram's money orders are sold at a wide variety of outlets, and customers "use money orders in

lieu of a personal checking account." *Id*. at 4 (citing Del.App.247).

A money order is easily identifiable by its label. Issuers label products "money orders" to effectively communicate core commercial characteristics to consumers. Indeed, every single example of a "money order" in this case bears the label "money order." *See, e.g.*, Del.App.212, 217, 222, 225, 230, 303-308, 334, 381, 391, 393, 399, 405, 407, 550, 555-558.[1]

2. The Special Master now agrees: Agent checks are not money orders. Second Report 3-5. Agent checks do not possess the core characteristics of money orders, and they are not labeled money orders for that reason.

Indeed, in sharp contrast to money orders sold to retail consumers, *agent checks "aren't often used to issue checks for customers" at all*. Del.App.275 (emphasis added). Instead, banks use agent checks to pay the bank's bills. *Id*. at 274-276. Here's why: MoneyGram's contract contains exclusivity provisions requiring banks to agree to "use [MoneyGram] for everything." *Id*. at 276. As a result, when banks contract with MoneyGram for official check services, banks typically do not maintain "an inhouse account" to pay

[1] A label-based approach—which reflects ordinary meaning in 1974—would easily distinguish money orders from other instruments. There is little concern that issuers will deliberately mislabel money orders. Issuers have strong incentives to accurately label products for consumers, and the leading banking association states that holders "are indifferent as to which State is entitled to escheat." ABA Br. 1. Defendants' *amicus* agrees that if "an instrument bears the label 'money order,' then it is a money order." UPPO Br. 12. Moreover, the FDA refers to money orders and traveler's checks. The latter is consistently defined as bearing the label "traveler's check." Del. First Exceptions 25.

the bank's own bills. *Id*. Instead of using their own bank checks, banks use agent checks.

In rare instances, a bank may sometimes sell agent checks to customers. MoneyGram's corporate witness confirmed that such sales happen infrequently. *Id*. at 275. This Court should define agent checks according to the purpose for which they are designed, not their atypical use. Every financial instrument may be used in an idiosyncratic manner. For instance, a person with a bank account might sometimes use a money order. That atypical use does not change the core commercial attributes of a money order as a low-dollar instrument designed for and used by consumers without bank accounts. Similarly, a consumer who returns home from an overseas trip may use a leftover traveler's check to buy groceries. That does not transform a traveler's check into something else. So too, the infrequent sale of agent checks to retail customers does not change agent checks' core function: as a replacement for the bank's own checks.

The Special Master's Second Interim Report incorrectly focuses on the atypical sale of agent checks to retail customers. *See* Second Interim Report 4-5. The Special Master agrees, however, that even when agent checks are sold to individual customers, they are not money orders. *See id.* As the Special Master explains, when agent checks are sold to individuals, they "are sold primarily to the selling bank's customers" and are issued in any amount—unlike money orders, which are sold primarily in small denominations to consumers without bank accounts. *Id*. at 4.

The Special Master's conclusion is correct. In the rare case where a bank sells an agent check to a customer, the bank's "customer comes in" to the bank

"*asking for a bank check*." Del.App.275 (emphasis added). The customer does *not* ask for or want a money order. The instrument the customer receives does not look like—or work like—a MoneyGram money order. The bank employee signs the agent check, just like a bank employee signs all bank checks. The agent check is not labeled a "money order." And the agent check is not subject to a limited recourse provision, which applies to every MoneyGram money order, limiting MoneyGram's liability on the instrument.[2]

3. Defendants' argument that agent checks are money orders is wrong. Defendants ignore the record evidence that agent checks "aren't often used to issue checks for customers." *Id*. Instead, throughout this litigation, Defendants have focused on the mechanical way in which MoneyGram processes financial instruments. *See, e.g.*, Defs.' First Reply 10-15. Defendants suggest that, because MoneyGram holds funds from different instruments in the same accounts and reimburses drawee banks in a similar manner, every MoneyGram instrument *must* be a money order. This Court should reject that position. The fact that MoneyGram sometimes uses the same account to hold funds to pay money orders, teller's checks, and agent checks does not make teller's checks and agent checks "money orders." Likewise, the fact that MoneyGram uses the same banking system to transfer money does

[2] All MoneyGram official checks are printed from the same check stock containing the limited-recourse provision. The limited-recourse provision states that it applies *only if* the instrument "is designated on its face as a money order." Del.App.230 (capitalization omitted). This allows a bank to use the same printing supplies for all MoneyGram instruments.

not make every MoneyGram financial instrument the same.

