Nos. 145, 146, Original

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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 Report of Special Master

APPENDIX TO REPLY OF DEFENDANTS IN NO. 145 AND PLAINTIFFS IN NO. 146 TO DELAWARE'S EXCEPTIONS TO FIRST INTERIM REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

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SUPREME COURT OF THE UNITED STATES

Nos. 220145 & 220146
(Consolidated)

DELAWARE,

Plaintiff,

v.

ARKANSAS, *et al.*,

Defendants.

STATEMENT OF UNDISPUTED FACTS

Organizational Background

1. MoneyGram Payment Systems, Inc. ("MoneyGram") is a business incorporated in Delaware and has its principal place of business in Minnesota. MoneyGram is a wholly owned subsidiary of MoneyGram International, Inc., which is incorporated in Delaware and has its principal place of business in Texas. Affidavit of Cory J. Feinberg ("Feinberg Aff.") ¶¶ 2-4.

2. MoneyGram is a "payment providing company" and its lines of business include "money orders, official checks and also money transfer." Yingst 18:10-16 (Ex. A to Declaration of John David Taliaferro ("Taliaferro Decl.")). Prior to 2005, the Official Check business at issue in this case was conducted by MoneyGram's predecessor entity, Travelers Express Company, Inc ("Travelers Express"). Feinberg Aff.¶ 5. Travelers Express offered money orders and Official Checks,

bank services, and other types of payment processing. Yingst 19:20-20:15 (Ex. A to Taliaferro Decl.); *see, e.g.*, 1981 Annual Report, Ex. B to Declaration of Jonathan A. Massimino ("Massimino Decl.") at 9, VIAD 65 ("While money orders are still the core of [Travelers Express], the company is now processing more credit union share drafts than any other processor in the nation and has developed a substantial volume of official check processing for a variety of financial institutions."); 1993 Annual Report, Ex. I to Massimino Decl. at Part 1, VIAD 399 ("Travelers Express is the nation's leading issuer of money orders, issuing approximately 236 million money orders in 1993 . . . . Travelers Express also provides processing services for more than 4,500 credit unions and other financial institutions which offer share drafts (the credit union industry's version of a personal check) or official checks (used by financial institutions in place of their own bank check or teller check))."

3. Travelers Express became a subsidiary of The Greyhound Corporation in the mid-1960s. The Greyhound Corporation subsequently became known as Greyhound Dial Corporation, then The Dial Corp, and ultimately became known as Viad Corp. Massimino Decl. ¶¶ 2-3

4. In 1998, Viad Corp. acquired MoneyGram and made it a subsidiary of Travelers Express. 1998 Annual Report, Ex. J to Massimino Decl. at 2, VIAD 524. In 2005, Travelers Express and MoneyGram merged and the combined entity became an independent company. Feinberg Aff. ¶ 6.

5. MoneyGram's business lines are divided into "segments." MoneyGram's Financial Paper Products segment provides Money Orders to consumers through its retail agents and financial institutions located

throughout the U.S. and Puerto Rico and provides Official Check outsourcing services for financial institutions across the U.S. MoneyGram Official Checks are used by consumers where a payee requires a check drawn on a bank. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst 327:3-13 (Ex. A to Taliaferro Decl.).

Overview of Instruments at Issue in This Case

6. There are two types of MoneyGram Money Orders at issue in this case: MoneyGram Retail Money Orders and MoneyGram Agent Check Money Orders. These two types of MoneyGram Money Orders are discussed in more detail below. *See*, ¶¶ 21-44.

7. There are two types of Official Checks at issue in this case: MoneyGram Teller's Checks and MoneyGram Agent Checks. These two types of MoneyGram Official Checks are discussed in more detail below. *See,* ¶¶ 45-91.

Money Orders

8. A money order is "[a] type of negotiable draft issued by banks, post offices, telegraph companies and express companies and used by the purchaser as a substitute for a check." *Money order, Black's Law Dictionary* (5th ed. 1979). "A money order is a form of credit instrument calling for the payment of money to the named payee and providing a safe and convenient means of remitting funds by persons not having checking accounts . . . . [T]he distinction between a check and a money order is that the latter is frequently issued with the amount printed on its face by the drawee." 1 *Brady on Bank Checks* ¶ 1.20 (rev. ed. 2009).

9. "Money order" is not a defined term under the Uniform Commercial Code. Instead, "[a]n instrument may be a check even though it is described on its face by another term, such as 'money order.'" U.C.C. § 3-104(f).

10. In *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 72 (1961), the Court described a money order as follows:

> A sender goes to a Western Union office, fills out an application and gives it to the company clerk who waits on him, together with the money to be sent and the charges for sending it. A receipt is given the sender and a telegraph message is transmitted to the company's office nearest to the payee directing that office to pay the money order to the payee. The payee is then notified and upon properly identifying himself is given a negotiable draft, which he can either endorse and cash at once or keep for use in the future.

11. As defined by Munn's Encyclopedia of Banking and Finance around the time of the passing of the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-2503, a money order is "[a] form of credit instrument calling for the payment of money to the named payee which provides a safe and convenient means of remitting funds by persons not having checking accounts." F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962). *See also,* 120 Cong. Rec. 4529 (Feb. 27, 1974) ("We know that many low-income families use money orders instead of checking accounts to pay their bills, because they are readily available and because of their low cost.")(Sparkman, J.).

12. Operationally, MoneyGram defines a Money Order as a paper instrument that has purchaser-payee and service charge language on the back. Yingst 42:6-20 (Ex. A to Taliaferro Decl.). It is issued by an agent for MoneyGram and is purchased at one of MoneyGram's agent locations. *Id.*

Addresses are Collected on Some Money Order and Traveler's Check Purchases

13. The escheat of money orders has been before the Supreme Court on multiple occasions. *See*, ¶¶ 14-16.

14. In 1961, the Commonwealth of Pennsylvania sought to escheat the "amount of undisbursed money held by Western Union arising out of money orders bought in Pennsylvania offices to be transmitted to payees in Pennsylvania and other States." *Western Union*, 368 U.S. at 73. Western Union objected to escheat of the funds to Pennsylvania because it had previously escheated the same funds to the State of New York. *Id.* at 74. The Supreme Court rejected Pennsylvania's claim to the uncashed money orders, finding that "there can be no doubt that Western Union has been denied due process by the Pennsylvania judgment here unless the Pennsylvania courts had power to protect Western Union from any other claim, including the claim of the State of New York." *Id.* at 75.

15. Following the holding in *Western Union*, Pennsylvania filed an original action in the U.S. Supreme Court against New York. *Pennsylvania v. New York*, 407 U.S. 206 (1972). Pennsylvania asserted that, contrary to the holding in *Texas v. New Jersey*, 379 U.S. 674 (1965), "the State where the money order was purchased be permitted to take the funds. It claimed that the State where the money orders are

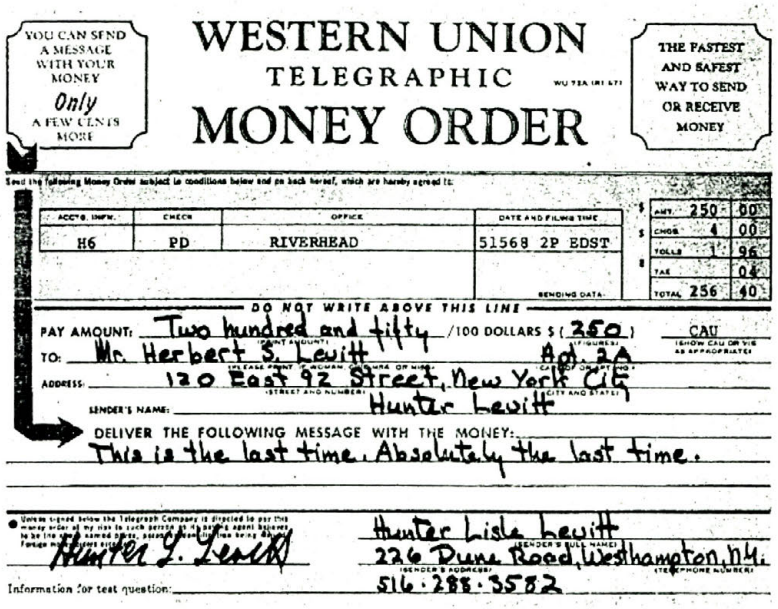
bought should be presumed to be the State of the sender's residence." *Pennsylvania,* 407 U.S. at 212.

16. One of Pennsylvania's arguments in favor of ignoring Supreme Court precedent was that "Western Union's money order records do not identify anyone as a 'creditor' of the company and in many instances do not list an address for either the sender or payee." *Id.* at 211-12.The Supreme Court rejected this factual argument, noting:

> Furthermore, a substantial number of creditors' addresses may in fact be available in this case. Although Western Union has not kept ledger records of addresses, the parties stipulated, and the Special Master found, that money order applications have been retained in the company's records "as far back as 1930 in some instances and are generally available since 1941." Report 9. To the extent that creditor addresses are available from those forms, the "windfall" to New York will, of course, be diminished.

Id. at 215.

17. Contemporary business records produced by Western Union in this case demonstrate Western Union's practice of collecting addresses when it sold money orders. *See, e.g.,* Gillette Ex. 136 at WU0000020 (Ex. V to Taliaferro Decl.), bottom right-hand corner (displayed below).



YOU CAN SEND A MESSAGE WITH YOUR MONEY *Only* A FEW CENTS MORE

WESTERN UNION
TELEGRAPHIC
MONEY ORDER

THE FASTEST AND SAFEST WAY TO SEND OR RECEIVE MONEY

Send the following Money Order subject to conditions below and on back hereof, which are hereby agreed to:

ACCT'G. INFM.	CHECK	OFFICE	DATE AND FILING TIME
H6	PD	RIVERHEAD	51568 2P EDST

AMT	250 00
CHGS	4 00
TOLLS	96
TAX	04
TOTAL	256 40

SENDING DATA

DO NOT WRITE ABOVE THIS LINE

PAY AMOUNT: Two hundred and fifty /100 DOLLARS $ (250) CAU

TO: Mr. Herbert S. Levitt Apt 2A

ADDRESS: 120 East 92 Street, New York City

SENDER'S NAME: Hunter Levitt

DELIVER THE FOLLOWING MESSAGE WITH THE MONEY:
This is the last time. Absolutely the last time.

Hunter J. Levitt

Hunter Lisle Levitt
226 Dune Road, Westhampton, N.Y.
516-288-3582

Information for test question:

See also, Gillette Ex. 137 (Ex. W to Taliaferro Decl.).

18. Additionally, the following excerpts from the 1939 Western Union Money Order Service Rules, Gillette Ex. 138 (Ex. X to Taliaferro Decl.), indicate that senders' addresses were routinely collected and retained by Western Union.

- "35. Either given names or nicknames may be used as signature by the sender for transmission purposes. However, the sender's full name, address and telephone number shall also be written on the application form for future reference. The sender's address may be transmitted, if desired, and charged for at the additional-word rate as defined in paragraph 56." P. 72

- "101. The sender's name, address and telephone number, as given on the application, shall be entered in the lower left hand corner of the MOD message." P. 76
- "203. When a refund is in order, a draft shall be prepared to the order of the sender for the principal of the order . . . This draft shall then be mailed to the sender . . ." P. 83
- Fig. 1 Money Order Application-Form 72-H "Address must be given in every case, but is not transmitted unless paid for." P. 95
- Fig. 11 Notice to Sender of Undelivered Money Order-Form 4022 includes "Name and address of sender of money order" and agents are directed to "hold...in a pending file so it may be used as a follow-up with the sender in cases where a better address might be available." P. 103
- Fig. 12 Notice to Accompany Refund Draft-Form 4022 includes name and address of sender. P. 104

19. Additionally, Travelers Cheque issuers such as American Express also collect addresses from the purchasers of travelers cheques. Gillette Ex. 139 (Ex. Y to Taliaferro Decl.); Gillette 78:4-80:21 (Ex. U to Taliaferro Decl.).

20. On the other hand, MoneyGram generally does not collect any personally identifiable information from the purchaser of a MoneyGram Money Order. Yingst 57:17-22 (Ex. A to Taliaferro Decl.). However, if a consumer purchases more than $3,000 of Money

Orders in a single day, that individual's information is collected and maintained for five years. Yingst 57:22-58:9 (Ex. A to Taliaferro Decl.).

MoneyGram Money Orders Specifically

21. MoneyGram issues Money Orders through its network of approximately 17,500 agents and financial institution locations in the U.S. and Puerto Rico as well as through company operated retail locations. Consumers use MoneyGram Money Orders to make payments in lieu of cash or personal checks. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst 48:24-49:3 (Ex. A to Taliaferro Decl.).

22. MoneyGram maintains an internet database if consumers want to locate a retail location to purchase a MoneyGram Retail Money Order. Yingst 305:22-306:2 (Ex. A to Taliaferro Decl.).

23. A purchaser of a MoneyGram Money Order can contact MoneyGram directly and complete a claim card if he or she wants to receive a refund on an uncashed Money Order. Yingst 320:13-322:11 (Ex. A to Taliaferro Decl.); Yingst Ex. 27 (Ex. K to Taliaferro Decl.).

24. A consumer would use a money order instead of a personal checking account because there is a segment of the population that does not use or does not want to use a personal checking account to make payments, so that person has a regular practice of using money orders to pay bills instead of personal checks. Yingst 49:4-16 (Ex. A to Taliaferro Decl.); Yingst 199:2-15 (Ex. A to Taliaferro Decl.); Yingst Ex. 12 at MG 002711 (Ex. F to Taliaferro Decl.).

25. According to MoneyGram, the decision to purchase a money order is driven by a customer's banking

habits. They either do not use banks or they do not want to use banks. Yingst 146:19-24 (Ex. A to Taliaferro Decl.).

26. MoneyGram's money transfer and Money Order products are a consumer facing product sold through its agent base, which consist of a "whole realm of nonfinancial institution businesses" such as "[r]etail agents, convenience stores, Walmart, CVS, [and] mom and pop stores." Yingst 29:4-10 (Ex. A to Taliaferro Decl.).

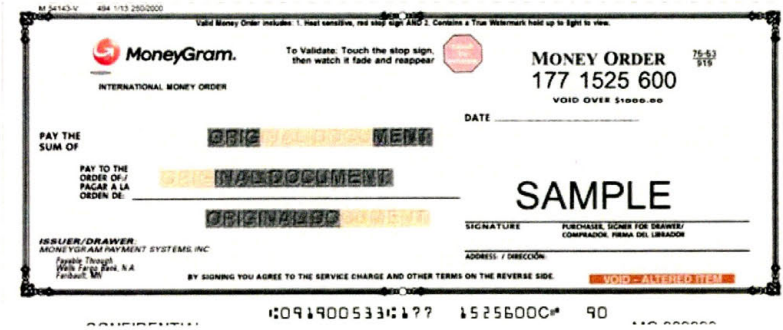
27. MoneyGram Money Orders are marketed as a more reliable substitute for a personal check. MoneyGram markets this service directly to the public through methods including digital and social media, point of sale materials and global branding to increase market awareness of MoneyGram. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst Ex. 28 at 6 (Ex. L to Taliaferro Decl.); Yingst 329:17-330:20 (Ex. A to Taliaferro Decl.).

28. MoneyGram does not guarantee payment of a MoneyGram Money Order. Yingst 51:9-13 (Ex. A to Taliaferro Decl.). There are situations where MoneyGram is presented with the same Money Order multiple times, or a Money Order is stolen, or a Money Order appears to be altered, that would cause a MoneyGram Money Order to be returned unpaid by MoneyGram when it is presented for payment. Yingst 52:8-53:8 (Ex. A to Taliaferro Decl.).

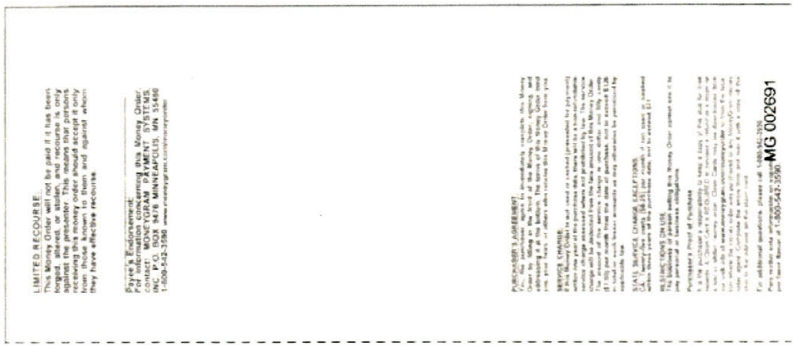
29. Marketing for MoneyGram Money Orders is "consumer facing," which means that the marketing for MoneyGram services is directed at consumers who might use those services, and not to prospective agents who sell to customers. Yingst 46:17-47:4 (Ex. A to Taliaferro Decl.).

30. MoneyGram Money Order competitors include a small number of large money order providers and a large number of regional and niche money order providers. MoneyGram's largest competitors in the money order industry are Western Union and the U.S. Postal Service. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst 331:8-17 (Ex. A to Taliaferro Decl.).

31. MoneyGram Money Orders prominently display the words "Money Order" and MoneyGram's name and logo. Ex. A to Affidavit of Jennifer Whitlock re: MoneyGram Money Orders ("Whitlock Money Order Aff.") at MG 002690 (displayed below).



32. MoneyGram Money Orders contain "terms and conditions" on the face or the back of the Money Order. Yingst 310:16-311:19 (Ex. A to Taliaferro Decl.); Exhibit A to Whitlock Money Order Aff. at MG 002691 (displayed below).



33. All MoneyGram Money Orders are assessed a monthly service fee of $1.50/month if the Money Order is uncashed after a certain period of time. Ex. A to Whitlock Money Order Aff. at MG 002691; Yingst 411:2-4 (Ex. A to Taliaferro Decl.); Petrick 243:7-11 (Ex. O to Taliaferro Decl.). In a State with a seven year dormancy period, $126 of a given Money Order's value is consumed by service charges before the item becomes dormant. Petrick 246:17-24 (Ex. O to Taliaferro Decl.). As a result, any MoneyGram Money Order with a value below $126 is completely consumed by service charges before it would otherwise escheat to a State with a seven year dormancy period.

34. Currently, MoneyGram Money Orders generally remain outstanding for six days, which is a decrease from ten days in 2010. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst Ex. 28 at 5 (Ex. L to Taliaferro Decl.); Yingst 327:19-328:7 (Ex. A to Taliaferro Decl.).

35. The drawer of a MoneyGram Money Order is MoneyGram. Yingst 68:22-69:1 (Ex. A to Taliaferro Decl.).

36. MoneyGram Money Orders are typically not issued in amounts exceeding $1,000, although some individual agents could have their maximum permissible amount set at a lower level. Yingst 58:19-59:6 (Ex. A to Taliaferro Decl.).

37. Although all MoneyGram Money Orders contain the above-listed characteristics, MoneyGram processes its Money Orders through several different computer/IT systems. The first group, Delta, DeltaWorks, and DNET, are point of sale systems for MoneyGram Money Orders sold in retail establishments. Yingst 341:11-18 (Ex. A to Taliaferro Decl.). These systems are MoneyGram owned and provided hardware. Yingst 341:19-24 (Ex. A to Taliaferro Decl.). Money Orders sold on these systems are called "Retail Money Orders." According to MoneyGram's Fed. R. Civ. P. 30(b)(6) witness, it has always been the case that agents that sell Retail Money Orders use MoneyGram's money order dispensers. Yingst 386:4-8 (Ex. A to Taliaferro Decl.).

38. Retail Money Orders typically do not display the logo of the establishment where the Retail Money Order was purchased. Yingst 317:10-18 (Ex. A to Taliaferro Decl.).

39. MoneyGram usually directly debits the bank account of agents that sell Retail Money Orders in order to receive the proceeds of those sales. Yingst 339:9-21 (Ex. A to Taliaferro Decl.).

40. With the exception of one major retailer, agents that sell MoneyGram Retail Money Orders do not earn any interest on the outstanding balance of

their uncashed MoneyGram Retail Money Orders. Yingst 364:18-365:6 (Ex. A to Taliaferro Decl.); Yingst Ex. 35 (Ex. N to Taliaferro Decl.).

41. A MoneyGram Money Order agent has no legal right to stop payment on a Money Order. Yingst 387:17-388:11 (Ex. A to Taliaferro Decl.).

42. MoneyGram's financial institution clients "may have a desire to print these money orders from their teller system on their own printers instead of using MoneyGram printing equipment [as is the case with money orders sold by retail establishments]." Yingst 83:5-12 (Ex. A to Taliaferro Decl.). In that case, those financial institution clients can use the MoneyGram Primelink Portal, which is a "servicing website that [MoneyGram's] financial institution clients can use to get information about their checks." Yingst 337:14-18 (Ex. A to Taliaferro Decl.). The Primelink Portal is also the website through which MoneyGram's financial institution clients can transmit and obtain information about the MoneyGram Agent Checks and Teller's Checks that they issue. Yingst Ex. 13 at MG0002281-2295 (Ex. G to Taliaferro Decl.). Although these MoneyGram money orders are sold from the financial institution's teller system, and accessed on the Primelink system, they are "also a money order." Yingst 82:13 11 (Ex. A to Taliaferro Decl.). Money Orders printed from a financial institution's own teller system and accessed on the Primelink system are called "Agent Check Money Orders" and are the same product as MoneyGram's other Money Order products. Yingst 85:12-22 11 (Ex. A to Taliaferro Decl.).

43. There is no legal distinction between an Agent Check Money Order and one purchased from one of MoneyGram's retail agents. Yingst 175:3-11 (Ex. A

to Taliaferro Decl.). The only identified differences between an Agent Check Money Order and one purchased from one of MoneyGram's retail agents is that an Agent Check Money Order does not necessarily have a dollar amount restriction and an Agent Check Money Order is issued through the financial institution's systems and hardware. Yingst 175:3-176:1 (Ex. A to Taliaferro Decl.).

44. MoneyGram produced a declaration in this case identifying the various templates on which MoneyGram Money Orders can be issued. *See,* Whitlock Money Order Aff.

MoneyGram Official Checks Specifically

45. An Official Check is a prepaid, purchased financial institution branded instrument. Unlike Money Orders, Official Checks are not marketed to the public by MoneyGram but instead all MoneyGram marketing of Official Checks is to financial institutions so that the financial institutions may market Official Checks to their customers. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst 330:21-331:7 (Ex. A to Taliaferro Decl.).

46. MoneyGram has done some Official Check marketing in magazines, such as ads in trade magazines directed to persons in the credit union industry. Most of MoneyGram's marketing of Official Checks is conducted by being involved in the industry, going to banking conferences, and getting involved in state banking organizations. Yingst 126:10-21 (Ex. A to Taliaferro Decl.).

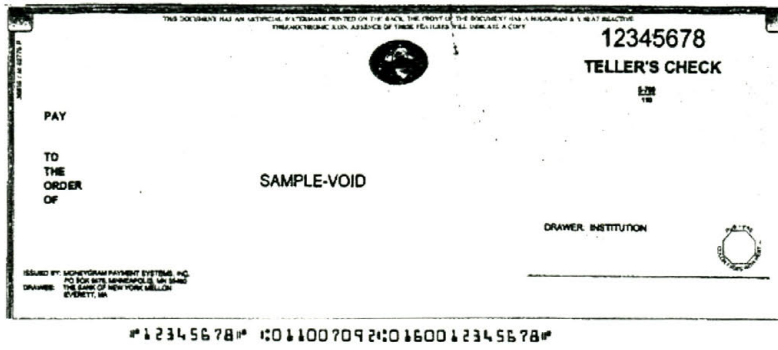
47. As described by MoneyGram's Fed. R. Civ. P. 30(b)(6) witness, "a bank or a credit union . . . can elect to use MoneyGram to provide a realm of services around their official check program including provid-

ing inventory, reconciliation, back office processing, exception research handling, et cetera, so it's an outsourcing of parts of [the financial institution's] official check program." Yingst 28:11-19 (Ex. A to Taliaferro Decl.). *See also,* Yingst 32:11-23 (Ex. A to Taliaferro Decl.); Yingst Ex. 2 at MG-000394 (Ex. B to Taliaferro Decl.).

48. Only financial institutions can offer MoneyGram's Official Check processing services. Yingst 29:1-3 (Ex. A to Taliaferro Decl.).

49. Unlike Money Orders, there is no internet database if consumers want to locate a financial institution to purchase a MoneyGram Official Check. Yingst 305:22-306:6 (Ex. A to Taliaferro Decl.).

50. Unlike Money Orders, there are no terms and conditions on a MoneyGram Official Check. Yingst 317:20-318:8 (Ex. A to Taliaferro Decl.); *see, e.g.,* Ex. C to Affidavit of Jennifer Whitlock re: MoneyGram Official Checks ("Whitlock Official Check Aff.") at MG0000008 (displayed below).



51. Unlike Money Orders, there are no service charges imposed by MoneyGram on a MoneyGram Official Check. Yingst 314:21-315:8 (Ex. A to Taliaferro Decl.).

52. MoneyGram Official Checks typically display the logo of the selling financial institution. Yingst 317:5-9 (Ex. A to Taliaferro Decl.).

53. A purchaser of a MoneyGram Official Check cannot contact MoneyGram directly to request a refund of that Official Check. Instead, they must contact the bank that issued the Official Check. Yingst 324:11-325:2 (Ex. A to Taliaferro Decl.).

54. A financial institution that sells MoneyGram Official Checks typically transmits the proceeds of the sale of those Official Checks by wiring payment to MoneyGram. Yingst 340:5-15 (Ex. A to Taliaferro Decl.).

55. A financial institution that sells MoneyGram Official Checks has a number of operational rights that a seller of a MoneyGram Retail Money Order does not have. Yingst Ex. 13 (Ex. G to Taliaferro Decl.); Yingst Ex. 14 (Ex. H to Taliaferro Decl.); Yingst Ex. 15 (Ex. I to Taliaferro Decl.); Yingst Ex. 35 (Ex. N to Taliaferro Decl.); Yingst 352:5-358:23 (Ex. A to Taliaferro Decl.); Yingst 370:14-373:15 (Ex. A to Taliaferro Decl.).

56. A financial institution that sells MoneyGram Official Checks shares interest earnings on the balance of uncashed Official Checks that it has sold. Yingst 362:20-364:16 (Ex. A to Taliaferro Decl.).

57. The history of MoneyGram Official Checks, as discussed in Annual Reports from Greyhound, Greyhound Dial, Dial, and Viad over the last 40 years, makes clear that MoneyGram Official Checks were created as a service for banks and credit unions and are substitutes for those financial institutions' own products. *See, e.g.,* 1993 Annual Report, Ex. I to Massimino Decl. at Part 1, VIAD 399 ("Travelers

Express also provides processing services for more than 4,500 credit unions and other financial institutions which offer share drafts (the credit union industry's version of a personal check) or official checks (used by financial institutions in place of their own bank check or teller check))."

58. MoneyGram's predecessor company was named Travelers Express, and for much of its history it was a subsidiary of The Greyhound Corporation, which was subsequently renamed Greyhound Dial Corporation, then The Dial Corp., and then Viad Corp. Massimino Decl. ¶¶ 2-3

59. Annual Reports from Greyhound, Dial and Viad during the 1980s and 1990s demonstrate their development of the Travelers Express/MoneyGram Official Check product. *See, e.g.,* 1981 Annual Report, Ex. B to Massimino Decl. at 9, VIAD 65 ("While money orders are still the core of [Travelers Express], the company . . . has developed a substantial volume of official check processing for a variety of financial institutions."); 1998 Annual Report, Ex. J to Massimino Decl. at 2, VIAD 524 ("Travelers Express also provides processing services for approximately 5,000 banks, credit unions and other financial institutions which offer official checks (used by financial institutions in place of their own bank check or cashier's check) and share drafts (the credit union industry's version of a personal check.")).

60. The first reference to "Official Checks" is contained in the Greyhound 1981 Annual Report, which states that Travelers Express "has developed a substantial volume of official check processing for a variety of financial institutions." Ex. B to Massimino Decl. at 9, VIAD 65. This is consistent with testimony from MoneyGram's Fed. R. Civ. P. 30(b)(6) witness,

who testified that MoneyGram had offered official check outsourcing "[s]ince] around 1979." Yingst 30:5-16 (Ex. A to Taliaferro Decl.).

61. Annual Reports of Greyhound through the mid-1980s described the growth in Travelers Express's Official Check processing. For example, the 1986 Annual Report stated that "Travelers processed over 626 million money orders, share drafts and official checks during the year." Ex. G to Massimino Decl. at 6, VIAD 308.

62. Annual Reports of Dial in the early 1990s made clear that these Official Check instruments were substitutes for bank checks and teller's checks. For example, the 1993 Dial Annual Report stated that Travelers Express "offers money orders, official checks, and negotiable instrument clearing services through a national network of approximately 43,000 retail agents, mid-size bank customers and over 4,500 credit unions . . . Travelers Express also provides processing services for more than 4,500 credit unions and other financial institutions which offer share drafts (the credit union industry's version of a personal check) or official checks (used by financial institutions in place of their own bank check or teller check)." Ex. I to Massimino Decl. at Part 1, VIAD 398-99.

63. Similarly, the 1998 Viad Annual Report explained that "Travelers Express also provides processing services for approximately 5,000 banks, credit unions and other financial institutions which offer official checks (used by financial institutions in place of their own bank check or cashier's check) and share drafts (the credit union industry's version of a personal check). . . . The Payment Services segment sells money orders through agents, performs official check and negotiable instrument clearing services for banks

and credit unions." Ex. J to Massimino Decl., VIAD 524, 648.

64. The 2001 and 2002 Viad Annual Reports contain similar language, noting "Travelers Express also provides processing services for approximately 8,500 branch locations of banks, credit unions and other financial institutions which offer official checks (used by financial institutions in place of their own bank check or cashier's check) and share drafts (the credit union industry's version of a personal check)." Ex. M to Massimino Decl. at 1, VIAD 846; *see also,* Ex. N to Massimino Decl. at 1, VIAD 959.

65. Unlike Money Orders, MoneyGram does not sell Official Checks directly to customers. Official Checks are sold only by Federally Insured Depository Institutions. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.).

66. Approximately 800 financial institutions at 5,600 branch locations in the United States offer MoneyGram Official Checks. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.).

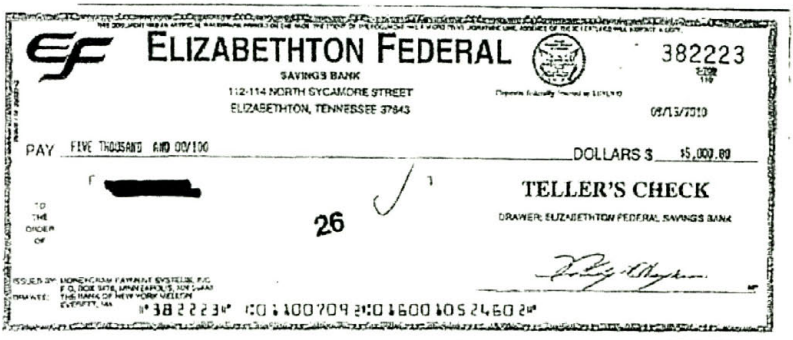
67. For its bank and credit union customers MoneyGram offers "Official check processing as well as money orders" and also offers money transfer services. Yingst 21:16-22 (Ex. A to Taliaferro Decl.).

68. Official Checks are used by consumers where a payee requires a check drawn on a bank. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.). Official Checks have no denominational limit and can be issued in any amount. Yingst 137:13-16 (Ex. A to Taliaferro Decl.).

69. Under Money Service Business Regulations issued by the U.S. Department of Treasury, financial institutions that sell MoneyGram Official Checks are

not required to register as Money Service Businesses. 31 CFR §1010.100(ff)(3); 31 CFR §1010.100(d).

70. MoneyGram Official Checks prominently display the name and logo of the financial institution that sells them and are used by those financial institutions in place of their own bank check or teller check. Yingst 317:5-9 (Ex. A to Taliaferro Decl.); 1993 Annual Report, Ex. I to Massimino Decl. at Part 1, VIAD 399 (describing Official Checks as being "used by financial institutions in place of their own bank check or teller check."); Yingst Ex. 6 (Ex. C to Taliaferro Decl.) (displayed below).


ELIZABETHTON FEDERAL
SAVINGS BANK
112-114 NORTH SYCAMORE STREET
ELIZABETHTON, TENNESSEE 37643
382223
05/13/2010
PAY FIVE THOUSAND AND 00/100 DOLLARS $ 5,000.00
TELLER'S CHECK
DRAWER: ELIZABETHTON FEDERAL SAVINGS BANK
26
THE BANK OF NEW YORK MELLON
⑈382223⑈ ⑆100709210⑆600105246⑆

72. MoneyGram's Official Check competitors include financial institution solution providers, such as core data processors and corporate credit unions. MoneyGram's Official Check business also competes against a financial institution's desire to perform these processes in-house with support from these latter organizations. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.).

73. A customer typically acquires a MoneyGram Official Check when they need a "good funds check," such as to make a deposit on a car or place a down payment on the purchase of a home. Yingst 138:11-20 (Ex. A to Taliaferro Decl.). A check issued by a financial institution is typically accepted as a good funds check. Yingst 144:15-23 (Ex. A to Taliaferro Decl.).

74. A MoneyGram Teller's Check is used by a consumer that needs funds for a purpose for which a money order would not be accepted because money orders lack next day funds availability. Yingst 147:6-12 (Ex. A to Taliaferro Decl.). An Official Check is accepted as a form of payment in a wider range of circumstances than a money order. Yingst 148:21-23 (Ex. A to Taliaferro Decl.).

75. A bank customer in need of a bank-issued check does not ask for a specific type of bank-issued instrument. Instead, a customer typically asks for a bank-issued check and the bank, in response, then determines the type of check to issue. Yingst 169:17-170:8 (Ex. A to Taliaferro Decl.).

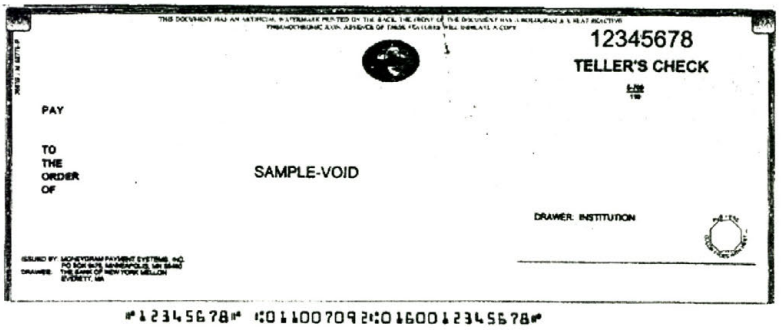
76. There are two types of MoneyGram Official Checks at issue in this case: a MoneyGram Teller's Check and a MoneyGram Agent Check. *See*, ¶¶ 78-91.

77. Some MoneyGram Teller's Checks and Agent Checks contain MoneyGram money order language on their back because they are printed on so-called "blank stock." Yingst at 412:5-413:14 (Ex. A to Taliaferro Decl.); Yingst Supplemental Dec. at ¶ 2. However, the money order language is not operative because, in accordance with the terms of the language, the MoneyGram Teller's Checks and Agent Checks that have this language are not "DESIGNATED ON ITS

FACE AS A *MONEY* ORDER." Exs. A, B to Declaration of Eva Yingst.

Teller's Checks

78. The first category of MoneyGram Official Checks at issue in this case, a MoneyGram Teller's Check, contains a specific product code – 016. This product code can be found in the Magnetic Ink Character Reader ("MICR") line at the bottom of the check. Petrick Ex. 41 at MG0002301 (Ex. P to Taliaferro Decl.); Ex. D to Whitlock Official Check Aff. at MG0000010; Ex. C to Whitlock Official Check Aff. at MG0000008 (displayed below)



79. All MoneyGram Teller's Checks share critical common characteristics. *See*, ¶¶ 80-84.

80. A MoneyGram Teller's Check is a type of MoneyGram Official Check issued by a financial institution. Yingst 136:4-7 (Ex. A to Taliaferro Decl.). All MoneyGram Teller's Checks indicate that the drawer of the instrument is the financial institution that sells the MoneyGram Teller's Checks. Yingst 136:8-13 (Ex. A to Taliaferro Decl.); Ex. D to Whitlock Official Check Aff. at MG0000010.

81. All MoneyGram Teller's Checks indicate that the drawee of the instrument is a different financial

institution than the financial institution that sells the MoneyGram Teller's Checks. Ex. D to Whitlock Official Check Aff. at MG0000010. That drawee bank, also known as the "clearing bank," is a bank with which MoneyGram has a banking relationship for the purposes of receiving Official Checks as they clear. Yingst 33:8-18 (Ex. A to Taliaferro Decl.); Yingst 35:10-11 (Ex. A to Taliaferro Decl.).

82. All MoneyGram Teller's Checks are "good funds checks," and are accepted by financial institutions as "good funds checks." Yingst 142:9-13 (Ex. A to Taliaferro Decl.). MoneyGram operationally recognizes the difference between a MoneyGram Teller's Check, which is a next day "good funds" item, and a MoneyGram Money Order, which is not. Yingst 143:10-17 (Ex. A to Taliaferro Decl.).

83. A MoneyGram Teller's Check is subject to Regulation CC Next-Day Funds Availability and Regulation D Reserve Requirement. Yingst Ex. 16 at MG004615 (Ex. J to Taliaferro Decl.) (displayed below).

MoneyGram

Official Check & Money Order Types

	Cashier's Checks	Teller's Checks	Agent Checks	Financial Institution Money Orders
Issuer	Financial Institution	MoneyGram	MoneyGram	MoneyGram
Drawer	Financial Institution	Financial Institution	MoneyGram	MoneyGram
Drawee	Financial Institution	MoneyGram (clearing bank)	MoneyGram (clearing bank)	MoneyGram
Reg. CC/Next-Day Funds Availability	Yes	Yes	No	No
Reg. D/Reserve Requirement	Yes	Yes	No	No
Escheat	Financial Institution	MoneyGram	MoneyGram	MoneyGram
Document Type	Check	Check	Check	Draft
Dollar Amount	Unlimited	Unlimited	Unlimited	Limited

84. Under the Uniform Commercial Code, a teller's check is "a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank." U.C.C. § 3-104(h). The Expedited Funds Availability Act contains a nearly identical definition – a teller's check is "any

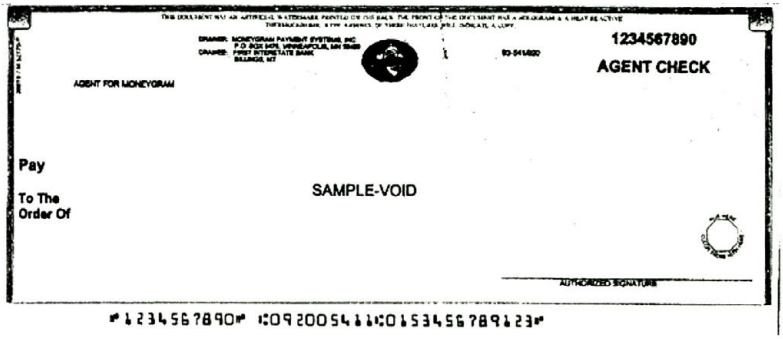
check issued by a depository institution and drawn on another depository institution." 12 U.S.C. §4001(22).

Agent Checks

85. The second category of MoneyGram Official Checks at issue in this case – an Agent Check, also contains a specific product code – 015. This product code can be found in the MICR line at the bottom of the check. Yingst 420:6-17 (Ex. A to Taliaferro Decl.); Petrick Ex. 41 at MG0002302 (Ex. P to Taliaferro Decl.).

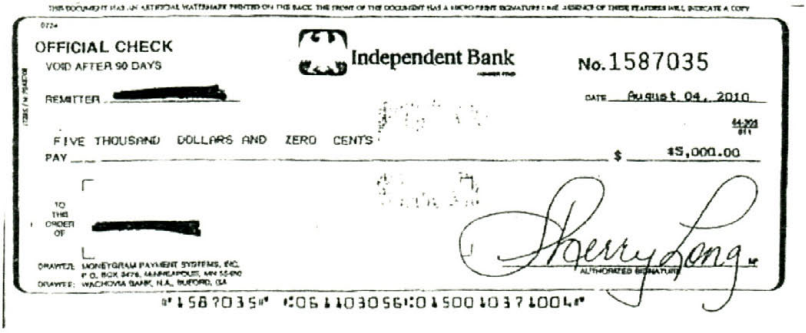
86. Unlike the uniformity that exists among MoneyGram Teller's Checks, MoneyGram Agent Checks come in two varieties. *See,* ¶¶ 87-88.

87. One variety of MoneyGram Agent Check indicates that the drawer of the instrument is MoneyGram, and that the individual signing the check is signing as "Agent for MoneyGram." Ex. A to Whitlock Official Check Aff. at MG0000004 (displayed below).



88. A second variety of MoneyGram Agent Check lists the drawer of the instrument as MoneyGram, but simply lists the individual signing the check as "authorized signature." In the absence of language indicating otherwise, "a signature in the lower right

hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft." U.C.C. § 3-204, cmt. 1; Yingst 419:7-420:21 (Ex. A to Taliaferro Decl.); Yingst Ex. 10 (Ex. D to Taliaferro Decl.) (displayed below).



89. All MoneyGram Agent Checks indicate that the drawee of the instrument is a different financial institution than the financial institution that sells the MoneyGram Agent Checks. That drawee financial institution has a contractual relationship with MoneyGram regarding the "clearing" of the instrument. Yingst 33:8-18 (Ex. A to Taliaferro Decl.).

90. Most MoneyGram Agent Checks are typically used by the financial institution to pay an obligation of the financial institution. MoneyGram Agent Checks are not typically sold to bank customers. Yingst 170:2-8 (Ex. A to Taliaferro Decl.).

91. A MoneyGram Agent Check is different from a MoneyGram Agent Check Money Order in several ways. MoneyGram treats them as distinct product categories. Yingst 161:6-13 (Ex. A to Taliaferro Decl.). A MoneyGram Agent Check Money Order says "money order" on the front and includes all of the relevant legal language on the back related to the purchaser's agreement and the Money Order's service

charges. Yingst 161:15-21 (Ex. A to Taliaferro Decl.). MoneyGram also places title restrictions on what an Agent Check Money Order can be called, including prohibitions on calling it a bank check or Official Check. Yingst 162:7-13 (Ex. A to Taliaferro Decl.); Yingst Ex. 11 at MG-000298 (Ex. E to Taliaferro Decl.). A MoneyGram Agent Check Money Order also contains a different product code – 017 – in the MICR line at the bottom of the Agent Check Money Order. Ex. E to the Whitlock Money Order Aff. At MG002704.

MoneyGram Escheatment Practices

92. MoneyGram escheats unaddressed uncashed Money Orders to the State in which those uncashed Money Orders are sold. Petrick 30:22-23 (Ex. O to Taliaferro Decl.); Petrick 36:1-20 (Ex. O to Taliaferro Decl.).

93. MoneyGram escheats uncashed unaddressed MoneyGram Teller's Checks and Agent Checks to Delaware – its State of incorporation. Petrick 31:2-6 (Ex. O to Taliaferro Decl.); Petrick 35:12-24 (Ex. O to Taliaferro Decl.).

94. In 2005, following MoneyGram's reincorporation as a Delaware entity, MoneyGram determined that unaddressed MoneyGram Teller's Checks and Agent Checks should be escheated to its State of incorporation – Delaware – after it was instructed to do so by lawyers in the MoneyGram legal department in consultation with management. Petrick 43:23-44:23 (Ex. O to Taliaferro Decl.); Petrick Ex. 42 (Ex. Q to Taliaferro Decl.).

95. Both MoneyGram lawyers and outside counsel were involved in the decision to escheat unaddressed MoneyGram Teller's Checks and Agent Checks to

Delaware. Petrick 73:2-12 (Ex. O to Taliaferro Decl.). The determination was made "[b]ased on a careful review of unclaimed property laws and [MoneyGram's predecessor entity] TECI's obligations under those laws." Petrick Ex. 42 at MG 002833 (Ex. Q to Taliaferro Decl.); Petrick 134:17-135:11 (Ex. O to Taliaferro Decl.). Although she could not recall the specific details, MoneyGram's Fed. R. Civ. P. 30(b)(6) witness recalls seeing an opinion of outside counsel regarding the decision to escheat unaddressed MoneyGram Teller's Checks to its State of incorporation. Petrick 255:13-256:2 (Ex. O to Taliaferro Decl.).

96. After the decision to escheat to Delaware was made, MoneyGram lawyers informed MoneyGram personnel responsible for the escheat of MoneyGram's unclaimed property of the decision. Petrick:74:7-11 (Ex. O to Taliaferro Decl.); Petrick 75:17-24 (Ex. O to Taliaferro Decl.).

97. When filing its unclaimed property reports with various States, MoneyGram uses the National Association of Unclaimed Property Administrators ("NAUPA") format. Petrick 93:9-22 (Ex. O to Taliaferro Decl.); Petrick 95:21 96:1 (Ex. O to Taliaferro Decl.). NAUPA establishes Property Type Codes and a filer must select an applicable property type code for property it escheats to a given State. Petrick 95:17-96:17 (Ex. O to Taliaferro Decl.) ("We select the code that matches our property types for a property that we are escheating").

98. MoneyGram escheats its unclaimed unaddressed Official Checks under the NAUPA Code CK15 (Other Outstanding Official Checks). Petrick 98:9-99:5 (Ex. O to Taliaferro Decl.). The decision by MoneyGram to use NAUPA Code CK15 for its Official

Checks was made at the direction of counsel. Petrick 101:11-14 (Ex. O to Taliaferro Decl.).

99. MoneyGram escheats its unclaimed Money Orders under NAUPA Code CK07 (Money Orders) although it previously escheated its Agent Check Money Orders under NAUPA Code CK77 (Non-Bank Money Orders). Petrick 182:13-184:21 (Ex. O to Taliaferro Decl.); Petrick 218:9-219:7 (Ex. O to Taliaferro Decl.); Petrick Ex. 55 (Ex. R to Taliaferro Decl.).

100. On a per item basis, there are more MoneyGram Money Orders escheated a year than there are MoneyGram Official Checks of both the Teller's Check and Agent Check varieties combined, but on a dollar basis the value of MoneyGram Teller's Checks and Agent Checks escheated in a year exceeds the dollar value of MoneyGram Money Orders. Petrick 251:2-16 (Ex. O to Taliaferro Decl.).

Defendant States' Escheats Laws

101. The escheat laws of some of the Defendant States provide for the escheat to State of purchase of only unaddressed money orders and traveler's checks and not "similar written instruments." *See*, *e.g.*, Code of Ala. § 35-12-74 (Alabama), A.R.S. § 44-304 (Arizona), A.C.A. § 18-28-204 (Arkansas), Ind. Code Ann. 32-34-1-21 (Indiana), IA Code §556.2A (Iowa), K.S.A. 58-3936 (Kansas), LA Rev Stat § 9:156 (Louisiana), Mont. Code Ann. § 70-9-805 (Montana), Nev. Rev. Stat. Ann. §120A.530 (Nevada), Tex. Property Code Ann. § 72.102 (Texas), W. Va. Code § 36-8-4 (West Virginia).

Dated: February 1, 2019

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SUPREME COURT OF THE UNITED STATES

Nos. 22O145 & 22O146
(Consolidated)

DELAWARE,

Plaintiff

v.

ARKANSAS, *et al.*,

Defendants

DEFENDANTS' RULE 56.1 STATEMENT OF MATERIAL FACTS ON MOTION FOR SUMMARY JUDGMENT

Pursuant to Case Management Order No. 2, Doc. No. 47 § II, and Rule 56.1 of the Local Rules of the United States District Courts for the Southern, all Defendants (together, the "Defendant States") submit this concise statement of the material facts as to which there is no genuine dispute in support of their Motions for Summary Judgment. The admissible evidence supporting this statement is contained in a concurrently filed appendix. Citations designated "App." are to that appendix.[1]

1. All Defendant States have enacted state legislation that empowers them to take custody of the unclaimed property at issue in this case. *See* Table A

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[1] The documents in that appendix are accurate copies of the deposition exhibits, produced documents, historical sources, expert reports, deposition excerpts, and a supplemental declaration from MoneyGram.

(attached to Defendant States' concurrently filed motion for summary judgment on liability).

2. MoneyGram Payment Systems, Inc. ("MoneyGram") is a subsidiary of MoneyGram International, Inc. *See* App. 353 (Dep. Ex. 28 at 1).

3. MoneyGram International, Inc. is the second largest money-transfer business in the world. *See* App. 4 (Dep. Ex. 2 at 4); *see also* App. 1064 (Yingst Dep. 21:3–7).

4. MoneyGram International, Inc. processes over 750,000 transactions each day; its annual revenue exceeds $1 billion; and it employs more than 2,300 employees. *See* App. 40 (Dep. Ex. 5 at 5). It is a publicly traded corporation that, as a money transmitter, is subject to extensive state regulation. *See, e.g.*, Cal. Fin. Code § 2000, *et seq.*; 7 P.S. § 6101 *et seq.*

5. MoneyGram has served financial institutions for over 75 years by providing prepaid money transfer products for the financial institutions to sell or to use to pay their own obligations. *See* App. 40 (Dep. Ex. 5 at 5); App. 353 (Dep. Ex. 28 at 1); *see also* App. 1064 (Yingst Dep. 21:16–22).

6. MoneyGram—which until approximately 2005 operated under the name Traveler's Express, Inc.,—processes the prepaid money transfer products sold by thousands of financial institutions in the United States. *See* App. 40 (Dep. Ex. 5 at 5); App. 353 (Dep. Ex. 28 at 1); *see also* App. 1064, 1145–46 (Yingst Dep. 21:16–22, 124:23–125:10).

7. MoneyGram refers to these financial institutions, which consist of banks and credit unions that sell its prepaid money transfer products, as its customers.

See App. 1064, 1066–67 (Yingst Dep. 21:8–22, 28:6–29:3).

8. MoneyGram markets two lines of prepaid money transfer products for its customers: one line that MoneyGram markets as "Retail Money Orders," and another that MoneyGram markets as "Official Checks." *See* App. 1065–66, 1106, 1114 (Yingst Dep. 27:22–28:19, 85:6–22, 93:8–23).

9. MoneyGram has provided representative examples of the MoneyGram Retail Money Orders sold between 2000 and 2017, which are sometimes but not always sold by financial institutions, in this litigation. *See* App. 16–33 (Dep. Ex. 4 [Exs. A–D]); *see also* App. 1102–03 (Yingst Dep. 81:17–82:22).

10. The appendix contains a representative sample MoneyGram Retail Money Order. *See* App. 18–19 (Dep. Ex. 4 [Ex. A]).

11. The appendix contains a sample of a template for printing a Retail Money Orders. *See* App. 34–35 (Dep. Ex. 4 [Ex. F]).

12. A purchaser of a Retail Money Order buys a Retail Money Order by remitting the monetary amount imprinted on the face of the instrument, plus any applicable fee, to the seller. *See* App. 1079, 1083–84 (Yingst Dep. 45:7–15, 49:17–50:19).

13. The Retail Money Order seller is an agent for MoneyGram and is not considered a party on the instrument. *See* App. 1075–76 (Yingst Dep. 41:22–42:17).

14. In return, the purchaser receives a written instrument on which the purchaser can identify the desired recipient or payee. *See* App. 1077 (Yingst Dep. 43:10–15).

15. MoneyGram is designated as the "issuer" and the "drawer" of the Retail Money Order instrument. *See* App. 1078 (Yingst Dep. 44:1–14); *see also* App. 18–19 (Dep. Ex. 4 [Ex. A]).

16. The Retail Money Order can then be redeemed by the recipient of the instrument for the face value imprinted on the instrument. *See* App. 1075–77 (Yingst Dep. 41:22–43:24).

17. MoneyGram typically caps the value of Retail Money Orders at $1,000, though a customer may buy more than one money order at a time. *See* App. 58 (Dep. Ex. 11 at 2); *see also* App. 1092–93 (Yingst Dep. 58:16– 59:11).

18. MoneyGram's decision to typically cap on the value of Retail Money Orders at $1,000 is a business decision and not one required by law. App. 1097–98 (Yingst Dep. 63:16–64:5).

19. MoneyGram considers and markets the Retail Money Order instruments as "safe payment mechanism[s]" that are "accepted pretty much universally" and are "as good as cash." *See* App. 1081–82, 1084–85, 1219–21 (Yingst Dep. 47:20–48:23, 50:20–51:7, 198:21–200:3).

20. When a MoneyGram agent sells a Retail Money Order, it reports four pieces of information back to MoneyGram: the dollar amount of the instrument, the instrument's serial number, the date of sale, and the customer-identification number of the location that sold the instrument. *See* App. 1247–49 (Yingst Dep. 263:5–265:6).

21. That customer-identification number of the location that sold the Retail Money Order allows MoneyGram to determine the State in which the

instrument was sold. *See* App. 1249 (Yingst Dep. 265:9–21).

22. The information conveyed back to MoneyGram from the MoneyGram agent does not include any information related to the party who purchased the instrument, including that party's last-known address. *See* App. 1091–92 (Yingst Dep. 57:17–58:4).

23. Additionally, MoneyGram does not receive an image of the Retail Money Order until it has been presented for payment and cleared. *See* App. 1200 (Yingst Dep. 179:12–23).

24. The money that is remitted to purchase a MoneyGram Retail Money Order is transferred from the seller of the instrument to MoneyGram. *See* App. 1087 (Yingst Dep. 53:9–21).

25. MoneyGram then holds the money remitted to purchase a MoneyGram Retail Money Order in a portfolio of accounts and investments, where it comingles the balance of all its outstanding Retail Money Orders and other MoneyGram paper-based payment products—including that of its Official Checks products. *See* App. 1088–89, 1262 (Yingst Dep. 54:5–55:4, 278:15–22).

26. The money that is remitted to purchase a MoneyGram Retail Money Order then remains in that commingled portfolio referred to in the previous paragraph until the Retail Money Order is presented for payment or remains dormant for long enough to become subject to unclaimed-property laws. *See* App. 1089–90, 1128–29 (Yingst Dep. 55:13–56:5, 107:11–108:11).

27. When a Retail Money Order is presented for payment, it goes through the Federal Reserve clearing

process using the routing number and transit number on the bottom of the instrument. *See* App. 1100–01, 1130–31 (Yingst Dep. 71:4–72:20, 109:7–110:8).

28. Those routing and transit numbers on the Retail Money Order are associated with a certain "clearing bank" that MoneyGram has contracted with to use its routing and transit numbers to intercept the MoneyGram items. *See* App. 1071–72, 1130–31 (Yingst Dep. 33:8–34:6, 109:7–110:8); *see also* App. 239–306 (Dep. Exs. 17–19).

29. A clearing bank is listed as the "payable through" entity on the face of the Retail Money Order. *See* App. 18–19 (Dep. Ex. 4 [Ex. A]); *see also* App. 1075–76, 1100–01 (Yingst Dep. 41:22–42:17, 71:10–72:11).

30. MoneyGram uses funds from its commingled portfolio (described above) to pay the clearing banks for the amount of the cleared Retail Money Orders. *See* App. 1101 (Yingst Dep. 72:12–20).

31. The clearing banks do not receive any information about the Retail Money Orders presented to them for payment, and the clearing banks have no relationship with the agents that sell Retail Money Orders. *See* App. 1072–73, 1130–31 (Yingst Dep. 34:22–35:11, 109:7–110:8).

32. The role of the clearing banks is simply to provide routing and transit numbers for MoneyGram's use. *See* App. 1130–31 (Yingst Dep. 109:7–110:8).

33. If a Retail Money Order is not presented for payment, MoneyGram—as the holder of the unclaimed property—is responsible for reporting the sum representing the unclaimed balance. *See* App. 1040–41, 1053 (Petrick Dep. 131:17–132:3, 185:1–3).

34. Neither the agent that sold the Retail Money Order nor the clearing bank plays any role in the reporting of unclaimed Retail Money Orders. *See* App. 1042, 1048 (Petrick Dep. 133:14–16, 139:16–19).

35. Because MoneyGram has established its systems to not collect records that would allow it to identify the purchaser of the Retail Money Order, it does not perform due diligence to try to identify the rightful owner before reporting the unclaimed property. *See* App. 1091–92 (Yingst Dep. 57:17–58:4); *see also* App. 421 (Dep. Ex. 50 at MG004667).

36. Pursuant to the Federal Disposition Act, MoneyGram remits the unclaimed property to the State in which the Retail Money Order was purchased. *See* App. 1021 (Petrick Dep. 36:18–20); *see also* App. 425 (Dep. Ex. 50 at MG004671).

37. In addition to Retail Money Orders, MoneyGram offers another line of prepaid money transfer products for financial institutions to sell, which it markets as "Official Checks." *See* App. 1066 (Yingst Dep. 28:6– 19).

38. An "Official Check" is not a defined type of instrument in the Uniform Commercial Code (the "U.C.C."); it is a label MoneyGram uses to describe the prepaid instruments processed through its "Official Check" platform. *See* App. 1122 (Yingst Dep. 101:2–14); *see also* App. 182, 217 (Dep. Ex. 13 at 1, 36) ("Primelink Official Checks Operating Instructions").

39. MoneyGram sells its Official Check processing service to its banks and credit union customers. *See* App. 1066–67 (Yingst Dep. 28:6–19, 28:20–29:3).

40. In its line of Official Checks, MoneyGram offers four products: what it labels as "Cashier's

Checks," "Agent Check Money Orders," "Agent Checks," and "Teller's Checks." *See* App. 1074 (Yingst Dep. 36:15–21); *see also* App. 226 (Dep. Ex. 15 § 2).

41. In some cases, MoneyGram appears to have sold Retail Money Orders through its Official Check platform as well. *See* App. 1074 (Yingst Dep. 36:15–21); *see also* App. 307 (Dep. Ex. 20 § 2).

42. Because MoneyGram is not responsible for reporting the unclaimed balances of abandoned Cashier's Checks, those instruments are not subject to this lawsuit. *See* App. 1242 (Yingst Dep. 229:17–22).

43. A representative example of the product that MoneyGram labels as an "Agent Check Money Order" is included in the appendix. *See* App. 32–33 (Dep. Ex. 4 [Ex. E]); *see also* App. 1113–14 (Yingst Dep. 92:22–93:7).

44. MoneyGram provides a template to its selling financial institutions showing what must be printed on an Agent Check Money Order. *See* App. 35 (Yingst Dep. Ex. 4 [Ex. G]); *see also* App. 1119 (Yingst Dep. 98:6– 24).

45. The documents attached to Deposition Exhibit 4 as Exhibits E and G are representative of the Agent Check Money Orders issued by MoneyGram since 2000. *See* App. 16–17 (Dep. Ex. 4 at ¶ 4).

46. Another example of an Agent Check Money Order appears in the record at App. 53 (Dep. Ex. 8).

47. The appendix contains a representative sample Agent Check Money Order. *See* App. 53 (Dep. Ex. 8).

48. A MoneyGram Agent Check Money Order functions in the same way as a MoneyGram Retail

Money Order. *See* App. 1106, 1114–15, 1137–38 (Yingst Dep. 85:6–22, 93:24–94:17, 116:8–117:7).

49. Agent Check Money Orders are sold by financial institutions, which act as agents for MoneyGram and are not considered parties who are liable on the instruments. *See* App. 1195 (Yingst Dep. 174:15–22); *see also* App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Ex. 8); App. 226–27 (Ex. 15 § 3).

50. An individual wishing to purchase an Agent Check Money Order pays the desired face value of the Agent Check Money Order to the selling financial institution, and then signs the instrument. *See* App. 53 (Dep. Ex. 8); App. 64–65 (Dep. Ex. 12 at 5–6); *see also* App. 1198–1200 (Yingst Dep. 177:14–20, 178:19–179:1).

51. MoneyGram imposes no limits on the face value of an Agent Check Money Order or any other type of Official Check, though the selling financial institution may choose to do so. *See* App. 1211–12 (Yingst Dep. 190:4–191:3).

52. MoneyGram is designated as both the "drawer" and the "issuer" of the Agent Check Money Order. *See* App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8); App. 226–27 (Dep. Ex. 15 § 3); *see also* App. 1118 (Yingst Dep. 97:4–10).

53. The purchaser then delivers the Agent Check Money Order to the intended recipient, who can redeem the instrument for its face value in the same way as the recipient of a Retail Money Order. *See* App. 1106–07, 1114–15 (Yingst Dep. 85:6–86:15, 93:24–94:17).

54. At its own discretion, the selling financial institution may label its Agent Check Money Orders

more generally as "personal" or "international" money orders. *See* App. 1194–95 (Yingst Dep. 173:22–174:14); *see also* App. 53 (Dep. Ex. 8); App. 58 (Dep. Ex. 11 at 2).

55. The selling financial institution of the Agent Check Money Order then sends the same four pieces of information to MoneyGram as with a Retail Money Order—the amount of the instrument, the date of purchase, the serial number, and the customer identification number of the financial institution that sold the Agent Check Money Order. *See* App. 1250–51 (Yingst Dep. 266:16–267:6); *see also* App. 1254 (Yingst Dep. 270:5–11).

56. MoneyGram can use that information gleaned from the selling financial institution of the Agent Check Money Order to determine the State in which the purchaser bought the Agent Check Money Order. *See* App. 1025 (Petrick Dep. 68:2–10).

57. The selling financial institution does not convey any information about the purchaser of the Agent Check Money Order, and MoneyGram does not receive an image of the Agent Check Money Order until it is presented for payment. *See* App. 1139–42 (Yingst Dep. 118:24– 121:12).

58. Also like a Retail Money Order, the selling financial institution of the Agent Check Money Order transfers the money (equal to the face value of the Agent Check Money Order) to satisfy the obligation thereunder to MoneyGram. *See* App. 1253–54 (Yingst Dep. 269:12–270:4).

59. MoneyGram then holds that money identified in the previous paragraph in the same commingled portfolio where it holds the funds to satisfy Retail Money Orders. *See* App. 1136–37 (Yingst Dep. 115:15–116:6).

