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

REPLY OF THE STATE OF DELAWARE TO DEFENDANTS' EXCEPTIONS

STEVEN S. ROSENTHAL
TIFFANY R. MOSELEY
JOHN DAVID TALIAFERRO
LOEB & LOEB LLP
901 New York Ave., N.W.
Washington, D.C. 20001

NEAL KUMAR KATYAL
Counsel of Record
KATHERINE B. WELLINGTON
JO-ANN TAMILA SAGAR
NATHANIEL A.G. ZELINSKY
DANA A. RAPHAEL
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for State of Delaware

Additional counsel listed on inside cover

MARC S. COHEN
LOEB & LOEB LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067

KATHLEEN JENNINGS
Attorney General of Delaware
PATRICIA A. DAVIS
State Solicitor
MICHELLE E. WHALEN
Deputy Attorney General
DELAWARE DEPARTMENT OF JUSTICE
DEPARTMENT OF FINANCE
CARVEL STATE OFFICE BUILDING
820 North French Street
Wilmington, DE 19801

Counsel for State of Delaware

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INTRODUCTION

Defendants' latest briefing before this Court has substantially narrowed the parties' dispute. Defendants now largely agree with Delaware's interpretation of the FDA. Defendants agree that the FDA is a targeted statute that does not apply to well-known bank checks. *See* Defs.' Exceptions 16, 21-24. They agree that the term "money order" does not encompass "well-known generic class[es] of instruments, like cashier's checks" and "teller's checks." *Id*. at 16. They agree that the term "similar written instrument" does

"not sweep in cashier's checks and teller's checks." *Id*. at 24 n.4. And they agree that checks used to pay bank bills are not "similar written instruments," and thus fall outside the FDA. *See id*.

These concessions are fatal to Defendants' position. Because the FDA does not encompass teller's checks and checks used to pay bank bills, the FDA does not apply to MoneyGram teller's checks and agent checks. MoneyGram teller's checks are simply teller's checks, as the Special Master concluded. *See* Second Report 23. They are drawn by a bank on a different bank, and thus meet the longstanding definition of a "teller's check." And they are "good funds instruments" treated by financial institutions in the same way as every other teller's check. Agent checks overwhelmingly *serve as a bank's own checks*. Defendants agree that checks used to pay bank bills fall outside the FDA; this Court should thus hold that agent checks, which are overwhelmingly used to pay bank bills, fall outside the FDA.

The few arguments Defendants muster are unconvincing. Defendants claim that MoneyGram teller's checks are not "real" teller's checks because MoneyGram, rather than the selling bank, coordinates the mechanics of payment with the drawee bank. As the Special Master explained, however, the definition of a teller's check is a check drawn by a bank on a different bank—and MoneyGram teller's checks meet that definition. Defendants also assert that agent checks are subject to the FDA, but they conflate the agent checks at issue here with a different MoneyGram instrument called an "agent check money order." As MoneyGram's witness explained, these

"two distinctly different" instruments are used in different ways. Del.App.270.

At bottom, Defendants ask this Court to rule for them in the name of fairness—specifically to redistribute, years later, hundreds of millions of dollars from one State to the various Defendants. But ruling for Defendants would be unfair. For a decade, Delaware has accepted MoneyGram teller's checks and agent checks based on a good-faith interpretation of the FDA—an interpretation that Defendants now largely share. Delaware should not be subject to hundreds of millions of dollars in retroactive liability based on Defendants' hairsplitting arguments about "real" teller's checks, or the tiny proportion of agent checks that are sold to customers.

SUMMARY OF ARGUMENT

I. This Court should consider the Special Master's Second Interim Report. It is imperative that this Court decide the case correctly and provide necessary clarity to holders of unclaimed property and States alike. This Court granted the Special Master authority to submit reports without limitation. The matter was fully briefed before the Special Master, and it is fully briefed here. There is no compelling reason to ignore the Special Master's revised recommendation.

II. Defendants now agree that the FDA does not apply to teller's checks and checks that banks use to pay their own bills. That development resolves this case.

A. As the Special Master found, MoneyGram teller's checks are just teller's checks, drawn by a bank on a different bank. Thus, under Defendants' own reading, these teller's checks fall outside the FDA. Defendants argue that MoneyGram teller's checks are somehow

not "real" teller's checks because MoneyGram, not the selling bank, formally coordinates with the drawee bank. This is an immaterial distinction. The selling bank is liable on MoneyGram teller's checks as a drawer; that is what makes them teller's checks.

B. MoneyGram agent checks are chiefly used by banks to pay their own bills. Defendants now agree that checks used by banks to pay their own bills are *not* similar to money orders and traveler's checks, and thus fall outside the FDA. Because MoneyGram agent checks are primarily used by banks to pay their own bills, the Court should hold that these instruments fall outside the FDA. Defendants conflate agent checks with an entirely different instrument called an "agent check money order." But MoneyGram's witness explained that agent check money orders are *not* the same thing as agent checks. The two instruments possess fundamentally different legal terms and conditions, and they are used in distinctly different ways.

III. A close analysis of the FDA confirms that it does not apply to well-known bank checks, including cashier's checks and teller's checks sold to customers, as well as checks that banks use to pay their own bills.

A. As copious historical sources confirm, the term "money order" refers to a low-dollar instrument typically sold to consumers without bank accounts as a substitute for a personal check. Defendants agree that the term money order does not include "teller's checks," which are "a well-known generic class of instruments." Defs.' Exceptions 16. Defendants also agree that the term "money order" does not mean checks that banks use to pay their own expenses. *Id*. at 24 n.4.

Those concessions resolve this case. MoneyGram teller's checks are simply teller's checks, and MoneyGram agent checks are overwhelmingly used to pay bank bills. Defendants nitpick the Special Master's definition of a money order, focusing on how money orders can potentially be used by consumers with bank accounts, or might rarely have been issued in larger amounts. But all commercial products can be used atypically at times; that does not mean that such products cannot be defined according to their ordinary use.

B. Defendants now agree with Delaware that the term "similar written instrument" does not include teller's checks or checks that banks use to pay their own bills. *Id*. at 24 n.4. And in sharp contrast to their earlier expansive reading of the FDA, Defendants now discourage the Court from interpreting "similar written instrument" to "sweep[] in all prepaid drafts." *Id*. at 23.

That resolves this case: MoneyGram teller's checks are simply teller's checks, and MoneyGram agent checks are primarily used to pay bank bills. Defendants briefly suggest that MoneyGram teller's checks and agent checks might be similar written instruments because MoneyGram lacks records of creditor addresses. But the FDA does not apply *anytime* a debtor lacks addresses. Instead, the FDA applies to two classes of low-dollar instruments for which issuers and sellers did not normally collect addresses in 1974, and where doing so would have been prohibitively expensive.

In 1974, those same policy concerns did not apply to cashier's checks, teller's checks, and certified checks sold to individuals, or checks used to pay bank

expenses, and so Congress did not include those instruments in the FDA. Nor do those same concerns apply to MoneyGram teller's checks and agent checks today. In contrast to money orders and traveler's checks, banks record addresses for these MoneyGram instruments, which are larger-dollar instruments and checks used to pay bank bills. Del.App.599. Defendants can solve their own complaint and do not need this Court to do their work for them: They need only require banks to transmit the information they already collect to MoneyGram.

C. Based on Defendants' concessions, this Court should hold that MoneyGram teller's checks and agent checks fall outside the FDA entirely. There is thus no need for this Court to define the scope of the "third party bank check" exception. But if this Court reaches that question, it should adopt the Special Master's approach, which relies on the plain meaning of the FDA. A third party bank check is a bank check designed to make payment to a third party. MoneyGram teller's checks and agent checks fit that definition and are not subject to the FDA.

IV. If this Court is left with any doubt about the FDA's scope or application to this case, three separate tie-breaking principles counsel in favor of Delaware. *First*, statutes in derogation of the common law are strictly construed, even when the statute intentionally supplements the common law in some fashion. *Second*, Delaware's approach is administrable. By contrast, ruling for Defendants would invite a question—in every case—whether to apply competing common-law or FDA priority rules. *Third*, ruling for Delaware is fair: Delaware accepted these funds in good faith, based on a plain-reading interpretation of the

FDA that Defendants now in large part share. It would be deeply unfair to require Delaware's taxpayers to pay hundreds of millions of dollars to Defendants—especially when Defendants can easily solve their complaint by requiring selling banks to transmit creditor addresses to MoneyGram.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE SPECIAL MASTER'S SECOND INTERIM REPORT.