Defendants have at times conflated "agent checks" with a different instrument called an "agent check money order." MoneyGram's corporate witness explained that these are different instruments, used in "different manner[s] by the financial institution." Del.App.271. An "agent check money order" is a money order printed by a bank from the same machine that prints official checks. *See id.* at 256, 271. As a result, an agent check money order *must* be labeled a money order, must contain the limited-recourse language applicable to *all* MoneyGram money orders, and must be signed by the purchaser. *See id*. at 230-231, 270, 326. For that reason, MoneyGram escheats agent check money orders according to the FDA. By contrast, an agent check cannot ever be labeled a "money order"; is not subject to limited-recourse language; and is signed by a bank employee, reflecting the agent check's status as the bank's own check. *See id*. at 270.[3]

The bottom line: Both MoneyGram and Judge Leval reject Defendants' argument that an agent check is a money order. This Court should do the same.

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[3] Defendants have pointed to a contractual provision which defines "Agent Checks" as all checks "drawn by" MoneyGram "on its bank," and states that "[a]t Financial Institution's option, these *may be used as money orders*, but they are Agent Checks *for the purposes of this Agreement*." Defs.App.476 (emphases added); *see* Defs.' First Reply 12-13. That portion of the contractual definition references *agent check money orders*.

B. Agent Checks Are Not Similar Instruments.

Nor are agent checks "other similar written instrument[s]" subject to the FDA. 12 U.S.C. § 2503. As Delaware has explained, this Court should read the term "other similar written instrument" narrowly. *See* Del. First Exceptions 42-45. The FDA is a targeted statute: It was designed to address the unique escheatment policy concerns posed by two well-known retail products, money orders and traveler's checks, sold to and purchased by individual customers. By contrast, the FDA does not apply to bank checks, which did not pose the same concerns in 1974, when the FDA was adopted. Agent checks are nothing like money orders or traveler's checks. They primarily replace the bank's own checks, a classic function of bank checks. On the rare occasion that an agent check is sold to a retail customer, agent checks are sold to a bank's customer seeking a "bank check." Agent checks are thus not "similar" to money orders or traveler's checks and are not subject to the FDA.

1. To fall within the FDA, a "written instrument" must be "similar" to both a "money order" and a "traveler's check." 12 U.S.C. § 2503. Things are "similar" when they share "characteristics" in "common" that make them "like, though not identical." *Rousey* v. *Jacoway*, 544 U.S. 320, 329 (2005).

In 1974, money orders and traveler's checks shared three relevant "common feature[s]," which are not shared by bank checks, and which explain why the term "other similar written instrument" does not encompass agent checks. *Id*. at 331. *First*, retailers typically sold money orders and traveler's checks to customers in small amounts. *See* Del.App.377 (*Munn's*)

(traveler's checks sold in denominations of "$10, $20, $50, and $100"), 400 (*1956 ABA Report*) (money orders limited to between $100 and $250).

Second, both issuers' and sellers' business records did not reveal the purchaser's address for money orders and traveler's checks, and requiring companies to record addresses would have been expensive and drastically increased the cost of these low-dollar instruments. *See id*. at 503-504, 517 (1972 *American Express* brief).

Third, two entities—American Express and Western Union—dominated the telegraphic money order and traveler's check market in 1974. *See id*. at 570-572.

These three common features of money orders and traveler's checks posed unique policy concerns in the context of escheatment. Because the companies that issued and sold money orders and traveler's checks did not record address information, the escheatment of these products was governed by the common-law secondary rule, and holders reported them to the debtor's State of incorporation. And because these products were primarily issued by just two companies domiciled in New York, money orders and traveler's checks did not escheat evenly among the States. Although States could address this by passing laws requiring issuers and sellers to record addresses at the point of sale, that would in turn increase the price of these low-dollar instruments, thereby harming low-income consumers who used money orders in particular. Congress passed the FDA to address these unique concerns and evenly distribute abandoned money orders and traveler's checks among the States, *without* raising the costs of these instruments for consumers.