60. When an Agent Check Money Order is presented for payment, it goes through the Federal Reserve clearing process in the same manner as Retail Money Orders by using the routing and transit numbers of one of MoneyGram's clearing banks. *See* App. 1118–19, 1138–39 (Yingst Dep. 97:8–98:5, 117:8–118:23).

61. MoneyGram can use the same clearing bank for both Retail Money Orders and Agent Check Money Orders. *See* App. 1121 (Yingst Dep. 100:6–18).

62. MoneyGram, not the selling financial institution, selects the clearing banks for Agent Check Money Orders. *See* App. 1120 (Yingst Dep. 99:8–15).

63. The clearing banks identified in the previous paragraph are designated as the "drawees" on the Agent Check Money Orders. *See* App. 1118 (Yingst Dep. 97:11–20); *see also* App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8).

64. Like with Retail Money Orders, MoneyGram is the holder of the funds that represent the proceeds of unclaimed Agent Check Money Orders. *See* App. 1023 (Petrick Dep. 66:11–23).

65. MoneyGram does not collect information related to the purchaser of the unclaimed Agent Check Money Orders, so it does not perform any due diligence before reporting the property as unclaimed. *See* App. 1139–42 (Yingst Dep. 118:24–121:12); *see also* App. 421 (Dep. Ex. 50 at MG004667).

66. As with Retail Money Orders, MoneyGram reports the funds representing unclaimed Agent Check Money Orders to the State in which the Agent Check Money Order was purchased. *See* App. 1021 (Petrick Dep. 36:1–4); App. 210 (Dep. Ex. 13 at 29).

67. A representative example of the product that MoneyGram labels as an "Agent Check" is included in the appendix. *See* App. 343–44 (Dep., Ex. 26 [Ex. A]); *see also* App. 1204–06 (Yingst Dep. 183:14– 185:19).

68. MoneyGram provides a template to its selling financial institutions showing what must be printed on an Agent Check. *See* App. 345–46 (Dep. Ex. 26 [Ex. B]).

69. The aforementioned Agent Checks are representative of the Agent Checks issued by MoneyGram since 2000. *See* App. 342 (Dep. Ex. 26); App. 1180–81, 1204 (Yingst Dep. 159:22–160:5, 183:14–21); *see also* App. 52, 56 (Dep. Exs. 7, 10) (further examples of Agent Checks); *see* App. 1266–68 (Supp. Yingst Decl. ¶¶ 2–3 & [Ex. A]) (giving example of a "blank stock" Agent Check).

70. Just as with Retail Money Orders and Agent Check Money Orders, an Agent Check purchaser remits the face value of the Agent Check to the selling financial institution. *See* App. 64–65 (Dep. Ex. 12 at 5–6).

71. As with Retail Money Orders and Agent Check Money Orders, the selling financial institution of an Agent Check acts only as an agent for MoneyGram, who is identified as the drawer and issuer of the Agent Checks. *See* App. 236–38 (Dep. Ex. 16); *see also* App. 1185 (Yingst Dep. 164:13–24).

72. MoneyGram's clearing bank is designated as the drawee on an Agent Check. *See* App. 236–38, 343–44 (Dep. Exs. 16, 26 [Ex. A]); *see also* App. 1186 (Yingst Dep. 165:6–15).

73. An Agent Check also can be labeled simply as an "Official Check" on its face. *See* App. 56 (Dep. Ex. 10); *see also* App. 1204–05 (Yingst Dep. 183:14–184:19).

74. Using the same system that processes Agent Check Money Orders, the selling financial institution informs MoneyGram of the amount of the Agent Check, the date of purchase, the serial number, and the customer identification number of the selling financial institution. *See* App. 1250–51, 1254 (Yingst Dep. 266:16–267:6; 270:5–11).

75. As with Agent Check Money Orders, the selling financial institution does not convey to MoneyGram any information about the purchaser of the Agent Check or an image of the Agent Check. *See* App. 1150–52 (Yingst Dep. 129:4–131:13).

76. MoneyGram holds the money obtained from the purchase of the Agent Check (which is equal to the face value of the Agent Check) in the same commingled portfolio of investments and accounts as with those from Agent Check Money Orders and Retail Money Orders. *See* App. 1088–89 (Yingst Dep. 54:17–55:7); *see also* App. 1136–37, 1174 (Yingst Dep. 115:15–116:6; 153:7–16).

77. An Agent Check presented for payment goes through the same clearing process as with Agent Check Money Order and Retail Money Order, using a clearing bank's routing and transit number. *See* App. 1185, 1188–92 (Yingst Dep. 164:6–12; 167:23–171:8).

78. The backend processing that MoneyGram provides for Agent Checks is no different than the backend processing that MoneyGram provides for Agent Check Money Orders and Retail Money Orders. *See* App. 1191, 1243 (Yingst Dep. 171:3–8, 258:14–20).

79. Unlike with Agent Check Money Order and Retail Money Orders, however, MoneyGram reports the proceeds of all of its unclaimed Agent Checks to the State of its incorporation—Minnesota until 2005, and Delaware since then. *See* App. 375–78 (Dep. Ex. 42); *see also* App. 210 (Dep. Ex. 13 at 29).

80. MoneyGram does not collect any information related to the purchaser of the unclaimed Agent Check, so it does not perform any due diligence before reporting the property. *See* App. 1150–52 (Yingst Dep. 129:14–131:13); *see also* App. 421 (Dep. Ex. 50 at MG004667).

81. Despite the functional equivalency of Agent Checks, Agent Check Money Orders, and Retail Money Orders, MoneyGram's corporate designee on its escheatment practices, Kate Petrick could not state the basis for MoneyGram's policy of reporting unclaimed Agent Checks to its State of incorporation. *See* App. 1042–44 (Petrick Dep. 133:17–135:4).

82. Rather, Petrick testified that the decision to report unclaimed Agent Checks to MoneyGram's State of incorporation was made by MoneyGram's "attorneys and outside counsel." App. 1042–44 (Petrick Dep. 133:17–135:4).

83. A representative example of the product that MoneyGram labels as a "Teller's Check" is included in the appendix. *See* App. 347–48 (Dep. Ex. 26 [Ex. C]).

84. Other examples of Teller's Checks appear in the record. *See, e.g.*, App. 51, 54 (Dep. Exs. 6, 9); *see also* App. 1156, 1201 (Yingst Dep. 135:17–22, 180:4–18); App. 1266, 1269–70 (Supp. Yingst Decl. ¶¶ 2, 4 & [Ex. B]) (giving example of a "blank stock" Teller's Check).

85. MoneyGram provides a template to its selling financial institutions showing what must be printed on a Teller's Check. *See* App. 349–50 (Dep. Ex. 26 [Ex. D]).

86. These documents are representative of the Teller's Checks issued by MoneyGram since 2000. *See* App. 342 (Dep. Ex. 26 ¶ 7).

87. A MoneyGram Teller's Check is issued and paid in the same way as Retail Money Orders and Agent Check Money Orders:

a. The purchaser of the Teller's Check remits the value of the Teller's Check to the selling financial institution, which then issues the written instrument. *See* App. 1158–60 (Yingst Dep. 137:23–139:13).

b. The selling financial institution of the Teller's Check transfers the money (equal to the face value of the Teller's Check) to satisfy the obligation thereunder to MoneyGram. *See* App. 1150–52 (Yingst Dep. 129:14–131:13).

c. The selling financial institution of the Teller's Check provides the following information to MoneyGram: the amount of the instrument, the date of purchase, the serial number, and the customer identification number of the financial institution that sold the Teller's Check. *See* App. 1150–52 (Yingst Dep. 129:14–131:13).

d. The selling financial institution does not report to MoneyGram any information regarding the purchaser of the Teller's Check. *See* App. 1150–52 (Yingst Dep. 129:14–131:13).

88. And like the other Official Check products, Teller's Checks are made payable to a named payee. *See* App. 347–48 (Dep. Ex. 26 [Ex. C]).

89. Money from the Teller's Check purchase (equal to the face value of the Teller's Check) remains in the same commingled investment portfolio with the proceeds from Retail Money Orders, Agent Check Money Orders, and Agent Checks (as previously described) until the Teller's Check is cleared through the Federal Reserve using the clearing bank's routing and transit numbers. *See* App. 1174 (Yingst Dep. 153:7–16).

90. Like Agent Checks, Teller's Checks will sometimes simply be labeled as "Official Checks" on their face. *See* App. 54–55 (Dep. Ex. 9) (Teller's Check); App. 56 (Dep. Ex. 10 (Agent Check)).

91. The selling financial institution's role in the process of selling a Teller's Check is limited in the same way as it is with respect to Retail Money Orders and other Official Checks – the institution issues the instrument to the purchaser, collects the purchaser's money, and forwards that money and certain information along to MoneyGram. *See* App. 1150–52, 1177–79, 1188 (Yingst Dep. 129:14–131:13, 156:2–158:9, 167:15–19).

92. There are some differences between Teller's Checks and the previously-discussed instruments:

a. While MoneyGram continues to be identified as the issuer of its Teller's Checks, the local financial institution is typically described as a drawer. *See* App. 347–48 (Dep. Ex. 26 [Ex. C]).

b. MoneyGram's agreements with its financial institution customers refer to these Teller's

Checks as being "drawn by" both the financial institution and MoneyGram. *See* App. 307–08 (Dep. Ex. 20 § 3).

c. While MoneyGram's corporate representative, Eva Yingst testified that the selling financial institutions do not act as agents for MoneyGram in selling Teller's Checks (unlike the other instruments previously discussed); however, at least some of the financial institution agreements specifically appoint the financial institution as MoneyGram's agent for purposes of selling Teller's Checks and other Official Checks. *See* App. 1187–88 (Yingst Dep. 166:24–167:14); *see also* App. 227 (Dep. Ex. 15 § 5).

d. Teller's Checks may have next-day availability under federal Regulation CC, which means the depositor has a right to withdraw the funds represented by a Teller's Check on the day after its deposit. *See* App. 58 (Dep. Ex. 11 at 2).

93. As with Retail Money Orders, Agent Check Money Orders, and Agent Checks, MoneyGram is responsible for reporting the funds representing unclaimed Teller's Checks. *See* App. 1020–22 (Petrick Dep. 35:11– 37:1).

94. But unlike Retail Money Orders and Agent Check Money Orders, today MoneyGram reports the proceeds of unclaimed Teller's Checks to the State of its incorporation. *See* App. 1020–22 (Petrick Dep. 35:11– 37:1); *see also* App. 210 (Dep. Ex. 13 at 29).

95. As was true of Agent Checks, MoneyGram cited only the instruction from its "attorneys and outside counsel" to explain its current reporting of Teller's Checks differently than Retail Money Orders

and Agent Check Money Orders. *See* App. 1044 (Petrick Dep. 135:5–11).

96. From the time that MoneyGram began offering Teller's Checks as part of its "Official Check" line of products until 2005, MoneyGram reported funds from unclaimed Teller's Checks to the States in which they were purchased or in which their financial-institution customer was incorporated. *See* App. 375–85 (Dep. Exs. 42–44).

97. MoneyGram changed its practice in 2005 and began to report all of its unclaimed Teller's Check proceeds to Delaware. *See* App. 375–85 (Dep. Exs. 42–44).

98. By reporting its unclaimed Teller's Check proceeds to its state of incorporation, MoneyGram acknowledges that its books and records do not contain information about the purchaser or intended payee of the instrument. *See* App. 375–85 (Dep. Exs. 42–44).

99. Per its internal policies, MoneyGram does not perform any due diligence to try to locate the rightful owner of Teller's Checks despite the acknowledgement that the selling financial institutions may indeed have that information. *See* App. 375–85 (Dep. Exs. 42–44); *see also* App. 421 (Dep. Ex. 50 at MG004667).

100. MoneyGram has admitted that escheating funds from abandoned Official Checks to every State of purchase is as easy for MoneyGram as escheating to just one State. *See* Petrick Dep. 81:1–22, 83:21–84:4.[2]

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[2] These excerpts from the Petrick Deposition are contained in the amendment to the appendix that Pennsylvania is concurrently filing.

101. In or around 2014, certain of the Defendant States contracted with Treasury Services Group ("TSG") to audit MoneyGram's books and records to determine compliance with unclaimed-property laws. *See* App. 958–65 (Kauffman Dep. 18:5–25:14); *see also* App. 583–85 (Dep. Exs. 71–73).

102. The TSG audit of MoneyGram's books and records found that MoneyGram should have remitted to Delaware only approximately $1 million—not the more than $250 million that Delaware in fact received from MoneyGram. *See* App. 593 (Dep. Ex. 103 at ALF00001796).

103. Between 2002 and 2017, less than one half of one-percent of all official check property escheated to Delaware was actually purchased in Delaware. App. 593 (Dep. Ex. 103 at ALF00001796); *see also* App. 967–68 (Kauffman Dep. 192:16–193:2).

104. Minnesota, MoneyGram's prior state of incorporation, has paid previously remitted unclaimed official check proceeds to a number of States. *See* App. 968–69 (Kauffman Dep. 193:3–194:8).

February 1, 2019 Respectfully submitted,

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Counsel of record for Defendant States in Case No. 22O146 certifies that on February 1, 2019, this document was served, as required by Case Management Order No. 5, on the following counsel:

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SUPREME COURT OF THE UNITED STATES

Nos. 220145 & 220146
(Consolidated)

DELAWARE,

Plaintiff,

v.

ARKANSAS, *et al.*,

Defendants.

RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

1. All Defendant States have enacted state legislation that empowers them to take custody of the unclaimed property at issue in this case. See Table A (attached to Defendant States' concurrently filed motion for summary judgment on liability).

Response: Delaware disputes this fact. Even if the instruments at issue are found to be "similar written instruments," under 12 U.S.C. § 2503, a State is only entitled to take escheat of items otherwise subject to the FDA "to the extent of that State's power under its own laws to escheat or take custody of such sum." At a minimum, at least ten (10) Defendant States do not have the "power under [their] own laws" to take possession of "similar written instruments." *See, e.g.,* Code of Ala. § 35-12-74 (Alabama), A.R.S. § 44-304 (Arizona), A.C.A. § 18-28-204 (Arkansas), Ind. Code Ann. 32-34-1-21 (Indiana), IA Code § 556.2A (Iowa), K.S.A. 58-3936 (Kansas), Mont. Code Ann. § 70-9-805

(Montana), Nev. Rev. Stat. Ann. § 120A.530 (Nevada), Tex. Property Code Ann. § 72.102 (Texas), W. Va. Code § 36-8-4 (West Virginia).

2. MoneyGram Payment Systems, Inc. ("MoneyGram") is a subsidiary of MoneyGram International, Inc. See App. 353 (Dep. Ex. 28 at 1).

Response: Not disputed.

3. MoneyGram International, Inc. is the second largest money-transfer business in the world. See App. 4 (Dep. Ex. 2 at 4); see also App. 1064 (Yingst Dep. 21:3–7).

Response: Not disputed.

4. MoneyGram International, Inc. processes over 750,000 transactions each day; its annual revenue exceeds $1 billion; and it employs more than 2,300 employees. See App. 40 (Dep. Ex. 5 at 5). It is a publicly traded corporation that, as a money transmitter, is subject to extensive state regulation. See, e.g., Cal. Fin. Code § 2000, et seq.; 7 P.S. § 6101 et seq.

Response: Not disputed.

5. MoneyGram has served financial institutions for over 75 years by providing prepaid money transfer products for the financial institutions to sell or to use to pay their own obligations. See App. 40 (Dep. Ex. 5 at 5); App. 353 (Dep. Ex. 28 at 1); see also App. 1064 (Yingst Dep. 21:16–22).

Response: Delaware disputes the characterization of the instruments at issue in this case as "money transfer products." The instruments at issue in this case are part of MoneyGram's Financial Paper Product segment and are also sold through retail locations. Delaware Statement of Undisputed Facts ("Delaware

SOF") ¶ 5 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Declaration ("Taliaferro Decl.")). Although MoneyGram Payment Systems, Inc. has been in business for over 75 years, it did not begin offering Official Check outsourcing until around 1979. Delaware SOF ¶ 60 (Ex. B to Massimino Decl. at 9, VIAD 65; Yingst 30:5-16 (Ex. A to Taliaferro Decl.)).

6. MoneyGram—which until approximately 2005 operated under the name Traveler's Express, Inc.,—processes the prepaid money transfer products sold by thousands of financial institutions in the United States. See App. 40 (Dep. Ex. 5 at 5); App. 353 (Dep. Ex. 28 at 1); see also App. 1064, 1145–46 (Yingst Dep. 21:16– 22, 124:23–125:10).

Response: Delaware disputes the characterization of the instruments at issue in this case as "money transfer products." The instruments at issue in this case are part of MoneyGram's Financial Paper Product segment and are also sold through retail locations. Delaware SOF ¶ 5 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.)). Although MoneyGram Payment Systems, Inc. has been in business for over 75 years, it did not begin offering Official Check outsourcing until around 1979. Delaware SOF ¶ 60 (Ex. B to Massimino Decl. at 9, VIAD 65; Yingst 30:5-16 (Ex. A to Taliaferro Decl.)).

7. MoneyGram refers to these financial institutions, which consist of banks and credit unions that sell its prepaid money transfer products, as its customers. See App. 1064, 1066–67 (Yingst Dep. 21:8–22, 28:6–29:3).

Response: Delaware disputes the characterization of the instruments at issue in this case as "money transfer products." The instruments at issue in this

case are part of MoneyGram's Financial Paper Product segment. Delaware SOF ¶ 5 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.)). Retail Money Orders are usually sold at retail locations; banks and credit unions do not generally sell Retail Money Orders. Delaware SOF ¶ 26 (Yingst 29:4-10 (Ex. A to Taliaferro Decl.)).

8. MoneyGram markets two lines of prepaid money transfer products for its customers: one line that MoneyGram markets as "Retail Money Orders," and another that MoneyGram markets as "Official Checks." See App. 1065–66, 1106, 1114 (Yingst Dep. 27:22–28:19, 85:6–22, 93:8–23).

Response: Delaware disputes the characterization of the instruments at issue in this case as "money transfer products." The instruments at issue in this case are part of MoneyGram's Financial Paper Product segment. Delaware SOF ¶ 5 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.)). Delaware does not dispute that MoneyGram markets Retail Money Orders to the public and markets Official Checks to financial institutions. SOF ¶ 45 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst 330:21-331:7 (Ex. A to Taliaferro Decl.)).

9. MoneyGram has provided representative examples of the MoneyGram Retail Money Orders sold between 2000 and 2017, which are sometimes but not always sold by financial institutions, in this litigation. See App. 16–33 (Dep. Ex. 4 [Exs. A–D]); see also App. 1102–03 (Yingst Dep. 81:17–82:22).

Response: Delaware disputes this fact. Retail Money Orders are almost universally sold by retail locations. MoneyGram agents include "mom and pop"

stores as well as large chains like Walmart. Delaware SOF ¶ 26 (Yingst 29:4-10 (Ex. A to Taliaferro Decl.)).

10. The appendix contains a representative sample MoneyGram Retail Money Order. See App. 18–19 (Dep. Ex. 4 [Ex. A]).

Response: Not disputed.

11. The appendix contains a sample of a template for printing a Retail Money Orders. See App. 34–35 (Dep. Ex. 4 [Ex. F]).

Response: Delaware disputes this fact. Although the cited App. 34 is a sample of a template for printing a Retail Money Order, cited App. 35 is a sample template for printing an Agent Check Money Order. Additionally, both templates are incomplete.

12. A purchaser of a Retail Money Order buys a Retail Money Order by remitting the monetary amount imprinted on the face of the instrument, plus any applicable fee, to the seller. See App. 1079, 1083–84 (Yingst Dep. 45:7–15, 49:17– 50:19).

Response: Not disputed.

13. The Retail Money Order seller is an agent for MoneyGram and is not considered a party on the instrument. See App. 1075–76 (Yingst Dep. 41:22–42:17).

Response: Not disputed.

14. In return, the purchaser receives a written instrument on which the purchaser can identify the desired recipient or payee. See App. 1077 (Yingst Dep. 43:10–15).

Response: Not disputed, as to Retail Money Orders.

15. MoneyGram is designated as the "issuer" and the "drawer" of the Retail Money Order instrument. See App. 1078 (Yingst Dep. 44:1–14); see also App. 18–19 (Dep. Ex. 4 [Ex. A]).

Response: Not disputed.

16. The Retail Money Order can then be redeemed by the recipient of the instrument for the face value imprinted on the instrument. See App. 1075–77 (Yingst Dep. 41:22–43:24).

Response: Not disputed.

17. MoneyGram typically caps the value of Retail Money Orders at $1,000, though a customer may buy more than one money order at a time. See App. 58 (Dep. Ex. 11 at 2); see also App. 1092–93 (Yingst Dep. 58:16–59:11).

Response: Not disputed.

18. MoneyGram's decision to typically cap on the value of Retail Money Orders at $1,000 is a business decision and not one required by law. App. 1097–98 (Yingst Dep. 63:16–64:5).

Response: Delaware disputes this fact. MoneyGram's witness testified that she was *unaware* of any legal restrictions. Yingst 307:9-15 (Ex. DD to Supplemental Taliaferro Declaration ("Supp. Taliaferro Decl.")). By capping the value of Retail Money Orders at $1,000, retail agents are not required to register as money services businesses. 31 CFR §1010.100(ff)(3). Otherwise, states a legal conclusion to which no response is required.

19. MoneyGram considers and markets the Retail Money Order instruments as "safe payment mechanism[s]" that are "accepted pretty much universally"

and are "as good as cash." See App. 1081–82, 1084–85, 1219–21 (Yingst Dep. 47:20– 48:23, 50:20–51:7, 198:21–200:3).

Response: Not disputed, as to Retail Money Orders.

20. When a MoneyGram agent sells a Retail Money Order, it reports four pieces of information back to MoneyGram: the dollar amount of the instrument, the instrument's serial number, the date of sale, and the customer-identification number of the location that sold the instrument. See App. 1247–49 (Yingst Dep. 263:5–265:6).

Response: Not disputed.

21. That customer-identification number of the location that sold the Retail Money Order allows MoneyGram to determine the State in which the instrument was sold. See App. 1249 (Yingst Dep. 265:9–21).

Response: Not disputed.

22. The information conveyed back to MoneyGram from the MoneyGram agent does not include any information related to the party who purchased the instrument, including that party's last-known address. See App. 1091–92 (Yingst Dep. 57:17–58:4).

Response: Delaware disputes this fact. In a case where a consumer purchases more than $3,000 of Money Orders in a single day, that individual's information is collected and maintained for five years. Delaware SOF ¶ 20 (Yingst 57:22-58:9 (Ex. A to Taliaferro Decl.)).

23. Additionally, MoneyGram does not receive an image of the Retail Money Order until it has been

presented for payment and cleared. See App. 1200 (Yingst Dep. 179:12–23).

Response: Delaware disputes this fact, as the cited deposition testimony is discussing Agent Check Money Orders.

24. The money that is remitted to purchase a MoneyGram Retail Money Order is transferred from the seller of the instrument to MoneyGram. See App. 1087 (Yingst Dep. 53:9–21).

Response: Delaware disputes this fact. The money remitted to purchase a MoneyGram Retail Money Order is not transferred from the agent to MoneyGram, but is directly debited by MoneyGram from the bank account of the agent. Delaware SOF ¶ 39 (Yingst 339:9-21 (Ex. A to Taliaferro Decl.)).

25. MoneyGram then holds the money remitted to purchase a MoneyGram Retail Money Order in a portfolio of accounts and investments, where it comingles the balance of all its outstanding Retail Money Orders and other MoneyGram paper-based payment products—including that of its Official Checks products. See App. 1088–89, 1262 (Yingst Dep. 54:5–55:4, 278:15–22).

Response: Not disputed.

26. The money that is remitted to purchase a MoneyGram Retail Money Order then remains in that commingled portfolio referred to in the previous paragraph until the Retail Money Order is presented for payment or remains dormant for long enough to become subject to unclaimed-property laws. See App. 1089–90, 1128–29 (Yingst Dep. 55:13–56:5, 107:11–108:11).

Response: Not disputed.

27. When a Retail Money Order is presented for payment, it goes through the Federal Reserve clearing process using the routing number and transit number on the bottom of the instrument. See App. 1100–01, 1130–31 (Yingst Dep. 71:4– 72:20, 109:7–110:8).

Response: Not disputed.

28. Those routing and transit numbers on the Retail Money Order are associated with a certain "clearing bank" that MoneyGram has contracted with to use its routing and transit numbers to intercept the MoneyGram items. See App. 1071–72, 1130–31 (Yingst Dep. 33:8–34:6, 109:7–110:8); see also App. 239–306 (Dep. Exs. 17–19).

Response: Not disputed.

29. A clearing bank is listed as the "payable through" entity on the face of the Retail Money Order. See App. 18–19 (Dep. Ex. 4 [Ex. A]); see also App. 1075–76, 1100–01 (Yingst Dep. 41:22–42:17, 71:10–72:11).

Response: Not disputed.

30. MoneyGram uses funds from its commingled portfolio (described above) to pay the clearing banks for the amount of the cleared Retail Money Orders. See App. 1101 (Yingst Dep. 72:12–20).

Response: Not disputed.

31. The clearing banks do not receive any information about the Retail Money Orders presented to them for payment, and the clearing banks have no relationship with the agents that sell Retail Money

Orders. See App. 1072–73, 1130–31 (Yingst Dep. 34:22–35:11, 109:7–110:8).

Response: Not disputed.

32. The role of the clearing banks is simply to provide routing and transit numbers for MoneyGram's use. See App. 1130–31 (Yingst Dep. 109:7–110:8).

Response: Not disputed.

33. If a Retail Money Order is not presented for payment, MoneyGram—as the holder of the unclaimed property—is responsible for reporting the sum representing the unclaimed balance. See App. 1040–41, 1053 (Petrick Dep. 131:17–132:3, 185:1–3).

Response: Assumed "reporting" means complying with unclaimed property laws. So assumed, not disputed.

34. Neither the agent that sold the Retail Money Order nor the clearing bank plays any role in the reporting of unclaimed Retail Money Orders. See App. 1042, 1048 (Petrick Dep. 133:14–16, 139:16–19).

Response: Assumed "reporting" means complying with unclaimed property laws. So assumed, not disputed.

35. Because MoneyGram has established its systems to not collect records that would allow it to identify the purchaser of the Retail Money Order, it does not perform due diligence to try to identify the rightful owner before reporting the unclaimed property. See App. 1091–92 (Yingst Dep. 57:17–58:4); see also App. 421 (Dep. Ex. 50 at MG004667).

Response: MoneyGram disputes this fact, as there is no testimony that states MoneyGram established

its system for those purposes. Additionally, in a case where a consumer purchases more than $3,000 of Money Orders in a single day, that individual's information is collected and maintained for five years. Delaware SOF ¶ 20 (Yingst 57:22-58:9 (Ex. A to Taliaferro Decl.)).

36. Pursuant to the Federal Disposition Act, MoneyGram remits the unclaimed property to the State in which the Retail Money Order was purchased. See App. 1021 (Petrick Dep. 36:18–20); see also App. 425 (Dep. Ex. 50 at MG004671).

Response: Not disputed.

37. In addition to Retail Money Orders, MoneyGram offers another line of prepaid money transfer products for financial institutions to sell, which it markets as "Official Checks." See App. 1066 (Yingst Dep. 28:6–19).

Response: Delaware disputes the characterization of the instruments at issue in this case as "money transfer products." The instruments at issue in this case are part of MoneyGram's Financial Paper Product segment. Delaware SOF ¶ 5 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.)). Additionally, Retail Money Orders are almost universally sold at retail locations. Delaware SOF ¶ 26 (Yingst 29:4-10 (Ex. A to Taliaferro Decl.)). Official Checks are exclusively sold by financial institutions. Delaware SOF ¶ 65 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.)).

38. An "Official Check" is not a defined type of instrument in the Uniform Commercial Code (the "U.C.C."); it is a label MoneyGram uses to describe the prepaid instruments processed through its "Official Check" platform. See App. 1122 (Yingst Dep. 101:2–

14); see also App. 182, 217 (Dep. Ex. 13 at 1, 36) ("Primelink Official Checks Operating Instructions").

Response: Delaware disputes this fact. In Defendant States' expert's own casebook and case outline, he states that an "official check" is a "teller's check," which is a defined type of instrument in the U.C.C. Gillette Ex. 149 at 55 (Ex. FF to Supp. Taliaferro Decl.); Gillette Ex. 150 at 8 (Ex. GG to Supp. Taliaferro Decl.).

39. MoneyGram sells its Official Check processing service to its banks and credit union customers. See App. 1066–67 (Yingst Dep. 28:6–19, 28:20–29:3).

Response: Not disputed.

40. In its line of Official Checks, MoneyGram offers four products: what it labels as "Cashier's Checks," "Agent Check Money Orders," "Agent Checks," and "Teller's Checks." See App. 1074 (Yingst Dep. 36:15–21); see also App. 226 (Dep. Ex. 15 § 2).

Response: Delaware disputes this fact. In her testimony, MoneyGram's witness clarified that although these four instruments are *processed* on the Official Check platform, Agent Check Money Orders *cannot* be titled "Official Checks." Yingst 36: 17-21 (Defendant States' Appendix ("DS App.") 1074); Yingst 162:17-163:6 (DS App. 1183-1184); Delaware SOF ¶ 91 (Yingst 162:7-13 (Ex. A to Taliaferro Decl.); Yingst Ex. 11 at MG-000298 (Ex. E to Taliaferro Decl.)).

41. In some cases, MoneyGram appears to have sold Retail Money Orders through its Official Check platform as well. See App. 1074 (Yingst Dep. 36:15–21); see also App. 307 (Dep. Ex. 20 § 2).

Response: Delaware disputes this fact. The cited evidence does not refer to Retail Money Orders.

42. Because MoneyGram is not responsible for reporting the unclaimed balances of abandoned Cashier's Checks, those instruments are not subject to this lawsuit. See App. 1242 (Yingst Dep. 229:17–22).

Response: Not disputed.

43. A representative example of the product that MoneyGram labels as an "Agent Check Money Order" is included in the appendix. See App. 32–33 (Dep. Ex. 4 [Ex. E]); see also App. 1113–14 (Yingst Dep. 92:22–93:7).

Response: Not disputed.

44. MoneyGram provides a template to its selling financial institutions showing what must be printed on an Agent Check Money Order. See App. 35 (Yingst Dep. Ex. 4 [Ex. G]); see also App. 1119 (Yingst Dep. 98:6–24).

Response: Delaware disputes this fact. App. 35 is an incomplete template.

45. The documents attached to Deposition Exhibit 4 as Exhibits E and G are representative of the Agent Check Money Orders issued by MoneyGram since 2000. See App. 16–17 (Dep. Ex. 4 at ¶ 4).

Response: Delaware disputes this fact. Exhibit G is a template for the front of an Agent Check Money Order.

46. Another example of an Agent Check Money Order appears in the record at App. 53 (Dep. Ex. 8).

Response: Not disputed.

47. The appendix contains a representative sample Agent Check Money Order. See App. 53 (Dep. Ex. 8).

Response: Not disputed.

48. A MoneyGram Agent Check Money Order functions in the same way as a MoneyGram Retail Money Order. See App. 1106, 1114–15, 1137–38 (Yingst Dep. 85:6–22, 93:24–94:17, 116:8–117:7).

Response: Not disputed.

49. Agent Check Money Orders are sold by financial institutions, which act as agents for MoneyGram and are not considered parties who are liable on the instruments. See App. 1195 (Yingst Dep. 174:15–22); see also App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Ex. 8); App. 226–27 (Ex. 15 § 3).

Response: Not disputed.

50. An individual wishing to purchase an Agent Check Money Order pays the desired face value of the Agent Check Money Order to the selling financial institution, and then signs the instrument. See App. 53 (Dep. Ex. 8); App. 64–65 (Dep. Ex. 12 at 5–6); see also App. 1198–1200 (Yingst Dep. 177:14–20, 178:19–179:1).

Response: Not disputed. However, a financial institution may also charge a fee in addition to the face value of the Agent Check Money Order. Yingst 406:7-13 (Ex. DD to Supp. Taliaferro Decl.).

51. MoneyGram imposes no limits on the face value of an Agent Check Money Order or any other type of Official Check, though the selling financial institution may choose to do so. See App. 1211–12 (Yingst Dep. 190:4–191:3).

Response: Not disputed.

52. MoneyGram is designated as both the "drawer" and the "issuer" of the Agent Check Money Order. See App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8); App. 226–27 (Dep. Ex. 15 § 3); see also App. 1118 (Yingst Dep. 97:4–10).

Response: Not disputed.

53. The purchaser then delivers the Agent Check Money Order to the intended recipient, who can redeem the instrument for its face value in the same way as the recipient of a Retail Money Order. See App. 1106–07, 1114–15 (Yingst Dep. 85:6–86:15, 93:24–94:17).

Response: Not disputed.

54. At its own discretion, the selling financial institution may label its Agent Check Money Orders more generally as "personal" or "international" money orders. See App. 1194–95 (Yingst Dep. 173:22–174:14); see also App. 53 (Dep. Ex. 8); App. 58 (Dep. Ex. 11 at 2).

Response: Not disputed.

55. The selling financial institution of the Agent Check Money Order then sends the same four pieces of information to MoneyGram as with a Retail Money Order—the amount of the instrument, the date of purchase, the serial number, and the customer identification number of the financial institution that sold the Agent Check Money Order. See App. 1250–51 (Yingst Dep. 266:16–267:6); see also App. 1254 (Yingst Dep. 270:5–11).

Response: Not disputed.

56. MoneyGram can use that information gleaned from the selling financial institution of the Agent Check Money Order to determine the State in which the purchaser bought the Agent Check Money Order. See App. 1025 (Petrick Dep. 68:2–10).

Response: Not disputed.

57. The selling financial institution does not convey any information about the purchaser of the Agent Check Money Order, and MoneyGram does not receive an image of the Agent Check Money Order until it is presented for payment. See App. 1139–42 (Yingst Dep. 118:24–121:12).

Response: Not disputed.

58. Also like a Retail Money Order, the selling financial institution of the Agent Check Money Order transfers the money (equal to the face value of the Agent Check Money Order) to satisfy the obligation thereunder to MoneyGram. See App. 1253–54 (Yingst Dep. 269:12–270:4).

Response: Delaware disputes this fact. The selling financial institution usually wires MoneyGram the face value of the Agent Check Money Order. Yingst 269:15-24 (DS App. 1253).

59. MoneyGram then holds that money identified in the previous paragraph in the same commingled portfolio where it holds the funds to satisfy Retail Money Orders. See App. 1136–37 (Yingst Dep. 115:15–116:6).

Response: Not disputed.

60. When an Agent Check Money Order is presented for payment, it goes through the Federal Reserve clearing process in the same manner as Retail

Money Orders by using the routing and transit numbers of one of MoneyGram's clearing banks. See App. 1118–19, 1138–39 (Yingst Dep. 97:8–98:5, 117:8–118:23).

Response: Not disputed.

61. MoneyGram can use the same clearing bank for both Retail Money Orders and Agent Check Money Orders. See App. 1121 (Yingst Dep. 100:6–18).

Response: Not disputed.

62. MoneyGram, not the selling financial institution, selects the clearing banks for Agent Check Money Orders. See App. 1120 (Yingst Dep. 99:8–15).

Response: Not disputed.

63. The clearing banks identified in the previous paragraph are designated as the "drawees" on the Agent Check Money Orders. See App. 1118 (Yingst Dep. 97:11–20); see also App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8).

Response: Not disputed.

64. Like with Retail Money Orders, MoneyGram is the holder of the funds that represent the proceeds of unclaimed Agent Check Money Orders. See App. 1023 (Petrick Dep. 66:11–23).

Response: Not disputed.

65. MoneyGram does not collect information related to the purchaser of the unclaimed Agent Check Money Orders, so it does not perform any due diligence before reporting the property as unclaimed. See App. 1139–42 (Yingst Dep. 118:24–121:12); see also App. 421 (Dep. Ex. 50 at MG004667).

Response: Not disputed.

66. As with Retail Money Orders, MoneyGram reports the funds representing unclaimed Agent Check Money Orders to the State in which the Agent Check Money Order was purchased. See App. 1021 (Petrick Dep. 36:1–4); App. 210 (Dep. Ex. 13 at 29).

Response: Not disputed.

67. A representative example of the product that MoneyGram labels as an "Agent Check" is included in the appendix. See App. 343–44 (Dep., Ex. 26 [Ex. A]); see also App. 1204–06 (Yingst Dep. 183:14–185:19).

Response: Not disputed, but clarified that there are two different types of MoneyGram Agent Checks. Delaware SOF ¶ 87 (Ex. A to Whitlock Official Check Aff. at MG0000004); Delaware SOF ¶ 88 (Yingst 419:7-420:21 (Ex. A to Taliaferro Decl.); Yingst Ex. 10 (Ex. D to Taliaferro Decl.)).

68. MoneyGram provides a template to its selling financial institutions showing what must be printed on an Agent Check. See App. 345–46 (Dep. Ex. 26 [Ex. B]).

Response: Not disputed.

69. The aforementioned Agent Checks are representative of the Agent Checks issued by MoneyGram since 2000. See App. 342 (Dep. Ex. 26); App. 1180–81, 1204 (Yingst Dep. 159:22–160:5, 183:14–21); see also App. 52, 56 (Dep. Exs. 7, 10) (further examples of Agent Checks); see App. 1266–68 (Supp. Yingst Decl. ¶¶ 2–3 & [Ex. A]) (giving example of a "blank stock" Agent Check).

Response: Not disputed, as to the Exhibits to the Whitlock Declaration.

70. Just as with Retail Money Orders and Agent Check Money Orders, an Agent Check purchaser remits the face value of the Agent Check to the selling financial institution. See App. 64–65 (Dep. Ex. 12 at 5–6).

Response: Delaware disputes this fact. Agent Checks are not usually purchased by consumers, but are used by banks to pay their own obligations. Yingst 169:11-170:8 (Ex. A to Taliaferro Decl.).

71. As with Retail Money Orders and Agent Check Money Orders, the selling financial institution of an Agent Check acts only as an agent for MoneyGram, who is identified as the drawer and issuer of the Agent Checks. See App. 236–38 (Dep. Ex. 16); see also App. 1185 (Yingst Dep. 164:13–24).

Response: Delaware disputes this fact. One variety of MoneyGram Agent Check indicates that the drawer of the instrument is MoneyGram, and that the individual signing the check is signing as "Agent for MoneyGram." Delaware SOF ¶ 87 (Ex. A to Whitlock Official Check Aff. at MG0000004). A second variety of MoneyGram Agent Check lists the drawer of the instrument as MoneyGram, but simply lists the individual signing the check as "authorized signature." In the absence of language indicating otherwise, "a signature in the lower right hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft." Delaware SOF ¶ 88 (U.C.C. § 3-204, cmt. 1; Yingst 419:7 420:21 (Ex. A to Taliaferro Decl.); Yingst Ex. 10 (Ex. D to Taliaferro Decl.)).

72. MoneyGram's clearing bank is designated as the drawee on an Agent Check. See App. 236–38, 343–

44 (Dep. Exs. 16, 26 [Ex. A]); see also App. 1186 (Yingst Dep. 165:6–15).

Response: Not disputed.

73. An Agent Check also can be labeled simply as an "Official Check" on its face. See App. 56 (Dep. Ex. 10); see also App. 1204–05 (Yingst Dep. 183:14–184:19).

Response: Not disputed.

74. Using the same system that processes Agent Check Money Orders, the selling financial institution informs MoneyGram of the amount of the Agent Check, the date of purchase, the serial number, and the customer identification number of the selling financial institution. See App. 1250–51, 1254 (Yingst Dep. 266:16–267:6; 270:5–11).

Response: Not disputed.

75. As with Agent Check Money Orders, the selling financial institution does not convey to MoneyGram any information about the purchaser of the Agent Check or an image of the Agent Check. See App. 1150–52 (Yingst Dep. 129:4– 131:13).

Response: Not disputed.

76. MoneyGram holds the money obtained from the purchase of the Agent Check (which is equal to the face value of the Agent Check) in the same commingled portfolio of investments and accounts as with those from Agent Check Money Orders and Retail Money Orders. See App. 1088–89 (Yingst Dep. 54:17–55:7); see also App. 1136–37, 1174 (Yingst Dep. 115:15–116:6; 153:7–16).

Response: Not disputed.

77. An Agent Check presented for payment goes through the same clearing process as with Agent Check Money Order and Retail Money Order, using a clearing bank's routing and transit number. See App. 1185, 1188–92 (Yingst Dep. 164:6–12; 167:23–171:8).

Response: Not disputed.

78. The backend processing that MoneyGram provides for Agent Checks is no different than the backend processing that MoneyGram provides for Agent Check Money Orders and Retail Money Orders. See App. 1191, 1243 (Yingst Dep. 171:3–8, 258:14–20).

Response: Not disputed.

79. Unlike with Agent Check Money Order and Retail Money Orders, however, MoneyGram reports the proceeds of all of its unclaimed Agent Checks to the State of its incorporation—Minnesota until 2005, and Delaware since then. See App. 375–78 (Dep. Ex. 42); see also App. 210

Response: Not disputed.

80. MoneyGram does not collect any information related to the purchaser of the unclaimed Agent Check, so it does not perform any due diligence before reporting the property. See App. 1150–52 (Yingst Dep. 129:14–131:13); see also App. 421 (Dep. Ex. 50 at MG004667).

Response: Not disputed.

81. Despite the functional equivalency of Agent Checks, Agent Check Money Orders, and Retail Money Orders, MoneyGram's corporate designee on its escheatment practices, Kate Petrick could not state the basis for MoneyGram's policy of reporting

unclaimed Agent Checks to its State of incorporation. See App. 1042–44 (Petrick Dep. 133:17–135:4).

Response: Delaware disputes the "functional equivalency" of Agent Checks, Agent Check Money Orders, and Retail Money Orders. For example, there is no service charge contract on the back of MoneyGram Official Checks, Delaware SOF ¶¶ 50, 51 (and cited evidence therein), MoneyGram Official Checks are sold exclusively through financial institutions and cannot be purchased at retail locations, Delaware SOF ¶ 48 (and cited evidence therein), and MoneyGram Official Checks are not limited to a maximum value of $1,000 and may be issued for any amount. Delaware SOF ¶ 68 (and cited evidence therein). Additionally, MoneyGram Official Checks have marketing and operational differences, such as: Branding, Delaware SOF ¶¶ 52, 31 (and cited evidence therein); Marketing, Delaware SOF ¶¶ 27, 45, 46 (and cited evidence therein); Use and Acceptability of Instruments, Delaware SOF ¶¶ 21, 24, 68, 73, 74 (and cited evidence therein); Size of Market, Delaware SOF ¶¶ 21, 66 (and cited evidence therein); Public Availability of Information, Delaware SOF ¶¶ 22, 49 (and cited evidence therein); Competitors, Delaware SOF ¶¶ 30, 72 (and cited evidence therein); Processing of Refunds, Delaware SOF ¶¶ 23, 53 (and cited evidence therein); Split of Interest on Uncashed Instruments, Delaware SOF ¶¶ 56, 40 (and cited evidence therein); Average Time Until Redemption, Delaware SOF ¶¶ 34, 71 (and cited evidence therein); Dollar Limits, Delaware SOF ¶¶ 36, 68 (and cited evidence therein); Processing of Proceeds, Delaware SOF ¶39, 54 (and cited evidence therein); and Right to Stop Payment, Delaware SOF ¶¶ 41, 55 (and cited evidence therein). Delaware avers that the inability of Kate Petrick to state the legal basis is not a fact requiring response. However if it is,

Delaware disputes that MoneyGram lacks a legal basis for the policy.

82. Rather, Petrick testified that the decision to report unclaimed Agent Checks to MoneyGram's State of incorporation was made by MoneyGram's "attorneys and outside counsel." App. 1042–44 (Petrick Dep. 133:17–135:4).

Response: Not disputed, but advice was provided by counsel for TECI, MoneyGram's predecessor entity. Delaware SOF ¶ 95 (Petrick 73:2-12 (Ex. O to Taliaferro Decl.); Petrick Ex. 42 (Ex. Q to Taliaferro Decl.); Petrick 134:17-135:11 (Ex. O to Taliaferro Decl.); Petrick 255:13-256:2 (Ex. O to Taliaferro Decl.)).

83. A representative example of the product that MoneyGram labels as a "Teller's Check" is included in the appendix. See App. 347–48 (Dep. Ex. 26 [Ex. C]).

Response: Not disputed.

84. Other examples of Teller's Checks appear in the record. See, e.g., App. 51, 54 (Dep. Exs. 6, 9); see also App. 1156, 1201 (Yingst Dep. 135:17–22, 180:4–18); App. 1266, 1269–70 (Supp. Yingst Decl. ¶¶ 2, 4 & [Ex. B]) (giving example of a "blank stock" Teller's Check).

Response: Not disputed.

85. MoneyGram provides a template to its selling financial institutions showing what must be printed on a Teller's Check. See App. 349–50 (Dep. Ex. 26 [Ex. D]).

Response: Not disputed.

86. These documents are representative of the Teller's Checks issued by MoneyGram since 2000. See App. 342 (Dep. Ex. 26 ¶ 7).

Response: Not disputed, as to the Exhibits to the Whitlock Declaration.

87. A MoneyGram Teller's Check is issued and paid in the same way as Retail Money Orders and Agent Check Money Orders:

Response: Delaware disputes this fact. There are many differences between Teller's Checks and Money Orders. For example, a MoneyGram Teller's Check is accepted as a form of payment in a wider range of circumstances than a money order. A MoneyGram Teller's Check is used by a consumer that needs funds for a purpose for which a money order would not be accepted because money orders lack next day funds availability. Delaware SOF ¶ 74 (and cited evidence therein). MoneyGram Teller's Checks can only be issued by a financial institution, and the selling financial institution is listed as the drawer on MoneyGram Teller's Checks. Delaware SOF ¶ 80 (and cited evidence therein). All MoneyGram Teller's Checks are "good funds checks," and are accepted by financial institutions as "good funds checks." MoneyGram operationally recognizes the difference between a MoneyGram Teller's Check, which is a next day "good funds" item, and a MoneyGram Money Order, which is not. Delaware SOF ¶ 82 (and cited evidence therein). A MoneyGram Teller's Check is subject to Regulation CC Next-Day Funds Availability and Regulation D Reserve Requirement. Delaware SOF ¶ 83 (and cited evidence therein).

a. The purchaser of the Teller's Check remits the value of the Teller's Check to the selling financial

institution, which then issues the written instrument. See App. 1158–60 (Yingst Dep. 137:23–139:13).

Response: Delaware disputes this fact. A Teller's Check is purchased by an existing customer of the financial institution and the payment for the Teller's Check is transferred directly from the customer's account at the financial institution. Yingst 138:7-139:13 (DS App. 1159-1160); Delaware SOF ¶ 45 (Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.); Yingst 330:21-331:7 (Ex. A to Taliaferro Decl.)).

b. The selling financial institution of the Teller's Check transfers the money (equal to the face value of the Teller's Check) to satisfy the obligation thereunder to MoneyGram. See App. 1150–52 (Yingst Dep. 129:14–131:13).

Response: Not disputed, but the money is usually wired to MoneyGram the next day. Delaware SOF ¶ 54 (Yingst 340:5-15 (Ex. A to Taliaferro Decl.).

c. The selling financial institution of the Teller's Check provides the following information to MoneyGram: the amount of the instrument, the date of purchase, the serial number, and the customer identification number of the financial institution that sold the Teller's Check. See App. 1150–52 (Yingst Dep. 129:14–131:13).

Response: Not disputed.

d. The selling financial institution does not report to MoneyGram any information regarding the purchaser of the Teller's Check. See App. 1150–52 (Yingst Dep. 129:14–131:13).

Response: Not disputed.

88. And like the other Official Check products, Teller's Checks are made payable to a named payee. See App. 347–48 (Dep. Ex. 26 [Ex. C]).

Response: Not disputed.

89. Money from the Teller's Check purchase (equal to the face value of the Teller's Check) remains in the same commingled investment portfolio with the proceeds from Retail Money Orders, Agent Check Money Orders, and Agent Checks (as previously described) until the Teller's Check is cleared through the Federal Reserve using the clearing bank's routing and transit numbers. See App. 1174 (Yingst Dep. 153:7–16).

Response: Not disputed.

90. Like Agent Checks, Teller's Checks will sometimes simply be labeled as "Official Checks" on their face. See App. 54–55 (Dep. Ex. 9) (Teller's Check); App. 56 (Dep. Ex. 10 (Agent Check)).

Response: Not disputed.

91. The selling financial institution's role in the process of selling a Teller's Check is limited in the same way as it is with respect to Retail Money Orders and other Official Checks – the institution issues the instrument to the purchaser, collects the purchaser's money, and forwards that money and certain information along to MoneyGram. See App. 1150–52, 1177–79, 1188 (Yingst Dep. 129:14– 131:13, 156:2–158:9, 167:15–19).

Response: Delaware disputes this fact as to the role of the selling financial institution, as it is not limited in the same way as Retail Money Orders. A financial institution that sells MoneyGram Official Checks has a number of operational rights that a seller of a

MoneyGram Retail Money Order does not have. Delaware SOF ¶ 55 (and cited evidence therein). *See also, e.g.*, Processing of Refunds, Delaware SOF ¶¶ 23, 53 (and cited evidence therein), Split of Interest on Uncashed Instruments, Delaware SOF ¶¶ 56, 40 (and cited evidence therein), Processing of Proceeds, Delaware SOF ¶¶ 39, 54 (and cited evidence therein), and Right to Stop Payment, Delaware SOF ¶¶ 41, 55 (and cited evidence therein).

92. There are some differences between Teller's Checks and the previously-discussed instruments:

Response: Not disputed.

a. While MoneyGram continues to be identified as the issuer of its Teller's Checks, the local financial institution is typically described as a drawer. See App. 347–48 (Dep. Ex. 26 [Ex. C]).

Response: Delaware disputes this fact. The selling financial institution is *always* and *exclusively* described as the drawer of a MoneyGram Teller's Check. Delaware SOF ¶ 80 (Yingst 136:8-13 (Ex. A to Taliaferro Decl.); Ex. D to Whitlock Official Check Aff. at MG0000010).

b. MoneyGram's agreements with its financial institution customers refer to these Teller's Checks as being "drawn by" both the financial institution and MoneyGram. See App. 307–08 (Dep. Ex. 20 § 3).

Response: Delaware does not dispute that this language appears in MoneyGram's agreements with financial institutions, but Delaware disputes that this language is relevant as to whether these instruments are teller's checks under the U.C.C. and other relevant laws.

c. While MoneyGram's corporate representative, Eva Yingst testified that the selling financial institutions do not act as agents for MoneyGram in selling Teller's Checks (unlike the other instruments previously discussed); however, at least some of the financial institution agreements specifically appoint the financial institution as MoneyGram's agent for purposes of selling Teller's Checks and other Official Checks. See App. 1187–88 (Yingst Dep. 166:24–167:14); see also App. 227 (Dep. Ex. 15 § 5).

Response: Delaware disputes this fact. Defendant States cite a single contract that references the financial institution serving as MoneyGram's "limited agent . . . for the sole purpose of using and selling" a small number of financial instruments, including MoneyGram Money Orders and Agent Checks. Yingst Ex. 15 (Ex. I to Taliaferro Decl.). At least two other versions of the MoneyGram Financial Institution Contract make no reference to "agency" or "agents." Yingst Ex. 14 (Ex. H to Taliaferro Decl.); Yingst Ex. 20 (DS App. 307). MoneyGram's Fed. R. Civ. P. 30(b)(6) witness expressly disclaimed agency with respect to MoneyGram Teller's Checks. Yingst 166:24-167:14 (DS App. 1187-1188) ("Q. In the instance of a teller's check is Elizabethton Federal considered an agent of MoneyGram? A. No . . . they are not an agent of MoneyGram. They're not defined as an agent of MoneyGram. They are issuing that check. They are the drawer of that check, people who are getting payment, and we are the issuer of the item, but they are not an agent.").

d. Teller's Checks may have next-day availability under federal Regulation CC, which means the depositor has a right to with-draw the funds represented by

a Teller's Check on the day after its deposit. See App. 58 (Dep. Ex. 11 at 2).

Response: Delaware disputes this fact. All MoneyGram Teller's Checks *do* have next-day availability. Delaware SOF ¶ 82 (Yingst 142:9-13 (Ex. A to Taliaferro Decl.); Yingst 143:10-17 (Ex. A to Taliaferro Decl.)).

93. As with Retail Money Orders, Agent Check Money Orders, and Agent Checks, MoneyGram is responsible for reporting the funds representing unclaimed Teller's Checks. See App. 1020–22 (Petrick Dep. 35:11–37:1).

Response: Not disputed.

94. But unlike Retail Money Orders and Agent Check Money Orders, today MoneyGram reports the proceeds of unclaimed Teller's Checks to the State of its incorporation. See App. 1020–22 (Petrick Dep. 35:11–37:1); see also App. 210 (Dep. Ex. 13 at 29).

Response: Not disputed.

95. As was true of Agent Checks, MoneyGram cited only the instruction from its "attorneys and outside counsel" to explain its current reporting of Teller's Checks differently than Retail Money Orders and Agent Check Money Orders. See App. 1044 (Petrick Dep. 135:5–11).

Response: Not disputed, but advice was provided by counsel for TECI, MoneyGram's predecessor entity. Delaware SOF ¶ 95 (Petrick 73:2-12 (Ex. O to Taliaferro Decl.); Petrick Ex. 42 (Ex. Q to Taliaferro Decl.); Petrick 134:17-135:11 (Ex. O to Taliaferro Decl.); Petrick 255:13-256:2 (Ex. O to Taliaferro Decl.)).

96. From the time that MoneyGram began offering Teller's Checks as part of its "Official Check" line of products until 2005, MoneyGram reported funds from unclaimed Teller's Checks to the States in which they were purchased or in which their financial-institution customer was incorporated. See App. 375–85 (Dep. Exs. 42–44).

Response: Not disputed.

97. MoneyGram changed its practice in 2005 and began to report all of its unclaimed Teller's Check proceeds to Delaware. See App. 375–85 (Dep. Exs. 42–44).

Response: Not disputed.

98. By reporting its unclaimed Teller's Check proceeds to its state of incorporation, MoneyGram acknowledges that its books and records do not contain information about the purchaser or intended payee of the instrument. See App. 375–85 (Dep. Exs. 42–44).

Response: Not disputed that MoneyGram acknowledges that its books and records do not contain information about the purchaser or intended payee of the instrument.

99. Per its internal policies, MoneyGram does not perform any due diligence to try to locate the rightful owner of Teller's Checks despite the acknowledgement that the selling financial institutions may indeed have that information. See App. 375–85 (Dep. Exs. 42–44); see also App. 421 (Dep. Ex. 50 at MG004667).

Response: Not disputed.

100. MoneyGram has admitted that escheating funds from abandoned Official Checks to every State

of purchase is as easy for MoneyGram as escheating to just one State. See Petrick Dep. 81:1–22, 83:21–84:4.2

Response: Not disputed.

101. In or around 2014, certain of the Defendant States contracted with Treasury Services Group ("TSG") to audit MoneyGram's books and records to determine compliance with unclaimed-property laws. See App. 958–65 (Kauffman Dep. 18:5–25:14); see also App. 583–85 (Dep. Exs. 71–73).

Response: Not disputed.

102. The TSG audit of MoneyGram's books and records found that MoneyGram should have remitted to Delaware only approximately $12 million not the more than $250 million that Delaware in fact received from MoneyGram. See App. 593 (Dep. Ex. 103 at ALF00001796).

Response: Delaware disputes that TSG made any findings regarding where MoneyGram "should have remitted" unclaimed MoneyGram Official Checks. TSG made no legal determinations and its role was limited to gathering data to confirm a determination that "had been made already by the State of Arkansas." Kauffman 33:24-34:14 (Ex. II to Supp. Taliaferro Decl.); Kauffman 45:19 (Ex. II to Supp. Taliaferro Decl.). TSG made no distinctions between MoneyGram Agent Checks and MoneyGram Teller's Checks. Kauffman 100:15-20 (Ex. II to Supp. Taliaferro Decl.). The demand letter sent to MoneyGram at the conclusion of TSG's work contained no supporting information, legal analysis or calculations demonstrating how the demand amount was calculated. Kauffman 110:23-111:16 (Ex. II to Supp. Taliaferro Decl.). TSG made its so-called conclusions without

ever reviewing (or even receiving) examples of MoneyGram Official Checks. Kauffman 134:21-135:25 (Ex. II to Supp. Taliaferro Decl.). Even when providing information to State clients of TSG, TSG tried to "make it as simple as possible" by, for example, not providing States with MoneyGram Money Order Terms and Conditions or images of MoneyGram Teller's Checks. Kauffman 138:4-142:22 (Ex. II to Supp. Taliaferro Decl.). In providing examples to the States, TSG chose example instruments that were "most similar," omitted dissimilar ones, and omitted terms and conditions from the MoneyGram Money Order provided to the States. Kauffman 146:16-147:3 (Ex. II to Supp. Taliaferro Decl.). TSG issued its report without taking into consideration any market research, market differences, or regulatory differences between MoneyGram Money Orders, MoneyGram Teller's Checks, and MoneyGram Agent Checks. Kauffman 53:22-61:24 (Ex. II to Supp. Taliaferro Decl.). Even with respect to a simple calculation of the aggregate amount of MoneyGram Teller's Checks and MoneyGram Agent Checks, TSG was advised by MoneyGram that their calculation was overstated. Kauffman 127:22-128:21 (Ex. II to Supp. Taliaferro Decl.); Kauffman Ex. 95 (Ex. JJ to Supp. Taliaferro Decl.).

103. Between 2002 and 2017, less than one half of one-percent of all official check property escheated to Delaware was actually purchased in Delaware. App. 593 (Dep. Ex. 103 at ALF00001796); see also App. 967–68 (Kauffman Dep. 192:16–193:2).

Response: Delaware disputes that TSG made any findings regarding where MoneyGram "should have remitted" unclaimed MoneyGram Official Checks. TSG made no legal determinations and its role was

limited to gathering data to confirm a determination that "had been made already by the State of Arkansas." Kauffman 33:24-34:14 (Ex. II to Supp. Taliaferro Decl.); Kauffman 45:19 (Ex. II to Supp. Taliaferro Decl.). TSG made no distinctions between MoneyGram Agent Checks and MoneyGram Teller's Checks. Kauffman 100:15-20 (Ex. II to Supp. Taliaferro Decl.). The demand letter sent to MoneyGram at the conclusion of TSG's work contained no supporting information, legal analysis or calculations demonstrating how the demand amount was calculated. Kauffman 110:23-111:16 (Ex. II to Supp. Taliaferro Decl.). TSG made its so-called conclusions without ever reviewing (or even receiving) examples of MoneyGram Official Checks. Kauffman 134:21-135:25 (Ex. II to Supp. Taliaferro Decl.). Even when providing information to State clients of TSG, TSG tried to "make it as simple as possible" by, for example, not providing States with MoneyGram Money Order Terms and Conditions or images of MoneyGram Teller's Checks. Kauffman 138:4-142:22 (Ex. II to Supp. Taliaferro Decl.). In providing examples to the States, TSG chose example instruments that were "most similar," omitted dissimilar ones, and omitted terms and conditions from the MoneyGram money order provided to the states. Kauffman 146:16-147:3 (Ex. II to Supp. Taliaferro Decl.). TSG issued its report without taking into consideration any market research, market differences, or regulatory differences between MoneyGram Money Orders, MoneyGram Teller's Checks, and MoneyGram Agent Checks. Kauffman 53:22-61:24 (Ex. II to Supp. Taliaferro Decl.). Even with respect to a simple calculation of the aggregate amount of MoneyGram Teller's Checks and MoneyGram Agent Checks, TSG was advised by MoneyGram that their calculation was overstated.

Kauffman 127:22-128:21 (Ex. II to Supp. Taliaferro Decl.); Kauffman Ex. 95 (Ex. JJ to Supp. Taliaferro Decl.). Delaware lacks sufficient basis to admit or deny the percentage of all MoneyGram Official Checks that were actually purchased in Delaware.

104. Minnesota, MoneyGram's prior state of incorporation, has paid previously remitted unclaimed official check proceeds to a number of States. See App. 968–69 (Kauffman Dep. 193:3–194:8).

Response: Delaware disputes this fact. Defendant States have not cited any evidence of the basis for any payment Minnesota may have made to any States.

Dated: March 8, 2019

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SUPREME COURT OF THE UNITED STATES

Nos. 22O145 & 22O146 (Consolidated)

DELAWARE,

Plaintiff,

v.

ARKANSAS, *et al.*,

Defendants.

DEFENDANT STATES' RESPONSE TO DELAWARE'S STATEMENT OF UNDISPUTED FACTS

Per Southern District of New York Local Rule 56.1(b), all Defendant States ("Defendants") submit the following responses and objections to Delaware's Statement of Undisputed Facts. For reference, Defendants' Statement of Material Facts are referred to as "Defs. SMF." Delaware's Statement is referred to as "Delaware SMF."

1. Admitted.

2. Defendants deny the averments in this paragraph that MoneyGram and Travelers Express' "official checks," "Official Checks," and "money orders" are separate and distinct instruments. By way of further response, MoneyGram uses the trade name "Official Checks" to describe four products, including Agent Check Money Orders. *See* Defs. SMF ¶¶ 38, 40. As Delaware admits "there is no legal distinction" between MoneyGram's Official Check Agent Money

Orders and Retail Money Orders products. *See* Delaware SMF ¶ 43. Delaware's attempt here to differentiate "official checks" and "Official Checks" from "money orders," therefore is misleading and confusing, and on that basis the averments in this paragraph are denied. Defendants admit the remaining averments in this paragraph.

3. Admitted.

4. Admitted.

5. Admitted (first and second sentences).

Denied (third sentence). Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). Ms. Yingst's testimony regarding why consumers use MoneyGram Official Checks is speculative and lacks foundation.