Defendants make a half-hearted plea (at 15-16) for this Court to ignore the Second Interim Report. But it is imperative for the Court to decide this matter correctly, using every tool at its disposal. This Court is the exclusive venue for interstate escheat disputes. *See Texas* v. *New Jersey*, 379 U.S. 674, 677 (1965). It alone can definitively interpret the FDA. When the Court resolves this matter, it will not only determine the status of disputed MoneyGram instruments, but will also provide much-needed guidance for every State and all holders, and its decision could impact pending litigation over cashier's checks. Ignoring the Special Master's confession of error, and the parties' fulsome briefing, could only frustrate that important task.

Defendants analogize the Special Master to a district court that formally loses jurisdiction on appeal. But the Special Master is an arm of this Court, not a separate judicial entity with jurisdiction and the power to issue judgments. The relationship between the Special Master and this Court is more akin to the relationship between a magistrate judge and a district court judge, or between the Court and its Clerk. The

Special Master provides non-binding recommendations to the Court. The Court's order appointing the Special Master therefore does not create any jurisdictional limit. Instead, the Court directed Judge Leval "to submit Reports as he may deem appropriate," without limitation. Special Master Dkt. 31.

Nor is this particular circumstance unprecedented. Federal magistrate judges sometimes find themselves in a similar position to the one that Judge Leval faced, and they do not hesitate to correct their errors. "[A]mple authority supports the practice of magistrate judges revising their recommendations when mistakes become apparent." *Winston & Strawn LLP* v. *FDIC*, 841 F. Supp. 2d 225, 229 (D.D.C. 2012). So, too, Judge Leval had both the authority and the duty to reconsider his position upon recognizing an error in his prior recommendation to this Court, request briefing from the parties, and provide this Court with a revised recommendation.

II. MONEYGRAM TELLER'S CHECKS ARE TELLER'S CHECKS, AGENT CHECKS PAY BANK BILLS, AND DEFENDANTS AGREE THAT NEITHER TYPE OF CHECK IS SUBJECT TO THE FDA.

By Defendants' own account, neither "teller's checks" nor checks that banks use "to pay their own bills" are subject to the FDA. Defs.' Exceptions 24 n.4; *see id*. at 16, 23, 33. Defendants' concession regarding the FDA's scope resolves this case. As the Special Master found, MoneyGram teller's checks "are indeed teller's checks," drawn by the selling bank on a different clearing bank. Second Report 23, 24. Meanwhile, MoneyGram agent checks "aren't often used to issue checks for customers," but are instead used to pay

bank bills. Del.App.275. As Defendants now recognize, both types of instruments fall outside the FDA.

A. MoneyGram Teller's Checks Are Simply Teller's Checks.

1. Defendants now agree that "teller's checks" fall outside the FDA. Defs.' Exceptions 16, 24 n.4. As the Special Master correctly found, MoneyGram teller's checks "are indeed teller's checks." Second Report 23, 24. These teller's checks are subject to the common law, not the FDA.

A teller's check has a settled definition as a check "drawn by a bank" "on another bank." U.C.C. § 3-104(h); *see* 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 (1980) ("[A] teller's check is a check drawn by one bank—usually a savings and loan association—upon another bank."); 12 C.F.R. § 229.2(gg) (defining teller's check as "a check" "drawn by the bank" "on another bank"); *Check*, Black's Law Dictionary (11th ed. 2019) (defining "teller's check" as a "draft drawn by a bank on another bank."); Defs.App.155 (defense expert relying on U.C.C. definition of teller's check). The "uses of teller's checks" "parallel those of cashier's checks." Lawrence, *supra*, at 333. Teller's checks are "used as cash equivalents by purchasers of the checks" and "as personal checks by" financial institutions. *Id*.

MoneyGram's teller's checks are simply teller's checks. They are teller's checks in both form and function: Like all teller's checks, MoneyGram teller's checks are drawn by a bank on a different bank. The selling bank is the drawer on every MoneyGram

teller's check, and a different clearing bank is the drawee. *See* Second Report 24; Del.App.259, 269, 272, 326. Because the selling bank's employee signs the teller's check on behalf of the bank as drawer, the selling bank is liable on the instrument. *See* U.C.C. § 3-401 (signature creates liability). Tendering the teller's check automatically discharges an obligation, and the drawer bank is subject to penalties if it does not pay. U.C.C. §§ 3-310, 3-411.

MoneyGram teller's checks also serve the classic purpose of teller's checks. They are a secure cash equivalent used for large transactions. There is no limit on MoneyGram's teller's checks. Del.App.259, 269. The selling bank's customers use MoneyGram teller's checks for major purchases, such as to "put a deposit on a car" or "money towards purchasing a home." *Id*. at 260. The customer typically has a checking account at the bank, and the bank withdraws funds from the "customer's account" to pay for the teller's check. *Id*. In some instances, banks also use teller's checks "to pay for their own" bills, such as "accounts payable" or "distributions from an IRA." *Id*. This is exactly how teller's checks have operated for decades. *See* Del.App.459-460 & n.92; Lawrence, *supra*, at 333. And that is why MoneyGram calls these instruments "teller's checks."

The financial industry treats MoneyGram teller's checks as teller's checks. For instance, because the bank's liability as a drawer makes a teller's check so credit-worthy, federal law requires banks to make funds available the day after someone deposits a teller's check. *See* 12 C.F.R. § 229.10(c)(1)(v). The financial industry recognizes that MoneyGram teller's checks are teller's checks and makes funds available

to depositors the next day. Del.App.326. Indeed, customers purchase these instruments precisely because they specifically need a "next day good funds" instrument. *Id*. at 265.

2. Defendants nevertheless resist the Special Master's conclusion that MoneyGram teller's checks are teller's checks. Defendants' argument turns on the fact that, among the many administrative services MoneyGram provides, MoneyGram coordinates with the drawee bank to process payment. Defs.' Exceptions 40-42. Defendants say that a teller's check is only a "true" teller's check if the drawer bank coordinates *directly* with the drawee bank, and formally maintains an account at the drawee bank. *Id*.

Defendants are incorrect. Whether a drawer bank coordinates with a drawee bank directly—or outsources that administrative task to MoneyGram—does not affect either the legal status of the instrument or its use in commerce.

Defendants are thus wrong when they claim that MoneyGram teller's checks only "nominally list the selling bank as a drawer." *Id*. at 41. *There is no such thing as a "nominal drawer."* The drawing bank's employee signs these instruments on behalf of the bank as a drawer, and the bank is liable on these teller's check as a result. *See* U.C.C. § 3-401(a). The fact that the drawing bank is liable on the check as a drawer is precisely why the financial industry treats MoneyGram teller's checks like all other teller's checks and affords MoneyGram teller's checks next-day-funds status under federal law. Del.App.326. Consumers use MoneyGram teller's checks when they need a "next day good funds" check drawn on a bank. *Id*. at 265.

Defendants nevertheless argue—without any citation whatsoever—that a "bank can't 'draw' funds on a bank at which it has no account." Defs.' Exceptions 41. This is wrong. No law requires a drawer to formally coordinate with a drawee bank, instead of using an intermediary like MoneyGram to manage logistics. A drawer is merely "a person who signs or is identified in a draft as a person ordering payment." U.C.C. § 3-103(a)(5). In this case, the drawing bank signs the teller's check and orders the drawee bank to pay. The drawee bank honors that order when it pays the teller's check. In the event the drawee bank refuses to pay, the drawer bank is liable on that instrument. *See* U.C.C. § 3-401(a).[1]

Finally, Defendants point to historical sources (at 41) describing how some selling banks have coordinated directly with drawee banks in the past regarding teller's checks. *Not a single source states that the drawer bank's direct coordination with the drawee bank is an essential characteristic of a teller's check*. Instead, these sources confirm that the essential definition of a teller's check is a "check[] drawn by a

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[1] MoneyGram is also listed as an "issuer" on its teller's checks. Under the modern Uniform Commercial Code, the word "issuer" is a synonym for a drawer. This means that MoneyGram is also liable on the instrument. Second Report 23-24. Nothing prevents a teller's check from having two drawers, so long as one drawer is a bank. As one of Defendants' experts explained, a "teller's check is always signed by a bank as 'drawer' of the instrument even though another financial company such as MoneyGram can be liable as 'issuer.' " Defs.App.155-156. The teller's check receives "next day good funds" treatment only because the bank is a drawer. Del.App.265; *see* 12 C.F.R. §§ 229.2(gg); 229.10(c)(1)(v); U.C.C. §§ 3-310, 3-411 (finality of payment rules apply because the bank is a drawer).

bank * * * upon a commercial bank." Lawrence, *supra*, at 333; *id*. at 278 (restating nearly identical definition).[2] Nor does anything indicate that Congress intended the FDA to distinguish between situations in which a drawer bank contracts directly with a drawee bank, or the drawer instead outsources administrative tasks to a third-party like MoneyGram to increase efficiency.