Section 2501's legislative findings memorialized Congress's concerns and the FDA's targeted purpose. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning."). Section 2501 explains that "the books and records" of entities "issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers." 12 U.S.C. § 2501(1). And Section 2501 states that the FDA seeks to distribute "the proceeds of such instruments" "among the several States," *id*. § 2501(3), without imposing "the cost of maintaining and retrieving addresses," *id*. § 2501(5). These statutory findings confirm that the FDA did not abolish the common law for all prepaid instruments. Instead, Congress surgically modified the common law for two specific instruments—money orders and traveler's checks—that posed unique escheat concerns.

The legislative history, to the extent this Court considers it, confirms the FDA's limited scope. As the Senate Committee Chairman explained:

> [The FDA] is intended to do equity while avoiding unnecessarily cumbersome recordkeeping requirements that would drive up the cost of these instruments to the consumer. *We know that many low-income families use money orders instead of checking accounts to pay their bills, because they are readily available and because of their low cost*. I believe that [the FDA] will do the job without impairing the usefulness of these instruments.

Del.App.580-581 (emphasis added).

Congress's drafting process likewise demonstrates its laser-like focus on money orders and traveler's checks. Congress crafted the FDA using language from the 1966 Revised Uniform Disposition of Unclaimed Property Act. Section 2502's definitions of a "banking organization," "business association," and "financial organization" are lifted nearly verbatim from the 1966 Act. *See* Del. First Exceptions 30-31. But when it came to Section 2503, Congress did *not* wholesale copy the 1966 Act. The 1966 Act provided State-law dormancy periods for a broad class of instruments, including

> [a]ny sum payable on *checks certified* in this state or on *written instruments* issued in this state on which a banking or financial organization or business association is directly liable, including, *by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks*.

Del.App.336 (emphases added). Congress pointedly narrowed the 1966 Act's text, eliminating the sweeping language "by way of illustration but not of limitation" and removing the express references to certified checks, certificates of deposit, and drafts. The drafting history of the FDA thus further confirms that Congress chose a targeted approach and did not intend the FDA or the term "other similar written instrument" to cover all "drafts."

2. Given the text, history, and purpose of the FDA, this Court should hold that the term "other similar written instrument" does not apply to financial instruments that were well-known in 1974 but are not included in the FDA's text, such as cashier's checks, teller's checks, and certified checks sold to retail

customers, or a bank's own checks used to pay a bank's bills. None of these bank checks share the three common features of money orders and traveler's checks that explain why Congress sought to subject those specific instruments to the FDA.

First, when banks sell bank checks to retail customers, those customers use bank checks for larger transactions. *See* Del.App.400. Unlike the purchasers of money orders and traveler's checks, consumers purchasing bank checks are thus less sensitive to marginal increases in the instrument's price. A hypothetical $1 increase in cost might mean a lot to "low-income families" using "money orders" "to pay their bills." *Id*. at 580. A $1 increase matters less to a person using a cashier's check or teller's check to make a multi-thousand-dollar down payment on a house, or to a bank using a bank check to pay its own bills.

Second, when banks sold bank checks to retail customers in 1974, banks recorded creditors' addresses. Del.App.400 (*1956 ABA Report*); *see also id*. at 599 (banks selling disputed MoneyGram instruments record creditors' addresses today). Similarly, when banks use bank checks to pay their own expenses, banks likewise record creditor addresses. *See* ABA Br. 9, 22.

Third, in 1974, banks issuing bank checks were historically incorporated in each State under laws limiting interstate banking. *See* Sur-Reply 10; ABA Br. 25. Because banks recorded addresses, bank checks escheated to the State of the creditor's address under the common-law primary rule. In the event that some banks did not record addresses, each State received escheated bank checks under the common-law

secondary rule, when banks escheated those checks to the bank's State of incorporation.

Because bank checks did not present the same policy concerns as money orders and traveler's checks, the FDA does not mention well-known bank checks, such as cashier's checks, teller's checks, and certified checks sold to retail customers, or the bank's own checks. Nor does *anything* in the FDA's statutory findings or legislative history indicate that Congress ever intended the FDA to apply to these well-known financial products. That silence is a "dog that didn't bark." *Church of Scientology of California* v. *IRS*, 484 U.S. 9, 17-18 (1987) (internal quotation marks omitted). Instead, as the Special Master explained, Treasury recommended adding the "third party bank check" exception to prevent a State from exploiting any ambiguity in the term "similar written instrument" and claiming that the FDA encompassed bank checks. *See infra*, pp. 40-41.