6. Denied to the extent this statement implies that Agent Check Money Orders are not a type of Official Check. *See* Defs. SMF ¶¶ 38, 40. Otherwise, admitted.

7. Denied to the extent this statement implies that Agent Check Money Orders are not a type of Official Check. *See* Defs. SMF ¶¶ 38, 40. Otherwise, admitted.

8. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

9. Defendants admit the first sentence of this paragraph. Defendants deny the second sentence of this paragraph as a conclusion of law, which cannot be deemed a "material fact" for purposes of compliance with Local Rule 56.1.

10. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

11. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

12. Admitted.

13. Admitted.

14. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

15. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

16. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

17. Denied. Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). The averments in this paragraph lack foundation and are hearsay.

18. Denied. Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). The averments in this paragraph lack foundation and are hearsay.

19. Denied. Defendants object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). Whether *all* "Travelers Cheque issuers such as American Express collect addresses from purchasers of travelers cheques" cannot be gleaned by the single demonstrative evidence – a traveler's check allegedly purchased by Delaware counsel's associate – cited by Delaware. This assertion lacks foundation and is speculative.

20. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

21. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

22. Admitted.

23. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

24. Denied. Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). The averments in this paragraph lack foundation and are speculative. This statement is also inconsistent with the testimony and documents presented by MoneyGram with respect to MoneyGram's Retail Money Orders (which MoneyGram states are used for purposes other than identified in Delaware's statement), and Agent Check Money Orders (which MoneyGram states are typically sold to customers with bank accounts). App. 1111, 1219–1220 (Yingst Dep. 90:5–22, 198:21–199:15); App. 64 (Dep. Ex. 12 at MG002712); App. 1256 (Yingst Dep. 272:1–21).

25. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

26. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

27. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

28. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

29. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

30. Denied as stated. Defendants admit only that MoneyGram's largest competitors in the retail money order business are Western Union and the U.S. Postal Service. *See* Yingst Ex. 29 at 6 (Ex. M to Declaration

of James David Taliaferro, dated Feb. 1, 2019 (the "Taliaferro Decl.")); Yingst Dep. 331:8-17 (Ex. A. of Taliaferro Decl.). MoneyGram's 30(b)(6) witness, Eva Yingst did not specifically testify as to competitors of MoneyGram's Agent Check Money Orders. *See id.*

31. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. Denied to the extent this paragraph refers to "Official Checks" of any kind (including Agent Check Money Orders), since the proffered evidence is limited to MoneyGram Retail Money Orders.

32. Admitted in part; denied in part. To the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders, Defendants admit that MoneyGram Retail Money Orders contain terms and conditions on the back of the instrument. By way of further response, Delaware admits that some MoneyGram Official Checks are printed using so-called "blank stock," and those instruments carry "terms and conditions" on the back of the physical check. *See* Delaware SMF ¶ 77. Defendants deny that any MoneyGram instrument contains terms and conditions "on the face" of the instrument. *See* Yingst 310:16-311:19 (Ex. A to Taliaferro Decl.); Whitlock Money Order Aff. at ¶ 5 & Ex. A.

33. Denied (first sentence). The cited deposition testimony states that the "current" service charge is $1.50 a month, not that "[a]ll MoneyGram Money Orders" contain such a service charge. Yingst 411:2-4 (Ex. A to Taliaferro Decl.); Petrick 243:7-11 (Ex. O to Taliaferro Decl.). This is also inaccurate as to MoneyGram Retail Money Orders sold in certain States with restrictions on such charges. Delaware SMF ¶ 32. Further, the service charges are and have

been subject to change, even during the period between 2000 and 2017. App. 16–17 (Dep. Ex. 4 ¶ 5).

Denied (second sentence). Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). Ms. Petrick's testimony about state laws is speculative and lacks foundation. Further, this allegation is denied, in particular, since at least one state—California—has a limit on the amount of value that can be taken from money orders. Whitlock Money Order Aff. at Ex. A ("State Service Charge Exceptions").

Denied (third sentence). Defendant States object to this averment because it is not supported by any evidence. *See* Local Rule 56.1(d).

34. Denied as stated. The evidence supporting the statement of fact runs only through fiscal year 2017, and thus is not "current." Further, with that caveat, Defendants also only admit to this paragraph to the extent that "Money Orders" refers to MoneyGram Retail Money Orders.

35. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders.

36. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders. By way of further answer, while MoneyGram Retail Money Orders have limits, those limits are set by MoneyGram policy and not by legal restriction. Yingst 63:16-64:13 (Ex. A to Taliaferro Decl.).

37. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders.

38. Admitted.

39. Admitted.

40. Admitted.

41. Admitted to the extent "Money Order" in this paragraph refers to MoneyGram Retail Money Orders.

42. Admitted (first sentence).

Denied (second sentence). The Primelink system referenced in this sentence is used in connection with MoneyGram's Official Check products, which include Agent Check Money Orders but do not necessarily include MoneyGram Retail Money Orders. Yingst 337:5-18 (Ex. A to Taliaferro Decl.).

Admitted (third and fourth sentences).

Denied (fifth sentence) to the extent this statement suggests that Agent Check Money Orders are not one of the products sold under MoneyGram's Official Check program. *See* Defs. SMF ¶ 38, 40.

43. Admitted.

44. Admitted.

45. Defendant States admit only the first sentence in this paragraph. Defendant States deny the second sentence in this paragraph. MoneyGram uses the trade name "Official Checks" to describe four products, including Agent Check Money Orders. *See* Defs. SMF ¶ 38, 40. As Delaware admits "there is no legal distinction" between MoneyGram's Official Check Agent Money Orders and Retail Money Orders products. *See* Delaware SMF ¶ 43. Delaware's attempt here to differentiate "Official Checks" from "Money Orders", therefore is misleading and confusing, and on that basis these averments in this paragraph are denied.

46. Admitted.

47. Admitted.

48. Admitted.

49. Admitted.

50. Denied. Delaware readily admits that some MoneyGram Official Checks are printed using so-called "blank stock," and those instruments carry terms and conditions on the back of the physical check. *See* Delaware SMF ¶ 77. Further, MoneyGram uses the phrase "Official Check" to cover four products, including Agent Check Money Orders. *See* Defs. SMF ¶ 40. Agent Check Money Orders, which are Official Checks, carry terms and conditions on the back of the physical check. *See* Defs. SMF ¶ 45.

51. Denied. MoneyGram uses the phrase "Official Check" to cover four products, including Agent Check Money Orders. *See* Defs. SMF ¶ 40. Agent Check Money Orders, which are Official Checks, carry terms and conditions on the back of the physical check, which include the service charge language used with MoneyGram Retail Money Orders. *See* Defs. SMF ¶ 45; Delaware SMF ¶ 77. Delaware even states that "there is no legal distinction" between Official Check Agent Money Orders and Retail Money Orders. *See* Delaware SMF ¶ 43.

52. Admitted.

53. Admitted.

54. Admitted.

55. Admitted.

56. Admitted.

57. Admitted.

58. Admitted.

59. Admitted.

60. Admitted.

61. Admitted.

62. Admitted.

63. Admitted.

64. Admitted.

65. Denied (first sentence). MoneyGram uses the phrase "Official Check" to cover four products, including Agent Check Money Orders, *see* Defs. SMF ¶ 40, so Delaware's comparison between "Money Orders" and "Official Checks" is confusing and misleading, since both categories include money orders.

Admitted (second sentence).

66. Admitted.

67. Admitted.

68. Admitted in part (first sentence). MoneyGram Official Check services are used where payees require a check drawn on a bank, but are also used by financial institutions to pay their own obligations. Yingst Ex. 29 at 6 (Ex. M to Taliaferro Decl.).

Admitted (second sentence). By way of further answer, while MoneyGram Retail Money Orders have limits, those limits are set by MoneyGram policy and not by legal restriction. Yingst 63:16-64:13 (Ex. A to Taliaferro Decl.).

69. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

70. Admitted.

71. Denied as stated. The evidence supporting the statement of fact runs only through fiscal year 2017, and thus is not "current."

72. Admitted.

73. Admitted.

74. Denied (first sentence). Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). Ms. Yingst's testimony regarding why consumers use MoneyGram Official Checks is speculative and lacks foundation.

Denied (second sentence). MoneyGram uses the phrase "Official Check" to cover four products, including Agent Check Money Orders, *see* Defs. SMF ¶ 40, so Delaware's comparison between "Money Orders" and "Official Checks" is confusing and misleading, since both categories include money orders. Further, Ms. Yingst's speculation about the acceptability of official checks versus money orders is not admissible in evidence. *See* FRCP 56(c)(2).

75. Denied. Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). Ms. Yingst's testimony regarding the motives of bank customers and speculation about typical bank transactions is speculative and lacks foundation.

76. Admitted.

77. Denied that the italicized emphasis is present on the cited sample documents; otherwise admitted. Exs. A, B to Declaration of Eva Yingst.

78. Admitted.

79. Admitted.

80. Admitted.

81. Admitted.

82. Admitted.

83. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

84. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

85. Admitted.

86. Admitted, subject to the understanding that use of the phrase "Agent Check" by Delaware in this paragraph is intended to exclude "Agent Check Money Orders."

87. Admitted, subject to the understanding that use of the phrase "Agent Check" by Delaware in this paragraph is intended to exclude "Agent Check Money Orders."

88. Admitted (first sentence).

Denied (second sentence). Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

89. Admitted, subject to the understanding that use of the phrase "Agent Check" by Delaware in this paragraph is intended to exclude "Agent Check Money Orders."

90. Denied. Defendant States object to this averment because it is not supported by admissible evidence. *See* FRCP 56(c)(2). Ms. Yingst's testimony regarding the "typical" MoneyGram Agent Check transaction is speculative and lacks foundation.

91. Denied to the extent the second sentence suggests that Agent Check Money Orders are not sold under MoneyGram's Official Check program. *See* Defs. SMF ¶¶ 38, 40. Otherwise admitted.

92. Admitted.

93. Admitted.

94. Admitted. By way of further answer, Delaware itself later ratified MoneyGram's escheating decision when, after MoneyGram sought guidance from Delaware, Delaware advised MoneyGram that MoneyGram "has been properly reporting and delivering unclaimed property in accordance with the strict rules established by the Supreme Court of the United States[.]" App. 624; *see also* App. 624-632.

95. Admitted. By way of further answer, Delaware itself later ratified MoneyGram's escheating decision when, after MoneyGram sought guidance from Delaware, Delaware advised MoneyGram that MoneyGram "has been properly reporting and delivering unclaimed property in accordance with the strict rules established by the Supreme Court of the United States[.]" App. 624; *see also* App. 624-632.

96. Admitted. By way of further answer, Delaware itself later ratified MoneyGram's escheating decision when, after MoneyGram sought guidance from Delaware, Delaware advised MoneyGram that MoneyGram "has been properly reporting and delivering unclaimed property in accordance with the strict rules established by the Supreme Court of the United States[.]" App. 624; *see also* App. 624-632.

97. Admitted.

98. Admitted.

99. Admitted.

100. Admitted.

101. Denied. Denied as conclusions of law, which cannot be deemed "material facts" for purposes of compliance with Local Rule 56.1.

March 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel of record for Defendant States in Case Nos. 22O145 and 22O146 (consolidated) certifies that on March 8, 2019, this document was served, as required by Case Management Order No. 5, on the following counsel:

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SUPREME COURT OF THE UNITED STATES

Nos. 22O145 & 22O146
(Consolidated)

DELAWARE,

Plaintiff,

v.

ARKANSAS, *et al.*,

Defendants.

EXPERT REPORT OF RONALD MANN

September 19, 2018

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I. INTRODUCTION AND SUMMARY OF REPORT

1. I have been asked to prepare an opinion regarding various aspects of the MoneyGram products at issue in this matter.

2. In general, subject to the assumptions described below, and as explained in more detail below, my opinion is as follows:

(a) Neither a bank nor MoneyGram is directly liable on the MoneyGram official checks evaluated in this report.

(b) Official checks differ from money orders in the indirect liability of banks to pay them and the terms and conditions that they bear on their face.

(c) The statutory reference to "third party bank checks" is obscure, and would not naturally be used to describe personal checks indorsed to third parties, but it could describe the checks that banks issue to pay bills for their customers.

II. BACKGROUND AND QUALIFICATIONS

3. Before explaining my opinion and the basis for it, I start with a brief discussion of my background and of the research that puts me in a position to offer the opinion below. In general, I am a law professor who specializes in the study of commercial law, with a focal emphasis on payment systems. At Appendix 2, I attach a resumé that includes a complete list of my academic publications and an abbreviated description of my employment history. I am being compensated at an hourly rate of $900 per hour. My compensation in this matter does not depend upon either the substance of my opinions or the outcome of this dispute.

4. I have provided expert reports, depositions, or testimony in litigation related to various aspects of business and consumer payment systems in numerous previous cases.[1] The attached resumé identifies all of my trial and deposition testimony in the last four years.

5. I hold a B.A. (1978) from Rice University in History (Magna Cum Laude) and a J.D. (1985) from the University of Texas, where I was first in my class and managing editor of the *Texas Law Review*. I subsequently clerked for Joseph T. Sneed on the United States Court of Appeals for the Ninth Circuit and Lewis F. Powell, Jr. on the United States Supreme

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[1] District of Columbia v. Bank of America, N.A., Civil Division No. 2008 CA 007763 (D.C. Superior Ct. 2016); Heartland Payment Systems, Inc. v. Mercury Payment Systems, LLC, No. C 14-0437 (N.D. Cal. 2015); DB NPI Century City, LLC v. Legendary Investors Group No. 1, No. BC494921 (Super. Ct. Los Angeles County (Central) 2015); NML Capital, Ltd. v. Republic of Argentina, No. 08 Civ 6978 (S.D.N.Y. 2014); Rosewood Cancer Care, Inc. v. PNC Financial Services Group, Court of Common Pleas, No. 11944 CD 2010 (Indiana County, PA 2014); Saint Bernard School of Montville, Inc. v. Bank of America, Superior Court, No. CV-08-5006676-S (New London, CT 2012) (result affirmed on appeal at 312 Conn. 811 (2014)); Merrill Lynch v. Choy, FINRA Arbitration No. 09-06111 (Honolulu, HI 2011); Walker Digital v. Capital One Services, LLC, No. 1:10cv212 (JFA) (E.D. Va. 2010); Emmett v. Wachovia Securities, LLC, Court of Common Pleas, No. GD05-25678 (Allegheny County, PA 2008); FTC v. Neovi, Inc., Civil No. 06 CV 1952 (S.D. Cal. 2008) (result reported at 598 F. Supp,. 2d 1104 (S.D. Cal. 2008)); ACLU v. Gonzales, No. 98-CV-5591 (E.D. Pa. 2006) (result reported at 478 F. Supp. 2d 775 (E.D. Pa. 2007)); Wachtell v. Capitol One Financial Corp., 4th Judicial Dist. Ct., No. CV 0C 0304972D (Idaho 2006); LaBarge Pipe & Steel Co. v. First Bank, No. 03CV382-C-M3 (M.D. La. 2005) (result reported at 550 F.3d 442 (5th Cir. 2008)); Shinitzky v. Boston Securities N.A., 15th Jud. Circuit Court, No. CL 00-2328 AJ (Palm Beach County, FL 2004).

Court. I also served for three years as an Assistant to the Solicitor General in the United States Department of Justice.

6. I currently am the Albert E. Cinelli Enterprise Professor of Law at Columbia Law School, where I am the Co-Director of the Charles E. Gerber Program in Transactional Studies. I previously have held tenured positions at the law schools at the University of Texas, the University of Michigan, and Washington University in St. Louis. I also have taught courses in various aspects of commercial law as a visitor at Harvard Law School and at the Faculty of Law at Tokyo University.

7. Of relevance to this matter, the study of payment systems has been a focal point of my research and teaching for the last twenty years. I regularly have taught courses in payment systems and am the author of a widely adopted casebook on that subject (*Payment Systems and Other Financial Transactions* (6th ed. WoltersKluwer 2016)). Those materials are distinctive (as compared to most law school materials) for their relatively heavy emphasis on commercial practice, as opposed to statutory doctrine. The methodology for preparing (and updating) the course and casebook involves ongoing interviews with industry participants about their ordinary operating procedures and the reasoning that supports them.

8. I have published frequently in law reviews on subjects related to various aspects of modern payment systems. Papers in that line of work have appeared, among other places, in the *Michigan Law Review*, the *Texas Law Review*, the *Georgetown Law Journal*, the *UCLA Law Review*, and the *Lewis & Clark Law Review*. Details of those publications appear on the resum6 attached to this report.

9. I served as Reporter for the Drafting Committee that prepared the two most recent sets of amendments to UCC Articles 3, 4, and 4A and presently serve as an ALI adviser to the committee considering further revisions to UCC Articles 3, 4, 8, and 9. I am a member of the American Law Institute and a conferee of the National Bankruptcy Conference. In recent years, I have been invited on three different occasions to serve as the moderator for the three-day annual meeting of the Financial Lawyers Conference in Ojai.

10. The analysis in my report reflects general familiarity with the customs and practices involved in the use and design of payment instruments, resulting from the academic studies and teaching activities summarized above.

III. Factual Background and Assumptions

11. In general, I have been asked to opine about the legal and practical attributes of a variety of instruments marketed by MoneyGram Payment Systems, Inc. ("MoneyGram") and distributed through various channels at financial institutions and retailers. My opinion rests on my review of samples of those instruments that appear in the record in this matter, viewed through the expertise and experience summarized above. The opinion that I provide below assumes that the samples I have reviewed accurately portray and represent the instruments in question; I have no reason to doubt the accuracy or representativeness of the samples I have reviewed.

12. Although the record includes quite a few samples, most seem to differ only in irrelevant details. For practical purposes, it is useful to discuss four distinct categories: agent checks, teller's checks, retail money orders, and agent check money orders.

13. In describing the basic features of those instruments, I identify the role of the various parties by the way in which they are described on the face of the instrument itself; applicable legal rules generally rely on indications apparent from the face of the instrument because those indications are the only information available to those that acquire the instrument.

A. *AGENT CHECKS*

14. The first product is the agent check; a representative example appears at MG0000004. The check would be purchased by a consumer from a bank selling the product, the so-called "agent" bank. The instrument states in small type just to the left of the top center of the instrument that the drawer of the instrument is MoneyGram. When purchased, an authorized officer of the agent bank signs at the bottom right-hand corner of the instrument. The agent bank (or the purchaser) would fill in the name of the party to be paid in the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to the drawee, indicated in small type just to the left of the top center of the instrument as First Interstate Bank in Montana.[2]

15. There apparently is some variation in this category in the delineation of the relation between the bank signing the check and MoneyGram. In at least one example in the documents that have been provided to me for review, there is no evidence on the face of

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[2] As with any instrument, it would be up to the payee to decide whether it would seek payment by taking the instrument directly to the party on or through whom it is to be paid or instead by depositing it at the payee's own bank and allowing that bank to seek collection through ordinary banking channels.

the check that the bank signing the check acts as an agent of MoneyGram. Specifically, the item appearing at MG0002396 is captioned "OFFICIAL CHECK," lists Independent Bank at the top center of the item, and apparently bears an "authorized signature" from a responsible officer of Independent Bank affixed when the item is purchased. In contrast to the template discussed in the preceding paragraph (and other samples apparent in the record, such as the item appearing at DE0000220 (discussed in detail below)), nothing on the face of MG0002396 identifies Independent Bank as an agent of MoneyGram.

B. *TELLER'S CHECKS*

16. The second product is the teller's check; a representative example appears at MG0000008. The check would be purchased by a consumer from a bank selling the product. The drawer of the instrument is the selling bank, as indicated just above the signature line in the bottom right-hand corner; it is apparent from the record that when this template is completed the full name of the selling bank is filled in above the signature line. *See* MG0002395 (instrument identifying "Elizabethton Federal Savings Bank" as the "drawer"). The instrument, though, also indicates that it is issued by MoneyGram. When purchased, an authorized officer of the agent bank (the drawer) signs at the bottom right-hand corner of the instrument. The agent bank (or the purchaser) fills in the name of the party to be paid in the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to the drawee, indicated in small type near the bottom left-hand corner of the

instrument as a branch of the Bank of New York Mellon located in Massachusetts.[3]

C. *RETAIL MONEY ORDERS*

17. The third product is the retail money order; a representative example appears at MG002690. Its designation as a money order is apparent from the title in large-and-small capital letters to the right of center near the top of the image ("MONEY ORDER"). The issuer or drawer of the instrument is MoneyGram, indicated in small type near the lower left-hand corner of the instrument. The retail customer purchasing the money order signs for the drawer on the signature line on the lower right-hand corner. The purchaser identifies the name of the party being paid by filling in (or having the seller fill in) the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to Wells Fargo Bank, N.A., through whom the instrument is payable, as indicated in small type near the lower left-hand corner of the instrument.

D. *AGENT CHECK MONEY ORDERS*

18. The second group of documents are agent check money orders; a representative example appears at MG002704. Its designation as a money order is apparent from the title in capital letters near the top right-hand corner of the image ("AGENT CHECK MONEY ORDER"). The money order would be purchased from a bank selling the product – the so-

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[3] The Declaration of Jennifer Whitlock accompanying MG0000004 and MG0000008 refers to both the agent check and the teller's check as a "MoneyGram Official Check." MG0000001. Following that usage, I use the term "official check" to refer to both MoneyGram agent checks and MoneyGram teller's checks.

called "agent" bank. The issuer or drawer of the instrument is MoneyGram, indicated in small type near the lower left-hand corner of the instrument. The retail customer purchasing the money order signs for MoneyGram on the signature line on the lower right-hand corner. The purchaser identifies the name of the party being paid by filling in (or having the seller fill in) the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to the drawee, indicated in small type near the bottom left-hand corner of the instrument as a branch of the Bank of New York Mellon located in Massachusetts.

IV. OPINION

19. In general, subject to the assumptions explained above and as explained in more detail below, my opinions are as follows:

(a) Neither a bank nor MoneyGram is directly liable on the MoneyGram official checks or MoneyGram money orders evaluated in this report.

(b) Official checks differ from money orders in the indirect liability of banks to pay them and in the terms and conditions that they bear on their face.

(c) The statutory reference to "third party bank checks" is obscure, and would not naturally be used to describe personal checks indorsed to third parties, but it could describe the checks that banks issue to pay bills for their customers.

A. *NO RELEVANT ENTITY IS DIRECTLY LIABLE ON THE INSTRUMENTS IN QUESTION*

20. 12 U.S.C. § 2503 establishes rules that determine which State is entitled to escheat the funds

payable on any "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." Of the four types of instruments discussed in Part III, I understand the retail money orders (discussed in subpart III(c)) and agent check money orders (discussed in subpart III(D)) to be money orders within the language of the statute and thus not a matter of dispute in this litigation. Application of Section 2503 to the remaining types of instruments (the agent checks discussed in subpart III(A) and the teller's checks discussed in subpart III(B)) depends in part upon whether "a banking or financial organization or a business association is directly liable" on the instrument in question. It is my opinion that no banking or financial organization or business association is liable on those instruments; the most common payment instrument on which such an entity is directly liable is a cashier's check.

21. As an introductory matter, I note that 12 U.S.C. § 2502 provides definitions of "banking organization," "financial organization," and "business association." A "banking organization" is "any bank, trust company, savings bank, safe deposit company, or a private banker engaged in business in the United States," and a "business association" is "any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals." I see no reason to doubt that MoneyGram is a business association and that the various banks that market the products and on which they are drawn qualify as banking organization. The only question, then, is whether any of those entities are directly liable on the

instruments in question. I explain below why they are not.

i. General Principles of Liability on Instruments

22. Although the framework of obligations that the Uniform Commercial Code (the "UCC") prescribes for various types of checks might seem arcane at first glance, it reflects longstanding tradition and the need for those obligations to support practical use of the instruments to which they apply. Because that framework is central to the application of Section 2503, it is useful to summarize the general system before turning to the specific products that MoneyGram has marketed.

23. The starting point is an ordinary check written by a party with no connection to a bank. For such a check, the bank on which the check is drawn – the bank at which the check-writer has an account – has no obligation to pay the check. A moment's consideration shows why this should be so: if the bank on which the check was written was obligated to pay any check written by its depositor, then it would be exposed to losses whenever the depositor wrote checks that exceeded the balance of funds available in the depositor's account. Accordingly, UCC §§ 3-408 & 3-409 provide that the bank on which a check is drawn is not liable on any check until it agrees in writing to accept liability.[4]

[4] I refer for convenience to the official text of the Uniform Commercial Code as currently promulgated by the American Law Institute and the Uniform Law Commission. The numbering and, in some cases, the phrasing of the provisions differ in some respects from State to State, but so far as I know all of the rules

24. To be sure, the bank would be liable to its customer for wrongful dishonor if it declined to pay a properly payable instrument presented in a timely manner without a stop-payment order against an account including sufficient funds. *See* UCC § 4-402. But that does not give the payee any rights to enforce the instrument against the check-writer's bank; as between the payee and the bank, the bank is free to decline payment for any reason or indeed for no reason at all.

25. Those rules were the same under the 1972 version of the UCC, in effect when Congress adopted Section 2503. *See* UCC § 3-409(1) (1972) ("A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee * * * , and the drawee is not liable on the instrument until he accepts it."); UCC § 4-402 (1972) ("A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item.").

26. In just the same way, the person that wrote the check – the "drawer" – has no direct liability on the instrument. That makes sense as a practical matter, because the drawer's intent in giving the check is that the person to which the check is given (the payee) will obtain payment by presenting the check to the check writer's bank. It is reasonable for the drawer to expect the payee to look first to the drawee bank, because in the ordinary course of business drawee banks honor far more than 99% of all checks presented to them. It is only in the rare case, when a drawee bank refuses to pay a check, that a drawer would expect the payee to seek recourse against the drawer. Again, the UCC

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that I discuss in this report are substantively identical in all United States jurisdictions.

implements that rule by providing in UCC § 3-414 that the drawer is liable only indirectly, contingent on the refusal of the drawee bank to honor the check.

27. That rule was the same under the 1972 version of the UCC. *See* UCC § 3-413(2) (1972) ("The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up.").

28. To put those rules in context, there is one common banking product on which a banking organization is directly liable – a cashier's check. The point of a cashier's check is to give the payee an enforceable assurance that a bank is directly obligated on the instrument, and the UCC's rules for cashier's checks illustrate what direct liability would mean in this context: "The issuer of a * * * cashier's check * * * is obliged to pay the instrument * * * according to its terms."[5] UCC § 3-412.[6] The distinction between that

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[5] The full text of § 3-412 reads:

> The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 3-115 and 3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under Section 3-415.

[6] That rule was the same under the 1972 version of the UCC. UCC §§ 3-118(a) (1972) ("A draft drawn on the drawer is effective as a note."), 3-413(a) (1972) ("The maker * * * engages that he will pay the instrument according to its tenor at the time of his engagement * * * ."); *see* UCC § 3-412 cmt. 1 (comparing the 1972 provisions to current law).

rule and the liability of drawers on ordinary checks is the difference between the direct and unconditional liability of the issuer of a cashier's check and the indirect and conditional liability of the drawer of an ordinary check.

ii. Application to MoneyGram Products

29. Against that background, I turn now to the MoneyGram products described in Part III.

a. *Agent Checks*

30. The business entities involved in the agent check are the drawer (MoneyGram), the drawee (First Interstate Bank in the principal sample to which I refer for convenience), and the so-called "agent bank" that sells the instrument to the consumer. None of those entities is directly liable on the instrument.

31. First, the drawee is not directly liable because under UCC § 3-408 the drawee has no obligation to pay an instrument until it has accepted it. *See* UCC §§ 3-408 ("[T]he drawee is not liable on the instrument until the drawee accepts it.") & 3-409 (explaining that a drawee accepts an instrument by a signed agreement in which the drawee agrees to pay the instrument); *see also* UCC § 3-410(1) (1972) (defining acceptance as "the drawee's signed engagement to honor the draft as presented" and explaining that "[i]t must be written on the draft").

32. The status of the selling bank on those instruments is unclear, though the seller would not be directly liable in any of the relevant formats. In both the principal sample ('0004) and the variant ('2396), the seller signs the instrument in the lower right-hand corner, an action that ordinarily would justify treating the seller as the drawer. *See* UCC § 3-204 cmt. 1 ("[B]y

long-established custom and usage, a signature in the lower right hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft."); *see also* UCC § 3-402 cmt. (1972) (same). Yet both variants indicate in the fine print that MoneyGram is the drawer, a fact that could suggest that the seller should not be liable as the drawer. In any event, that question is irrelevant for present purposes because it is plain that the seller could be liable ***at most*** as a drawer. For the reasons explained above, the liability of the drawer under UCC § 3-414(b) is indirect, not direct. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means in either case is that the drawer would be obligated to pay the instrument only if it were first presented to the drawee and the drawee declined to pay it in a timely manner.

33. For similar reasons, the status of MoneyGram on the agent checks is unclear. On the one hand, both variants include marginal notations identifying MoneyGram as the drawer of the instrument. MoneyGram does not, though, sign either instrument, unless we regard the agent bank as signing as the agent of MoneyGram, a circumstance that would leave MoneyGram liable as the drawer of the instrument. *See* UCC § 3-402(a). That might make sense on the principal sample ('0004) but it would be harder to justify on a variant like '2396, which does not indicate any agency capacity for Independent Bank. In any event, in either case, MoneyGram is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer would be obligated to pay the instrument only

if it were first presented to the drawee and the drawee declined to pay it in a timely manner.

b. *Teller's Checks*

34. The business entities involved in the teller's check are the drawer (the institution selling the check), the issuer (MoneyGram), and the drawee (the Bank of New York Mellon). For reasons similar to those detailed above, none of those entities is directly liable on the instrument.

35. As with the agent checks, the drawer is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer would be obligated to pay the instrument only if it were first presented to the drawee (the Bank of New York Mellon) and that bank declined to pay it in a timely manner.

36. The status of MoneyGram on the teller's check is unclear for reasons quite similar to those described in the discussion of agent checks. On the one hand, the instrument in its lower left-hand corner indicates that the instrument is "issued by" MoneyGram. On the other hand, the lower right-hand corner of the instrument indicates that the institution is the drawer of the instrument. Ordinarily, under UCC § 3-105, the issuer of a check is the drawer: "Issuer * * * means a * * * drawer of an instrument."[7] Because MoneyGram

[7] The omitted text in UCC § 3-105 states that an issuer in some cases is the "maker" of an instrument, but that is irrelevant to any of the instruments discussed here, because "maker" is a term that applies only to notes. *See* UCC § 3-103(a)(7) ("'Maker' means a person who signs or is identified in a note as a person undertaking to pay").

has not signed the instrument, it cannot be the drawer. In any event, even if MoneyGram were the issuer of the draft, it would at most have the liability of a drawer of the draft. For the reasons explained repeatedly in the preceding paragraphs, that would not make MoneyGram directly liable; it would have at most the indirect liability of a drawer.

37. As with the instruments discussed above, the drawee (Bank of New York Mellon in this case) is not directly liable because under UCC § 3-408 the drawee has no obligation to pay an instrument until it has accepted it. *See* UCC §§ 3-408 ("[T]he drawee is not liable on the instrument until the drawee accepts it.") & 3-409 (explaining that a drawee accepts an instrument by a signed agreement in which the drawee agrees to pay the instrument).

c. *Retail Money Orders*

38. The business entities involved in the retail money order are the drawer (MoneyGram), the agent that sells it, and the bank through which it is payable (Wells Fargo). For reasons quite similar to those repeated above, none of those entities is directly liable on those instruments.

39. As explained several times above, the drawer is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer (MoneyGram) would be obligated to pay the instrument only if it were first

presented to the drawee through Wells Fargo and the drawee declined to pay it in a timely manner.[8]

40. The agent is not directly liable because it is not a party to the instrument. Because the agent does not sign the instrument in any capacity, it can have no liability on it. *See* UCC § 3-401(a) ("A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument.").[9]

41. The party through which the item is payable has no liability because it has not signed it in any capacity. *See* UCC § 3-401(a) ("A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument."). Indeed, because the item is only "payable through" that bank, the entity is not even authorized to pay the instrument. *See* UCC § 4-106 ("If an item states that it is "payable through" a bank identified in the item, * * * the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the

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[8] The retail money order template does not explicitly identify the drawee. Under UCC § 3-501 & -502, dishonor occurs only if the instrument is presented to the drawee. I note the requirement under Regulation CC that a bank arranging for checks on which it is the drawee to be payable through another bank must identify itself by name and location on the instrument. *See* 12 C.F.R. § 229.36(e). The only routing number that appears on the retail money order template is a routing number for Wells Fargo (the bank through which the money order is payable). That arrangement leaves open the possibility that MoneyGram is the intended drawee of the item, though the face of the item does not make that status explicit.

[9] That rule was the same under the 1972 version of the UCC. UCC §§ 3-118(a) (1972) ("No person is liable on an instrument unless his signature appears thereon.").

item."); *see also* UCC § 3-120 (1972) ("An instrument which states that it is 'payable through' a bank * * * designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.").

d. *Agent Check Money Orders*

42. The business entities involved in the agent check money order are the drawer (MoneyGram), the drawee (Bank of New York Mellon), and the agent. Again, as with the instruments discussed above, none of those entities is directly liable on those instruments.

43. First, the drawer is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer (MoneyGram) would be obligated to pay the instrument only if it were first presented to the drawee (Bank of New York Mellon) and that bank declined to pay it in a timely manner.

44. Second, the agent is not directly liable because it is not a party to the instrument. Because the agent does not sign the instrument in any capacity, it can have no liability on it. *See* UCC § 3-401(a) ("A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument."). Indeed, because the instrument identifies the agent explicitly as an agent, it would have no liability on the instrument even if it had signed it; the

signature of an agent for a disclosed principal creates liability only for the principal. *See* UCC § 3-402(b).[10]

45. Finally, the drawee (Bank of New York Mellon) is not directly liable because under UCC § 3-408 the drawee has no obligation to pay an instrument until it has accepted it. *See* UCC §§ 3-408 ("[T]he drawee is not liable on the instrument until the drawee accepts it.") & 3-409 (explaining that a drawee accepts an instrument by a signed agreement in which the drawee agrees to pay the instrument); *see also* UCC § 3-410(1) (1972) (defining acceptance as "the drawee's signed engagement to honor the draft as presented" and explaining that "[i]t must be written on the draft").

B. *AGENT CHECKS AND TELLER'S CHECKS DIFFER FROM MONEY ORDERS IN IMPORTANT WAYS.*

46. The previous section of the opinion discussed the extent to which a listed entity "is directly liable" on any of the MoneyGram products. This section discusses the extent to which agent checks and teller's checks are "similar" to money orders. I express no opinion on the legal question of precisely what degree of "similar[ity]" would be relevant under Section 2503. Rather, my purpose is to analyze practical ways in which the various products do and do not resemble each other.

i. Bank Liability

47. One notable difference between agent checks and tellers checks on the one hand and money orders

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[10] That rule was the same under the 1972 version of the UCC. UCC § 3-403 & cmt. 3 (1972).

on the other is that a bank ordinarily is indirectly liable on an agent check or a teller's check; ordinarily no bank is directly or indirectly liable on a money order. Having said that, I discuss below the possibility that some of the MoneyGram agent checks do not involve even indirect liability on the part of a bank.

48. The commonplace distinction between the two groups of instruments follows directly from the discussion above regarding the liability of a drawer, which explained that the drawer is only indirectly liable for payment of an instrument. The corollary of that rule, though, is that the drawer can be called upon to pay in any case in which the drawee dishonors the instrument. What that means is that the payee that accepts a teller's check or an agent check ordinarily can be sure that it will be able to obtain payment from the bank that is the drawer of the instrument unless that bank fails before the instrument can be processed.

49. In the case of money orders, by contrast, no bank is directly or indirectly liable on the instrument, because the drawer of the instrument is MoneyGram, which is not a bank. As the discussion above illustrates, that is true for both retail money orders and agent check money orders. Given MoneyGram's substantial and longstanding financial position, the distinction between an instrument on which a bank is liable and an instrument on which MoneyGram is liable might seem irrelevant or technical at first glance. In the context of payments, though, that distinction is quite important, generally reflecting the reality that as a class the likelihood that a bank liable on an instrument will become insolvent before it is paid is quite remote, both because of the supervision of bank solvency by responsible regulators and

because of the reality of bank liquidity. Because the solvency of entities that are not banks is much less regularized and reliably evident to the market, instruments on which banks are liable are treated in the marketplace quite differently than those on which no bank is directly or indirectly liable.

50. The distinction between instruments on which a bank is liable and those on which no bank is liable is important in a variety of contexts. For example, the UCC includes rules that govern the relationship between an instrument and the obligation for which the instrument is taken. Ordinarily, those rules provide that the obligation is suspended when the payee accepts the instrument and discharged only when the instrument is honored. So, for example, if a tenant gives its landlord a check to pay the rent, the obligation to pay that month's rent is suspended when the landlord receives the check and discharged only when the check is honored. The same rule would apply if the tenant paid the landlord with a money order. *See* UCC § 3-310(b).

51. The rule is different, however, for cashier's checks and teller's checks, on which a bank is directly or indirectly liable. If a party accepts one of those instruments, the obligation is discharged immediately. *See* UCC § 3-310(a). That rule by its terms applies to teller's checks and also applies to many of the agent checks at issue in this litigation,[11] because a

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[11] That rule is broader than it was in 1972. Like the current version of UCC § 3-310, UCC § 3-802 (1972) drew a distinction between instruments on which a bank is directly or indirectly liable and those on which a bank is not liable. The category of instruments that would produce an immediate discharge, though, was effectively limited to certified checks. *See* UCC § 3-802(1)(a) (1972) ("Unless otherwise agreed where an instrument is taken

bank signs those checks as the drawer (which makes them qualify as teller's checks for purposes of the UCC). *See* UCC § 3-104(h) (defining "teller's check" to include any item drawn by one bank on another bank). The only exception applies to the agent check templates completed in a way that designates the bank on the face of the instrument as the agent of MoneyGram. *E.g.*, DE0000220 (designating the institution signing as drawer ("Pennstar, Division of NBI Bank") as an "agent for MoneyGram"). For instruments of that type, the bank (signing as agent for a disclosed principal) would not be directly or indirectly liable on the instrument. *See* UCC § 3-402(a); *see also* UCC § 3-403 & cmt. 3 (1972) (same outcome under 1972 UCC).

52. A similar distinction appears in the rules that govern when an institution must make funds available against an item that a customer deposits. The low-risk rules in 12 U.S.C. § 4002(a)(2) (implemented in Regulation CC 12 C.F.R. § 229.10(c)), apply when customers deposit specific "low-risk" items in their account. The "low-risk" rules obligate banks to provide available funds sooner than they must provide available funds based on the deposit of ordinary personal checks. As relevant here, low-risk rules for cashier's and teller's checks obligate the bank at which the item is deposited to provide funds on the next

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for an underlying obligation (a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor"); *see also* UCC § 3-802 cmt. 2 (suggesting that the purpose of the provision was to discharge the obligation owed by the drawer of a certified check). The provision was broadened to its current range of coverage in 1990. *See* UCC § 3-310(a) (1990); UCC § 3-310 cmt. 2 (1990) (comparing the 1990 revisions to the earlier statute).

business day, an obligation the depositary bank would not have if a customer deposited a personal check. With one narrow exception, though, those rules do not apply to money orders. *See* 12 U.S.C. § 4002(a)(2)(F) (low-risk exception for cashier's and teller's checks); 12 C.F.R. § 229.10(c)(1)(ii) (low-risk exception for Postal money orders), (v) (low-risk rule for cashier's and teller's checks). Thus, when a customer deposits a conventional money order like the MoneyGram products involved here, the customer is not entitled to available funds the next day; the customer would have that entitlement, though, if the customer deposited a cashier's check or a teller's check.

53. The exclusion of money orders from the low-risk rules (leaving them to the same treatment as personal checks) is not accidental. Commenters during the notice-and-comment development of Regulation CC requested an express exclusion of money orders from the low-risk rules, but the Federal Reserve declined, concluding that money orders differed so substantially from the covered instruments that their exclusion was clear even without an explicit mention in the regulation. Among other things, the Federal Reserve explained that money orders "are generally signed by the purchasing customer, not by an officer of the issuing bank and therefore are not cashier's checks subject to the [low-risk rules]." 53 Fed. Reg. 19372, 19396.

54. A similar distinction also has been implemented in the operation of Regulation D (12 C.F.R. Part 204), which governs the reserve requirements for depositary institutions. The regulation requires covered institutions to maintain reserves against any "deposit," a term that 12 C.F.R. § 204.2(a)(1) defines in detail. The concept is that the deposits a bank holds

for its customers are effectively liabilities of the bank, against which the bank must maintain a reserve of assets adequate to satisfy the requests for withdrawal a bank might face on any particular day. Among other things, that definition includes any "outstanding teller's check, or an outstanding draft, certified check, cashier's check, money order, or officer's check drawn on the depository institution." The premise of that provision is that once a bank has issued an item of that nature, drawn on itself, the item effectively becomes a liability of the institution, against which it must maintain reserves. Importantly, it applies only to items on which the bank is directly or indirectly liable. Thus, it would include the teller's checks and official checks at issue here, but it would not include the MoneyGram money orders discussed above, because those items are not drawn by (or signed by) any depository institution.

55. As discussed above, MoneyGram also has an "agent check money order" product, on which a bank signs as an agent of MoneyGram. On such a product, as with the more conventional money orders discussed above, no bank would be directly or indirectly liable; rather, by signing as an agent of MoneyGram, the bank would sign only to create for MoneyGram the indirect liability as a drawer.

56. In sum, a variety of legal and practical considerations make an important distinction between instruments that a bank has signed on its own behalf (such as cashier's checks, teller's checks, and agent checks that do not indicate the bank's status as an agent), and those that no bank has signed (such as the money orders marketed by MoneyGram and the agent checks signed by the bank only as an agent).

ii. Contractual Conditions

57. Another distinction between teller's checks and agent checks on the one hand and money orders on the other appears in the terms and conditions printed on the back of a standard MoneyGram money order. Two important terms describe the limited recourse and the service charge.

58. The "Limited Recourse" term emphasizes the inability of the holder to force any financial institution to pay the instrument. Specifically, that term states in large bold-face type that the only "recourse" on the money order is "against the presenter. This means that persons receiving this money order should accept it only from those known to them and against whom they have effective recourse." That term appears to mirror the discussion above of the effect of the absence of any bank signature under the UCC. Apparently, MoneyGram thought it important to emphasize those attributes in writing on the instrument to ensure that disappointed purchasers would have little basis for claiming that they had been misled into thinking that the instruments were more robustly enforceable than they were.

59. The second term of relevance is the "Service Charge" term, which describes a service charge of one dollar and fifty cents per month if the money order is not used within one year of the purchase date. That has the effect of steadily absorbing the value of the money order if it is not promptly used. So far as I can tell from the instruments that I have seen, banks ordinarily do not impose such charges on the bank-signed MoneyGram instruments (the official checks), which instead retain their value until they escheat to the relevant jurisdiction. Thus, the MoneyGram official checks contain no such "Service Charge" term.

C *"THIRD PARTY BANK CHECK[S]" IS AN OBSCURE TERM, WHICH COULD REFER TO CHECKS THAT BANKS ISSUE TO PAY BILLS FOR THEIR CUSTOMERS.*

60. Section 2503 excludes from the group of "other similar written instrument[s]" a category of instruments that the statute describes as "third party bank check[s]."

61. As a matter of history, of course, the source of the term seems clear. First, a November 1, 1973 letter from Edward Schmults, General Counsel of the Department of the Treasury, commenting on the bill that would become Section 2503, suggested that the legislation should exclude "third party payment bank checks." S. Rep. 93-505, 93rd Cong., 1st Sess. 5 (Nov. 15, 1973). Then, apparently in an imprecise response to the letter, the bill was amended to exclude "third party bank checks." *Compare* S. 1895 § 2, 93rd Cong., 1st Sess. (May 29, 1973) (no exclusion, predating the Schmults letter), *with* S. 2705 § 3, 93rd Cong., 1st Sess. (Nov. 15, 1973) (draft after the Schmults letter including exclusion for "third party bank check[s]"); S. 2705 § 3, 93rd Cong., 2nd Sess. (House version dated Mar. 4, 1974) (same). Neither the Schmults letter nor any other provision of the report or legislative history of which I am aware offers any guidance as to the product intended to be excluded.

62. As a matter of commercial law, the term is obscure. The modern UCC does not use the terms "bank check" or "third party check," much less the more specific terms "third party bank check" or "third party payment bank check." Nor am I familiar with either of those specific terms in the common parlance of industry professionals or literature. Similarly, the designation of the MoneyGram products as "official"

checks is not a designation with a source in the modern UCC; thus it seems to me to bear only the general trade connotation of a check that is more reliable than a check that is not "official."[12]

63. Attempting to make some sense out of the term itself, the idea of a "bank check" logically suggests a check on which a bank is directly or indirectly liable. All checks are drawn on banks. *See* UCC § 3-104(f) (defining "check" as "(i) a draft * * * payable on demand and drawn on a bank or (ii) a cashier's check or teller's check"). So if the reference to "bank check" is to convey anything different from an unadorned reference to a "check," the most likely connotation would be a reference to a check issued by a bank as opposed to a garden-variety "check" issued by a person other than a bank.

64. Strong support for that idea comes from the text of the UCC at the time that Section 2503 was adopted, which used the terms "bank check" and "non-bank check" to distinguish between checks on which some bank is liable and those on which no bank is

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[12] The term "official bank check" did appear in an early draft of what eventually became the 1990 revisions to UCC Article 3 and amendments to Article 4 (discussed in the next footnote). In that draft, the term was defined to include what are now known as teller's checks and cashier's checks. *See* UCC § 3-104(d) (1987 Exploratory Draft) (defining "official bank check" as "(i) a draft payable on demand drawn by a bank on another bank, or (ii) a draft payable on demand with respect to which the drawer and the drawee are the same bank or branches of the same bank"). That draft used the term in UCC § 3-310 in the same way that the current UCC refers to teller's checks and cashier's checks – to describe the instruments that discharge an obligation as soon as they are "taken" by the payee "as payment of an obligation." *Compare* UCC § 3-310(1) (1987 Exploratory Draft) *with* UCC § 3-310(a).

liable. *Compare* UCC § 4-211(1)(d) (1972) (requiring banks to accept as settlement "a cashier's check, certified check or other bank check or obligation") *with* UCC § 4-211(3)(b) (1972) (describing process for a bank that voluntarily has agreed to accept "a non-bank check or obligation").[13]

65. It is less clear what to make of the additional qualification that the exclusion refers to "third party" bank checks (or, in the phrasing of the Schmults letter, "third party payment" bank checks). The overwhelming majority of checks are written to "third parties," in the sense that they are written to a party distinct both from the party that writes the check and from the party on which the check is drawn. Similarly, the overwhelming majority of checks are written to make "payment" to that third party. To make sense of the reference to "third parties," logically there should be an additional party to the transaction beyond the payor, payee, and the payor's bank.

66. The statutory context also suggests an additional qualification in making sense of the term. Because "third party bank checks" (or "third party payment bank checks") are to be excluded from the category of "similar written instruments * * * on which a [listed entity] is directly liable," the relevant product should be a product on which some listed entity is directly liable. Because the excluded category is third

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[13] The references to "bank checks" and "non-bank checks" were removed in the 1990 version of Article 4, which substituted references to cashier's checks and teller's checks, terms added at the same time to UCC Article 3. *See* UCC §§ 3-104(g) & (h) (1990) (definitions of cashier's check and teller's check), 4-213 (1990) (replacing UCC § 4-211 (1978)).

party ***bank*** checks, logically it should be a product on which a bank is liable.

67. One possibility that is easy to discard is that the designation refers to a personal check (that is, a check drawn by an individual) that the payee has indorsed to a third party.[14] The discussion above suggests one obvious problem with application of that term to the scenario – why would anybody use the term "third party bank check" as opposed to the term "third party check" to refer to a check on which a bank has no cognizable role. More specifically, though, that application would make no sense in the context of Section 2503. The problem is that the escheating party has no way of telling if an instrument has been indorsed to a third party until the indorsed item is presented for payment. Section 2503, though, applies only to instruments that are not ever presented for payment. Thus, to read the statutory reference to "third party bank checks" as excluding only indorsed checks is to read it as excluding checks to which Section 2503 would not apply in any event.

68. Another possibility, mentioned in a September 29, 2015 letter from David Gregor, the Delaware State Escheator (ALF00002365), is that the term refers to teller's checks. That makes sense of the "bank check" part of the term – because a teller's check is a check that is drawn by a bank. It treats the "third party" portion of the term as reflecting the difference between the bank that draws a check and the bank on which the check is drawn, which means that the instrument involves three parties. That is a possible

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[14] Pennsylvania suggested that possibility in its May 30, 2017 "Bench Memorandum on the Disposition of Abandoned Money Orders and Traveler's Checks Act."

interpretation, though the use of "third party" to indicate a difference between the identity of the issuer and the drawee seems a little odd; that term usually refers to checks that end up being paid to a party distinct from the original parties to the check transaction. Moreover, as explained above, a teller's check is not a check on which a bank is directly liable; it is a bit odd, then, to include a phrase excluding teller's checks from a group of instruments on which a financial institution "is directly liable."

69. Recognizing the reality that it may be difficult to understand precisely what Schmults (or Congress) intended by the term at the time, another possibility is that the term refers to the checks that banks write at the direction of their customers through their bill-payment services. For several decades, banks have offered bill-payment services, under which banks pay bills to identified payees at the request of their customers. Traditionally, banks made those payments either by making ACH transfers (which are quite inexpensive) to the identified payees if possible, or by issuing paper checks (which are much more expensive) to payees for which it is not practical to complete an ACH transfer. In recent years, banks complete an increasing share of those payments by ACH transfers.

70. In the early years of those products, however, the banks of customers commonly effected a large share of the payments by issuing paper checks. Conventionally, those checks were signed (and thus issued by) the customer's bank, and drawn on the same bank. Thus, though in my experience they have not been issued on the common forms for cashier's checks (which state prominently that the instrument is a cashier's check), they are cashier's checks in legal contemplation (in the same way that the agent checks

described above are teller's checks in legal contemplation even if they do not bear that designation on their face). *See* UCC § 3-104(g) (defining "cashier's check" as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank"). Because those checks are checks on which a bank is directly liable, and because they involve an additional party not present at the issuance of the check, they meet the basic requirements of a sensible interpretation of the reference in Section 2503 to a "third party bank check."

V. CONCLUSION

71. Because discovery is continuing as of the date of this report, I expect that I will continue to review documents and testimony related to the topics discussed in this report. Accordingly, I reserve the right to supplement my report based on materials not available at the time I prepared it, including any reports that other experts might submit.

/s/ Ronald Mann
RONALD MANN

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Expert Report

In the Matter of *Delaware v. Arkansas, et al.*,

U.S. Supreme Court Case
Nos. 220145 & 220146 (consolidated)

September 24, 2018

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Qualifications of Barkley Clark

Based upon my credentials and experience in the area of negotiable instruments, banking and check law, I have been engaged by Kleinbard LLC as an expert on behalf of the state of Pennsylvania in the above-captioned litigation. My hourly rate for this engagement is $715.

My Credentials

My vita is attached as Exhibit A. I am a partner in the law firm of Stinson Leonard Street LLP, Denver, Colorado. I am a member of the firm's Banking and Financial Services Practice Group. I have consulted with banks and other depository institutions for 53 years regarding commercial and banking law issues, with an emphasis on bank deposits, payment systems and negotiable instruments law. My consultations with financial institution clients have included review of: demand deposit account issues, account opening and closing, check fraud, check fraud detection systems, wire transfer litigation, remittance instruments such as cashier's checks, teller's checks and money orders, check fraud litigation, a drawee bank's "strict accountability" for late return of checks, check kiting issues including all-funds holds, check rules under the Uniform Commercial Code ("UCC") and Federal Reserve Board Regulation CC, Federal Reserve Board Operating Circulars, cash management products, bank setoff, expedited funds availability, automated deposit-taking and check payment, and credit and compliance issues. I have also drafted deposit account agreements, wire transfer agreements and account-opening documents for bank clients. I have been involved in the litigation of a number of payment-system issues under the UCC and related federal law

and have advised banks regarding the handling of both commercial and consumer deposit accounts.

My career has also included a strong academic component. From 2003 to 2006, I served as an Adjunct Professor at the University of Virginia School of Law, where I taught courses on secured transactions, negotiable instruments, bank deposits and payments under the UCC, and federal banking law. Prior to my appointment at the University of Virginia, I taught banking law as an Adjunct Professor at the Georgetown Law Center in Washington. Before that, I held an endowed chair in commercial and banking law at the University of Kansas School of Law. For four years, I served as Professor of Law at the National Law Center, George Washington University, where I taught courses on the UCC and Federal Regulation of Banking. I have also taught banking and commercial law courses at the University of Colorado, the University of Oregon, and the University of Michigan.

I regularly lecture throughout the country on banking, and other commercial law topics. I have taught special seminars on bank deposit issues, issues including check collection, setoff and holds, wire transfers, ACH, negotiable instruments, and various payment systems. I have given lectures on deposit account issues for the Southwest Legal Foundation at SMU in Dallas; the School of Banking of the South in Baton Rouge; the Louisiana Bankers Association in New Orleans; in-house personnel at the twelve Federal Reserve Banks; the Banking Law Institute; the UCC Institute; the American Bankers Association; the American Bar Association; ALI/ABA; the Practicing Law Institute; and the Bank Administration Institute.

I have co-authored three treatises that are widely used by bankers and their counsel around the country,

by academicians, and by attorneys who practice banking and commercial Law. These treatises are regularly cited by federal and state courts around the country. They are published by Lexis/Nexis, and are titled: (1) *The Law of Bank Deposits, Collections and Credit Cards* (with Barbara Clark, supplemented three times a year), which discusses a variety of deposit account issues including various negotiable instruments, check collections and wire transfers; (2) *The Law of Secured Transactions under the UCC* (with Barbara Clark, also supplemented three times a year); and (3) *Compliance Guide to Payment Systems* (with Mark Hargrave and Barbara Clark, supplemented semi-annually), which discusses a wide range of payment systems and negotiable instrument issues. I also co-edit a monthly newsletter entitled *Clarks' Bank Deposits and Payments Monthly,* which has subscribers around the country and has often included articles on topics such as various types of check fraud, bank deposit agreements, and payment finality. These treatises include discussion of negotiable instruments relevant to the present case. Chapter 24 of my Bank Deposits treatise, as well as Chapter 7 of the *Compliance Guide,* deal specifically with remittance instruments such as cashier's checks, teller's checks and money orders.

I have served as a special consultant to the Federal Reserve Board, the American Bankers Association, the Uniform Law Commission, and the American Law Institute, as well as a number of state legislatures regarding banking, commercial law, and consumer protection legislation. I have been active in banking law reform, serving on the original Study Committee that established the guidelines for Revised Article 9 of the UCC dealing with secured transactions. I have given in-house seminars on check and negotiable

instruments issues for bank officers and employees. I serve on the Board of Editors of the Banking Law Journal and The UCC Law Journal. In 2012, I was awarded the Senator William Proxmire Lifetime Achievement Award from the American College of Consumer Financial Services Lawyers.

I have served as a director of a national bank and as an employee in the back office of another national bank. In my capacities as a bank director and employee, I have dealt with a variety of deposit and payment system issues, including suspected kites, "state of the art" deposit account provisions, security procedures, remittance instruments, automated check collection, and the duty of customers to review monthly bank statements.

During the past 30 years, I have testified often as an expert witness--by affidavit, deposition or at trial, including before federal and state courts and arbitration panels. List pursuant to Fed. R. Civ. P. 26(a)(2)(b)(v) is attached at Exhibit B.

Materials Reviewed For This Report (Exhibit C)

Pleadings:

* Original Complaint and other pleadings in *Pennsylvania v. Delaware and MoneyGram Payment Systems Inc.,* filed on Feb. 26, 2016, in Federal District Court, Middle District of Pennsylvania

* Delaware Motion for leave to file Bill of Complaint in State of *Delaware v. Commonwealth of Pennsylvania and State of Wisconsin,* in U.S. Supreme Court seeking original jurisdiction, with Hon. Pierre N. Leval, as Special Master

* Contents of pdf attachment docket files 1-66, beginning May 26, 2016
* Bills of Complaint and related motions and briefs of Pennsylvania, Delaware, Wisconsin and Arkansas in connection with the granting of original Supreme Court jurisdiction

Hearing Transcripts

* Transcript of the deposition of Eva Yingst, dated May 23, 2018, including exhibits
* Transcript of the deposition of Kate Petrick, dated June 5, 2018, including exhibits
* Transcript of hearing before Judge Leval on June 5, 2017

Documents

* Exemplars of certain negotiable instruments issued by MoneyGram, which are exhibits to the Yingst deposition transcript
* MoneyGram marketing materials for money orders and Official Checks, which are exhibits to the Yingst deposition
* Delaware Escheator David Gregor's letter dated September 29, 2015, with exhibits
* The Report of the President's Commission on Financial Structure & Regulation (December 1971, revised September 1973), commonly called "The Hunt Commission Report"
* U.S. Treasury Department, Recommendations for Change in the U.S. Financial System (1973)
* Newspaper reports regarding the potential impact of the Hunt Commission Report: (1) Robert E. Knight, *The Hunt Commission: An*

Appraisal, Wall Street Journal, July 3, 1972, at 4 and (2) James L. Rowe, Washington Post, January 13, 1973, at G2

* Affidavit of Jennifer Whitlock, with exhibits including check templates and marketing materials dated October 3, 2017

* Senate Report No. 93-505, to accompany S. 2705

Statutory Materials

* The Federal Disposition Act (now codified at 12 U.S.C. §§ 2501-2503)

* Edward Schmults' commentary on Senator Scott's original bill (S. 1895), in response to inquiry from the Senate Committee on Banking, Housing and Urban Affairs in 1973

* The Uniform Commercial Code, including Section 3-104 defining types of negotiable instruments and the Official Comments to that UCC provision

* Regulation CC, including 12 CFR § 229 defining various negotiable instruments

* 1983 statute from the State of Washington (Wash. Rev. Code § 63.29.020(17)), defining "third party bank check"

* Draft Model Unclaimed Property Act, 73 Bus. Law. 763 (2018)

* Pennsylvania Disposition of Abandoned and Unclaimed Property Act, Section 1301.1 et. seq.

* Chapter 177 Wisconsin Code, Uniform Unclaimed Property Act (1981)

* Uniform Law Commission, Revised Uniform Disposition of Unclaimed Property Act (1966)

Judicial Materials

* *Pennsylvania v. New York,* 407 U.S. 206 (1972) (leading to enactment of FDA)
* *Texas v. New Jersey,* 379 U.S. 674 (1965)
* *MoneyGram International v. Commissioner of Internal Revenue,* 2014 WL7795630 (U.S. Tax Court (2014) (describing MoneyGram's business model)

Secondary Source Materials

* *Personal money orders and Teller's* Checks*: Mavericks under the UCC,* 67 Colum. L. Rev. 524 (1967)
* Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527 (1947)
* Chapter 24 of Clark & Clark, *The Law of Bank Deposits, Collections and Credit Cards*
* Chapter 7 of Clark, Clark & Hargrave, *Compliance Guide to Payment Systems*
* Millar, Heyman and Noel, *Building a Better Unclaimed Property Act,* 73 Bus. Law. 711 (2018)

I. INTRODUCTION

I have been retained to opine on the characteristics of certain prepaid instruments marketed and sold by MoneyGram Payment Systems, Inc. ("MoneyGram") as "Official Checks" and to opine on whether such instruments are money orders—or written instruments similar to money orders and traveler's checks—subject to the priority rules established under the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-03 (the "Federal

Disposition Act" or "FDA"). I have been further asked to opine on what is a "third party bank check" as set forth under the FDA.

MoneyGram refers to the following instruments as "Official Checks": (a) teller's checks; (b) agent checks; (c) cashier's checks; and (d) agent check money orders.[1] See deposition transcript of Eva Yingst, at p. 36:15-37:15. This report largely concerns the characteristics of these MoneyGram teller's checks and agent checks and whether they are subject to the priority rules of the FDA.

A. Section 2503 of the FDA

Section 2503 of the FDA establishes priority rules for the escheatment of certain prepaid negotiable instruments, stating in relevant part:

> Where any sum is payable on a money order, traveler's check, or **other similar written instrument (other than a third party bank check)** on which a banking or financial organization or a business association is directly liable—
>
> (1) if the books and records of such banking or financial organization or business association show the State in which such money order, traveler's check, or similar written instrument was purchased, that State shall be entitled exclusively to escheat or take custody of the sum payable on such instru-

[1] MoneyGram also markets and sells another money order product it refers to as a "retail money orders," which are generally purchased at retail establishment, such as 7-Elevens and check cashing agencies. These retail money orders do not fall under MoneyGram's "Official Check" umbrella.

> ment, to the extent of that State's power under its own laws to escheat or take custody of such sum[.]

12 U.S.C. § 2503(1) [Emphasis Added].

To determine whether MoneyGram Official Checks, specifically its "teller's checks" and "agent checks," are subject to the above priority rules, it is necessary to determine what is a "similar written instrument," as well as a "third party bank check" excluded from these priority rules.

B. Summary Opinion

This case is about what I call "remittance instruments," which are negotiable instruments that share common core characteristics (particularly prepayment and the obligation of a financial or business entity) that set them apart from ordinary bank checks. A money order is one type of remittance instrument; a teller's check is another. In my opinion, all of the MoneyGram Official Checks at issue in this case are money orders or are "similar to" money orders. Therefore, they are subject to the priority rules of the Federal Disposition Act, 12 U.S.C. § 2503. This conclusion is strongly supported by the plain language of the statute, read in light of its clear and unmistakable purpose—to avoid a windfall in application of federal escheatment priority rules. As remedial legislation, the scope of the FDA should be construed broadly. Most important, Delaware should not be able to exclude itself from the priority rules of the FDA on the ground that, contrary to banking industry understanding, MoneyGram teller's checks are "third-party bank checks." 12 U.S.C. §§ 2501-2503. If Congress had wanted to exempt teller's checks from the statute, it would have said so, but it did not. Under

a proper construction of the statute, the term "third-party bank checks" means ordinary checks drawn out of ordinary checking accounts that are not prepaid; it does not mean teller's checks, or what MoneyGram refers to as Official Checks.