In short, a MoneyGram teller's check is just a teller's check drawn by a smaller bank that outsources certain back-end administrative functions to MoneyGram. The drawing bank is liable on these instruments as drawers—just as a bank must be liable on all teller's checks. Ruling otherwise would require not just disagreeing with Delaware, but disagreeing with the financial industry which—for years—has treated MoneyGram teller's checks as teller's checks subject to next-day funds status. Defendants admit that teller's checks fall outside the FDA, and MoneyGram's teller's checks are teller's checks. MoneyGram teller's checks thus fall outside the FDA. Defs.' Exceptions 16, 23-24 & n.4.

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[2] Defendants assert (at 40) that Delaware's expert defined a bank check as a check drawn by a bank on a drawee bank with which the drawer formally maintains an account (rather than using an intermediary to manage the account). That is wrong. Delaware's expert explained that the 1987 draft of the Uniform Commercial Code defined a bank check to mean "a draft payable on demand drawn by a bank on another bank," or a draft for "which the drawer and the drawee are the same bank." Defs.App.135 n.12 (quoting U.C.C. § 3-104(d) (1987 Exploratory Draft)). Defendants' expert likewise defined a bank check as "both drawn on a bank and by a bank," although he later argued (despite his own definition) that MoneyGram teller's checks "should not be considered" teller's checks. *Id*. at 212, 221.

B. MoneyGram Agent Checks Are Bank Checks Used To Pay Bank Bills.

1. MoneyGram agent checks are checks that banks use to pay their bills. As Defendants now agree, checks that banks use "to pay their own bills" fall outside the FDA—which means that MoneyGram agent checks fall outside the FDA and should be escheated under the common law. Defs.' Exceptions 24 n.4.

MoneyGram agent checks "aren't often used to issue checks for customers." Del.App.275. Instead, MoneyGram requires banks that contract with MoneyGram to use MoneyGram for all official check services, including when a bank pays its own bills. *Id*. at 276. As a result, when banks contract with MoneyGram, banks typically do not maintain "an in-house account" to pay their own bills. *Id*. Instead, banks use MoneyGram agent checks. On rare occasions, a bank may sometimes sell an agent check to a customer with a bank account "asking for a bank check." *Id*. at 275. But this is not the typical use of agent checks.

The Court should categorize MoneyGram agent checks according to their typical use as a bank's own check. According to Defendants, where "banks sometimes" use an instrument "to pay their own bills," this is a reason to conclude that the instrument *should not* be subject to the FDA. Defs.' Exceptions 24 n.4. Under that logic, agent checks should not be subject to the FDA. *See also* Del. Second Exceptions 28 (explaining that the atypical use of agent checks does not change the instrument's core commercial attributes as a bank's own check).

At a minimum, Defendants' agreement that where a check is used to pay the bank's bills, that check should not fall within the FDA, means that the *vast majority* of MoneyGram agent checks are subject to escheatment under the common law. *See* Defs.' Exceptions 24 n.4. Nor should this Court hold that the rare agent checks sold to customers asking for a bank check are subject to the FDA. Those atypical agent checks are neither low-dollar money orders, nor are they similar to low-dollar money orders and traveler's checks. *See* Del. Second Exceptions 26-29, 37-39; *infra*, pp. 18-33.

2. Defendants do not grapple with the fact that banks use agent checks to pay their own bills, and far less frequently sell agent checks to customers needing a bank check. Instead, Defendants argue that agent checks are "functionally identical" to an entirely different instrument called *agent check money orders*. Defs.' Exceptions 21. This is wrong, as Delaware explained at length in its Second Exceptions Brief. *See* Del. Second Exceptions 30.

MoneyGram's corporate witness testified that *agent checks* and *agent check money orders* are different instruments, used in "different manner[s] by the financial institution." Del.App.271. *Agent check money orders* are money orders. They are labeled "money order," they are sold to customers who come into a bank asking for a "money order," and MoneyGram escheats them according to the FDA. *Agent check money orders* are simply printed off the same machine that also prints official checks. That does not make an agent check money order the same thing as an agent check.

Agent checks and agent check money orders differ in crucial ways. Banks limit the amount on agent check money orders. *See id*. at 278 (bank imposed $1,000

limit). An agent check money order must be labeled a money order, whereas an agent check *cannot* be labeled a money order. *Id*. at 270. An agent check money order is subject to limited-recourse language applicable to all MoneyGram money orders (which has legal significance), whereas an agent check is not subject to limited-recourse language. *Id*. And an agent check money order must be signed by the purchaser, whereas an agent check is signed by a bank employee, reflecting the agent check's status as the bank's own check. *See id*. at 230; Second Report 24-26. Because agent checks are chiefly the bank's own check, they fall outside the FDA.

3. Finally, if this Court concludes that agent checks fall within the FDA on the rare occasion when agent checks are sold to individual customers "asking for a bank check," the Court should not require Delaware to pay damages for these previously escheated instruments. Del.App.275. The number of agent checks used in this way appears to be extremely limited. *See id*. And it would likely be impossible years later to differentiate the small subset of agent checks sold to customers. The chances are small that banks maintained records for decades detailing how each agent check was used. Moreover, Congress did not intend the FDA to provide for retroactive damages liability. Rather, Congress specifically ensured that the FDA would apply only prospectively to prevent

redistributing previously escheated funds among the States. Del. Second Exceptions 45; Del. Sur-Reply 24.[3]

* * *

Because Defendants now agree that teller's checks and checks used to pay bank bills fall outside the FDA, the Court could stop its analysis here. MoneyGram's teller's checks are simply teller's checks. MoneyGram's agent checks pay bank bills. Neither instrument is subject to the FDA, under Defendants' own reading of the statute. Indeed, this is precisely how States and holders alike had long understood the FDA, prior to this litigation. That is the end of this case.

III. THE FDA DOES NOT APPLY TO TELLER'S CHECKS AND CHECKS USED TO PAY BANK BILLS.

The FDA's plain text confirms what Defendants now admit. The FDA does not apply to "well-known generic class[es] of instruments, like cashier's checks" and "teller's checks." Defs.' Exceptions 16. Nor does

[3] MoneyGram has escrowed some agent checks pending the resolution of this litigation. If the Court were to differentiate between typical agent checks used to pay bank bills and rare agent checks sold to retail customers, all escrowed agent checks should flow to Delaware, unless Defendants can meet their burden to prove that, "on a transaction-by-transaction basis," a "particular" agent check was sold to an individual and thus gave rise to a "superior right to escheat." *Delaware* v. *New York*, 507 U.S. 490, 509 (1993) (explaining that "the State of corporate domicile should be allowed to retain the property" unless "some other State comes forward with proof that it has a superior right" (cleaned up)). Additionally, because these funds would otherwise flow to Delaware, Defendant "claimant States" "should bear" any associated "cost" of their investigation "as a matter of fairness." *Pennsylvania* v. *New York*, 407 U.S. 206, 215 (1972).

the FDA apply to instruments which banks use "to pay their own bills." *Id*. at 24 n.4. Indeed, in light of Defendants' latest position, there is fairly little disagreement between the parties on the previously contested question of the FDA's scope.

A. MoneyGram Teller's Checks And Agent Checks Are Not Money Orders.

As the Special Master has correctly concluded, the term "money order" does *not* denote specific "legal rights and obligations inhering in the instrument." Second Report 3-4. Instead, a "money order" is a small-dollar product marketed to the underbanked as a replacement for a personal check, and sold at a variety of retail establishments. *Id.* at 4. Neither teller's checks nor agent checks are money orders. Teller's checks are well-known bank checks sold to existing bank customers for major purchases. Agent checks are used by banks to pay their own bills.

