Nos. 145 and 146, Original

In The
Supreme Court of the United States

STATE OF DELAWARE,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF WISCONSIN,

Defendants,

AND

STATE OF ARKANSAS, *et al.*,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

MOTION FOR LEAVE TO AMEND COUNTERCLAIM AGAINST THE STATE OF ARKANSAS ET AL., AND AMENDED COUNTERCLAIM

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MOTION FOR LEAVE TO AMEND COUNTERCLAIM AGAINST THE STATE OF ARKANSAS ET AL.

The State of Delaware ("Delaware") hereby moves this honorable Court for leave to amend its Counterclaim against the State of Arkansas *et al.* for two reasons.

First, by order of this Court, dated November 28, 2016, the Court granted leave to include additional Plaintiff States of California, Iowa, Maryland, Oregon, Washington, and the Commonwealth of Virginia.

These additional Plaintiff States have the identical allegations and claims for relief as those set out in Arkansas *et al.*'s original Bill of Complaint. Delaware's Counterclaim for relief against these additional Plaintiff States is materially identical to its original Counterclaim against the initial Plaintiff States. Delaware's Amended Counterclaim extends its Counterclaim to these additional Plaintiff States.

Second, Delaware seeks leave to amend its Counterclaim to assert claims for certain unclaimed negotiable instruments that Delaware believes have been wrongly escheated to Arkansas *et al.* These unclaimed negotiable instruments, including but not limited to official checks which were issued by companies other than MoneyGram, do not fall within the definition of 12 U.S.C. § 2503 and should therefore have been escheated to Delaware, the domicile of the holder of this unclaimed property.

On December 6, 2016, Counsel for Delaware informed Counsel for Arkansas *et al.* that it intended to

amend its claims against those respective States. Arkansas *et al.* consent to the inclusion of the additional Plaintiff States. Arkansas *et al.* oppose amendments to Delaware's Counterclaim regarding certain unclaimed negotiable instruments.

Respectfully submitted,

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AMENDED COUNTERCLAIM

Pursuant to Federal Rules of Civil Procedure 8 and 13, the State of Delaware asserts the following Amended Counterclaim against the States of Arkansas, Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, West Virginia, California, Iowa,

Maryland, Oregon, Washington, and the Commonwealths of Virginia and Kentucky (collectively, "Arkansas *et al.*"):

1. The Court has exclusive and original jurisdiction of this counterclaim under Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28, Section 1251(a) of the United States Code.

2. The Court is the sole forum in which Delaware may enforce its rights under the Supremacy Clause, Article VI of the Constitution of the United States.

3. All 50 States have statutes regarding the State's ability to "take title to certain abandoned intangible personal property through escheat, a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." *Texas v. New Jersey*, 379 U.S. 674, 675 (1965).

4. The Supreme Court has on three occasions resolved disputes between States regarding which State had priority to claim certain abandoned intangible personal property. *See Delaware v. New York*, 507 U.S. 490 (1993); *Pennsylvania v. New York*, 407 U.S. 206 (1972); and *Texas*, 379 U.S. 674.

5. In *Texas*, the Supreme Court initially established what have become known as the "priority rules," whereby the first opportunity to escheat the property belongs to the State of the last known address of the creditor as shown by the debtor's books and records (the "primary rule"), and if there is no record of any

address for a creditor, or because the creditor's last known address is in a State which does not provide for the escheat of abandoned property, the property escheats to the State in which the debtor is incorporated (the "secondary rule"). *Texas*, 379 U.S. at 680-82.

6. Seven years after *Texas*, Pennsylvania proposed that for transactions where the debtor did not keep records showing the address of the creditor, "the State of origin of the transaction," *i.e.*, the State of the place of purchase, should have the right to escheat the abandoned property, rather than the State of the debtor's domicile as was required under the second priority rule in *Texas*. *Pennsylvania*, 407 U.S. at 213-14. The Supreme Court rejected this alternative and held that the priority rules first established in *Texas* should continue to apply. *Id.* at 214-15.

7. Following the Supreme Court's decision in *Pennsylvania*, in 1974 Congress adopted the Disposition of Abandoned Money Orders and Traveler's Checks Act, which had the effect of reversing the Supreme Court's holding in *Pennsylvania* for certain types of property. 12 U.S.C. §§ 2501-2503. Specifically, for 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," the State in which such an instrument was purchased has the exclusive right to escheat or take custody of sums payable on such instruments. 12 U.S.C. § 2503. If the State in which such instruments were purchased is not known, then unclaimed property associated with such

instruments escheats to the State in which the banking or financial organization or business association has its principal place of business. *Id.*

8. MoneyGram Payment Systems, Inc. ("MoneyGram") is a Delaware corporation that has its principal place of business in Texas. MoneyGram is a wholly owned subsidiary of MoneyGram International, Inc. MoneyGram provides Official Check services to financial institutions.

9. MoneyGram determined that the Disposition of Abandoned Money Orders and Traveler's Checks Act does not apply to MoneyGram Official Checks and escheats unclaimed property from Official Checks to the State of Delaware, pursuant to the general priority rules outlined by the Supreme Court in *Texas*, *Pennsylvania*, and *Delaware*. Delaware concurs in this determination by MoneyGram.