II. BACKGROUND ANALYSIS

A. The Commercial Function of Remittance Instruments and Their Common Characteristics

The present case is at bottom about the nature and scope of remittance instruments, particularly money orders and teller's checks, as well as the contrast between bank checks used as remittance instruments and ordinary bank checks. The following addresses the characteristics of remittance instruments versus that of ordinary bank checks.

1. Conditionality of the Ordinary Bank Check

Ordinary bank checks are highly conditional. They are issued by an individual or entity to the order of the payee. The words "to the order of' are the "magic words" of negotiability. There are at least three parties to an ordinary check—the drawer, the drawee bank and the payee. As negotiable instruments, ordinary bank checks can be negotiated by the payee (by endorsement) to a third party "holder," who may be able to qualify as a holder in due course of the check, with power to enforce the check free of the drawer's personal claims and defenses. In either case, the check is deposited into the bank collection process, cleared through the interbank clearing system, and presented to the drawee bank for payment or return.

The problem with ordinary checks signed by an individual or business is that payment upon presentment is subject to a number of conditions. Because there is no direct bank liability, enforcement by the payee/holder as against the drawer or prior endorser is always a risk. The holder of the check relies on the obligation of the drawer to pay by debit of its deposit account at the drawee bank. If the drawee bank wrongfully dishonors the check, the drawer may have a cause of action against the bank, but the payee does not. Dishonor of the check can occur for a number of reasons. Examples of conditionality include the drawer's stop payment order, insolvency of the drawer, insufficient funds (NSF), bank setoff, garnishment, account closed, or simply "refer to maker."

The Uniform Commercial Code ("UCC") is central to the present case because Article 3 of that statute has, since the 1950s, codified banking industry practice and understanding with respect to the rules defining and governing all negotiable instruments, including not only ordinary checks but also money orders, cashier's checks, teller's checks, certified checks and traveler's checks. Once negotiable checks enter the bank collection system, headed toward the drawee bank to be paid or returned, Article 4 of the UCC provides the legal framework. The present case is governed more by Article 3 than Article 4. Closely related to the uniform state rules of the UCC are the federal rules of Regulation CC, which were authorized by the Expedited Funds Availability Act, effective in 1988. Definitions found in Reg. CC generally follow the UCC.

The term "check" is defined in UCC 3-104(f) as an order from the drawer to its bank to pay to the payee or third-party holder a specified amount out of the

drawer's deposit account. It is a negotiable instrument, governed by the UCC, a draft payable on demand and drawn on the drawer's account. With an ordinary check, there is no prepayment of the drawer's obligation to the payee; the only direct obligor is the nonbank drawer, whose obligation to pay arises following dishonor of the check by the drawee bank upon presentment. Because a check is not an assignment of funds in the drawer's deposit account (UCC 3-408), the drawee bank has no obligation to pay the holder, even though the drawer might be able to sue its bank for wrongful dishonor. In short, an ordinary check is highly conditional and could bounce. If the payee of an ordinary check negotiates the item to a third party holder, the instrument is known in the banking industry as a "third-party check" or "twice-endorsed" check. The term "check" as defined in the UCC 3-104(f) includes cashier's checks and teller's checks, and the UCC states that "[a]n instrument may be a check even though it is described on its face by another term, such as `money order.'

2. Overcoming the Conditionality of an Ordinary Check by Using a Remittance Instrument

To overcome the conditionality of an ordinary check, and to encourage commercial transactions between creditors and debtors, over the past century the financial services industry has developed a number of payment instruments where the underlying obligor is a bank or a regulated business organization.[2] The

[2] In Pennsylvania, a non-bank issuer of such payment instruments is generally required to obtain a license and satisfy minimum net worth and bonding requirements. Pennsylvania Money Transmitter Act of 2016, P.L. 1002, No. 129.

debtor in the underlying transaction prepays in cash (or by the immediate debiting of its deposit account) and in return receives a "remittance instrument" on which a bank or regulated business organization is primarily obligated, and on which the payee's name and amount are indicated by the seller of the instrument.

These instruments take a number of forms and names, but they all have four core characteristics: (1) prepayment by the debtor/remitter; (2) the direct obligation of a bank or other regulated business entity on the new instrument, to replace the original obligation of the debtor/remitter to the payee; (3) the form of a written negotiable instrument, governed by the UCC, that is collected and paid through the interbank clearing system; and (4) treatment of the instrument as a "cash-equivalent" in order to encourage transactions where the creditor would otherwise balk because of the conditional nature of ordinary checks. In my opinion, prepayment is the most important core characteristic.

As a group, these instruments can be referred to as "remittance" instruments. The debtor who pays the bank for the instruments is called the "remitter," as a matter of industry practice and understanding. Under UCC 3-103(11), the term "remitter" means "a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser." Although the term "remittance instrument" is not defined in the UCC, Chapter 24 of my treatise, *The Law of Bank Deposits, Collections and Credit Cards,* discusses these instruments as a group and is titled "Remittance Instruments." Similarly, I have co-authored Chapter 7 of another treatise, *Compliance Guide to Payment Systems,* which

deals specifically with remittance instruments. Set forth below is a brief description of seven key remittance instruments, with a focus on the common denominators that characterize them all, and more importantly, distinguish them from ordinary bank checks. Throughout this report, I use the term "remittance instruments" as a convenient umbrella term to describe a variety of negotiable instruments with common core characteristics.

3. Cashier's Check

One of the most popular remittance instruments is the cashier's check, which is defined in UCC 3-104(g) as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank." Reg. CC (12 CFR § 229.2(i)) defines a cashier's check as "a check that is (1) drawn on a bank; (2) signed by an officer or employee on behalf of the bank as drawer; (3) a direct obligation of the bank; and is (4) "provided to the customer of the bank or acquired from the bank for remittance purposes." [Emphasis added.] Following prepayment to a seller, the cashier's check is used by the remitter to satisfy a debt that the remitter owes to a creditor, who is normally the payee of the instrument. Cashier's checks are granted next-day availability under Reg. CC.

A typical example of how a cashier's check is used in commerce is the requirement that it be prepaid and then tendered by a prospective buyer of real estate to satisfy the down payment on a home in a real estate contract. As another example, many state statutes require that a cashier's check be posted as a bond to secure a contractual obligation. In both cases, the creditor wants to avoid the conditionality of an ordinary bank check. When used as remittance instruments, cashier's checks satisfy all four criteria listed

above. (Cashier's checks can also be used by the issuing bank to pay its own debts.) As with many other remittance instruments, the remitter's giving of a cashier's check to its creditor will immediately discharge the remitter's underlying obligation to the creditor. By contrast, if a debtor tenders an ordinary check, its obligation to pay the underlying debt is suspended until the check is paid by the drawee bank; if the check is dishonored, the drawer's obligation ripens. UCC 3-310. As a general matter, the remitter has no right to stop payment on a cashier's check based on a dispute with the payee, though the issuing bank can stop payment based on its own defenses (such as nonpayment), so long as the instrument has not gotten into the hands of a holder in due course.

4. Teller's Check

Teller's checks are defined in UCC 3-104(h) as "drafts" that are "drawn by a bank (1) on another bank, or (2) payable at or through a bank." The Reg. CC definition (12 CFR § 229.2(gg)) generally tracks that of the UCC, and puts great emphasis on the use of teller's checks "for remittance purposes." Like cashier's checks, teller's checks are considered standard remittance instruments, they involve prepayment, they are the direct obligation of a bank, they are used by the remitter to pay an underlying obligation, the remitter prepays with cash or by having his/her account debited for the face amount of the instrument (plus a fee), and teller's checks get their commercial utility because of their cash-equivalence. They also get next-day funds availability under Reg. CC. Teller's checks, like cashier's checks, are collected through the interbank clearing system and they both came into the UCC together, as defined terms, in the 1990 Revision of Article 3. 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."

5. Certified Check

One remittance instrument that has lost some popularity in recent years to the cashier's check and the teller's check is the certified check. The term is defined in UCC 3-409(d) as an ordinary check that is "accepted" in writing by the bank on which it is drawn. The term "accepted" means the drawee bank's signed engagement to pay the draft as presented. The acceptance must be written on the face of the check and signed by an authorized agent for the bank. The nonbank drawer of the check also remains secondarily liable, but the bank's written acceptance on the face of the check is what gives the certified check its market value/cash-equivalence. Reg. CC makes it clear that the bank certifies not only the genuineness of the drawer's signature, but also that the bank has obtained prepayment from the remitter, normally through a debiting of the remitter's deposit account. 12 CFR § 229.2(j). As with all remittance instruments, the issuer/drawer's contemporaneous receipt of value from the remitter is critical. Although certified checks remain an important remittance instrument, I understand they were not a product sold by MoneyGram.

6. Money Order

The term "money order" is not defined in either the UCC or Reg. CC. A "money order" is defined by Black's Law Dictionary (10th ed. 2014) as "a negotiable draft issued by an authorized entity (such as a bank, telegraph company, post office, etc.) to a purchaser, in lieu of a check, to be used to pay a debt or otherwise transmit funds on the credit of the issuer." Retail

money orders are typically purchased at nonbank retail locations such as convenience stores, by individuals in relatively small amounts. The issuer/drawer of a retail money order may be either a bank or a nonbank such as MoneyGram in the present case. A bank money order is a teller's check under another name. With respect to money orders, the instrument has long been characterized as a "one-check checking account" for use by the remitter in paying his/her creditor. In most cases, the money order is prepaid by the remitter in cash, and thus becomes a prefunded cash-equivalent in the remitter's hands, with an indicated payee and amount imprinted on the instrument. Unlike cashier's checks and teller's checks, retail money orders do not get next-day funds availability under Reg. CC, although retail money orders are still considered by the banking industry as cash-equivalents because they are prefunded.

Although the term "money order" is not separately defined in the UCC, the drafters of the statute explain the instrument in Comment 4 to UCC 3-104:

> "Money orders" are sold both by banks and nonbanks. They vary in form and their form determines how they are treated in Article 3. 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. That kind of money order is a check under Article 3 and is subject to a stop order by the purchaser-drawer as in the case of ordinary checks. The seller bank is the drawee and has no obligation to a holder to pay the money order. If the money order falls within the definition of a teller's check, the rules applicable to teller's checks apply.

> Postal money orders are subject to federal law. [Emphasis added.].

In short, under the UCC, money orders can be many things, including teller's checks.

7. Traveler's Check

The term "traveler's check" is defined in UCC 3-104(i) as "an instrument that (1) is payable on demand, (2) is drawn on or payable at or through a bank, (3) is designated by the term `traveler's check' or by a substantially similar term and (4) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument." A traveler's check is a cash-equivalent, based on prepayment by the remitter/traveler. The obligor/issuer of traveler's checks may be a bank or a nonbank financial services company such as Western Union. The remitter is protected from loss of the instrument where it has not been countersigned. The unique aspect of the traveler's check is the countersignature requirement at the time it is cashed. It gets next-day availability under Reg. CC.

8. Agent Check

As a matter of industry practice, some remittance instruments are labeled as "agent checks" to designate that a particular bank is serving as agent for a nonbank issuer/drawer of the instrument. These "agent checks" are typically in the form of money orders, with prepayment by the remitter indicated. The term "agent checks" is not defined in either the UCC or Reg. CC, but in my opinion they clearly qualify as remittance instruments because they share their core characteristics, including prepayment.

9. Postal Money Order

Postal money orders are like bank money orders except that the issuer is the U.S. Postal Service rather than a bank. They are subject to special federal regulations. Like other remittance instruments, postal money orders are sometimes designated as two types: domestic and international. They get expedited funds availability under Reg. CC.

B. The Official Checks at Issue in This Matter are Remittance Instruments

Based upon review of the pleadings and documents I received, it is my opinion that both "money orders" and MoneyGram "Official Checks" at issue in this case fit the definition of "remittance instruments" like a glove. Both products are prepaid by a remitter, which makes them cash-equivalents. In both cases, no funds are "pulled" from the remitter's checking account when the instruments are presented for payment, as is the case with standard bank checks. In both cases, after receiving payment in cash or by debiting the remitter's deposit account, the seller of the instrument issues the money order or official check that reflects the value of the payment that is remitted by the customer. In both cases, MoneyGram is directly liable, as issuer/drawer, for the value that has been prepaid. The only substantive difference between retail money orders and Official Checks is the larger size of official check transactions (as a matter of company policy, MoneyGram retail money orders are generally limited to $1,000), and the fact that retail money orders are sold at retail nonbank establishments while Official Checks are outsourced and sold at financial institution locations. Otherwise, they are similar instruments.

Conversely, it is my opinion that ordinary, non-prepaid bank checks are not remittance instruments. (Under standard banking industry practice and understanding, the term "bank checks" is synonymous with "checks." A leading treatise, *Brady on Bank Checks,* uses the terms interchangeably.) With respect to such instruments, in a typical transaction the drawer is a nonbank debtor who is liable on the instrument if it is dishonored, but the drawee bank has no direct obligation on the check. The payee (or a third-party holder) deposits the check, which is then collected through the interbank collection system. Upon presentment, funds are "pulled" from the drawer's deposit account. There is no prepayment of ordinary, uncertified checks, nor is there any remitter. Since payment of ordinary bank checks is highly conditioned at presentment, they are the antithesis of "cash-equivalents." In short, standard bank checks are drawn on a bank and collected through the interbank check collection system, but they are not "remittance instruments."

C. The FDA is Remedial Legislation that Should be Construed Broadly to Include all Remittance Instruments, in order to Promote its Underlying Purposes

The Federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA), enacted in 1974 and codified at 12 U.S.C. §§ 2501-2503, establishes escheat priority rules for all remittance instruments. It covers "any sum [that is] payable on a money order, traveler's check, or similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable . . . ." If the books and records

of such an organization show the state in which an instrument was purchased, "that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum; . . . ."

The immediate purpose of the FDA was to overturn *Pennsylvania v. New York,* 407 U.S. 206, decided in 1972, with respect to remittance instruments such as money orders. The Supreme Court decision gave New York priority over Pennsylvania to abandoned Western Union money orders. Under federal common law prior to enactment of the FDA in 1974, New York had priority because it was the state of Western Union's incorporation, even though Pennsylvania was the state where the purchase of the money orders took place. In direct response to the 1972 decision, in 1973 Senator Hugh Scott of Pennsylvania introduced S. 1895, which was the escheat legislation that was to become the FDA. He inserted into the Congressional Record the overarching rationale of the legislation:

> The difficulty with the Supreme Court's decision is that in the case of traveler checks and commercial money orders where addresses do not generally exist large amounts of money will, if the decision applies to such instruments, escheat as a windfall to the state of corporate domicile and not to the other 49 states where purchasers of travelers checks and money orders actually reside . . . Finally, Congress should note that the problem to which this bill is directed is a matter of important public concern in that the bill would, in effect, free for distribution among the states several million dollars in proceeds

> from abandoned property now being claimed by one state. The bill is eminently fair and equitable because it would permit the state where a traveler's check or money order was purchased and which is the state of the purchasers' actual residence in over 90% of the transactions to escheat the proceeds of such instruments . . . ." 119 Cong. Rec. at S9750.

Senator Scott's views were also incorporated into the recitals in the final legislation, which are now codified in section 1 of the FDA, at 12 U.S.C. § 2501:

> The Congress finds and declares that—
>
> (1) the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments;
>
> (2) a substantial majority of such purchasers reside in the States where such instruments are purchased;
>
> (3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;
>
> (4) it is a burden on interstate commerce that the proceeds of such; instruments are not being distributed to the States entitled thereto; and
>
> (5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on

> interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

In short, while the *immediate* purpose of the FDA was to overturn the 1972 Supreme Court decision, the *overarching* purpose was to eliminate a windfall that unfairly benefitted corporate domicile states, to the detriment of states where the abandoned money orders, traveler's checks and similar instruments had been sold. Eliminating a windfall is a public policy goal of the law of escheat, just as is its consumer protection goal. The FDA was intended to bring certainty to an issue that had given rise to much escheat litigation over the years.

The principle of *ejusdem generic (i.e.,* of the same kind) is a staple of statutory construction. That principle is directly applicable to the present case. The statute begins by stating its scope: "Where any sum is payable on a money order, traveler's check or other similar written instrument . . . ." Unless the plain language of the statute otherwise prohibits it (which is not the case here), the catchall word "similar" at the end of the series should be broadly construed to effectuate the underlying purpose of the statute, *i.e.,* the elimination of an abandoned property windfall. As discussed above, all remittance instruments have core common characteristics such as prepayment, financial entity liability, and cash-equivalence. Money orders and traveler's checks fit comfortably under the umbrella of "remittance instruments." These common denominators are shared by money orders and traveler's checks as "similar instruments." If Congress identified money orders and traveler's checks for coverage under the FDA, it follows that other members of the family of remittance instruments such as

cashier's checks and teller's checks should also be covered under the FDA as "similar written instruments." They are all negotiable instruments covered by the UCC. Traveler's checks have a unique characteristic of required countersignatures at the time of encashment, yet the statute expressly includes traveler's checks because, in spite of the countersignature requirement, they still share the core characteristics—particularly prepayment—of all remittance instruments. The umbrella is wide, given the basic purpose of the statute.

III. CONCLUSIONS CONCERNING MONEYGRAM OFFICIAL CHECKS AT ISSUE IN THIS CASE

A. All of the Official Checks at Issue in This Case are Money Orders or "Similar to" Money Orders and Traveler's Checks Under Generally Accepted Usage of Those Terms in Banking Practice.

For escheat purposes, MoneyGram reports its "money order" product to Pennsylvania, the state of sale. Petrick 36:18-20. Presumably, it does this because of the mandate imposed by the plain language of the FDA. By contrast, MoneyGram's product manager, Eva Yingst, describes in her deposition the "official check umbrella" under which MoneyGram markets four specific types of instruments: "agent checks," "agent check money orders," "teller's checks" and "cashier's checks." Yingst 36:15-21; 92:22-93:7; 101:6-14; 188:10-189:2; and exhibit Yingst-11. At page 183 of her deposition, Ms. Yingst concedes that there are no specific instruments designated as "Official Checks," instead, the "official check umbrella" includes specific instruments called agent checks, money orders, teller's checks and cashier's checks. The "umbrella" term

"Official Checks," therefore, is simply a marketing label. Yingst 101:6-14.

In my opinion, the Official Checks marketed by MoneyGram as "agent checks" or "agent checks money orders" are literally "money orders" such that they are subject to the FDA disposition rules by the plain language of the statute. By way of support, in one sample contract, MoneyGram's predecessor, Travelers Express Company, even expressly stated that agent checks "may be used as money order" at the agent's choosing. See Exhibit Yingst-14. Next, even assuming that the other Official Checks, including teller's checks, do not qualify literally as money orders, they are "similar to" money orders because they share the same core characteristics of money orders, travelers checks and other remittance instruments: (1) the teller's checks, like the other Official Checks, are prepaid or "prefunded" by the remitter; (2) upon sale of the instrument, the obligation to the creditor shifts from the remitter to an institutional obligor; (3) the instrument is widely accepted by creditors as "near cash;" (4) the instrument is collected through the interbank clearing system; and (5) having the instrument paid from MoneyGram's account increases the risk of abandonment. Another point of similarity is that all remittance instruments replace the conditionality of the ordinary bank check.

A further strong similarity between Official Checks and money orders is reflected in the way the instruments are sold. For example, in the case of MoneyGram's "retail money orders," which are purchased from a participating MoneyGram location (usually a retail store), the customer/remitter pays a transaction fee and prepays the value in cash required to be sent to the creditor. MoneyGram becomes liable for the

preprinted value of this retail money order, with the remitter now out of the picture after delivering the retail money order to the indicated payee. Money orders are collected through the interbank collection system. They are ultimately presented to MoneyGram's drawee bank, and paid. On pages 156-157 of her deposition transcript, Ms. Yingst concedes that the remitter's prepayment of the instrument in cash is the same or "similar" for both MoneyGram money orders and teller's checks.

The sales transaction is structured the same way for instruments under the Official Check umbrella, which are purchased by the remitter from a financial institution that has contracted with MoneyGram. As with a retail money order, the customer buying an Official Check from a financial institution pays a transaction fee and pays the preprinted value of the official check. After receiving payment, the seller of the Official Check issues an instrument that is preprinted with the value of the payment remitted by the customer. MoneyGram is liable for the preprinted value of the Official Check. Finally, like retail money orders, Official Checks are collected through the interbank collection system.

There are some operational, marketing and nomenclature differences between Official Checks and retail money orders: (1) retail money orders are sold at retail outlets like 7-Eleven, while Official Checks are sold at financial institutions that use MoneyGram as a vehicle for outsourcing these products; (2) MoneyGram retail money orders are generally limited to $1,000 per transaction while official check products have no such ceilings; (3) a retail money order is considered a "one-shot checking account" by an unbanked consumer who pays with cash, while an official check is usually

drawn on a bank account established by MoneyGram out of which the purchase price can be debited; and (4) the labeling/nomenclature are different. In my opinion, the similarities between retail money orders and Official Check far outweigh the differences.

The most notable outcome in the Yingst deposition is her admission that the term "official check" is nothing more than a marketing label. Yingst 181:16-182:2 and 183:1-7. MoneyGram and its financial institution customers seem to prefer the label of "Official Checks" to "money orders," "teller's checks" or "cashier's checks" because it sounds more "official." Yingst 181:16-182:2. Whatever label is put on a check issued by a bank (according to Ms. Yingst in her deposition the physical labeling of an instrument can be done by the seller of the instrument, Yingst 413:6-14), however, the underlying instrument still carries the legal status of a cashier's or teller's check under the UCC and Reg. CC, where the statutory definitions focus upon who is the drawer and who is the drawee of the instrument.

In its Bill of Complaint against Pennsylvania and Wisconsin, filed in May 2016, Delaware tries to avoid the impact of the FDA, a statute it apparently had ignored.[3] It argues that Official Checks were "known and recognized monetary instruments" in 1974 when the FDA was enacted, yet Official Checks were not

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[3] This is not surprising, given that noted commentators in the area downplay the significance of the FDA. See Millar, Heyman and Noel, *"Building a Better Unclaimed Property Act,"* The Business Lawyer, Summer, 2018)(minimizing the federal statute in footnote 14 as "the only exception that has been adopted to the jurisdictional rules established by the [Supreme Court]" (emphasis the authors'). Tellingly, the authors don't mention the "similar written instruments" language found in the FDA.

included in the scope of the federal statute like money orders and travelers checks. But it is not surprising that the FDA does not explicitly describe Official Checks as covered instruments. Nor does it describe cashier's checks. The statute only mentions money orders and traveler's checks, then uses the catchall phrase "similar written instruments" under the *ejusdem generis* principle. Moreover, Official Checks were not included in the statutory language since the term "Official Check" is not a recognized UCC instrument but rather is simply an umbrella term, a convenient label, used by MoneyGram for marketing purposes. The way the federal statute is structured, the issue is whether the recognized negotiable instruments covered by the marketing umbrella—agent checks, cashier's checks and teller's checks—are in fact money orders or "similar to" money orders and traveler's checks. Based on their shared core characteristics, they are indeed money orders or "similar" instruments.

Delaware alleges that "Official Checks differ from money orders in a number of respects, including: (i) Official Checks are not labeled as money orders, (ii) Official Checks are generally issued by financial institutions and not 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 [unnamed] federal regulations relating to monetary instruments." It is notable that first on Delaware's "dissimilar" list is MoneyGram's use of the label "Official Checks" on the negotiable instruments that it issues. What Delaware is seeking to do is to reify the label, in order to make the underlying instruments "dissimilar" to money orders. In my opinion, that reification does not work. In spite of the "Official Check" label, the MoneyGram

"Agent Checks" are in fact money orders, while the cashier's checks and teller's checks are, at a minimum, "similar to" money orders and traveler's checks because of their common core characteristics—particularly prepayment, institutional obligor, and acceptance in the market as cash-equivalents.

B. As a Matter of Banking Industry Practice and Understanding, the Term "Third Party Bank Check" Does Not Mean a Teller's Check

The FDA covers "any sum [that] is payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable—. . . ." Delaware asserts that most of MoneyGram's Official Checks are in fact teller's checks under Section 3-104(h) of the UCC, and that teller's checks are excluded from the priority rules of the FDA because they qualify as third party bank checks. I disagree.

Teller's checks had become a well-recognized form of remittance instrument by the 1960's and early 1970s, when the FDA was drafted. The issue that generated most litigation at the time was whether remitters of money orders and teller's checks could stop payment on those instruments. The leading case dealing with teller's checks is *Malphrus v. Home Say. Bank,* 44 Misc.2d 705, 254 NYS2d 980 (Albany County Ct.), a 1965 New York decision which held that the remitter could not stop payment on a teller's check because, as with certified checks, the teller's check was a cash-equivalent. The leading law review commentary analyzed the case law in *"Personal Money Orders and Teller's Checks: Mavericks under the UCC,"* 67 Colum. L. Rev. 524 (1967). Teller's

checks had substantial visibility during that era, as they still do. In September 1974, the Federal Reserve Board reported that remittance instruments (referred to as "certified and officers' checks, etc.") totaled $9.637 billion in aggregate value. Like certified and cashier's checks, teller's checks were well-established negotiable remittance instruments.

If Congress had intended to exempt a single type of remittance instrument from the FDA priority rules, as Delaware contends, surely the parenthetical phrase would have identified the specific remittance instrument category that was to be excluded so that the phrase would read "(other than a teller's check)" instead of "(other than a third party bank check)." When Congress wanted to refer to a specific type of remittance instrument, it did so in the statute, i.e., "money order" and "traveler's check." Yet neither the statute as written nor the legislative record includes any reference at all to teller's checks. One searches in vain for a rationale that would support exclusion of a single type of remittance instrument, continuing the "windfall" that Senator Scott was seeking to eliminate. That is the way that Delaware reads the statute, but that is not the way the parenthetical phrase was written by Congress. In short, it is my opinion that the FDA covers all remittance instruments, with no stand-alone exception for teller's checks.

This is a case where a number of principles of statutory construction converge. The first is that remedial legislation should be broadly construed to effectuate the purpose of the statute. If ever there was remedial legislation, the escheat bill introduced by Senator Scott in 1973 is it. The perceived mischief was a priority rule that escheated abandoned remittance instruments to the favored few states of incorporation

instead of the state where the purchase of the instruments took place. Following the 1972 decision of the Supreme Court in *Pennsylvania v. New York,* which affirmed the "federal common law" priority rule, the Scott bill was introduced to curtail the mischief by reversing the priority rule. The plain language of the Scott bill sought to give the benefit of the new rule to all remittance instruments by including money orders, traveler's checks and "other similar written instruments." Use of the catchall word "similar" allowed all other remittance instruments to fill the gap. The goal was to avoid the kind of "windfall" enjoyed by a few states like Delaware. The same principle that invites a great variety of remittance instruments to be considered "similar" to money orders and traveler's checks, requires a narrow construction of the parenthetical term "third party bank checks," which is an exception to the general rule.

Reading the parenthetical exception to mean teller's checks, thus lopping off an entire subset of remittance instruments from the scope of the statute, is a drastic change in the statute that would require some explanation from the drafters. It is hardly a mere "technical" change, as assumed by the Senate Committee on Banking, Housing, and Urban Affairs. Such a reading totally undercuts the remedial purpose of the FDA.

A closely related principle of statutory construction is that, in some cases, statutory silence can be just as strong as affirmative language. In his seminal law review article entitled *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 536 (1947), Justice Felix Frankfurter offers a warning: "One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say." This principle

applies directly to the present case, where there is no mention of teller's checks in the text of the statute or anywhere in the legislative history. The silence is deafening. Teller's checks were (and are) an important remittance instrument. If Congress had wanted to suddenly remove teller's checks from the scope of the FDA, it would have said so plainly in the parenthetical text, *i.e.* , by referring to the well-understood term "(teller's checks)" and not "(third-party bank checks)."

Another principle of statutory construction is that, if the language is clear enough, the analysis ends there. For example, if the FDA stated that remittance instruments "(other than teller's checks)" were covered by the escheat priority rule, it would make no difference that the purpose of the statute conflicted with the plain language. Teller's checks would be excluded. But the FDA legislation does not exclude teller's checks, only "third party bank checks." Moreover, if Congress intended to exclude teller's checks from the FDA, presumably it would have used the accepted commercial law term "teller's checks."

A final principle of statutory construction is that, if possible, a statute should not be construed to yield an absurd result. In the present case, neither the text nor the legislative history of the FDA mentions any exclusion of teller's checks from the scope of the FDA. There is no statutory plain language that would require teller's checks to be excluded. There is no mention in the text or legislative history of any operational problems that would require teller's checks to be excluded. The exclusion of teller's checks as "third-party bank checks" is drastic legislation that severely undercuts the "windfall" purpose of the Scott bill, yet there is no warning of this conflict in the text

or legislative record. In my opinion, that is an absurd result.

In his letter dated September 29, 2015, Delaware Escheator David Gregor contends that teller's checks issued by MoneyGram are exempt from the priority rules of the FDA because they qualify as "third party bank checks." He asserts that this conclusion is supported by the definition of teller's checks in the UCC and Reg. CC as checks drawn by one bank on the funds of a second bank—the drawee bank. Under his analysis, the drawee bank is the "third party" referred to in the statutory phrase "third party bank check."

In my opinion, however, the "third party" in the parenthetical is not the drawee bank in a teller's check as Delaware contends, but is the payee of an ordinary check who receives a transfer of funds from the drawer. As discussed below, this conclusion is supported by the United States Treasury Department's own definition of "third party payment services": "Any mechanism whereby a deposit institution transfers a depositor's funds to a third party upon the negotiable or non-negotiable order of the depositor may be called a third-party payment service. Checking accounts are the most common type of third-party payment services." [Emphasis added.] It is the transmission of funds, through a checking account, from the drawer of an ordinary check to a payee, that gives rise to the "third party." In short, the "third party" is the transferee of the funds in an ordinary check transaction, not the drawee bank in a teller's check transaction. Mr. Gregor's drastic construction not only focuses on the wrong "third party", but completely undercuts the purpose of the FDA—to eliminate a windfall. In my opinion, the term "third party bank

check" means an ordinary check, as set forth in detail below.

C. As Used in the Federal Disposition Act, the Term "Third Party Bank Checks" Means Ordinary Checks That Are Not Prepaid

At the same time that Senator Scott was introducing his FDA to deal with escheatment priorities and to eliminate the "windfall" enjoyed by corporate domicile states, Congress was also working on a significant "checking account deregulation" project that had an entirely different focus. In 1970 President Nixon organized the Commission on Financial Structure and Regulation, popularly known as the Hunt Commission. In December 1971, a first draft of the Hunt Commission report was completed. The final report, titled *The Report of the President's Commission on Financial Structure and Regulation,* was filed in July 1972. In its appraisal of the report on July 23, 1972, the Wall Street Journal stated that the charge of the Commission was to review the "existing financial and regulatory structure."

The December 1971 version of the Hunt Commission report included recommendations on a variety of regulatory issues:

* Regulation of interest rate ceilings on deposits, including demand deposits, *i.e.,* checking accounts;

* Regulation of the functions of depositor financial institutions, covering savings and loan associations, mutual savings banks, commercial banks and credit unions;

* Chartering and branching of depository financial institutions;
* Deposit reserve requirements for thrifts and credit unions;
* Taxation of financial institutions; and
* Deposit insurance.

A critical aspect of the 1971 report is its emphasis on "third party payment services." On page 8, the drafters of the report state:

> It is essential, for example, that *all institutions offering third party payment services* have the same reserve requirements, tax treatment, interest rate regulation, and supervisory burdens. The critical need for competition on equal terms causes the Commission to emphasize the interdependence of the recommendations and warn against the potential harm of taking piecemeal legislative action. [Emphasis added, here and below.]

In Part II of the report, the first major recommendation involves the deregulation of interest rate ceilings on deposits. One such recommendation, at page 23, is to give standby power to the Federal Reserve Board including the power to "establish for a period of five years ceiling differentials between institutions providing *third party payment services.*" The report then defines the critical term in footnote 1: "Third party payment services, as here defined, include any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party or to the account of a third party upon the negotiable or non-negotiable

order of the depositor. *Checking accounts are one type of third party payment service."*

On page 27 of the report, the Hunt Commission recommends that the prohibition against the payment of interest on demand deposit accounts be retained: "Nonetheless, the Commission believes that its recommendation against the removal of the prohibition should be reviewed in the future. There are important trends in *the use of demand deposits and other third party payment services* that should be noted."

Another important recommendation, found at page 33, is that "under specified conditions, savings and loan associations and mutual savings banks be permitted to provide third party payment services, including checking accounts and credit cards, to individuals and non-business entities only . . . . The Commission believes deposit thrift institutions should not be permitted to offer third party payment services for business and professional purposes. Such powers should be obtained and exercised only under a commercial bank charter."

On page 43, the report emphasizes that commercial banks "are now the only type of institution *generally permitted to offer unrestricted third party payment services.* That is, they operate the mechanism for check funds transfer and, in their lending and investing operations, create money. In all other activities, they compete with other financial and non-financial institutions. . . . As stated above, the Commission believes that the public would benefit from increased competition within the financial system."

In its recommendations regarding deposit reserve requirements (page 65), the Commission recommends

that membership in the Federal Reserve System be made mandatory for all state chartered commercial banks "and for all savings and loan associations and mutual savings banks that offer *third party payment services.*" In short, variations of the phrase "third party payment services" was on the lips of many people working on the Hunt Commission project in the early 1970s. This phrase was consistently and strongly linked to treatment of ordinary checking accounts.

In addition to these multiple and consistent references in the Hunt Commission report equating "third party payment services" with ordinary checking accounts, other contemporary sources make the same point. Good examples include Robert E. Knight, *The Hunt Commission: An Appraisal,* in the Wall Street Journal, July 3, 1972, at 4: "To ensure that financial institutions will be responsive to economic and social needs of the future, the commission generally recommended that regulatory barriers be lowered and that increased reliance be placed on competition. Thus nonbank depository institutions would be permitted to offer *third-party payment privileges (checking accounts, automatic bill payment, credit cards."* James L. Rowe, in a Washington Post article dated January 13, 1973, at G2, makes the same point: " `*Third party payment' today means essentially a checking account although bank credit cards are rapidly rising in importance."* [Emphasis added.]

On September 24, 1973, the U.S. Department of the Treasury published its own summary of the Hunt Commission report entitled *Recommendations for Change in the U.S. Financial System.* That summary contains a glossary of key terms, including (at page 44) the term *"THIRD-PARTY PAYMENT SERVICES."*

The glossary defines that critical term: "Any mechanism whereby a deposit institution transfers a depositor's funds to a third party upon the negotiable or non-negotiable order of the depositor may be called a third-party payment service. *Checking accounts are the most common type of third-party payment services.*" [Emphasis added.] The glossary in which the term "third party payment services" is defined to mean ordinary checking accounts was published by the Treasury Department on September 24, 1973. When it was published, the general counsel of Treasury was Edward P. Schmults, who undoubtedly was familiar with the Treasury document and the recurrent term "third party payment services."

At this very same time, it was none other than Mr. Schmults who was working with the Senate Banking Committee to add Treasury Department language exempting "third party bank checks" from the scope of the FDA. On November 1, 1973, Mr. Schmults wrote the Senate Banking Committee that the language of the Scott bill might be "broader than intended by the drafters." On behalf of the U.S. Treasury Department, he suggested that the bill add a "clarifying" amendment that excluded from its scope "third party payment bank checks." The Senate Banking Committee accepted the Treasury Department's "technical suggestions," although the Committee deleted the word "payment" in the final text adopted—namely, third party bank checks. By these drafting decisions and related text changes, the broader term "third-party payment services" used by Treasury in its glossary morphed into the more narrow term, "third party bank checks" but for good reason, since the U.S. Treasury definition of third party payment services included payment instruments such as credit cards, as well as demand deposits including checking accounts.

In the context of the FDA clarification, Treasury's proposed clarifying language was sound. Treasury properly focused on the impact of the FDA's original language and its potential effect solely on ordinary checks, since credit cards would clearly fall outside the scope of the FDA language without needing any additional exemption language. It might be argued that deletion of the word "payment" as well as the substitution of bank checks for the word "services" slightly weakens the linguistic bridge between Treasury's comprehensive glossary definition of "third-party payment services" *(i.e.,* ordinary checking accounts along with other payment services such as credit cards) and "third party bank checks" (the final language in the FDA, as amended.). Nonetheless, the strong connection remains. Indeed, the legislative record makes it clear that other types of third party payment services, such as credit cards, are not covered by the FDA. The result is that the term "third party bank checks" means ordinary checks drawn on ordinary demand deposit accounts, not remittance instruments like teller's checks.

Another element of legislative history illustrates why Mr. Schmults equated third-party bank checks with ordinary, non-prepaid checks. When Senator Scott introduced S. 1895, he stated in the Senate Record that his bill was intended to provide uniform priority rules governing disposition of the proceeds of "abandoned travelers checks, money orders and *similar instruments for the transmission of money."* 119 Cong. Rec. at S9750 [Emphasis added]. It seems likely that Mr. Schmults saw that the Scott bill was overbroad because ordinary checks from ordinary checking accounts, just like remittance instruments, are "instruments for the transmission of money." Therefore, it was necessary to explicitly carve out

ordinary checks from the scope of the FDA so that his bill would be limited to remittance instruments, i.e. "traveler's checks, money orders and similar instruments" that were prepaid. In Mr. Schmults' view, ordinary checks should remain separate from remittance instruments in the legislative scheme.

None of the many state abandoned property laws define the term "third party bank check" as a teller's check. By contrast, at least one jurisdiction—the State of Washington has enacted its version of the Uniform Unclaimed Property Act to define the term "third party bank check" to mean an ordinary check drawn on an ordinary checking account: "'Third party bank check' means any instrument drawn against a customer's account with a banking organization or financial organization on which the banking organization or financial organization is only secondarily liable." Wash. Rev. Code § 63.29.010(17). The drawer of such a check—a business or individual—is the party primarily liable. In my opinion, the drawee bank is "secondarily liable" under the UCC rules if (1) it holds the item beyond its midnight deadline, (2) the item is forged or counterfeit such that it is not "properly payable," (3) the item has been altered or bears a forged endorsement such that the drawee bank has a warranty claim against upstream banks in the collection stream, or (4) the item is wrongfully dishonored.

Reading "third party bank checks" to mean "teller's checks" totally undercuts the purpose of the FDA because it carves out an important type of remittance instrument whose history long predates the early 1970s. It also leaves a large piece of the "windfall" in place. There is nothing "technical" about such a massive carve-out, and there is no indication in the legislative history that the parenthetical phrase was

intended to do anything but "clarify" the scope of the FDA. In my opinion, the purpose of the parenthetical was to eliminate any potential confusion between the two legislative "check" projects that were being considered by Congress at the same time.

Delaware contends Congress was concerned that teller's checks posed a particular problem of "bifurcated" recordkeeping obligations, that is, with respect to abandoned teller's checks, the drawer bank and the drawee bank would need to communicate with one another to determine which checks were abandoned. Yet that same operational issue applies to money orders, where the selling agent has no way of comparing records with the drawee bank because of "bifurcated" recordkeeping. My review of the legislative history reveals not one whiff of evidence that Congress or Mr. Schmults intended to single out teller's checks as the only remittance instrument not covered by the FDA. The argument that "third party bank checks" meant teller's checks did not surface until the Delaware Escheator, Mr. Gregor, advanced this position in a letter dated September 29, 2015.

The legislative record from 1973 never mentions any "bifurcated" recordkeeping problems that had arisen with respect to teller's checks. Mr. Schmults never mentions it. The UCC never mentions it. In fact, it is my opinion that all types of remittance instruments are covered by the FDA, not just teller's checks. Cashier's checks are covered. Money orders are covered. Official Checks are covered. Agent checks are covered. Traveler's checks are covered. Certified checks are covered. If Congress were carving out teller's checks as exempt from the FDA, surely it would have said so. Instead, Congress accepted Mr. Schmults' "scope" amendment because it was

described as "technical" in nature, a "clarification" of the law, not a drastic change like the exemption of a large and established class of remittance instruments.

As a matter of banking industry practice and understanding, the term "third party bank checks" also means twice-endorsed checks. An ordinary bank check is payable "to the order of" a payee. In most cases, the payee will deposit the check, run it through bank clearings, and present it to the drawee bank, which will pay the item. Sometimes, however, the payee of a check will endorse the item to a third-party holder who may qualify as a holder in due course under the law of negotiable instruments. In this scenario, it is the third-party holder who will endorse the check a second time and then deposit the check and get the instrument paid (or returned). As a matter of banking industry practice and understanding, such a check is called a "third-party" check and is also known as a "twice-endorsed" check. The "third party" in this scenario is simply the payee's transferee under the law of negotiable instruments. Similarly, the "third party" in the phrase "third party payment services," used by Treasury in its summary of the Hunt Commission report, refers to the scenario where "a deposit institution transfers a depositor's funds to a third party upon the negotiable or non-negotiable order of the depositor." In both scenarios, the "third party" is a transferee of the check. For a leading case finding that a twice-endorsed check was a "third party bank check", for purposes of posting a bond, see *United States v. Thwaites Place Associates,* 548 F. Supp. 94 (S.D.N.Y. 1982).

In the present case, Delaware seems to be arguing that a teller's check always involves a "third party" simply because two different banks are involved—a

drawer bank and a drawee bank. In my opinion, that use of "third party" is very different from the other two defined uses of the term and provides no support for Delaware's argument that teller's checks are "third party bank checks" just because two banks are involved. Instead, the term "third party payment services" was well understood in 1973-1974 to mean a banking service under which ordinary checks were drawn on ordinary checking accounts in order to transfer deposited funds to a third party. Thus, the term "third party bank checks" simply means ordinary checks.

There is a further explanation of Mr. Schmults' exclusion of "third party bank checks" from the scope of the FDA. The escheat statute, with its focus on remittance instruments such as money orders and traveler's checks, occupied a field that had nothing to do with the legislative reforms that Congress was considering in the Hunt report for ordinary checking accounts. He saw the importance of keeping the two legislative efforts in separate compartments because, although both dealt with "checks," the legislative record does not indicate any concern that Senator Scott's efforts had any impact on, or were related to, the separate effort to deregulate ordinary checking accounts so thrift institutions could be on a more even playing field with commercial banks.

With respect to the legislative history of the FDA, Senator Scott's original bill, S.B. 1895, was introduced on May 29, 1973. It is important to note that the original Scott Bill did not include the "third party bank check" language. Instead, the bill described its scope in unmistakably broad terms to include "any sum payable on a money order, travelers check, or similar written instrument on which a banking or

financial organization or a business association is directly liable . . . ."

It may be that even Delaware would concede that the escheat priority rules of the Scott bill, before Mr. Schmults' suggested changes, would cover a classic remittance instrument like a teller's check. The changes suggested by Mr. Schmults were described as "technical" in nature and it seems clear that he had no intent to suggest language that would exclude teller's checks from the priority rules. Instead, the statute as enacted by Congress should be read to keep the escheat priority rules as Senator Scott requested. The language in parentheses should not be read to exclude teller's checks, but to exclude "third party payment bank checks," which was slightly reshaped to be "third party bank checks," *i.e.,* ordinary bank checks that are drawn on ordinary checking accounts with no prepayment. Only in this way could the escheat priority rules cover all remittance instruments, while ordinary checks would be placed outside the scope of the FDA, where they belong.

Money orders have long been considered by the banking industry to be "one-check checking accounts." See, e.g., *MoneyGram International, Inc. v. Commissioner of Internal Revenue,* 2014 WL 7795630 (U.S. Tax. Ct. 2014) (Tax Court uses that phrase to describe MoneyGram's retail money order business). Mr. Schmults may well have been concerned that ordinary (not one-shot) checking accounts would inadvertently be brought within the scope of the FDA, with unintended consequences. Because of this concern, he suggested the insertion of the parenthetical language to keep a strong separation between the two legislative efforts. Treasury described these efforts as "technical suggestions," not drastic substantive changes that

would exempt all teller's checks or any other class of remittance instruments from coverage by the FDA.

It is a venerable principle of statutory construction that two intersecting statutes should be construed in a way that harmonizes one with the other. In my opinion, reading the term "third party bank check" to mean ordinary checks from ordinary checking accounts, where funds are transferred to a payee and then perhaps to an additional holder under a second endorsement, is the only way to harmonize the two separate legislative efforts that engaged Congress in the early 1970s. In short, the "third party" in "third party bank checks" means a transferee of the drawer's funds, not a second bank on a MoneyGram teller's check.

Mr. Schmults wanted to keep the two legislative projects dealing with checks in their separate spheres: (1) the deregulation of ordinary checking accounts and (2) the priority rules governing escheatment of remittance instruments. Only in that way could harmony be preserved.

Dated: 9/24/18

/s/ Barkley Clark
Barkley Clark

SUPREME COURT OF THE UNITED STATES

Nos. 220145 & 220146 (Consolidated)

DELAWARE,

Plaintiff,

v.

ARKANSAS, *et al.*,

Defendants

September 24, 2018

EXPERT REPORT OF CLAYTON P. GILLETTE

I, Clayton P. Gillette, provide this Expert Report in order to assist the Court in its resolution of this matter.

1. I am currently the Max E. Greenberg Professor of Contract Law at New York University School of Law, where I have taught courses in commercial law (including payment systems), contracts, and state and local government law.

2. I have authored or co-authored numerous articles, texts, and newsletters, and have lectured in the area of payment systems on subjects including the use of checks and other negotiable instruments. The audiences for my publications and lectures have included academics, law students, practicing attorneys, and banking professionals.

3. Prior to joining the faculty of New York University School of Law in 2000, I was the Perre Bowen Professor of Law at the University of Virginia School

of Law (1992-2000). From 1997 to 2000, I was also the John V. Ray Research Professor at the University of Virginia Law School, and from 1993 to 1996 I was the Caddell and Conwell Research Professor at the University of Virginia Law School. From 1978 until 1984, I was an Associate Professor of Law, and from 1984 until 1992 a Professor of Law at the Boston University School of Law. From 1988 until 1992, I was the Harry Elwood Warren Scholar in Municipal Law at the Boston University School of Law. I served as Associate Dean of the Boston University School of Law from 1990 1992. I later served as Vice Dean of New York University School of Law from 2004 to 2007. From 1976 until 1978, I was associated with the New York City law firm of Cleary, Gottlieb, Steen & Hamilton, where a significant amount of my practice involved commercial and contract law and commercial litigation, including issues related to payments law and negotiable instruments.

4. I have provided expert testimony or consulting advice on matters of contract and commercial law, including payments issues, in arbitrations or litigation in Argentina, Australia, Austria, Canada, England, Germany, Israel, Jersey (Channel Islands), New Zealand, Sweden, and Singapore, as well as in the United States.

5. My curriculum vitae is attached hereto as Appendix A. My curriculum vitae contains a list of all the publications which I have authored within the previous ten years, as well as a list of all cases in which I have testified at trial or by deposition in the previous four years.

6. I have been retained in this matter by the States of Arkansas, California, Texas, and Wisconsin on behalf of the Defendant States (excluding

Pennsylvania) to provide my opinion on various issues relating to the nature of certain products offered by MoneyGram. In particular, I have been asked to provide my opinion on the extent to which those products should be treated as falling within the types of instruments governed by the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. § 2501 *et seq.* (the "Federal Disposition Act"). I am being paid $800 per hour for my work on this case.

7. In this Report, I will initially describe the characteristics of traveler's checks and money orders. I will explain how money orders and traveler's checks constitute prepaid items that are purchased to make payments to third parties and with respect to which sellers typically do not maintain information concerning the purchaser. I will then describe the products that are offered by MoneyGram and that are at issue in this litigation. I will indicate how, as a functional and contractual matter, those products raise the same recordkeeping issues concerning the residence of purchaser and place of purchase that Congress considered when it developed the escheatment rules of 12 U.S.C. § 2503. Finally, I will discuss potential meanings for the phrase "third party bank check" and whether any of those meanings encompass the relevant MoneyGram instruments.

8. In preparing this Report, I have reviewed: the pleadings filed in these consolidated cases; the deposition transcripts of Eva Yingst and Kate Petrick, and all the exhibits attached to those transcripts; the text of the Federal Disposition Act and Revised Code of Washington § 63.29.010, and the legislative history of those statutes; a memorandum sent from Treasury Services Group to various State Unclaimed Property Administrators, containing the Bates numbering

ALF00006603-ALF00006608; and an email from Caroline Cross to Michael Rato dated October 12, 2015, containing the Bates numbering MG0002494-MG0002496.

I. Characteristics of Traveler's Checks and Money Orders as Instruments.

9. An instrument generally falls within the scope of 12 U.S.C. § 2503 if it is a money order, traveler's check, or "other similar written instrument."[1] Therefore, as an initial matter, it is useful to understand the characteristics of a traveler's check and a money order to determine whether a particular instrument qualifies as one of those instruments, or is "similar" to those instruments.

10. A traveler's check is defined by both practice and the Uniform Commercial Code as an instrument that is payable on demand, is drawn on or payable at or through a bank, is designated by the term traveler's check or substantially similar term, and requires, as a condition of payment, a countersignature by the person whose specimen signature appears on the instrument. U.C.C. § 3-104(i). A traveler's check may be issued by a financial institution or a non-financial institution, and the issuer may or may not be the same party that sells it.[2] The seller typically acts as the agent of the issuer where the two are not

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[1] The statute imposes additional requirements in subsections (1)-(3).

[2] Under the Uniform Commercial Code, an "issuer" is the "maker or drawer of an instrument," and "issue" consists of "the first delivery of an instrument by the maker or drawer . . . for the purpose of giving rights on the instrument to any person." U.C.C. §§ 3-105(a), (c). In the case of a money order or traveler's check, the seller of the item may be different from the issuer.

the same. A purchaser of a traveler's check typically pays the face amount of the traveler's check, plus any fee, directly to the seller. If the seller is not the issuer who produces the traveler's check, the seller will remit the face amount of the traveler's check to the issuer. At the time of sale, the purchaser signs the traveler's check. When the purchaser uses the traveler's check to pay for an item or service or to deposit it in an account, the purchaser signs the traveler's check a second time. This allows the transferee of the traveler's check to compare the specimen signature with the second signature and receive assurances that the purchaser is the rightful holder of the traveler's check. The traveler's check is then processed through banking channels and is paid by the issuer or paying agent. Because the traveler's check has been prepaid by the purchaser, the purchaser who transfers the traveler's check to a payee typically is not aware of whether or when the traveler's check has been presented for payment. Similarly, issuers typically do |not retain information about the residence of the purchaser of the traveler's check. The issuer, might, however, have information concerning the place of purchase of the traveler's check. The funds that have been paid by the purchaser remain with the issuer until the traveler's check is ultimately presented for payment or until the passage of a period of time which, under various state laws, is sufficient to require that these funds be turned over to the state government. The fact that the issuer who holds the funds represented by an abandoned traveler's check does not retain residence information concerning the purchaser, but may have information concerning the place of purchase, motivated Congress to use those factors when it sought to create an equitable distribution of the proceeds of abandoned traveler's checks through

the Federal Disposition Act. *See* Disposition of Abandoned Money Orders and Traveler's Checks, Sen. Report No. 93-505 (November 15, 1973) (hereinafter S. Rep. No. 93-505).

11. A money order is a prepaid draft, or payment order, that the seller provides to a purchaser in a specified amount that is typically imprinted on the face of the instrument. A money order frequently serves as a substitute for a personal check from an individual's bank account. The term "money order" traditionally comprises related but different forms of payment. Some money orders, sometimes referred to as "personal money orders," are sold by banks or merchants. They consist of orders that are drawn by the issuer or the purchaser and bear a machine-impressed face amount. That type of money order may be a check (if it is drawn on a bank). See UCC § 3-104(f). In these cases, the money order essentially serves as a checking account on which one deposit has been made and one check (the money order itself) can be drawn. In the case of a personal money order, no bank signs the instrument at the time of its sale. Thus, any drawee bank has liability on the money order only when it has been accepted.

12. Other money orders, sometimes referred to as "bank money orders," are sold and issued by banks and are drawn and signed by the issuing bank. They may be drawn either on the issuing bank or on another bank. Thus, these money orders may also constitute cashier's checks (checks drawn by a bank on itself) or teller's checks (checks drawn by a bank on another bank). *See* U.C.C. § 3-104 cmt. 4; *Bank of Niles v. American State Bank*, 303 N.E.2d 186 (Ill. App. Ct. 1973).

13. Notwithstanding their differences, purchase and processing of bank and personal money orders is essentially similar. Like a traveler's check, a money order is typically issued to a purchaser who pays the face amount of the money order plus any fee to the seller, whether that seller is a financial institution or not. The seller may or may not be the same as the issuer of the money order. Where the seller is not the same as the issuer, the seller will remit the face amount of the money order to the issuer. Because the money order has been prepaid by the purchaser, the purchaser who transfers the money order to a payee typically is not aware of whether or when the money order has been presented for payment. Similarly, sellers of money orders or holders of funds represented by abandoned money orders would not have information about the residence of the purchaser of the money order or about who owned it at any given point in time. Similarly, issuers would not have information about the payee of the money order or about who owned it at any given point in time. The issuer, might, however, have information concerning the place of purchase of the money order. As in the case of a traveler's check, the funds that have been paid by the purchaser remain with the issuer until the money order is ultimately presented for payment or until the passage of a period of time which, under various state laws, is sufficient to require that these funds be turned over to the state government. The fact that the issuer who holds the funds represented by an abandoned money order does not retain residence information concerning the purchaser, but may have information concerning the place of purchase, motivated Congress to use those factors when it sought to create an equitable distribution of the proceeds of

abandoned money orders through the Federal Disposition Act. *See* Sen. Report No. 93-505.

II. Characteristics of MoneyGram Instruments.

14. I understand that MoneyGram offers its customers four different products relevant to this litigation: Retail Money Orders and three products sold pursuant to its Official Check program. MoneyGram labels those Official Check products "Agent Check Money Orders," "Agent Checks," and "Teller's Checks."

15. I understand that the last three of these products are processed on the same MoneyGram platform, the Official Check platform. Dep. of Eva Yingst ("Yingst") at 84; Yingst Ex. 13 at 29 (stating that Primelink Official Checks Operating Instructions apply to Agent Check Money Orders, Agent Checks, and Teller's Checks, as well as to cashier's checks, the last of which are not involved in this litigation).

A. MoneyGram Retail Money Orders.

16. A MoneyGram Retail Money Order is issued through entities that contract with MoneyGram to sell money orders to purchasers. Those entities, which can be financial institutions or nonfinancial institutions (such as retailers), serve as agents for MoneyGram for the purpose of selling MoneyGram Retail Money Orders. The purchaser of the Retail Money Order pays the seller the face amount of the instrument, plus any fee. The Retail Money Order may also be subject to a service charge. The Retail Money Order states that it is both issued and drawn by MoneyGram and that it is "payable through" a bank. As may be the case with the traditional "personal money order" (see Paragraphs 11-13, *supra*) no

bank signs the MoneyGram Retail Money Order at the time of its sale. At the time of sale, the selling agent prints the amount of the Retail Money Order using equipment and/or a form provided by MoneyGram. The selling agent also remits the face amount of the Retail Money Order to MoneyGram. I understand that remittance occurs by the selling agent depositing the funds into its bank account and MoneyGram withdrawing the amount from the agent's bank account through an automated clearing house process. MoneyGram deposits funds remitted to it from the sale of its various instruments into a commingled fund. *See* Yingst at 54-56, 108-109, 115-116, 153, 363-364. The purchaser signs the Retail Money Order on purchase. The signature line indicates that the purchaser is signing "for drawer," so that the purchaser is serving as MoneyGram's agent for purposes of making MoneyGram an issuer, because an instrument must be signed by, or on behalf of a drawer, in order to become a negotiable instrument. *See Smith v. Farmers Union Mut. Ins. Co.,* 260 P.3d 163, 172 (Mont. 2011). The Retail Money Order also includes terms on the back that relate to service charges and the limited recourse that a holder of the instrument may have against MoneyGram. Typically, MoneyGram Retail Money Orders are not issued in amounts in excess of $1,000. Yingst at 58-59. When a MoneyGram Retail Money Order is presented for payment to the "payable through" bank, that bank pays the face amount of the Retail Money Order; MoneyGram provides funds in the amount of the presented items to that bank from MoneyGram's commingled fund containing the proceeds of the sale of its instruments and in accordance with a contract between MoneyGram and the clearing bank. MoneyGram's forms include a serial number and a

customer or agent ID that permits MoneyGram to track its Retail Money Orders and determine the location where the Retail Money Order was sold. Yingst at 57, 264-265. MoneyGram, however, does not have information about the specific purchaser. Yingst at 57.

B. MoneyGram "Agent Check Money Orders."

17. A MoneyGram Agent Check Money Order is issued through financial institutions that contract with MoneyGram to sell these instruments. The selling bank is designated as "agent for MoneyGram," and MoneyGram is designated as the drawer of the Agent Check Money Order. *See* Yingst Ex. 4 (ex. E); Yingst Ex. 8. The purchaser of the Agent Check Money Order pays the seller the face amount of the instrument, plus any fee. While the purchaser of a MoneyGram Retail Money Order may pay with cash, the purchaser of the Agent Check Money Order will often be a customer of the financial institution from which the instrument is purchased, so that the face amount of the instrument plus any fee may be debited from the purchaser's account at that institution. MoneyGram Agent Check Money Orders may also be sold in face amounts greater than those available on MoneyGram Retail Money Orders.[3] The purchaser will sign the Agent Check Money Order on purchase. The signature line indicates that the purchaser is signing "for drawer," so that the purchaser is serving as MoneyGram's agent for purposes of making MoneyGram an issuer, because an instrument must be signed by, or on behalf of a drawer, in order to become a negotiable instrument.

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[3] I understand that MoneyGram's cap on the value of Retail Money Orders is an internal requirement imposed by the company.

Neither the financial institution that sells the Agent Check Money Order nor the bank designated as drawee signs the Agent Check Money Order at the time of issuance. *See, e.g.*, Yingst Ex. 8. Thus, the Agent Check Money Order qualifies as a personal money order and may be so designated on its face.

18. An Agent Check Money Order states that it is drawn on a specific bank. In fact, however, I understand that the bank designated as the drawee is actually a clearing bank, rather than a bank that holds a pre-existing deposit for MoneyGram. Yingst at 97-98. When a MoneyGram Agent Check Money Order is presented for payment to the "drawee" bank, MoneyGram provides funds in the amount of the presented items to that bank in accordance with a contract between those two institutions. Yingst at 82-85, 117-118. Thus, the functions that the clearing banks and MoneyGram play with respect to the processing of Agent Check Money Orders are the same as the functions that it plays with respect to MoneyGram Agent Checks and Teller's Checks, which are also issued through its Official Check platform. *See* Yingst Exs. 13, 16.

19. Agent Check Money Orders are issued through MoneyGram's Official Check platform rather than through MoneyGram's Retail Money Order program. Thus, the seller of a MoneyGram Agent Check Money Order is obligated to report to MoneyGram information concerning the instrument within a day of when it is sold. That information includes serial number, dollar amount, date of issuance, and account number or customer ID with MoneyGram, the last of which may indicate the location where the instrument was purchased. Yingst at 209-210, 267; Yingst Ex. 13

at 6. The required information does not include information about the specific purchaser.

C. MoneyGram "Agent Checks."

20. A MoneyGram Agent Check is issued through financial institutions that contract with MoneyGram to sell these instruments. As in the case of Retail Money Orders, Agent Check Money Orders, and Teller's Checks, the financial institution sells Agent Checks to its customers and may charge its customer a fee. The Agent Check form designates MoneyGram as the "drawer" and the financial institution as "agent for MoneyGram." Because MoneyGram's financial institution customer is only an agent on these instruments and is designated as such, that financial institution is not liable on an Agent Check. Another bank is designated as the "drawee." As in the case of MoneyGram Agent Check Money Orders and Teller's Checks, the bank that is designated as the "drawee" serves as a clearing bank. MoneyGram holds the funds that are sent to it by the selling financial institution until the item is presented for payment to the clearing bank. When a MoneyGram Agent Check is presented for payment to the "drawee" bank, MoneyGram provides funds in the amount of the presented items to that bank in accordance with a contract between those two institutions. Agent Checks are often used to pay obligations of the financial institution designated as agent. Yingst at 168-169. Funds represented by Agent Checks do not have next-day availability under the federal Expedited Funds Availability Act. *See* 12 U.S.C. § 4002(a)(2)(F). I understand that MoneyGram created this instrument to help its financial institution customers minimize their reserves under Federal Reserve Board Regulation D. Yingst Ex. 13 at 31.

21. MoneyGram Agent Checks are processed through MoneyGram's Official Check program systems. Thus, MoneyGram's customer is obligated to report to MoneyGram information concerning the instrument within a day of when it is sold. That information includes serial number, dollar amount, date of issuance, and account number or customer ID with MoneyGram, the last of which may indicate the location where the instrument was purchased. Yingst at 209-210, 267. The required information does not include information about the specific purchaser.

22. A MoneyGram customer who has elected to use both MoneyGram Agent Checks and Agent Check Money Orders may choose to treat an Agent Check as an Agent Check Money Order. *See* Yingst Ex.14 clause 3, Ex. 15 clause 3. That demonstrates that the two instruments do not have significant operational differences, though the instrument would have to bear the appropriate money order language to serve as an Agent Check Money Order. *See* Yingst at 249-251.