1. The Special Master's plain-meaning definition is correct.

The Special Master's plain-meaning definition of a money order finds support in numerous sources. *See* Del. First Exceptions 18-22. Thus, in 1956, an industry report on money orders explained that "money orders serve those who for one or more reasons do not want or need a checking account"; were limited to small amounts such as $100-$250; and were sold at a variety of locations, including "drug stores and department stores." Del.App.385, 400, 411 (*1956 ABA Report*). In an *amicus* brief before this Court in *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), American Express explained that money orders "are used for the

most part to pay bills by persons who do not have checking accounts." Del.App.511.

Black's Law defined money orders as "used by the purchaser as a substitute for a check" and sold by a variety of outlets. *Id*. at 365. *Compton's Encyclopedia* described money orders as limited in amount and "especially helpful to persons who do not have checking accounts." *Id*. at 379, 380. *Munn's Encyclopedia of Banking and Finance* defined a money order as a "form of credit instrument" used "by persons not having checking accounts," and also noted their low maximum account. *Id*. at 373. The Chairman of the Senate Committee that passed the FDA described "money orders" as used by "low-income families * * * instead of checking accounts to pay their bills, because they are readily available and because of their low cost." *Id*. at 580.

Meanwhile, numerous other sources differentiated between money orders and well-known bank checks, such as cashier's checks and teller's checks. A 1967 law review article separately addressed—in the very same sentence—"personal money orders," "bank money orders," "teller's checks," "cashier's checks," and "traveler's checks." *Id*. at 430-431. The 1956 industry report on money orders distinguished between money orders and "official bank checks." *Id*. at 385. Other contemporary federal statutes differentiated between money orders and bank checks. Del. First Exceptions 26 (citing 26 U.S.C. § 6311 and 31 U.S.C. §§ 5325(a), 9303(c)). And shortly after Congress passed the FDA, the Uniform Law Commission issued a new draft of its uniform unclaimed property act, which incorporated the FDA's rules for money orders and traveler's checks, and also distinguished between

those instruments and bank checks. *Id*. at 26-27; *see* American Bankers Association Amicus Br. 27-28 (ABA Br.).

2. Defendants nitpick the Special Master's definition, but their arguments are meritless.

There is no merit to Defendants' nitpicking about the Special Master's definition of "money order" (which, again, Defendants now agree does not mean a teller's check or check used to pay bank bills, *see* Defs.' Exceptions 16, 24 n.4).

First, Defendants observe (at 18-21) that money orders might be used in an atypical manner or by an atypical consumer. But nearly every commercial product is used atypically at times. The fact that a financial instrument may occasionally be used in an atypical way does not mean that financial instruments cannot be defined or distinguished based on how they are typically used. That is especially so in this case. Congress was particularly focused in the FDA on how money orders were typically used by "low-income families" "to pay their bills" on a regular basis, creating a specific escheatment policy problem that Congress sought to solve in the FDA. *Id*. at 580; *see* 12 U.S.C § 2501. The fact that someone with a bank account might occasionally use a money order does not change a money order's core definition as a low-dollar instrument primarily sold to consumers without bank accounts.

Second, Defendants vastly overstate the atypical uses of money orders. Defendants stress that *in 1939*, Western Union might have allowed telegraphic money orders to be issued in larger amounts. Defs.' Exceptions 19. But that is not evidence of Western Union's policy *in 1974*. And even if Western Union did allow

for larger telegraphic money orders in 1974, there is no evidence such money orders would have been anything but the rare exception. *Cf.* Del.App.303 (Western Union advertisement showing $100 telegraphic money order dated May 5, 1969). In sharp contrast, the overwhelming historical evidence confirms that money orders were limited to low amounts. *See supra*, pp. 18-19.

Today, MoneyGram imposes a $1,000 limit for retail money orders. Del.App.251, 255-256. Defendants note that MoneyGram's system permits banks to issue agent check money orders for more than $1,000. Defs.' Exceptions 18. But the record evidence shows that, even where the system permits it, banks do not necessarily do so. Instead, banks limit the amount of agent check money orders to match the limit for other money orders. *See* Del.App.278 (bank imposed $1,000 limit on its agent check money orders).

Meanwhile, without any citations to any historical source whatsoever, Defendants suggest that money orders sold at banks were *chiefly* sold to customers with bank accounts. Defs.' Exceptions 19 & n.3. This is completely inaccurate. The 1956 American Banking Association report on money orders explained that money orders sold by banks "*serve those who for one or more reasons do not want or need a checking account*." Del.App.385 (emphasis added). The report discusses how banks could best compete with "post offices," "drug stores and other establishments" *to sell money orders to those without bank accounts*. *Id*. at 386.

Third, Defendants stress the historical existence of so-called "bank money orders." Defendants argue that the "only difference between" bank money orders and

the "disputed instruments" is the label "money order." Defs.' Exceptions 20. This is wrong, too. Bank money orders were a type of money order on which a bank was liable as a drawer. Bank money orders were already uncommon in 1974 and remain uncommon today. Like all money orders, "bank money orders" were sold as low-dollar substitutes for personal checks. As the Special Master explained, his interpretation of "money order" *includes* bank money orders within the FDA, but *excludes* from the FDA well-known bank checks used to transmit larger sums of money. Second Report 6 n.5, 17-18 n.9.

Defendants attempt to confuse the history. But the 1956 ABA report clearly distinguishes between three different kinds of instruments sold by banks: older "bank money orders," more modern "personal money orders," and "official bank checks." Del.App.385. Banks were drawers on bank money orders. *Id*. at 392. By contrast, for personal money orders, purchasers acted as the drawer on the prepaid money order. *Id*. at 397. The ABA deemed personal money orders more efficient and described banks as transitioning away from bank money orders in 1956. *See id*. at 396-402.[4]

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[4] At times, Defendants mistakenly conflate "bank money order" with "bank-issued money order." *See* Defs.' Exceptions 19. Bank-issued money orders refer to all money orders issued into circulation by banks (*i.e*. sold by banks), including personal money orders. *See, e.g.*, Del.App.381 ("This personal money order was issued by a bank and signed by the payer."). Bank money orders are the rare subset of money orders for which a bank signs as the drawer. Delaware explained this point in the correspondence Defendants cite (at 20), and again in its filing before Judge

The 1956 ABA report also clearly differentiated "bank money orders" from "official bank checks." *Id*. at 385. According to the report, bank money orders shared the "legal status" "of an official check or instrument of the issuing bank," "the same as Cashier's or Treasurer's Checks." *Id*. at 389. But the report did not equate these instruments, and the ABA explained that banks imposed maximum limits on bank money orders, *id*., but not for "an official check," *id*. at 400.

In addition to the 1956 ABA report, other historical sources likewise differentiated between "personal money orders," "bank money orders," "teller's checks," "cashier's checks," and "traveler's checks." *Id*. at 430-431; *see also, e.g.*, *id*. at 345-347 (1981 Uniform Act); 483-486 (*The Law of Bank Checks*); 487-494 (*The Law of Bank Deposits*). Today, bank money orders remain the outdated and uncommon form of money order. According to official commentary to the modern Uniform Commercial Code, "the most common form of money order sold by banks is that of an ordinary check drawn by the purchaser except that the amount is machine impressed," *i.e*. a personal money order. U.C.C. § 3-104 cmt. 4. But should any dispute over bank money orders ever arise, the Special Master explained that his definition of "money order" includes bank money orders. Second Report 6 n.5, 17-18 n.9.

In short, like all money orders, bank money orders were primarily low-dollar substitutes for personal checks. They were not synonymous—as Defendants imply—with all bank checks, nor does any source

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Leval. *See* Special Master Dkts. 126A at 2, 133 at 18 & n.11. For a discussion of the nature of a bank's liability on personal money orders, *see* Special Master Dkt. 133 at 17.

define "bank money orders" as such. The instruments at issue in this case are not low-dollar bank money orders. Instead, MoneyGram teller's checks are sold to people with bank accounts seeking to make major purchases, such as "to put a deposit on a car" or "money towards purchasing a home." Del.App.260. Meanwhile, agent checks serve as the bank's own checks. They are rarely sold to customers, and even then are used for larger transactions too. *Id*. at 274-276.

Fourth, Delaware has argued that there are two ways to identify money orders: First, issuers universally label money orders as such. Because issuers have strong incentives to correctly market their products, the label provides an efficient heuristic for identifying money orders. Second, the Court and holders of unclaimed property could also look to the facts-and-circumstances of the instrument to determine its status. Del. First Exceptions 34-36.