At a minimum, the FDA's text clearly does not apply to the species of bank checks used *to pay bank bills*. Most bank checks used to pay bank bills were not "s[old]" and "purchased" in 1974—words the FDA repeatedly uses to describe the instruments to which the statute applies. 12 U.S.C. §§ 2501, 2503; *see* ABA Br. 22. Instead, in most cases, when a bank uses a bank check to pay its own bills there is no sale of any kind. The bank simply writes a check—typically a cashier's check or a teller's check—on itself or on an account at another bank. *See* ABA Br. 22. The FDA thus should not be interpreted to cover a bank's own checks.

3. MoneyGram agent checks are not similar written instruments. They are primarily used by banks to pay their own bills, and they replace a financial

institution's bank checks used for the same purpose. In rare cases, agent checks are sold to customers "asking for a bank check." Del.App.275. Agent checks are not "similar" to money orders and traveler's checks in any relevant respect, and are thus not "similar written instrument[s]" subject to the FDA. 12 U.S.C. § 2503.

First, in sharp contrast to money orders and traveler's checks—and like the bank's own checks they replace—agent checks are typically *not* sold to individuals in small-dollar denominations. Instead, agent checks allow smaller financial institutions to outsource administrative tasks associated with their existing bank checks used to pay bank bills. Even in the *rare* case in which an agent check is sold to a consumer—which is atypical—the agent check is sold to a bank customer "asking for a bank check" meant for a larger transaction. Del.App.275.

Indeed, the prototypical agent check used to pay a bank's own bills does not clearly fit within the text of the FDA at all. Agent checks are only "s[old]" and "purchased" in the loosest sense of those terms, 12 U.S.C. §§ 2501, 2503, due to the arrangement between the bank and MoneyGram, which requires banks to use MoneyGram official checks for all purposes, *see* Del.App.276. When a bank uses a MoneyGram agent check to pay expenses, the bank transmits the face value of the agent check to MoneyGram. In effect, the bank "sells" the agent check to *itself*. That transaction, which is a result of the bank's decision to use MoneyGram to help with official check services, looks nothing like the retail sale of a low-dollar money order or traveler's check to an individual customer over a counter.

Second, when banks pay their own expenses, banks record information about their creditors. *See* ABA Br. 9, 22. Similarly, when banks sell bank checks to customers, they know their own customers who have accounts at the bank, and either already record (or can easily record) creditor information. *See* Del.App.260, 400, 599. Contrast that critical fact with money orders and traveler's checks, for which Congress found that the "selling" institutions "do not" record creditors' addresses. 12 U.S.C. § 2501(1). This fact means Defendants can solve their own complaint. Defendants need only require banks to transmit the information they already possess to MoneyGram, which would then report the unclaimed property to the State of the creditor's address. This is true of both agent checks used to pay a bank's own bills, as well as the rare agent check sold to retail customers.

Third, in 1974, bank checks did not escheat unevenly under the common-law rules. *See* Sur-Reply 10; ABA Br. 25-26. At that time, interstate banking was generally prohibited and banks were incorporated in each State. Thus, when Congress passed the FDA, there would have been no concern that bank checks—whether used by banks to pay their own bills or sold to retail customers—were escheated unevenly among the States.

Even after the rise of interstate banking in the 1980s, moreover, some financial institutions continued to incorporate in multiple States. Defendants paint a misleading picture that Delaware receives a windfall by focusing exclusively on MoneyGram. But agent checks do not represent the entire universe of checks that financial institutions use to pay bank bills. Other financial instruments are used by other financial institutions incorporated across the States—

and those instruments escheat evenly among the States under the common law as well.

In sum, agent checks are checks that banks use primarily to pay their own bills, and sell, though rarely, to customers seeking a "bank check." Del.App.275. Agent checks possess commercial characteristics different from money orders and traveler's checks, and agent checks do not pose the concerns raised by those instruments. Agent checks are thus not similar to money orders and traveler's checks and fall outside the scope of the FDA.

4. The Special Master concluded that agent checks are "similar written instruments." *See* Second Report 5. This Court should reject that interpretation of the FDA for two reasons.