D. MoneyGram "Teller's Checks."

23. A MoneyGram Teller's Check is issued through financial institutions that contract with MoneyGram to sell these instruments. The Teller's Check form designates MoneyGram as the "issuer" and the selling financial institution as the "drawer." Another bank is designated as the "drawee." Teller's Checks are typically issued to customers of the selling financial institution that contracts with MoneyGram. When the financial institution sells the Teller's Check to its customer, it typically debits its customer's account and sends the amount of the Teller's Check to MoneyGram. As in the case of Retail Money Orders, Agent Check Money Orders, and Agent Checks, the financial institution may charge its customer a fee for

the Teller's Check. Alternatively, the financial institution may use a MoneyGram Teller's Check to pay its own obligations. Yingst at 139. As in the case of MoneyGram Agent Checks, the bank that is designated as the "drawee" serves as a clearing bank. MoneyGram holds the funds that are sent to it by the selling bank until the item is presented for payment to the clearing bank. Yingst at 156. When a MoneyGram Teller's Check is presented for payment to the "drawee" bank, MoneyGram provides funds in the amount of the presented items to that bank in accordance with a contract between those two institutions. Unlike the case of Agent Check Money Orders and Agent Checks, funds represented by Teller's Checks may have "next business day availability" under the federal Expedited Funds Availability Act. *See* 12 U.S.C. § 4002(a)(2)(F). The depositor of funds that have next-day availability has access to those funds, i.e., can withdraw them as a matter of right, on the first business day following the banking day of deposit. Types of deposits eligible for next-day availability include cash, United States Treasury checks, and cashier's checks and teller's checks where those instruments have been deposited in person into an account held by the payee of the check. Instruments that do not have next-day availability may not be available to the depositor for a longer period of time, generally extending up to five business days following the banking day of deposit. *See* 12 C.F.R. § 229.12.

24. MoneyGram Teller's Checks are processed through MoneyGram's Official Check program systems. Thus, MoneyGram's customer is obligated to report to MoneyGram information concerning the instrument within a day of when it is sold. That information includes serial number, dollar amount, date of issuance, and account number or customer ID

with MoneyGram, the last of which may indicate the location where the instrument was purchased. Yingst at 209-210, 267. The required information does not include information about the specific purchaser.

25. A MoneyGram customer who elects to use either MoneyGram Teller's Checks or Agent Checks typically makes the decision based on whether it prefers to have an item that has next-day availability rather than because of any operational or processing differences. Yingst at 255.

III. For Purposes of 12 U.S.C. § 2503, MoneyGram Teller's Checks and Agent Checks Share the Relevant Characteristics of Money Orders and Traveler's Checks, as well as MoneyGram Retail Money Orders and Agent Check Money Orders.

26. The provisions of 12 U.S.C. § 2503 apply to any "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." I understand that MoneyGram escheats Retail Money Orders to the states in which the Retail Money Orders were purchased pursuant to that statute. Likewise, MoneyGram escheats Agent Check Money Orders sold through its Official Check Program to the states in which the Agent Check Money Orders were purchased pursuant to that statute. In my opinion, the products that MoneyGram labels as Agent Checks and Teller's Checks sold through its Official Check program share the same relevant characteristics as Retail Money Orders and Agent Check Money Orders for the purposes of the Federal Disposition Act.

27. In determining whether MoneyGram Agent Checks and Teller's Checks share the same relevant characteristics as traveler's checks or money orders more generally, I consider the similarities between traveler's checks and money orders that make them subject to the statute. For example, different types of instruments may be similar with respect to the purposes for which they are used or the process of issuance, but not similar with respect to the amounts in which they are typically issued or with respect to the ability of the purchaser of the instrument to stop payment.

28. MoneyGram Agent Checks and Teller's Checks are issued through a similar process as traveler's checks and money orders. In each case, the purchaser obtains the instrument by prepaying the seller the amount in which the instrument is issued plus any fee. In turn, in each case if the seller of the instrument is different from the issuer (as is true for MoneyGram instruments and some traveler's checks and money orders), the seller remits the face amount of the instrument to the issuer and provides information concerning the sale to the issuer. That information includes the date of sale, the amount, the serial number of the instrument, and the seller identification, which may include location of sale information. It does not include customer information.

29. In addition, MoneyGram Agent Checks and Teller's Checks are similar to traveler's checks and money orders in that MoneyGram is unaware of the identity or specific address of the purchaser, just as the non-seller issuer of a traveler's check or money order would generally be unaware of the identity of the purchaser. *See* Deposition of Kate Petrick ("Petrick") at 208. The purchaser, in turn, is unaware

of when or whether a traveler's check, money order, or MoneyGram instrument is presented for payment; that is because the purchaser has prepaid for all such instruments and the account that that is debited when the instrument is presented for payment is not an account of the purchaser.

30. MoneyGram Agent Checks and Teller's Checks are also similar to traveler's checks and money orders in the sense that, like the latter products, they are typically used in place of a personal check. That may be because the purchaser is a person who does not have a personal checking account or because the payee of the check prefers the security of receiving an instrument on which a bank or well-known business association is liable.

31. Primarily, however, MoneyGram Agent Checks and Teller's Checks are similar to traveler's checks and money orders for purposes of 12 U.S.C. § 2503 because those MoneyGram instruments are "similar" in respect of the characteristics of instruments with which Congress was concerned when it enacted the Federal Disposition Act.

32. The allocation of funds represented by abandoned instruments under 12 U.S.C. § 2503 depends on the information on the holder's books and records concerning the state in which the instrument was purchased. If the holder's books and records reveal that information, funds representing abandoned instruments escheat to the state of purchase. Only if that information is not available on the books or records of the financial organization or business association that is the holder of those proceeds is that entity entitled to escheat the funds represented by abandoned instruments to its state of incorporation.

33. Congress made the place of purchase the determining factor based on its findings that the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments, but that a substantial majority of such purchasers reside in the states where such instruments are purchased. 12 U.S.C. §§ 2501(1), (2). Congress further found and declared that the states wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several states, be entitled to the proceeds of such instruments in the event of abandonment, and that the failure to distribute the proceeds of such instruments to the states entitled thereto created a burden on interstate commerce. 12 U.S.C. §§ 2501(3), (4). Finally, Congress found that, because most purchasers reside in the state of purchase of such instruments, the cost of maintaining and retrieving addresses of purchasers of these instruments in order to achieve the proper equitable distribution of proceeds in the event of abandonment would constitute an additional burden on interstate commerce. 12 U.S.C. § 2501(5).

34. In light of these Congressional findings and purposes, the relevant characteristics of an instrument for purposes of 12 U.S.C. § 2503 involve not only similarities to money orders and traveler's checks in issuance or use, but also similarities with respect to whether sellers and holders of funds generated by the sale of the instruments, as a matter of business practice, are likely to retain or report the addresses of the purchasers or any other information about the purchasers and thus are in a position to effect the equitable distribution of those proceeds that Congress

desired. In addition, given Congress's presumption that the purchasers of money orders and traveler's checks are residents of the state in which the instrument is purchased, a "similar instrument" would also be likely to have been purchased in the purchaser's state of residence.

35. That is consistent with the legislative history of the Federal Disposition Act. The Report of the Senate Committee that analyzed and proposed the bill that became that Act contains a letter from Arthur Burns, then-Chair of the Federal Reserve Board. Chairman Burns recognized that the objective of the bill was to correct what he called the "obvious inequity" of allowing escheat of proceeds represented by money orders and traveler's checks to the debtor's corporate domicile in the event that the creditor's (purchaser's) address was unknown. The inequity arose in the case of money orders and traveler's checks because the holders of funds in those transactions typically did not record the address of the creditor (purchaser). Indeed, Chairman Burns recommended changing the initial bill from making escheat depend on the state of issuance to the state of purchase. He noted that, at least in the case of traveler's checks, the instruments were sold by banks locally although most of them were "issued" by a few organizations and banks. Thus, the equitable distribution of abandoned proceeds would be frustrated if the state of incorporation of the "issuing" entity, rather than the state of purchase, could receive the unclaimed proceeds of traveler's checks. Chairman Burns's proposed amendment to the statutory language, therefore, was intended to ensure that escheat of prepaid instruments, the sale of which generated funds held until the instrument was presented for payment, should occur to the state of purchase, as long as the holder of

the proceeds of the instrument had information about that location within its records.

37. MoneyGram Teller's Checks and Agent Checks are similar to traveler's checks and money orders in that each of these instruments is "purchased" by a remitter from a financial or business association rather than issued by a customer from the customer's personal checking account. As I have indicated above, as a matter of business practice, the contractual arrangements between MoneyGram and its customers who sell Agent Checks and Teller's Checks require the customers to report to MoneyGram information concerning those instruments within one day of their sale. As I have also noted above, the required information may allow MoneyGram to determine the location of purchase. But MoneyGram does not receive the address of the purchaser or any other information about the purchaser.

38. I understand that MoneyGram currently escheats funds represented by abandoned Agent Check Money Orders to the state of purchase. Because MoneyGram's contractual arrangements with its financial institution customers provide that Agent Check Money Orders are governed by the same operational rules that apply to Agent Checks and Teller's Checks, the same information is reported to MoneyGram with respect to each of these products. Moreover, each of these products is issued through the similar process of prepayment by purchasers in amounts imprinted on the face of the instruments, and remission of those amounts to MoneyGram, which holds the funds in the same commingled investment account until the instruments are presented for payment or until escheat to the state is required. The fact that MoneyGram has sufficient information to

escheat funds represented by abandoned Agent Check Money Orders to the state of purchase suggests that it has similar information and capacity with respect to its Agent Checks and Teller's Checks. Thus, MoneyGram Agent Checks and Teller's Checks share the same relevant characteristics as its Agent Check Money Orders for purposes of 12 U.S.C. § 2503.

38. Indeed, I understand that, although MoneyGram currently escheats funds represented by abandoned Agent Check Money Orders to the state of purchase, it escheats funds represented by abandoned Agent Checks to the State of Delaware. As I have noted above, MoneyGram Agent Check Money Orders are interchangeable with MoneyGram Agent Checks at the election of the selling bank if that bank has contracted with MoneyGram to sell both instruments. The primary distinctions between these instruments—which, again, similarly consist of prepaid instruments for which MoneyGram holds the funds generated by purchase—involves the designation as a "money order" on the form where the institution prefers to use an Agent Check Money Order. There does not appear to be any difference at all between the two with respect to the capacity of MoneyGram to detect the location at which the instrument was purchased. Nor does there appear to be any material difference in the function of these instruments from a perspective of their use for payments or from their use as negotiable instruments. The interchangeability of Agent Check Money Orders and Agent Checks thus also indicates that the two are "similar" for purposes of 12 U.S.C. § 2503.

39. In addition, given the presumption that Congress created based on its findings that money orders and traveler's checks were purchased in the

purchaser's state of residence, I note that MoneyGram has stated that funds used to purchase one of its Teller's Checks will tend to be taken from the purchaser's bank account. *See* Yingst at 138. It is a reasonable assumption that the purchaser of a MoneyGram Teller's Check maintains its bank account from which the funds for the instrument will be drawn in the purchaser's state of residence. I conclude, therefore, that the Congressional presumption is equally appropriate for MoneyGram Teller's Checks.

40. MoneyGram has also stated that financial institutions typically issue MoneyGram Agent Check Money Orders only to their own customers and that payment for MoneyGram Agent Check Money Orders sold by a financial institution will tend to be made from the purchaser's account at the financial institution. *See* Yingst at 90, 119. Again, it is a reasonable assumption that the purchaser of a MoneyGram Agent Check Money Order maintains its bank account from which the funds for the instrument will be drawn in the purchaser's state of residence. I conclude, therefore, that the Congressional presumption is equally appropriate for MoneyGram Agent Check Money Orders.

41. Moreover, as I have noted above, MoneyGram Agent Checks are interchangeable with MoneyGram Agent Check Money Orders. *See supra* Paragraphs 22, 38; Yingst at 238-239, 251, 254-255. I assume, therefore, that financial institutions also typically issue MoneyGram Agent Checks only to their own customers and that payment for MoneyGram Agent Checks sold by a financial institution will tend to be made from the purchaser's account at the financial institution. Again, it is a reasonable assumption that the purchaser of a MoneyGram Agent Check maintains its

bank account from which the funds for the instrument will be drawn in the purchaser's state of residence. I conclude, therefore, that the Congressional presumption is equally appropriate for MoneyGram Agent Checks.

42. Thus, consistent with Congress's findings that states wherein the purchasers of money orders and traveler's checks reside were entitled to the proceeds of those abandoned instruments, and that the states of purchase were likely to be the states of purchaser residence, I conclude that instruments about which MoneyGram obtains and retains the records of purchase as a matter of business practice share the same relevant characteristics as traveler's checks and money orders for the purposes of the Federal Disposition Act. In addition, given the place of purchase information that MoneyGram receives as a result of its contractual arrangements and business practices, in my opinion MoneyGram Agent Checks and Teller's Checks share the same relevant characteristics as traveler's checks and money orders for the purposes of the Federal Disposition Act.

43. MoneyGram Teller's Checks are dissimilar from its Agent Checks in that a bank is designated as the drawer on the former, while MoneyGram is designated as the drawer on the latter. Teller's Checks also vary from Agent Checks in that the former are subject to Regulation D of the Federal Reserve Board, while the latter are not. Finally, as I have noted above, Teller's Checks are different from Agent Checks and Agent Check Money Orders in that only Teller's Checks are subject to next-day availability. But, in my opinion, none of these distinctions implicate whether, or the way in which, information concerning the purchase is conveyed to MoneyGram. For example,

while next-day availability may cause purchasers or payees of Teller's Checks to favor them over Agent Checks, next-day availability is not an important distinction for purposes of the Federal Disposition Act. Next-day availability affects only the timing of the use of funds by a depositor, not the information concerning the purchaser or the place of purchase on which Congress focused. Indeed, the Federal Disposition Act was enacted prior to the Expedited Funds Availability Act, so next-day availability could not have been a factor on which Congress was defining "similar written instrument[s]" under the Federal Disposition Act.

44. In addition, consistent with Congress's findings regarding the typical case with respect to the sellers or issuers of traveler's checks and money orders, MoneyGram does not collect information on the residence of purchasers of its Retail Money Orders, Agent Check Money Orders, Agent Checks, or Teller's Checks. Indeed, obtaining that information with respect to MoneyGram instruments would require MoneyGram or its financial institution customer to incur the very costs of maintaining and retrieving addresses of purchasers that Congress indicated it did not want issuers or sellers of traveler's checks to incur. As Congress stated in 12 U.S.C. § 2501, it incorporated the presumption that place of purchase was the place of the purchaser's residence because a requirement of recording and maintaining the purchaser's residence would impose costs that burden interstate commerce.

IV. MoneyGram Teller's Checks and Agent Checks are not "Third Party Bank Checks" for Purposes of the Federal Disposition Act.

45. The requirements of 12 U.S.C. § 2503 do not apply to a "third party bank check." The term "third party bank check" is not defined in the statute. In my opinion, the term has no clear meaning and is not widely used in the law or practice of payment systems. There are a few potential meanings that I describe below. However, none of those potential meanings of the term apply to MoneyGram Agent Checks or Teller's Checks given those instruments' characteristics.

46. The legislative history of the Federal Disposition Act, which is quite sparse, does not provide significant guidance on the meaning of the term "third party bank check." The original version of the bill that became 12 U.S.C. § 2503 did not contain the exception for "third party bank checks." The Report of the Senate Committee that reviewed the bill added the relevant language. It apparently did so because the General Counsel of the Treasury issued a letter of November 1, 1973 in which he contended that

> The introductory language of section 2 could be interpreted to cover third party payment bank checks since it refers to a "money order, traveler's check, or similar written instrument on which a bank or financial organization or business association is directly liable." It is recommended that this ambiguity be cured by defining these terms to exclude third party payment bank checks.

S. Rep. No. 93-505 at 5.

47. The letter from the General Counsel did not further indicate what he meant by "third party payment bank checks" or why it was problematic to include them within the bill that became 12 U.S.C. § 2503. Nor did the Report of the Senate Committee elaborate on the language in the letter. The Report of the Senate Committee noted only that it had "adopted the technical suggestions of the Department of the Treasury." S. Rep. No. 93-505 at 6. It is noteworthy, moreover, that whatever the General Counsel of the Treasury meant when he proposed to exclude a "third party payment bank check" from the Federal Disposition Act, the language inserted into the statute was, in fact, different, i.e., "third party bank check."

48. I am aware of only one judicial decision that has construed the term "third party bank check." That case, *U.S. v. Thwaites Place Associates*, 548 F. Supp. 94 (S.D.N.Y. 1982), involved the auction of foreclosed property by the United States Marshal. The terms of the auction required the successful bidder to pay by cash or certified check made payable to U.S. Treasury or the U.S. Marshal. A bidder sought to pay with two "bank checks" that were payable to another person and that the bidder desired to have indorsed to the U.S. Treasury or the U.S. Marshal. Consistent with business usage, the court equated "bank check" with a check "issued by a bank." 584 F. Supp. at 97. Throughout the opinion, the court refers interchangeably to the bank checks at issue as "third party checks," "a doubly indorsed check," and 'third party bank checks." Thus, the court used the term "third party bank check" to mean a check drawn that the original payee transfers to another payee and that happens to be a bank check.

49. In my opinion, the use of the term "third party bank check" in the *Thwaites Place Associates* case to mean a bank check (a check issued by a bank and drawn on a bank) that has been indorsed by the original payee to a new indorsee is the most natural reading of "third party bank check." The phrase "third party check" is a common term that refers to a check that has been indorsed by the original payee and transferred to a third party. This terminology was used at the time of the enactment of the Federal Disposition Act. *See, e.g.*, *Von Gohren v. Pacific Nat. Bank of Washington*, 505 P.2d 467 (Wash. Ct. App. 1973).

50. A "bank check" is commonly understood to mean a check that is both drawn on a bank and by a bank. If the drawer and drawee are the same bank, the bank check is a cashier's check. If the drawer and the drawee are different banks, then the bank check is a teller's check.

51. The term "bank check" has also been used more generally to mean any check drawn on a bank, including checks drawn on personal or business checking accounts. *See, e.g.*, JOHN EDSON BRADY, THE LAW OF BANK CHECKS 1-6 (2d ed. 1926).

52. Indeed, the edition of Brady's treatise on The Law of Bank Checks (a leading treatise on payment systems since its first edition in 1916) that was current at the time that the Federal Disposition Act was enacted specifically noted that "the term 'bank check' as used in this volume is, unless the context specifies otherwise, interchangeable with the term 'check' and does not necessarily denote a direct bank obligation, such as a cashier's check, certified check, or bank draft." HENRY J. BAILEY, THE LAW OF BANK CHECKS 1 n.1 (4th ed. 1969). It is plausible that the author

retained this usage because the treatise he was editing had wide acceptance and retaining the existing title may have had value, even if the term "bank check" to refer to any check drawn on a bank had become redundant. But the footnote would have been unnecessary unless the term "bank check" would otherwise have been understood to refer only to checks on which a bank was directly liable.

53. Because a "third party check" was commonly understood in the 1970s to refer to a check indorsed by the payee to another person, and a "bank check" was commonly understood to refer to a check drawn by and on a bank, in the absence of a clear alternative definition, it is natural to conclude that a third party bank check is a check drawn by and on a bank, but that the original payee has indorsed to another person.

54. It is plausible that "third party bank check" as used in 12 U.S.C. § 2503 means a personal check, that is, any personal draft drawn on a bank. While, as I have noted above, that construction may entail some redundancy, it is an apt description of a personal check in that all checks have three parties, a drawer, a payee, and a drawee, and Congress may have been attempting to distinguish between drafts drawn on banks and drafts (such as documentary drafts, which may be drafts that a seller of commodities draws on a buyer) not drawn on banks. Congress might, for example, have wanted to exempt from otherwise applicable escheatment rules personal checks that the drawer had issued but that had not been presented for payment.[4]

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[4] While this construction may be thought to be unlikely since the statute refers to instruments that have been "purchased," and one does not think of personal checks as being purchased, it is

55. Alternatively, the term "third party bank check" could mean any check indorsed by the original payee to a new indorsee, i.e., any check indorsed over to a "third party," regardless of whether it was a bank check.

56. In my opinion, other sources provide very little information about the meaning that Congress may intended when it used the term "third party bank check."

57. A statute of the State of Washington contains the language "third party bank check" and provides a definition of that term. *See* Wash. Rev. Code 63.29.010(17). That provision defines a "third party bank check" as "any instrument drawn against a customer's account with a banking organization or financial organization on which the banking organization or financial organization is only secondarily liable." To my knowledge, there have been no cases construing the statutory definition since its enactment in 1983.

58. In my opinion, the Washington statutory definition of "third party bank check" provides little assistance in construing the same term under 12 U.S.C. § 2503. Not only does the statute post-date the enactment of 12 U.S.C. § 2503, but the Washington definition is confusing, if not self-contradictory. The Washington definition appears to apply when a relevant banking organization is a drawee, because it

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worthwhile to recall that the earlier version of the bill that became the Federal Disposition Act used the term "issued" rather than "purchased." It is plausible that when Congress added the exception for "third party bank checks" and also substituted "purchased" for "issued," it failed to consider the anomaly created by the simultaneous changes.

applies when the relevant instrument is "drawn against" a customer's account with such an organization. But it also applies only when the financial organization is only "secondarily liable" on the instrument. That language, which dates from 1983, appears to incorporate the provisions of Article 3 of the Uniform Commercial Code that were in effect prior to promulgation of the revision of Article 3 in 1990. The pre-revision version, in effect in Washington in 1983, defined a "secondary party" as "a drawer or indorser." *See* Pre-Revision U.C.C. § 3-102(1)(d) (1972). Those parties were deemed to be "secondarily liable" because a draft, such as a check, is supposed to be paid by the drawee, not by the drawer or indorser. Only on dishonor of the draft by the drawee is there a right against the drawer or indorser. *See id.* §§ 3-413, 3-414. However, the drawee itself is not "secondarily liable." Indeed, the drawee is not liable on an instrument at all until it "accepts" the instrument. *Id.* §§ 3-409(1), 3-410. At that point the drawee becomes primarily liable on the instrument. In other words, a bank acting solely as drawee has either primary liability or no liability; it cannot be secondarily liable.

59. Revised Article 3 eliminated the language of secondary liability. Nevertheless, it retained the concepts inherent in that language. Drawees do not have liability until they accept an item, and drawers have liability only when the drawee dishonors the instrument. *See* U.C.C. § 3-408, 3-414. Thus, the scenario described in the Washington statute, i.e., that there is a banking organization that 1) is the drawee (because the relevant instrument must be "drawn against a customer's account with" the banking organization), and 2) is "only secondarily liable" will not actually occur. As a result, the definition in the Washington statute of a "third party bank check" as

an instrument drawn on a financial institution on which that institution is only secondarily liable does not make sense and cannot be assumed to reflect what Congress meant when it used the term in a statute a decade earlier.

60. It is, of course, possible that a banking organization could be a drawer as well and thus have secondary liability even though it is also a drawee. That would be the case if the banking organization issues a cashier's check drawn on itself. But that case seems to be outside the scope of the Washington statute. That statute defines a "third party bank check" in terms of an instrument that is 1) drawn on a banking organization, where 2) that banking organization is "only" secondarily liable. In the case of a cashier's check, the issuing bank is generally liable for the amount of the instrument according to its terms when issued. It would not be "only" secondarily liable. *See* U.C.C. § 3-412. As a result, I admit to confusion concerning the meaning and scope of the Washington definition of "third party bank check" and do not find it useful for purposes of construing 12 U.S.C. § 2503. I have reviewed the legislative history of the Washington statute and have not found anything therein that affects my analysis.

61. I understand that Delaware has previously argued that the most natural reading of the term "third party bank check," i.e., a check that is a bank check and that has been indorsed by the payee to a new indorsee, is not the definition that should apply to 12 U.S.C. § 2503. That is because, according to Delaware, the objective of that statute is to allocate the escheatment of funds in a manner that takes into account the information that is likely available to the holder of the funds concerning the escheated

instrument. Delaware contends that the holder would not have information about whether a check, bank check or otherwise, has been transferred by the original payee. The holder would only obtain that information once the check was presented for payment, at which time the check is no longer unclaimed. Thus, Delaware contends that reading the term "third party bank check" in accordance with what, in my opinion, is its most natural reading, would be inconsistent with the statute's purpose.

62. I am not persuaded by Delaware's argument, primarily because, as I have indicated above, there is no alternative obvious or rational interpretation. Moreover, I reiterate that the language of 12 U.S.C. § 2503 varies from language in the letter that the Senate Committee purported to be implementing, i.e., "third party payment bank check," a term for which I have found no allusion or interpretation in any judicial decision or legislation. Thus, it is plausible that Congress was, in fact, simply misguided in its use of language in the statute and/or was unclear about its own intentions.

63. I understand that Delaware has also contended that "third party bank check" means a teller's check. In my opinion, this is incorrect. If what Congress meant by excluding a "third party bank check" was to exclude a teller's check from the reach of 12 U.S.C. § 2503, one would think that Congress would have used a more specific and familiar term to accomplish that purpose. Both the term "teller's check" and "bank draft" were commonly understood in 1973 to mean a draft drawn by one financial institution on another institution. *See, e.g.*, *Perry v. West*, 266 A.2d 849 (N.H. 1970) (stating that a "bank draft" is a draft drawn by one bank upon its deposits at another bank);

Manhattan Imported Cars, Inc. v. Dime Sav. Bank of New York, 355 N.Y.S.2d 356 (N.Y. App. Term 1st Dept. 1972); *Levin v. Union National Bank of Westminster*, 168 A.2d 889 (Md. 1961); HENRY J. BAILEY, THE LAW OF BANK CHECKS 34, 405-406 (4th ed. 1969).

64. Moreover, there would be little reason for Congress to have excluded teller's checks from 12 U.S.C. § 2503. Because banks can be issuers or holders of funds who are liable for escheatment on traveler's checks or money orders, which clearly are included in 12 U.S.C. § 2503, it would make little sense to exclude other instruments, such as teller's checks, solely on the grounds that banks are liable on them.

65. As I have noted above, the Congressional purpose of the Federal Disposition Act is set forth in 12 U.S.C. § 2501. That provision indicates that the purpose of the Act was to create an equitable allocation of the abandoned proceeds of instruments such as traveler's checks and money orders, taking into account 1) that the books and records of banking and financial organizations and business associations that issue and sell those instruments typically do not show the last known addresses of purchasers of such instruments, and 2) a presumption that a substantial majority of purchasers of such instruments reside in the states where such instruments are purchased.

66. I have noted above that the purpose of the Federal Disposition Act is relevant to determining what are the relevant characteristics of an instrument that would subject it to 12 U.S.C. § 2503. In my opinion, those characteristics are also relevant to resolve the ambiguity in the definition of a "third party bank check" that is excluded from the escheatment provisions of the statute. That is, the term "third party bank check" does not make sense to the extent that it

excludes from 12 U.S.C. § 2503 escheatment rules instruments for which the holders of abandoned funds maintain "place of purchase" information in their records as a matter of business practice. That is because those are the very types of instruments for which Congress desired to make this legislation applicable to ensure equitable distribution of abandoned proceeds.

A. MoneyGram Instruments Designated as Agent Checks Are Not Third Party Bank Checks, Even Accepting Delaware's Previously Articulated Definition of the Term.

67. Even if "third party bank check" did mean a teller's check, the instruments issued by MoneyGram do not necessarily qualify as teller's checks. Delaware defines a teller's check as a check that is "drawn by a bank (i) on another bank, or (ii) payable at or through a bank." *See* E-mail from Caroline Cross to Michael Rato (Oct. 12, 2015, MG0002494-MG0002496). That is also the definition of a teller's check in the Uniform Commercial Code. *See* UCC § 3-104(h).

68. In my opinion, MoneyGram Agent Checks are not bank checks at all and certainly are not teller's checks (which are a type of bank check, as described above). Therefore, they cannot be "third party bank checks" for purposes of 12 U.S.C. § 2503. I reach that conclusion because Agent Checks denominate MoneyGram as the "drawer" of the check, and MoneyGram is not a bank. On some specimens, the preprinted specimens designate the party in the upper left hand corner, typically reserved for the name of the drawer, as "agent," presumably as agent for MoneyGram. Thus, these checks do not even nominally designate a bank as a drawer. As MoneyGram's

contract with its financial institution customers states, "Financial Institution is not a party to Agent Checks even though its name may appear on the Agent Checks." Yingst Ex. 15 clause 3. Again, in my opinion, at the time that the Federal Disposition Act was enacted, the common understanding of a bank check was that it was a check drawn by a bank on a bank.

69. Where a MoneyGram Agent Check designates the selling bank as an "agent," that agent bank bears no drawer liability on the check, even if the designated agent is a bank. That is because the agent bank purports to be signing in a representative capacity as agent and the check shows unambiguously that it is made on behalf of MoneyGram, the principal, who is identified on the instrument. In such a situation, UCC § 3-402(b)(1) provides that the agent bears no liability on the instrument. *See also* Yingst at 164-166. Thus, the true drawer of the Agent Check, both nominally and functionally, is MoneyGram. Because Agent Checks are not drawn by a bank at all, they represent the clearest examples of instruments created by MoneyGram that do not qualify as teller's checks or bank checks because they indicate clearly that the drawer is not a bank.

B. MoneyGram Instruments Designated as Teller's Checks Are Not Third Party Bank Checks, Even Accepting Delaware's Previously Articulated Definition of the Term.

70. Instruments designated by MoneyGram as a "Teller's Check" also should not be considered as "third party bank checks" for purposes of 12 U.S.C. § 2503, even assuming for the sake of argument that teller's checks were for some reason excluded from the statute as "third party bank checks." MoneyGram Teller's

Checks designate a bank as a drawee, designate a bank as a drawer, and designate MoneyGram as the "issuer." *See, e.g.*, Yingst Ex. 6. Under the Uniform Commercial Code, however, an "issuer" is also a drawer of a check. There is no difference between the two terms for purposes of a check. *See* UCC § 3-105(c) ("'Issuer' applies to issued and unissued instruments and means a maker or drawer of an instrument."). As a consequence, there are two drawers on MoneyGram Teller's Checks, one of which is a bank and one of which is not a bank.

71. I have not discovered any cases that deal with the issue of whether a check that has two drawers, one of which is a bank and one of which is not, can qualify as a bank check or as a teller's check. In my opinion, it should not be so considered at least with respect to Teller's Checks that are drawn by MoneyGram.

72. I reach that conclusion because as a functional matter, the nominal drawer bank with respect to such instruments serves solely as an agent for MoneyGram. Indeed, the contract between MoneyGram and its financial institution customers recites that "MoneyGram hereby appoints Financial Institution as its limited agent and authorized delegate for the sole purpose of using and selling the Products as set forth in this Agreement; and Financial Institution hereby accepts this appointment." Yingst Ex. 15 clause 5. The "Products" under that agreement include any Agent Checks, Agent Check Money Orders, cashier's checks and Teller's Checks that the financial institution has elected to have provided by MoneyGram. Yingst Ex. 15 clause 2.

73. In addition, examination of the functional manner in which MoneyGram "Teller's Checks" operate indicates that the nominal "drawer" bank is

acting as an agent of MoneyGram rather than in the traditional role of a bank drawer. Traditionally, the bank designated as the "drawer" of a teller's check maintains an account with the drawee bank, and that account is debited when the drawee pays a check drawn from the account of the drawer. Alternatively, a teller's check may be drawn on a nonbank, but be payable at or through a bank. In the latter case, that bank typically collects the amount of the teller's check from the drawer bank.

74. MoneyGram Teller's Checks work very differently. The selling institution that is denominated as the "drawer" on the Teller's Check sends to MoneyGram the funds that are received in return for the Teller's Check. When the payee on the Teller's Check deposits it into the payee's account, the depositary bank forwards the check to the bank denominated as the drawee on the check. That bank, however, does not debit an account of the bank denominated as the drawer on the instrument. Instead, the nominal drawee is MoneyGram's clearing bank, which pays the item. MoneyGram provides funds in the amount of the presented items to the clearing bank in accordance with a contract between those two institutions. Thus, once the nominal "drawer" issues the instrument, it plays no role whatsoever in the check collection, payment, or escheatment process.

75. This agency relationship is made clear in the contracts between MoneyGram and the financial institutions that sell its Teller's Checks. Under those contracts, a financial institution that sells a MoneyGram Teller's Check holds the funds received in exchange for those items in trust for MoneyGram until it sends the funds to MoneyGram. *See* Yingst Ex. 15 clause 7(A). Unlike the typical case of a teller's check,

therefore, the funds received by the seller of a MoneyGram Teller's Check do not become general funds of the financial institution that sells the instrument.

76. In addition, under its contract with its financial institution customers, MoneyGram, not the financial institution, maintains copies of both sides of a check that has been presented for payment. Yingst Ex. 15 clause 18. MoneyGram, not the financial institution, is responsible for unclaimed property related to MoneyGram instruments other than cashier's checks. Yingst Ex. 15 clause 19. The financial institution agrees broadly to follow "all of MoneyGram's reasonable instructions relating to this agreement," and MoneyGram "may change the instructions from time to time." Yingst Ex. 15 clause 31 (A).

77. The effect of those provisions is to transform the nominal drawer on a MoneyGram Teller's Check into an agent of MoneyGram that essentially plays no role other than to sell checks on behalf of MoneyGram and send the proceeds to MoneyGram. Thus, as a functional matter, MoneyGram Teller's Checks operate identically to MoneyGram instruments denominated as Agent Checks and Agent Check Money Orders. The relationships between MoneyGram and its financial institution customers are governed by the same contractual provisions with respect to both Agent Checks and Teller's Checks. In both cases, a customer of the seller of the instrument purchases the instrument from the seller bank, not from MoneyGram. In both cases, the seller remits the proceeds of the sale to MoneyGram and conveys to MoneyGram the information relevant to its purchase. Prior to the time that the funds are transferred to MoneyGram the seller of both instruments holds those

funds in trust for MoneyGram. In both cases, the seller of the instrument has no further responsibilities towards the instrument once it has been sold and the proceeds have been remitted to MoneyGram.

78. As I have noted above, MoneyGram Agent Checks cannot be considered to be bank checks or teller's checks, even if the latter qualify for the exclusion in 12 U.S.C. § 2503. In my opinion, the same conclusion should apply to MoneyGram Teller's Checks in which the nominal drawer is the functional equivalent of the designated agent financial institution on a MoneyGram Agent Check.

79. The fact that a bank is the nominal drawer on a MoneyGram Teller's Check may have significance in some settings. For example, I understand that funds represented by a MoneyGram instrument designated as a "Teller's Check" may have next-day availability under Regulation CC of the Federal Reserve Board, while funds represented by a MoneyGram instrument designated as an "Agent Check" may not. Additionally, a bank that is the nominal drawee of a Teller's Check may have to account for the item under Federal Reserve Board Regulation D. I offer no opinion on those issues. But in my opinion, the fact that a bank is nominally designated as drawer on an instrument drawn on another bank and designated as a teller's check does not necessarily mean that the check qualifies as a "third party bank check" for purposes of 12 U.S.C. § 2503, even if other teller's checks qualify for that term. That is because the purpose of 12 U.S.C. § 2503 is to ensure equitable allocation of the funds attributable to abandoned items in accordance with information about the state of purchase. If, as an operational matter, that information is not held by the seller of the teller's check who is designated as the

nominal drawer, but is held by MoneyGram, then excluding the instrument from the allocation rules of 12 U.S.C. § 2503—notwithstanding MoneyGram's possession of the relevant purchase information—defeats the objectives for which Congress enacted the Federal Disposition Act.

80. Nor do MoneyGram Teller's Checks operate like traditional teller's checks from the drawee's perspective. The nominal drawee serves solely as a clearing bank for obligations assumed by MoneyGram. Nor does the nominal drawee of the MoneyGram instrument, the clearing bank, pay a MoneyGram instrument by debiting a nominal drawer's account. *See* Yingst at 53-55. Instead, the clearing bank pays the Federal Reserve or a presenting bank for the item and MoneyGram separately provides funds relating to payment of the Teller's Checks directly to the clearing bank. Yingst at 279. Indeed, in documents generated by MoneyGram to explain its role in Teller's Check and Agent Check transactions to employees and potential bank customers, MoneyGram holds itself out as the "drawee" on such items and refers to the clearing bank only parenthetically. *See* Yingst Ex. 16; Yingst at 231-233. In other words, although MoneyGram Teller's Checks offered under its official program nominally designate a financial institution drawer and drawee, as a functional matter MoneyGram plays both those roles.

Dated: September 24, 2018 /s/ Clayton P. Gillette
Clayton P. Gillette

SUPREME COURT OF THE UNITED STATES

Nos. 220145 & 220146
(Consolidated)

DELAWARE,

Plaintiff,

v.

ARKANSAS, *et al.*,

Defendants.

October 24, 2018

REBUTTAL EXPERT REPORT OF CLAYTON P. GILLETTE

I, Clayton P. Gillette, provide this Rebuttal Report under Federal Rule of Civil Procedure 26(a)(2)(D)(ii) to assist the Court in its resolution of this matter and to respond to some of the contentions made in the Expert Report of Ronald Mann dated September 19, 2018 (the "Mann Report").

1. Professor Mann's first stated opinion is that "[n]either a bank nor MoneyGram is directly liable," within the meaning of 12 U.S.C. § 2503, "on the MoneyGram official checks or MoneyGram money orders" evaluated in his report. (Mann Rep. ¶ 19(a).) This conclusion is based on his contention that the term "directly liable" as used in that statute is derived from the liability scheme for parties to negotiable instruments under Articles 3 and 4 of the Uniform Commercial Code (the "UCC"). *(See, e.g.,* Mann Rep. ¶¶ 22-28.) I disagree with that assumption. Professor

Mann offers no support for his argument that "direct liability" is defined by, or has any particular meaning within, the UCC's liability scheme. Indeed, the term "directly liable" is not found with respect to the liability of drawers, indorsers, or drawees on instruments anywhere in Article 3 or in the Official Comments thereto.[1] Because the term "directly liability" is not utilized or defined in the relevant portions of the text of the UCC or applicable case law, and because equating the term with "unconditional liability" is inconsistent with the stated objectives of Federal Disposition Act,[2] I disagree with Professor Mann's conclusions that flow from what I view as this erroneous assumption.

2. Professor Mann notes that liability for parties on most check and check-like instruments under the UCC is conditional. Drawers are generally not liable on instruments until the instruments have been dishonored; drawees are generally not liable on instruments until the drawees have accepted them. The one exception involves a cashier's check, which Professor Mann notes imposes unconditional liability on the drawer/drawee on issuance. I do not dispute Professor Mann's statement of these basic principles of the liabilities of parties to instruments.

3. The UCC's liability scheme for parties to instruments, however, is not (and was not at the time of the enactment of the Federal Disposition Act) predicated

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[1] Official Comment 4 to § 3-605 to the UCC uses the term "directly liable" in the context of guarantor liability, which is a completely distinct concept from the issue of liability on instruments on which Professor Mann bases his opinion.

[2] As I did in my initial report, I use the term "Federal Disposition Act" to refer to the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. § 2501, *et seq.*

on anything commonly called "direct liability" or "indirect liability." Nor were those terms used in the UCC to indicate conditional or unconditional liability. Instead, the principle of indirect liability described by Professor Mann was expressed by calling drawers "secondary parties," based on the understanding that they were liable only if the drawee dishonored an instrument. Pre-Revision U.C.C. § 3-102(1)(d) (1972) (defining "secondary party" as a drawer or indorser). Although the term "primarily liable" was not used with respect to drawees within the definitions of the UCC, both commentators and courts used the term to refer to the liability of those who were liable on issuance, such as issuers of cashier's checks, or drawees that had accepted checks and thus satisfied any condition to liability on the instrument. With rare exceptions, courts and commentators did not use the phrase "direct liability" as a synonym for "primary liability" in that context.[3] When courts and commentators did use the term "direct liability" with respect

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[3] I am aware of occasional, though infrequent, uses of the term "directly liable" in the manner used by Professor Mann. For example, in *Ward v. Federal Kemper Insurance Comany,* 489 A.2d 91 (Md. Ct. Spec. App. 1985), the court noted: "When the drawer draws a check on the drawee and delivers the check to the payee, the check ordinarily is regarded as only a conditional payment of the underlying obligation . . . . Until those conditions are met, no one is directly liable on the check itself...." *Id.* at 95. I have also found pre-UCC cases that refer to certification of a check as a process that renders the certifying bank "directly liable" to the holder. *See, e.g., Gray v. First Nat'l Bank of Birmingham,* 80 So. 2d 528, 530 (Ala. 1955); *Dawson v. Nat'l Bank of Greenville,* 144 S.E. 833 (N.C. 1928). Because these cases constitute rare, if not unique, uses of the terms as used by Professor Mann or are not UCC cases at all, they do not affect my conclusion that the term "directly liable" lacks any specific or well-understood meaning within the UCC liability scheme.

to check-like instruments during the period when the Federal Disposition Act was being considered, they were addressing issues other than the liability of drawers, indorsers, or drawees on the instrument. For example, courts sometimes used the phrase "direct liability" when addressing whether a depositary or collecting bank that transferred a check bearing a forged indorsement was "directly liable" to the drawer. *See, e.g., Allied Concord Fin. Corp. v. Bank of America,* 80 Cal. Rptr. 622 (Cal. Ct. App. 1969); HENRY J. BAILEY, THE LAW OF BANK CHECKS 201 n.90 (4th ed. 1969). Other cases using the term involved the issue of whether a depositary or collecting bank could become "directly liable" to a payee where the bank acted in bad faith. *See, e.g., Knesz v. Central Jersey Bank & Tr. Co.,* 477 A.2d 806 (N.J. 1984). Those issues involve liability under theories such as conversion for payment of a check under improper circumstances rather than the liability that a party to a check bears by virtue of its role on the check itself.

4. In contrast to the absence of the term "direct liability," during the period when the Federal Disposition Act was enacted, courts and commentators consistently referred to the liability of drawees who had accepted checks, so that any condition to liability had been satisfied, and to issuers of cashier's checks as being "primarily liable." *See, e.g.,* HENRY J. BAILEY, THE LAW OF BANK CHECKS 218 (4th ed. 1969) ("A person primarily liable is one who by the terms of the instrument is absolutely required to pay it; that is, the maker of a note or the acceptor of a draft or bill of exchange. A bank certifying a check becomes primarily liable and presentment is not necessary to charge the bank."); *Tepper By and Through Michelson v. Citizens Fed. Say. & Loan Assn,* 448 So.2d 1138, 1140 (Fla. Dist. Ct. App. 1984) ("The act of accepting

the instrument renders the drawee primarily liable as an acceptor . . . . A cashier's check is a check on which the issuing bank acts as both the drawer and the drawee. Its own act of issuance renders the bank a drawee who has accepted the draft; thus the issuing bank becomes primarily liable as an acceptor.") (citing J. White and R. Summers, *Uniform Commercial Code* § 17-5 (2d ed. 1980)); *Society Nat'l Bank of Cleveland v. Capital Nat'l Bank,* 281 N.E.2d 563 (Ohio Ct. App. 1972) ("In issuing the cashier's checks, [issuing bank], rather than [remitter], became primarily liable on them."); *Santos v. First Nat'l State Bank of New Jersey,* 451 A.2d 401 (N.J. Super. Ct. App. Div. 1982) ("Timely presentment for payment is necessary to charge parties who are secondarily liable on an instrument. *N.J.S.A.* 12A3--501. . . . However, presentment is not required to charge parties primarily liable, such as the maker of a note, acceptor of a draft, or a bank that certifies a check . . . . 3 *Anderson, Uniform Commercial Code* (2 ed. 1971)"); *see also Hackett v. Broadway Nat'l Bank,* 570 S.W.2d 184 (Tex. Civ. App. 1978) (dishonor of check satisfied conditions to drawer liability and thus rendered drawer "primarily liable").[4]

5. As I have noted above, courts and commentators who discussed the UCC at the time of the enactment of the Federal Disposition Act referred to parties to checks whose liability was subject to the satisfaction of conditions were referred to as "secondarily liable,"

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[4] Some courts erroneously described the drawer as "primarily liable." *See, e.g., Shafts v. Pardi,* 483 S.W.2d 879, 881 (Tex. Civ. App. 1972) ("A drawer of a check is primarily liable. An indorser is secondarily liable."). Nevertheless, the important point is that even those courts used language of "primary" and "secondary" liability to describe the liability of parties on checks. They did not use the language of "direct" or "indirect" liability.

not as parties with "indirect liability." *See, e.g.,* HENRY J. BAILEY, THE LAW OF BANK CHECKS 218 (4th ed. 1969) ("On the other hand, the Code declares that, unless excused, presentment is necessary to charge secondary parties to an instrument such as the drawer and any indorser of a check."); *Tepper By and Through Michelson,* 448 So.2d at 1140 ("The drawer, on the other hand, is only secondarily liable on the instrument, in that there are conditions precedent to liability. W. Hawkland, *Commercial Paper* 52 (2d ed. 1979).").

6. When Article 3 of the UCC was revised in 1990, the terminology of "secondary" liability to define the responsibility of parties to the check was eliminated. But as with the prior version, revised Article 3 did not define (or otherwise refer to) the conditional or unconditional liability of parties to instruments as "direct" or "indirect." Instead, Official Comment 4 to revised § 3-414 was changed to state: "The liability of the drawer of an unaccepted draft is treated as a primary liability. Under former Section 3-102(1)(d) the term `secondary liability' was used to refer to a drawer or indorser. The quoted term is not used in revised Article 3."

7. Professor Mann, however, equates unconditional liability under the UCC with the phrase "directly liable" as it is used in 12 U.S.C. § 2503. Similarly, he implies that those parties to instruments who have only conditional liability as set forth above must have "indirect liability," and thus are outside the scope of 12 U.S.C. § 2503. For the reasons set forth above, it is my opinion that Professor Mann's attempt to equate these terms is not supported by the UCC.

8. It is not surprising that Congress did not use either the terms or concepts of party liability under the

UCC when it drafted 12 U.S.C. § 2503. The plain language of 12 U.S.C. § 2501 reveals that Congress was interested in the entirely different issue of equitably reporting and remitting the proceeds of certain unclaimed instruments, *See* 12 U.S.C. § 2501(3) ("[T]he States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment."). Whether parties to instruments bear conditional or unconditional liability for payment of those instruments under the UCC is irrelevant to that objective. And stated above in Paragraph 3, the UCC does not equate direct liability with unconditional liability in any event.

9. There are additional reasons to reject the contention that Congress's use of the term "direct liability" in 12 U.S.C. § 2503 was derived from the UCC's liability scheme for parties to negotiable instruments. First, Professor Mann agrees that MoneyGram retail money orders and MoneyGram agent check money orders have no party who is "directly liable" as he uses the term. *See* Mann Report at ¶¶ 19(a), 38. Yet a money order was the quintessential instrument identified by Congress to exemplify the kind of instruments that it wanted covered by 12 U.S.C. § 2503. Thus, under Professor Mann's definition of the term "directly liable," Congress, according to Professor Mann, included only other instruments on which there was unconditional "direct," liability, even though Congress's primary example of a covered instrument did not possess that characteristic.

10. Second, given the clear and uncontroversial rationale of the Federal Disposition Act of ensuring equitable distribution of the proceeds from unclaimed

property where 1) a holder's records allow identification of the location of purchase, and 2) it is appropriate to presume that the location of purchase is the location of the purchaser's residence, Professor Mann offers no explanation as to why Congress would have applied the statute to cashier's checks, but not to teller's checks or other MoneyGram instruments as to which relevant records similarly exist and the Congressional presumption is similarly appropriate.

11. Professor Mann provides only one example—a cashier's check—of an instrument on which a party is "directly liable" under his definition of the term. (Mann Rep. ¶¶ 20, 28.) But if a cashier's check were the only instrument subject to the statute other than money orders and traveler's checks, then the statute would have been drafted quite differently. In the first instance, it would have been sufficient to say that covered instruments were "a money order, traveler's check, or a draft drawn by the drawer on itself." There would have been no need to speak in terms of an "other similar written instrument (other than a third party bank check) . . . ." In the second instance, since a cashier's check is necessarily drawn on a bank, there would have been no need to speak of an instrument "on which a banking or financial organization or a business association is directly liable." A business association could not be "directly liable" on an instrument as Professor Mann has defined it, since only a cashier's check qualifies, and a "business association" could not be the issuer or drawee of a cashier's check. *See* U.C.C. § 3-104(g) (defining a "cashier's check" as "a draft to which the drawer and drawee are the same *bank* or branches of the same *bank*") (emphasis added). Thus, it makes sense to assume that the addition of the term "business association" was intended to capture situations in which a business

association was a party to an instrument in some other capacity, such as being the drawer of the instrument – even though that meant the business association would only be conditionally liable. It would have been unnecessary to use term "business association" to capture the situation in which a business association was the issuer of a traveler's check. The phrase "traveler's check" itself would have accomplished that, since a significant majority of traveler's checks were issued by business associations at the time. *See* Disposition of Abandoned Money Orders and Traveler's Checks, Sen. Report No. 93-505 at 3 (November 15, 1973) ("[T]here are five organizations supplying (issuing) most of the output of the travelers' check industry . . . . The largest organization, American Express, accounts for about two-thirds of the industry total; two nonbanking subsidiaries of large bank holding companies each control almost 15 per cent of that total . . . .").

12. If one did believe that Congress intended the applicability of 12 U.S.C. § 2503 to turn on principles of party liability under the UCC, it would have been anomalous for Congress to have distinguished between cashier's checks and teller's checks. Although, as a technical matter, cashier's checks do carry unconditional liability and teller's checks do not, the ultimate liability of issuers of both those instruments is equivalent. That is, both issuers of both cashier's checks and teller's checks bear exceptional and identical consequences in the event that they are wrongfully dishonored by the issuer of the cashier's check or the drawer of a teller's check. *See* U.C.C. § 3-411. That is because these instruments are typically viewed as being supported by the credit of a bank and failure to pay each would undermine confidence in checks issued by banks. Given their fungible objectives in commerce

and identical treatment in this regard, there is no clear reason for Congress to have distinguished between them for unclaimed property purposes.

Dated: October 24, 2018 /s/Clayton P. Gillette
Clayton P. Gillette

SUPREME COURT OF THE UNITED STATES

Case Nos. 220145 & 220146
(Consolidated)

DELAWARE,

Plaintiff,

v.

ARKANSAS, et al,

Defendants.

VIDEOTAPE DEPOSITION OF: BARKLEY CLARK

October 16, 2018

PURSUANT TO NOTICE, the videotape deposition of BARKLEY CLARK was taken on behalf of the Plaintiff at 1050 17th Street, Suite 2400, Denver, Colorado 80265, on October 16, 2018 at 9:02 a.m., before Tracy R. Stonehocker, Certified Realtime Reporter, Registered Professional Reporter and Notary Public within Colorado.

* * *

[Page 8] Q. Okay. I'm going to start by asking you some questions about your background. You've been in private practice during portions of your career, correct?

A. Correct.

Q. Could you tell me when during your career you were in private practice?

[Page 9] A. I was in private practice from 1965 until 1969. And then I went into — those were the — and I was in private practice from 2000 or 2005 until I think 2015 and — well, kind of working backwards, I was — I've been in private practice now since 19 — let me try to reconstruct this.

I was in private practice from '65 to — to '69. Then I was in teaching from '69 to '85. And then I was in private practice from '85, really, on until now, even though I have done some teaching as an adjunct.

Q. During your period 1965 to '69, what firm were you at?

A. I was at the firm of Holmes, Robert and Owen here in Denver.

Q. And since 1985, what firm or firms were you at?

A. Well, the first firm was a firm called Shook, Hardy and Bacon and that was until, I think, 2000 — 1999, 2000. And then I was — at another firm — I started my work with Stinson in 2005, about. And I've been at Stinson ever since.

Q. During your time, sir, at private practice, did you ever represent a client in a matter involving escheat or unclaimed property?

[Page 10] A. No.

Q. And I take it, from what you've said, during your time in private practice, you did not hold yourself out as practicing in the areas of escheat or unclaimed property?

A. No.

Q. You did not?

A. I did not.

Q. Okay. How would you describe the areas of law in which you did practice during your periods in private practice?

A. Banking law was the centerpiece, and within that, the whole area covered by the Uniform Commercial Code and that would include warrants under Title 2 of the UCC and negotiable instruments under Article 3. Bank deposits and collections under Article 4. Some work in the area of letters of credit under Article 5. And substantial work in the area of secured transactions under Article 9. And my — I was working on a variety of matters doing some expert witness engagement, but also counseling with bank clients during that period of time.

Q. For simplicity purposes, would it be appropriate for me to characterize your practice areas as banking in commercial transactions, is that a —

[Page 11] A. Yes.

Q. — a fair statement?

A. That's a fair statement.

Q. Okay. Did you, during your practice, ever do significant portions — strike that. Did any portions of your private practice consist of areas outside of banking or commercial transactions?

A. Certain of the warranty projects that I had under Article 2 is basically contracts law for the sale of goods — sales of goods. And so that was not, I don't think, commercial and banking. It didn't have anything to do with banking, but it did have to do with

commercial law, the law of sales under Article 2 of the UCC.

Q. Can you expand a little bit on what you did in connection with warranties as you've just described it warranty law?

A. Warranty law is codified in Article 2 of the Uniform Commercial Code, particularly the sale of goods, and what I did or have done in my practice over the years is sales contracts, working on sales contracts, heavy emphasis on warranty and warranty forms. I have written on the topic of warranties under the UCC and federal law, too, Magnuson-Moss [Page 12] Warranty Act and remedies for breach of warranty and a lot of emphasis on drafting of contracts from a seller's point of view that limit liability, and conversely, from the buyer's point of view, strategies to eliminate the impact of that — of those disclaimers.

Q. Okay. And just to round this out, other than your work — your practice in banking, commercial transactions, warranties, sales contracts, is it fair to say that you did not practice in any other areas besides that?

MS. AHUMADA: Objection as to form. You can answer.

A. I did do some legal work for a county, Wyandotte County in Kansas, when it was in the process of consolidation and because I taught local government in law school, particularly at the University of Kansas law school, I did do some work in that area, and I was also a mayor of the city, so I got some municipal corporation's questions, which I tried to use in class when I could and — and so that was another area that was outside of what I would call commercial law.

Q. (BY MR. ROSENTHAL) Mr. Clark, I'm now going to direct your attention to the portion of your report that starts on page 22. It talks about third-party bank checks. Do you recall that portion?

A. Certainly do.

Q. Okay. Am I correct, sir, that it's your opinion that if Congress in 1974 had intended that third-party bank checks include teller's check, it would likely have included the term "teller's check"?

A. That's my opinion, yes.

* * *

[Page 195] Q. Okay. And that's because teller's checks were well established at the time, correct?

A. They were and they all — already had done that with respect to traveler's checks and money orders, so they certainly had the capability in the interest of using those more precise terms during the drafting process.

Q. And indeed, you mentioned this a little earlier, but you mentioned that in a report of the federal reserve board in September 1974, it had listed a category that was certified checks, teller's checks and other official checks, right?

A. Correct.

Q. And that totaled 9.6 billion dollars?

A. Something like that.

Q. I think I have it pretty close. It was something approaching 10 billion dollars, right?

A. Right.

Q. The reason you did that was that because of the large value of checks that were involved, that would likely have been something Congress would have been aware of given the volume of money involved, correct?

A. Well, yes, there — well, it was always a category in the reports that the fed put out.

[Page 196] Q. But specifically the reason you mentioned that large amount is because you're trying to make the point that given the large amount involved, it's something that Congress would have had cognizance of at the time, am I —

A. That's fair to say, yes.

* * *

[Page 202] Q. Well, there's no mention of it in the legislative history, is there?

A. Yes, there is. Because —

Q. Of that report?

MS. AHUMADA: Objection, would you please let him answer fully.

A. No. What there is is there was a term of art, third party — third party payment, which had a connotation of checking accounts. Then that — then the treasury report sort of summed that up by using the term "third-party payment services" and said these are checking accounts. These are just standard checking accounts where you're trying to transmit money to the payee of a check, and that was what they thought. That's why I feel that that linguistic bridge, I like to call it, and the morphing of the term is — is good indication of a legislative history of it, I think.

[Page 1]

SUPREME COURT OF THE UNITED STATES

Case Nos. 220145 & 220146
(Consolidated)

DELAWARE,

Plaintiff

vs.

ARKANSAS, et al.,

Defendants

DEPOSITION OF ALEX KAUFFMAN

June 21, 2018

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* * *

[Page 13] Q. Do you understand that you are here today as a corporate representative of Treasury Services Group?

A. Yes.

Q. Do you understand what that means?

A. Yes.

Q. And what does that mean?

A. That I'm legally representing the organization.

[Page 14] Q. And do you understand that your answers that you give today are answers of the organization itself?

A. Yes.

Q. Could you turn to the topics of deposition which is the second to last and last page of the — of the paper? Do you understand from your counsel that she and I have reached an agreement not to ask you questions about topic number four today, which is communications with Defendant States regarding the unclaimed property examination of MoneyGram official checks?

A. Yes.

Q. And do you understand that Treasury Services Group would be asked at a later date to confirm the authenticity of certain documents sent from TGS to states or from states to TSG?

A. Yes.

Q. With the exception of topic number four, are you prepared to discuss all of the topics listed on the subpoena?

A. Yes.

Q. What did you do to prepare to testify regarding these topics?

A. I reviewed documents and discussed with my counsel.

[Page 15] Q. Okay.

Other than your counsel did you meet with anyone?

A. No.

Q. Did you confer with Mr. Osborn about any of the topics listed on the subpoena?

A. Yeah, we discussed it.

Q. Is there any topic listed on the subpoena that you're not prepared to discuss today putting to one side number four?

A. No.

Q. What is your job title at — I'll withdraw the question.

If I use the term TSG just to make things a little easier today, you understand I'm referring to Treasury Services Group?

A. Yes.

Q. What is your job title at TSG?

A. I'm the president.

Q. And what are your responsibilities?

A. I oversee the staff and the day to day conduct of audits.

Q. And when did you join TSG?

A. We started in 2012.

Q. And what did you do before starting TSG?

A. I — immediately prior I worked for USDA Rural [Page 16] Development.

Q. And how long did you work for USDA?

A. I believe four years.

Q. That takes us back to about 2008. What did you do before that?

A. I worked in the Nebraska State Treasurer's Office.

Q. And what were your responsibilities in the Nebraska State Treasurer's Office?

A. I oversaw the Unclaimed Property Division.

Q. And how long did you have that job?

A. I had it for four years. And I should say that there was some overlap between USDA and Treasury Services Group.

Q. Are you a member of Treasury Services Group?

A. Yes.

Q. Who are the other members of Treasury Services Group?

A. Shane Osborn, the Ashcroft Group, and a couple individuals form the Ashcroft organization.

Q. What's the percentage membership stake of the Ashcroft Group and individuals from the Ashcroft Group or law firm combined?

A. I believe 28 percent.

Q. And is the balance held by you and Mr. Osborn?

[Page 17] A. That's right.

Q. What was your role in the examination of MoneyGram official checks that TSG performed on behalf of its client states?

A. I personally conducted the review and managed the audit.

Q. Were there any other individuals at TSG with responsibilities on the audit that — excuse me. Strike that question.

Were there any other individuals at TSG that worked on the audit?

A. Yes.

Q. Who were they?

A. Pretty much most of the staff contributed in some form or another, either helping to contact the states or analyze data. It was a team effort.

Q. Other than you could you name one individual that had the second most responsibility for the examination?

A. Shane Osborn.

Q. And then after Mr. Osborn who would you say had the next amount of responsibility for the exam?

A. Our audit manager, Avalina Buikema.

COURT REPORTER: Could you say the name again?

[Page 18 THE WITNESS: Avalina, A-V-A-L-I-N-A, Buikema, B-U-I-K-E-M-A.

BY ATTORNEY TALIAFERRO:

Q. Mr. Kauffman, I've just handed you three exhibits marked Exhibit 71, 72, and 73. And I'm going to ask you questions about each of them. But given

their similarities I'm going to — it'd be easier just to — to do all three at once.

(Whereupon, Plaintiff Deposition Exhibit 71, 8/29/14 Letter to Mr. Holmes, was marked for identification.)

(Whereupon, Plaintiff Deposition Exhibit 72, 8/1/14 Letter to Mr. Holmes, was marked for identification.)

(Whereupon, Plaintiff Deposition Exhibit 73, Letter from Mr. Angus, was marked for identification.)

BY ATTORNEY TALIAFERRO:

Q. Exhibit 71 is a letter from Yaw Obeng of the Ohio Department of Commerce. Do you have that in front of you?

A. I do.

[Page 19] Q. Do you know who — or who — I don't know if that is a man or a woman. But do you know if that is a man or a woman?

A. It's a man.

Q. It's a man. Okay.

And who is Mr. Obeng?

A. He is the superintendent of the Unclaimed Property Program for the State of Ohio.

Q. Have you ever seen this letter before?

A. Yes.

Q. And what is this letter?

A. This is an audit authorization letter or initiation letter we sometimes call it which informs that a company, or as we call them a holder, that they're under audit.

Q. All right.

If you could look at the first sentence of the second paragraph, it reads the examination will be conducted by APEX, a division of Treasury Services Group, LLC parentheses contractor as an authorized representative of the state.

Who — who is APEX?

A. APEX was a company that we acquired and held contracts for certain states through for a period of time.

[Page 20} Q. Is APEX still active?

A. No. All the contracts have subsequently been reassigned to TSG.

Q. Do you understand from this letter that Mr. Obeng is informing Alex Holmes of MoneyGram that Treasury Services Group is an authorized representative of the state?

A. Right. Correct.

Q. If you look at Exhibit 72 which is a letter from Brian Munley of the Pennsylvania Treasury to Mr. Holmes.

Have you seen this letter before?

A. Yes.

Q. If you could look at the first sentence of the second paragraph of that letter it says this letter shall constitute authority for TSG to identify, collect, and report all unclaimed property due and payable to Treasury.

Do you see that sentence?