Defendants oppose Delaware's labeling approach, suggesting that issuers may "relabel[] their products" "to control whether they escheat to one State or 50." Defs.' Exceptions 21. But this farfetched hypothetical has no basis in reality. The American Banking Association has told this Court that the holders of unclaimed property "are indifferent as to which State" receives the funds. ABA Br. 1. Financial institutions are not indifferent, however, when it comes to labeling their products accurately for consumers. Defendants cannot point to a single example in the record of intentional mislabeling to manipulate escheatment. In sharp contrast, every example of a money order in this case bears the label "money order." Del.App.212, 217, 222, 225, 230, 303-308, 334, 381, 391, 393, 399, 405, 407, 550, 555-558. Even Defendants' amicus agrees

that if "an instrument bears the label 'money order,' then it is a money order." Unclaimed Property Professionals Organization Br. 12.[5]

A label-based approach is especially administrable for holders of unclaimed property, whose employees must determine whether to apply the FDA or the common-law rules for each instrument. By looking to a financial instrument's label, holders can easily and accurately determine an instrument's status. And in the unlikely event that an issuer were to intentionally mislabel a money order, that instrument would still be subject to escheatment under the FDA as a "similar written instrument."[6]

Looking for the label "money order" is an accurate and efficient way for holders to identify money orders. As Delaware has explained, however, labels are not the only way to identify money orders. The Court could also apply a facts-and-circumstances approach, which might prove more fact-intensive for holders and States, but would reach the same result in this case. Del. First Exceptions 35-36. Under that approach, MoneyGram teller's checks and agent checks are clearly not money orders. They are not low-dollar instruments used by consumers without bank accounts. Instead, teller's checks and agent checks are larger

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[5] The FDA refers to money orders and traveler's checks side-by-side. There is no dispute that traveler's checks are defined as bearing the label "traveler's check," demonstrating the role of labeling in defining financial instruments. Del. First Exceptions 25.

[6] Defendants' suggestion (at 20-21) that banks might intentionally mislabel bank money orders to evade the FDA is particularly far-fetched. Bank money orders are extremely uncommon. *See supra*, pp. 21-24.

instruments sold to people with bank accounts, and checks used to pay bank expenses. *See supra*, pp. 9-17.

3. Defendants' remaining arguments are incoherent.

Whatever the precise contours of a "money order," Defendants now agree with Delaware on several key points: They say in their latest Exceptions that the term "money order" does not include "well-known generic class[es] of instruments," including specifically "cashier's checks" and "teller's checks." Defs.' Exceptions 16. And Defendants now agree that money orders are not used to pay a bank's bills. *Id*. at 24 n.4. Defendants' concessions doom their case. Defendants' own definition of "money order" excludes MoneyGram teller's checks and agent checks. And Defendants agree that teller's checks and checks used to pay the bank's own bills—which is what these MoneyGram instruments are—are not "similar written instruments." *See supra*, pp. 9-17.

What is left of Defendants' position is incoherent. Despite now agreeing that the term "money order" excludes "teller's checks," "cashier's checks," and checks used to pay bank "bills," Defendants also suggest "money order" might mean "prepaid drafts used to transmit money to a named payee." Defs.' Exceptions 16, 21, 24 n.4. This position is inherently contradictory: The term "money order" cannot *both* exclude prepaid drafts like teller's checks and *also* include every prepaid draft—which would include (for instance) teller's checks. Moreover, Defendants' definition of "money order" to include all prepaid drafts still encompasses "traveler's checks," rendering one of the

two named instruments in the FDA surplusage. *See* Del. Sur-Reply 7-8.

Defendants cannot point to a single authority that defines "money order" as "all prepaid drafts." Nor do they cite any source defining "money order" to include "all prepaid drafts, except cashier's checks, teller's checks, and checks that banks use to pay their own bills," which is Defendants' new position. That is because Defendants have no support for their new, made-up definition of "money order" that excludes all teller's checks and checks used to pay bank bills from the FDA, except the specific instruments at issue here.

B. Teller's Checks And Agent Checks Are Not "Similar Written Instruments."

Defendants now agree that "similar written instrument" is a narrow category that does not include teller's checks and checks banks use to pay their own bills. Moreover, Defendants now agree that the "similar written instrument" category should apply only to those instruments that pose similar policy concerns to money orders and traveler's checks. Under Defendants' own interpretation of the FDA, MoneyGram teller's checks and agent checks thus fall outside the FDA and are subject to the common law.

1. Delaware and Defendants agree that "similar written instrument" should be read narrowly.

All parties now agree that the Court should interpret the term "similar written instrument" narrowly. According to Defendants, that term does *not* "sweep[] in all prepaid drafts" and instead excludes "cashier's checks and teller's checks," as well as instruments used "to pay" bank bills. Defs.' Exceptions 23, 24 n.4.

Defendants claim that the term "similar written instrument" should embrace only "novel or post-FDA instruments that may not quite be money orders or traveler's checks, but function the same way and present the same escheatment problems." *Id*. at 22. In a supplemental *amicus* brief, the American Bankers Association likewise encourages the Court to interpret "similar written instrument" "narrowly." ABA Supp. Br. 4.

Delaware concurs. In "listing the instruments to which" the FDA "applied," Congress "made no mention of" "well-known categories of bank checks." Second Report 17. "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*. Thus, because the FDA does *not* name either teller's checks *nor* checks that banks use to pay their own bills, the FDA does not apply to these instruments.

As Delaware has detailed, money orders and traveler's checks shared three "similar" characteristics that motivated Congress to pass the FDA. Del. Second Exceptions 31-32. *First*, retailers typically sold money orders and traveler's checks to customers in small amounts. *Second*, both issuers' and sellers' business records did not record creditors' addresses for money orders and traveler's checks. Requiring companies to record addresses would have been expensive and increased the cost of these low-dollar instruments. *Third*, two companies domiciled in New York largely dominated the market. *Id*.

As a result of those three characteristics, money orders and traveler's checks posed a unique escheat

policy concern. Because issuers and sellers did not record addresses, holders reported these instruments to the State of incorporation. And because of the concentrated market, the funds primarily flowed to New York in 1974. But if States had sought to ameliorate the problem themselves by passing address recordation laws, such laws would have increased the price of these low-dollar instruments for consumers. Congress passed the FDA to evenly distribute abandoned money orders and traveler's checks among the States, without raising the cost of these instruments, particularly for low-income families who used money orders to pay routine bills. *Id*. Congress memorialized these carefully crafted policy concerns in Section 2501, which exclusively refers to money orders and traveler's checks. *See* 12 U.S.C. § 2501; *see also* Del. Second Exceptions 33.

These policy concerns did not apply to bank checks as a class in 1974, including teller's checks and checks that banks use to pay their own bills. *First*, in 1974, bank checks were typically large-dollar instruments used for major transactions, or instruments used by a bank to pay its own bills. Del.App.459-460 & n.92; Lawrence, *supra*, at 333. As a result, a nominal increase in the price of bank checks due to address recordation requirements would not have significantly harmed consumers (if the price would have increased at all, given that addresses for these instruments were already being kept). *Second*, in 1974, banks recorded addresses when they sold bank checks, such as teller's checks. Del.App.400. At a minimum, banks could easily record addresses because the purchaser was an existing bank customer with a bank account. *Id*. at 459. Banks also knew their creditors when paying their

own bills via bank check. *See* ABA Br. 22. *Third*, bank checks as a class were not dominated by one issuer in 1974, because banks had to incorporate in the State in which they did business (and banks remain incorporated in every State today). Del. Second Exceptions 38.

Again, Defendants largely agree with Delaware's analysis. According to Defendants, the "FDA does not sweep in all bank checks" because—in sharp contrast to "money orders and traveler's checks"—"banks" "record[]" "addresses" for "bank checks." Defs.' Exceptions 4. According to Defendants, bank checks thus "are not 'similar written instruments' to money orders and traveler's checks in the relevant sense." *Id*.

In short, Congress did not extend the FDA to well-known bank checks. MoneyGram teller's checks are teller's checks, and agent checks are checks banks use to pay their own bills (and in rare instances, sell to bank customers as bank checks for larger transactions). Both are excluded from the FDA and are not "similar written instruments."

2. Defendants contend that MoneyGram teller's checks and agent checks are "similar written instruments," but their argument merely supports Delaware's position.

Defendants offer just one reason for classifying MoneyGram teller's checks and agent checks as "similar written instruments": The fact that MoneyGram itself does not possess the record of creditor addresses in this case. Defendants suggest that the "similar written instrument" provision might apply *anytime* a "recordkeeping problem" exists and "results in inequitable escheatment." Defs.' Exceptions 24. Defendants are wrong four times over.