10. Official Checks were known and recognized monetary instruments at the time the Disposition of Abandoned Money Orders and Traveler's Checks Act was enacted but were not included in the scope of 12 U.S.C. § 2503. Official Checks are not money orders, traveler's checks, or other similar written instruments under the Disposition of Abandoned Money Orders and Traveler's Checks Act.

11. Official Checks differ from money orders in many respects, including, without limitation: (i) Official Checks are not labeled as money orders, (ii) Official Checks are generally issued by financial institutions

and not by convenience stores and similar small businesses, (iii) Official Checks are capable of being issued in substantially larger dollar amounts than money orders, and (iv) Official Checks are treated differently under various federal regulations relating to monetary instruments.

12. Official Checks differ from traveler's checks in many respects, including, without limitation: (i) Official Checks are not issued in fixed denominations generally of $100 or less like traveler's checks, (ii) Official Checks do not require a counter-signature when used in a transaction, (iii) Official Checks are not issued in a manner and by companies that will facilitate replacement checks if lost or stolen, and (iv) Official Checks are not promoted so as to be widely and easily negotiable by individuals traveling overseas.

13. In the absence of specialized definitions in the Act, money orders and traveler's checks were intended to have the meaning given them in every day usage.

14. Approximately 20 States retained a third-party auditor, Treasury Services Group ("TSG"), to conduct a review of MoneyGram's Official Checks. At the conclusion of that audit, TSG declared that MoneyGram Official Checks were subject to the Disposition of Abandoned Money Orders and Traveler's Checks Act, and that the funds related to Official Checks that MoneyGram had been escheating to Delaware instead should have been escheated to the States where the Official Checks were sold.

15. On May 26, 2016, the State of Delaware filed a Motion and Proposed Bill of Complaint in this Court against the Commonwealth of Pennsylvania and the State of Wisconsin, who had previously sued the Delaware State Escheator in the U.S. District Court for the Middle District of Pennsylvania and the U.S. District Court for the Western District of Wisconsin. *See State of Delaware v. Commonwealth of Pennsylvania and State of Wisconsin*, No. 22O145 (filed May 26, 2016).

16. MoneyGram, much like Western Union in *Pennsylvania*, is facing potential double-liability for the escheat of the same unclaimed property to two States unless the issue of whether Official Checks are subject to the Disposition of Abandoned Money Orders and Traveler's Checks Act is fully and finally resolved in a decision that binds all fifty States.

17. The State of Delaware has no adequate remedy at law to enforce its superior right to that of Arkansas *et al.* to receive abandoned property related to MoneyGram Official Checks.

18. On information and belief, other companies have erroneously applied 12 U.S.C. § 2503(1) and have wrongly escheated unclaimed negotiable instruments to Arkansas *et al.* based on the State of purchase of the negotiable instruments.

19. These certain other unclaimed negotiable instruments, including but not limited to official checks which were issued by companies other than MoneyGram, do not fall within the definition of 12 U.S.C. § 2503.

20. Because these certain other unclaimed negotiable instruments do not fall within the definition of 12 U.S.C. § 2503, they should have escheated to Delaware, the domicile of the holder of this unclaimed property, pursuant to the priority rules established by the Supreme Court in *Texas v. New Jersey*, *Pennsylvania v. New York*, and *Delaware v. New York*.

21. However, these certain other unclaimed negotiable instruments were not escheated to the State of Delaware and instead were wrongfully escheated to Arkansas *et al.* – the States where these instruments were purchased.

22. Arkansas *et al.* unlawfully took custody of sums payable on these certain unclaimed negotiable instruments.

23. As the ultimate proper recipient of sums payable on these certain other unclaimed negotiable instruments, Delaware is entitled to bring this action to enforce its laws and recover property unlawfully remitted to – and currently in the custody of – Arkansas *et al.*

24. Indeed, in paragraph 33 of their Bill of Complaint, Arkansas *et al.* assert that at least two other entities "report and remit sums payable on unclaimed and abandoned official checks to the State of purchase."

25. The State of Delaware has no sufficient remedy except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the State of Delaware respectfully prays that the Court:

A. Declare that a MoneyGram Official Check is not "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," pursuant to 12 U.S.C. § 2503.

B. Declare that MoneyGram Official Checks are third party bank checks.

C. Issue its Decree commanding Arkansas *et al.* not to assert any claim over abandoned and unclaimed property related to MoneyGram Official Checks.

D. Issue its Decree that all future sums payable on abandoned MoneyGram Official Checks should be remitted to the State of Delaware.

E. Declare that certain other unclaimed negotiable instruments are not "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," pursuant to 12 U.S.C. § 2503.

F. Issue its Decree commanding Arkansas *et al.* not to assert any claim over these certain other unclaimed negotiable instruments issued by entities other than MoneyGram.

G. Issue its Decree that all future sums payable on these certain other unclaimed negotiable instruments issued by entities other than

MoneyGram should be remitted to the State of Delaware.

H. Declare that these certain other unclaimed negotiable instruments are third party bank checks.

I. Grant such costs and other relief as the Court deems just and proper.

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