SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*

v. Nos. 22O145 & 22O146 (Consolidated)

ARKANSAS, *et al.*, *Defendants*

DEFENDANT STATES' COMMENTS IN RESPONSE TO THE SPECIAL MASTER'S OCTOBER 31 ORDER

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Delaware's supplemental briefing on third party bank checks demonstrates why revising the Special Master's Report at this late stage would be improper. The bulk of it, Delaware touts, rehashes arguments it "pressed . . . repeatedly" before the Court. Del. Br. 1; *id.* at 23 (incorporating Exceptions 39-42). The remainder seeks to retract concessions Delaware made before the Court—most notably, that the Hunt Commission's report defines "third party bank check." The Special Master is left to either offer the Court his "objective analysis" of the arguments the parties made there, *id.* at 7, or advise the Court to accept arguments Delaware only advances here. Neither is appropriate. The Special Master should adhere to his Report.

ARGUMENT

As the Special Master recounted, Congress inserted the third party bank check exclusion in response to Treasury's request that Congress exclude "third party payment bank checks." Report 72. Like "third party bank check," that phrase had "no established legal meaning." *Id.* But it is very similar to a term that did have an established meaning—third party payment services. Federal regulators on the Hunt Commission used that phrase to "describe 'any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party . . . upon the . . . order of the depositor.'" *Id.* at 75 (quoting Del. App. 350 n.1). That "mean[t] essentially a checking account." Defs. App.

177 (quoting 1973 Washington Post). But it also included "bank credit cards," i.e., debit cards. *Id.*; *see also* Del. App. 358-59. The phrase "third party payment bank checks" thus captured a subset of third party payment services: those that were "bank checks," namely ordinary checks. Report 75-76 (noting that ordinary checks were sometimes called bank checks at the time).

Delaware disputes this straightforward reading of "third party bank check." Del. Br. 23-25. But before the Supreme Court, Delaware argued that "the Hunt Commission does know what it means, and they told you what it means in that report." Tr. 74:18-20. That concession controls here; the Special Master cannot advise the Court to embrace an argument Delaware waived.

The only question then is whether the Hunt Commission's definition of third party payment services describes the disputed instruments. Here too, Delaware's waivers bar the Special Master from modifying his recommendation. Before the Special Master, "Delaware d[id] not argue that the Disputed Instruments fall within [our] construction of 'third party bank check.'" Report 78 n.43. It only raised that argument before the Court. Whether or not the Court can consider that argument, the Special Master cannot weigh in on arguments first developed in Delaware's Supreme Court briefing.

But even if the Special Master could revisit the question, the Hunt Commission's definition of "third party payment services" does not include any of

the disputed instruments. The Hunt Commission broadly defined those services to include any means by which a bank "transfers a depositor's funds to a third party . . . upon the . . . order of the depositor." Del. App. 350 n.1. So did Treasury, which proposed the third party bank check exclusion, in its summary of the Hunt Commission report. Defs. App. 178.

MoneyGram's instruments fail that definition. Unlike checks, they do not transfer a *depositor's* funds on *his* order. Nor, contra Delaware's claim, do they even "transfer funds from a customer's account." Del. Br. 26. Instead, a purchaser—who may not even have an account at the selling bank—pays MoneyGram, through the selling bank, for an instrument that transfers *MoneyGram*'s funds to a third party upon *MoneyGram*'s order (plus the selling bank's order in the case of Teller's Checks). That's why neither the Hunt Commission nor any of the contemporary discussions of its work, Defs. App. 177-78, ever described a single prepaid instrument as a third party payment service. This is consistent with the views of all the payment systems experts who testified in this case—including Delaware's own expert—who agreed that the MoneyGram instruments at issue are not third party bank checks. *See* Defs. App. 134-39, 283 (Mann); *id.* at 169-85 (Clark); *id.* at 210-25 (Gillette).

Delaware's sole argument that the Hunt Commission's definition embraces the disputed instruments rests on one obscure sentence of its report.

That sentence said that some savings and loans "offer non-negotiable third party payment services using customers' interest bearing accounts." Del. App. 357. Delaware claims that is a reference to teller's checks. Del. Br. 26. That's wrong for three reasons. First, teller's checks flunk the Commission's definition; they transfer the *drawing bank*'s funds on that bank's order, not a depositor's funds on his order. Second, teller's checks are negotiable, *see* U.C.C. 3-104, but the report describes an unnamed non-negotiable instrument. Third, Delaware baselessly assumes that because some savings and loans issued teller's checks, they must be the unnamed instrument. That overlooks other possibilities that contemporary sources actually describe as third party payment services, such as "automatic bill payment." Defs. App. 177.

But even if "third party bank checks" embraced teller's checks or even bank checks generally, it would make no difference. For the disputed instruments are neither. Delaware insists an instrument can be a teller's check even if, as is true of MoneyGram Teller's Checks, the drawing and drawee banks have no relationship. Del. Br. 11. But its own contemporary sources say the opposite. One says teller's checks were drawn by banks on other banks "with which they maintain checking accounts." Del. App. 459. The other says "[t]he drawer bank . . . is a customer of the drawee bank." Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective*, 64 Minn.

L. Rev. 275, 333 (1980). Whatever nominal drawer status MoneyGram Teller's Checks accord MoneyGram's selling banks, a bank cannot draw on a bank at which it has no account. MoneyGram is the true drawer.

Nor are the disputed instruments bank checks. Contemporary sources defined bank checks (excepting ordinary checks) as checks a bank drew either on itself or a bank at which its funds were deposited. Del. App. 360. Neither is true of the disputed instruments. Most notably, the disputed instruments lack the defining traits Delaware says led Congress to exclude bank checks from the FDA. Unlike bank checks, their issuer, MoneyGram, does *not* keep records of purchasers' addresses, and they do *not* "escheat[] evenly" among the States under the common law. Del. Br. 20. That isn't because they're exceptions to the rule; it's because they aren't bank checks at all.[1]

CONCLUSION

The Special Master should adhere to the First Interim Report.

[1] The Special Master also requested comment on whether the third party bank check parenthetical modifies only "other similar written instrument," or also modifies "money order" and "traveler's check." Delaware waived the latter position. Before the Court, it claimed Defendant States' definition of money orders would make the third party bank check exclusion "superfluous," Exceptions 23, which assumes that exclusion doesn't modify "money order." On the merits, Delaware's suggestion that the parenthetical "can" be read to modify the entire list, Del. Br. 26, remains as "implausible" and "supported . . . with scant analysis" as it was before. Report 79 n.44.

November 23, 2022

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