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In The
Supreme Court of the United States

STATE OF ARKANSAS, STATE OF TEXAS, STATE
OF ALABAMA, STATE OF ARIZONA, STATE OF
COLORADO, STATE OF FLORIDA, STATE OF IDAHO,
STATE OF INDIANA, STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY, STATE OF
LOUISIANA, STATE OF MICHIGAN, STATE OF
MONTANA, STATE OF NEBRASKA, STATE OF
NEVADA, STATE OF NORTH DAKOTA, STATE OF OHIO,
STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA,
STATE OF UTAH, AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

**STATE OF DELAWARE'S BRIEF IN RESPONSE
TO STATE OF ARKANSAS ET AL.'S MOTION
FOR LEAVE TO FILE BILL OF COMPLAINT,
MOTION FOR LEAVE TO FILE
COUNTERCLAIM, AND COUNTERCLAIM**

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SOUTH CAROLINA, STATE OF UTAH,
AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

BRIEF IN RESPONSE

INTRODUCTION

The State of Delaware, by and through its Attorney General, Matthew P. Denn, concurs in the State of

Arkansas et al.'s pending Motion for Leave to File Bill of Complaint. This is undoubtedly an interstate dispute over the right to custody of certain abandoned intangible property, which is a core area of state sovereign interest. Moreover, the legal and factual issues presented in Arkansas et al.'s Motion and Proposed Bill of Complaint were previously raised in their entirety in an earlier Motion and Proposed Bill of Complaint. That earlier Motion and Proposed Bill of Complaint, *State of Delaware v. Commonwealth of Pennsylvania and State of Wisconsin*, No. 22O145 (filed May 26, 2016), concerns the same unclaimed Official Checks from MoneyGram Payment Systems, Inc. and the same issue of interpretation of the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-2503.

◆

STATEMENT

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). This 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. The holdings of these cases,

as well as the enactment of the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-2503, was summarized in Delaware's Brief in Support of Motion for Leave to File Bill of Complaint, *State of Delaware v. Commonwealth of Pennsylvania and State of Wisconsin*, No. 22O145 (filed May 26, 2016).

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. According to a U.S. Tax Court Opinion, MoneyGram provides Official Check outsourcing services to financial institutions who do not want to provide their own "bank checks, cashier's checks, and teller checks." *MoneyGram International, Inc. v. Comm'r*, 144 T.C. 1, 5 (2015). "In 2007 MoneyGram provided [O]fficial [C]heck services to more than 1,900 financial institutions, consisting mainly of banks, thrifts, and credit unions." *Id.*

MoneyGram receives fees from financial institution customers for its Official Check services. MoneyGram also derives revenue from the temporary investment of funds remitted from its financial institution customers until such time as the Official Checks clear. "Outstanding [O]fficial [C]hecks . . . are classified as 'payment service obligations' and treated as liabilities on MoneyGram's consolidated financial statements." *Id.* at 6. MoneyGram 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*, because MoneyGram determined that the Disposition of Abandoned Money Orders and Traveler's Checks Act did not apply to MoneyGram Official Checks. Delaware concurs in MoneyGram's determination.

Following a review by a private auditor – Treasury Services Group – working on behalf of a number of States, those States began taking the position that under the Disposition of Abandoned Money Orders and Traveler's Checks Act, MoneyGram had erroneously escheated certain unclaimed property sums relating to Official Checks to Delaware as MoneyGram's State of incorporation rather than to the States in which the Official Checks had been originally purchased.

The Commonwealth of Pennsylvania and the State of Wisconsin sued Delaware State Escheator David Gregor in federal district court in Pennsylvania and Wisconsin, respectively. In response to those lawsuits, on May 26, 2016, the State of Delaware filed a Motion for Leave to File Bill of Complaint in this Court. *State of Delaware v. Commonwealth of Pennsylvania and State of Wisconsin*, No. 22O145.

On June 9, 2016, Arkansas and twenty other States filed their own Motion for Leave to File Bill of Complaint. *State of Arkansas et al. v. State of Delaware*, No. 22O146.