A. Yes.

Q. And what do you understand Mr. Munley to be saying in that sentence?

A. That Treasury Services Group will conduct an audit and collect and deliver any identified reported property.

[Page 21] Q. And what — the word specifically authority, what authority is Mr. Munley giving to TSG with that sentence?

A. The state statutory authority to appoint auditors to conduct examinations.

Q. If you could look at Exhibit 73, that's a letter from Matthew Angus from the Texas Comptroller of Public Accounts to Alex Holmes of MoneyGram.

Do you have that letter in front of you?

A. Yes.

Q. And if you could look at the first sentence of the second paragraph of that letter, it says the audit and examination will be conducted by Treasury Services Group as the state's authorized agent.

Do you have an understanding of what it means to be an agent of the state?

A. Yes.

Q. And what do you understand that to be?

A. That Treasury Services Group will act on the state's behalf to conduct an audit.

Q. One question about the Texas letter. There's — there's no date on it. Do you have any understanding — the — the other two letters that I've shown you are dated August 1 and August 29th of 2014.

Do you have an understanding of when the Texas [Page 22] letter would've been sent?

A. I don't recall. I'm sorry.

Q. Would it have been around the same time period, summer of 2014?

A. I would think so.

Q. Was — let me ask this.

Was Texas an original client state in this examination or an add-on client state in this examination?

A. I believe they were original.

Q. When conducting this examination, did TSG understand that its actions as an agent could bind its principles to states?

A. Yes.

Q. And that its actions could bind the states by words — sorry. Strike that question.

That TSG could bind the states by words or actions?

ATTORNEY VOSS: Objection.

ATTORNEY TALIAFERRO: You can answer.

ATTORNEY DISHER: Objection. Calls for legal conclusion.

COURT REPORTER: [Page 23] Who — who was that?

ATTORNEY TALIAFERRO: Todd Disher.

COURT REPORTER: Okay.

ATTORNEY O'KORN: Same objection from Ohio.

THE WITNESS: I'm not sure I understand the question.

BY ATTORNEY TALIAFERRO:

Q. Well I asked you if you under — well, let me back up a minute.

Did you understand that Treasury Services Group was acting as an agent of its client states?

A. Yes.

Q. And what did you understand that to mean?

ATTORNEY DISHER: Same objection.

ATTORNEY O'KORN: Same objection.

ATTORNEY VOSS: Join.

ATTORNEY TALIAFERRO: You can answer.

THE WITNESS: [Page 24] We have limited authority I believe to conduct an audit. We don't have the authority to represent the states in legal matters and our contracts require us to receive approval or, you know, advanced notice to the states of certain actions. So I'd say in a very limited capacity we act as an agent of the state.

BY ATTORNEY TALIAFERRO:

Q. Okay.

And within that capacity, understand the limitations that you've put, but within that capacity does TSG understand that the authority that is delegated to it by the states means that its actions are actions of the states?

ATTORNEY VOSS: Objection.

ATTORNEY DISHER: Objection. Calls —

ATTORNEY O'KORN: Objection.

ATTORNEY DISHER: — for legal conclusion.

ATTORNEY O'KORN: Same objection from Ohio.

THE WITNESS: [Page 25] I believe we were allowed and supposed to conduct an audit on the state's behalf.

BY ATTORNEY TALIAFERRO:

Q. In conducting that audit did you — did Treasury Services Group believe that its conclusions were conclusions of its client states?

A. Limited to the scope of the audit. Yes.

Q. Now I — I have additional state authorization letters which I — I don't think would be any — any interest to go through. But I'll just ask are you aware of any authorization letter in the summer of 2014 that did not refer to TSG as the state's representative or agent?

A. I don't believe so.

Q. How did this examination start?

A. We were contacted by the State Of Arkansas who had, I understand, previously corresponded with MoneyGram about this issue. And they asked us to conduct a review to dig deeper into the issues and to try to quantify what the liability for this type of property might be.

Q. And so it's fair to say that the issue was first presented or came to the attention of TSG through the State of Arkansas?

A. Correct.

[Page 26] Q. And once Arkansas had asked TSG to do the examination how did other states become aware of the examination?

A. We invited all of our other client states to participate in the audit.

Q. At the time that the audit was initiated how many client states did TSG have?

A. I don't remember. I'm sorry.

Q. Did every client state that TSG had at the time join the examination?

A. I don't believe so.

Q. Do you — can you recall any states that did not join the examination?

A. I can't off the top of my head.

Q. Did a majority of the states join the examination?

A. Yes.

Q. And is the August dates that we looked at on the authorization letter, is that consistent with your understanding of when the examination began?

A. Yes.

* * *

[Page 192] Q. Do you recall as part of your analysis of the official checks escheated to Delaware if you did an analysis of how many of those checks were purchased in Delaware?

A. Yes. We did.

Q. Do you know what percentage of the total of those checks escheated to Delaware were purchased in Delaware?

A. I believe about one percent.

Q. One percent?

If I could direct you to 103, Exhibit 103, and specifically I want to send you to page ALF Bates 1796. One, two, third paragraph down, first sentence. And it says less than one half of one percent of all official check properties escheated to the State of Delaware were actually purchased in Delaware. Do you see that?

A. Yeah. I'm sorry.

Q. Do you think the percentage, after having looked at this document, was closer to one half of one [Page 193] percent?

A. You're correct.

Q. Also, in this document although there's discussion about checks escheated to Minnesota.

Do you recall that?

A. Yes.

Q. And as part of your audit did you do an analysis of MoneyGram official checks escheated to Minnesota?

A. Yes.

Q. Did you subsequently make a demand on Minnesota for your respective client states?

A. Yes.

Q. What was the outcome of that demand?

A. Minnesota paid those state the amount that had been erroneously reported to Minnesota.

Q. Is it your understanding that the checks escheated to Minnesota were also travelers' checks and agent checks?

ATTORNEY TALIAFERRO: Object to the form of the question.

ATTORNEY VOSS: Yes. Let me correct — that's a bad question.

BY ATTORNEY VOSS:

Q. Is it your understanding that the checks [Page 194] escheated to Minnesota were teller's checks and agent checks?

A. Yes.

Q. And those are the same instruments that were escheated to Delaware?

A. Yes.

Q. With a different result?

A. Correct.

[Page 1]

SUPREME COURT OF THE UNITED STATES

Nos. 220145 & 220146
(Consolidated)

DELAWARE,

Plaintiff,

-against-

ARKANSAS, et al.,

Defendants.

VIDEOTAPED DEPOSITION OF RONALD J. MANN

New York, New York
Friday, November 9, 2018

Reported by Roberta Caiola

* * *

[Page 12] Q. Then second, related to that, it is your opinion that neither a bank nor MoneyGram is directly liable on the MoneyGram money orders evaluated in this report, is that correct?

A. That's correct.

Q. And that's still your opinion today?

A. Yes.

Q. Second, your opinion is that official checks differ from money orders in the indirect liability of banks to pay, is that correct?

A. That is correct.

Q. And official checks differ from money orders and the terms and conditions that they bear on their face, is that fair?

A. That is correct.

Q. And that's still correct today?

A. Yes.

Q. Then lastly, it is your opinion that the statutory reference to third-party bank checks is obscure. Is that still your opinion today?

A. It is.

* * *

[Page 23] Q. Sure. Thank you. In paragraph 68 you are opining on this idea that it seems a little odd to you to give the phrase third-party bank check the meaning of teller's checks, do you see that?

A. Yes, I do.

Q. So why does it seem odd to you to ascribe the meaning of third-party bank checks as teller's checks?

A. Well, I think the report speaks for itself. I agree with what I wrote in the report. In my common experience, when people talk about third-party checks of any kind they mean some difference between the person that's going to be paid and one of the original parties to the issuance of the check.

Q. Okay. So when you say "that term usually refers to checks that end up being paid to a party distinct from the original parties."

When you say "that term" you mean third party?

A. A third-party check, yes.

Q. So in your opinion, in the context of negotiable instruments, the phrase third party or [Page 24] third-party check usually refers to checks that end up being paid to a party distinct from the original party?

A. Yes.

Q. Is that the same as a double endorsed check?

A. That is not a commonly used term, in my experience, and to the extent I understand it I would think it's different from third party.

Q. How is it different?

A. Because it would suggest that something has been endorsed twice, which might or might not involve it being paid to a different person.

It's just a different class of circumstances.

Q. I understand. What about twice endorsed check, are you familiar with that phrase?

A. It's not a phrase that I have ever used and it's not a phrase that I've commonly heard.

I can assume it means a check that's been endorsed twice.

* * *

[Page 30] Q. Thank you. Let's talk about your background briefly. What do you do for a living now?

A. I'm a law professor at Columbia Law School, where I teach courses about various aspects of commercial law.

Q. How long have you been a law professor?

A. This is my 25th year.

Q. Have you ever taught a class about unclaimed property or escheatment?

A. I have not.

Q. Have you ever included topics in any of your classes about unclaimed property or escheatment?

A. I have not.

Q. Have you ever written any scholarly works about unclaimed property or escheatment?

A. I have not.

[Page 31} Q. Have you ever given any presentations about unclaimed property or escheatment?

A. I have not.

Q. Do you consider yourself an expert on the areas of unclaimed property and escheatment?

A. I do not.

Q. Now, if we look at your report on paragraph 7. If you see the last sentence of paragraph 7, you discuss

ongoing interviews with industry participants, do you see that?

A. I do.

Q. Have you had any discussions with any industry participants about the issues in this case?

A. I have not.

Q. Have you had any discussions with industry participants about unclaimed property or escheatment practices?

A. I have not.

Q. Have you ever served as an expert witness in a case involving unclaimed property law or escheatment?

A. I have not.

* * *

[Page 35] Q. Have you ever offered any opinions as an expert witness related to this idea of direct liability, as you have defined it?

[Page 36] A. I have not.

Q. Have you ever authored any scholarly works that discuss this idea of direct liability, as you have defined it?

A. I have not.

Q. Have you ever taught any classes that may have covered the topic of direct liability, in the way that you have defined it?

A. Every time that I teach a class about payment systems I discuss cashier's checks and teller's checks, and the ways in which the parties on those instruments are liable, and how those liabilities resemble or differ from the liability on conventional checks.

Q. In those classes do you use the phrase direct liability?

A. I do not.

* * *

[Page 50] Q. And is the liability of an issuer on a draft the same as the liability of a drawer on a draft?

A. The liability of the issuer of a cashier's check would be the same as the liability of a drawer — I'm sorry, let me rephrase.

The liability of the issuer of a teller's check would be the same as the liability of the drawer of the teller's check, but if both [Page 51] parties are on the check their responsibility between themselves might differ.

Q. What would we look at to determine what the responsibilities are between a listed drawer and a list the issuer?

A. Well, first you have to determine whether the issuer in fact is liable as an issuer, which depends on whether the indication of MoneyGram in the lower left-hand corner counts as a signature. If both parties signed it then, as against anybody that was a person entitled to enforce the instrument, they would have identical liability.

If one or the other of them paid the instrument to a person — I'm sorry, if one or the other of them, you know, paid a person entitled to enforce the instrument, then the person who paid it might be able to pursue the other person, arguing that the other person was primarily liable, and that the person that paid it was secondarily liable.

Q. What would determine between the two parties who had primary liability and who had secondary liability?

A. The relations involved in the issuance [Page 52] of the instrument.

Q. Would that be governed by, for example, the contract between the two entities?

A. That would be relevant.

Q. So the contract between Elizabethton Federal and MoneyGram could determine who had primary and who had secondary liability as the drawer or issuer?

A. Yes.

* * *

[Page 69] Q. One of those things that you reviewed, but didn't find anything of interest, was various versions of the Uniform Unclaimed Property Act?

A. Yes.

Q. Let's look at a few more documents and they may answer some of these questions. I'm just going to walk through a couple of them.

(Exhibit 123, Document Bates stamped ALF0000 2365 through ALF00002387, marked for identification.)

Q. Here is Exhibit 123. I believe that [Page 70] this is one of the documents on the list?

A. Yes. And I mention this in my report in paragraph 68.

Q. Where is it mentioned?

A. Paragraph 68.

Q. Got it. So you mention Exhibit 123 in the context of it putting forth the Delaware State escheater, referring to third-party bank checks as teller's checks, right?

A. Is there a question?

Q. Yes. You only cited to Exhibit 123 as the source for this idea that Delaware's putting forth, which is that a third-party bank check may mean teller's checks?

A. That's the only context in which I mention this letter, yes.

Q. Is that the only context in which this played any role in you developing your opinions reflected in your report?

A. Yes.

* * *

[Page 75] Q. In 19 sub A you say MoneyGram is not directly liable on MoneyGram money orders evaluated in this report, right?

A. With respect to the ones that I had seen, that's correct.

Q. You say that a bank is not directly liable on MoneyGram money orders evaluated in this report, is that correct?

A. That's correct.

Q. Do you know whether Western Union is directly liable on Western Union money orders?

MS. MOSELEY: Objection, scope.

A. Based on the instruments that you just handed to me, I can say that Western Union's liability on its

money orders is no more direct than the liability of MoneyGram on its money orders.

Q. Okay. Do you know whether a bank is directly liable on Western Union money orders?

MS. MOSELEY: Same objection.

A. And I would have the same answer.

Q. In paragraph 20 you say, "I understand the retail money orders and agent check money orders to be money orders within the language of [Page 76] the statute." Did I read that right?

A. Yes.

Q. Is that your opinion?

A. I was told by counsel for Delaware, the people at Loeb & Loeb, that those two products were being treated as money orders, and they weren't a matter of dispute in this litigation. So I'm reporting that I understand that what counsel told me is correct.

Q. Do you have any reason to dispute that?

A. I do not.

Q. Have you done any analysis of agent check money orders or retail money orders that would make you of the opinion that they are not subject to the statute?

MS. MOSELEY: Objection scope.

A. I have no reason to think that they should not be subject to the statute. I simply wrote that in the report because they told me that it was true.

Q. All right. But you have no reason to

dispute that they should not be subject—

A. If I had reason to dispute it I wouldn't have put it in the report.

Q. Let me just finish my question first, [Page 77] if you could.

You have no reason to dispute that retail money orders and agent check money orders are subject to the statute?

MS. MOSELEY: Objection; asked and answered.

A. I have no reason to dispute that.

Q. And if you had reason to dispute that, I think you just said you would not have put that in your report?

A. If I had a reason to dispute it I would have explained in the report that they had told me this, but that I doubted it was true.

Q. Okay, thanks. In your opinion, what does the phrase direct, well, let me use the specific phrase of the statute.

In your opinion, what does it mean for an entity to be directly liable on an instrument?

A. I think that the most natural meaning of references to parties being directly liable on an instrument is to describe liability that is categorical and unqualified, and depends only on the presentation of the instrument.

Q. What is your source for that opinion?

A. A variety of things, most of which are [Page 78] mentioned in the report. The primary one being that the scheme of liability in Uniform Commercial Code for instruments involves some types of liability that depend solely on seeking payment, and other types of

liability that depend on a variety of external circumstances, such as the instrument previously being dishonored by the party on which it's drawn.

And the ones where the liability is categorical and unqualified strike me as more direct than the ones in which liability depends on, among other things, the instrument previously being dishonored by the party in which its drawn.

Q. Okay. Does the phrase directly liable for direct liability exist in the UCC?

A. It does not appear in Article 3 of the UCC.

Q. Is that true for all of the prior versions of Article 3 as well?

A. As far as I am aware.

Q. How can we tell if a party is directly liable on an instrument, as you have defined direct liability?

A. If you take the references to entities being directly liable to have the meaning I [Page 79] mentioned a moment ago, you would look to the provisions of Article 3 that define the liability of parties on an instrument, and you would look through them to find the types of liability that don't depend on dishonored, or some other prior act. And I do that in my report.

Q. Okay. Now, in your report you give, let me find it here, okay. In paragraph 28 you say "To put those rules in context."

Those rules you're referring to there are the UCC rules that you just mentioned, is that right?

A. That is correct.

Q. So, "To put those rules in context there is one common banking product on which a banking

organization is directly liable, a cashier's checks." Did I read that right?

A. You did.

Q. That's still your opinion?

A. That is my opinion.

Q. So other than a cashier's check, what other types of instruments carry with them direct liability?

A. Any type of instrument on which an acceptor has undertaken liability.

[Page 80] Q. Explain that a little bit for me?

A. A certified check.

Q. A certified check, okay. Anything else?

A. Well, a variety of other things. Anything in which a draft has been accepted by the drawee, a bill of exchange, a banker's acceptance.

Q. What do you mean by banker's acceptance?

A. That's the type of negotiable instrument that's created in a transaction called a banker's acceptance transaction.

Q. Okay. I have so far cashier's checks, which are listed in your report, certified checks. Why does a certified check carry with it direct liability?

A. Because the contract with the acceptor under 3409 is to pay the instrument when it's presented.

Q. When you say the contract under 3409, who is that contract between?

A. The provisions of part 4 of UCC Article 3 create liability based on signatures on an instrument, which ordinarily is referred to as [Page 81] contract liability. The person that signs in the capacity of an acceptor

has accepted the liability described in UCC section 3409, and that liability is to pay the instrument.

Q. What does it mean to be an acceptor?

A. Generally speaking, acceptance is a signed agreement of a drawee to pay a draft.

Q. Signed agreement of a drawee to pay a draft?

A. Yes.

Q. What does that agreement typically look like?

A. It looks like a signature.

Q. On the face of the draft?

A. On the face of the draft, yes, or on an instrument attached to the draft.

Q. Does it have to be either on the draft or on an instrument attached to the draft?

A. I think I said document attached to the draft. It has to be a part of the draft. So it can be on the face of the draft or on an allonge attached to the draft.

Q. It can't be an extraneous contract that exists somewhere else?

A. That is correct.

]Page 82] Q. Then you mentioned a draft accepted by a drawee, that's after the instrument has been presented and the drawee has then accepted it?

A. It isn't necessary that it had been presented, I think. I think it's necessary that the drawee sign it and agreed to pay it.

Q. In that context does the drawee need to be a bank?

A. It does not.

Q. Then you said a banker's acceptance?

A. Yes.

Q. What is that?

A. It's a time draft that is accepted by a bank. It is commonly used to finance the sale of good transactions in international commerce.

Q. So cashier's checks, certified checks, draft accepted by drawee and banker's acceptance, we have those four examples of an instrument that carries with it direct liability. Can you think of any others?

A. A bill of exchange.

Q. What is a bill of exchange?

A. We discussed that already in the report. It's a draft that's drawn on a business, and if the business accepts the draft then they [Page 83] would have direct liability on it. It would be used as a way to finance the sale of goods, so that the person agreeing to make payment would have an opportunity to sell the goods, before they would be obligated to pay on the draft.

Q. Anything else?

A. Those are the examples that occur to me.

Q. In order for an instrument to carry with it direct liability, it sounds like certain things have to be apparent from the face of the instrument, or something that is attached to the instrument, is that fair?

MS. MOSELEY: Objection.

A. Under the UCC there can be no liability on an instrument without a signature, and different types of signatures carry with them different types of liability. So the types of signatures that carry with

them the liability that I'm characterizing as direct would carry that type of liability, and other types of signatures would carry different types of liability, and absence of a signature would carry with it no liability of the instrument.

Q. Those signatures have to be on the face [Page 84] of the document?

A. They don't have to be on its face, they could be on the front, they could be on the bank, or they could be on an allonge that becomes part of the draft.

Q. Got it. A cashier's checks carries direct liability, but a teller's check does not carry direct liability, is that right, as you've defined the term?

A. If you're using direct liability in the way in which I have suggested, a teller's check is not an instrument on which any party is directly liable for.

Q. What about a money order?

A. The money orders examined in this report are not instruments on which any party is directly liable.

Q. I should have asked you this a long time ago. Do you have a definition of money order?

A. The UCC doesn't use money order as a way to define liability instruments. It refers to money order generally as a term that is used in business commerce to describe products, and then it leaves it to the actual nature of the [Page 85] instrument, for us to decide what the rules are of the UCC and what type of instrument could be in the UCC.

Which leaves open the possibility that an instrument could be marketed and sold as a money order, and be any of a variety of types of instruments for purposes of the Uniform Commercial Code.

Q. What are some of the types of instruments that could be marketed and sold as a money order?

A. Well, a money order could, without a great deal of difficulty, be either a regular conventional check, that is neither a cashier's check nor a teller's check. It could relatively easily be a teller's check or it could simply be a draft.

Q. Now, you distinguished between draft and checks and draft and teller's checks. What is a draft?

A. A draft of a UCC is an instrument that includes an order. I think that answer might not be particularly illuminating. So what I would say is that a check is a draft that is drawn on a bank. So you had something that functioned much [Page 86 like a check, but it wasn't drawn on a bank, then it wouldn't be a check.

For example, if you had a money order that was payable through a bank, but was drawn on an entity that was not a bank, such as MoneyGram, well then because it's not drawn on a bank it wouldn't be a check, it would be a draft.

Q. So a check is a subset of draft?

A. That is correct.

Q. And then a teller's check is a subset of check?

A. That is correct.

Q. Are you aware of the phrase directly liable or direct liability being used in a way other than the way you have used it in your report?

A. I think that the phrase is not used in the Uniform Commercial Code in this context at all and, insofar as I'm aware, not anywhere else in the Uniform Commercial Code. I think that you can find it used in other contexts in a variety of ways. I'm not

aware of anybody interpreting the phrase in section 2503 in any particular way at all.

* * *

[Page 94] Q. Now if you flip the page to MG2397. Does this instrument carry with it direct liability, as you have defined the phrase in your report?

A. It does not.

Q. Why not?

A. Because the only party that will have signed it is going to have been the drawer. Also, at least potentially, because of the possibility that the conditions on the back of it will cause it not to be a negotiable instrument.

Q. Okay. Even if those conditions were gone, this still would not be an instrument that carried with it direct liability, as you have defined the phrase, is that correct?

A. That is correct.

Q. Do you have Exhibit 125?

A. I do.

Q. In your opinion, does Exhibit 125 carry with it direct liability, as you have defined the phrase in your report? Take as long as you need.

[Page 95] A. I would rather think not, but I can't be sure.

Q. So what makes you think that it doesn't?

A. Because of the likelihood that the countersignature is signed by the person that is the remitter of the money order.

Q. Why would that mean that it does not carry with it direct liability?

A. Because that would be a signature of the remitter. If the countersignature is the signature from somebody at Chase Manhattan Bank, which seems unlikely, then you might regard that as an acceptance of this money order at the point that it's issued, but I think that's unlikely.

Q. Why do you think that's unlikely?

A. Because I expect that this is issued at a counter of a retail facility operated by Western Union.

Q. If that was true, there wouldn't be somebody from Chase Manhattan Bank there to sign this; is that what you're saying?

A. That is correct.

Q. What else would you need to know to be sure whether this was a direct liability [Page 96] instrument, as you have defined the phrase?

A. That's all I would need to know.

Q. Now, if you look at Exhibit 126, please. Do you know whether this is an instrument that carries with it direct liability, as you have defined the phrase?

A. I do not.

Q. What else would you need to know in order to make that determination?

A. It's at least, let me rephrase. It's likely that the drawer of this instrument is American Express Company, and that the signature at the bottom right-hand corner is a signature of Howard A. Smith, Treasurer of American Express Company.

If this is a draft that is drawn on American Express Company, then American Express Company, as both the drawer and the drawee of the draft, might be directly liable on it.

Q. But you don't know if American Express Company is the drawee of this draft?

A. I don't. I've never seen an instrument quite like this before. I think it's interesting.

Q. What would you need to do to determine [Page 97] whether American Express Company is the drawee on this draft?

A. I'm not sure. I've never seen an instrument like this.

Q. Okay. If you go to Exhibit 127, please. Do you know whether this instrument carries with it direct liability, as you have defined the phrase in your report?

A. If I properly understand this document, it is not an instrument at all. It's an order form that a person would fill out at a Western Union facility, with the expectation that at some other Western Union facility Western Union would issue a money order, which would be an instrument on which Western Union would have no direct liability.

Q. Understood. Thank you. Exhibit 128. It looks like the top portion of the second page is the order or the— what would you describe that as, do you know what that is?

A. I would describe this as a form that a customer would fill out at a Western Union facility, in the expectation that Western Union would respond to this form by issuing a money order at a different facility.

[Page 98] Q. Do you think that that money order that is issued at a different facility is reflected on the bottom half of this?

A. I do.

Q. So is this instrument on the bottom half an instrument that carries with it direct liability, as you have defined the phrase?

A. It is not.

Q. Why not?

A. Because the entities that have signed it are Western Union representatives, and they have signed it as drawer.

Q. Are you familiar with traveler's checks?

A. I think the question is vague. I know a fair amount about traveler's checks more than most of my students.

Q. Do traveler's checks carry with them direct liability, as you have defined the phrase?

A. It depends on the way in which they are structured and issued.

Q. What does it depend on?

A. If the entities that issued them are the same as the entities in which they are drawn, well then they well might carry direct liability.

[Page 99] Q. But if the entities are different then they don't?

A. It's my understanding that in the current environment, for example, an American Express traveler's check is issued by a company that is different from the

bank on which it's drawn, and so I don't think that any entity would have direct liability on that check.

It's possible, as indicated by the instrument you showed me earlier, that in an earlier period American Express traveler's checks might have been both issued and drawn on an American Express Company, or some bank under common control of American Express Company, and if that were true then that entity might have direct liability on a traveler's check.

Q. You have seen examples of traveler's checks that do not carry with them direct liability, as you have used the phrase?

A. I have.

Q. Have you seen examples of traveler's checks that do carry direct liability, as you have used the phrase?

A. I'm not sure.

* * *

[Page 134] Q. Fair enough. Is there a difference between an instrument and a written instrument?

A. The Uniform Commercial Code in different articles uses instrument in a variety of contexts. So instrument has a different meaning in UCC Article 9 than it does in UCC Article 3. For purposes of UCC Article 3, all instruments must be in writing.

Q. How about this, do you know what a negotiable draft is?

A. I do.

Q. What is it?

A. A negotiable draft is a type of instrument that is a draft, as opposed to a note.

Q. If I could direct you to 119, and all the exemplars that are in the exhibit. Are these all negotiable drafts?

A. The items on 2394 and 2395 and 2396 are negotiable drafts. The item on 2397 might or might not be a negotiable draft, depending on [Page 135] what you think about the conditions on the back. The items on 2399 and 2400 are not negotiable drafts.

Q. How about this, and I apologize, I didn't appreciate these, 2399 and 2400. My next question is directed again at 2394, 2395, 2396 and 2397 through 2398, which is the back of it. Are those all written instruments?

A. They are images of written instruments. 2397 is an image of a document that would be an instrument, if the conditions on the back don't undermine its ability to qualify as an instrument for purposes of the UCC.

Q. Have you formed an opinion on what is a similar written instrument?

A. I have not formed an opinion on the meaning of similar written instrument in section 2503. I have formed an opinion that I explained to the court about ways in which certain classes of instruments are similar and dissimilar to others.

Q. What similarities do money orders and traveler's checks have?

A. They're both instruments, they're both drafts, they're both products that people could [Page 136] buy to use to pay other people.

Q. Can you think of anything else?

A. It's a very vague question. They're both printed on a piece of paper, they both have microlines at the bottom, at least in modern commerce.

Q. Are they typically paid through the Interbank Clearing System?

A. Money orders are typically paid through the Interbank Clearing System. Traveler's checks, it's less clear to me precisely how those are paid, to the extent that they are, or at least at some points in time drawn on entities that aren't banks.

Q. What other instruments bear the similarities of being instruments, drafts that you could buy to pay other people?

A. Pretty much any instrument that is an instrument could satisfy those conditions. I don't understand what you're getting at.

Q. I'm just trying to find out what other items have those similarities?

A. Well, any other instrument can be used for any of those purposes by the nature of negotiable instruments. I'm not sure what it is [Page 137] that you're trying to get me to say.

Q. How about a, back to my example, a standard checking account check that a business writes, is that similar to traveler's checks and money orders?

MS. MOSELEY: Objection, scope.

A. It's similar in some ways and dissimilar in others. It's similar in that it's a draft drawn on a bank, that money orders are often drawn on banks. It's dissimilar in the sense that the person that's writing it and issuing it is transmitting it directly to somebody to which they intend to make a payment.

Q. How about this, do you know what are instruments for the transmission of money?

A. That's not a term that I have ever used. It's possible to use instruments to transmit money, it has been done. Instruments

have been used to transmit money in many contexts, but that is something in which you can use an instrument.

Q. Back to Exhibit 119, 2394, 2395, 2396 and 2397 through 98. Are those instruments for the transmission of money?

A. They could be used to transmit money, [Page 138] subject to the qualification that the one on pages 2397 and 2398 at least arguably is not an instrument at all.

Q. Okay. Let's set that one aside and I'll ask my question. 2394, is that an instrument for the transmission of money?

A. 2394 is an instrument that can be used for the transmission of money, but it can be used for other purposes as well.

Q. The same question for 2395, is that an instrument for the transmission of money?

A. That is an instrument that can be used for the transmission of money, but it can be used for other purposes as well.

Q. The same question for 2396, is that an instrument that can be used for the transmission of money?

A. That is an instrument that can be used for the transmission of money, but it can be used for other purposes as well.

* * *

[Page 147] Q. So let's take direct liability out of it for a minute. Is this item at 2394 similar to a money order?

Is it a similar written instrument to a money order or a traveler's checks?

A. I would say, without expressing an opinion on what the statute means, I would say yes, this is similar to money order.

Q. Is this a third-party bank check, as you've defined in your report what a third-party bank check could be?

A. I don't think it's fair to describe my report as defining what a third-party bank check would be. I think it's fair to describe my report as similar to a lot of things that a third-party bank check is not. This is not fairly regarded as a third-party bank check.

Q. Do you believe the item at 2394 is subject to dishonor?

A. Yes. I believe the item at 2394 could be dishonored.

Q. Let's go to the next one at 2395. Is this a money order?

A. I do not believe that this is a money order.

* * *

[Page 150] Q. Is 2395 an instrument?

A. 2395 is an image of an instrument.

Q. Is it a draft?

A. It is a draft.

Q. Could it be used to pay other people?

A. It could be used to pay other people. It also could be used for the transmission of funds as well.

Q. Let's flip to 2396. What is this for purposes of the UCC, what category do you think this fits, 2396?

A. I would characterize that, for purposes of the Uniform Commercial Code, as a check that is a teller's check.

Q. How about for purposes of Reg CC, any idea what that would be technically under Reg CC?

A. I think it would be a teller's check, subject to the low-risk rules in Regulation CC.

Q. Why do you believe that it's a teller's check?

A. Because it's drawn on a bank that's different from the bank that has drawn it.

Q. Is the item at 2396 a money order?

[Page 151] A. I do not think the item at 2396 is a money order.

Q. Does the item at 2396 fit your description of what could be a third-party bank check?

A. I don't think so.

Q. Again, we're going to disassociate directly liable. Is this item at 2396 a similar written instrument to money orders and traveler's checks?

MS. MOSELEY: Objection.

A. For purposes of the opinion I gave in part 4(b) of the report, I discuss reasons why you might regard teller's checks as not being similar to money orders and traveler's checks.

Q. Is the item at 2396 an instrument?

A. Yes.

Q. Is the item at 2396 a draft?

A. Yes.

Q. Is the item at 2396 an item that could be used to pay other people?

A. Yes.

* * *

[Page 154] Q. How would you do that?

A. Well, you would take off where it says agent check, you would complete where agent for MoneyGram is, the name of some institution, and you would write money order at the top of it.

Q. I will forgo the rest of my questions, because this one seems a bad example.

On what type of instrument is a banking organization directly liable?

A. The most common type of instrument in which a banking organization is directly liable is a cashier's check. The next common instrument in which a banking organization is directly liable would be a certified check or a banker's acceptance. There are still more certified checks than there are banker's acceptances.

Q. How about this. On what type of instrument would a business association be directly liable?

For purposes of this question, I'm using business association the way it's used in section 2 of the FDA.

A. A bill of exchange.

Q. Anything else?

A. Not that immediately comes to mind.

[Page 155] Q. What's a bill of exchange?

A. A bill of exchange is what you just asked about. It's a type of draft on which the drawee is a business, as opposed to a bank, that's been accepted by the business on which it's drawn.

Q. Any of the exemplars that you looked at of the MoneyGram products, retail money orders or official checks, are any of those a bill of exchange?

A. No.

Q. How about these Western Union instruments we looked at, for example, at Exhibit 125, is that a bill of exchange?

A. None of the exemplars that have been introduced as exhibits in this deposition are bills of exchange.

Q. Did you study any MoneyGram instrument that could be a third-party bank check?

A. There is so much obscurity in the term third-party bank check, that I think it would be rash to answer that question in the negative. What I would say is I didn't study any products that strike me as fitting with any ordinary sense of what those terms should mean.

[Page 1]

SUPREME COURT OF THE UNITED STATES

DELAWARE,

Plaintiff,

vs.

ARKANSAS, *et al.*,

Defendants.

CONFIDENTIAL Deposition of KATE PETRICK
As a corporate designee

Pursuant to Rule 30(b)(6) for the Deposition of
MoneyGram Payment Systems, Inc.

Tuesday, June 5, 2018

10:00 a.m.

Reporter:

Barbara J. Carey
Registered Professional Reporter

GOLKOW LITIGATION SERVICES
877.370.3377 ph | 917.591.5672 fax
Deps@golkow.com

* * *

[Page 12] Q. Okay. Great. Ms. Petrick, did you graduate from college?

A. I never finished college.

Q. Okay. Where did you go to college?

A. I went to the University of Minnesota.

Q. And what did you study there?

A. General classes, to begin with.

Q. And how many years did you go to school there?

A. About a year and a half.

MR. RATO: Could you just keep your voice up a little bit, because there's also people on the phone.

THE WITNESS: Yes, okay.

BY MS. AHUMADA:

Q. Do you have any credentials; any licensing credentials, for example?

A. No.

Q. Okay. Where are you currently employed?

A. MoneyGram Payment Systems, Inc.

Q. And how long have you been there?

A. 32 years.

Q. And what is your current position there?

A. Manager of government affairs.

Q. Okay. And what do you do as a manager of [Page 13] government affairs?

A. My team and I do the unclaimed property reporting and all the things that go along with it as

due diligence, and I also review legislation relating to unclaimed property.

Q. And you said you had a team.

How many people are on your team?

A. Two.

Q. And how long have you been in that position?

A. I have been doing the unclaimed property for at least 30 years.

Q. And did you serve as the manager of government affairs through that 30-year period?

A. No.

Q. Okay. What was your title before that position?

A. Well, it started as legal admin — excuse me, legal administrative assistant. It went to — I'm trying to think here, legal — legal specialist, senior legal specialist, senior government affairs specialist, and then to manager of government affairs.

* * *

[Page 17] Q. Ms. Petrick, I've placed in front of you a document that the court reporter has labeled Petrick 37.

Do you see that; it's marked Petrick 37?

A. I just 37.

(Reporter clarification.)

BY MS. AHUMADA:

Q. I'll refer it as Petrick 37 for the record.

A. Okay.

Q. And that will be placed on there by the court reporter.

What's been placed in front of you is a Notice of Deposition of Defendant, the Commonwealth of Pennsylvania Pursuant to Federal Rule of Civil Procedure.

Do you see that title?

A. Yes.

Q. Have you seen this document before?

A. Yes.

Q. When did you see it?

A. Yesterday.

Q. Okay. And who showed it to you?

[Page 18] A. Mike Rato.

Q. Okay. And it's my understanding that you're here today as a corporate representative of MoneyGram Payment Systems, Inc.; is that correct?

A. Yes.

Q. And that you are here to cover certain topics that are listed on this Notice of Deposition; is that correct?

A. Yes.

Q. Okay. And from my understanding, you're here to provide testimony on behalf of MoneyGram with regard to, if you scroll through, Number 3, 4 —

MR. RATO: Why don't we take them one at a time if you're going to have her say yes. Go one at a time.

BY MS. AHUMADA:

Q. Okay. So Number 3, are you here to give testimony?

A. Yes.

Q. Okay. Number 4; same question?

A. Yes.

Q. Number 11?

A. Yes.

Q. And Number 12?

[Page 19] A. Yes.

Q. Are there any other topics on this form that you are here to provide testimony on?

A. No.

Q. Okay. Did you prepare for today's deposition?

A. Yes.

Q. How did you prepare?

A. I met with Mike Rato and Cory Feinberg.

Q. And when did you meet with them?

A. Yesterday afternoon.

Q. And for how long did you meet?

A. A couple hours.

Q. Two, three?

A. Two. Yeah, two.

Q. Is that the only preparation you've had for today's deposition?

A. Yes.

Q. Okay. Have you met with counsel for Delaware to prepare for today's deposition?

A. No.

Q. Okay. Did you review any documents to prepare for today?

A. Yes.

* * *

[Page 30] Q. Okay. What does that entail?

A. It entails gathering the appropriate checks to be escheated based on the abandonment period. We then put together a report. Usually, there's a paper form that needs to be filled out with information about the company and the types of property we are escheating. It is taking the data that we receive, put it into some sort of form, whether paper, electronic, and putting that all together, coming up with a total amount, and requesting that money from our AP department, and then filing with the state.

Q. Okay. Let's start with the last thing you said.

What's the AP department?

A. Accounts payable.

Q. Okay. And you said you filed a report to the state.

And what state do you refer to?

A. It depends on the product.

Q. What does that mean?

A. It means there's the types of items that we have, money orders, official checks based on the rules. Money orders are escheated to the state where they're sold. So money orders, we'd get them in the state

order, and we put the data together and file them with the [Page 31] applicable state.

For the official checks, those are — we file them with the — our state of incorporation because we do not have any owner information, the owner's unknown, and so we file those with Delaware, our state of incorporation.

We have other types of property, such as accounts payable checks, payroll checks. Those, based on the payee and their address, that they would escheat to that — that state.

Q. And we'll review some documents to go over that process a little bit more in detail.

A. Uh-huh.

Q. This is a little sort of table setting. I'll ask you to put a pin on some of that. All right.

Does your team — and I think you said it's a team of three, with yourself — are you the only three that are working on this process, this filing escheatment report process?

A. Yes.

Q. Do you consult with any other departments to put together your reports?

A. Yes, we get reports from different departments.

* * *

[Page 35] Q. Okay. Do you agree with me that those are official check products of MoneyGram?

MR. RATO: Object to form. You can answer.

MR. TALIAFERRO: Join.

A. I can tell you that the only one I have — the financial institution money order, I'm not sure which — I don't know if that's an official check, but the others I believe are.

BY MS. AHUMADA:

Q. Okay. Let's go through these one at a time. For the teller's check, where does MoneyGram escheat a teller's check that's been abandoned?

A. Delaware, our state of incorporation.

Q. Next one. How about a cashier's check; what's the escheatment process with regard to cashier's check?

A. That is not MoneyGram's check; it is the financial institution's check, and we do not escheat those.

Q. Next item, agent check.

Do you see that?

A. Yes.

Q. Where are agent checks escheated to?

A. Delaware, our state of incorporation.

[Page 36] Q. Next, agent check money order.

Do you know where those are escheated to?

A. They are escheated to the state where they were sold.

Q. Do you know where financial institution money orders are escheated to?

A. They would be escheated to the state where they were sold.

Q. And earlier, we talked about something called a "retail money order."

Do you recall that?

A. Yes, they —

Q. And where are — sorry. And actually, you know what? I tripped on your answer, and I apologize.

MR. RATO: No, just let her finish the question. Go ahead.

BY MS. AHUMADA:

Q. So with regard to the retail money order, where are these escheated to?

A. The state that they were sold.

Q. With — I'm sorry, with the exception of cashier's check, is it your department that does and handles the escheatment process with regard to the other instruments that are listed on here?

[Page 37] A. Yes.

Q. Okay. If you go down to the last block on that same page, it says, "Escheatment."

Do you see that?

A. Yes.

Q. And the last sentence under the second column, it says, "For MoneyGram escheatable — escheated items —" excuse me "— MoneyGram handles all reclamation activities."

What does that mean?

A. This means that if we have escheated a check, any — any type of property and the consumer comes forward for their money, we will pay the consumer and go back to the state that was — that received — that it was escheated to and request our money back.

Q. Okay. If we go to the third column under that same escheatment section, it says — and I will purport to you that "FI" stands for "financial institution."

Do you know that to be true?

A. Yes.

* * *

[Page 66] Q. Okay. Turn to the next page, which is MG2303, and towards the bottom of the page, it says, "Agent Check Money Order (Product 17) Question and Answers."

Do you see that?

A. Yes.

Q. So Product 17 is your agent check money orders; is that right?

A. Yes.

Q. Okay. And here, it says, under the first bullet, that MoneyGram is the holder of an agent check money order; is that right?

MR. RATO: Objection to the form to the extent it calls for a legal conclusion, but you can answer.

A. Yes.

BY MS. AHUMADA:

Q. Has someone relayed that information to you besides seeing it here on this document, that MoneyGram is the holder of an agent check money order?

A. Yes, I was trained before money orders, where they were to be escheated.

Q. Okay. With regard to the agent check money [Page 67] orders, how does MoneyGram know what state the — the instrument is purchased in?

A. I don't know the specifics, but I'm sure the system knows where they are sold.

Q. Okay. Would that same system know where a teller's check is sold, for example?

A. I don't know for sure, but I believe so.

Q. How about with an agent check; would that system also have the information of where it was sold?

A. I believe so.

Q. Okay. Does your office get that kind of information?

A. What do you mean?

Q. So when you get information that, let's say, an agent check has been abandoned, do you get any information of where it was sold, any kind of reporting that relates to that kind of information?

A. For reporting purposes, no.

Q. What do you get; what kind of information?

A. We get the serial number of the check, the amount, and the date it was sold.

Q. And that's for an agent check?

A. Yes.

Q. How about for a teller's check?

[Page 68] A. The same.

Q. How about for an agent check money order; what information do you get?

A. We get the — the same information, the serial number, where it was sold. I'm sorry, yes, we do get where it was sold. I'm getting a little confused here. State, serial number, amount, date, and service charge.

Q. Okay. You also get the information of where that agent check money order is sold; correct?

A. Yes, so we know which state to report it to.

Q. Could you get that same information for a teller's check, for example; where it was sold?

A. Yes.

Q. Do you — do you have that information in front of you as you're going through the escheatment process for that instrument?

A. No.

Q. Okay. Why not?

MR. RATO: Object to form. You can answer.

A. Because we escheat them to Delaware, we know — they just go to Delaware.

* * *

[Page 70] (Whereupon, Exhibits 42 and 43 were marked.)

BY MS. AHUMADA:

Q. The documents that have been placed in front of you have been marked by the court reporter as Petrick 42, and that document is Bates Labeled MG23 — I'm sorry, 2833, and it goes until MG2836.

Do you see that?

A. Yep.

Q. The second document placed in front of you has been marked Petrick 43 and has been — it's been Bates Labeled MG2837 and it goes to 2840. Let's start with the one that the been marked 42.

Are you familiar with this document?

A. Yes, I have seen this before.

Q. Okay. Now, if you could look to 43 — and I just want to clarify in terms of documents —

MR. RATO: Yeah, let me — I can put something on the record.

MS. AHUMADA: Yes, please.

MR. RATO: We've been going this way.

MS. AHUMADA: Yes.

MR. RATO: When we received the original [Page 71] file and processed it, on Petrick 43, I believe the January 11, 2018 date on that memo is the date it was processed. There was an automatic data field. So the witness is familiar with it if you want to figure out the providence of the document and the date. That date, I can — I believe that it was when we processed the document, that that date was put on there.

MS. AHUMADA: And that was my only confusion; that they're identical in every way, except one.

THE WITNESS: Yes.

BY MS. AHUMADA:

Q. So we'll put aside 43 and just go to 42.

A. Okay.

Q. Okay. You see, at the top there, it's dated August 2005.

Do you know if that's when the document was created?

A. I believe so.

Q. Okay. And what — tell us, what is this document?

MR. RATO: We're on 42, now?

MS. AHUMADA: Yes, 42. 43 was just for understanding why we had a document that was labeled 2018.

[Page 72] A. This is a document that shows the changes that were being made to the teller's check unclaimed property reporting.

BY MS. AHUMADA:

Q. Okay. And it says here that it's information for sales group.

Do you see that?

A. Yeah.

Q. Would that be for MoneyGram's sales group?

A. I believe so.

Q. Okay. Now, if you go to the first line, it says under, "What," and the second sentence it says, "TECI."

Do you see that?

A. Yes.

Q. Do you know what TECI is?

A. Yes, Travelers Express Company, Inc.

Q. And what is that?

A. That was the initial company. That was the company that acquired MoneyGram, and MoneyGram is the survivor.

Q. Okay. And so, do you know, what had transpired that led to this document being created?

A. It was a change in how a teller's check was to [Page 73] be reported as unclaimed property.

Q. Okay. And what was the change?

A. The change was to report the teller's check to Delaware, our state of incorporation, where previously, we had escheated the teller's check to the state in which it was sold or the financial institution's incorporation state, if we knew it.

Q. And were you part of that decision-making process?

A. No.

Q. Do you know who was?

A. Lawyers and outside lawyers.

Q. Okay. Were you consulted in any which with regard to this process, this decision?

A. Not consulted, no.

Q. Were you in any meetings with regard — with regard to this change?

MR. RATO: Before or after the change, just to clarify?

BY MS. AHUMADA:

Q. To lead to the change, excuse me?

A. I don't recall.

Q. Okay. And then, did you receive any training with regard to what was change in policy?

[Page 74] A. Training? What do you mean by "training"?

Q. Training; any new education, any new information from MoneyGram? Training.

A. No.

Q. So how did you get information from MoneyGram — oh, let me start over.

Did you get information from MoneyGram that there was this change in policy?

A. Yes.

Q. How did you receive that information?

A. From our lawyers.

Q. Okay. And besides the lawyers, were there any other discussions with MoneyGram personnel with regard to this new process change for you?

A. For the unclaimed property?

Q. Uh-huh.

A. I'm not aware of any.

Q. Okay. And how did it affect your day-to-day operations, if at all?

A. We just needed to change where we were going to escheat the teller's check.

Q. Did your systems have to be updated in any way?

A. They did — they did need to make some system [Page 75] changes so that we would now be reporting

to Delaware, our state of incorporation, versus the other way.

Q. Okay. And what kind of changes were made to your system?

A. I don't know exactly how they did it; programmers. I don't know.

Q. Do you know if MoneyGram had any communications with the State of Delaware with regard to this new change in process?

A. I don't recall any.

Q. Were you made aware of any at the time?

A. None that I know of.

Q. Would you have been made aware of any communications with the State of Delaware?

MR. RATO: Object to form. You can answer.

A. Perhaps. I don't know. To let me know that we were going to make that change, that's what I was told about it.

BY MS. AHUMADA:

Q. And by whom?

A. The lawyers.

Q. For who?

A. MoneyGram. MoneyGram's lawyers.

* * *

[Page 81] You would agree with me that escheating all teller's checks to Delaware is a pretty easy process for you; right? And by you, I mean MoneyGram.

MR. RATO: Object to form. You can answer.

A. Just because it goes to one state, because we would not have the name and addresses even if we were doing it to all the various states.

BY MS. AHUMADA:

Q. Well, let's say you had all the names and information for teller's checks and you had the responsibility of escheating to all of those checks.

Stands to reason, it's much easier to escheat just to one date, Delaware, where you're incorporated, correct, than escheating to various states; right?

MR. RATO: Objection to form. You can answer.

MR. TALIAFERRO: Join.

A. We escheat to every state, so it would not — we could still do it to all the states. It's the same. We report money orders, other types of products. We just have to add that to the other states.

BY MS. AHUMADA:

Q. Why not just get the names and addresses for [Page 82] the owners and the payees of the teller's checks and escheat to the purchasing states?

A. I —

MR. RATO: Objection to the form; calls for speculation, and outside the scope of the testimony. You can answer.

A. I don't have that information. I don't have that information.

BY MS. AHUMADA:

Q. Do you know who makes those decisions at MoneyGram?

A. Maybe the lawyers. Probably would be management.

Q. Did this new policy that's being referred to on this document also — and again, it's to escheat to the — to the State of Delaware, did that also apply to agent checks; do you know?

A. No.

Q. Why not?

A. My understanding is that because the agent check is MoneyGram's item. It's not shared with the financial institution.

Q. I guess, we said that — well, you had said that this document was to pronounce a new policy that now [Page 83] teller's checks were going to be escheated to the State of Delaware as opposed to Minnesota; is that right?

So does that apply —

MR. RATO: Object.

MR. TALIAFERRO: Mischaracterizes the document.

BY MS. AHUMADA:

Q. Where were teller's checks escheated prior to August 25, this memo that was sent out?

A. They were escheated either to the state where they were sold or to where — if we knew the financial institution state of incorporation.

Q. Okay. So that was the change. It wasn't a change in — related to where MoneyGram is now being incorporated; is that right?

A. That's right.

Q. Okay. When MoneyGram was escheating the teller's checks to the state of the purchase, was that a process that you were involved in?

A. That's the way we escheated them; correct.

Q. Okay. So once the new change occurred, would your agree with me that it was much easier for you to perform your escheatment duties?

MR. RATO: Objection to form. You can [Page 84] answer.

A. It didn't really make it easier. I mean, we escheated it to the other states. Its just one state to the other. It's not — doesn't make it easier.

BY MS. AHUMADA:

Q. Do you know if there was a cost benefit to escheating these teller's checks now to Delaware as opposed to various states?

A. I don't know.

Q. Do you remember anything else that occurred at this time frame to lead MoneyGram to make this change with regard to its teller's checks? Anything else that you haven't testified to already that, now that we've gone through this, does it jar your memory in any way?

A. I'm going to read this one thing, here.

Q. Sure.

A. Because I don't recall. No, just we were doing the reporting. It should be going to the state of incorporation.

* * *

[Page 104] A. For Delaware, specifically?

Q. No, any state. Does anyone provide that training to you?

A. Just the training we talked about earlier, going to UPP, Unclaimed Property Professionals Organization, and knowledge. I mean, I was trained way back, you know, in 1980, 1990s, and just we have — we also have — Mike provides us with some surveys that we refer to.

Q. And what are the surveys?

A. It's just the state laws.

Q. Okay. Do you, yourself, review individual state laws with regard to escheatment?

A. We do.

Q. As part of your duties?

A. We do.

Q. Okay. Do you get training on individual state laws from MoneyGram?

A. Not — no, not training.

(Whereupon, Exhibit 47 was marked.)

BY MS. AHUMADA:

Q. So what's been placed in front of you has been marked as Petrick 47. It is a document that we received in production from MoneyGram, and it is Bates [Page 105] Labeled MG4887, and it's an Excel spreadsheet, excuse me, that is titled, "FinalCK152017. XLXX."

That's — I just know that that's the title of it.

A. Yes.

Q. But do you see the document that's in front of you?

A. Yes.

Q. Are you familiar with what's being reported on this document?

A. Yes.

Q. Okay. And what is that?

A. This is the — you said 2017; right?

Q. Yes.

A. These are the items that were escheated to Delaware. Let me look at the dates first. I need to — so this was as of December 31, 2017 and reported in March this year.

Q. Okay.

MR. RATO: Well, could I clarify for the record?

THE WITNESS: Sure.

MR. RATO: If it was stuff that was reported this year, I don't know that it would have been [Page 106] reported to Delaware. It may have been turned over to the Southern District of New York.

THE WITNESS: I'm sorry, I forgot that. I forgot.

BY MS. AHUMADA:

Q. Thanks. So did you — did you put together this report?

A. I did not.

Q. Do you know who did?

A. We got this information from our IT department.

Q. Okay. And for what purpose?

A. This information was requested from us.

Q. By whom?

A. I don't recall.

Q. If I say TSG, does that ring any bells?

MR. RATO: Can I — well, I can just make a statement for the record. The 2017 report was created, I guess you want to call it, at the request of a Special Master. That's a slightly different situation.

So 2017, this would have been a report to record what was being remitted with the stipulation, I believe, of all the parties that was being turned over to the Special Master. So this one is a little bit [Page 107] psuedo-generous. But the ones prior to that will all have a similar providence.

BY MS. AHUMADA:

Q. Do you recall putting together this similar type of information for purposes of an audit performed by TSG?

A. Yes.

Q. Okay. And do you recall what years that you did that for?

A. I recall putting it together in 2014/'15. It was around December/January 2014.

Q. No, but what data were you collecting? From what years; do you recall?

A. We went back — do you mean like the years that were — we went from — boy, we went back to 2000, and it was in 2014. So I can't remember if you gave them the 2014 or if that was later, only because, at the timing that we gave them the data, we may not

have had it. So we went from at least 2013 — 2000 to 2013.

Q. Okay. So in production, we have received these reports, CK15, from 2006 through this 2017; okay?

MR. RATO: Well, okay. What would — can I ask her a question?

MS. AHUMADA: Well, I'd hate to belabor [Page 108] it. Would you just stipulate that these are authenticated documents and not make us go through —

MR. RATO: Of what was given to TSG?

MS. AHUMADA: Of what was given to TSG?

MR. TALIAFERRO: Yeah, what are we stipulating to?

MS. AHUMADA: That these are authenticated documents. That's literally all I wanted to do.

MR. TALIAFERRO: That's Mike's — we wouldn't object.

MR. RATO: We can put together a stipulation.

MS. MOSELEY: I think we're all negotiating. We can just add it in.

MR. TALIAFERRO: We're not trying to roadblock this document, just wanted to make sure what it is and who received it.

MS. AHUMADA: Right.

BY MS. AHUMADA:

Q. So we'll just go through the 2017 because that's the only one I have printed out as opposed to all of them. So let's just go line-by-line so we can understand what things are.

[Page 109] So under the "Financial Institution Name," those are your clients; is that correct?

A. Yes.

Q. Okay. What's the customer? What's that column information?

A. There are two different numbers that are assigned to the financial institutions; one is the parent, and if they have branches, they would be customer numbers.

Q. Okay. So we covered parent, as well.

So these are unique identifiers for the specific financial institution; is that right?

A. Yes, yes.

Q. Okay. And under "Product," what does that mean?

A. That tells you the type of check it is. This is a 15, so that is an agent check.

Q. Okay. And we talked about that earlier.

And the 16, what would that be?

A. That is the teller's check.

Q. And then the next column says "Use."

What is being conveyed there?

A. This is another field in that system that I'm not really, really familiar with. It's — this may be the use for — where it said expense on that other check, the [Page 110] one we looked at here, the 46, Exhibit 46.

Q. Okay. And — but what does that mean, "Use"?

A. I don't know.

Q. Okay. The next column, it says, "Item Serial Number."

What does that mean?

A. That's the check number.

Q. And when you say "check number," do you mean the instrument that's being escheated?

A. Yes.

Q. Okay. And then, the "Last Transaction Date," what's that?

A. That is the — typically, it's the — not typically — it is the date of the check. Excuse me, "Last Transaction Date" is the date of the check.

Q. So that's the date that it was purchased?

A. Yes.

Q. Okay. Could it be anything else?

A. I don't know.

Q. All right. Under "Amount"?

A. That's the amount of the check.

Q. Okay. And the next line says, "Financial Institution Address." I assume that's the address of your customer?

[Page 111] A. Right. Yes.

Q. Okay. What about under "Address 2"; is that just continuation of the address?

A. Yes.

Q. Okay. Any other information that you gleaned that's not represented on this chart from these individual financial institution customers?

A. I don't know.

Q. So is this it? Is this it that you get with regard to, let's say, Product 15, all the information that you get from, let's say, the first one, Bremer Bank National Association?

Would this be the bulk of the information that you're getting on the escheatable item?

A. I don't know if it's everything. I don't know if there's more fields in the official check system.

* * *

[Page 131] Q. Okay. And so, then when the selling financial institution has to report that unclaimed cashier's check, does the money get transferred back to the financial institution?

A. It would be, yes.

Q. Okay. But that doesn't happen in the context of an agent check money order, an agent check or teller's check?

A. No.

Q. The money always stays with MoneyGram, and MoneyGram is the one that sends it to the state? A. Correct.

Q. All right. So now, let's go to retail money orders.

What is the process for reporting unclaimed retail money orders?

A. Okay. We also have an automated type reporting system in the money order system. We go into that — we call it the — it's the subsystem of the money order system, the unclaimed property piece. We go in there and key in a date that we want the report to run, and it will generate a paper file, and

then we have to [Page 132] request a job to run to get the electronic file, which again, we would either burn to a CD or upload to the state's website.

Q. Okay. I just want to make sure I have it right.

So you have a system in your department that puts in a date and gets the reportable unclaimed money orders as of that date?

A. Correct.

Q. And then the system gives you a printout?

A. Right.

Q. And then you take the printout and generate a report?

A. No, we just have that, basically, for our files. I mean, this is a very old system, so it used to be paper all the time was being sent so we would have the paper. But we just put that in our files, and then we request the electronic job to run, and then it would produce the file that we can send to the state.

Q. Understood. So the money order system, itself, produces the file that MoneyGram can then send to the states?

A. Yes.

Q. All right. Retail money orders are sold by [Page 133] gas stations and convenience stores, but as well as banks; right?

A. Yes.

Q. Now, what role does the selling entity have in reporting unclaimed retail money orders?

A. Nothing.

MR. RATO: Objection to the form.

Can we just clarify, when you — when you say "selling entity," do you mean the agent? I mean, because retail money order could be MoneyGram, and I just —

MR. DISHER: Sure. Yeah, thank you.

Let's clarify that, then.

BY MR. DISHER:

Q. So what role does the selling agent play in the reporting of unclaimed retail money orders?

A. Nothing.

Q. All right. Okay. Retail money orders are reported to the state of purchase?

A. Correct.

Q. And agent check money orders are reported to the state of purchase?

A. Correct.

Q. So how was the decision made to report unclaimed agent check money orders to the state of [Page 134] purchase?

A. It was — it was provided to me. The information was provided to me within the lawyers that made that decision.

Q. Okay. You don't have anything additional to add about why that decision was made or how that decision was made?

A. No.

Q. All right. Unclaimed agent checks are reported to the state of MoneyGram's incorporation; right?

A. Which one? Agent — agent check money orders?

Q. No, just — yeah, let me repeat the question. Unclaimed agent checks are reported to the state of incorporation from MoneyGram?

A. Correct.

Q. How was the decision made to report unclaimed agent checks to the state of incorporation? How was that decision made?

MR. RATO: Objection to the form; asked and answered. You can answer.

A. It was the attorneys and outside counsel. They — they went that way, and then they let us know how to report them.

[Page 135] BY MR. DISHER:

Q. Okay. And you don't have any additional information to add on how that decision was made?

A. No.

Q. Okay. Same question with teller's checks; how was the decision made to report unclaimed teller's checks to the state of incorporation?

MR. RATO: Same objection. You can answer.

A. Same answer; our attorneys and outside counsel reviewed all that and then told us how to report them.

BY MR. DISHER:

Q. Okay. Did you play a role in any of those decisions?

A. No. I mean, they may have talked to me, but I was not part of the decision-making. They might have just asked me how things work, like you've asked me,

and that's how they — you know, they just asked a few questions. That's all.

Q. Okay. All right. Let me ask a more pointed question:

Do you know why MoneyGram treats unclaimed agent checks different from how it treats unclaimed agent check money orders?

[Page 136] MR. RATO: I would caution the witness not to — not to disclose any information that came from counsel, but to the extent that you have a personal understanding, you can answer.

A. I don't know.

BY MR. DISHER:

Q. Okay.

A. I don't recall.

Q. Let me ask the same question for teller's checks:

Do you know why MoneyGram sends unclaimed teller's checks to the state of incorporation but sends unclaimed agent check money orders to the state of purchase?

MR. RATO: And again, to the extent that you know why they are sent differently, you can answer that question. I would just instruct you not to — not to disclose any communications you had with counsel about the rationale for that. But if you — if you independently know the reason why it is done that way, you can certainly answer that question.

A. I'm not sure how to respond to that question.

MR. RATO: If — if you have an understanding of some characteristic of any of these [Page 137] items,

why they're escheated a certain way that is independent from something you have been told by counsel, you can answer that question. Anything you were told by counsel for the rationale, I would instruct you not to answer as Attorney-Client Privilege.

A. So you want to know the difference between the two, how to — well, the teller's check was the financial institution and MoneyGram responsible, and MoneyGram contractually took the responsibility of doing the escheatment.

Agent check, my understanding is that it's a MoneyGram check and, therefore, since we don't have names and addresses, we report them to the state of incorporation.

BY MR. DISHER:

Q. Okay. And I just want to be real specific about my question here because there's a bunch of different type of products.

And so, I'm talking about the difference between how MoneyGram reports unclaimed teller's checks versus how it reports unclaimed agent check money orders.

A. Okay.

Q. Do you have an understanding about the rationale behind why MoneyGram treats those two products [Page 138] differently for unclaimed property reporting purposes?

A. Agent check money order is a money order, and my understanding is that it's — it is escheated to the state of sale — or of purchase where the teller is — what I said previously.

Q. All right. Now, you said agent check money orders is a money order.

What do you mean by that?

A. It's not a check. It's a money order.

Q. Okay. And why is it — let's break those things down.

Why is an agent check money order not a check?

A. I don't know.

Q. Why is an agent check money order a money order?

A. I don't know.

Q. Okay. Now, pursuant to Mr. Rato's instructions, let me ask you this initial question:

Have you had discussions with MoneyGram lawyers about the rationale for why these different types of official checks are reported to different states?

A. Yes, in that — not the rationale, but they would tell me what — you know, how they are to be reported.

[Page 139] Q. Okay. But the rationale wasn't then conveyed to you?

A. It may have been. I don't recall.

Q. Sure. Do you know what a clearing bank is?

A. Vaguely.

Q. Okay. What is your vague knowledge of what a clearing bank is?

MR. RATO: Just object to outside the scope of the witness' designated testimony, but you can certainly answer in your personal capacity.

A. Okay. I believe that's where checks go through to clear.

BY MR. DISHER:

Q. All right. So for any of the — let's try a different way first. For any of the unclaimed MoneyGram official check products, does the clearing bank play any role in reporting those unclaimed funds to the various states?