First, the Second Interim Report focused on the *atypical* use of agent checks as a retail product sold to consumers. Agent checks, however, "aren't often used to issue checks for customers"; instead, agent checks are used by banks to pay their own expenses. Del.App.275-276. As a result, the Second Interim Report never confronted the core dissimilarity between agent checks, on the one hand, and money orders and traveler's checks, on the other. Agent checks are not typically sold to or purchased by retail customers. MoneyGram agent checks are "sold"—in the loosest sense—by a bank to itself for the purpose of paying the bank's bills.

Defendants have sought to conflate *every* financial instrument sold by MoneyGram with MoneyGram's money orders. But the overwhelming majority of unclaimed agent checks at issue in this case were *not* "s[old]" to and "purchased" by individuals. 12 U.S.C. §§ 2501, 2503. Agent checks are thus nothing like

money orders or traveler's checks, and thus do not fall under the FDA. Even the rare agent checks sold to individual consumers, moreover, are unlike money orders and traveler's checks. Those agent checks are not sold in small amounts as a substitute for a personal check; instead, they are sold to a customer "asking for a bank check." Del.App.275.

The Special Master expressed uncertainty with respect to his conclusion that agent checks are "similar written instruments," acknowledging that any "similarities between" agent checks and money orders might be "insufficient to render them either 'money orders' or 'similar written instruments' within the meaning of the" the FDA. Second Report 5 n.4 (brackets omitted). The Special Master was right to acknowledge this possibility: Agent checks are typically used by banks to pay their own bills, and are thus *even less similar* to money orders than other bank checks.

Second, the Special Master erred by adopting an overly expansive approach to the term "similar written instrument," while declining to define it. *Id*. at 5. The Special Master effectively limited the FDA's scope by correctly defining "third party bank check" according to its plain meaning. *Id*. at 6-22. But the term "similar written instrument" should also be read narrowly to exclude agent checks.

As the Special Master explains, Treasury proposed the third party bank check exception to Congress because Treasury worried that the draft FDA "gave no clue *how similar* an instrument needed to be to money orders and traveler's checks in order to come within the Act's prescriptions." *Id*. at 16. Treasury realized that a revenue-hungry State might argue the

"similar * * * instrument[ ]" included bank checks "which Congress had no intention to include." *Id*. at 17. According to the Special Master, by adopting the third party bank check exception, Congress agreed with Treasury that the FDA did not sweep broadly and did not apply to well-known bank checks. *Id*.

That same statutory history *also* counsels in favor of giving "similar written instrument" the narrow meaning Congress intended. As the Special Master's Second Interim Report makes clear, Congress wanted the FDA to be read narrowly to exclude bank checks. *Id*. Congress adopted the third party bank check exception to be doubly sure of the FDA's targeted meaning. It would thus defeat Congress' purpose to expand the phrase "similar written instrument" into the ambiguous catchall Congress sought to avoid. The Court should thus hold that agent checks are not "similar written instruments" under the FDA.

C. Agent Checks Are Third Party Bank Checks.

In the alternative, this Court should hold that agent checks constitute third party bank checks expressly exempt from the FDA. Agent checks primarily offer a way for banks to replace their own checks, a classic function of bank checks.

1. Delaware agrees in large part with the Special Master's analysis of the phrase "third party bank check." Delaware also agrees with the Special Master's conclusion that MoneyGram teller's checks—which, like all teller's checks, are drawn by a bank on a different bank—are third party bank checks exempt from the FDA.

Relying on numerous historical sources and Defendants' expert testimony, the Second Interim Report

concludes that the term "bank check" has a well-understood meaning: "a check that is both drawn on a bank and by a bank." Second Report 13 (quoting Defs.App.212). The Special Master likewise explains that the phrase "third party" refers to "an instrument that is designed to be used for making payments to a third party." *Id*. at 19.[4]

Putting both pieces together, the Second Interim Report defines a "third party bank check" as a bank check designed to make payment to a third party. This "is essentially the reading advocated by the Defendant States, with the exception that, while they read the 'bank check' component to mean simply a 'check,' [the Special Master] read[s] that component to mean" a "bank check." *Id*. at 19-20. This definition of "third party bank check" would exempt from the FDA cashier's checks, teller's checks, and certified checks.