First, Defendants present an overly simplistic account of the precise "recordkeeping problem" Congress faced in 1974 and the FDA sought to address. *Id*. The problem was not simply that holders lacked addresses for money orders and traveler's checks. The problem was that state recordation laws might have driven up the cost of these specific low-dollar instruments. Congress was particularly worried about raising the cost of money orders for "low-income families." Del.App.580. That is why Congress called out these low-dollar instruments by name—and did not name larger instruments like teller's checks and cashier's checks sold to customers, or instruments used by banks to pay their own bills. Based on these concerns, Congress excluded bank checks as a class from the FDA. MoneyGram teller's checks and agent checks are part of that class of instruments, and they thus fall outside the FDA. *See supra*, pp. 9-17.

Indeed, MoneyGram teller's and agent checks are not low-dollar instruments similar to money orders and traveler's checks. Customers with bank accounts use MoneyGram teller's checks for major transactions, such as to purchase cars and homes. Del.App.260. Similarly, agent checks are primarily used by banks to pay their own bills, rather than being sold to low-income consumers. On rare occasions, customers use agent checks when they need a bank check for a major purchase; they are not a substitute for low-dollar instruments. *Id*. at 274-276. Thus, a nominal increase in price due to address recordation requirements would not meaningfully affect the users of teller's checks and agent checks. These are not the low-dollar instruments that Congress targeted.

Second, Congress could have said that the FDA applies *anytime* a holder lacks sufficient records to apply the common-law primary rule. Congress did not write that statute. Instead, Congress identified two instruments that, in the mine-run case, posed unique escheat policy concerns. Congress did not extend the FDA to other instruments that did not tend to pose the same concerns. Indeed, Defendants *agree* that banks typically "keep records" of "addresses" for "bank checks." Defs.' Exceptions 4. When it comes to those instruments, the FDA thus leaves States free to pass address recordation laws if they find it desirable in a particular circumstance. As Delaware has explained, state recordation laws benefit consumers because they likely result in more property being returned to the rightful owner. *See* Del. Second Exceptions 49.

Third, the record evidence shows that selling banks already record creditor information for MoneyGram teller's checks and agent checks. Del.App.599 (noting that banks possess "payee/remitter information"). This key fact takes this case well-outside the heartland of the FDA. In Section 2501, Congress found that entities "*issuing* and *selling* money orders" did not record purchasers' addresses. 12 U.S.C. § 2501(1) (emphasis added). In this case, the issuer—MoneyGram—may not possess addresses. But the bank *selling* these instruments to individual customers, or using these instruments to pay its own expenses, records this information. *See* Del.App.599; ABA Br. 22.

Thus, Defendants have the power to solve their own complaint without having to run to this Court. They can require the selling banks to transmit information

the banks already record to MoneyGram.[7] Once Defendants take that simple step, Defendants will receive these instruments prospectively under the common law.[8] This key factual point was a central focus of oral argument before this Court. Yet Defendants' Exceptions Brief tellingly says nothing about it. To the extent Defendants say anything at all, they agree that instruments such as these for which "banks" "keep records" fall outside the FDA. Defs.' Exceptions 4.

Fourth, Defendants' approach—under which the FDA applies whenever a debtor lacks addresses—would create tremendous "uncertainty" over the precise scope of the term "similar written instrument," enmeshing this Court in countless original jurisdiction disputes. *Texas*, 379 U.S. at 679. For instance, States may next seek to expand the FDA to gift certificates or prepaid cards, without any indication that Congress intended the FDA to sweep that broadly. This Court should avoid an interpretation of the FDA that leads to yet more litigation over its scope.

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[7] Indeed, even in a circumstance in which a selling bank did not record addresses for a bank check, it would be easy for the bank to do so. The purchaser is an existing customer at the bank with a bank account. In sharp contrast, in 1974, requiring sellers of money orders—such as a mom-and-pop drug store—to record addresses would have been complicated, especially without computers, and would have increased the price of these instruments for consumers.

[8] Defendants have never made any claim to the funds at issue under the existing common-law priority rules and have thus forfeited such a claim to the funds at issue in this case. *See* Del. Second Exceptions 47 n.5 (noting forfeiture); Del. Sur-Reply 12 n.7 (same); Special Master Dkt. 133 at 3 n.3 (same).

C. The Special Master Correctly Defined "Third Party Bank Check."

This Court should hold that the terms "money order" and "similar written instrument" do not include teller's checks and agent checks. This Court thus does not need to determine the meaning of the term "third party bank check." Even if this Court adopts a broad interpretation of "similar written instrument," however, it should hold that teller's checks and agent checks fall outside the FDA because they are "third party bank checks."

1. The Court should adopt the Special Master's approach to the term "third party bank check," but also include bank checks used to pay bank bills.

The Special Master broke "third party bank check" into its component parts and gave each part its ordinary meaning. The Special Master first defined a "bank check" as a check "on which a bank has assumed liability." Second Report 20.[9] The Special Master then defined "third party" as "an instrument

[9] The ABA asks this Court to use the phrase "is liable" rather than "has assumed liability" to avoid creative "future litigants" from arguing that the third party bank check exception applies only to cashier's checks that are purchased by consumers, and not to cashier's checks used to pay bank bills. ABA Supp. Br. 5-6. This technical recommendation is fully consistent with the Special Master's Second Interim Report, which focuses on bank liability. *See, e.g.*, Second Report 3 (focusing on "a capacity that renders the bank liable"). It is also consistent with Defendants' briefing, which suggests that checks used to pay a bank's own bills should be excluded from the FDA. *See* Defs.' Exceptions 24 n.4.

that is designed to be used for making payments to a third party." *Id*. at 19.

The Special Master explained that his interpretation of "third party" "is essentially the reading advocated by the Defendant States." *Id*. The Special Master also explained that Congress likely adopted the "third party bank check exception" to prevent States from exploiting any ambiguity in Section 2503 and arguing that well-known bank checks fell within the FDA. *See id*. at 15-16.

Delaware largely agrees with the Special Master's approach to defining "third party bank check," with one exception: The term "bank check" should also include checks that banks use to pay their own bills, *i.e.* a *bank's* own *checks*. Del. Second Exceptions 44. In 1974, and today, bank checks served two distinct purposes: First, bank checks provide a bank's customer with secure "cash substitutes" suitable for a major transaction (for which a bank's liability on the instrument is critical). Lawrence, *supra*, at 340. Second, bank checks also "serve as the personal checks of banks." *Id*. Both kinds of checks fall within the plain meaning of "third party bank check."

The Special Master read the term "bank check" narrowly to encompass only that first category of bank checks, not the second category. But Defendants now agree that checks bank use "to pay their own bills" fall outside the FDA. Defs.' Exceptions 24 n.4. This Court should thus adopt Delaware's definition of "third party bank check," which includes instruments—such as agent checks—that are used to pay bank bills.

2. A "third party bank check" cannot be an ordinary check drawn on a checking account.

Defendants assert that "third party bank check" means an ordinary check drawn on a checking account. This makes no sense for seven reasons.

First, as the Special Master explained, Defendants do not offer "a persuasive reason why Congress, or Treasury," would have thought such an exclusion was necessary. Second Report 13. Personal checks are nothing like money orders or traveler's checks, two prepaid instruments with specific purposes. Because a "personal check is not prepaid," "there is no assurance that it will be honored by the drawee bank." *Id*. That makes a personal check fundamentally dissimilar to a money order or traveler's check, and meant there was no risk the FDA might accidentally apply to personal checks. Indeed, the FDA cannot possibly apply to an ordinary check written on a checking account. By its terms, the FDA only applies to instruments that are "purchased," *i.e.* the face value is prepaid in advance, and ordinary checks are not "purchased." 12 U.S.C. § 2503(1)-(3).

Second, Defendants' interpretation requires fundamentally rewriting Section 2503. Defendants would delete the words "third party bank," leave the word "check," and add the additional words "drawn on [a] personal or business checking account[]." Defs.' Exceptions 30. Defendants agree this "interpretation may not strike a reader as obvious." *Id.* at 26. That puts it mildly. If Congress had intended to exclude personal checks from the FDA, it would have used a narrower term, such as "personal checks" or "checking accounts," rather than "third party *bank checks*."