ARGUMENT

This Court has original jurisdiction over cases and controversies between States. *See* U.S. Const. art. III, § 2, cl. 2. In accordance with Article III, the First Congress adopted a provision of the Judiciary Act of 1789, subsequently codified at 28 U.S.C. § 1251(a), which provides that this Court “shall have original and exclusive jurisdiction of all controversies between two or more States.” In the present case, the exercise of this Court’s original and exclusive jurisdiction is necessary to finally resolve competing escheat claims between the States over the same unclaimed and abandoned monetary instruments. As this Court has long recognized, “the States separately are without constitutional power . . . to settle” interstate escheat controversies. *Texas*, 379 U.S. at 677; *see also Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 77 (1961).

Although 28 U.S.C. § 1251(a) gives this Court original and exclusive jurisdiction over “all controversies between two or more States,” this Court views its jurisdiction in these matters as “obligatory only in appropriate cases.” *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); *see also Arizona v. New Mexico*, 425 U.S. 794, 796-98 (1976) (per curiam opinion declining to hear a dispute falling within the Supreme Court’s exclusive jurisdiction). In deciding whether to grant leave to file a complaint, this Court examines two factors: (1) “the nature of the interest of the complaining State,’ focusing on the ‘seriousness and dignity of the claim’”; and (2) “the availability of an alternative forum in which

the issue tendered can be resolved.” *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted).

It is only as a sovereign that a State may take custody of abandoned property, and thus the interest that Arkansas et al. seek to enforce, and the reciprocal right that Delaware seeks to enforce, relate directly to its sovereign power and to the sovereign powers of the defendant States. Consequently, as this Court has recognized in *Texas*, *Pennsylvania*, and *Delaware*, there is no state or lower federal court that has the power to resolve an interstate escheat controversy. Interstate escheat controversies are paradigmatic disputes heard by this Court under 28 U.S.C. § 1251(a). This is particularly true in the present case because the disputed property right was created by federal statute with the express intent to govern competing property claims between the States. Thus, this Court’s exercise of its original and exclusive jurisdiction in this case is warranted, and Arkansas et al. should be granted leave to file their Bill of Complaint.

Because Arkansas et al. addressed the *Mississippi v. Louisiana* factors in their Motion for Leave to File, and because Delaware previously addressed the *Mississippi v. Louisiana* factors in its Motion for Leave to File in Original Action No. 145, in the interest of brevity, Delaware refers the Court to those factors.

**IF ARKANSAS ET AL.'S MOTION IS
GRANTED, THIS COMPLAINT SHOULD
BE CONSOLIDATED WITH
DELAWARE V. PENNSYLVANIA AND
WISCONSIN AND BOTH MATTERS
REFERRED TO A SPECIAL MASTER**

As previously noted, the legal and factual issues presented in Arkansas et al.'s Motion and Proposed Bill of Complaint are identical to the issues raised in Delaware's Motion and Proposed Bill of Complaint against the Commonwealth of Pennsylvania and the State of Wisconsin. No. 22O145 (filed May 26, 2016). Delaware therefore respectfully requests that if the Court grants both Delaware's Motion and Arkansas et al.'s Motion, that the two cases be consolidated. Moreover, because the cases present disputed issues of material fact, the State of Delaware also requests that the Court appoint a Special Master and refer both cases to that Special Master to conduct proceedings and issue a report.



CONCLUSION

Arkansas et al.'s Motion for Leave to File Bill of Complaint and Delaware's Motion for Leave to File Counterclaim should be granted.

Respectfully submitted,

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AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

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Defendant.

**MOTION FOR LEAVE TO
FILE COUNTERCLAIM**

Comes now the State of Delaware, by and through
its Attorney General, Matthew P. Denn, pursuant to
authority vested in him under the laws of Delaware,

and moves the Court for leave to file the accompanying Counterclaim. The grounds for this Motion are set out in Arkansas et al.'s Brief in Support of their Motion for Leave to File Bill of Complaint and in Delaware's Brief in Response to Arkansas et al.'s Motion.

Respectfully submitted,

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COUNTERCLAIM

Pursuant to Federal Rules of Civil Procedure 8 and 13, the State of Delaware asserts the following 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, and West Virginia and the Commonwealth of 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. 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. Grant such costs and other relief as the Court deems just and proper.

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