The Second Interim Report explains that Defendants' reliance on the Hunt Commission's use of the term "third party payment services" "is shaky." *Id*. at 11; *see* Del. First Exceptions 41. But as the Special Master explains, even the Hunt Commission rejects Defendants' narrow reading of the term "third party bank check." The Hunt Commission defined "third party payment services" broadly to mean "*any mechanism*" to transfer "a depositor's funds to a third party." Second Report 20 (emphasis added) (quoting

[4] This is similar, albeit not identical, to Delaware's analysis. Delaware's First Exceptions defined "bank check" as a check signed by a bank employee, and either sold to a customer to transmit large sums or used as the bank's own check. Del. First Exceptions 37-38. Delaware offered a few possible definitions of "third party," including when an instrument is designed to make payment to a third party. *Id*. at 41-42.

Del.App.350 n.1). The Hunt Commission thus further supports Delaware's position that the Court should not read the term "third party bank check" narrowly.

As Judge Leval also explains, the FDA's text, structure, purpose, and history further support defining "third party bank check" to mean bank checks designed to make payments to third-parties. *See* Second Report 6-22. Congress did not intend for the FDA to encompass bank checks, such as cashier's checks, teller's checks, and certified checks, which are nowhere mentioned in the FDA. "These categories of bank checks were so well known that it can be assumed with confidence that if Congress had intended to include them within the scope of the bill, it would have mentioned them by name." *Id*. at 17. Treasury anticipated that the FDA's "open-ended 'similar * * * instrument[s]' clause posed a risk" that revenue-hungry States could seek to expand the FDA well beyond its intended reach. *Id*. To forestall that risk, Treasury proposed, and Congress adopted, the third party bank exception. *Id*.

Finally, Judge Leval explains why Defendants' definition of a "third party bank check" as a regular personal check written on a checking account is not "persuasive." *Id*. at 13. There "is little similarity between a personal check and a money order." *Id*. Most obviously, a "personal check is not prepaid" and a drawee bank will honor the personal check only if "the account holder has sufficient funds on deposit." *Id*. at 13-14. Thus, "Congress would have perceived no need to add a clause excluding" personal checks from the similar-written-instrument clause. *Id*. at 14.

2. Although Delaware largely supports the Special Master's approach to defining "third party bank

check," Delaware respectfully disagrees with the Special Master's conclusion that agent checks are not "third party bank checks" because they are not bank checks. Agent checks are simply a way that smaller banks use MoneyGram to save money on bank checks used to pay bank bills.

The Special Master is correct that one definition of a "bank check" is a check drawn by a bank on a bank. That definition finds support in historical sources and the law of negotiable instruments, and it is shared by Defendants' expert. *See* Second Report 11-12. When a bank is the drawer on a bank check (or otherwise signs it, as in the case of a certified check), the bank becomes liable and backs the instrument with its credit. This is why cashier's checks, teller's checks, and certified checks are considered such secure cash substitutes. *See supra*, pp. 8-9.

But bank checks have long served *another* separate function. In addition to providing extremely secure "cash substitutes, offering the finality of payment in cash," bank checks also "serve as the personal checks of banks." Lawrence, *supra*, at 340. A *bank's* own *checks* thus meet the plain meaning of the term "bank check."

Nothing indicates that Congress intended the FDA to encompass checks primarily used by banks to pay their own bills. Bank checks existed in 1974, and they are not listed in the FDA. There is no reason to believe Congress would have intended them to be included within the FDA. The Court should hold that agent checks fall outside the FDA because they are not "similar written instrument[s]." *See supra*, pp. 31-41. In the alternative, the Court should interpret the term "third party bank check" to include both bank

checks on which a bank is a drawer and those checks designed to pay a bank's own bills.

Finally, if the Court instead concludes that agent checks are similar instruments and are not bank checks on the atypical occasions when agent checks are sold to a retail customer "asking for a bank check," Del.App.275, the Court should hold that Delaware need not pay damages for these previously escheated instruments. *See* Sur-Reply 24 (arguing that, because the FDA applied only prospectively, Congress did not intend the FDA to provide damages or result in the radical retribution of escheatment). As Delaware has noted, the number of agent checks sold by banks to retail customers appears to be limited. *See supra*, pp. 27-28.

D. Three Separate Tie-Breaking Principles Resolve This Dispute In Delaware's Favor.

If this Court has any doubt about either the term "similar written instrument" or "third party bank check," three tie-breaking principles counsel in favor of giving the FDA a narrow scope and ruling for Delaware.

First, the Court should read the FDA narrowly to avoid derogating the common law. Congress's "desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993); *see* Del. First Exceptions 31-32.