A. I do not believe so.

Q. Okay. All right. And you may have answered this, but I'm going to ask it again because I don't think I heard the answer.

So we were talking about products codes. Each official check product has a different type of products [Page 140 code; right?

A. Yes.

Q. Who assigns that product code to each individual product that gets sold?

MR. RATO: Objection to form. Can you just clarify?

MR. DISHER: Okay.

MR. RATO: Meaning, if I may — and I'm not trying to — are you saying who came up with teller's checks is a 14, or who decided that this item that was sold is a 14?

MR. DISHER: Right; the latter.

BY MR. DISHER:

Q. So a selling financial institution sells a MoneyGram official check. Who decides what

MoneyGram code gets associated with that official check?

A. I don't know how the official check system works. I believe, though, it comes from the official check system.

Q. Okay. Your department, the governmental affairs department, does not play any role in deciding which official check code will be associated with a given individual official check?

A. No.

* * *

[Page 154] Q. And then, the retail money orders. It says, "State Requirements Maintenance File."

What is that?

A. That's — that's the name of the system.

Q. Okay.

A. That's where we go into — to put in that date to run the reporting.

Q. Okay. The system we talked about earlier?

A. Yes.

Q. All right. Okay. Now, if you go to the very next page, it should be the beginning of the definition, the first one is business association. The last sentence says, "MoneyGram is defined as a business association for unclaimed property reporting."

Do you have any reason to disagree with that?

A. No.

Q. You agree with that?

A. I agree with that.

Q. Okay. If you go to the next page where it has a definition for "Holder," you see the second sentence says, "MoneyGram is the holder of outstanding money orders, money transfers, gift certificates, payroll money orders, official checks, money transfer checks, bill payment checks, vendor checks, and payroll checks."

* * *

[Page 177] Q. And is that your e-mail address at MoneyGram.com?

A. Yes.

Q. So — and I realize we've got pages 2 going on to page 3.

So flipping back to page 3 with regards to the paragraph under Point Number 2, you sent this e-mail with this paragraph to Mr. Wood in Arkansas?

A. Yes.

Q. So let me — let's stay on the paragraph below Bullet Point Number 2. I want — I'm going to read the second sentence:

"MoneyGram is responsible for escheating all other official checks because MoneyGram is the issuer."

Do you see that sentence?

A. Under 2?

Q. Yes. So it's under 2 and it's the second sentence in that paragraph.

A. Yep.

Q. Do you see that sentence?

A. Yes.

Q. When — when you say in that sentence, "other [Page 178] official checks," what do you mean? Which of the four product groups that we talked about today were you referring to?

A. I was referring to the teller, agent, check, and agent check money order.

Q. So let me make sure I — teller checks, agent checks, and agent check money orders?

A. (Witness nodding head.)

Q. I'm going to hand you what I'm going to mark as Petrick 54.

(Whereupon, Exhibit 54 was marked.)

MR. O'KORN: Off the record for just a second.

(Discussion off the record.)

BY MR. O'KORN:

Q. I'm actually going to have you — I'm going to have you refer to Exhibit 50 that Mr. Disher handed you initially.

So Ms. Petrick, I'm referring you here to Exhibit 50, and in particular, MG — MG4673.

Do you see that?

A. Are you talking about this, here?

Q. Yes, this particular page.

A. Yes.

* * *

[Page 185] What entity would be reporting unclaimed retail money orders?

A. MoneyGram Payment Systems, Inc.

Q. What entity would be reporting any items under CK15?

A. MoneyGram Payment Systems, Inc.

Q. And what entity would be reporting to states any items under CK77?

A. If it shows up that way, it would be — MoneyGram Payment Systems, Inc. is the — that is the entity that we file under for everything.

Q. So it's your testimony that MoneyGram International doesn't report any of these particular unclaimed items we talked about with these codes to any states?

A. They do not. Not MoneyGram International.

* * *

[Page 228] Q. Could you turn to the property record section, which begins on the bottom of page 6 of the document? And I'll first ask — let me ask this:

When MoneyGram files money orders, retail money orders in its annual reports, does it include in that filing with the state the place of purchase?

MR. DISHER: Objection to the form.

MR. RATO: Objection.

MS. AHUMADA: Join.

A. Yes.

BY MR. TALIAFERRO:

Q. And do you know where that is listed in the NAUPA form?

A. Yes.

[Page 229] MR. RATO: Can we just clarify, you're talking about official checks right now?

MR. TALIAFERRO: No, the question is about money orders.

MR. RATO: Okay. I'm sorry.

A. It's in there. I just — I'm trying to see where it is. Number 14 on the Field 14, property owner state.

BY MR. TALIAFERRO:

Q. So that is a field, and the description says to enter the owner's last known address; is that correct?

A. It does say that, yes.

Q. Okay. And is it — I believe your previous testimony was that retail money orders are owner address unknown?

A. Yes.

Q. Do you put the place of purchase in that state, Field 14?

A. Yes.

Q. Okay. Do you know if you were — do you know why you do that?

A. To identify the state where it was sold, and\ that's going to the appropriate state.

Q. All right. Same question for agent check [Page 230] money orders:

Do you put the place of purchase in Field 14?

A. I believe so.

Q. Same question for official check teller's checks:

Do you put the place of purchase in Field 14?

A. Agent checks?

Q. Yes.

MS. AHUMADA: Objection; form.

A. I do not believe so. I just can't recall right now if we put in Delaware or —

BY MR. TALIAFERRO:

Q. Well, let's take a look at — we're going to come back to Petrick 65, but let's take a look at Petrick 48. If you turn to the second page, these are the fields that Delaware has in its system from — from MoneyGram.

And do you see that Address 1, Address 2, city and zip code are all blank?

A. Yes.

* * *

[Page 1]

SUPREME COURT OF THE UNITED STATES

NOS. 220145 & 220146(Consolidated)

DELAWARE,

Plaintiff,

vs.

ARKANSAS, *et al.*,

Defendants.

Philadelphia, Pennsylvania

May 23, 2018

CONFIDENTIAL

Videotaped deposition of EVA YINGST, taken pursuant to notice at the law offices of Kleinbard, LLC, One Liberty Place, 46th Floor, 1650 Market Street, Philadelphia, Pennsylvania, on the above date, beginning at 10:11 a.m., before Jared E. Bittner, RPR-CSR, Notary Public.

GOLKOW LITIGATION SERVICES
(877) 370-3377 / fax (917) 591-5672
deps@golkow.com

* * *

[Page 12] Q. Ms. Yingst, I'll just very quickly cover some background information from you. Do you have a college degree?

A. Yes.

Q. And where did you go to school?

[Page 13] A. Undergraduate Bloomsburg University.

Q. When did you — what degree did you get?

A. Accounting and business administration, Bachelor of Science.

Q. Do you have any other advanced degrees?

A. I have my master's degree, my MBA from West Chester University.

Q. And when did you get that degree?

A. Around 2003.

Q. Okay. And where are you currently employed?

A. MoneyGram.

Q. And how long have you been employed at MoneyGram?

A. 17 and a half years.

Q. Okay. And what is your current title at MoneyGram?

A. Head of product and solutions.

Q. And how long have you had [Page 14] that title?

A. A year and a half.

Q. Okay. And what are your job responsibilities and duties as head of product and solutions?

A. I am the primary product owner of the financial paper products which includes our official check and money order programs. I also am responsible for a team of people that manage some of those relationships in the United States.

Q. And what was your title before head of product and solutions at MoneyGram?

A. Director of product and solutions.

[Page 21] Q. Okay. If I said it was the second largest money transfer company, do you know that to be true or not?

A. I believe that's probably true.

Q. Okay. Who are MoneyGram's customers?

A. So MoneyGram's customers are both institutions such as banks and credit unions. We also have consumers who do business with us from the money transfer perspective, so I think it depends on the product.

Q. Okay. So for the institutions and you said banks and credit unions, what services does MoneyGram offer those customers?

A. Official check processing as well as money orders. We also offer money transfer to those institutions.

* * *

[Page 27] Q. Okay. On the last bullet point it says product lines. Let's go through these. Tell me, what is global funds transfer person to person payment?

A. That would be as referenced previously the money transfer business.

Q. Okay. And the next bullet, bill payment services, what does that mean?

A. Bill payment services are where a consumer can present cash at one of our agent locations to pay any biller who is on our list. So they provide their account number and it goes through the same process as our money transfer, but the money goes to a particular biller.

Q. The next bullet is money orders. What is that product?

A. Money orders are a [Page 28] particular kind of instrument that are sold by our agents including some financial institutions to a consumer for use in making payments, and it's like a draft or a check basically.

Q. And the next bullet is an official check processing service. What does that mean, official check processing services?

A. One of our services is that a financial institution, meaning a bank or a credit union, can elect to use MoneyGram to provide a realm of services around their official check program including providing inventory, reconciliation, back office processing, exception research handling, et cetera, so it's an outsourcing of parts of their official check program.

Q. When we went over the money order, you had stated that you, MoneyGram, has agents. Do those same agents also offer official check processing services?

[Page 29] A. Only financial institutions can do official check — can offer official check processing services.

Q. Okay. So who are the agents that are not financial institutions?

A. Retail agents, convenience stores, Walmart, CVS, mom and pop stores, a whole realm of nonfinancial institution businesses that offer the sale of money transfer and/or money order.

Q. If you could go to the next page which is MG 392. On the top line there it's — the heading is outsourcing payment services. And if you could describe for us what is meant by, "Financial institutions continue to seek revenue generation and cost saving opportunities through outsourcing."

A. That — the primary premise of why an institution would outsource to MoneyGram is that they — some of the work that we do they no longer have to do, so they gain efficiency. They can use their resources more efficiently and [Page 30] they also can both save money and perhaps generate some additional revenue through the way that our pricing structure is with that program.

Q. Okay. And how long have you offered that product?

MR. TALIAFERRO: Object to the form.

MR. RATO: Object to the form.

THE WITNESS: Do — are you referencing official checks?

BY MS. AHUMADA:

Q. Yes, the outsourcing services.

A. Okay. Since around 1979.

Q. And since that time has MoneyGram offered the same products as part of its outsourcing?

MR. TALIAFERRO: Object to the form of the question.

MS. AHUMADA: Do you understand my question?

THE WITNESS: Could you [Page 31] rephrase it, please?

BY MS. AHUMADA:

Q. Sure. So you indicated that MoneyGram provides certain outsourcing services to banks and money — excuse me, credit unions. Okay. So what — and you went over the different kinds of outsourcing. From its inception of providing that outsourcing service, have — has MoneyGram provided the same product lines for — that has been outsourced to your clients?

A. Yes.

Q. Okay.

A. There are — there have been some other smaller product lines in the interim that don't exist anymore and don't have anything to do with these official check or money order products.

Q. Okay.

A. But those have been primary since the beginning.

Q. Okay. If you could turn to Page MG 394. Well, it's been Bates [Page 32] labeled that. Okay. Again, the top of the page is a title, a header, that says "Outsourcing Official Checks Value Proposition." Do you see that?

A. Yes.

Q. Okay. On the second, there is a chart here. On the second line item it says "Systems Utilized and Processing Services." Do you see that?

A. Yes.

Q. And it says, and if you go across, it says, "All performed by MGI and clearing banks integrated systems and process." What does that mean?

A. It essentially means that the — once the check is issued by the financial institution, we do — we maintain all of the back office systems related to everything, related to reconciliation, related to imaging and retention of copies, related to the clearing process with the clearing banks, related to records retention and sources. So we — basically what that is [Page 33] referencing is that we maintain all of those systems. The institution does not need to do that.

Q. And again this is for, excuse me, your official check service; is that right?

A. Yes.

Q. Okay. And so what is a clearing bank?

A. A clearing bank is a bank that MoneyGram has a relationship with for the purpose of receiving those clearing — those checks as they clear. So we have a relationship with the bank and we receive those check clearing files on a daily basis, and those are the items that have been issued by our official check clients, customers.

Q. Are who are MoneyGram's clearing banks?

A. We have several different relationships. We have a relationship with, as of right now, [REDACTED] [Page 34] [REDACTED]. I don't think I'm missing any there. [REDACTED] I think that's all of them.

Q. Okay. And how does MoneyGram determine which of these banks it will use as a clearing bank for a given instrument?

A. Each financial institution clears all of their items through one relationship, so it's not an instrument by instrument decision. It is a relationship by relationship decision and primarily MoneyGram is leveraging the vendor, the relationship to the clearing bank that in many cases offers us the best price. So it is an economic decision more than any other decision on our part.

Q. Okay. And I think maybe I misunderstood if you can clarify. So your financial institution clients, is [Page 35] that okay if I use that terminology? Do you understand what I mean?

A. Yes.

Q. Okay.

A. Yes.

Q. So they are the ones that are having the direct relationship with the clearing bank or is that MoneyGram that has the relationship?

A. MoneyGram has the relationship with the clearing bank.

Q. Okay. Are there any communications between your financial institution clients and the clearing banks?

A. No.

MR. RATO: Objection to the form.

MR. TALIAFERRO: Join.

THE WITNESS: No.

BY MS. AHUMADA:

Q. Okay. If you go to the third item down it says "Multiple Payment Types." First, what does a payment type [Page 36] mean?

A. I believe that in the context of this slide it means that within the official check program we can support different types of checks, different types of payments.

Q. Okay. When you say the "context of this slide," could you explain what you mean by that?

A. I just mean that because this slide is referencing official checks, I believe based on the information here that multiple payment types means multiple types of checks.

Q. Okay. And if you go across that same line, it says here, "Flexible Payment Options. MoneyGram supports teller, agent, cashier's, money orders." Are those all official checks?

A. They are all processed on our official check platform, yes.

* * *

[Page 41] Q. Okay. And which type of checks is that?

A. That would be for teller's checks, agent checks and also money orders.

Q. And so the list that we previously looked at there was also a cashier's check. So is that not a product that MoneyGram is filing escheatment products for?

A. It is not.

Q. And the last bullet there, it says "Reimbursements from the state on presented items after escheatment." What is meant by that?

A. If we have handled the escheatment process and that item comes in to clear, the physical item comes in, we will pay that item and then handle the reclamation process to go back and get that money back.

Q. Okay. One of the products we had covered on the last page that we had looked at was money orders. I'd like [Page 42] to switch and start reviewing some of those. Just generally if you could describe a money order, and I think you may have done that, but just to retable set for me I'd appreciate it.

A. A money order is a specific document that has language on the back of it. It's got purchaser payee document — purchaser payee language on the back, some service charge language. It is a — issued by an agent of MoneyGram, so it says agent for MoneyGram on the face of it. It is payable through one of our clearing banks. It is a document or an item that a consumer purchases at one of our agent locations and uses for specific payment purposes, whatever their need is.

Q. Okay. So again it's a paper instrument, right?

A. It is a paper instrument.

Q. Are there any nonelectronic money orders?

A. No.

Q. Okay. You said that there [Page 43] was a payer listed. What — who would be a payer?

A. I said payer. Well, payee.

Q. Well, that's another question I have.

A. I'm not sure if I used the word payer or not.

Q. Okay.

A. That was an error.

Q. Okay. All right. Payee, then what's a payee?

A. So a money order is typically received in blank and then the purchaser would fill in the payee on that item.

Q. Okay. So if there is a monetary obligation, the payee is the ultimate end user or end recipient of that money order; is that right?

A. That's normally how it works. The payee is filled in and the money order is given to the payee and then they will deposit or process that item.

[Page 44] Q. Okay. And who is deemed the issuer of a money order?

MR. RATO: Object to the form.

MR. TALIAFERRO: Objection; calls for a legal conclusion.

THE WITNESS: I believe that the issuer of a money order is MoneyGram.

BY MS. AHUMADA:

Q. Okay. And is there a drawer on a MoneyGram money order?

A. Yes. I believe that's also MoneyGram.

Q. Okay. Is the purchaser of the product, the customer, are they deemed an agent in any way of MoneyGram?

MR. RATO: Object to the form to the extent it calls for a legal conclusion. You can answer.

THE WITNESS: The customer is not an agent for MoneyGram.

BY MS. AHUMADA:

Q. Okay. Do you classify money [Page 45] orders as a remittance instrument?

A. I'm not sure what that term "remittance instrument" means.

Q. Okay. That's fine. Did MoneyGram create this product?

A. I don't know.

Q. I think you covered this, but just generally where would someone go to purchase a money order?

A. They would typically go to a MoneyGram agent location which could be a retail store, it could be a convenience store, it could be a financial institution, any of our agents that sell money orders.

Q. Okay. And how would someone, a consumer, know that they could purchase a MoneyGram money order through your agents?

A. There are a number of ways. There is often signage. There is often signage at the agent locations that says "MoneyGram" on it. There is also a locater online that enables them to find [Page 46] a location.

Q. Do you market these money order products to any specific type of consumer?

A. No.

Q. In terms of your agents, do you do any specific marketing to cull agents?

A. To?

Q. To choose your agents. And I assume that's a customer relationship for you as well and you used the term "agent," right? Do you also consider your agents a customer of MoneyGram?

A. There is a contractural agent customer relationship, yes.

Q. And do you do any marketing to specifically target new agents?

A. Our marketing is primarily consumer facing for the money transfer business.

Q. And when you say "consumer facing," what do you mean?

A. Meaning that the marketing [Page 47] that MoneyGram performs is related to the messaging as directed to consumers who might use our services, not necessarily to prospective agents.

Q. What are the marketing strategies you use to, excuse me, to encourage individuals to use money orders?

A. There is not a lot of direct money order related marketing. There is sometimes messaging on money transfer related marketing that would have a money order bullet on it, but there is not a lot of money order marketing that I can point to directly. It's not our primary product. Money transfer is MoneyGram's primary product, so it isn't — there isn't a marketing strategy around promoting money orders specifically.

Q. Okay. In terms of using a money order, what benefits does MoneyGram tout for the use of a money order?

MR. RATO: Object to the form.

[Page 48] MR. TALIAFERRO: Object to the form of the question.

THE WITNESS: There are — benefits are it's an easy vehicle to obtain. They don't have to have a bank account. They are accepted pretty much universally. There is a receipt provided so you have some evidence of your purchase. Those are some of the key benefits to the consumer.

BY MS. AHUMADA:

Q. I'm sorry. Did you say it was safe, it is a safe product?

A. I think at times the word "safe" has been used in our money order. It is a safe payment mechanism. I didn't just say that.

Q. Okay.

A. But at times —

Q. I'm sorry. I —

A. At times that word has been used.

Q. Okay. And you said it's a [Page 49] product to use in lieu of a personal checking account; is that right?

A. Yes.

Q. Okay. And why in MoneyGram's estimation would a consumer use a money order as opposed to a personal checking account?

A. There is a segment of the population that doesn't use or want to use, some maybe cannot, some they don't want to, but they don't have or don't want to use a personal checking account to make payments, so they have a regular — many have a regular habit of using money orders to pay their bills instead of checks.

Q. Okay. How would a customer purchase a money order? Just go through that process.

A. They would walk into an agent location that sells money orders. They would pay for that instrument with cash. The agent would basically print the money order, collect the cash plus [Page 50] whatever their fee was on top of the face amount of the money order, and they would hand them the physical document.

Q. Okay. When you say that they pay for the instrument, so are they paying for the denomination of the money order?

A. They are paying for the face of the money order plus a fee. So if I could provide an example, if I walk in and I want to buy a $10.00 money order, I would say I want to buy a $10.00 money order. They would create that money order. They would collect the $10.00 from me along with whatever fee the agent has determined they are charging for that service, and I would pay them that money in cash, and then they would hand me the money order.

Q. Okay. Do you consider the money order then in that example, the $10.00 money order cash equivalent?

MR. RATO: Object to the form to the extent it calls for a [Page 51] legal conclusion. You can answer.

THE WITNESS: There — there has been the term "as good as cash" used. There is a perception in the market that because you paid for that instrument with cash that it is similar to cash.

BY MS. AHUMADA:

Q. Okay. So going back to the example of that $10.00 money order, is that $10.00 then guaranteed in any way by MoneyGram?

A. No.

Q. So that customer, again they go to pay a bill as you said as a use. What assurances are there that there is $10.00 to back it up?

MR. TALIAFERRO: Object to the form of the question.

THE WITNESS: We know that the agent has collected the money and the agent has — they owe us that money. So we contracturally know that we have the money to [Page 52] back up that payment as MoneyGram. We would definitely upon clearing of that item, we would pay that item, and the payment would be a, you know, an accepted good funds payment, not good funds, but an accepted payment on our side.

When I say there is no guarantee, there are things that can happen within the check clearing system that might cause that money order to be returned by MoneyGram at the time that it comes in for payment.

BY MS. AHUMADA:

Q. And what are some examples of causing a return of a money order?

A. There are situations where we're presented the same money order multiple times, so they're fraud, counterfeit. There could be alterations to that money order, so if somebody altered the amount we might return that item. If for some reason we knew that [Page 53] that money order was stolen and we had a flag on it, we might return that item. If the item — I already said duplicate payment. That's another. So if somebody deposited a mobile deposit on that item and then walked in to somewhere else and deposited that,

that would be a duplicate and we would return one of those.

Q. And if you could just describe that process, again going back to the scenario of the $10.00 money order. So the customer pays the $10.00 to your agent; is that right?

A. Yes.

Q. What does the agent in turn

do, if anything, with that $10.00?

A. The agent deposits those funds into their bank account and MoneyGram withdraws that money via ACH from their bank account as the remittance for those payments that they've sold.

Q. And what is ACH?

A. I don't know exactly what that term refers to. Automated clearing [Page 54] house, I believe.

Q. Okay.

A. And it is a type of transaction between institutions.

Q. So once the funds have gone from your agent's bank account to MoneyGram, is that — at that point does it go into a MoneyGram account?

A. Yes.

Q. Bank account?

A. Yes.

Q. Okay. And again, make sure I understand this, the clearing banks that we discussed, would it go into those banks?

A. No.

Q. Okay. So where is this — so the MoneyGram account that you're referring to for that $10.00, for example, where is that account held?

A. MoneyGram manages a portfolio of accounts and investments related to the outstanding money orders and other paper items, so I — I can't [Page 55] tell you specifically where that money is, but it is managed within a portfolio of funds that our treasury department manages.

Q. And are they kept in, for example, a trust account?

A. Not to my knowledge, no.

Q. Is it an interest bearing account?

A. Some of them are interest bearing and some of them are basically cash accounts.

Q. So earlier we went through the clearing banks that you use, [REDACTED]

A. Yes.

Q. So none of those banks would hold that $10.00, for example, that we had used?

A. MoneyGram may have some deposits at some of those institutions as part of that clearing relationship. [Page 56] They're not tied to specific items. They're just part of the overall portfolio that we maintain, and they may or they may not have deposits at those institutions.

Q. Okay. When a customer purchases a money order, do they get any documentation back besides that physical paper instrument that you described?

A. They receive the physical instrument and attached to that is a receipt that they then can tear off and keep. There are some agents that also would provide a transaction receipt of their own saying you purchased a money order and here is your receipt for that $10.00 plus the fee that we added to it. That's not in every situation.

Q. Does MoneyGram track that specific money order after it's purchased?

A. Yes.

Q. And how does it do that?

A. Money orders, our money [Page 57] orders are primarily sold using MoneyGram equipment. So the physical printer that prints the money order is something we have provided to that agent location and there is a point of sale that they are using to process that transaction. And those — that — that hardware process is then sending MoneyGram information about what happened with every one of those items.

Q. Does the instrument have, for example, like a routing number?

A. There is a serial number and a routing number that is part of that instrument and then we are also receiving the amount of that instrument.

Q. Does MoneyGram track any personal identifying information on the customer that purchased that instrument?

A. We do not require any information nor do we receive any information. In a case where a consumer — where an agent is aware that a consumer purchases more than $3,000 in [Page 58] money orders in one day, then there is an information gathering

requirement in the form of a log, and the agent is required to retain that information.

Q. And do you know how long the agent is required to retain that information?

A. I believe it's a five-year retention period.

Q. Are — does MoneyGram require its agents to get, for example, identification from the purchaser?

A. Only in situations where they're purchasing more than $3,000 in one day.

Q. Actually that's a question I had. Is there a limit on an individual money order transaction amount?

A. There are several kinds of limits, so there is a document limit. Some of our agents are set at — typically that's no more than $1,000, and there could be agents set at 500, 900, 1,000. Typically the document itself, [Page 59] the individual money order, is not issued for more than $1,000. There is not a limit to somebody coming in and buying $4,000 worth of money orders. They would just receive multiple money orders totaling that amount. And then there are some agent limits that are set on our — our systems to prevent an agent from selling more than we want them to sell —

Q. Okay.

A. — in a day.

Q. Can a customer cancel a money order?

A. No.

Q. Can they return a money order?

A. The customer can request a refund for a money order that they purchased by basically filling out some information and a form and going through a process

where we're confirming that that money order has not already been cashed or paid. So there is a process for them to receive their funds back.

[Page 60] Q. So for the scenario where a customer is able to get their money back, somebody filled out your form and you determined that they can get a refund, where do those funds come from?

A. The processing for that work is happening in our operations area and those funds are coming basically from a general ledger account of some sort. I don't know specifically what account, but it's part of the money that MoneyGram is holding for that item.

Q. Okay. Does MoneyGram get notice when the money order is actually cashed?

A. Not until the item is coming in through the clearing bank process.

Q. Okay. And how about the customer who purchased that money order, will they know when the recipient, we said the payee, cashes that instrument?

A. They could know if they — there is a way for them to find out the status through calling MoneyGram and [Page 61] obtaining that information. The consumer, the purchaser, would have to proactively seek out that information.

Q. And how would a consumer know to do that?

A. There — on the receipt there is information about how to call MoneyGram and/or our website information is on the physical receipt that the consumer retains.

Q. And so you said it's on the consumer to make that phone call and inquiry; is that right?

A. Yes.

Q. They don't get an automatic result in some way that the funds have been cashed?

A. No.

MR. RATO: Object to the form.

BY MS. AHUMADA:

Q. Do you believe that — does this — does this make that instrument susceptible to abandonment? Do you know?

[Page 62] MR. RATO: Object to the form.

MR. TALIAFERRO: Object to the form.

THE WITNESS: Could you rephrase the question, please?

BY MS. AHUMADA:

Q. So if the consumer is not getting affirmatively a notice that the money has been cashed, is it possible then that it could go stretches of time when there is no transaction on the other end and the payee hasn't cashed it; is that right?

A. Yes, that can happen.

Q. Okay. Do you believe that makes it more so likely to be abandoned then say, for example, a personal check?

MR. RATO: Object to the form.

MR. TALIAFERRO: Object to the form of the question, outside the notice topics of deposition.

BY MS. AHUMADA:

[Page 63] Q. You can answer.

A. I don't know that it makes it more susceptible than a check. I think the risk is there either way.

Q. Okay. Do you know, are you familiar with Reg CC?

A. Yes, somewhat.

Q. Do you know if money orders are next day available funds under Reg CC?

MR. RATO: Object to the form to the extent it calls for a legal conclusion. You can answer.

THE WITNESS: No.

BY MS. AHUMADA:

Q. They are not, okay. We — you had discussed the limits on the actual instrument of the money order as $1,000 or less. Is that something that MoneyGram determines or is it a legal requirement that it be kept under that amount?

MR. RATO: Object to form to the extent it calls for a legal [Page 64] conclusion. You can answer.

THE WITNESS: To the best of my knowledge it's a MoneyGram determination. There is no legal restrictions on that.

BY MS. AHUMADA:

Q. Do you know why MoneyGram makes the determination that $1,000 limit is the maximum amount?

A. I believe it's a combination of industry standard as well as risk management that it's just to keep those amounts lower.

(Yingst-3, Two Copies of Photographs Bates PA_0000349 and PA_0000350, was marked for identification.)

BY MS. AHUMADA:

Q. Okay. All right. Ms. Yingst, I'm handing to you a document that I've marked Yingst-3. Ms. Yingst, are you familiar with this document?

A. Yes.

Q. And I should rephrase that. [Page 65] I'm sorry. This is a picture of a document, a copy of a document, right?

A. Yes.

Q. And are you familiar with what's being depicted in this two-page document?

A. Yes.

* * *

[Page 71] figure this out. So [REDACTED] here is a clearing bank for MoneyGram?

A. Yes.

Q. Okay. I thought we had said, or you had said, that your money orders don't go through your clearing banks.

A. No, they do go through our clearing banks.

Q. Okay. I guess I misunderstood. So let's say this money order that I have in front of you was for $15.00. Who is holding that $15.00? [REDACTED]

MR. RATO: Object to the form.

THE WITNESS: It's MoneyGram.

BY MS. AHUMADA:

Q. It's MoneyGram?

A. It's MoneyGram.

Q. Okay. [REDACTED]

A. The physical item, once this [Page 72] item is purchased and negotiated, they send it to the utility company. The utility company deposits it. It will physically come into MoneyGram through a [REDACTED] routing and transit number under the clearing bank relationship that we have with [REDACTED], and we will then pay [REDACTED] for those items and we will have obtained that $15.00 from the agent through them after they sell that money order.

Q. Okay. I understand. So you're reimbursing [REDACTED] for let's say $15.00, but they've paid on the obligation; is that right?

A. When — yes. We collect — when we get our clearing files and we see how much is coming in each day, we are paying [REDACTED] for those items, so yes.

* * *

[Page 81] Q. Okay. If you'll notice on the first paragraph there, it says she is head of global supply chain for MoneyGram International. And the same question I've asked you previously, does she work for a different entity than you?

A. We work for the same entity.

Q. Okay. Do you use the term

MoneyGram International as well?

A. It — I typically just use the term "MoneyGram" to be really honest.

Q. So today when we're talking about MoneyGram, we're talking about that as well, right?

A. Yes.

Q. Yes. If I could have you turn, please, to MG 2688 which is the third I think page or so. And again we're focusing on — I'm sorry. I called out the wrong number. I apologize. It's MG 2690. I apologize for that error in Bates numbering.

Okay. Would you agree with [Page 82] me that this is a document that's titled "Money Order"?

A. Yes.

Q. And that the image that we have here is different than the image we previously reviewed; is that right?

A. Yes.

Q. Okay. Are you familiar with this instrument that's being depicted here?

A. Yes.

Q. Okay. What is it?

A. This is also a money order. It is a money order that — it is a different type of inventory than the one that we previously reviewed. This is a money order that wouldn't only be printed by one of our financial institution money order agents, not by a retailer or nonfinancial institution, but it is a money order just like the other instrument in a different form.

Q. Okay. And why would your I'll call them financial institution [Page 83] clients use this instrument or this inventory using your term than the different one that's being used by your agents?

A. They may have a desire to print these money orders from their teller system on their own printers instead of using MoneyGram printing equipment. So we provide them with additional options from an

inventory perspective to meet their printing requirements or their printing needs.

Q. Okay. And like we did with the others, let's just go through it. On the top right-hand side it says "Money order" and then underneath that there is a number. Is that the serial number?

A. Yes.

Q. And then below it says "Void over 1,000," and that's because of the maximum limit we just talked about?

A. Yes.

Q. Okay. Can your financial institutions choose to have a limit [Page 84] that's higher than that?

A. Not on the — not if they are an agent using our retail money order program, they cannot.

Q. Okay. You coached that in some language I'm not sure I fully understand. So when can they use a money order for a large amount or if at all?

A. If they are using an agent check money order that is coming through the official check platform instead of the money order platform at MoneyGram, they can issue that agent check money order for really any denomination.

Q. Okay. And why would one instrument have a higher amount, denomination amount, than the other?

A. The $1,000 is primarily a restriction of our retail money order program which this item that you're looking at is part of. However, if they are using the agent check money order that's available through the official check program, we allow them to use [Page 85] higher dollar amounts. It's just a platform specific requirement. It's not based on any particular

difference between the two products. It's just how we manage the products.

Q. Okay. So here you said this is a retail money order program, what we have in front of you, but you also stated that this is a sample of something we use by a financial institution, and I'm not sure I understand what that means.

A. When I reference the retail money order program, I am referencing the — MoneyGram's money order product program systems processes which could include retailers or financial institutions that are issuing those money orders through that system, that are being managed through that system. An agent check money order is the same product, but it's on our official check platform.

Q. Okay.

A. All right.

[Page 86] Q. And they're both in a sense money orders, just different platforms that you're using?

A. They are.

Q. Okay.

MR. TALIAFERRO: Object; mischaracterizes testimony.

MS. AHUMADA: Well, she agreed to it. So did I —

THE WITNESS: They are — to clarify, they are both money orders. They have the same language on the back of them and the same terminology on the front of them.

MS. AHUMADA: Thank you.

BY MS. AHUMADA:

Q. If I could please have you turn now to on the title it says Exhibit B, but it's Page MG 2692. It looks like this is the same product as we just previously looked at; is that right?

A. Yes.

Q. Are there any differences?

[Page 87] A. No, the — there are no differences in the product.

Q. Okay. Now, if you'll note one, I have both of the pages up just so if you want to refer.

A. Okay.

Q. But one document has the words "International Money Order" on the upper right-hand corner. The other one has it in the lower left. Does that change the instrument in any way?

A. No.

Q. Okay. And this one that we're reviewing, this on 2692, is this also the retail money order program?

A. Yes.

Q. And because of the way that it appears, which is different than the very first MoneyGram we looked at, you know that this is a financial institution client?

A. Yes.

Q. Okay. If I could please have you refer to 2694. And this [Page 88] document, do you know what it is?

A. So beginning with 2692 and 2694 and 2695, this is a multipart document. So the primary money order is the front. That's 2692. 2694 is a, one of the multi-parts of that document, so it would be behind the

money order, and 2695 is the receipt. That would be the third part of the money order.

Q. Okay. So 94, is that a separate piece of paper or is it the back side of what we just looked at?

A. It's a separate piece of paper. 2693 is the back side.

MR. RATO: The back side of?

THE WITNESS: Of the primary money order 2692.

BY MS. AHUMADA:

Q. And who if anyone keeps this copy?

A. Normally the file copy is retained by the financial institution.

Q. Okay. And you'll note that it says on the upper left-hand corner [Page 89] towards the center, it says "Notice to purchaser. This copy of your money order was given to you in error. Please return immediately to the place where you bought it. Thank you."

What is that note for?

A. That, I believe that is there in case the seller of the money order accidentally hands the file copy to the purchaser. The purchaser receipt is the next document.

Q. Okay.

A. And they would normally hand that to the purchaser, so that file copy is normally for retention and I think that is on there in case they actually hand it to the consumer, the purchaser.

Q. Okay. So when earlier we talked about the first example of a money order if you recall and we talked about some general characteristics of it, you explained

that a person would go into an agent and purchase for whatever denomination they wanted their money [Page 90] order. Would that hold true for this style that we've just been reviewing, the past two documents?

A. Yes.

Q. Okay. So the customer again would pay in some up front fashion cash?

A. When a financial institution is selling the money order they may be taking that money out of an account. In fact they are probably most often taking that money out of an account as opposed to handing cash over.

Q. Taking out of whose account?

A. The consumer's account at the institution.

Q. So the consumer of the product?

A. Yes. The purchaser typically has an account at the financial institution and the money is often coming out of their account to fund the money order.

Q. Okay. And then the same system, then the financial institution at [Page 91] some point remits that money to MoneyGram; is that right?

A. Yes.

Q. Okay. And again we talked about how it's paid through and here it looks like is that [REDACTED]; is that right?

A. Yes.

Q. Same system that we discussed with the first money order?

A. Yes.

Q. Okay. So again the only difference we see here is that it's being used by a financial institution?

A. Yes.

Q. Okay. I want to ask you to please refer to page MG 2697. And would you agree with me that this is the form that we looked at initially, right?

A. Yes.

Q. So looking at this, do you know that this comes from one of your agents, retail agents?

A. What I — what this document [Page 92] tells me is that this item was sold through our equipment.

Q. Okay.

A. Not necessarily that it was a — it could have been a financial institution using that equipment set up on that system or it could have been a retailer, but this was issued. This form is used in our equipment.

Q. Okay. And a financial institution can choose to use your equipment or their own printing; is that right?

A. Yes.

Q. Okay. But in essence it's the same document or same instrument that we looked at just previously to this, the copy that you said was by financial institutions to submit an order; is that right?

A. Yes.

Q. Okay. All right. I'll ask you to please refer to Page 2704. Are you familiar with this instrument?

[Page 93] A. Yes.

Q. What is it?

A. This is a sample of our agent check money order which is a money order that is processed through our official check platform or official check program systems.

Q. Now, you've used that a couple times and let's clarify. What is your official check processing systems?

A. At MoneyGram we have — our money orders, our retail money order program is handled through one set of systems and processes and our official checks are managed through a different set of systems, technical systems and processes. So when I reference official check system or official check processing, I mean that the agent check money order is a product that is supported on the official check systems within the business as opposed to the money order systems.

Q. Okay. So an agent check [Page 94] money order, would you agree with me that it's no different than the other money orders we looked at, it just has a different name?

MR. RATO: Object to the form.

MR. TALIAFERRO: Join.

THE WITNESS: There are some minor differences such as this dollar, the face amount not being limited, but the actual language that is on the back of the money order, the purchaser agreement, the service charge, all of that is the same as our money order, the money order that we reviewed previously.

BY MS. AHUMADA:

Q. Okay. So one difference you noted was the amount, the denomination amount. Is there any limit?

A. No.

Q. Okay. So if a customer — well, let me step back. One of your [Page 95] retail agents, do they sell this product?

A. No. It has to be a financial institution.

Q. Okay. So the financial institution that is using this product, if they have a customer that has a need for a $500.00 money order, can they use, the financial institution sell them this agent money check order?

A. If they are signed up to use this product, yes.

Q. Okay. And if that financial institution is signed up to use all of your products, can the financial institution make a determination if it's going to be the international money order we looked at previously or this agent check money order? Is that their decision?

A. They do not normally leverage both products. They have one or the other.

Q. Okay.

A. Or neither.

[Page 96] Q. Okay. Now, you'll look at the — I'm sorry. If you could just take a look at the upper left-hand side. It says "Agent for MoneyGram." What does that mean?

A. The relationship that we have with the issuer of this item is that they are an agent of MoneyGram.

Q. Okay. But nothing is listed there. Do you — let me just ask. Would there be more information usually? Is this a blank agent money check order?

A. Yes, this is. They would print their institution name in the, typically in the upper left-hand corner above that.

Q. Okay. If you look towards the bottom it says "Drawer MoneyGram Payment Systems, Inc."

Do you see that?

A. Yes.

Q. And previously we looked at there was language used, drawer and issuer. Is that the same terminology?

[Page 97] A. I believe the drawer and the issuer are two different parties to the instrument.

Q. Okay. Who is the issuer?

A. MoneyGram is the issuer of this instrument. It's not on here, but we are.

Q. Okay. And MoneyGram is also the drawer?

A. Yes.

Q. And it says here "Drawee."

Do you see that?

A. Yes.

Q. [REDACTED] What does that mean, the drawee?

A. The drawee is the clearing bank, so that is the bank that the item is drawn on and that is our clearing bank.

Q. Okay. But in terms of the process that you described for us, previously you looked at, and I'm just calling it international money order in [Page 98] order just so you can see the difference, but is it the same process in terms of what you described previously?

A. Yes, the clearing process, yes.

Q. Okay. Let's go to the next document which is 2707. It's actually I think the last page on that. Can you just tell us what this is?

A. This is the technical — this is the technical specification that we would provide to a financial institution who was going to print agent check money orders through their own print solution system printer. So this is the, what we would provide to them so that they know what has to be in the MICR line which is the line at the bottom where all of the numbers are and what other language has to be printed on the physical document. So this is the specification we would give them, say this is what your items need to look like.

[Page 99] Q. Okay. If you look down on the — before you get to the series of numbers right above it, it says "Drawee, [REDACTED]." Is that another clearing bank?

A. That is one of our clearing banks.

Q. Okay. When a financial institution contracts with MoneyGram for these products, do they choose this drawee?

A. No.

Q. How — does MoneyGram choose

that drawee?

A. Yes.

Q. And how does MoneyGram make that decision of which of these banks it's going to make the drawee for the instrument?

A. Some of our clearing banks — we would make that determination first by the products. So some of our clearing banks only clear official checks and some

only clear money orders and then [Page 100] some clear both. So we would choose that bank based on the product and then also based on the favorability of our pricing of our relationship with that clearing bank.

Q. The clearing bank that clears both money order platform and the official check platform, what — how does MoneyGram determine that those clearing banks can do both?

A. It's through the contractural relationship that we have with them.

Q. Can a bank choose to do both?

A. If we negotiate that contracturally and decide we want them to do both, yes.

Q. Okay. Is there a benefit to having them do both?

MR. RATO: Object to the form.

THE WITNESS: Not particularly.

[Page 101] BY MS. AHUMADA:

Q. Okay. You used this word several times and we've talked about the system, but the words "official check," what does that mean to MoneyGram?

A. An official check is first a product category. We call it our official check product and then within that it is a negotiable instrument that is issued by our financial institution clients, and then under that umbrella there are as we discussed earlier different types of products under the official check umbrella.

MS. AHUMADA: I'll go through some of those. Okay. I've been asked to take a break. Is that okay?

THE WITNESS: All right. MS. AHUMADA: Okay. We'll go off.

THE VIDEOGRAPHER: The time is 11:39 a.m. We're going off the record.

[Page 102] (Recess; 11:39 a.m.)

(Resumed; 11:59 a.m.)

THE VIDEOGRAPHER: The time is 11:59 a.m. This begins DVD Number 2. We are back on the record.

MS. AHUMADA: Okay. Ms. Yingst, I am marking this document at Yingst-5.

(Yingst-5, 09/14/12 Slide Packet Bates MG-000194 through MG-000208, was marked for identification.)

BY MS. AHUMADA:

Q. Put this in front of you. Ms. Yingst, are you familiar with the this document?

A. Yes.

Q. It's — tell me, what is it?

A. It is a document that at the time was used to have product discussions with prospective institutions that might become our customers.

Q. And earlier today we looked [Page 103] at another document if you recall that also had a title of "Partnership Overview." Do you recall that document we looked at?

A. Yes.

Q. Was that document for an existing client?

A. I believe that one was for an existing client.

Q. Okay. I'll ask you to please turn to the second page which is MG 195. Would — if you know, is this presentation a presentation that MoneyGram would hand a prospective client or person?

A. Typically, yes, but not always.

Q. Okay. And on this second page it says here an agenda.

A. Yes.

Q. Are you generally familiar with these agenda items?

A. Yes.

Q. On the fourth bullet point [Page 104] down it says "The remittance marketplace alternative financial services." Do you know what's meant by that agenda item?

A. Alternative financial services when talking with financial institutions is referencing the kinds of services that consumers might seek out at alternative places, so not at a financial institution such as money transfer being the primary. A lot of financial institutions don't offer that person to person product, so this — the reference here in the context of this deck is that we were going out and talking to that institution about how they might get involved in offering those alternative financial services, meaning nontraditional services that a financial institution would offer.

Q. Okay. When you say "this deck," I'm not familiar with that term.

A. Oh, slide deck, presentation.

Q. Okay. I'd ask if you can [Page 105] please refer to page MG 197. Do you know what information is being relayed here on this page of the presentation?

A. Yes.

Q. And what is it?

A. So this is apparently a presentation that was made to an existing official check client about our other services meaning money transfer. So this information is information about their official check program with MoneyGram.

Q. Okay. If you look at the — underneath official check clients, and it's 2008, there is a dash and the first item there is "4,800 items issued per month." Do you see that?

A. Yes.

Q. What is an item?

A. A check, an official check.

Q. An official check, okay.

And does that mean MoneyGram official check?

A. Yes. This would only summarize data about their — what they [Page 106] are doing with us.

Q. Okay. So as of 2008. This is what you've tallied as the number of official checks that this institution has issued; is that right?

A. On average per month, yes.

Q. Okay. And then at the bottom there it says "7.1 million in balances." Whose balances is that?

A. Those — so when an institution issues a check and that check — the time between when that check is issued and when it comes in to clear to the clearing bank, we have those funds during that time and we — we track on an institution level what their outstanding items are, so those balances represent the outstanding checks at any given time for their official check program.

Q. Balances that are held by MoneyGram?

A. Yes.

Q. Okay. For this specific institution?

[Page 107] A. Yes.

Q. Okay. So actually that is a good segue to a couple questions I had about some things we talked about a little bit earlier today. When, and I'm going to differentiate between what we talked about, the retail or international money order product line and then the official check product line. Okay?

A. Okay.

Q. So for the reconciliation process for the retail money order, if you could, just describe that for me. And I think you said, please clarify me if I'm wrong, that your agent who receives, and I'm going to use the $10.00 example again, receives the $10.00 from the purchaser, that $10.00 goes to the MoneyGram; is that right?

A. Yes.

Q. How long does MoneyGram hold those funds?

A. We hold those funds up until the item either comes in to clear, in [Page 108] which case we're paying the clearing bank as we discussed earlier, or if that item never comes in to clear, we hold those funds until we remit them to the appropriate states as unclaimed property.

Q. Okay. And where does MoneyGram hold those funds?

A. In that aggregate investment portfolio that I discussed earlier, so we have a variety of accounts and investments that that money is held in.

Q. Okay. And does that include financial institution accounts?

MR. RATO: Object to the form. You can answer.

BY MS. AHUMADA:

Q. Bank accounts?

A. They could be bank accounts. They could be other types of instruments such as CDs.

Q. Okay. Could they be like mutual funds?

A. They could be.

Q. Okay. And do you know the [Page 109] percentage of where you're holding that money?

A. I do not.

Q. Okay. Does someone at MoneyGram have that information?

A. Yes.

Q. Okay. Now, the clearing bank that we had talked about, again we're just on the retail money order side, that clearing bank that gets information that a $10.00 money order has been cashed, do they go through any process to reconcile with MoneyGram or do they just pay it outright?

A. The clearing bank doesn't get any of that information. The clearing bank has — the nature of the relationship that we have with the clearing bank is that we maintain the system of record of all of the items that have been issued and the current status of those items, whether they have been paid or not paid. The clearing bank merely allows us to use their route, one [Page 110] of their routing and transit numbers to intercept these items. They don't get detail about the items. They don't — they don't have anything to do

with that item, that particular item other than that item is technically clearing through the Federal Reserve on one of their routing and transit numbers.

Q. Okay. So if I walked in and purchased a 10 — not a good example. If someone gave me that $10.00 money order.

A. Okay.

Q. And I go to my bank and I give that to them, do I get $10.00 in cash right then?

A. If you were the recipient of that money order, you could deposit that money order into an account that you have. You could take it to any kind of a check casher or anyone who cashes checks. Then you could try to cash it if they accepted that type of a payment, totally up to them what they cash and don't cash. But in — yes, you would get the $10.00 [Page 111] if you cashed it or deposited it and you the recipient would have those $10.00.

Q. And when — where do you do that reconciliation process to find out if it's a fraudulent money order, for example, or if I've gone and tried to cash this in several different places and got money already, where does that come into the process?

A. It's on the back end, so it's after the fact. Our system of record knows that these items have been sold and the particular dollar amounts of those items. When we receive the clearing files there is a process by which those clearing files are matched up against the outstand — the system of record and if — if there are exceptions then there is reporting that is generated and there is a whole operational team that would then make decisions as to what to do with those exceptions.

Q. So in the scenario where I go to a check cashing place and they cash [Page 112] my $10.00 money order and you later find out it's fraudulent, does MoneyGram collect its money back?

A. The check casher that deposited that item, if it does happen to be fraudulent and we return that item, then it's the check casher who ultimately is out that money if they can't find you to collect that money from you.

Q. Okay. And for, again, I'm the customer and I go buy that $10.00 money order, what information is being relayed from that agent where I bought that document from, the instrument from, to MoneyGram about me as the customer, if anything?

A. There isn't any information relayed from the agent to MoneyGram regarding the customer.

Q. Do you know — you would know the state it was purchased in, right?

A. For that money order, yes.

Q. And other than that you have [Page 113] no other information?

A. We know the dollar amount and the serial number obviously and who sold it, the state, but we don't have any other data or any other information.

Q. Do you require your agents to get any additional information or any customer information?

A. Can you clarify that we're talking about money orders?

Q. Yes. Again, we're still sticking in that retail money order world.

A. We don't require the agent to obtain any information about the purchaser, except in the situation where the purchaser is known to be purchasing more than $3,000 of money orders in one day.

Q. Okay. Now, for the other platform, the official check platform, if we could go through, so I can understand again, these instruments are paid for in advance; is that right?

[Page 114] A. They are paid for — can you clarify that question, please?

Q. So if I went in and bought, for example, we looked at the form, you said agent and we've done these agent check money orders is under your official check platform; is that correct?

A. Yes.

Q. So let's look at that document. If I went to go get one of those instruments from my bank, I'm expected to, and let's say I want it for $1,500, I'm expected to have those monies come from my checking account I think you said or my account with the bank; is that right?

A. Yes.

Q. Or I can pay in cash I presume?

A. Yes. They are paid for prior to them being issued, yes.

Q. Okay. And those funds there, are they also being transmitted to MoneyGram from the financial institution?

[Page 115] A. Yes.

Q. Okay. And how long does MoneyGram hold on to that money?

A. Until the item either comes in to clear or until that item is — becomes unclaimed property.

Q. And for the same question that I asked earlier but for this product, where is MoneyGram holding that money?

A. The — all of those outstanding funds are aggregated in that same investment portfolio and it could be in any part of that portfolio.

Q. Do you commingle for lack of a better word the money that you're holding for MoneyGram retail purchase versus an agent check money order, for example? Is it all kept within your investment portfolio that you just described?

MR. RATO: Object to the form; outside the topics in the notice. The witness can certainly [Page 116] answer if she knows.

THE WITNESS: Yes, they are — that part, that cash management of the funds that MoneyGram is managing is aggregated and comingled.

BY MS. AHUMADA:

Q. Okay. And the clearing bank that we had been discussing that also you said applies to these agent check money orders, for example that [REDACTED] that we looked at, what is the process there for when someone presents that agent check money order to be cashed? Who is — where do those funds come from?

MR. ROSENTHAL: Objection. I think you misspoke.

BY MS. AHUMADA:

Q. Do you understand my question?

A. I believe I do.

Q. Okay. Please answer it.

A. The — it's the same process. So the item is issued or sold. [Page 117] We hold that money until that item comes in to be paid through our clearing bank. If that — somebody has that physical item and they go and deposit or cash that item, it then comes to us through that clearing process and we pay for it. We pay the clearing bank for it.

Q. Right. The clearing — like you had just described with the retail money order side, that clearing bank's process is to simply allow you to use the routing number and their mechanism to be able to — for me, the person that purchased that agent check money order, to cash it; is that right?

A. Yes. You wouldn't be cashing it at the clearing bank. You would be cashing it at your bank or a check casher or some other institution.

Q. So who does my bank turn to when I put the deposit in to get the funds?

A. That's through the Federal Reserve, the clearing process that exists [Page 118] in the US. So the deposit, the bank, the first deposit, the depository institution then sends those items to be paid for and then they are sent to the clearing institution who then pays for them. So that is all settled through the Federal Reserve process.

Q. And then when does MoneyGram settle with the institution, the clearing institution to pay?

A. When we receive those files.

Q. Okay. And receive those files from whom?

A. In many cases we are receiving those clearing files directly from the Federal Reserve. We are allowed to go and pull those files down by the nature of our relationship with the clearing bank.

Q. Okay. Is that something you've contracted with the clearing banks to do?

A. Yes.

Q. Okay. And for that [Page 119] instrument that I walked in at a financial institution, bought this agent check money order, gave my $1,500 to get that back, what information is that financial institution getting about me, the customer who has purchased that?

MR. RATO: Object to the form. You can answer.

THE WITNESS: The — when a financial institution is issuing an agent check money order, they are normally only issuing those to their own customers. And they are virtually always issuing them with a payee on them, so they know who purchased that item. They know that because they typically aren't offering those items to non-customers. So they aren't telling — we don't require them to obtain any information, but they typically know their customer.

BY MS. AHUMADA:

[Page 120] Q. Right. So they would have information on their customer and I think you also said they have information, they meaning the financial institution, on the payee, so who the money is going to go towards; is that right?

MR. RATO: Object to the form. You can answer.

THE WITNESS: Generally, yes.

BY MS. AHUMADA:

Q. And does MoneyGram receive that money from the financial institutions?

A. No, we do not.

Q. Why not?

A. I don't know the reason that we don't. We never have. We do not ask for that information or retain that information.

Q. Could you get that information if you sought it?

MR. RATO: Object to the form.

[Page 121] MR. TALIAFERRO: Object to form of the question; outside the scope of the topics.

BY MS. AHUMADA:

Q. You can answer.

A. Not necessarily.

Q. And why not?

A. I suppose we could if we rearchitected the whole product and process to obtain that information. Today there is not a mechanism for us to receive nor retain that information.

Q. Okay. But you could create that infrastructure, right?

MR. RATO: Object to the form.

MR. TALIAFERRO: Join.

THE WITNESS: I suppose.

BY MS. AHUMADA:

Q. Okay. So let's look at the document that I have marked as Yingst-5 again. If you go to the page that's MG 198. And the second to the bottom from the bottom bullet point, it says [Page 122] "MoneyGram products, paper based, official checks, money orders." What is meant by "paper based" and then "official checks, money orders"?

A. Our financial paper products, which really has to do with the negotiable instruments, our official

checks and money orders, so that's just referencing the fact that it is a paper payment of sorts.

Q. Okay. Are they the only paper based instruments or products that MoneyGram services or deals with?

MR. RATO: Object to the form. You can answer.

THE WITNESS: Yes. Right now, yes.

BY MS. AHUMADA:

Q. Okay. And, I'm sorry, if you go to the front page, it looks like this document is dated September 14, 2012. Do you see that?

A. Yes.

Q. Okay. At that time there is [Page 123] some information here about MoneyGram at a glance as we see the title of the document, correct? And it says again, the second to bottom bullet point underneath the paper based product information, it says how many financial institutions are being served globally. Do you know if that number has increased since 2012?

A. I do not know for sure, no.

Q. Do you think it's decreased?

MR. RATO: Object to the form. You can answer.

THE WITNESS: Because that's listed as a global number, I don't know.

BY MS. AHUMADA:

Q. So that's a good issue, globally. So is this product, MoneyGram product we've been talking about, the paper product, that's a product that you deal not only in the United States but elsewhere; is that right?

A. These paper products are [Page 124] only sold or contracted with institutions that are in the US and there are a couple of Canadian entities.

Q. So globally just means US and Canada?

A. I believe that that number is the number of global financial institution relationships that we have, however, that is — that's not necessarily tied to the paper based. I'm not sure who created this, but that — we probably had 7,000 or had 7,152 global financial institution relationships.

They were not all using those paper based products at that time.

Q. So whatever products would, for example, another global entity be using if they're not using these paper products?

A. They're using money transfer. They are money transfer agents.

Q. Okay. And underneath that it says "4,000 plus domestic." Do you [Page 125] know if that number has increased since 2012?

A. That number has decreased since 2012.

Q. Do you know how many domestic financial institutions MoneyGram contracts with?

A. I can estimate that number. I don't know exactly what that number is. I believe that it's around 2,500 now.

Q. Is there a reason for the decrease?

A. Yes.

Q. And what is that?

A. There are — institutions have left our programs and taken — found other ways to handle their official check program. Some of it is due to merger and acquisition and some of it related to the financial institution relationships that we had might be because we have exited some unprofitable money order relationships, so there is several reasons why.

[Page 126] Q. Does MoneyGram continue, does it now currently market its official check platform to financial institutions?

A. Yes.

Q. So is MoneyGram, is its goal

to increase the financial institutions that are using this product?

A. Yes.

Q. And how do you market that?

A. We, a lot of our marketing is really hands — it's more being involved in the industry. It's not marketing per se. So the team goes to banking conferences and we get involved in state banking organizations and we have done a little bit of, you know, marketing in the form of, for instance, magazines, the credit union magazine ad, but most, a lot of the marketing is more just being involved in the industry and creating awareness.

Q. Okay. Besides the credit union, the other financial institutions that you market to, do they fit a certain [Page 127] profile? For example, size, do you market to a certain size financial institution?

A. Our target client is — I don't want to say the specific size, but it would be, you know, regional, super

regional and smaller, not the — not really the big, big banks.

MR. RATO: If I could just note something for the record just because we're getting into certain marketing things, we'd just ask that the transcript to the extent it's not already be designated marked confidential.

MS. AHUMADA: Absolutely.

BY MS. AHUMADA:

Q. How about geographically, do you market this product line to certain regions?

A. No, we cover the whole United States.

Q. Okay. If you could turn to page MG 200. Are you familiar with this [Page 128] I'll call it a chart?

A. Yes.

Q. Okay. And what is it?

A. This is a representation of obviously the life cycle of an official check and all the different things that happen and the process around official checks and it covers some of the different stages and the different key steps that happen with an official check.

Q. Okay. And when we came back from the break or maybe right before we left the break actually, you went over what official checks meant to you, right, and I think you said it's a product category and then you said it's negotiable instruments, correct? So this life cycle, are we talking about everything that you classify as an official check or is it something specific?

A. This is a — this is intended to be a general representation of any kind of official check with the

[Page 129] exception as noted that escheatment is only limited to teller and agent type things.

Q. Okay. Let's sort of go through that. Full escheatments, that means MoneyGram escheats and then for teller checks and agent checks, is that what that means?

A. Yes.

Q. And I think you said this earlier, the cashier's check, that's different, right?

A. Yes.

Q. Okay. All right. So can you just go through that cycle and explain what each of these things mean?

A. Sure. Issuance is just the actual creation and issuance of the check. So they, within the institution, they issue that item meaning they create it and give it to their customer. As it says here, we — part of what we provide to them as our service is that we provide the actual check, stock the inventory.

[Page 130] The next piece of the process is that the institution is required to create an issue file of all of the items they have issued meaning serial number, dollar amount and their account number associated with it and they create that file and they transmit it to us. Typically that happens overnight or the next morning.

The — they also at that time it says fund here, fund really means the remittance of that money to MoneyGram, which again typically happens the next day after the item is issued.

So we get a file of all the items and we get the money to cover those items from the financial institution clients. Then that item is somewhere cashed or

negotiated by the payee. It then will come to us in the clearing — in the clearing process through our clearing bank.

We then do the reconciliation of those items that come [Page 131] in to clear against what we know to be valid and we then handle all of the exceptions, create some reporting for the financial institution clients. And then we, once that processing is all done for those items, we have the images of those items and we also provide — so that's the archive bullet on here. We provide the servicing, the customer servicing to that financial institution and then obviously if items are not cleared and they reached that particular time frame we would handle the escheatment.

Q. Okay. Let's go through some of these specific. Under the capture transmit fund cycle, it says here, "Capture issuance through a data processor." Who is the data processor?

A. It's really dependent upon the financial institution client, how they capture that. Sometimes it is a check register file that comes out of their teller system. Sometimes it is a file they create in Excel. Sometimes it [Page 132] is a file from their core data processor, but somewhere on the financial institution end they have to create some kind of list of the checks that were issued and tell us how they — tell us what they were, so that's what capture and transmit.

Q. Is there a step missing here? Or maybe I'm just misunderstanding. Where does the step of the financial institution transmitting the money it collects for the instrument goes, and I think you said it goes to MoneyGram, where does that fall in the process?

A. That's what the word "fund," the word "fund" is.

Q. Okay, okay. And that you said happens next day, overnight?

A. Next day.

Q. Okay. So under the archive, what specifically are you archiving?

A. That is related to the retention of the paid items, that images [Page 133] of the paid items. So we call it our image archive.

Q. Okay.

A. So that really, it actually is seven years plus current now. It's not 15 anymore. It's what's legally required, seven years, but our archive is really referencing our retention of those images of the paid items.

Q. And so the actual image of, for example, an agent check money order?

A. Exactly.

Q. Okay. So on that document it would have, for example, payee information on the image?

A. On the image of the item, yes. There could be — there would be a payee and there could be any other information that perhaps a purchaser wrote on that item, an account number or there could be information on there, yes.

Q. I think you — okay. And I think you covered this, but I just want to ask you when it happened. It says [Page 134] here it's archived for 15 years and you said it's changed to seven?

A. Yes.

Q. And when did you make that change?

A. I believe we made that change last year.

Q. Okay. And why, why so?

A. We were keeping more than was legally required to keep, so we just decided to go with the legal requirement.

Q. Okay, done with that one. Just while we're —

MS. AHUMADA: We'll stop at one o'clock if that's okay.

MR. TALIAFERRO: Yes.

(Yingst-6, Photocopy Bates MG0002394, was marked for identification.)

BY MS. AHUMADA:

Q. Ms. Yingst, I've handed you a document that's been marked Yingst-6. Take a minute to review it. Next, just to again table set, if you go back to the [Page 135] previous document which was marked I believe 5. You have it right in front of you. If you go to the — actually it's in middle there, but it's MG 201. And you'll see the outsourcing official check value proposition chart that we previously looked at in another exhibit. And I had you review on the chart the third — on the second column and the third line down. And we talked about the different MoneyGram, what you said were under the official check umbrella, and they were a teller check, agent check, cashier's check, money orders. Do you see that?

A. Yes.

Q. So now I want you to refer to Yingst-6. Okay. And do you know what this is, the image?

A. This appears to be a teller's check issued by one of our financial institution clients.

Q. Okay. First, what is a teller's check?

[Page 136] MR. RATO: Object to the form to the extent it calls for a legal conclusion. You can answer.

THE WITNESS: A teller's check is a type of official check that is issued by the financial institution. MoneyGram is the issuer of the item. They are the drawer of the item and it's basically a payment order that they have made either on their behalf or on behalf of their customer.

BY MS. AHUMADA:

Q. Go on the top there. It says Elizabethton Federal Savings Bank. Is that your customer?

A. Yes.

Q. Okay.

A. I don't know if they're still our customer, but yes.

Q. At the time that this was issued.

A. Okay.

[Page 137] Q. What does it mean that this Elizabethton is the drawer?

A. That is their defined role on the teller's check. They are the — contracturally on the teller's check they are the drawer of the item meaning they are ordering payment. I believe that from a nonlegal perspective, that's what I understand that to mean.

Q. All right. If you look here the value on here is $5,000.

A. Yes.

Q. Do you see that? For these teller's checks, are there monetary limits on the amount?

A. No.

Q. And where does the $5,000 come from? Not a very good question, but this is a negotiable instrument, correct?

A. Yes.

Q. And it's for $5,000, right?

A. Yes.

Q. So has someone paid $5,000 for this negotiable instrument or, for [Page 138] example, I'm going to give you, or is this a checking account that's going to come out of my personal checking account at some point?

MR. RATO: Object to form. You can answer it.

THE WITNESS: Official checks, teller's checks could be funded in a number of ways. I think that's the question that you're asking. The customer could have needed this check to pay for something, to buy a — put a deposit on a car or, you know, money towards purchasing a home or anything. So if the customer has come in to the institution and needed an official check or a teller's check, a good funds check, they would take that money out of the customer's account and put it into the bank's account and then ultimately send it to MoneyGram.

[Page 139] There are also situations where the financial institution would be using this check to pay for their own — their accounts payable or to do mandatory distributions from an IRA. So there are multiple uses, so in some cases that money is coming out of the financial institution's funds and in some cases it's coming out of a customer account depending on the need and the nature of the payment.

BY MS. AHUMADA:

Q. So in a situation where it's a customer that's requesting this teller's check and it's going to be a $5,000 amount, is that financial institution which is your client, right?

A. Yes.

Q. The financial institution, is that — is it taking that money out of — let's say I choose to have it come out of my checking account. Is that [Page 140] money coming out of my checking account when I, in order to receive this in hand or is it a promise I'm going to make that at some point when someone cashes this, then the money will be taken out of my account?

A. No, that money is coming out when this item is coming into variance before this item.

Q. Is there a fee associated with it, along with that?

A. Most institutions charge a fee for that, although they have the ability to waive that fee based on the relationship with the client or other situations.

Q. Okay. And similar to what we discussed with the other instruments, that $5,000 that is being taken out of my checking account, where does it go?

A. So normally, and I would say that within each financial institution they would determine their flow of funds, but from my experience they would be [Page 141] removing that money from your account, putting it into some kind of a holding account, not a consumer account, but a general ledger account of some sort at the institution, and it would stay in that account until the time the next day when they wire MoneyGram the money representing all of those checks, so typically going into some kind of a general ledger account.

Q. Okay. And like the money order that we had talked, the retail money order, the $5,000 gets sent to MoneyGram next day or overnight?

A. Yes.

Q. But in the interim it's being held in some account of the bank?

A. Yes.

Q. Okay. And that's I assume similar to the money order where the agent is holding on to the money in some way —

A. Yes.

Q. — for the money order, [Page 142] right? And then the agent transmits that money to MoneyGram, right?

A. Yes.

Q. Okay. Does MoneyGram guarantee the $5,000, this instrument, the $5,000 that will be paid?

MR. RATO: Object to the form.

THE WITNESS: A teller's check is considered a good funds check. We don't provide a guarantee, although it's accepted as a good funds check. The institution is — that's generating it is paying us for it, so of course we have the money, but I — the term guarantee doesn't really come into play anywhere.

BY MS. AHUMADA:

Q. Okay. All right. Now, you used the term "good funds" representing the $5,000 from the teller's check and I believe you used that same term when you [Page 143] refer to a money order and the denomination of that money order that they are both good funds? What does that mean?

MR. TALIAFERRO: Object. Objection; mischaracterizes part of her testimony.

BY MS. AHUMADA:

Q. You can answer.

A. A money order is not a good funds item. I believe that's what we said at that time. The — when I use the term "good funds" I am referring to under uniform commercial code certain items are considered next day availability items, and so a teller's check is that type of an item. A money order is not.

Q. Okay. And I apologize for getting that wrong. Is the money, agent check money order, is that what you referred to as good funds? I know you had used that phrase. I'm just trying to —

MR. RATO: Object to form.

[Page 144] MR. TALIAFERRO: Object to the form of the question.

THE WITNESS: That is not. A money order of any kind is not a good funds item. It's not a next day availability item.

BY MS. AHUMADA:

Q. Okay. Now, why if I have a checking account with my bank, let's say this bank here, why would I get a teller's check and not just simply write a personal check?

MR. RATO: Object to form. You can answer.

THE WITNESS: There are scenarios where the payee or whatever you're using that check for doesn't want a personal check because it may not be represented by good funds. I can write bad checks all day long, but if it is a bank check then it is typically

accepted as a funded check. So there are certain types of things [Page 145] that, for instance, if you were going to a real estate closing, they would not want you to write a personal check or if you're purchasing a car they often don't want a personal check. Sometimes they do, sometimes they don't. There are situations where you need as a consumer, you need to pay for something with a good funds type of check.

BY MS. AHUMADA:

Q. Okay. Now, you said money orders don't have the next day availability and you said I was wrong on this, that it's not good funds, but is it the same principle that if I have a checking account and I have to pay a utility bill, for example, $500.00, what would be the, and I think you covered this already, the benefit of using that $500 money order to pay for that utility versus a personal checking account?

MR. RATO: Object to the [Page 146] form.

MR. TALIAFERRO: Object to the form.

MS. AHUMADA: It's a very clumsy question and I take it out. Strike that.

BY MS. AHUMADA:

Q. Is there similarities then for this, you know, what you're calling good funds under the regulations for a teller's check and the purpose of a consumer wanting that instrument, do you see comparisons with why someone would want to buy a money order?

MR. TALIAFERRO: Object to the form of the question.

BY MS. AHUMADA:

Q. You can answer.

A. I think the decision to purchase a money order by a consumer is more based upon their banking habits or lack of banking habits. They either don't use banks or they don't want to use banks. They're more comfortable with a [Page 147] different — they have different flow of funds in their world and they make a decision to use a money order based on not necessarily having a bank account or not wanting to have a bank account.

I think the use of a teller check by a consumer is more a matter of, A, dollar value in many cases, and B, this is a bank consumer who has a need to have a bank check for some purpose rather than a money order which would not be a next day good funds type of item.

Q. Does MoneyGram market its money orders as a — as an instrument that will be accepted anywhere it's presented?

A. Not necessarily because that's not always the case.

Q. When is it not the case?

A. There are check cashers who, for instance, may not cash MoneyGram money orders or may not cash money orders at all, so it's not a universally acceptable item in my opinion.

[Page 148] Q. Are there banking institutions or the same retail institution that you just described, these agents, that would refuse to also honor a teller's check?

A. Not — not to my knowledge with the exception of the fact that a check casher may not cash a $5,000 check because they don't have $5,000 in their cash drawer. They don't want to pay out $5,000, so they may have some desire not to cash it based on the cash

flow of that transaction, but not necessarily based on the fact that it's a bank check, a teller's check.

Q. So in MoneyGram's position their money orders don't have the same, I can't even think of the right word, but gravitas as a teller's check. Is that sort of what you're saying?

A. I think an official bank check has a different level of acceptability than a money order does.

Q. Okay. And is that due to [Page 149] any specific reason?

A. I think it's a common perception that a bank check is a more reliable instrument than a money order.

Q. Okay. Does MoneyGram market its money orders as a reliable instrument?

MR. TALIAFERRO: Objection; asked and answered.

MR. RATO: Object to the form. You can answer.

THE WITNESS: Yes. I mean, it is, yes.

BY MS. AHUMADA:

Q. Okay. So is it your, MoneyGram's testimony that it markets it as such, but it's not?

MR. RATO: Objection to form.

MR. TALIAFERRO: Objection; mischaracterizes testimony.

THE WITNESS: You used the word "reliable." It is a reliable payment method. It is not a [Page 150] guaranteed payment method. It is not a next day availability payment method, so I would agree that we used the word "reliable."

BY MS. AHUMADA:

Q. Okay. For this image, if you go back to I think it's Yingst-6, like we did with the others on the middle of the page here it says "To the order of." What gets filled out there?

A. That would have been the payee of the item.

Q. Okay. And what information of the payee gets placed there? For example, is it solely the payee's name or institution name?

A. It likely — it really depends on the institution and what they choose to print there.

Q. Okay.

A. They might print a payee.

They might print a payee name and address depending on how they have their system set up and what they require.

[Page 151] Q. Okay. Is that something the financial institution decides itself what information to put there?

A. Yes.

Q. Okay. Now, below that you'll see that it says "Issued by" and it says "MoneyGram Payment Systems." Do you see that?

A. Okay.

Q. Okay. So it's drawn — the drawer is the credit union here, it's a savings bank, but it's issued by MoneyGram; is that right?

A. Yes.

Q. And then the drawee is [REDACTED]

A. [REDACTED]

Q. [REDACTED] And is that a clearing bank?

A. That is a clearing bank.

Q. Okay. And the numbers that are below that, is the first set of numbers a routing number?

[Page 152] A. The first set of numbers is the serial number. You'll see that matches what's up in the upper right-hand corner.

Q. Okay. Of the instrument?

A. Yes, of the instrument.

Q. And then the second sequence of numbers?

A. The second sequence of numbers is the routing number.

Q. Does that route to [REDACTED]

A. Yes.

Q. Okay. And then the second — the third sequence of numbers?

A. That is this institution's account with MoneyGram.

Q. This is — this —

A. That's the account number on our system that represents [REDACTED]

Q. Okay. All right. And how long — I think you said that the $5,000 would be transmitted from the savings [Page 153] bank to MoneyGram. How long does MoneyGram hold on to that — to those funds?

A. Until the item either clears or it reaches the time frame where it needs to be escheated.

Q. And does that also get, the $5,000 and anything else you obtained from Elizabethton Federal for the official check platform, does that all go to that managed account that you described earlier of MoneyGram?

A. All of those outstandings, outstanding money representing checks are in that aggregate investment portfolio that we discussed.

Q. Okay. Does the bank get notice once the teller's check has been cashed?

A. They don't specifically get notice. They have access through our system that we give them access to where they can see the current status of any item at any time. They can see daily [Page 154] totals of what has come in to clear. They can run reports if they wish of all the cleared items from today to see what came in. We don't specifically give them notice on each item, but their — they have the ability to see when that item has cleared.

Q. What about the financial institution's customer who has purchased and then paid this $5,000, do they get notice of any form that it's been cashed?

MR. RATO: Object to the form.

THE WITNESS: No.

BY MS. AHUMADA:

Q. And why not?

MR. RATO: Object to the form.

THE WITNESS: We don't have any kind of direct relationship, first of all, with that consumer, that client of the institution. And there is no mechanism for

us to tell them when that item has [Page 155] cleared. They can go to their — they could go to Elizabethton and ask for status of that item or ask for a copy of the paid item if they needed it.

BY MS. AHUMADA:

Q. What — if you know, what are the differences between the teller's check that I'm looking at and the international/retail money order that we talked about at the beginning of the day?

A. Well, one of the key differences is that the drawer on a teller's check is the drawer to the financial institution and the drawer on the international money order is MoneyGram. Another difference would be that next day availability category, categorization of a teller's check versus not next day availability for the international money order. Those — I mean, those are some. The dollar value that's allowed on those items is different as well. Those are some of the [Page 156] differences.

Q. Okay. How about similarities, can you describe to us some similarities?

MR. TALIAFERRO: Object to the extent it calls for a legal conclusion.

THE WITNESS: Obviously the drawee on both of those items is one of our clearing banks and those items do go through the same back end processing, different systems, but we still do the reconciliation. We still hold the funds until the item clears, however those are some of the similarities I think.

BY MS. AHUMADA:

Q. How about the fact that in each of those instances, the teller check and the money order that we talked about earlier in the day, that someone is

paying up front for the instrument? Is that a similarity?

[Page 157] A. Yes.

Q. Do you believe that both this teller check and the money order that we discussed earlier today both have susceptibility of abandonment because of the notice issues that we discussed?

MR. RATO: Object to the form.

MR. TALIAFERRO: Mischaracterizes testimony.

THE WITNESS: I think as I answered earlier, any type of check has the potential to be abandoned. And I don't know that there is substantial difference, although I would suppose that a higher dollar value item might be less susceptible to abandonment because of the value of it. Other than that I think it's similar.

BY MS. AHUMADA:

Q. This customer which was yours at one time, we don't know if it still is, [REDACTED], what [Page 158] interaction do they have with the, specific to these teller's checks, do they have with this clearing bank, [REDACTED]

A. They don't have a relationship with the clearing bank.

Q. At all?

A. No.

Q. Okay. Can they get information? Let me back up. You had described sort of a mechanism that you can go online or in your portal system and get information that this thing, this financial institution gets

that information from MoneyGram. Can they do the same? Can [REDACTED] get bank information from this clearing bank about the status of a teller's check, for example?

A. No. The clearing bank doesn't have any of that information. They don't know anything about these items other than that we have a [Page 159] contractual relationship to clear through them.

MS. AHUMADA: Okay. I think this is probably a good place to stop before we take a lunch.

THE VIDEOGRAPHER: The time is 12:56 p.m. We're going off the record.

(At 12:56 p.m. a luncheon recess was taken.)

(The deposition resumed at 1:37 p.m.)

THE VIDEOGRAPHER: The time is 13:37 p.m. This begins DVD Number 3. We are back on the record.

(Yingst-7, Photocopy Bates PA_0000351, was marked for identification.)

BY MS. AHUMADA:

Q. Ms. Yingst, I am putting in front of you a document that I have just marked Yingst-7. Take a look at that [Page 160] document. And are you familiar with the image that's being — that's on this piece of paper?

A. It appears to be an — an example of an agent check.

Q. Okay. Have you seen this type of instrument before?

A. Yes.

Q. Let's go through it like we've done with the others. Now, you have just called this an agent check. If you look under sort of the center of the page right beneath the word "Void" it says "Expense check." Is this also called an expense check?

A. Yes. This particular one is, yes.

Q. Is expense check the same thing as an agent check or are they different in any way?

A. This is technically an agent check as we discussed in the prior conversations and the product under the official check world. This is an agent [Page 161 check. The institution can call this check any number of things. So the expense check is what they are titling this check, but it is an agent check as described in our documentation.

Q. Okay. Let's just sort of break that down a bit. Is agent check the same thing that we had previously been looking at, an agent check money order?

A. They're — to us they are two distinctly different product categories.

Q. And how are they different?

A. Well, so obviously one says money order on it. One includes agent check money order, includes all of the relevant legal language on the receipt in the back are related to purchaser's agreement and the money orders, service charges and things like that.

So one difference is that a money order is included, includes — an agent check money order is inclusive of [Page 162] all that language. I believe that the drawer, the drawer and the issuer are the same for those two instruments, but they are not necessarily used the same way.

Q. Are there any other differences?

A. There are some titling restrictions. For instance, you can't call an agent check money order a bank check or an official check. You can't call it an expense check. It has to be called a money order. That's one of the differences.

Q. An agent check money order has to be called a money order?

A. Yes, yes.

Q. Previously when we talked about the two different programs you had, you called one as the money order program and then you had one that was the official check program, right? And under that official check program I believe you told me agent check money order falls under that sphere.

[Page 163] A. It is under that sphere in the sense that it is processed on our official check platform. It is still a money order, but due to the need of the financial institution, it's being handled on the official check platform.

Q. Okay. With regard to just the agent check, and I will be very specific with the language, when I say agent check I mean that instrument and when I mean the other I will specifically say agent check money order.

A. Okay.

Q. With regard to the agent check, and I asked you for differences, you said they have different product categories. And what does that mean?

A. In our system they are a different product. We call — we have it — there is a product number in our system and an agent check money order is different

from an agent check. So it is — it has some similar characteristics such as the issuer, the drawer, agent for [Page 164] MoneyGram is on those items. An agent check would be used in a different, you know, a different manner by the financial institution. I think I answered your question.

Q. Okay. So in terms of the document that's in front of you that's been marked Yingst Number 7, this even though it says expense check, you, MoneyGram, characterizes it as an agent check?

A. Yes.

Q. Full stop, okay, agent check. What are the differences between an agent check and a teller's check?

A. So a teller check does not say agent for MoneyGram on it or, because a teller check is a MoneyGram instrument, however the financial institution is the drawer of that instrument, so they're the one that's ordering payment on that check, whereas an agent check is completely a MoneyGram item and we are the drawer and the issuer.

[Page 165] Q. On an agent check, full stop?

A. Agent check compared to a teller check which I believe is what you asked.

Q. Okay, thank you.

For the top here that's listed here, it says drawer MoneyGram and drawee is it looks like Bank of — I can't make that out. Can you make that out under drawee?

A. [REDACTED] that is one of our clearing banks.

Q. Okay, okay. And so you when I asked you for differences, I'm looking at what's been previously marked Exhibit Yingst-6. You used the words issued by MoneyGram and here it says drawer is MoneyGram. Tell me what the difference is of that.

MR. RATO: Object to the form to the extent it calls for a [Page 166] legal conclusion. You can answer.

MR. TALIAFERRO: Join.

THE WITNESS: Well, a teller's check, by definition of our contract with the institution and the type of instrument that it is, the issuer of a teller's check is MoneyGram. However, the drawer is the institution. On the agent check the drawer is MoneyGram and they are issuing that check or draft as an — I'm not sure about the legal distinction, but they are issuing it as an agent of MoneyGram.

BY MS. AHUMADA:

Q. Okay. All right. And is the, I can't make out what the agent is, but is this a financial institution?

A. It would be a financial institution, and I can't make it out either, but it would only be a financial institution.

Q. In the instance of a [Page 167] teller's check is Elizabethton Federal considered an agent of MoneyGram?

A. No.

Q. Why not?

A. They are not issuing that item as an agent of MoneyGram, from I believe — I believe the contracts are part of the discovery, but it's — they are not an agent of MoneyGram. They're not defined as an agent of MoneyGram. They are issuing that check. They are

the drawer of that check, people who are getting payment, and we are the issuer of the item, but they are not an agent.

Q. Is that something that your financial institution client chooses, whether or not they want to fill, have that role as an agent of MoneyGram?

A. No.

Q. Who decides that?

A. It's more a byproduct of which types of checks they are issuing.

Q. Okay. Now, if you go back to Number 7, Yingst-7, there is, at the [Page 168] top there is a number and right underneath there is a check amount.

A. Yes.

Q. And what would normally go there?

A. The right side of that check is where the amount of the item would be printed when this item was actually issued. This is a sample of blank stock. It hasn't been printed yet —

Q. Okay.

A. — so the dollar amount would be there.

Q. And under where it says "Proof" and there is a line, it looks like a signature line; is that right?

A. Most likely, yes.

Q. Who would sign that?

A. The financial institution.

Q. Okay. And pay to the order of, is that for payee information?

A. Yes.

Q. So if I understand, is this an instance where the financial [Page 169] institution is paying some sort of obligation and they would issue this expense check to do so?

A. Based on the titling of it, yes, that's what I would believe.

Q. Okay. So if a customer came in to whatever agent is denoted here and asks for an expense check, can they get that?

A. No, no.

Q. What about an agent check, can the customer go to its banking institution with whom you have a contract and ask for an agent check?

MR. TALIAFERRO: Object to the form of the question.

THE WITNESS: They're not — no, they're not coming in and asking for an agent check. When a customer comes in, they are asking for a bank check. It's up to the bank to determine what kind of check, whether they're issuing a cashier's check or whether they [Page 170] hand them a teller's check and whether they would — typically agent checks might be an item that they're offering, but it's definitely not a next day availability item, so they aren't often used to issue checks for customers.

BY MS. AHUMADA:

Q. If this had been made out for say $10,000, does that financial institution pay MoneyGram that $10,000 to get this written instrument?

MR. RATO: Object to the form. You can answer.

THE WITNESS: They would — yes, they would issue this check today and they would include that amount in the wire that they sent us the next day.

BY MS. AHUMADA:

Q. Okay. And here on the drawee, you said there is a bank that's noted here. And is that the clearing [Page 171] bank?

A. Yes.

Q. And is that the same process we had described earlier today where the clearing bank provides the routing information and the mechanism for the payment of one of your instruments?

A. Yes.

Q. Okay. Would your financial institution client get notice that this check was cashed?

A. Not particularly. They would not get the notice. They would have the ability to see the status as previously described.

Q. Is an instrument like this a cash equivalent?

MR. RATO: Object to form. You can answer.

THE WITNESS: An agent check is not a next day availability item.

BY MS. AHUMADA:

Q. Now, if this is a check that [Page 172] the bank is writing for its own obligations, could you explain to me why a bank would use this mechanism or this instrument as opposed to from its own funds and write a check from its own funds?

MR. RATO: Object to form. You can answer.

THE WITNESS: They are writing it with their own funds. I mean, their own funds are ultimately paying for this item. When an institution outsources their official checks to MoneyGram, they typically issue all checks that they are issuing, whether it is for a customer need or for their own payment need, they typically outsource all of their check processing, all of their official checks to MoneyGram. There are some exclusivity pages of the contract where if they're going to use us, [Page 173] we want them to use us for everything. So they don't typically issue some checks through us and others on an inhouse account, an inhouse working file account.

(Yingst-8, Photocopy Bates MG0002394, was marked for identification.)

BY MS. AHUMADA:

Q. Okay. Ms. Yingst, I have handed you a document that I have just marked as Yingst-8.

A. Yes.

Q. Yingst-8. Are you familiar with the instrument that's copied here on this document?

A. Yes.

Q. Okay. Do you see the title of it says "Personal Money Order"?

A. Yes.

Q. It's the first time I have heard that term today. So what is a personal money order?

[Page 174] A. So again to the previous conversation, this item appears to be an agent check money order based on the information that's on here. As with other checks, there are certain titles that they can use for those items and in this case they've chosen to call

this a personal money order. They aren't required to have agent check money order specifically on there. They can call that item a personal money order. So they've chosen one of the — a title that they are allowed to use and called this a personal money order.

Q. Okay. And if you look on the left-hand side, it says "Mercer Savings Bank" and underneath it says "Agent for MoneyGram." Are the financial institutions that are using your agent check money orders, are they deemed, all deemed agents for MoneyGram?

A. Yes.

Q. Okay. Like they were with the previous document we looked at with [Page 175] just agent check period, right?

A. Yes.

Q. Okay. So tell me the differences between this personal money order/agent check money order and the money order that someone would purchase through one of your retail agents?

A. The primary difference between those is that an agent check, it's — it's not a legal distinction on the item. So, one, this item would not have — I see not valid over 1,000 on here, which is certainly a choice to put that on there, but on the agent check money order we don't have, necessarily have that dollar amount restriction.

The other key difference is that an agent check money order is issued, physically issued through the financial institution's platforms, their hardware, their printers, their systems. A retail money order or an international money order if we use that term is always issued through MoneyGram provided [Page 176] hardware and point of sales.

So the — one of the key reasons why an institution would issue an agent check money order versus an international money order is because they wish to do that. I think I said this before. They wish to do that through their own partner, their own process.

Q. This financial institution in the case of what's in front of you, they chose to call it a personal money order and that's their choice?

A. It's their choice within some parameters. There are some titles that they can use and some titles that they can't use and I believe there is a matrix of those titles that's been provided.

Q. Okay. And the denomination amount being invalid for over $1,000, who decided that?

A. I'm not sure. They may have requested that that be on there. Sometimes they want that on there.

[Page 177] Q. And that's the same amount that MoneyGram issues or has for its retail sales money orders; is that correct?

A. Yes.

Q. And under the drawee here, [REDACTED] Is that the clearing bank?

A. Yes. I see this item is from 2010. [REDACTED] They were a clearing bank at the time.

Q. Okay. So this $32.70, has a customer of the bank presumably paid the bank $32.70?

A. Yes.

Q. For this instrument, excuse me.

A. Yes.

Q. And in turn as we said earlier today, that $32.70 gets sent to MoneyGram next day or overnight?

A. Yes.

[Page 178] Q. And it's the same process we've talked about earlier today that upon reconciliation from the clearing bank, $32.70 leaves MoneyGram and goes to the clearing bank?

A. Yes.

Q. Now, under here it has listed pay to the order of. So that would be the payee information?

A. Yes.

Q. Underneath that it says remittor and an address. What's expected to be there?

A. I believe that remittor would have been the client who purchased the money order or the customer of the bank and their address, so that's their customer.

Q. Okay. And then if you look on the right-hand side it says here purchaser, signer for, and I can't make that out. So who is signing there?

A. The purchaser. The purchaser should be signing the money [Page 179] order.

Q. How is that different from the remittor?

A. One is the signature and one is printed. I don't think it's intended to be —

Q. Okay.

A. — duplicate.

Q. And address information is listed there as well; is that right?

A. Yes.

Q. And MoneyGram keeps an image of this, at least it did it for 15 years and then at some point changed it to seven years, kept an image; is that right?

A. Yes, only after the item clears. We have the images of the cleared items. We don't have that for the items that have been issued. We don't know.

Q. Okay.

A. Only after it clears.

(Yingst-9, Photocopy Bates [Page 180] PA_0000347, was marked for identification.)

BY MS. AHUMADA:

Q. Ms. Yingst, I am handing to you a document that's been labeled Yingst-9. It's a two-page document. Just take a quick look at it and let me know when you've reviewed it.

A. Okay.

Q. Have you seen this instrument before?

A. I haven't seen this particular item, but I've seen this type of instrument before, yes.

Q. Okay. And what is it?

A. This appears to be a teller's check issued by BancorpSouth who is one of our clients.

Q. Look at the top image there. It says "Official Check."

A. Yes.

Q. Why is it label "Official\ Check" if you're telling us it's a teller's check?

[Page 181] A. Again, teller's check is the kind of product that they would have had on their contract

with us, but an official check is an allowable title for that, so they have chosen to call this an official check.

Q. Okay. And when you say "they," Bancorp?

A. The institution, BancorpSouth.

Q. And why would a bank choose to do that, to call this document an "Official Check"?

MR. RATO: Object to the form. You can answer.

THE WITNESS: Again, they have a number of choices about what they may call it and it's really their decision to call it that probably based on maybe what they called their checks prior to coming to MoneyGram. They wanted to keep consistency. It's also possible that was the title they [Page 182] deemed the most appropriate from an acceptability perspective.

BY MS. AHUMADA:

Q. So what you have in front of you that they're marked "Official Checks," this is no different, in fact it's the same thing as a teller's check; is that right?

A. Yes.

Q. So everything we've gone over previously, the document we looked at and the teller's checks apply to what's here?

A. Yes.

Q. Is that right?

A. Yes.

Q. Okay. Does MoneyGram have\ an instrument that is separate and apart from a teller's check or anything other that we discussed today that is called an official check?

MR. TALIAFERRO: Objection to the form of the question.

MR. RATO: Join.

[Page 183] THE WITNESS: Official check is the overall product category. There is not an instrument that is legally defined in our contract as an official check. It would be one of the other — one of the four that we've been discussing.

MS. AHUMADA: Okay. Sorry, wrong way.

(Yingst-10, Photocopy Bates MG0002396, was marked for identification.)

BY MS. AHUMADA:

Q. Ms. Yingst, I've put a document in front of you that I've labeled Yingst-10. Are you familiar with this instrument?

A. Again, I've not seen this particular check before, but it appears that — it appears to be an agent check I think.

Q. And how do you know that?

A. Just if I could have one moment to look at it, please.

[Page 184] Q. Absolutely.

A. Well, I'm not sure where this example came from, but it appears to be the account number that is on this item, the 015 number at the bottom, is indicative of an agent check. However it looks like the title "Official Check" is on there, so I'm not sure why that is.

Q. So an instrument that's titled official check, we saw one that was actually a teller's check, right? And

this one, again titled "Official Check," in your estimation it's an agent check?

A. It appears to be an agent check. There are a variety of titles and I don't have that list committed to memory that can be used on an — on an agent check.

Q. Okay.

A. And I don't know if official check is one of those or not.

Q. If you look underneath the title of "Official Check" it says "Void [Page 185] after 90 days." I don't recall seeing that kind of language in the previous official check category that we reviewed. Is that — who decides that?

A. If that is on a check it's typically at the request of the financial institution of the bank, in this case Independent Bank. Sometimes they wish to put that kind of language on there to promote faster clearing of items and not have them become dated.

Q. And the signer there, who would that be? Authorized — I don't mean who actually signed it, but what's expected there?

A. It would be signed by somebody at the financial institution.

Q. A representative of the bank?

A. A representative of the bank, yes.

Q. And where would the information go for the person or the customer who purchased the official or [Page 186] requested the official check?

A. Again, the bank would have that information. We don't have that information. Oh, you mean in terms of on here?

Q. Yes.

A. I don't know for sure. Sometimes they — they want these items structured in a certain way because, again maybe they want it to look like their old one did before they outsourced. I believe that that would probably be the remittor without knowing that.

Q. And we have at the bottom there the drawer, MoneyGram, and the drawee, [REDACTED]. Again that's the clearing bank is the drawee; is that right?

A. Yes.

Q. So this, and I'm not sure if I understand your testimony, but are you testifying that this is an agent check?

A. Based on what I see here, this is an agent check.

[Page 187] Q. So this document that's an agent check is no different than the agent check we've previously reviewed?

A. Correct.

Q. Okay.

(Yingst-11, Three Pages Packet Slide titled MoneyGram Paper Products Overview, was marked for identification.)

BY MS. AHUMADA:

Q. I'm handing you a document that's been marked Yingst-11. Ms. Yingst, are you generally familiar with this document?

A. Yes.

Q. What is it?

A. I'm not 100 percent sure where this was used. However, it looks like a customer facing — it seems

like it's been taken out of another presentation, but it is a customer facing document describing the different types of paper products on Number 298. And then 299 further compares our agent check [Page 188] money order against our, basically as used before, our international money order program.

Q. All right. So when you said "client facing," so what do you mean by that?

A. This most likely was used in a meeting with a financial institution client or prospect.

Q. If you could turn to the second page of that document which is at 298. At the top of the chart you have four columns. Do you see that?

A. Yes.

Q. And that's cashier's checks, teller's checks, agent check money order and financial institution money order. Do you see that?

A. Yes.

Q. Which of these are the money

order platform?

A. The last column, the financial institution money order column.

Q. And so the first three, is [Page 189] that the official check platform?

A. Yes.

Q. Okay. Let's go through the document, the chart. And I won't belabor it by going line by line, but if you could go through it yourself and see if there is anything that we discussed today when we looked at the different instruments where there is a difference here between what's noted on the chart in terms of, for

example, issue drawer. Tell me if for cashier's check, is it the financial institution is the issuer and the financial institution is the drawer; is that correct?

A. That is correct.

Q. Okay. So if you could do that going across.

A. These are — these all appear to be correct on the first line.

Q. Okay. And what about the escheatment line; is that correct?

A. Yes.

Q. Okay. And we did talk about [Page 190] this, the next day availability and Reg CC, is that information correct? A. Yes. Yes.

Q. Okay. Now, under that same Reg CC line, under agent money order it says whether it's next day availability of funds, it says "No," and then it says "No max amount"?

A. Correct.

Q. We just saw an agent check money order that had a maximum amount of $1,000; is that right?

A. Yes.

Q. So why is that different?

MR. RATO: Objection to form; asked and answered, but go ahead.

MR. TALIAFERRO: Join.

THE WITNESS: We don't impose a maximum amount. So the one that they looked at, they chose to put a maximum amount on there.

BY MS. AHUMADA:

[Page 191] Q. Okay.

A. "They" meaning the financial institution.

Q. Under the last line, it says, "Check titled allowed." I think you alluded to this a bit ago. Let's look under cashier's check. So cashier's check, what can it also be called by MoneyGram?

A. So I would just like to state that there is a longer list. This is a sample. There is another document I believe that has a more detailed list of the allowable title.

Q. Okay.

A. So this is not comprehensive.

Q. All right.

A. But these are some of the most common titles.

Q. Okay.

A. That would be used for each

of these items here.

Q. So you go through those for [Page 192] cashier's checks, what are the sample allowed titles?

A. Cashier's check, official check, official bank check, treasurer's check, and there is some commonality in the teller check column as well. They cannot call a teller's check a cashier's check, for instance, that's not there.

Q. Okay. So let's just stick on the cashier's check line. How would one know if a cashier's check was titled an official check, how would someone know that it was in fact a cashier's check?

A. When you say "someone," who are you referencing?

Q. A third party that's looking at a document that on its face says "Official Check." How would that person know that what they have in their hand is a cashier's check?

A. They don't typically know. They see that check. They — they're not making these distinctions. They're looking at it. If they deem it [Page 193] acceptable as a bank check, they're going to accept it and assign next day availability to those funds. They aren't specifically necessarily knowing that it is a cashier's check or a teller's check.

Q. Okay. And what about your financial institutions, would they have the knowledge — would they know if a cashier's check that's been labeled an official check is in fact a cashier's check?

A. Our financial institutions know which product they're issuing typically, so they would know that.

Q. And then MoneyGram, you did that here, but if you saw a document that's titled official check, are there characteristics of that check that would in turn help you to decipher what the actual instrument is; is that right?

A. Yes.

Q. Okay. Let's go to teller's check. What are the some of the sample listed allowed titles for that document?

[Page 194] A. Official check, official bank check, teller's check, treasurer's check.

Q. Okay. So again it can be labeled as an official check, right?

A. Yes.

Q. Okay. Under the agent check money orders, what are the sample listed allowed titles?

A. As we saw, a personal money order, agent check money order or international money order.

Q. Okay. So earlier we called international money order that retail money order, so was that incorrect on our part to be able to call it that?

MR. TALIAFERRO: Object to the form of the question.

MR. RATO: Join.

THE WITNESS: We use the term international money order on our money orders. They also can use that international money order if they wish to make it similar to [Page 195] what we're using on the retail money order platform.

BY MS. AHUMADA:

Q. I see, okay. And then for the money order platform, a financial institution money order, first, I don't think we've talked about what a financial institution money order is. What's that?

A. A financial institution money order is, that's somewhat of an internal term. It is just when a financial institution is issuing that retail money order. It's not a different type of item. It is just referred to within MoneyGram as a financial institution money order meaning that they're on the money order platform, not under the official check platform.

Q. Okay.

A. So it's the same thing as what Walmart would be selling.

Q. Okay. Now, earlier we talked about a doc — an instrument called agent check money order and then [Page 196] one that was just simply agent check full stop. Why is that not listed as a paper product option on this chart?

A. I don't know why it's not on this particular chart. We haven't promoted it, that — really promoted that as a product, so it's quite possible that we just didn't include it here because we didn't want to offer it.

Q. Okay. And if it had appeared on the chart it would — would it be under the official check file that we had or product line that you discussed?

A. Yes, they are, and yes.

MS. AHUMADA: All right. This one is really big, all of them. They're all the same. Give me a few beats, yeah.

(Yingst-12, MoneyGram Product and Services Reference Guide Bates MG 002708-002829, was marked for identification.)

BY MS. AHUMADA:

[Page 197] Q. The document that I have placed in front of you I have marked as Yingst-12. Are you familiar with this document?

A. Yes.

Q. And what is it?

A. This is a, basically a comprehensive product and services guide that MoneyGram created for a variety of purposes, but it's intended to cover all of our products and services.

Q. Okay. So what are the variety of purposes that it was created for? A. Well, I believe that the primary purpose of this document is for internal education, meaning if somebody is new to the company, they might be asked to give this a read so that they can become more familiar with all the parts of what we do. It's primarily an internal document as far as I'm aware.

Q. Okay. You said "primarily," but is it also used for external [Page 198] purposes?

A. I'm not aware that it is. I'm not aware if it has been.

Q. If you could please turn to Page 4 of the document and it's MG 2711. Do you see the top there? It's describing financial paper products.

A. Yes.

Q. And under that it has your name?

A. Yes.

Q. Okay. And why is someone to contact you about that?

A. Well, again as an internal document the — each section of this document for each separate kind of product it has an internal contact if somebody is looking at it and they have additional questions I'm the person they look up.

Q. Okay, good. If you look under "Money Order," next to money order and then introduction, if you could please read out loud for us those first [Page 199] two sentences.

A. "For consumers who do not have a checking account, check card or credit card, money orders are an ideal way for them to make consumer to consumer

and consumer to business payments. As a long established paper payment instrument they are widely accepted and generally considered to be as good as cash.

Q. Okay. And do you agree with that statement?

A. I agree that they are generally considered to be as good as cash and that this is an accurate statement, yes.

Q. Okay.

MR. RATO: I'd also note for the record that the phrase "as good as cash" is in quotes in the document.

THE WITNESS: Yes.

BY MS. AHUMADA:

Q. Ms. Yingst, do you know why it's in quotes, "as good as cash"?

[Page 200] A. Well, obviously it's not cash, so I think that is probably why that qualification was made.

Q. Okay. If you turn to the second page or the next page. I'm sorry, it's 5 and MG 2712. And you'll agree with me that it's still under the money order umbrella there?

A. Yes.

Q. Okay. If you could, target markets, do you see that?

A. Yes.

Q. Okay. What does that mean, target markets?

A. Those are potential users of this product.

Q. Okay.

A. Potential, yes.

Q. All right. And if you could read for me under the "Agent" heading the first and the last bullet point there?

A. "Significant number of un-banked or under banked customers such as regular check cashers and financial [Page 201] institutions who want to offer money orders to gain new customers."

Q. Okay. And then under the customer, and again we're looking at target markets; is that right?

A. Yes.

Q. Can you read — I apologize. Can you read the two bullet points there under customer?

A. "Anyone without a checking account or other payment method who wants to replace cash with good funds payment or to other consumers or businesses, and customer looking for an alternative to electronic payments or a more trusted alternative payment to personal checks."

Q. Do you agree with those bullet points?

A. I agree that — I mean, yes, those are people who use money orders.

Q. Okay. The first bullet point uses the phrase "good funds payment." Do you see that?

MR. RATO: Again, for the [Page 202] record in quotes.

THE WITNESS: Yes. BY MS. AHUMADA:

Q. What — Ms. Yingst, what does the quotes mean to you? And "you" I mean MoneyGram.

A. There is a — because these items are purchased with cash, they're often referred to as good funds as compared to a personal check.

Q. So there is a distinction then between this money order and a personal check. You see that in the second bullet point? There is a distinction being made between those two types of instruments?

A. I believe that there is often a perception that they are two different kinds of instruments, yes.

Q. Perception by whom?

A. Those who accept them as a means of payment.

Q. Does MoneyGram hold out that perception for its customers?

[Page 203] MR. RATO: Object to the form.

THE WITNESS: I'm not quite sure I understand what you mean when you say do we hold out that perception.

BY MS. AHUMADA:

Q. Do you — does MoneyGram use that as a marketing, for example a marketing tool to differentiate why someone should use a money order as opposed to a personal check?

A. Not particularly, no. No.

Q. The next section there is PrimeLink official check. First, what's PrimeLink?

A. PrimeLink is just a name for our official check program that we have used, the product name.

Q. Okay. Is that — when — how long has that product name been in use?

A. I'm not quite sure. Longer than 10 years.

[Page 204] Q. Okay. I'll ask you to flip back to Page 4. Do you see that there is a — in the middle of the page there is a section that says "Process" and it's steps 1 to 5. Are you generally familiar with what's being depicted there in steps 1 to 5?

A. Yes.

Q. And what is that?

A. That's what happens when a customer goes to an agent to purchase a money order. It also covers the processes that we've discussed related to payment for that money order and how that information gets reported to MoneyGram.

Q. And what's the step 3 if you could read that for us?

A. "Agent collects payment and prints money order."

Q. Okay. If you go to the next page we were just at under PrimeLink. Do you see the process steps that are 1 through 5 there?

A. Yes.

[Page 205] Q. Okay. Can you describe what that process is describing?

A. Again, I think it's describing what happens when a financial institution issues an official check.

Q. Okay. And what's the step 3 there?

A. "Payment to cover official check is taken from a customer's account."

Q. Okay. Would you agree with me that that's similar to step 3 under the money order process?

MR. TALIAFERRO: Objection.

THE WITNESS: Similar, yes, although step three under official check, the money is normally coming from a customer account. It's not in the form of cash. That distinction isn't made on that previous page.

BY MS. AHUMADA:

Q. But in both instances Step 3 there is the prepayment of the [Page 206] instrument?

A. It's the collection of the money, yes.

Q. Okay. The following page which is MG 2713, and again, we're talking about the PrimeLink official check section, you see on it's halfway down the page it says "Customer Benefits." Can you read for us what's there?

A. "Must have payment method when vendors insist on good funds payment for certain transactions. Official checks are a less expensive solution for the customer than a bank wire."

Q. Does that still hold true for MoneyGram, this statement?

A. Yes.

(Yingst-13, MoneyGram PrimeLink Official Checks Operating Instructions Bates MG0002277 through MG0002313, was marked for identification.)

BY MS. AHUMADA:

[Page 207] Q. Ms. Yingst, I'm handing you a document that I just marked Yingst-12. Oh, excuse me, 13. Are you familiar with this document?

A. Yes.

Q. What is it?

A. This is a document that contains some additional detail around the official check program. It is provided to our official check clients, our financial institution clients.

Q. Do you know if this operating instruction manual, can I call it that?

A. Sure.

Q. Is that still in operation today?

A. Yes.

Q. And you'll notice it says "PrimeLink official checks" at the top there. Tell me which official checks it's referring to.

A. This would cover all categories of official checks.

[Page 208] Q. Okay. So if you go to this page, it's actually a couple pages down. It's MG 2282 and it talks about daily functions. At the top it says that. So if I understood you, this is a document that your customers would have and to know how to handle an official check and what the process is; is that correct?

A. Yes.

Q. Okay. So if you could read for us the first line of that, the first sentence of that issued check item reporting section.

A. "Each business day issuance information must be reported to MoneyGram for all checks/items issued the previous day."

Q. And what kind of information is issuant information — issuance information?

A. Serial number, dollar amount, the date of issuance and their account number with MoneyGram.

Q. Do you also receive, does [Page 209] MoneyGram also receive information of where the instrument was purchased?

A. We may. We may receive that. That account number may indicate where it was purchased, however that is not always the case.

Q. Do you require that information at any point?

A. No.

Q. Earlier we had talked about some escheatment issues and we looked at a chart. So for the purposes of escheatment, are you getting information on, for example, the purchasing state for escheatment purposes?

MR. RATO: Object. The witness is not the designated witness for escheatment topics, but certainly to the extent you know you can answer.

THE WITNESS: They are not sending us the state of issuance as part of their file that they send to us.

Page 210

BY MS. AHUMADA:

Q. How does MoneyGram then collect that information if at all?

A. We — there is an issuing account number associated with those checks, and in our system that issuing account number may indicate the state of issuance.

Q. Okay. And other information on here I think we've covered. I don't want to rehash. I'll do one just general question. So for an official check, we did this with the retail money order, can a customer that

receives an official check, purchases an official check, can they cancel that official check?

A. The customer who is holding that check could go to their financial institution and say, I don't need this anymore or I would like to — or I would like you to stop payment. Typically the stop payments are not placed on official checks. However, it's really up to that institution to make a determination based [Page 211] on their conversation with their customer whether there are risks associated with refunding that item to them or putting a stop payment on it. It's their decision.

Q. What about, for example, if the instrument was lost, can the customer go back to the financial institution to get it reissued?

A. Yes.

Q. Okay. But they, let's say they provided it — they remitted the instrument to, I don't know, a mortgage company and they can't put a stop payment on that unless there is some further communications with their financial institution.

A. I'm not sure I understood. The consumer can't put — so for that instance with the mortgage company, they can't put a stop payment on it as they could maybe a personal check. What they could do is go in, go to their financial institution and say, I would like to put a stop payment on this item, and the [Page 212] institution would make that determination. So they may ask them to sign an affidavit or an indemnification or that's really up to them to determine whether they want to give that customer that money back and have confidence that that item isn't going to result in a claim.

MS. AHUMADA: Trying to be efficient here; last two.

MR. RATO: Which is 14, which is 15?

MS. AHUMADA: So 14 — I'll do this on the record. Just give me one second.

MR. RATO: Sure.

(Yingst-14, Financial Institution Agreement Bates MG0000011 through MG0000017, was marked for identification.)

(Yingst-15, MoneyGram Financial Institution Agreement for Official Checks, was marked for identification.)

[Page 213] BY MS. AHUMADA:

Q. Ms. Yingst, I am placing in front of you a document that I have titled — excuse me — I have labeled Yingst-15. And at the bottom it says 09/2011, and I assume that's September 2011. Tell me if it's not what that means.

A. Yes.

Q. Okay. The other document I'm going to place in front of you that we'll look at together is Yingst — I switched them. Let's redo those. Sorry, I was doing so well there. So what's been labeled as Yingst-14 —

MR. RATO: I think you were right the first time.

MS. AHUMADA: I was. Oh, my God, it's a long day.

BY MS. AHUMADA:

Q. Yingst-14, it is a document. At the bottom it says "Travelers Company, Inc. 2002." Do you see that document?

A. Yes.

[Page 214] MR. DISHER: What's the Bates number on it?

MS. AHUMADA: And it is Bates labeled MG 11.

MR. DISHER: Thank you.

BY MS. AHUMADA:

Q. The second document I'm placing in front of you is Yingst-15. At the bottom it says September 2011 and it's Bates MG 76. Okay.

Ms. Yingst, are you generally familiar with these documents?

A. Yes.

Q. What are they?

A. They are both agreements that we use with our financial institutions.

Q. Okay. Let's start with the one that's been labeled Yingst-14. At the top there of the document it says "Travelers Express Company." And would you agree with me that that's the predecessor of MoneyGram Payment Systems, Inc.?

[Page 215] A. Yes.

Q. Okay. And financial institution, we've talked about that. That's your customer, correct?

A. Yes.

Q. All right. Under scope, what does it mean that there are checks under both the teller checks or Xs between teller checks and money orders?

A. This client would have been issuing teller's checks and they would also be issuing money orders under our retail money order program.

Q. Okay. So a financial institution has the option of which of these products they want to use; is that correct?

A. Yes.

Q. Okay. I think at one point you said if they use one of the products, they have to use all of it. Am I misunderstanding?

MR. TALIAFERRO: Object; mischaracterizes testimony.

[Page 216] MR. RATO: Join. Go ahead.

THE WITNESS: When I had made that statement I was referencing the exclusivity nature, the exclusive nature of our official check agreement, meaning that if they are committing to outsourcing their official checks to MoneyGram, we typically want them to outsource all of the checks they issue within the institution to MoneyGram, not that they have to use all the products.

BY MS. AHUMADA:

Q. Okay. Thank you. I understand. So under the definition section, do you see the first one that's for agent checks, can you read that for us?

A. Yes. "Checks drawn on TECI on its bank. Financial institution is not a party to agent checks even though its name may appear on the agent checks. [Page 217] At financial institution's option, these may be used as money orders, but they are agent checks for the purposes of this agreement."

Q. Okay. Let's start with that second sentence, "Financial institution is not a party to the agent checks." So who are the parties to the agent checks?

A. MoneyGram is the issuer and the drawer and the drawee is MoneyGram's clearing bank.

Q. Okay. And it says on the last sentence, "At financial institution's option they may be used as a money order, but they are agent checks for purposes of this agreement." What does that mean?

A. In this agreement agent check money orders is not a defined term, so they are — in this agreement they are — whenever agent check is referenced in this agreement it could be referencing agent check money orders and agent checks. I think that's what that's [Page 218] intended to mean.

Q. Okay. Then if you go to the definition for checks, listed on that is agent checks, cashier's checks and teller's checks; is that correct?

A. Yes.

Q. Are each of these official checks?

A. Yes.

Q. Okay. And here, though, it's saying agent checks and we just looked at that definition, but it could also be an agent check money order; is that right?

A. Yes.

Q. Okay. On the second page of the document, which is MG 12, for money orders it says, "Drafts drawn by TECI," and again that's money order today?

MR. RATO: MoneyGram today.

MS. AHUMADA: MoneyGram. Thank you.

MR. RATO: A year from now would be —

[Page 219] MS. AHUMADA: Right.

BY MS. AHUMADA:

Q. It says, "Draft drawn by TECI only self-payable through a bank." What does that mean "through a bank"?

A. Payable through one of our clearing banks.

Q. Okay. And on the last two under the definition section, can you read for us what TECI item refers to?

A. Agent checks, teller's checks and money orders. And then it states, "Teller's checks are called TECI items even though the financial institution also is a drawer."

Q. And what's there in the parentheses? Can you explain what that means?

A. I believe that in our contract, as it states here, teller's checks are defined as a MoneyGram or Travelers Express Company, Incorporated item, even though the financial institution is also a party to that item [Page 220]

as we've discussed previously.

Q. Okay. Under 12, Section 12 which is on MG 13, there is a section on remittance and I'll just — under checks it says, "Financial institution will remit the face amount of checks issued, used and sold by wire transfer so that TECI has collected funds by 11:00 a.m. central the next business day. Such face amounts are deemed held in trust until remitted."

First, it says "remit," but it doesn't say to whom. Who does that get remit to?

A. They are remitting those funds to MoneyGram.

* * *

[Page 229] Q. Okay, great. So what I want to really drill down on is, this is titled "Life Cycle of an Official Check." Are there any differences or distinctions between the life cycle of the four different types of official checks?

A. Other than the difference in the escheatment process related to cashiers versus the others, or who does it I would say, the life cycles, at this level it's the same.

Q. Okay. And the escheatment issue you're talking about is that cashier's checks are escheated by the financial institution that issued the cashier's check?

A. Yes.

* * *

[Page 258] Q. The acceptability and, okay, I see what you're saying. The selling bank is not presenting either a teller's check or an agent check. That would be the person who purchased the teller's check or agent check, right?

MR. RATO: Object to the form.

MR. TALIAFERRO: Join. THE WITNESS: Yes.

MR. DISHER: All right, great.

BY MR. DISHER:

Q. All right. In terms of the financial institution that sells the official check products, no matter what type of product it is, MoneyGram handles all of the back office processing of that; is that right?

A. Yes.

Q. Okay. And what does back officing — excuse me. What does back office processing include?

A. It includes handling [Page 259] exceptions, handling the clearings, handling any exceptions, performing the reconciliation, retaining the images of the paid items, the image archive. It includes reporting, it includes handling collections down the road, claims, all the way through to potentially handling the unclaimed property process depending on the kind of item that it is.

Q. Okay. MoneyGram does all of that for all four types of official checks?

A. Yes.

Q. All right. Does the selling financial institution play any role in any of the back end processing for any four of the official check products sold by MoneyGram?

MR. RATO: Object to the form. You can answer.

THE WITNESS: They are — well, so primarily their role is to tell us about the items that they've sold, pay us for those [Page 260] items, and they are required to review a report every day that includes some exceptions that we need them to review and tell us whether those are valid checks or not.

BY MR. DISHER:

Q. Okay.

A. That is sometimes referred to as the positive pay report.

Q. All right. Anything else?

A. Those are their primary functions.

Q. Tell me a little bit more about the positive pay report. What exactly is that?

A. That is just a report that's generated every day of any items that come into — in the clearing file that

appear to be issued by that institution that they have not told us about. So it is a serial number that we know they have and they didn't tell us that they sold it. So it is a potential counterfeit [Page 261] perhaps or maybe it's a valid item that they just didn't include on their issue file —

Q. Okay.

A. — on the report.

Q. And the bank is required to do that every day?

A. Yes.

Q. Okay. And what does the bank do after it reviews the positive pay?

A. If there are items on there that are counterfeit or need to be returned, they have to tell us so we can do that by a specific deadline.

Q. All right. On the positive pay report, does that include all four types of MoneyGram official check products?

A. Yes.

Q. Okay.

A. If they are issuing, whichever types they are issuing.

Q. Got it, yes. Thank you. [Page 262] All right. So the role of the selling financial institution is, one, tell us about the item sold, two, pay us for the items and, three, review the positive pay report? Did I say that right?

A. Yes. Those are their primary day-to-day roles.

Q. Any other roles they have?

A. They deal with their customer, so if there are, you know, after the fact issues or they have to do replacements, they want to look at — they have to do their own internal reconciliation of the activities.

So there are other activities that they perform related to the programs that they are — those activities are also the same across all — whichever type of checks they're issuing.

Q. All four official check product types?

A. Yes.

Q. All right. And these three [Page 263] primary obligations, those are the same across all four official check product types?

A. Yes.

Q. All right. Now, if a financial institution sells retail money orders, what does that financial institution have to do in terms of those retail money orders that it has sold?

A. They have to — we have to know that they sold them. That may be through the equipment that they have on hand or it might be through them sending us some kind of a file, but they have to report those items as sold to MoneyGram. They — ultimately they pay us for those items. We may take the money out of their account versus a wire, but they pay us for those items, and those are the primary functions. There is not a positive pay process on the retail money order side.

Q. Okay. Anything else that the issuing financial institution has to [Page 264] do for retail money orders?

A. Other than perhaps handling customer requests when they come in, no.

Q. All right.

A. No.

Q. Now, in terms of retail money orders, so they have to tell MoneyGram that they sold the — let me back up. I want to talk about each of these individually. Okay?

A. Okay.

Q. So the first step is that they have to tell MoneyGram about the money orders that it has sold, right?

A. Yes.

Q. Okay. And so what information do they have to tell MoneyGram about the money orders that they sold?

A. Serial number, the dollar amount, the date. And there is an agent ID or a customer number that indicates who sold it.

Q. Okay. Anything else?

[Page 265] A. No.

Q. Just those four things. It's serial number, the dollar amount, the date it was sold and the customer ID who sold it?

A. Yeah.

Q. All right.

A. Yes.

Q. What about the state in which it was sold?

A. The customer ID which is, it's really the agent ID, but the customer ID is going to be our way of knowing where it was sold.

Q. How so?

A. Because in our systems that customer ID is associated with a location.

Q. Each location has a unique location ID number?

A. Yes.

Q. All right. And then how does the agent pay MoneyGram for the retail money orders that it sells?

[Page 266] A. In most cases MoneyGram is debiting the agent's account the next day for the items that they sold along with fees, any fees we're charging.

Q. You say normally debiting the agent account. How else could it be done?

A. There are some agents who wire money to MoneyGram for instance.

Q. All right. And where does MoneyGram get its fee in that process for retail money orders?

A. When MoneyGram charges the agent for the face, we also charge them at the same time for the fees.

Q. All right. Now, let's shift to MoneyGram official checks. So the first item is or the first obligation of the selling financial institution for MoneyGram official checks is tell MoneyGram about the items its sold, right?

A. Yes.

Q. Okay. And so what [Page 267] information does the selling financial institution have to tell MoneyGram about the MoneyGram official checks that it has sold?

A. Serial number, dollar amount, date and account number.

Q. Okay. Now, the account number, is that specific to each location in which MoneyGram official checks are sold?

A. Not always.

Q. Explain that to me.

A. There are some situations where that account number is assigned at every location or reported that way and there are other setups where they are reporting everything to us under one account number.

Q. Okay.

A. So we don't know specifically which location issued that item.

Q. So sometimes one account number may include multiple locations?

[Page 268] A. Yes.

Q. Who makes that decision?

A. That's normally part of how the — it's determined during the setup process and determined during how the financial institution is going to manage their inventory, how they want to be set up and do they want to report everything together essentially in one location, are they going to do it separately, so it's often a byproduct of their systems or their system limitations.

Q. Okay.

A. But it's determined during the setup process.

Q. Does MoneyGram have a preference whether one account location is going to be associated with each location or whether multiple locations would be included in one account number?

A. We do not.

Q. Is the decision made entirely by the selling financial institution?

[Page 269] A. Yes.

Q. Do you have any idea about the breakdown in terms of percentages of account numbers that are associated with only one location versus account numbers that might be associated with multiple locations?

A. I don't know.

Q. Do you have any idea?

A. I honestly don't have any idea.

Q. All right. The second function that the selling financial institution undertakes is to pay MoneyGram for the items. How does the selling financial institution pay MoneyGram for the official check products that it sells?

A. They wire us that money the next day. There may be a few exceptions where we are actually debiting their account. They're telling us what they sold and we're taking money, but in most cases it is a wire next day.

[Page 270] Q. And that's true for all four types of MoneyGram official check products?

A. Yes.

Q. All right. And I should have asked this earlier, but the first requirement of telling you about the product that they sold, those requirements are the same across all four MoneyGram official check products?

A. Yes.

Q. All right. How does MoneyGram get its fee for official checks sold by its clients?

A. There is a monthly billing process and we collect that fee via debiting an account at the institution.

Q. When you say "the institution," what do you mean by that?

A. They provide a bank account authorization, account number, routing number, and once a month we will charge that account for their fees.

Q. That's an account — it's an [Page 271] account held by the selling financing institution?

A. Yes.

Q. Typically at the selling financial institution?

A. Yes.

Q. Okay. And MoneyGram debits that account monthly for the fees associated with the official checks sold?

A. Yes.

Q. Does MoneyGram debit that account for the face dollar amount of the official checks sold?

A. No.

MR. TALIAFERRO: Objection; asked and answered.

THE WITNESS: No.

BY MR. DISHER:

Q. That money is physically wired?

A. Yes.

Q. But in some cases it may be debited? Did I hear that right?

A. Yes.

[Page 272] Q. All right. If a — let's say I walked into a financial institution that was selling MoneyGram official check products and I wanted to purchase a teller's check, for example, and I don't have an account with the institution that I walk into. Does MoneyGram prohibit that institution from selling me an official check?

A. We do not prohibit you from doing that.

Q. Let me try to say it another way that's perhaps more clear. Does MoneyGram require its selling financial institutions to sell official check products to only the accountholders who have an account at that selling financial institution?

A. We do not stop them from selling it. I mean, we don't require that.

Q. Okay. Okay. So once an official check product is sold to an individual consumer and the money gets [Page 273] transferred to MoneyGram, when does MoneyGram refuse to pay that obligation when it's presented?

A. The only time we would refuse the payment obligation would be if the issuing financial institution placed a stop on that item, or if the item was already presented, so if that item is not outstanding or there is a stop on it, then we would not pay it.

Q. Okay. When would a financial institution put a stop payment on a product that it sold?

A. There are probably several different scenarios. If their customer lost that item or it was destroyed, if for whatever reason they come in and say, I need to put a stop payment and for — and the institution

agrees to it. So I would say it's something that happens between them and their consumer.

It's a risk to put a stop payment on an official check, so they would only want to do that if they felt [Page 274] that there were going to be no negative ramifications or claims.

Q. Okay.

A. That is up to them.

Q. All right. So if the official check has already been satisfied or if the financial institution has put a stop payment on it, those are the only two situations in which MoneyGram would not satisfy an outstanding official check?

A. The only other I guess qualifier there is if that item happened to be a cashier's check and the issuer, the financial institution, had taken those funds back, maybe because they were replacing it or they were escheating it and that came into MoneyGram, we would return that item as well.

Q. All right. And that would only happen in the context of a cashier's check?

A. Yes.

Q. All right. If a financial [Page 275] institution put a stop payment on an official check and it turns out they did so incorrectly, who is liable for the amount to satisfy that obligation?

MR. RATO: Objection to the form to the extent it calls for a legal conclusion. You can answer the question.

THE WITNESS: The financial institution.

BY MR. DISHER:

Q. Would they seek to recover that money from MoneyGram?

A. Contracturally they are liable if they place a stop payment and there is a claim on those funds, so no.

Q. So if the financial institution has to pay a claim, they are not allowed to seek indemnification from MoneyGram for the money it already paid to MoneyGram?

MR. RATO: Object to the form.

THE WITNESS: Can you [Page 276] rephrase the question?

MR. DISHER: Yeah, sure.

BY MR. DISHER:

Q. So if a financial institution places a stop payment but then it turns out that the stop payment was placed incorrectly so the financial institution has to pay the amount to satisfy that check, right, can that financial institution then turn to MoneyGram and say, we have paid you the amount to satisfy this obligation, you were holding it for us, so you need to pay us, the financial institution, that amount?

A. What typically happens is when they place a stop payment they take that money back. They don't leave it with us when they place a stop payment.

Q. Understood.

A. They will — so if they have placed a stop and taken a refund on that item, they would have no basis to come to us to take that money, ask us for that [Page 277] money.

If they placed the stop and left the money with us and they had a claim and needed to pay it, they could take a refund on that item, but if they've already done that we're not going to give it to them again.

Q. Great. I understand completely. Thank you for explaining that.

So there is a process for a selling financial institution to seek a refund from MoneyGram?

A. Yes.

Q. Okay. And other than the stop payment scenario, when else might that happen?

A. In the case of a cashier's check they would take a refund if they wanted that money back so that they could perform the unclaimed money process.

Q. Okay. Any other situation in which a selling financial institution could seek a refund from MoneyGram?

[Page 278] A. Not that comes to mind.

Q. Okay. And when a selling financial institution takes a refund, do they get refunded the fee charged by MoneyGram to issue the check in the first place?

A. No.

Q. All right. Now, I want to talk briefly about clearing banks. Earlier, and just to confirm I heard you right, both retail money orders and official checks are cleared through a clearing bank?

A. Yes.

Q. Okay. The funds sent to MoneyGram by either the institution that sold the retail money order or the institution that sold the official check, those — all of

those funds get put into the same investment type program that you were describing earlier?

A. Yes.

Q. All right. When the — when a money order gets cleared through the [Page 279] clearing bank, what role does the clearing bank play in that process?

A. They have very minimum role. They — mostly they are paying the Federal Reserve for those items and we are paying them. That's their primary role.

Q. Okay.

A. We are performing everything else.

Q. All right. Now, when an official check goes through a clearing bank, what is the clearing bank's role in that transaction?

A. It's the same.

Q. All right. Why would a bank use MoneyGram's official check program to issue cashier's checks?

MR. RATO: Object to the form. You can answer.

THE WITNESS: To again leverage our back office functions so that they don't have to do all of that work.

[Page 280] BY MR. DISHER:

Q. Okay. Does the money — well, I think I've already asked you this because I asked you questions that applied to all four categories of official checks, but just to clarify, even in the cashier's check realm the money to satisfy that cashier's check is still transferred from the selling financial institution to MoneyGram?

A. Yes.

Q. Okay. And that money is also included in this conglomerate investment type activity fund that

includes the other three types of proceeds from official checks?

A. Yes.

Q. As well as retail money?

A. Yes.

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