Third, Defendants say that ordinary personal checks are "dissimilar from money orders in some ways, but they're similar in others," and so Treasury may have been worried that the FDA would accidentally encompass personal checks. *Id.* at 33. Wrong. Personal checks are similar to money orders only at a stratospheric level of generality: they both transmit funds. Defendants elsewhere *agree* that the level of similarity that triggered Treasury's concern must have been more specific. Defendants say "there[] [was] no need" for the third party bank check exception "to exclude" "well-known instruments" like "cashier's checks and teller's checks" because cashier's checks and teller's checks were not similar to money orders and traveler's checks, and thus fell outside the "similar written instrument" "catchall" (and the FDA altogether). *Id*. That argument rebounds on Defendants: If Congress did not think cashier's checks and teller's checks were similar to money orders and traveler's checks, all the more so Congress could not have thought that personal or business checks written on a checking account would accidentally fall within the FDA.

Fourth, Defendants suggest that Treasury proposed the exception because this Court's decision in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), had involved certain corporate debts and "business checks," Defs.' Exceptions 33. But Congress passed the FDA in response to *Pennsylvania* v. *New York*, which involved money orders. *See Pennsylvania*, 407 U.S. at 222 (Powell, J., dissenting) (recognizing that the case would govern "money orders and traveler's checks"). The fact that corporate debts—such as uncashed payroll checks—can potentially escheat *does not* mean Congress

thought business checks were sufficiently similar to money orders and traveler's checks to trigger Treasury's concern. *Texas*, 379 U.S. at 677 n.4. Again, business checks written on a checking account are not prepaid instruments, and are thus nothing like money orders and traveler's checks (and do not fall within the FDA at all, which applies only to instruments that are "purchased").[10]

In reality, Treasury likely intended the third party bank exception as a belt-and-suspenders approach. Treasury recognized that Congress did not "mention" "well-known categories of bank checks" and did not intend to include them within the FDA. Second Report 17. But Treasury also recognized that "[s]imilarity is a highly flexible concept." *Id*. at 16. The third party bank check exception precluded any doubt that bank checks designed to make payment to a third party—such as MoneyGram teller's checks and agent checks—fall within the FDA.[11]

Fifth, Defendants cite the Hunt Commission, but as the Special Master explained, this is "shaky" and "weak" precedent that in any event *refutes*

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[10] Moreover, unlike the diverse array of retailers selling money orders and traveler's checks, *see* 12 U.S.C. § 2501(1), the business that is the debtor on a business check knows its creditors' addresses, *cf*. ABA Br. 22.

[11] Defendants assert (at 25) that Delaware's expert had rejected Delaware's conclusion that these instruments could be third party bank checks. Delaware's expert, however, agreed that Delaware's definition of third party bank check was "possible." Defs.App.137. He adopted a different definition only because he interpreted the phrase "directly liable" to mean unconditionally liable, *id*. at 138, a position that the Special Master has rejected, and that Delaware did not dispute before this Court.

Defendants' reading of "third party bank check." *Id*. at 11. As the Special Master noted, *id*. at 20, the Hunt Commission used the term "third party payment services" broadly to mean "*any mechanism* whereby a deposit intermediary transfers a depositor's funds to a third party," including things like credit cards. Del.App.350 n.1, 358-359 (emphasis added).[12] The Special Master "essentially" gave the term "third party" the "reading advocated by the Defendant States," citing the Hunt Commission, which broadly defines "third party payment services" as a mechanism *that transfers funds to a third party*. Second Report 19-20.[13]

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[12] In their first Reply and at oral argument in this Court, Defendants did not dispute Delaware's position that the Hunt Commission's reference to "third party payment services" included teller's checks. *See* Del. Sur-Reply 18 n.10. In their latest Exceptions, Defendants now argue (at 29-30) that the Hunt Commission's language is "obscure" and instead referenced " 'automatic bill payment.' " At a minimum, Defendants thus agree that third party payment services meant more than just checking accounts. Moreover, as Delaware has argued, the Court should apply the ordinary plain meaning of "third party bank check"—rather than parse the Hunt Commission report, which used a different term. *See* Del.App.350 n.1.

[13] Defendants cite *United States League of Savings Associations* v. *Board of Governors of Federal Reserve System*, 463 F. Supp. 342 (D.D.C. 1978), and *American Bankers Association* v. *Connell*, 686 F.2d 953 (D.C. Cir. 1979) (per curiam), but those cases further confirm that the term "third-party payment" refers to "instruments for the purpose of making transfers to third parties," *Connell*, 686 F.2d at 954 n.1. That broad definition does not help Defendants. The other sources Defendants cite (at 27-28) provide contemporary accounts of the Hunt Commission and confirm that the term "third party payment services" was defined

Defendants are thus completely off-base (at 25) when they analogize the Special Master's careful analysis of the Hunt Commission—*their* preferred source—with what happened in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020). There, the Court of Appeals had *sua sponte* appointed "three *amici* and invited them to brief" a novel First Amendment argument. *Id*. at 1578, 1580-81. The Court held that the Court of Appeals had "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Id*. at 1578.

Here, by contrast, the Special Master's definition of "third party bank check" did not come from thin-air. The Special Master looked to multiple different sources *and Defendants' own arguments* when interpreting the term "third party bank check." Second Report 20 n.10 (noting Defendants' argument that "third party" "is commonly understood to refer to the party that ultimately gets paid on the instrument" (internal quotation marks omitted)). Defendants can hardly complain.[14]

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broadly to include things like credit cards. Meanwhile, Defendants' citation (at 30 n.8) to an inapplicable 2001 criminal indictment demonstrates the lack of support for their position.

[14] Defendants assert that, at oral argument before this Court, Delaware "waive[d] reliance" on any definition of "third party bank check" "that reject[s] the Hunt Commission as a source." Defs.' Exceptions 29. That is wrong. Delaware has never argued that its case turns on the Hunt Commission, or that the Hunt Commission is the only source relevant to interpreting the FDA. Instead, Delaware's position is that there is no reason to believe either Congress or Treasury modeled the FDA on the Hunt Commission. *See* Del. First Exceptions 41; Del. Sur-Reply 14-16.

Defendants argue (at 28) that the Hunt Commission defined "third party payment services" narrowly to mean *only* instruments that were written on the "order of the depositor." Del.App.350. From this, Defendants conclude that the term "third party bank check" cannot include bank checks, which "transfer bank funds on a bank's order." Defs.' Exceptions 28. But Congress did *not* used the term "third party payment services" or "third party payment check." Instead, Congress used the term "third party *bank check*." In 1974, the term "bank check" had a well-understood meaning as a check drawn by a bank on a bank or used to pay a bank's bills. *See* Second Report 11-12; Del. Second Exceptions 44-45.

Sixth, the Special Master refuted Defendants' argument that the term "bank check" could mean all checks, including an ordinary personal check written on a checking account. Defs.' Exceptions 31. Defendants rely on a single treatise, the 1969 edition of *The Law of Bank Checks*. That treatise "expressly notes in a footnote, that the term 'bank check,' is used 'in this volume' to mean simply a 'check,' and 'does not necessarily denote a direct bank obligation, such as a

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Instead, Delaware has cited the Hunt Commission to demonstrate that *Defendants' preferred source does not support their arguments.* *See* Del. First Exceptions 41-42; Del. Sur-Reply 14. Delaware cited other sources, including at argument, that support its interpretation of the FDA. *See, e.g.*, Del. First Exceptions 36-40 (citing dictionaries, academic articles, and historical treatise); Oral Argument Tr. 31-32 (citing *Munn's* and academic articles). The Special Master agrees with Delaware that the Hunt Commission report likely was not the source for the term "third party bank check" in the FDA, while concluding that the Hunt Commission report in any event supports Delaware's interpretation. *See* Second Report 10-11.

cashier's check, certified check, or bank draft.' " Second Report 11 (quoting Del.App.483 n.1).

According to Defendants' own expert, the treatise's definition of "bank check" is highly unusual. A " 'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank." *Id*. at 11-12 (quoting Defs.App.212). Defendants' expert further explained why the 1969 edition of *Law of Bank Checks* likely used the term "bank check" in such an odd way. "[T]he author" of the 1969 edition likely "retained" an idiosyncratic "usage" "because the treatise he was editing" had been long named *The Law of Bank Checks*. *Id*. at 12 (quoting Defs.App.212-213). Retaining the idiosyncratic usage in turn enabled the author to retain the title, which may have been widely recognized at the time. Indeed, if "bank check" simply meant an ordinary check, "the editor's footnote explaining the" idiosyncratic "use of the term would have been unnecessary." *Id*. at 12 (internal quotation mark omitted).

Defendants also point (at 31) to a single intermediate appellate decision from California interpreting the phrase "bank check" in a California tax statute that had originally been enacted in 1921. *Little* v. *City of Los Angeles*, 173 Cal. Rptr. 103, 105 (Ct. App. 1981). The California court recognized that, in 1981, California's commercial code defined a bank check as "a check drawn by an officer of a bank." *Id*. The court nevertheless interpreted the term "bank check" differently in the context of the tax statute to "accord[] with almost universal practice by assessors, tax collectors and treasurers" in accepting personal checks for certain obligations. *Id*. Defendants quote a footnote from *Little* defining "bank check" as a "check" and citing three decisions from 1887, 1873, and 1870. Whatever

their value in interpreting legislation from 1921, those nineteenth century decisions are hardly an indicator of plain meaning a century later in 1972. And in any event, defining a "bank check" to include *all* checks would just make the third party bank check exception more expansive; it would not undermine Delaware's position here.

Seventh, Defendants offer a structural argument: The FDA applies to "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*." 12 U.S.C. § 2503 (emphasis added). Defendants argue that the Special Master's definition of third party bank check is incorrect because it "would except all similar written instruments on which a bank has assumed liability." Defs.' Exceptions 38. Defendants claim this would create "a self-contradiction." *Id*. at 39. As Defendants read the statute, there must be *some* kind of "similar written instrument" on which a bank is liable. Thus, they assert that the Special Master's interpretation of the FDA is akin to someone saying: "I like sandwiches (except ones with ham) with ham, tuna, or roast beef." *See id*.

But Defendants' hypothetical does not fit the statutory text. Defendants' example uses a list with one item—"sandwiches"—that comes in three different varieties. In that situation, it would make no sense to specify that a type of sandwich falls within the statute, and then simultaneously exclude that type of sandwich from the statute. The FDA, however, uses a list with three different items—"a money order, traveler's checks, or other similar written instrument." The FDA then specifies that for a *subset of one*

of those items—"other similar written instrument" that is a "third party bank check"—the FDA does not apply. That exclusion makes perfect sense; it means that one subset of a type of financial instrument included within the statute should be excluded.

True, as Defendants argue, Congress could have reached the same result in a different manner. *See* Defs.' Exceptions 39. But Congress is entitled to use the statutory formulation here. Contrary to Defendants' assertions, the Special Master's interpretation gives meaning to each word of the statute. Under his approach, there are "money order[s]" and "traveler's check[s]" "on which a banking or financial organization * * * is directly liable," and to which the FDA clearly applies. 12 U.S.C. § 2503. And there could be "other similar written instruments" on which "a business association is directly liable." *Id*.

In short, should it reach the issue, the Court should reject Defendants' definition of "third party bank check" and hold that MoneyGram teller's checks and agent checks fall within that exclusion.

IV. THREE SEPARATE TIE-BREAKING PRINCIPLES RESOLVE THIS DISPUTE IN DELAWARE'S FAVOR.

1. This Court should hold that MoneyGram teller's checks and agent checks fall outside the FDA. To the extent there is any doubt, however, three separate tie-breaking principles counsel in favor of reading the FDA narrowly.

First, statutes in derogation of the common law, such as the FDA, are construed narrowly. 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).

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. In contrast, adopting a broad definition could require redistributing countless instruments escheated since 1974. It would also call into question—in every case—whether the common-law or FDA rules apply. This could fundamentally destabilize the common-law framework that has successfully governed interstate escheatment since the middle of the twentieth century.

Third, Delaware's approach is fair. *Id*. Defendants have the ability to solve their own complaint under the common law. Selling banks that contract with MoneyGram record creditors' addresses. Del.App.599; ABA Br. 22. The informational gap here is that the banks do not transmit that information to MoneyGram. States need only enact simple recordation regulations that require selling banks to provide address information to MoneyGram. Once that happens, these funds will escheat to States prospectively under the common-law primary rule.[15] Moreover, as the Special Master notes, Defendants possess considerable "voting power in Congress." Second Report 22 n.12. Defendants can "air their grievances before Congress," and that "body may

[15] Indeed, state recordation laws will be straightforward to enact in nearly every case involving a bank check sold to a customer with an account at the bank, or a check used to pay a bank bill. Banks generally have information for their customers and vendors, and at a minimum can easily record and transmit that information.

reallocate" these particular instruments on a prospective basis, as this Court has previously stated. *Delaware*, 507 U.S. at 510.

In contrast, it would be deeply unfair to penalize Delaware. Delaware relied on a good-faith interpretation of the FDA's plain language widely shared by States and holders alike prior to this litigation. Indeed, Defendants now agree that the FDA does not sweep in teller's checks and checks that banks use to pay their own bills. That Defendants have largely joined Delaware's interpretation of the FDA—and rejoined the longstanding consensus—confirms that Delaware acted in good faith. Delaware's taxpayers should not be forced now to retroactively pay potentially hundreds of millions of dollars.

2. Defendants offer just two policy arguments, neither of which is persuasive. *First*, Defendants again suggest that ruling for Delaware could "give issuers a roadmap to market and label their way of the FDA and more conveniently escheat to a single State." Defs.' Exceptions 44. That far-fetched concern has no basis in reality. Quite the opposite: the ABA has told this Court that holders of unclaimed property "are indifferent as to which State" receives the funds. ABA Br. 1. In contrast, companies have much stronger incentives to accurately describe their products so that ordinary consumers understand what they are buying.

The label "money order," moreover, is simply a convenient heuristic that holders can use to readily determine an instrument's status. In the unlikely event that an entity intentionally mislabels a product to circumvent the FDA, that instrument would *still* be a "money order" or "other similar instrument" under a

facts-and-circumstances approach. *See supra*, pp. 24-25. Or, as the Special Master notes, Defendants could seek to amend the FDA with respect to MoneyGram teller's checks and agent checks. *See* Second Report 22 n.12.

Second, Defendants suggest that ruling for them would further the FDA's purpose. Defs.' Exceptions 43-45. But Defendants paint a skewed and simplistic picture of the FDA's purpose. The FDA did not abolish the common law in every circumstance in which a holder lacks address records. Instead, the FDA narrowly targeted two low-dollar instruments for which issuers and sellers lacked addresses, where the market was largely dominated by two companies incorporated in one State, and where the cost of state recordation laws would have imposed a significant burden on consumers. *See* 12 U.S.C. § 2501.

Those policy concerns did not apply to bank checks generally in 1974—*nor do these policy concerns apply to these bank checks in this case*. *See supra*, pp. 29-33. Nor is there an acute windfall problem: MoneyGram's official check service offers just one way that smaller banks outsource certain administrative functions associated with bank checks. The American Bankers Association explains that, even today, banks are headquartered in "every state, as well as the District of Columbia and several U.S. territories." ABA Supp. Br. 3 n.2. Thus, until Defendants require sellers to transmit addresses to MoneyGram, Delaware may benefit from the common-law secondary rule in this case. But other States may benefit in other cases. And, in any event, this Court has long reiterated that the possibility of a "windfall" is not a compelling reason "to decide each escheat case on the basis of its particular facts."

Pennsylvania, 407 U.S. at 215 (internal quotation marks omitted).

Interpreting the FDA narrowly and requiring States to utilize the common law is the far better course. It is likely to result in more property being reunited with its rightful owner, will prevent this Court from becoming enmeshed in future disputes, and will protect Delaware's good-faith reliance on the FDA's plain text. *See* Del. Second Exceptions 49-50. This Court should grant Delaware summary judgment and end this long-running dispute.

CONCLUSION

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

Respectfully submitted,

STEVEN S. ROSENTHAL
TIFFANY R. MOSELEY
JOHN DAVID TALIAFERRO
LOEB & LOEB LLP
901 New York Ave., N.W.
Washington, D.C. 20001

MARC S. COHEN
LOEB & LOEB LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067

NEAL KUMAR KATYAL
Counsel of Record
KATHERINE B. WELLINGTON
JO-ANN TAMILA SAGAR
NATHANIEL A.G. ZELINSKY
DANA A. RAPHAEL
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

KATHLEEN JENNINGS
Attorney General of Delaware
PATRICIA A. DAVIS
State Solicitor
MICHELLE E. WHALEN
Deputy Attorney General
DELAWARE DEPARTMENT OF JUSTICE
DEPARTMENT OF FINANCE
CARVEL STATE OFFICE BUILDING
820 North French St.
Wilmington, DE 19801

Counsel for State of Delaware

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