Second, in this particular field, the Court strongly prefers an easily administrable regime. *See Delaware*, 507 U.S. at 510. That principle counsels in favor of a narrow interpretation of the FDA. Adopting a

broad interpretation risks upsetting long settled practice—and could require redistributing among all States countless teller's checks, cashier's checks, or certified checks escheated since 1974. Indeed, Defendants have readily admitted that the status of "other types of instruments," including cashier's checks, would need to "be determined in future cases." Defs.' First Reply 56.

Moreover, this case is not simply about choosing between the FDA's primary rule and the common-law secondary rule for these MoneyGram instruments. Adopting Defendants' sweeping interpretation of the FDA could create considerable uncertainty over when to apply competing common-law or FDA *primary rules* in countless cases. That risks undermining the durable common-law framework that has, for decades, successfully governed the escheatment of intangible property.

Third, this Court favors fairness, and Delaware's approach promotes "equity." *Delaware*, 507 U.S. at 507. Defendants can escheat these funds. States need only require selling banks to transmit creditors' addresses to MoneyGram. That simple step—one made even easier in the digital age—would evenly distribute escheated MoneyGram agent checks among all States. Similarly, as the Special Master explained, "Defendant States have sufficient voting power in Congress to" modify the FDA "for future escheats." Second Report 22 n.12. Because state or federal legislation will operate prospectively, addressing this matter through legislation will preserve Delaware's and holders' good-faith reliance on the FDA's plain text and will avoid disrupting long-settled unclaimed property reporting practices and expectations.

II. THIS COURT SHOULD DENY PENNSYLVANIA'S REQUEST TO MODIFY THE COMMON LAW.

Pennsylvania filed a separate claim arguing that the Court should modify the common-law priority rules. The First Interim Report initially recommended denying Pennsylvania's claim as moot. Del.App.94. Because the claim is no longer moot, the Second Interim Report now recommends remanding Pennsylvania's claim for the Special Master's further consideration. Second Report 27. But a remand is unnecessary. Pennsylvania's claim has no merit. This Court has considered and rejected requests to modify the common-law priority rules. A remand would only prolong these already lengthy proceedings. This Court can, and should, deny Pennsylvania's claim outright.[5]

Pennsylvania "seeks modification of the secondary federal common law rule," in the event that teller's checks or agent checks are subject to the common law. Special Master Dkt. 11 at 3 (Pennsylvania counterclaim). Pennsylvania argues "that the secondary rule as applied to the MoneyGram official checks at issue should be the same as" the FDA's place of purchase rule. *Id*. at 18.

In *Texas* v. *New Jersey*, 379 U.S. 674 (1965), however, this Court refused "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts," *id*. at 679. As this Court explained, case-by-case adjudication would "create so much uncertainty

[5] No Defendant has made any claim under the existing common-law priority rules. Defendants have thus forfeited any such common-law claim as to the funds at issue in this lawsuit. *See* Sur-Reply 12 n.7; Special Master Dkt. 133 at 3 n.3.

and threaten so much expensive litigation that the States" would "lose more in litigation expenses than they might gain in escheats." *Id*. That is precisely what would happen if this Court were to modify the common-law rules for the disputed instruments. The Court would then need to decide in future cases whether to extend that modification of the common law to other instruments.

In *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), this Court rejected the place-of-purchase rule Pennsylvania now proposes and confirmed that this Court will not "vary the application of the *Texas* rule according to the adequacy of the debtor's records," *id*. at 215. And in *Delaware* v. *New York*, 507 U.S. 490 (1993), this Court rejected a different Special Master's recommendation to modify the common-law secondary rule. The Court explained that a " 'heavy burden' " "attends a request 'to reconsider not one but two prior decisions' " of this Court. *Id*. at 506 (quoting *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980)).

Today, an even heavier burden attends Pennsylvania's request to overturn three prior decisions. Given this Court's clear precedent on precedent, there is no need to remand this issue to Judge Leval. This Court should reject Pennsylvania's claim.

The common-law rules provide a durable framework that applies to any type of intangible property. A holder of unclaimed property need only determine the "debtor-creditor relationship," look to any of its own business records that it has maintained, and decide which priority rule applies. *Delaware*, 507 U.S. at 499-500. Pennsylvania would throw that framework into doubt, leading to the kind of "uncertainty" and "expensive litigation" this Court's precedent disfavors.

Texas, 379 U.S. at 679. Indeed, because only this Court can resolve interstate escheat disputes between States, much (or all) of that factually complicated litigation would need to occur *in this Court's original jurisdiction*.

This Court's common-law rules are equitable. As Delaware's Sur-Reply explains (at 22-23), the common law likely results in more unclaimed property being reunited with the rightful owner. *See Taylor*, 136 S. Ct. at 930 (Alito, J., concurring in the denial of certiorari). That is because the common law incentivizes States, and here particularly the Defendants, to require the holders of unclaimed property to maintain creditor names and addresses. Sur-Reply 22. This, in turn, carries positive benefits. With creditors' names and addresses in hand, holders can more readily contact owners by mail (as state law typically requires) before reporting unclaimed property to a State. *Id*. By contrast, Pennsylvania's approach would reduce States' incentives to require holders to record addresses, meaning fewer debtors would successfully contact the rightful owners of unclaimed property before escheating. *Id*. at 22-23.

The common law also makes it easier for owners to locate lost property after the property has been reported to a State. Delaware and other States maintain online databases through which owners may search for lost property.[6] When abandoned property is associated in a database with an owner's name and address information, owners can efficiently search for that property. *Id*. at 23. By contrast, under Pennsylvania's approach, a State's database could contain

[6] Delaware's database can be found here: https://unclaimedproperty.delaware.gov.

only limited information, if any, such as the unclaimed instrument's face value (*e.g.* $100). *Id*.

Maintaining the common law is fair. Delaware accepted the property at issue in good-faith reliance on this Court's settled common-law rules. And there is no "inequity" in Delaware receiving that property because its laws of incorporation prove "more attractive." *Delaware*, 507 U.S. at 507. Nor is there any great unfairness to Defendants. Defendants can solve their own complaint under the common law. The banks that contract with MoneyGram record creditors' information; the banks simply do not transmit that information to MoneyGram. *See* Del.App.599. Defendants need only require banks to send that information to MoneyGram—something all the easier in the digital age—at which point Defendants can require escheat of these funds prospectively under the common law. *See Delaware*, 507 U.S. at 509 n.12 ("[N]othing in our decisions 'prohibits the States from requiring [debtors] to keep adequate address records.' " (quoting *Pennsylvania*, 407 U.S. at 215)).

As Judge Leval stated, Defendants also possess considerable "voting power in Congress." Second Report 22 n.12. Defendants can thus ask Congress to pass "a specific statute concerning" the escheatment of discrete instruments. *Delaware*, 507 U.S. at 510. Because local and national legislation would likely operate prospectively, resolving Defendants complaint through legislation would protect Delaware's and holders' good-faith reliance on this Court's precedent and the plain meaning of the FDA, and prevent calling into doubt decades of long-settled escheatment practices.

CONCLUSION

The Court should modify the Special Master's recommendation in part; hold that MoneyGram teller's checks and agent checks do not fall within the FDA and are subject to escheatment under the common-law rules; deny Pennsylvania's claim to modify the common law; and grant Delaware's motion for summary judgment on liability.

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APPENDIX

SECOND SUPPLEMENTAL APPENDIX

STATUTORY PROVISIONS INVOLVED

1. **12 U.S.C. § 2501 provides:**

§ 2501. Congressional findings and declaration of purpose

The Congress finds and declares that—

(1) the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments;

(2) a substantial majority of such purchasers reside in the States where such instruments are purchased;

(3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;

(4) it is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States entitled thereto; and

(5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

2. **12 U.S.C. § 2502 provides:**

§ 2502. Definitions

As used in this chapter—

(1) "banking organization" means any bank, trust company, savings bank, safe deposit company, or a private banker engaged in business in the United States;

(2) "business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals; and

(3) "financial organization" means any savings and loan association, building and loan association, credit union, or investment company engaged in business in the United States.

3. **12 U.S.C. § 2503 provides:**

§ 2503. State entitlement to escheat or custody

Where any sum is 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—

(1) 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;

(2) if the books and records of such banking or financial organization or business association do not show the State in which such money order, traveler's check, or similar written instrument was purchased, 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; or

(3) if the books and records of such banking or financial organizations or business association show the State in which such money order, traveler's check, or similar written instrument was purchased and the laws of the State of purchase do not provide for the escheat or custodial taking of the sum payable on such instrument, 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, subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum.