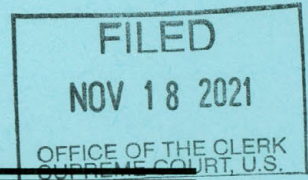


Nos. 22O145 & 22O146



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IN THE  
**Supreme Court of the United States**

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DELAWARE,

*Plaintiff,*

v.

PENNSYLVANIA AND WISCONSIN,

*Defendants.*

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ARKANSAS, *et al.*,

*Plaintiffs,*

v.

DELAWARE,

*Defendant.*

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**On Exceptions To The Report  
Of The Special Master**

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**APPENDIX TO EXCEPTIONS TO REPORT OF  
THE SPECIAL MASTER BY THE STATE OF  
DELAWARE – VOLUME I OF III**

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## TABLE OF CONTENTS

### Page

#### VOLUME I:

First Interim Report of the Special Master (July 23, 2021) .....	1
Draft First Interim Report of the Special Master (May 20, 2021).....	98
Delaware's Motion to File Bill of Complaint and Complaint (May 26, 2016).....	189
Stipulation to Realign the Parties (June 15, 2017).....	199
Order (July 24, 2017) .....	205
Letter to Special Master (Apr. 22, 2020).....	208
Affidavit #1 of Jennifer Whitlock (Money Order Affidavit) with Exhibits in Support re: 76 Motion for Summary Judgment on Behalf of Delaware (Filed Feb. 1, 2019) .....	210
Affidavit #2 of Jennifer Whitlock (Official Check Affidavit) with Exhibits in Support re: 76 Motion for Summary Judgment on Behalf of Delaware (Filed Feb. 1, 2019) .....	235
Deposition of Eva Yingst (May 23, 2018) (excerpts).....	241
Exhibit 6 – Sample Official Check.....	297
Exhibit 7 – Sample Official Check.....	298
Exhibit 8 – Sample Official Check.....	299
Exhibit 9 – Sample Official Check.....	300
Exhibit 10 – Sample Official Check.....	302



# TABLE OF CONTENTS—Continued

	<u>Page</u>
<b>VOLUME II:</b>	
Deposition of Ronald J. Mann (Nov. 9, 2018):	
Exhibit 125 – Western Union Money Order Advertisement .....	303
Exhibit 126 – Western Union Money Order .....	304
Exhibit 128 – Western Union Money Order Advertisements .....	306
Declaration of John David Taliaferro with Exhibits in Support re: 76 Motion for Sum- mary Judgment on Behalf of Delaware (Filed Feb. 1, 2019):	
Exhibit B – MoneyGram June 23, 2011 business presentation .....	310
Exhibit C – Sample Official Check .....	323
Exhibit D – Sample Official Check .....	324
Exhibit E – MoneyGram Paper Products Overview .....	325
Exhibit M – MoneyGram 10-K (excerpt) .....	328
Exhibit R – How to Get Paper Reports and Electronic Files for Agent Checks and Teller Checks .....	332
Exhibit W – Western Union Money Order Application .....	334
Revised Uniform Disposition of Unclaimed Property Act (1966) (excerpts) .....	335
Uniform Unclaimed Property Act (1981) (excerpts) .....	340
Hunt Commission Report (1971) (excerpt) .....	349



## TABLE OF CONTENTS—Continued

	<u>Page</u>
Black's Law Dictionary (rev. 4th ed. 1968) (excerpts).....	360
Black's Law Dictionary (5th ed. 1979) (excerpts).....	364
Glenn G. Munn's Encyclopedia of Banking and Finance (7th ed. 1973) (excerpts).....	367
Compton's Encyclopedia and Fact Index (Vol. 14) (1972) (excerpt) .....	379
The American Heritage Dictionary of the English Language (1971) (excerpts) .....	382
Webster's Seventh New Collegiate Dictionary (1972) (excerpt) .....	383
Am. Bankers Ass'n, Bank Mgmt. Pub. No. 140, <i>Money Order Services</i> (1956).....	384
G. P. Oslin, Western Union Telegraph Co., <i>Telegraph Services</i> , J. Bus. Educ., Sept. 1950, at 28.....	413
Note, <i>Negotiability of Travelers Checks</i> , 47 Yale L.J. 470 (1938) (excerpt) .....	425
Note, <i>Personal Money Orders and Teller's Checks: Mavericks Under the UCC</i> , 67 Colum. L. Rev. 524 (1967) .....	428
William D. Hawkland, <i>American Travelers Checks</i> , 84 Banking L.J. 377 (1967) (excerpt) .....	477
Henry J. Bailey, <i>The Law of Bank Checks</i> (4th ed. 1969) (excerpts) .....	482
Barkley Clark & Alphonse M. Squillante, <i>The Law of Bank Deposits, Collections and Credit Cards</i> (1970) (excerpt) .....	487

**TABLE OF CONTENTS—Continued**

	<u>Page</u>
Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of American Express Company, <i>Pennsylvania v. New York</i> , 407 U.S. 206 (1972) (No. 40, Orig.) .....	495
Report of John F. Davis, Special Master, <i>Pennsylvania v. New York</i> , 407 U.S. 206 (1972) (No. 40, Orig.) .....	523
Exhibits to Complaint, <i>Pennsylvania v. New York</i> , 407 U.S. 206 (1972) (No. 40, Orig.) (excerpt) .....	549
Exceptions of Plaintiff, Commonwealth of Pennsylvania, to Report of Special Master, <i>Pennsylvania v. New York</i> , 407 U.S. 206 (1972) (No. 40, Orig.) .....	559
S. Rep. No. 93-505 (1973) .....	567
120 Cong. Rec. 4528-4529 (1974) .....	578
119 Cong. Rec. 17046-17047 (1973) .....	585
26 U.S.C. § 6311 (1970) .....	592
31 U.S.C. § 9303(c) (1988) .....	594
31 U.S.C. § 5325 (1988) .....	595

**VOLUME III (Filed Under Seal):**

Deposition of Kate Petrick (MoneyGram 30(b)(6)) (June 5, 2018):	
Exhibit 42 – Teller’s Check Unclaimed Property Reporting, Information Sheet for Sales Group (August 2005) .....	597

**TABLE OF CONTENTS—Continued**

	<u>Page</u>
Exhibit 50 – MoneyGram Payment Systems, Inc., Unclaimed Property Reporting Proce- dures (Sep. 28, 2006) (excerpts).....	603





Nos. 22O145 & 22O146

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IN THE  
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DELAWARE,

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*Defendants.*

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ARKANSAS, *et al.*,

*Plaintiffs,*

v.

DELAWARE,

*Defendant.*

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**On the Parties' Cross Motions for Partial  
Summary Judgment**

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Pierre N. Leval

*Special Master*

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July 23, 2021

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**FIRST INTERIM REPORT OF  
THE SPECIAL MASTER**

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**INTRODUCTION**

This is a “controversy between two or more States”  
within the original jurisdiction of the Supreme Court.

The dispute is over which State is entitled to escheat, or take custody of,<sup>1</sup> the proceeds of certain unclaimed monetary instruments issued by MoneyGram Payment Systems, Inc. (“Moneygram”).<sup>2</sup> The dispute is between Delaware, the Plaintiff, and 30 other States, the Defendants.<sup>3</sup> Resolution turns in major part on the

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<sup>1</sup> Notwithstanding that the two terms have slightly different meanings, this Report uses the terms “take custody of” and “escheat” interchangeably to refer to a State’s taking possession of presumptively abandoned property. When property has “escheated,” in the narrowest technical meaning of that term, the State has become legal owner of the property and has no obligation to return it to the previous owner (or any person claiming to have derived title from the previous owner). Escheat is distinct from a State’s taking possession of unclaimed property, through which the State takes possession of the property at issue as custodian, for the benefit of the owner or her successors in interest, while title to the property remains in the owner. *See* Revised Uniform Unclaimed Property Act, Prefatory Note, at 2 & n.5 (Unif. L. Comm’n 2016). The disputed issues under these motions do not turn in any way on whether the State takes custody as owner or as custodian. The word “escheat” functions as either (i) a noun, as in, “The property reverted to the sovereign by escheat,” to designate the process by which property can revert to the sovereign, (ii) a transitive verb, as in, “The sovereign escheated the property,” to signify the sovereign’s action in causing property to revert to it; and (iii) an intransitive verb, as in, “The property escheated,” to designate the property’s reversion to the sovereign. The noun form “escheatment” is also in common use, although not found in all dictionaries.

<sup>2</sup> Moneygram Payment Systems, Inc. is a subsidiary of Moneygram International, Inc.

<sup>3</sup> On July 24, 2017, I issued, with the consent of the parties, an Order realigning the parties such that (1) Delaware would be deemed Plaintiff, for the purposes of its claims against the Defendants, and Counterclaim Defendant, for the purposes of Defendants’ claims against Delaware; and (2) the Defendants would



construction of the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Federal Disposition Act" or "FDA"), 12 U.S.C. §§ 2501-03. Section 2503 of the FDA establishes priority rules to determine which State is entitled to escheat certain categories of unclaimed financial instruments; the text of that Section is set forth in a footnote below.<sup>4</sup> I have

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be considered Defendants, with respect to Delaware's claims against them, and Counterclaim Plaintiffs with respect to their claims against Delaware. Dkt. No. 40 ¶ 2.

<sup>4</sup> 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 instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum;
- (2) if the books and records of such banking or financial organization or business association do not show the State in which such money order, traveler's check, or similar written instrument was purchased, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, until another State shall demonstrate by written evidence that it is the State of purchase; or
- (3) if the books and records of such banking or financial organizations or business association show the State in which such money order, traveler's check, or similar written instrument was purchased and the laws of the State of

been appointed by the Supreme Court to serve as Special Master, and, in that capacity, to make recommendations as to disposition. Before me now are cross motions for partial summary judgement on the question whether certain categories of instruments issued by Moneygram (the "Disputed Instruments") fall under the provisions of the FDA.

Under the FDA, sums 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" escheat to the State in which the instrument was purchased (if the books and records of such institution show the State in which the instrument was purchased), "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. The FDA partially abrogated the federal common law rule that debts left unclaimed by creditors would escheat, "to the State of the creditor's last known address as shown by the debtor's books and records" (the primary common law rule) but, if no record of the creditor's address is shown by the books and records of the debtor, to the State of the

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purchase do not provide for the escheat or custodial taking of the sum payable on such instrument, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum.

debtor's incorporation (the secondary common law rule). See *Texas v. New Jersey*, 379 U.S. 674, 680–82 (1965). In the context of presumptively abandoned, prepaid negotiable instruments, the Supreme Court has held that the relevant “creditor” for the purposes of the common law rule may be either the purchaser of the negotiable instrument (the payor) or the intended payee, while the relevant “debtor” is the issuer of the instrument (which, generally, holds the funds owed on the presumptively abandoned instrument). See *Delaware v. New York*, 507 U.S. 490, 503 (1993); *Pennsylvania v. New York*, 407 U.S. 206, 214 (1972).

At issue in this case is the entitlement to escheat the proceeds of instruments marketed by Moneygram as “Moneygram Official Checks.” There are two subcategories of Moneygram’s Official Checks involved in this dispute: Agent Checks and Teller’s Checks (together, the “Disputed Instruments”). Delaware contends that those instruments do not fall within the coverage of the FDA, and are therefore subject, under the common law rule, to escheat to Moneygram’s State of incorporation, which is Delaware, to the extent that Moneygram’s books and records do not show the last known address of the purchaser or intended payee. The 30 Defendant States contend that the FDA applies to the Disputed Instruments, with the consequence that the States in which the instruments were purchased are entitled to escheat their value. Pennsylvania, one of the Defendants, contends in addition that, assuming no coverage under the FDA, the secondary common law rule established by the Supreme Court should be partially overruled so that, when the books and records of the issuer do not reflect the address of the purchaser (or the payee), the Disputed Instrument’s value would escheat to the State where the



instrument was purchased, rather than to the issuer's State of incorporation.

On July 24, 2017, these proceedings were bifurcated, to deal in the first phase with the priorities of entitlement to escheat the Disputed Instruments, and thereafter litigating damages. Dkt. No. 43 at ¶ 6.<sup>5</sup> Under Supreme Court precedent,<sup>6</sup> this appears to be an appropriate stage in the litigation for the Supreme Court to consider the issues that have arisen in the case to date. The parties' cross motions for partial summary judgment present legal issues critical to the ultimate resolution of the case. Resolution of these issues will frame any future proceedings, and, depending on the disposition adopted by the Court, could resolve this case entirely.

For the reasons explained more fully below, I am persuaded that Delaware's Motion for Partial Summary Judgment should be DENIED, that the Defendants' Motion for Partial Summary Judgment should

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<sup>5</sup> Except where otherwise noted, references to "Dkt. No." refer to the Docket Number as listed on the docket sheet established by the Special Master for this case, [http://ww2.ca2.uscourts.gov/specialmaster/special\\_145.html](http://ww2.ca2.uscourts.gov/specialmaster/special_145.html). References to "22O146 Dkt. No." refer to the docket established for use in *Arkansas v. Delaware*, No. 22O146 ORG, [http://ww2.ca2.uscourts.gov/specialmaster/special\\_146.html](http://ww2.ca2.uscourts.gov/specialmaster/special_146.html). (After the two cases were consolidated, I ordered the parties to file all documents on the docket for No. 22O145 ORG.)

<sup>6</sup> The Supreme Court has, in several recent original proceedings, reviewed interim special master reports containing recommendations for the resolution of partial summary judgment motions on liability issues before remanding to the special master for resolution of issues related to appropriate relief. *See, e.g., Montana v. Wyoming*, 136 S. Ct. 1034 (Mem) (2016); *Kansas v. Colorado*, 514 U.S. 673 (1995).

be GRANTED, and that Pennsylvania's claim seeking amendment of the common law rule should be DISMISSED AS MOOT.

## BACKGROUND

### I. Legal Background

#### A. Unclaimed Property Law

As sovereigns, States are entitled to take custody of or escheat abandoned personal property. See *Delaware*, 507 U.S. at 497. The term "escheat" originally applied only to land; its common law origin derived from the notion that all land titles in England derived from the Crown; escheat was "the process by which tenurial land returned to the lord of the fee upon the occurrence of an event obstructing the normal course of descent." Note, *Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319, 1319 (1961). Because escheat originally applied only to real property, an analogous common law principle — *bona vacantia* — emerged to allow the sovereign to take possession of personal property deemed to have no owner. *Id.* at 1326; see also *Delaware*, 507 U.S. at 497 n.9. The term "escheat" has come to apply equally to real and personal property. See *Delaware*, 507 U.S. at 497 n.9. ("Our opinions, however, have understood 'escheat' as encompassing the appropriation of both real and personal property, and we use the term in that broad sense."). The term is colloquially used to refer to the right of a government to take either custody or ownership of unclaimed property.

These common law principles were adopted into American law, with the sovereign right to escheat residing with the States. See *Christianson v. King Cnty.*, 239 U.S. 356, 365 (1915) ("The distribution of and the

right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress.”). In its American incarnation, the principle of escheat has been justified by its tendency to allow unclaimed property to be “used for the general good rather than for the chance enrichment of particular individuals or organizations.” *Standard Oil Co. v. New Jersey* 341 U.S. 428, 436 (1951). All 50 states currently have laws that allow for the escheat of unclaimed property following a “dormancy” period after which property is deemed abandoned. *See, e.g.*, 72 Pa. Stat. § 1301.1 *et seq.*

### **B. Federal Common Law Priority Rules**

With respect to abandoned tangible property, “it has always been the unquestioned rule in all jurisdictions that only the state in which the property is located may escheat.” *Texas*, 379 U.S. at 677. Abandoned intangible property, however, “is not physical matter which can be located on a map.” *Id.* As a result, the straightforward rule governing escheatment of tangible property does not apply to intangible property. In the early twentieth century, states began to pass laws authorizing escheatment of intangible property, which the Supreme Court generally upheld as valid exercises of the sovereign power of states. *See, e.g.*, *Provident Inst. for Sav. v. Malone*, 221 U.S. 660, 666 (1911); *Sec. Sav. Bank v. California*, 263 U.S. 282, 285–86 (1923); *Anderson Nat’l Bank v. Lockett*, 321 U.S. 233, 252 (1944); *Conn. Mut. Ins. Co. v. Moore*, 333 U.S. 541, 546 (1947); *Standard Oil*, 341 U.S. at 442. *But see First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 370 (1923) (holding that a California statute



allowing for the escheatment of deposits at a national bank was an unconstitutional interference with the functioning of national banks). These cases did not, however, involve States' competing claims to escheat intangible property. Such competing claims became inevitable when, "[f]ollowing World War II, states, recognizing the potential for substantial revenues, began to enact broad custodial statutes encompassing all kinds of unclaimed property." Andrew W. McThenia, Jr. & David J. Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 Wash. & Lee L. Rev. 1429, 1436 (1983).

The Supreme Court first addressed such a dispute in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961). Western Union sold a telegraphic money order service, which allowed customers to send a money order across the wires to a named recipient, to be collected at another Western Union office. A sender would pay to a Western Union clerk the amount to be sent plus a fee. *Id.* at 72. The sending office of Western Union would give the sender a receipt and would send a message to the Western Union office closest to the intended recipient, directing the office to pay the specified amount to the payee. The payee would then be notified, and upon presenting himself at the Western Union office, would be provided a negotiable instrument in the amount specified by the sender. *Id.* At times, however, Western Union would be unable either to locate the intended recipient or to refund the sender. As a result, the company accumulated "large sums of money due from Western Union for undelivered money orders and unpaid drafts." *Id.* at 73.

Pennsylvania sued Western Union in Pennsylvania State court, and, pursuant to its unclaimed property statute, obtained a judgment requiring Western Union to remit to the State all funds from unclaimed money orders purchased in Pennsylvania. *Id.* at 74. Western Union defended on the ground that the potential for another State or States to claim entitlement to escheat the same funds subjected it to the risk of double liability in violation of its Due Process rights. *Id.* (Indeed, New York had already escheated some of the funds claimed by Pennsylvania.) Noting that “rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance,” the Court held that disputes between States over the right to escheat intangibles must be adjudicated in a forum where all competing States could present their claims. *Id.* at 79. The Court therefore reversed the judgment of the Pennsylvania State court. *Id.* at 80.

Four years later, in *Texas v. New Jersey*, 379 U.S. 674 (1965), the Court directly addressed competing State claims to escheat unclaimed intangible property. Texas invoked the original jurisdiction of the Supreme Court to sue New Jersey, Pennsylvania, and the Sun Oil Company, seeking a declaration that Texas was entitled to escheat certain small debts owed by Sun Oil to approximately 1,730 creditors who had failed to claim or cash checks over approximately 40 years preceding the lawsuit. *Id.* at 675. The unclaimed debts at issue were either evidenced in the records of Sun Oil’s Texas offices, or owed to creditors whose last known address was in Texas. *Id.*

The Court considered “[f]our different possible rules” to “settle[] the question of which State will be allowed to escheat.” *Id.* at 677–78. Texas, relying on State court choice-of-law decisions, urged a rule by which the State with the most significant contacts with the debt at issue would be entitled to escheat. *Id.* at 678. The Court rejected this as “not really any workable test at all” given that it would require the courts “in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts.” *Id.* at 679.

New Jersey, Sun Oil’s State of incorporation, argued that the debtor’s State of incorporation should govern. *Id.* at 679. The Court rejected that argument as well, observing that entitlement to escheat should be determined “primarily on principles of fairness,” and that allowing escheat of obligations incurred all over the country to the State of incorporation “would too greatly [exalt] a minor factor.” *Id.* at 680.

Pennsylvania, which housed Sun Oil’s principal place of business, argued that the State in which a debtor has its principal place of business should have priority. While the Court found the principal place of business preferable to the place of incorporation, it nonetheless concluded that allowing a State to benefit from a *debt* owed by a business operating there would, anomalously, “convert a liability into an asset when the State decides to escheat.” *Id.* at 680. Additionally, the Court noted that determining a company’s principal place of business could be cumbersome. *Id.*

The Court opted for the rule proposed by Florida (and recommended by the Special Master) (hereinafter, the *Texas* rule), under which the right to escheat

an unclaimed debt instrument is accorded to the State of the creditor's last known address as shown by the books and records of the debtor. *Id.* at 680–81. The Court found that the factual issue posed by this test would be “simple and easy to resolve,” would “leave[] no legal issue to be decided,” and would fairly “tend to distribute escheats among the States in the proportion of the commercial activities of their residents.” *Id.* at 681.

For the circumstance where a debtor's books showed no record of the creditor's address, or where the State of the creditor's last known address had no statute allowing it to escheat the property at issue, the Court adopted a secondary rule allowing escheat by the debtor's State of incorporation. *Id.* at 682.<sup>7</sup> The Court observed that this “secondary rule” was “likely to arise with comparative infrequency.” *Id.* The Court noted that the issue presented was fundamentally one “of ease of administration and of equity.” *Id.* at 683.

The Court has, on two subsequent occasions, considered challenges to the priority rules established in *Texas*. In *Pennsylvania v. New York*, 407 U.S. 206 (1972), Pennsylvania brought an original action against New York, arguing (as it had in *Western Union Telegraph*) that it was entitled to escheat unclaimed funds accumulated by Western Union when the company was able to locate neither the purchaser nor the payee of telegraphic money orders. *Id.* at 211–12. Pennsylvania noted that Western Union's records

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<sup>7</sup> In either case, this “secondary rule” would be subject to the right of a State to recover if and when its laws allowed, or upon evidence that the creditor's last known address was within the State's borders.

often do not list an address for the sender or payee of funds and argued that application of the *Texas* rule in such cases brought an unjustified windfall to Western Union's State of incorporation, New York. Pennsylvania argued "that the State where the money order was purchased [should] be permitted to take the funds" based on the assumption that the State of purchase could be presumed to be the purchaser's State of residence. *Id.* at 212. Where "a transaction is of a type that the obligor does not make entries upon its books and records showing the address of the obligee," Pennsylvania argued, the State where the transaction occurred should be entitled to escheat. *Id.* at 213–14 (internal quotation marks omitted).

While noting that Pennsylvania's proposal had "some surface appeal," the Court rejected it. *Id.* at 214. The Court disagreed with Pennsylvania's contention that the *Texas* rule was based on an assumption that addresses of creditors are generally known by debtors. *Id.* Indeed, the Court noted that some of the debt instruments involved in *Texas* did not indicate the creditors' last known address. *Id.* The Court held that even when the address of the creditor would not typically be known, Pennsylvania's proposed rule would require the sort of case-by-case adjudication that the Court had held should be avoided. *Id.* at 215. Further, the Court observed that the likelihood of a "windfall" to a State of incorporation did not furnish adequate reason for deviating from established priority rules. *Id.* at 214.

The Court next considered competing claims of States to abandoned intangible property in *Delaware v. New York*, 507 U.S. 490 (1993). The case involved unclaimed dividends, interest, and other distributions

made by the issuers of securities and held by intermediaries on behalf of their beneficial owners.<sup>8</sup> Between 1985 and 1989, New York had escheated several hundred million dollars in such funds from intermediaries doing business in the State, notwithstanding the potential claim of either the State of the last known address of the beneficial owner or the intermediaries' State of incorporation. *Id.* at 496.

The Special Master recommended that the Court deviate from the secondary rule established in *Texas* to hold that where the creditor's or beneficial owner's last known address is not known, a corporate debtor's principal place of business — rather than its State of incorporation — should have priority to escheat. *Id.* at 505–06. The Court rejected the Special Master's recommendation, ruling that “determining the State of incorporation is the most efficient way to locate a corporate debtor.” *Id.* at 506. The Court further observed that “[t]he mere introduction of any factual controversy over the location of a debtor's principal executive offices needlessly complicates an inquiry made irreducibly simple by *Texas*' adoption of a test based on the State of incorporation.” *Id.* Further, the Court noted that adopting a rule based on principal place of business would be unlikely to provide for a more equitable distribution of unclaimed funds; rather, it would simply tend to shift entitlement to escheat the unclaimed distributions at issue from Delaware — where the majority of the intermediaries were incorporated

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<sup>8</sup> This practice of using intermediaries “facilitates the offering of customized financial services” and allows for securities to be transferred between beneficial owners without requiring the underlying securities certificates to themselves be transferred. *Id.* at 495.

— to New York — where most had their principal place of business. *Id.* at 507 (“A company’s arguably arbitrary decision to incorporate in one State bears no less on its business activities than its officers’ equally arbitrary decision to locate their principal executive offices in another State.”). Finally, the Court once again emphasized the importance of adhering to precedent so as to avoid uncertainty and the protracted litigation amongst the States that might result from willingness “to decide each escheat case on the basis of its particular facts.” *Id.* at 510 (quoting *Texas*, 379 U.S. at 679).

### **C. The Statutory Backdrop**

#### **1. The Uniform Disposition of Unclaimed Property Act**

In the years following the Supreme Court’s decisions upholding the States’ sovereign power to escheat (or take custody of) intangible forms of property, but before the Court first addressed the potential for competing State claims to the same intangible property in *Western Union Telegraph*, the Uniform Law Commission published the 1954 Uniform Disposition of Unclaimed Property Act (the “1954 Uniform Act”). The 1954 Uniform Act was intended both to fill the “very real need” for “comprehensive legislation covering the entire field of unclaimed property,” and to address the risk that the Court’s early decisions upholding States’ power to escheat intangible property could subject property holders to multiple liability from the competing claims of States as they enacted more and more expansive laws providing for escheat of unclaimed property. 1954 Uniform Act, Prefatory Note, at 136 (Unif. L. Comm’n 1954) (noting that the Supreme Court’s decisions “reveal that a troublesome problem

of multiple liability for the holder of unclaimed property arises in case two or more states, each having jurisdiction over such property, enact statutes dealing with the subject”).

Section 2 of the 1954 Uniform Act set forth the criteria for the presumption of abandonment of intangible property<sup>9</sup> held by banking or financial institutions, *see* 1954 Uniform Act § 2, and specifically covered the disposition of “[a]ny sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, and traveler’s checks,” *id.* § 2(c). The comments to this portion of the 1954 Uniform Act note that “Section 2 Parallels Section 300 of the New York Abandoned Property Law.” *Id.* § 2 cmt.

The 1954 Uniform Act “was widely but by no means universally adopted” by States. McThenia & Epstein, *supra*, at 1441. It did not put an end to conflicts between the States over unclaimed intangible property. *Id.* While the 1954 Act contained a “reciprocity” provision that created priority rules for scenarios in which multiple States made a claim over the same abandoned property, the provision’s operation relied on enactment of legislation by States to forgo their claim in the reciprocal circumstances described by the Act. *See* 1954 Uniform Act § 10(b).<sup>10</sup> Additionally, the

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<sup>9</sup> This section also included criteria relating to the contents of safe deposit boxes. *See* 1954 Act § 2(d).

<sup>10</sup> The priority rules set forth in the reciprocity provision provided that, if two States had a claim to unclaimed property, and the holder of that property had a record of the owner’s last-known



reciprocity provision did not cover all types of property; notably, while the 1954 Uniform Act covered written financial instruments, it did so only where such instruments were issued "by a banking or financial institution." 1954 Uniform Act § 2(c).

The Revised Uniform Disposition of Unclaimed Property Act, published in 1966<sup>11</sup> (the "1966 Uniform Act"), aimed to address the gaps. The 1966 Uniform Act revised Section 2 to explicitly include "money orders and traveler's checks" issued by "business associations." 1966 Uniform Act § 2(c); Prefatory Note, at 3. As a result of this revision, Section 2 of the 1966 Uniform Act established criteria covering "[a]ny sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization or business association is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." 1966 Uniform Act § 2(c). The 1966 Uniform Act did not, however, define the terms "money order" or "traveler's check."

## **2. The Disposition of Abandoned Money Orders and Traveler's Checks Act**

In 1974, two years after the Supreme Court's decision in *Pennsylvania*, Congress enacted the FDA. See Act of Oct. 28, 1974, Pub. L. No. 93-495, §§ 601-04, 88 Stat. 1500, 1525-26 (codified at 12 U.S.C. §§ 2501-

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address, the State of the last-known address was entitled to custody of the property. *Id.*

<sup>11</sup> By which time the 1954 Act had been adopted by 12 States. See Revised Uniform Disposition of Unclaimed Property Act, Prefatory Note, at 3 (Unif. L. Comm'n 1966).

03). The FDA is the subject of this litigation. The FDA narrowed the *Pennsylvania* rule by altering the priority framework established in *Texas* as applied to certain specified financial instruments. Instead of allowing the issuer's State of incorporation to take custody of funds from the purchase of abandoned financial instruments, where the purchaser's and payee's addresses were unknown to the obligor (the secondary rule established in *Texas* and *Pennsylvania*), the FDA provides that the State in which the instrument was *purchased* is entitled to take custody of those funds (so long as the books and records of the instrument's issuer show that State, and that State's laws entitle it to take custody of the funds at issue). See 12 U.S.C. § 2503(1).

The FDA applies only to sums 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." *Id.* § 2503. Hereinafter, I refer to such instruments, those falling within the coverage of the FDA, as "Covered Instruments." Forms of intangible property other than Covered Instruments continue to be governed by the priority rules established by the Supreme Court in *Texas* and *Pennsylvania*. While the FDA defines the terms "banking organization," "business association," and "financial organization," see *id.* § 2502(1)–(3), it does not define "money order," "traveler's check," "directly liable," or "third party bank check."

Where the FDA applies, the occurrence of one of three mutually exclusive scenarios, each set forth in a subsection of § 2503, determines which State is entitled to take custody of the funds at issue. *First*, "if the

books and records of such banking or financial organization or business association [the issuer or obligor of the Covered Instrument] show the State in which" the Covered Instrument was purchased, then "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." *Id.* § 2503(1). *Second*, if the books or records of the issuer do *not* show the State in which the Covered Instrument was purchased, then the State in which the issuer "has its principal place of business shall be entitled to escheat or take custody of the sum payable," to the extent that State's laws allow it to do so, "until another State shall demonstrate by written evidence that it is the State of purchase." *Id.* at § 2503(2). *Third*, if the books and records of the issuer *do* show the State in which the Covered Instrument was purchased, but that State's laws do not allow it to take custody of the funds, then the State in which the issuer has its principal place of business is entitled to take custody of the funds (if that State's laws authorize this), "subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum." *Id.* at § 2503(3).

The legislative history of the FDA reflects that it was passed in direct response to the Supreme Court's rejection of Pennsylvania's claim in *Pennsylvania*. Senator Hugh Scott, of Pennsylvania, submitted the proposed bill to Congress alongside a memorandum noting that "[t]he problem to which this bill is directed has been highlighted and made more severe recently by the Supreme Court in *Pennsylvania v. New York*, 407 U.S. 206 (1972)." 119 Cong. Rec. 17047 (May 29,

1973) (Sen. Scott, Memorandum in Support of Proposed Federal Disposition of Unclaimed Property Act of 1973). The memorandum likewise observed that "in the case of travelers 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." *Id.* Similarly, the Senate Report for the FDA describes the bill as "designed to assure a more equitable distribution among the various States of the proceeds of [Covered Instruments]," rather "than continuing to permit a relatively few States to claim these sums solely because the seller is domiciled in that State, even though the entire transaction took place in another State." S. Rep. No. 93-505, at 1, 6 (1973).

Additionally, Congress codified the rationale behind the FDA as part of the statute itself. In a section of the FDA titled "Congressional findings and declaration of purpose," Congress noted its finding 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.

12 U.S.C. § 2501(1)–(5).

While the bill was in committee, the Chairman of the Senate Committee on Banking, Housing, and Urban Affairs sought the views of the Department of the Treasury ("Treasury") on the proposed legislation. See S. Rep. No. 93-505, at 5 (Letter from Edward C. Schmults). Treasury's General Counsel, writing on behalf of Treasury, responded with a letter stating that it did not object to the legislation, "but . . . believe[d] the language of the bill is broader than intended by the drafters." *Id.* at 5. Specifically, Treasury observed that the language "money order, traveler's check, or similar written instrument on which a bank or financial organization or business association is directly liable" could be interpreted to cover "third party payment bank checks." *Id.* Treasury recommended expressly excluding "third party payment bank checks" from the description of Covered Instruments. *Id.* Describing it as a "technical" change, the Committee adopted this suggestion, *id.* at 6, although deviating slightly from Treasury's suggested language. The final bill was enacted containing an exception for "third

party bank checks,” without defining that term. *See* 12 U.S.C. § 2503.<sup>12</sup>

### **D. Factual Background**

As is discussed more fully below, the facts that are material to these cross motions are, with limited exceptions, not in dispute. Moneygram is a Delaware corporation. It provides prepaid financial instruments to financial institutions and retail establishments, which use these products to pay their own obligations or sell them to customers. Moneygram’s parent company — Moneygram International, Inc. — is the second largest money transfer business in the world, with revenues exceeding \$1 billion. Until 2005, Moneygram operated under the name Traveler’s Express.

Moneygram markets two lines of prepaid financial instruments as part of its Financial Paper Product segment. One is marketed as “Retail Money Orders”; another is marketed as “Official Checks,” which are issued in several categories. The instant dispute is over entitlement to escheat certain categories of Official Checks.

#### **1. MoneyGram Retail Money Orders**

Moneygram Retail Money Orders, which are facially identified as “money orders” are not a subject of this dispute. Moneygram reports its abandoned Retail Money Orders pursuant to the FDA, and Delaware has not challenged that practice in this litigation.

A purchaser of a Moneygram Retail Money Order buys the instrument from a seller, which acts as an

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<sup>12</sup> The legislative history does not reflect why the final language of the bill deviated from the language suggested by Treasury.

agent for Moneygram, by paying the monetary amount imprinted on the face of the instrument, plus any applicable fees. Moneygram's selling agent is not itself a party on the Retail Money Order. In exchange for payment, the purchaser receives from the selling agent a written instrument (the Retail Money Order) on which she can enter the name of the desired payee. Moneygram is designated as the issuer and the drawer<sup>13</sup> of the Retail Money Order. The Retail Money Order can then be redeemed by the payee for its face value. Moneygram markets Retail Money Orders as instruments that are accepted almost universally and are treated "as good as cash." Nonetheless, Moneygram does not guarantee payment on Retail Money Orders and may under certain situations return a Retail Money Order unpaid (for example, when fraud is suspected).

Moneygram's agents generally do not collect personal identifying information from the purchaser, regarding either the purchaser or payee.<sup>14</sup> Instead, Moneygram's selling agents report four pieces of information to Moneygram upon the sale of a Retail Money Order: (1) the dollar amount of the instrument; (2) the instrument's serial number; (3) the date of the sale;

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<sup>13</sup> Under the Uniform Commercial Code (the "UCC") "issuer" "means a maker or drawer of an instrument." UCC § 3-105(c) (Am. L. Inst. & Unif. L. Comm'n 2017) ("2017 UCC"). "Drawer" "means a person who signs or is identified in a draft as a person ordering payment," while "maker" has the same significance with respect to a note. *Id.* § 3-103(5), (7).

<sup>14</sup> If, however, a Moneygram agent becomes aware that a purchaser buys more than \$3,000 worth of Moneygram Money Orders in a day, the agent collects identifying information from that purchaser, which is maintained for five years.

and (4) the selling agent's "customer identification number." The agent's customer identification number allows Moneygram to identify the State in which the instrument was sold. The value of the Retail Money Order is then transferred from the selling agent's bank account to Moneygram, which holds the funds in an intermingled account containing the balance of all outstanding Moneygram paper-based payment products. The funds remain in this account until the Retail Money Order is presented for payment, or the instrument goes uncashed for long enough that it becomes presumptively abandoned for the purposes of a claiming State's abandoned property laws. When a Retail Money Order is presented for payment, it is cleared through the banking system (using routing and transit numbers listed on the face of the instrument) by a "clearing bank" listed on the front of the instrument in the "payable through" field. Moneygram then draws the funds from the commingled account to pay the clearing bank. If a Retail Money Order is not presented for payment for a sufficiently long time that it is deemed presumptively abandoned, Moneygram, following the priorities established by the FDA, remits its value to the State in which it was purchased.

## **2. MoneyGram Official Checks**

MoneyGram also offers four categories of prepaid financial instruments that it processes on what it describes as its "Official Checks" platform. Two of those categories, Moneygram "Agent Checks," and Moneygram "Teller's Checks," are disputed in this litigation. Whereas Retail Money Orders are sold by retail agents such as convenience stores, supermarkets, drug stores, and other nonfinancial institutions, Official Checks are sold only by financial institutions



(such as banks and credit unions). As for a third category of instrument processed by Moneygram on its Official Check platform, "Agent Check Money Orders," these instruments are relevant to this case, but are not in dispute. They are described below. Moneygram reports and remits the value of abandoned Agent Check Money Orders pursuant to the FDA, and Delaware has not challenged that practice in this litigation.<sup>15</sup>

### **i. Moneygram "Agent Check Money Orders"**

Agent Check Money Orders function much as Retail Money Orders, with the exception that, while Retail

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<sup>15</sup> In what is a difference merely of diction, and not a difference of legal significance to this dispute, the parties use the term "Official Checks" slightly differently. The Defendants use the term as encompassing Teller's Checks, Agent Checks, *and* Agent Check Money Orders, *see, e.g.*, Defs. Br. 22-23, while Delaware uses the term as covering only Agent Checks and Teller's Checks. In this Report, I use the term "Official Checks" as covering all three instruments while recognizing that the dispute concerns only Agent Checks and Teller's Checks.

Moneygram already treats abandoned Agent Check Money Orders as covered by the FDA, reporting and remitting their value pursuant to the FDA's priority rules. Delaware has not challenged that practice in this litigation. As a result, there is not presently a live dispute between the parties with respect to Agent Check Money Orders.

To the extent ambiguity arises as to the extent of relief sought from the Defendants' use, in their Motion for Partial Summary Judgment, of the term "Official Checks" as including Agent Check Money Orders, this Report recommends adjudication solely of the propriety of Moneygram's treatment of the Disputed Instruments, and makes no recommendation concerning escheat of Agent Check Money Orders, which is not disputed in this litigation.

Money Orders are sold at convenience stores and similar retail locations, Agent Check Money Orders are sold only by financial institutions. As with its Retail Money Orders, but unlike Agent Checks and Teller's Checks, Moneygram remits the value of abandoned Agent Check Money Orders pursuant to the terms of the FDA. Delaware has not challenged that practice in this litigation.<sup>16</sup>

In the sale of Agent Check Money Orders, a financial institution acts as selling agent for Moneygram; the selling financial institution is not liable on the instrument; the purchaser pays the financial institution the face value of the Agent Check Money Order, plus any fees; Moneygram is considered both the drawer and the issuer; and the clearing bank is designated as "drawee."<sup>17</sup> Funds from the purchase of Agent Check Money Orders are transferred by the selling financial institution to Moneygram, which holds the funds in the same comingled account as proceeds from the sale of Retail Money Orders. When the instrument is presented for payment, it is processed through the clearing system to the clearing bank in the same manner as in the case of Retail Money Orders. Moneygram

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<sup>16</sup> In fact, Delaware's Statement of Undisputed Facts generally describes the characteristics of both Retail Money Orders and Agent Check Money Orders under the generic identifier "MoneyGram Money Orders." See Dkt No. 78 II 6, 21-44. (Much of the evidence that Delaware identifies in support of the characteristics it attributes to all "Moneygram Money Orders" appears, however, to refer only to Retail Money Orders. See Dkt. No. 102 II 21-44.)

<sup>17</sup> Under the UCC, "drawee" "means a person ordered in a draft to make payment." 2017 UCC § 3-103(4).

reimburses the clearing bank for its payment of the instrument.

Personal information regarding the purchaser or payee of an Agent Check Money Order is not collected by Moneygram. Moneygram holds the funds from the sale of Agent Check Money Orders until the instrument is presented for payment or deemed presumptively abandoned.

Delaware argues that Moneygram's Agent Checks and Teller's Checks (which are discussed in the next paragraphs) differ substantially from its Agent Check Money Orders and Retail Money Orders and are therefore not Covered Instruments subject to the FDA.

## **ii. Moneygram "Agent Checks"**

Moneygram's Agent Checks, like Moneygram's instruments labeled as "Money Orders," are prepaid financial instruments. In addition to other usages they may have, they are offered for sale to customers at financial institutions as a means to transmit funds to a named payee.<sup>18</sup> A purchaser pays the selling financial

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<sup>18</sup> Delaware disputes that Agent Checks are used by retail purchasers, arguing that these instruments are rather "used by banks to pay their own obligations." Dkt. 98 ¶ 70. It cites in support of this contention the deposition testimony of Moneygram's corporate representative, Eva Yingst. *See* Yingst Dep. 169:17-170:8 (Ex. A to Taliaferro Decl., Dkt. No. 86) ("[T]ypically 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."). But the Yingst testimony expressly acknowledged that distributing financial institutions might be offering such checks to their customers, and, in any event, the proposition that Agent Checks "aren't often used to issue checks for customers" does not say that they are *not* purchased by

institution the face value of the Agent Check, plus any fees. The selling bank transmits the funds (minus its fees) to Moneygram. When the payee of the Agent Check cashes it at a financial institution, that institution forwards the instrument to Moneygram's clearing bank, which reimburses it. Moneygram then reimburses the clearing bank.

Agent Checks come in two varieties. One type of Agent Check indicates that the financial institution signing the check signs as "Agent for Moneygram." A second type of Agent Check simply notes "Authorized Signature" next to the signature entered for the selling institution. Both varieties of Agent Check designate Moneygram as the issuer. Moneygram's clearing bank is designated as the drawee. An Agent Check is sometimes labeled simply as an "Official Check."

After an Agent Check is purchased, the same four pieces of information — amount of the Agent Check, date of purchase, serial number, and customer ID number (that is, the ID of the selling institution) — are transmitted to Moneygram. No identifying information relating to the purchaser or the payee is conveyed to Moneygram. Moneygram holds the proceeds of the sale of Agent Checks in the same intermingled

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consumers. The evidence cited by Delaware does not support the more extreme proposition. In fact, Delaware's own expert's report states that an Agent Check "would be purchased by a consumer from a bank selling the product." Dkt No. 70 ¶ 14 (Expert Report of Ronald Mann) ("Mann Report"). And, at least some of Moneygram's contracts with the distributing financial institutions state that Agent Checks "may be used as money orders" at the financial institution's option. Defs.' Br. 23 (citing Defs.' App'x 219). Delaware's argument on this matter does not create a "genuine dispute as to [a] material fact." Fed. R. Civ. P. 56(a).

account as the other Moneygram products discussed above, until the Agent Check is presented for payment or deemed abandoned. Once an Agent Check is presented for payment, it is cleared in the same manner as Retail Money Orders and Agent Check Money Orders.

Unlike the products that Moneygram markets under the label “Money Orders,” Moneygram remits the proceeds of abandoned Agent Checks to its place of incorporation — currently Delaware — treating them as not covered by the FDA. The Defendants contend in this litigation that Agent Checks are covered by the FDA, so that the proceeds of abandoned Agent Checks should not be sent to Delaware, the State of incorporation (unless they were purchased in Delaware).

### **iii. Moneygram “Teller’s Checks”**

Moneygram Teller’s Checks<sup>19</sup> (“Teller’s Checks”) are purchased in a manner substantially similar to the instruments described above, again with the qualification that, unlike Retail Money Orders but like Agent Checks, Teller’s Checks and other Official Checks are sold only at financial institutions. The purchaser pays the selling financial institution the face value of the instrument, plus any associated fees, and the seller issues the prepaid written instrument. The net proceeds of the purchase of the Teller’s Check are transferred to Moneygram, along with the same four pieces of information that are collected upon the sale of the other Moneygram products at issue. With rare exceptions,

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<sup>19</sup> “Teller’s check” also carries a generic meaning independent of the characteristics of any particular Moneygram product. *See* 2017 UCC § 3-104(h) (“‘Teller’s Check’ means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.”).

no personal information regarding the purchaser or payee is transmitted to Moneygram. Moneygram maintains the proceeds of the sale of Teller's Checks in the same commingled account as those from the sale of the other instruments at issue, until the Teller's Check is presented for payment and the instrument is cleared by the clearing bank. Moneygram reimburses the clearing bank for its payment of the Teller's Check. Like Agent Checks, Teller's Checks are sometimes designated only as "Official Checks" on the instrument.

In the case of Teller's Checks, unlike the other instruments at issue, the selling financial institution is designated as the "drawer" of the instrument. Nonetheless, Moneygram's agreements with its selling financial institution customers describe Teller's Checks as "drawn by" both the financial institution and Moneygram. Moneygram is designated as the issuer. The parties dispute the extent to which the selling institution acts as Moneygram's agent for the purpose of selling Teller's Checks. The clearing bank is designated as the drawee. When a Teller's Check is presented for payment, it is cleared in the same manner as the other instruments at issue. Unlike the other Moneygram instruments at issue, however, a Teller's Check is a "good funds" instrument under Federal Reserve Regulation CC, 12 C.F.R. § 229, with the consequence that the depositor of a Teller's Check can withdraw funds represented by the instrument the day after the check is deposited.

As with Agent Checks (but not Retail Money Orders or Agent Check Money Orders), Moneygram remits the proceeds of unclaimed Teller's Checks to Delaware, Moneygram's State of incorporation, treating

them as not covered by the FDA. The Defendant States contest the propriety of that action, contending that the Teller's Checks are covered by the FDA and therefore should not be remitted to Moneygram's State of incorporation.

### **E. Procedural Background**

This action was commenced on May 26, 2016, when Delaware sought leave to file a bill of complaint against Pennsylvania and Wisconsin within the original jurisdiction of the Supreme Court of the United States. Dkt. No. 1. Delaware's complaint sought a declaration that Moneygram's Agent Checks and Teller's Checks are not governed by the FDA, and are instead governed by federal common law principles under which, in event of abandonment, Delaware, as Moneygram's State of incorporation, may take custody of the proceeds by escheat, regardless of the State in which the instruments were purchased. *Id.*<sup>20</sup>

Delaware's proposed complaint was filed in response to two earlier-filed lawsuits arising from the same dispute. First, Pennsylvania sued Delaware and Moneygram in federal district court in Pennsylvania, asserting that Moneygram's practice of reporting and remitting the value of abandoned Agent Checks and Teller's Checks to Delaware violated the FDA and Pennsylvania's unclaimed property law. *See*

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<sup>20</sup> Delaware subsequently sought leave to amend its bill of complaint to assert similar claims against the Defendants with respect to the escheat of "other similar instruments" issued by Moneygram and unnamed third parties. *See* Dkt. No. 23. Following briefing by the parties, I denied this request on the basis that the proposed amendment would substantially expand the scope of this proceeding and delay resolution of the case. *See* Dkt. No. 40 ¶ 5(b).

Complaint, *Treasury Dep't of Pa. v. Gregor*, No. 1:16-cv-00351-JEJ (M.D. Pa. Feb. 26, 2016), ECF No. 1. Shortly thereafter, Wisconsin filed a similar lawsuit in federal district court in Wisconsin. *See* Complaint, *Wisconsin Dep't of Rev. v. Gregor*, No. 3:16-cv-00281-WMC (W.D. Wis. Apr. 27, 2016), ECF No. 1. Following the filing of Delaware's action in the Supreme Court, the Pennsylvania action was dismissed without prejudice and the Wisconsin action was stayed. *See* Order, *Treasury Dep't of Pa.*, (M.D. Pa. Oct. 5, 2016), ECF No. 48; Order, *Wisconsin Dep't of Rev.* (W.D. Wis. June 21, 2016), ECF No. 12.

Approximately two weeks after Delaware submitted its request to file its complaint, Arkansas, acting also for 20 other States,<sup>21</sup> moved in the Supreme Court to file a complaint against Delaware, seeking a declaration that the FDA applied to all Official Checks, and seeking an order requiring Delaware to "deliver to the [21] States sums payable on unclaimed and abandoned MoneyGram official checks purchased in those States and unlawfully remitted to Delaware." *See* Motion for Leave to File Bill of Complaint at 17-18, *Arkansas v. Delaware*, No. 22O146 (U.S. June 9, 2016). The Supreme Court allowed the filing of both complaints and consolidated the two actions. *See Arkansas v. Delaware*, 137 S. Ct. 266 (2016); Dkt. No. 9. Seven additional States<sup>22</sup> were subsequently granted leave to join the claims brought in Arkansas'

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<sup>21</sup> Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Kentucky.

<sup>22</sup> California, Iowa, Maryland, Oregon, Virginia, Washington, and Wyoming.



complaint. *See* Dkt. Nos. 19, 49. In response to Delaware's complaint, Pennsylvania filed a counterclaim seeking a declaration that the secondary rule established in *Texas* (favoring escheat to the instrument debtor's State of incorporation when the debtor's books do not reflect the purchaser's address) is "no longer equitable, and is therefore overruled." *See* Dkt. No. 11 ¶ 116.

With the agreement of the parties, I bifurcated the proceedings so that the question which State or States would have priority to take custody of the proceeds at issue would precede litigation of damages due. Dkt. No. 43 ¶ 6. During this first phase of the proceedings, the parties were entitled to seek discovery "on any issue relevant to the merits of the State's entitlement to the escheat." *Id.* The parties engaged in fact discovery, during which two corporate representatives of Moneygram (a nonparty in this action) were deposed pursuant to Rule 30(b)(6). Following the close of fact discovery, the parties engaged in expert discovery, including production of expert reports and expert depositions.

The parties have agreed that this matter should be generally governed by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Southern District of New York. *See* Sup. Ct. R. 17.2; Dkt. No. 74 (adopting Joint Proposal for Case Mgmt. Order No. 5, Dkt. No. 73). Before me now are the parties' cross motions for partial summary judgment on the question whether escheat of the Disputed Instruments is governed by the FDA.

## DISCUSSION

Under the Federal Rules of Civil Procedure,<sup>23</sup> summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). On a motion for summary judgment, a court must view the facts “in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Nonetheless, the opponent of a motion for summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A genuine issue of material fact exists if “the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party.” *Id.* at 248. The movant bears the burden of “demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

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<sup>23</sup> Although the Federal Rules are not strictly applicable in original proceedings before the Supreme Court, the Rules, as well as the Court’s precedents construing them, are “useful guides.” *See Nebraska v. Wyoming*, 507 U.S. 584 (1993). And, as noted above, the parties have agreed to their use.

For the reasons set forth below, I recommend that the Defendant states' motion be granted, and Delaware's motion be denied.<sup>24</sup>

### **I. Whether the Disputed Instruments Fall Within the Scope of the FDA**

The central issue in this dispute is whether the Disputed Instruments, Moneygram's Agent Checks and Teller's Checks, are Covered Instruments subject to the priority rules established by the FDA. The Defendant states contend that the Disputed Instruments, as is the case with Moneygram Retail Money Orders and Agent Check Money Orders, are within the scope of the FDA as "money orders,"<sup>25</sup> or, in the alternative, as "similar written instruments (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" ("similar Instruments"). 12 U.S.C. § 2503.<sup>26</sup> Delaware contends that the Disputed Instruments are neither "money orders" nor Similar Instruments, and that they do not, therefore, fall within the scope of the FDA.

The FDA does not define "money order," "similar written instrument," "directly liable," or "third party

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<sup>24</sup> On May 20, 2021, I published a draft version of this Report, Dkt. No. 113, and invited the parties to submit objections, Dkt. No. 114. I have considered Delaware's objections, some of which are discussed in this Report. They do not alter my conclusions.

<sup>25</sup> The FDA is written in the singular: "a money order, traveler's check, or other similar instrument." This Report nonetheless sometimes describes these instruments in the plural without the use of alterations, utilizing quotation marks to indicate reference to the terms' meaning as used in the FDA or related statutes.

<sup>26</sup> The Defendants do not contend that the Disputed Instruments are traveler's checks.

bank check.” See 12 U.S.C. § 2501. Unsurprisingly, the parties disagree as to the meaning of each of these terms and argue that adopting their proposed construction mandates finding in their favor as a matter of law. See Pl.’s Br. 15–16; Defs.’ Br. 20. As a result, close consideration of each of the disputed terms is important to resolving this dispute. Having considered the parties’ arguments, I conclude that, for the purposes of the FDA, the Disputed Instruments are “money orders,” or, at the very least, are Similar Instruments.

In reaching this conclusion, I note that resolution of this dispute does not require determination of the exact scope of the term “money order,” as used in the FDA. What matters is whether the Disputed Instruments fall within that scope. That question can be answered without simultaneously answering whether other instruments that share some features with the Disputed Instruments, but also exhibit differences, also fall within the coverage of the FDA. This Report does not propose answers to the latter question, for reasons more fully explained below.

#### **A. Are the Disputed Instruments “Money Orders” Under the FDA?**

The parties do not dispute that “money orders” are prepaid negotiable instruments, but agree on little else regarding what constitutes a “money order” under the FDA.

A court “normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); see also *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary

meaning.”). Delaware has not proposed a definition of “money order,” as the term is used in the FDA. It acknowledges that “[t]here is no single legal definition of a money order.” Pl.’s Br. 16. It argues that the Disputed Instruments are different from other instruments that are identified on their face as money orders and escheat as money orders pursuant to the FDA. See Pl.’s Br. 16–21.

Delaware points to several differences between instruments on whose face Moneygram prints the legend “money order,” and the Disputed Instruments. The features it identifies of instruments labelled by Moneygram as money orders, that are not features of the Disputed Instruments, are as follows:

- (i) the words “Money Order” appearing somewhere on the face of the instrument, (ii) the words “agent of MoneyGram” appearing somewhere on the face of the instrument, (iii) the inclusion of purchaser payee language creating a contract including service charges on the back of the instrument, (iv) the instrument can be acquired at [nonfinancial] retail locations like a convenience store, and (v) many of the instruments have a maximum value limit of \$1,000.

Pl.’s Br. 18.

For starters, the argument suffers from a fundamental logical flaw. It assumes that the characteristics found today in the instruments that Moneygram markets under the name “money order” are the defining characteristics of the type of instrument Congress had in mind over 40 years ago when it enacted the FDA’s references to “money orders.” Delaware seeks to bolster this flawed argument by pointing out that Moneygram is “either the largest or one of the largest

issuers of money orders” in the United States and has been for the entire time period for which the Defendant States are seeking to recover. Pl.’s Reply Br. 10 (citing *MoneyGram Int’l, Inc. v. Comm’r*, 144 T.C. 1, 4 (2015) (“MoneyGram in 2007 was the leading issuer of money orders in the United States.”)). But this merely underlines many flaws in the logic of Delaware’s argument. Delaware has not shown that the characteristics of contemporary Moneygram money orders to which it points were characteristic of money orders in 1974. Furthermore, if Congress had in mind the money orders of any particular issuer in 1974, in all likelihood it would have been Western Union, not Moneygram, as the legislative history of the FDA makes clear that the statute was passed in response to the Supreme Court’s decision in *Pennsylvania v. New York*, which involved money orders issued by Western Union. See 119 Cong. Rec. 17047 (May 29, 1973) (Sen. Scott, Memorandum in Support of Proposed Federal Disposition of Unclaimed Property Act of 1973); *Pennsylvania*, 407 U.S. at 211–12.

The Defendants are on sounder ground in interpreting the FDA’s use of the term by reference to the important functional features of the instruments and to definitions and usages of the term in then-contemporary sources. They cite the 1968 Black’s Law Dictionary (which was current at the time that the FDA was enacted in 1974, which, discussing postal money orders, observes that “[u]nder the postal regulations of the United States, a money order is a species of draft drawn by one post-office upon another for an amount of money deposited at the first office by the person purchasing the money order, and payable at the second office to a payee named in the order.” *Money Order*, *Black’s Law Dictionary* 1158 (4th ed. rev. 1968).

The 1979 edition of Black's Law Dictionary, similarly, defines a money order as

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. Form of credit instrument calling for payment of money to named payee, and involving three parties: remitter, payee, and drawee. Money order may encompass nonnegotiable as well as negotiable instruments and may be issued by a governmental agency, a bank, or private person or entity authorized to issue it, but essential characteristic is that it is purchased for purpose of paying a debt or to transmit funds upon credit of the issuer of the money order.

*Money Order*, *Black's Law Dictionary* 907 (5th ed. 1979) (internal citations omitted).

Defendants cite also the then-contemporary Webster's New Collegiate Dictionary, which defined "money order" as "an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another named office." *Webster's New Collegiate Dictionary* 547 (7th ed. 1967).<sup>27</sup> As some of these sources classified money orders as "drafts,"

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<sup>27</sup> The 1969 edition of The American Heritage Dictionary of the English Language (not cited by any party) defines a "money order" as "[a]n order for the payment of a specified amount of money, usually issued and payable at a bank or post office." *The American Heritage Dictionary of the English Language* 847 (1st ed. 1969); see also *Money Order*, *Webster's New World Dictionary of the American Language* 917 (2d coll. ed. 1972) ("an order for the payment of a specified sum of money, as one issued for a fee at one post office or bank and payable at another.").

Defendants point to the 1972 UCC definition of “draft” as “a direction to pay” someone that “must identify the person to pay with reasonable certainty.” 1972 UCC § 3-102(1)(b); *see also* 2017 UCC § 3-104(e) (the current version). Drawing from such sources, Defendants contend that the ordinary meaning of “money order” is “a prepaid draft issued by a post office, bank, or some other entity and used by a purchaser to safely transmit money to a named payee.” Defs.’ Br. 22.

Defendants point out that the Disputed Instruments fit squarely within this description. Defs.’ Br. 22. “[T]hey are [prepaid] written orders directing another person to pay a certain sum of money on demand to a named payee.” Defs.’ Br. 22. The purchaser of an Agent Check prepays the value of the instrument to the selling institution, which sends the proceeds to Moneygram, which holds those funds until the instrument is presented for payment, at which point Moneygram transfers the funds representing the prepaid value of the instrument to the clearing bank (the drawee). Teller’s Checks, the Defendants argue, are not different in “any way that is material to the definition of money order under the FDA.” Defs’ Br. 24.<sup>28</sup>

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<sup>28</sup> Delaware notes and the Defendants concede that Teller’s Checks are listed as a “good funds” instrument that has next business day availability under the Expedited Funds Availability Act, 12 U.S.C. § 4001 *et seq.*, and Regulation CC implementing it, *see* 12 C.F.R. Part 229. But the Expedited Funds Availability Act (the “EFAA”) was not enacted until 1987, more than a decade after the FDA, and does not relate to the same subject matter as the FDA. *See* Expedited Funds Availability Act, Pub. L. 100–86, 101 Stat. 635 (1987). The EFAA does not shed any light on the meaning of “money order” within the context of the FDA, because congress could not possibly have intended for the scope of the



Although the Defendants' proffered definition of a money order has potential flaws (discussed below), their argument is considerably more persuasive than Delaware's. Apart from the already noted logical flaws in Delaware's arguments, the characteristics of the instruments Moneygram expressly labels as "money orders" that Delaware identifies as not found in Moneygram's so-called "Agent checks" and "Teller's checks" are, for the most part, superficial and trivial — not the sort of characteristics that define a type of commercial instrument for purposes of its legal classification. While the fact that the term "money order" is written on one instrument and not another undoubtedly has some relevance to whether they should be considered money orders, such a distinction goes only so far.

If an instrument does what a particular category of instrument is expected to do, that fact is far more persuasive in supporting the argument that the instrument is covered by a law applicable to that category of instrument than is the mere absence of a label so identifying it in support of the opposite conclusion. If the unlabeled instrument serves the same commercial purpose, and is recognized in law as having the same attributes as a particular category of instrument, the absence of an identifying legend is insufficient reason not to deem it what its characteristics show it to be for purposes of laws governing that class of instrument.

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FDA to turn on the effects of then-unenacted future legislation relating to a subject matter other than unclaimed property. *Cf. Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.").

It is significant in this regard that Delaware has not offered a suggestion as to what the Disputed Instruments are, if they are not money orders. To the extent that those instruments bear legends, such as “Official Check,” “Agent Check,” or “Teller’s Check,” if Delaware would argue that those are the categories to which they belong, Delaware has not put forth a convincing argument that those categories and money orders (especially what Congress meant by “money orders” in 1974) are mutually exclusive of each other.<sup>29</sup>

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<sup>29</sup> Delaware relies on a 2012 ruling by the Department of the Treasury Financial Crime Enforcement Network (“FinCEN”) as a basis for asserting that the Disputed Instruments, by virtue of falling into the category of “official check” cannot also be categorized as “money orders.” Delaware argues that the FinCEN order confirms the “distinctness” of the category of instruments known as “official checks” from the class known as “money orders.” Pl.’s Br. 6 (citing Department of the Treasury Financial Crimes Enforcement Network Ruling FIN-2012-R001 (May 23, 2012)). The FinCEN ruling addressed whether or not an anonymous company qualified as a “money services business” — a term defined in the regulation at issue to include entities that issue “money orders” — by reason of having sold instruments identified on their face as “official checks.” Relying on an earlier Federal Reserve Bulletin, 72 Fed. Rsrv. Bull. 148 (Feb. 1986), FinCEN noted that the “official checks” at issue were “not the same as money orders” for the purposes of the regulation, and that the company was, accordingly, not a “money services business” by reason of selling instruments so-identified.

The argument is not persuasive. First, Delaware has not shown that the Disputed Instruments, beyond the fact that Moneygram at times refers to them as “Official Checks,” share the characteristics of the instruments considered by FinCEN. Nor has Delaware shown that the statutes and regulations at issue in the FinCEN order, relating to money laundering and other financial crimes, have any relevance to unclaimed property law,

The other differences Delaware points to have even less capacity to determine whether the Disputed Instruments are money orders. Whether the issuer distributes its instruments through agents or entities with which it has a different relationship, and whether it markets them through retail locations such as convenience stores, as opposed to financial institutions or other types of establishments, are marketing decisions that do not determine the rights and duties that arise from use of the instrument in commerce. Such marketing decisions surely do not determine whether the instruments are money orders, much less whether the issuer prints on the face of the instrument that the seller of the issuer's instrument is its "agent." Delaware is correct that some of the terms and conditions applicable to the Disputed Instruments differ from those applicable to the instruments that Moneygram labels as money orders, but those differing terms and conditions relate to such matters as fees charged and procedures for purchasers to follow to receive reimbursement. They relate to peripheral details and not to characteristics defining the rights and obligations inhering in use of the instruments. As for Delaware's observation that "many of [Moneygram's money orders] have a maximum value limit of \$1000 (which is not maintained for Official Checks)," Delaware does not even claim that this limitation is observed for all the instruments that Moneygram identifies as money orders, thus implicitly acknowledging that an instrument with a face value exceeding \$1,000 can be a money order. Pl's Br. 18.

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or were motivated by similar policy concerns as those that motivated the enactment of the FDA. In short, the FinCEN ruling sheds no light on our question.

Nor does Delaware assert that the characteristics it identifies in Moneygram's instruments labeled as money orders that are not found in the Disputed Instruments are necessarily found in the money orders of other issuers.<sup>30</sup> And to the extent that Delaware points to terms of Moneygram's so-identified money orders that are not applicable to the Disputed Instruments (such as a \$1.50 per month fee imposed in specified circumstances), Delaware neither asserts that this fee has always applied to Moneygram's so-identified money orders, nor that this fee is charged by other issuers of money orders.

Delaware, it appears, has simply pointed to every observable feature of Moneygram's instruments that bear a printed legend "money order" that is not also true of those it sells under the names "Agent Check" and "Teller's Check," no matter how inconsequential and regardless of whether those features materially affect the rights and obligations of users, treating them as if they served to define the essence of money orders. The Defendants' focus on the ways in which the Disputed Instruments conform to the fundamental nature of money orders (as that term was generally understood at the time of the passage of the FDA), is

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<sup>30</sup> At oral argument, Delaware suggested that, at around the time the FDA was enacted, Western Union money orders had a maximum value of \$1,000. *See* Tr. March 10, 2021, at 9–10 ("[W]e do include a Western Union money order . . . from 1966 . . . They were limited to a thousand dollars."). But the sample Western Union money order cited in support of this assertion does not evidence any such \$1,000 dollar limit. *See* Dkt. No. 86 (Taliaferro Decl., Ex. W). To the contrary, the rules and conditions governing Western Union money orders as of September 1, 1939 explicitly contemplate money orders of at least \$3,500. *See* Dkt. No 86 (Taliaferro Decl., Ex. X, at 5).

far more persuasive as demonstrating that the Disputed Instruments fall within the FDA's reference to money orders than Delaware's identification of trivial and superficial distinctions between Moneygram's marketing of what it labels "money orders" and what it labels "Agent Checks" and "Teller's Checks."

Delaware advances several further arguments. I do not find them persuasive. It argues, for example, that an essential, defining characteristic of a money order is that it is marketed to individuals who do not have checking accounts and therefore cannot send payments by personal check. The Disputed Instruments, in contrast, are sold only by financial institutions, primarily to their own customers (people who have a checking account). In support of this argument, Delaware cites sources that mention the utility of money orders for "unbanked" individuals as a safe way to transfer funds. See F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962) (defining a money order as "[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"); Barkley Clark & Alphonse M. Squillante, *The Law of Bank Deposits, Collections and Credit Cards* 54 (1970) (a personal money order is an "instrument, issued by and drawn upon a commercial bank without indication of either purchaser or payee . . . often used as a checking account substitute by the purchaser-remitter") Barkley Clark & Barbara Clark, *Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010) (describing a money order as "an instrument calling for the payment of money to a named payee and providing a safe and convenient means of remitting funds by a person not having a checking account."); see

also 72 Fed. Rsrv. Bull. 149 n.5 (Feb. 1986) ("Money orders are *primarily* used to transmit money by consumers who do not or cannot maintain checking accounts.") (emphasis added).

The argument is not persuasive. Delaware's cited sources do not suggest that marketing to unbanked persons is an essential characteristic of a money order — only that money orders are particularly useful to such persons because of their inability to send payments via personal check. The fact that a money order "provid[es] a safe and convenient means of remitting funds by persons not having checking accounts" does not mean that it does not also provide a safe and convenient means of remitting funds by persons who do have checking accounts but prefer not to use them for whatever reason in a particular circumstance. Indeed, the Federal Reserve Bulletin quoted above, stating that money orders "are *primarily* used to transmit money by consumers who do not or cannot maintain checking accounts," by use of the word "primarily" implicitly acknowledges that money orders are also used in other circumstances. 72 Fed. Rsrv. Bull. 149 n.5 (Feb. 1986) (emphasis added). That a money order "provid[es] a safe and convenient means of remitting funds by a person not having a checking account" is undoubtedly true but does not exclude a money order's provision of an alternative "safe and convenient means of remitting funds by a person [who does have] a checking account." Further, a money order would be useful to a person who does have a bank account who wishes to send money to a person that does not, or to a person who, for whatever reason, prefers that her receipt of the payment not be reflected in her bank account. While it appears to be true that a large percentage of the purchasers of money orders are persons who

do so because they have no checking accounts, it does not follow that an instrument having the same capability and legal effect cannot also be useful to persons who use them for a different reason. When the utility and legal effect of two instruments are the same, the mere fact that one is marketed to persons whose reason for using them differs from that of a larger number of customers for the other would not, absent further reason, justify treating the two otherwise identical instruments as legally different. Finally, Delaware's argument that an instrument sold by a banking institution cannot be a money order is undermined by the fact that Moneygram's Agent Check Money Orders — which Moneygram already treats as governed by the FDA (a treatment that Delaware does not challenge in this litigation), and which Delaware frequently describes as "money orders"<sup>31</sup> — are only sold by financial institutions. *See e.g.*, Pl.'s Br. 18 n.3, 22; Mann Report ¶ 18.<sup>32</sup> The more important point, however, is that an issuer's choices of how to market its instruments does not change the rights and obligations that inhere in them.

As a further flaw in Delaware's argument, it suggests no logical connection between the characteristics it describes as definitional features of "money orders" and Congress's objectives in enacting the FDA.

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<sup>31</sup> In fact, Delaware asserts, in its Statement of Undisputed Facts submitted in support of its Motion for Partial Summary Judgment, that there is "no legal distinction" between an Agent Check Money Order and a Retail Money Order. Dkt. No. 78 ¶ 43.

<sup>32</sup> One of the authorities relied upon heavily by Delaware also notes that money orders are sold "by some commercial and savings banks, and savings and loan institutions." F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962).

Delaware asserts that there is “no evidence” that the defining characteristics it has proposed “were not the precise characteristics that led Congress to identify the specific prepaid instruments ‘money order’ and ‘traveler’s check’ in the FDA.” Pls.’ Reply Br. 9. This statement is contrary to the plain text of the FDA. As noted above, Congress included in the text of the statute a section titled “Congressional findings and declaration of purpose.” This section of the statute makes no reference to any of the characteristics identified by Delaware as definitional. *See* 12 U.S.C. § 2501. It explains what were the characteristics of “money orders” and “traveler’s checks” that motivated Congress to impose the priorities established by the FDA. In this section, “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.

12 U.S.C. § 2501(1)–(5). Contrary to Delaware's argument, Congress made clear explanation of its purposes, and none of them depended on the characteristics Delaware argues are definitional of money orders. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning.").

Accepting the characteristics that Delaware points to as definitional of money orders would do nothing to further the stated purposes of the FDA. In fact, it might even foster the type of "inequity" that the FDA was designed to prevent by allowing issuers of money orders to choose which State will have escheat priority by making otherwise inconsequential, cosmetic changes to the face of the instrument. See *The Emily & The Caroline*, 22 U.S. (9 Wheat.) 381, 390 (1824) (concluding that construction of an ambiguous statute in a manner that would render "evasion of the law . . . almost certain" should not be adopted); Scalia & Garner, *Reading Law* 63 ("A textually permissible interpretation that furthers rather than obstructs the [statute]'s purpose should be favored.").

The Defendants are more persuasive in pointing out that the stated purposes of the FDA are served by treating the Disputed Instruments as "money orders," because Moneygram does not maintain records of the addresses of purchasers (or payees) of the Disputed Instruments and there is no contention that purchasers of the Disputed Instruments are any more likely to

reside outside the State of purchase than what Congress noted with respect to purchasers of money orders. *See* 12 U.S.C. § 2501(1)–(2).

In response to the Defendants' interpretation of the statutory term "money order" as a "prepaid draft issued by a post office, bank, or some other entity and used by a purchaser to safely transmit money to a named payee," Defs.' Br. 22, Delaware argues that Congress must have intended something more narrow because, if Congress had intended that the FDA govern the escheat of all prepaid drafts, it could have simply used that term:

[T]he language of the FDA itself evidences an intent to exempt specific categories of written instruments from the federal common law governing the escheat of limited categories of unclaimed intangible property, not the entire universe of drafts except those drawn on an individual or company's account.

Pl.'s Opp. Br. 7. The argument is not persuasive. It is certainly true that, if Congress considered the terms "money order" and "prepaid draft issued by a post office or business enterprise" as equivalent, it could indeed have used either term in drafting the statute. The fact that it used the shorter, simpler term, "money order," in preference to the longer, more complex descriptive does not suggest that it meant something different or narrower.

Delaware next invokes the canon against statutory surplusage, arguing that the Defendant's construction of "money order" as encompassing all forms of prepaid drafts issued by banks, businesses, or other entities would render the statute's additional covered terms unnecessary surplusage, which, Delaware asserts,

compels a narrower interpretation of “money order,” so as to preserve an independent meaning for the other covered terms, “traveler’s check” and “other similar instrument.”

The surplusage canon (*verba cum effectu accipienda sunt*, or “words are to be taken as having effect”) states that “the courts must lean . . . in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.” Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 58 (1868); see also *Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879). The canon presumes that legal drafters *should not* include in legal texts words that have no effect. Courts in turn, should assume that legislatures have observed this exhortation and, therefore, should avoid construing statutes in a manner that renders words redundant. See, e.g., *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”).<sup>33</sup>

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<sup>33</sup> Imprudent observance of the canon by courts can easily lead to giving statutes a meaning that Congress never intended or desired. In enacting a statute, Congress is likely to use a string of similar nouns or verbs in order to be sure to cover the field without leaving a gap or a loophole. In doing so, Congress will likely be more concerned with achieving its objective than with faithfully observing a theoretical prescription to avoid surplusage. See Linda D. Jellum, *Mastering Statutory Interpretation* 104 (2008) (“Legal drafters often include redundant language on purpose to cover any unforeseen gaps or for no good reason at all.”). If courts then insist that each term must have a meaning that distinguishes it from each other term, courts may well be pushed to

Delaware's first argument is that interpreting "money order" to mean "prepaid draft[s] issued by a post office, bank or some other entity" renders redundant Congress's additional inclusion of "traveler's check" in § 2503, because a traveler's check would be included within the definition of "money order." Pl.'s Opp. Br. 8–9. This argument relies on the incorrect assumption that all traveler's checks are necessarily "drafts." A traveler's check can be either a draft or a note. *See* 2017 UCC § 3-104 cmt. 4 ("Instruments are divided into two general categories: drafts and notes. A draft is an instrument that is an order. A note is an instrument that is a promise. . . . Traveler's checks are issued both by banks and nonbanks *and may be in the form of a note or draft.*") (emphasis added); *see also* 1972 UCC § 3-102 cmt. 4 (describing traveler's checks as "negotiable instruments" rather than as "drafts"); William D. Hawkland, *American Travelers Checks*, 15 Buff. L. Rev. 501, 510 (1966) (observing that a traveler's check can operate as a note). Because a traveler's check need not be a draft, interpreting "money order" as the Defendants propose does not cause the FDA's use of the term "traveler's check" to be redundant, and the canon against surplusage is not implicated.

Delaware then argues that the Defendants' construction makes the statutory phrase "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" surplusage, somehow requiring that courts give a narrower

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give the term in question before them a meaning that Congress did not intend, and would not have wished for, solely to achieve fidelity to the canon.

meaning to "money order." Pl.'s Opp. Br. 9. Delaware argues that there is no instrument that is similar to either a money order or a traveler's check that would not be covered by Defendants' definition of money order. The absence of any such instrument, which is similar, and yet is not a money order (or traveler's check), according to Delaware's argument, renders the Similar Instrument clause surplusage. *Id.* at 8-9.

The argument has no validity. The absence of any existing similar instrument does not render the "similar instrument" phrase surplusage. The logical inference from Congress's use of "other similar instrument" is that, while Congress was not aware of any such similar instrument, it wanted to ensure that if, by reason of future changes in State laws or business practices, or for any reason, such similar instruments came into existence in the future, they would be governed by the terms of the statute. If Congress had known of such similar instruments, it would have had every reason to name them explicitly, rather than rely on a vague invocation of similarity. It is precisely because Congress did not know of any such instrument, but suspected that some such instrument might emerge in time, that it extended the statute's coverage beyond the scope of the known instruments that are expressly covered to other similar instruments. Regardless of the present non-existence of such instruments (if indeed there are none), that does not render the clause redundant. The clause means something different from either "money order" or "traveler's check." That it refers to an instrument that is not a money order or traveler's check is clearly communicated by the word "other." The clause refers to an instrument, regardless of whether such an instrument exists at any particular time, that is not a money order or traveler's check

but is sufficiently similar to warrant being treated the same way under the FDA. It is clear from the face of the clause that it is not surplusage.

In any event, precedents explaining the canon against surplusage caution against its application to broad residual clauses that may be enacted when Congress wishes at once to cover specific dangers that are precisely known, while also using a broader, vaguer catchall phrase to cover “known unknowns.” See *Yates v. United States*, 574 U.S. 528, 551 (2015) (Alito, J., concurring in the judgment) (observing that a statutory construction that risks some surplusage may nonetheless be appropriate because “Congress ‘enacts catchall[s]’ for ‘known unknowns.’” (quoting *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009))); *Begay v. United States*, 553 U.S. 137, 153 (2008) (Scalia, J. concurring in the judgment) (“[T]he canon against surplusage has substantially less force when it comes to interpreting a broad residual clause.”); *United States v. Perschilli*, 608 F.3d 34, 41 (1st Cir. 2010) (“Congress may well have wanted to add specificity about known dangers while keeping the catch-all clause in the statute to be sure that other purposes, not readily imagined, were also encompassed.”).

Finally, in Delaware’s objections to the earlier draft of this Report, it makes a criticism of the Defendant states’ arguments that may ultimately prove to have some merit, although that criticism, even if valid, does not inure to Delaware’s benefit. Delaware argues that the definition of “money order,” put forth by the Defendant states is so expansive that it would sweep into the FDA’s coverage a wide variety of instruments, some of which, Delaware argues, Congress did not intend to be governed by the FDA. Pl.’s Objs. 3 (arguing

that the Defendant's proposed construction "sweeps into the definition of 'money order' in the FDA every type of prepaid draft including cashier's checks, teller's checks, certified checks, items denominated on their face as money orders, traveler's checks, agent checks, and USPS money orders.").

Defendant's posited definition is indeed broad, and might perhaps be subject to narrowing refinement. But we need not now confront whether such a narrowing will be required in the future in order to adjudicate the dispute presented here. Delaware argues also that this Report has adopted the Defendants' overbroad definition of money order and that, if the Report's reasoning is adopted by the Supreme Court, that will cause unwarranted disruption of previous escheats of a variety of instruments, prejudicing the interests of other States without their having the opportunity to be heard on the question. In this regard, Delaware's argument has no validity because this Report does not adopt, or depend on the validity of, the definition urged by the Defendant States.

I recognize that now adopting a firm definition of "money order," as used in the FDA, could have consequences for the escheat of various categories of abandoned instruments, affecting the interests of States that are not participants in this litigation and whose arguments will not have been heard. Accordingly, I have refrained from adopting any firm definition of "money order" and urge the Supreme Court to do the same. To decide the question raised by *this* case — whether Moneygram's Disputed Instruments are "money orders," as used in the FDA — does not require making a definitive ruling on the exact boundaries of the term. All that is necessary is to decide whether

Delaware or the Defendant States have the more persuasive arguments and whether a decision in favor of whichever has the more persuasive arguments is likely to conflict with future rulings on the status of other instruments. I am satisfied, and I propose to the Supreme Court, that the arguments of the Defendant States are far more persuasive, and that ruling in their favor while leaving open the exact contours of the definition of “money order,” to be refined as necessary in the future, will not lead to future adjudications that are incompatible with the decision here proposed.

In short, Delaware’s objection rests on the false premise that this Report’s conclusion depends on wholesale acceptance that any instrument falling within the Defendants’ broad definition of “money order” is necessarily governed by the FDA. The Report says no such thing.<sup>34</sup> It concludes that the Disputed Instruments are “money orders” under the FDA, leaving substantially open whether other instruments

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<sup>34</sup> And in any case, Delaware merely assumes, with scant analysis, that Congress did not intend the term “money order” to cover a wide range of discrete instruments that might, depending on the instruments’ characteristics, also be described by more specific identifiers, such as “cashier’s check,” “agent check,” teller’s check,” or “certified check.” *See, e.g.*, Pl.’s Objs. 3; Pl.’s Opp. Br. 7–8. But the current version of the UCC, on which Delaware relies, *see* PL’s Objs. 6, states in its official comments that money orders “vary in form and their form determines how they are treated.” 2017 UCC § 3-104, cmt. 4. The comment goes on to note (seemingly by way of example) that “[i]f a money order falls within the definition of a teller’s check, the rules applicable to teller’s checks apply.” *Id.* This appears to mean that, within the understanding of the UCC, the term “money order” is broad and encompasses various subclasses of instruments. It is not at all clear that the broad definition advanced by the Defendant States is broader than what Congress intended.



falling within the Defendants' broad definition should also be so classified. Defendants' arguments have considerable force and Delaware's arguments are not persuasive. I conclude that the Disputed Instruments are "money orders" within the meaning of the FDA.

**B. Are the Disputed Instruments "Other Similar Written Instruments" Under the FDA?**

In addition to covering a "money order" or "traveler's check," the FDA's priority rules also apply to any "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" (herein "Similar Instruments"). 12 U.S.C. § 2503. Assuming, *arguendo*, that, for whatever reason, the Disputed Instruments are not "money orders" under the FDA, they would still be covered by the statute as Similar Instruments.

To come within the Similar Instruments clause, (1) an instrument in question must be similar to a money order and traveler's check; (2) it must not be a "third party bank check"; and (3) a "banking or financial organization" or "business association" must be "directly liable" on it. Other than agreeing that Moneygram is a "banking or financial organization or business association" under the FDA, the parties disagree as to whether the Disputed Instruments fall under the Similar Instruments clause. Three issues are disputed: First, whether the Disputed Instruments are "similar" to "money orders" and "traveler's checks"; second, whether the Disputed Instruments are instruments "on which a banking or financial organization or a business association is directly liable"; third, whether a Disputed Instrument is a "third party bank check,"

which is explicitly excluded. I have considered these issues in turn.

**1. Whether the Disputed Instruments are “Similar” to “Money Orders” and “Traveler’s Checks”**

“Similarity,” as explained by the Supreme Court, is “resemblance between different things.” *United States v. Raynor*, 302 U.S. 540, 547 (1938) (noting that “similarity is not identity”). Delaware’s first argument is that, while a court can determine *dissimilarity* as a matter of law, similarity is inherently factual and cannot be decided as a matter of law on a motion for summary judgment. I find no validity in this argument. Here, the material facts are essentially undisputed, and the question of similarity turns on the applicable statutory standard under the FDA. *See McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991) (“It is for the court to define the statutory standard. . . . [S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion.”); *Rousey v. Jacoway*, 544 U.S. 320, 334 (2005) (determining that IRAs are “similar,” for the purpose of the Bankruptcy Code, to “stock bonus, pension, profitsharing, [and] annuity” plans or contracts).

I recognize, of course, that the term “similar” is unavoidably vague and susceptible of different meanings. Items can be similar and dissimilar in innumerable ways. Whether undisputed dissimilarities affect the answer to whether the items are “similar” to one another within the meaning of a particular statute is a question of law. The answer to it depends on analysis of the statute and its purposes, and determination of what features have greater or lesser significance for

the purposes of the statute. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”). For some statutes, the fact that one object is green while the other is red may be a crucial dissimilarity that is incompatible with a finding of similarity, whereas under another statute such a difference may have zero significance. If the similarities are of crucial importance and the dissimilarities are without importance to the purposes of the statute, a court would be compelled to find similarity, as a matter of law, and to reject a jury’s contrary verdict. A court in such circumstances should grant summary judgment finding similarity. There is simply no merit to Delaware’s argument that, while a court may grant summary judgment rejecting similarity, it may not grant summary judgment finding similarity. See, e.g., *Strubel v. Comenity Bank*, 842 F.3d 181, 197 (2d Cir. 2016) (granting summary judgment to the defendant on claims brought under the Truth In Lending Act on the basis that the defendant’s billing rights form was “substantially similar,” as a matter of law, to the model form promulgated by the CFPB); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 123 (2d Cir. 2021) (holding that silkscreen prints and illustrations created by Andy Warhol were substantially similar, as a matter of law, to the photograph on which they were based); *Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 53 (1st Cir. 2012) (holding that modified versions of translated religious texts were substantially similar, as a matter of law, to the original translations); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602

F.3d 57, 63 (2d Cir. 2010) (“The question of substantial similarity is by no means exclusively reserved for resolution by a jury . . . .”); *Segret’s, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 62 (1st Cir. 2000) (holding that two clothing designs were substantially similar as a matter of law); *Twin Peaks Prods., Inc. v. Publ’ns Int’l*, 996 F.2d 1366, 1372 (2d Cir. 1993) (affirming the district court’s holding that a book and a television show were similar as a matter of law); *Castle Rock Entm’t v. Carol Pub. Grp.*, 955 F. Supp. 260, 266 (S.D.N.Y. 1997) (Sotomayor, J.) (granting summary judgment on plaintiffs’ copyright infringement claim and holding that defendant’s book was substantially similar, as a matter of law, to plaintiffs’ television show); cf. *Rousey*, 544 U.S. at 334–45.

The structure of the FDA, by referring to a “money order, traveler’s check, or other similar written instrument” manifests a clear intent for the word “similar” to refer to the shared characteristics of “money orders” and “traveler’s checks.” That is, the characteristics to which a written instrument must be “similar” to fall within the scope of the FDA are those features that are common to a “money order” and a “traveler’s check,” and are of significance to the purposes of the FDA. See *Rousey*, 544 U.S. at 329–31 (holding that the correct construction of a statute applying to a “stock bonus, pension, profitsharing, annuity, or similar plan or contract” turns on similarity to “[t]he common feature of all [the enumerated items]”).<sup>35</sup>

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<sup>35</sup> By way of illustration, if a tax deduction were available for the purchase of a “car, boat, airplane, or other similar vehicle,” an individual could not reasonably expect to receive the deduction for the purchase of a toy car, despite that a toy car is, in many respects, similar to a car.

On the question whether the Disputed Instruments are similar to money orders and traveler's checks, the parties make substantially the same arguments as they make with respect to the question whether the Disputed Instruments *are* money orders. The Defendant States point out in support of similarity that the Disputed Instruments, like money orders, are prepaid drafts issued by a financial or official entity, providing for payment of an exact sum of money to a named individual (making them useful as a convenient, secure method for one person to transmit funds to another). They argue that these features conform to the fundamental characteristics of a money order that Congress would have envisaged in 1974, and, furthermore, that the Disputed Instruments share with money orders features identified by Congress as motivating enactment of the FDA: to wit, the issuer maintains records showing the State in which the instrument was purchased, but not of the address of the purchaser (or payee); purchasers, therefore, do not ordinarily receive notification from the issuer when the payee cashes the order, which increases the likelihood of abandonment; purchasers usually reside in the State where they make the purchase; and the cost of maintaining and retrieving addresses of purchasers would be a burden on commerce.

Delaware likewise raises substantially the same arguments as it did in arguing the Disputed Instruments are not money orders. It points to differences between the Disputed Instruments and the instruments that Moneygram now labels as money orders. Apart from the logical deficiencies of Delaware's assumption that the instruments Moneygram now labels as money orders are exactly what Congress had in mind in 1974 in passing the FDA, which is

discussed at length above, the more serious flaw in Delaware's argument is, once again, that the differences it points to relate to superficial, inconsequential issues. These are factual differences that have no material bearing on the rights or obligations arising from the use of the instruments, on their character as instruments in commerce, or on the purposes Congress sought to achieve in enacting the FDA. With respect to the differences that Delaware notes, the Defendants do not dispute their existence. Those differences are, however, too trivial and unrelated to the rights and obligations inhering in the instruments when used in commerce.

For example, Delaware again counters by pointing to a number of facial, technical, operational, and marketing differences between the instruments Moneygram markets as money orders and the Disputed Instruments, arguing that, in the aggregate, these differences defeat similarity. Delaware points, for example, to the fact "Moneygram Money Orders generally remain outstanding for approximately six days" while "Official Checks generally remain outstanding for approximately four days," Pl.'s Br. 53, and the fact that Moneygram maintains an internet database of selling locations for its Moneygram Retail Money Orders, but does not maintain such a database for the Disputed Instruments, Pl.'s Br. 52. It notes also that Teller's Checks are listed as "low risk items" under the Expedited Funds Availability Act, 12 U.S.C. § 4001, and Regulation CC implementing it, 12 C.F.R.

Part 229, while Moneygram's instruments labeled as money orders are not so listed. Pl.'s Br. 48.<sup>36</sup>

Delaware's arguments suffer from the same flaws as noted above. Most significantly, the differences it points to are trivial matters relating to the appearance of the face of the instrument or the manner of its marketing or administration by the issuer, without bearing on the rights and obligations arising from its use. A further logical flaw, once again, is that comparing the Disputed Instruments to the instruments Moneygram now issues under the label "money orders" does not necessarily compare them to the money orders, many marketed by other issuers, that Congress would have had in mind over 40 years ago, in enacting the FDA.<sup>37</sup>

And with respect to Delaware's argument that Congress was not motivated in passing the FDA by the fact that holders of unclaimed money orders do not maintain the addresses of purchasers, Delaware skates on thin ice in view of the statute's express recitation, under "Congressional findings and declaration of purpose," that "(1) the books and records of banking institutions and business associations engaged in

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<sup>36</sup> A further flaw in Delaware's argument is that neither the EFAA nor Regulation CC existed at the time the FDA was introduced. See Expedited Funds Availability Act, Pub. L. 100-86, 101 Stat. 635 (1987).

<sup>37</sup> In addition, many of the dissimilarities Delaware notes between the instruments Moneygram labels as money orders and its Teller's Checks and Agent Checks also distinguish them from Moneygram's Agent Check Money Orders, which Moneygram already treats as governed by the FDA, with no asserted objection by Delaware. See note 15, *supra*. For example, Agent Check Money Orders are sold only at financial institutions, and are marketed to the customers of such institutions.

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." 12 U.S.C. § 2501(1). Further, Delaware's assertion that the "congressional record is devoid of any basis for asserting that addresses are not kept for money orders," Pl.'s Opp. Br. 45, is beside the point. Regardless of whether support for this finding is found in the legislative history, Congress expressly so found, and recited this fact as part of its explanation of its purpose in passing the statute regulating escheatment of money orders. Because that fact is also true of the Disputed Instruments, we have every reason to believe that Congress would have considered this aspect of the Disputed Instruments pertinent to deciding whether they should be deemed Similar Instruments subject to § 2503. Furthermore, while asserting that support for this Congressional finding is not contained in the legislative history, Delaware has not made a showing that Congress's finding was factually incorrect. In any case, the issue here is whether Congress's express legislative findings may serve as an interpretive aid to assist the Court in construing the FDA, not whether the statute's legislative history reflects support for Congress's findings. Delaware's citations to cases that involved challenges to a statute's constitutionality, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989), are therefore inapposite.

In short, the Defendant States have made forceful arguments that, as a matter of law, the Disputed Instruments either *are* "money orders" within the meaning of the FDA or, at the very least, are sufficiently similar to money orders and traveler's checks to qualify as "other similar written instruments." In contrast,



Delaware's arguments to the contrary are insubstantial and unpersuasive. Employing the ordinary meaning of the word "similar," viewed in light of the characteristics that the Disputed Instruments share with money orders and traveler's checks, and considering Congress's purposes in passing the FDA, I find that, if the Disputed Instruments do *not* come within the FDA by *being* money orders, they undoubtedly come within the statute's coverage of "other similar written instruments."

## **2. Whether "a Banking or Financial Organization or a Business Association is Directly Liable" on the Disputed Instruments**

Under the terms of § 2503, a written instrument that is "similar" to a "money order" or "traveler's check" comes within the statutory coverage only if "a banking or financial organization or a business association is directly liable" on the instrument. Delaware argues that neither Moneygram nor any other party is "directly liable" on the Disputed Instruments because liability on a Teller's Check or Agent Check is "conditional," that is, "dependent on dishonor or some other external fact." Pl.'s Br. 28 (quoting Mann Dep. 26:22–23 (Ex. AA to Taliaferro Decl., Dkt. No. 86)). Under the UCC, the drawee of a check or other draft is "not liable on the instrument until he accepts it." 1972 UCC § 3-409(1); *see also* 2017 UCC § 3-408, 3-409 (the current version).

Delaware and its expert assert that the statutory term "directly liable," must be read as synonymous with the concept of unconditional liability under the UCC, because the UCC's distinction between conditional and unconditional liability was a background

legal principle relevant to negotiable instruments that would have been well-understood by Congress at the time the FDA was enacted. Delaware's expert asserts, and the Defendant States do not contest, that, under the terms of the UCC, neither Moneygram nor any other party is unconditionally liable on an Agent Check or Teller's Check. See Mann Report ¶¶ 30–37.

Delaware's position is somewhat undermined by the fact that the FDA employs the term "directly liable," not "unconditionally liable." 12 U.S.C. § 2503. If, as Delaware argues, Congress wished its statute to adopt from the UCC the standard of unconditional liability, why would Congress have employed a different term in preference to what it meant? Delaware's argument is further undermined by convincing evidence that the FDA took the statutory term "directly liable" from the 1966 Revised Uniform Disposition of Unclaimed Property Act (the "1966 Uniform Act"), under which that term had, at the time Congress passed the FDA, been interpreted to mean "ultimately liable."

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision," adoption of that same language in a new statute normally indicates an "intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); see also *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); Scalia & Garner, *Reading Law* 323 ("[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field . . . it is reasonable to believe that the terminology bears a consistent meaning.").

The 1954 Uniform Disposition of Unclaimed Property Act (the "1954 Uniform Act") was written in order

to fill the need for comprehensive unclaimed property legislation. 1954 Uniform Act, Prefatory Note, at 136. Section 2 of the 1954 Act states that covered instruments include "[a]ny sum payable on checks certified in this state or on written instruments issued in this state *on which a banking or financial organization is directly liable*, including, by way of illustration but not of limitation, certificates of deposit, drafts, and traveler's checks." *Id.* § 2(c) (emphasis added). The notes to the 1954 Uniform Act are explicit that "Section 2 Parallels Section 300 of the New York Abandoned Property Law." *Id.* § 2 cmt. The New York Abandoned Property Law, 1943 N.Y. Laws 1390, in turn, used the phrase "directly liable" in a manner that had been, in the years prior to the promulgation of the 1954 Uniform Act, consistently interpreted (in a series of New York Attorney General opinions) to mean "ultimately liable." *See Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at \*1-2 (Sept. 4, 1947); *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at \*1 (Dec. 23, 1946). And if the instrument at issue under the New York law was a draft, the drawer was considered "the party ultimately liable for its payment." *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at \*2. In 1966, the Uniform Law Commission published the 1966 Uniform Act, which revised Section 2 of the 1954 Uniform Act to cover "[a]ny sum payable on checks certified in this state or on written instruments issued in this state *on which a banking or financial organization or business association is directly liable*, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." 1966 Uniform Act § 2(c) (emphasis added).

Moreover, the definitions of "banking organization," "business association," and "financial organization" contained within the FDA precisely mirror the definitions of those very same terms contained within the 1966 Uniform Act. *Compare* 12 U.S.C. § 2502 and 1966 Uniform Act § 1(a)–(c).

Absent an indication of contrary intent, Congress's use of nearly identical language in the FDA is strong evidence that "directly liable" was intended to be interpreted as it was understood under the 1966 Uniform Act. This is especially so because the FDA and the 1966 Uniform Act both relate to the escheatment of unclaimed property. And, the legislative history of the FDA supports (if somewhat obliquely), rather than contradicts, the implication that Congress intended that "directly liable" be interpreted as in the 1966 Uniform Act. *See* S. Rep. No. 93-505, at 1 (1973) (describing the FDA as "designed to assure a more equitable distribution among the various States of the proceeds of abandoned money orders, traveler's checks or other similar written instruments on which a banking organization, other financial institution, or other business organization, is directly liable *through its having sold said instrument*") (emphasis added).

Delaware's arguments as to why Congress should not be understood to have intended "directly liable" to carry the meaning it had in the 1966 Uniform Act are not persuasive. First, there is no basis for Delaware's argument that Congress cannot incorporate the meaning of a term used in statutory draft prepared for use as a uniform law by a private organization, unless it has become a "law." Delaware cites no authority for

this proposition, nor does it make any logical sense.<sup>38</sup> In any event, the 1966 Uniform Act was “law” at the time the FDA was enacted by Congress, having been adopted by several States.

Second, Delaware is incorrect in stating that there is “no evidence that Congress was even aware of the 1966 [Uniform Act].” Pl.’s Opp. Br. 34. The fact that, in drafting the FDA, Congress was dealing with the same subject as covered by the 1966 Uniform Act, escheatment of unclaimed property, coupled with Congress’s adoption of word patterns precisely identical with those found in the 1966 Uniform Act, strongly suggests that Congress *was* aware of the terms of the earlier Uniform Act. Without such awareness, it would be an extraordinary coincidence for the later act to adhere so precisely to verbal formulations of the earlier act. This is evidence of Congress’s awareness.

Third, Delaware argues that the Defendant States’ proposed construction of “directly liable” creates surplusage by rendering the word “directly” redundant. In fact, the New York Attorney General opinions regarding the meaning of “directly liable” as used in the New York Unclaimed Property Law (which parallels the 1954 Uniform Act) clarify that the word “directly” is used in contemplation of a distinction between the “direct” liability of the drawer holding the amount owed for payment on a draft and the *contractual* liability owed from the drawee to the drawer. *Aband.*

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<sup>38</sup> Indeed, Delaware’s position is difficult to square with its argument that the correct interpretation of “directly liable” can be derived from the UCC, which is a uniform act published by a private organization.

*Prop. Law*, § 300, *Subd. 1, Par. (c)* & § 301, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at \*1.

Once again, Delaware's theory regarding the meaning of the term "directly liable" is difficult to square with the explicit purpose of the FDA. Under the construction proposed by Delaware and its expert, the only common written instrument that would be covered under the FDA as a Similar Instrument is a cashier's check, because, under the UCC, a bank's liability on a cashier's check is unconditional. *See* Mann Report ¶ 28; 2017 UCC § 3-412. Delaware provides no explanation as to why Congress would have chosen to target (in a highly indirect manner) cashier's checks, while excluding all other manner of "similar" instruments that share the characteristics that motivated enactment of the FDA. Ultimately, Delaware has not provided a sufficient basis to ignore the strong evidence that Congress incorporated the established meaning of "directly liable" from the 1966 Uniform Act.

Even if I were not persuaded that Congress incorporated the meaning of "directly liable" from the earlier Uniform Act, Delaware's proposed construction would not be persuasive. This is because the overall structure of § 2503 also seriously undermines Delaware's argument that "directly liable" means "unconditionally liable." Neither a traveler's check nor a money order is an instrument on which the issuer is unconditionally liable. Consequently, it makes no sense at all to treat "directly liable" as equivalent to "unconditionally liable" *unless* the FDA's "directly liable" restriction is *not* intended to apply to either money orders or traveler's checks. That is, if unconditional liability of "a banking or financial organization or a business association" is a requirement applicable to

“money orders” or “traveler’s checks,” then the FDA would largely be a nullity, because it would never cover the two types of instruments it is explicitly intended to address.

Delaware anticipates this issue by arguing that the syntactic structure of § 2503’s opening clause<sup>39</sup> compels the conclusion that the “directly liable” restriction “only limits the immediately preceding term ‘other similar written instrument (other than a third party bank check)’ and does not limit the two prior terms, ‘money order’ or ‘traveler’s check.’” Pl.’s Br. 24. Delaware reaches this conclusion by relying on “the grammatical ‘rule of the last antecedent,’ according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (citing 2A N. Singer, *Sutherland on Statutory Construction* § 47.33, p. 369 (6th rev. ed. 2000)).<sup>40</sup>

It is true that the absence of a comma between “similar written instrument (other than a third party bank check)” and “on which a banking or financial organization or a business association is directly liable,” lends support to Delaware’s contention that the “directly liable” limitation applies only to “other similar written instruments.” See *Am. Int’l Grp., Inc. v. Bank*

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<sup>39</sup> 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 . . . .” 12 U.S.C. § 2503.

<sup>40</sup> The Defendant States take no position on whether the “directly liable” limitation applies only to “other similar instruments” or all of the instruments listed in § 2503. Tr. March 10, 2021, at 48.

of *Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013). As a result, if the first clause of § 2503 existed in isolation, Delaware’s argument would make good sense. But that clause does not exist in a vacuum. It interacts with the three numbered subsections that follow, which describe the priority rules for the instruments described in the opening clause. See 12 U.S.C. § 2503(1)–(3). Each of these subsections begins with the clause, “if the books and records of *such banking or financial organization or business association*” — language that precisely mirrors the opening clause’s use of the phrase “on which a *banking or financial organization or a business association* is directly liable” *Id.* (emphases added).

The subsection of § 2503 that applies to a given sum covered by the FDA is determined by looking to what, precisely, “the books and records of *such banking or financial organization or business association* show.” *Id.* (emphasis added). By use of the word “such,” these subsections refer back to the opening clause’s reference to “a banking or financial organization or a business association,” a phrase that is used *only* in the context of the “directly liable” limitation. Section 2503 describes no other “banking or financial organization or . . . business association” to which the word “such” could refer. Consequently, if the “directly liable” limitation does not apply to “money orders” or “traveler’s checks” — as Delaware contends — there would be no basis on which to determine which subsection of the statute applies to a sum payable on a “money order” or “traveler’s check,” because the term “such banking or financial organization or business association” would have no meaning at all. Read in this manner, the FDA would direct the disposition by escheat of “other similar written instruments,” but would be a nullity with



respect to "money orders" and "traveler's checks." This cannot be what Congress intended. Thus, the text and structure of the FDA make clear that the "directly liable" limitation applies to "money orders" and "traveler's checks," as well as "other similar written instruments," further undermining Delaware's argument that "directly liable" means unconditionally liable.

Because Moneygram is ultimately liable on all Disputed Instruments, I conclude that they are instruments "on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503.

### **3. Whether the Disputed Instruments are "Third Party Bank Checks"**

Even if otherwise covered, a "similar written instrument" is excluded from the scope of the FDA if it is "a third party bank check." *Id.* The history of the phrase's inclusion in the FDA is more clear than its meaning. While the bill was in committee, the General counsel of Treasury sent the committee chairman a letter stating that "the language of the bill is broader than intended," and suggested that it could be interpreted to cover "third party payment bank checks." *See* S. Rep. No. 93-505, at 5. Treasury recommended expressly excluding "third party payment bank checks," the committee adopted this "technical suggestion[]," *id.* at 6, and the final bill was enacted containing an exception for "third party bank checks," *see* 12 U.S.C. § 2503. It is unclear why the final language of the exclusion differs from the language suggested by Treasury, but there is no evidence to suggest that the change of wording was intended to exclude anything other than what Treasury sought to exclude.

Both “third party bank check” and “third party payment bank check” are obscure terms with no established legal meaning. The parties offer three possible interpretations of the meaning of “third party bank check,” as used in the FDA.

Delaware argues that “third party bank check” means a bank check that is offered through a third party, and that the Disputed Instruments — which are “a means for banks to outsource their bank check offerings” — fit this description. Pl.’s Br. 37–38.<sup>41</sup> This construction is not persuasive because neither the text nor legislative history of the FDA suggests that Congress considered the difference between bank checks offered by third parties and bank checks issued directly by banks to be material to the purposes of the FDA. Delaware provides no explanation as to why Congress (or Treasury) would have considered it desirable to exclude bank checks offered by third parties from coverage. Indeed, Delaware’s own expert did not endorse this definition of “third party bank check.” See Mann Report ¶¶ 65–69. In fact, when asked at his deposition whether he had studied “any Moneygram instrument that could be a third-party bank check,” Delaware’s expert responded that he “didn’t study any products that [struck him] as fitting with any ordinary

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<sup>41</sup> Delaware’s expert suggests that a “third party bank check” could mean a bill payment check that a bank issues on behalf of its customers. Mann Report ¶¶ 69–70. Delaware has not argued that this is the correct construction of the term, likely because it would not exclude the Disputed Instruments from the scope of the FDA. Delaware’s expert also comments that “third party bank check” could, possibly, mean a traditional teller’s check, but he notes numerous reasons why this definition is unlikely. *Id.* ¶ 68.

sense of what those terms should mean.” Defs.’ App’x 1010.

The Defendant States argue that the most natural meaning of “third party bank check” is “a check drawn by a bank on a bank that has been indorsed over to a new (or ‘third party’) payee.” Defs.’ Br. 41. But, as Delaware notes, this definition would be a nullity in operation. Once a check is in the marketplace, it is impossible to determine whether it has been “indorsed to a third party” without looking at the instrument itself, and an abandoned check — one which has not been presented for payment — under almost all circumstances is not available for inspection to determine whether it has been indorsed to a third party. It is generally impossible to know this of an abandoned check. Thus, under the Defendant States’ primary proposed construction, the statutory exclusion of a “third party bank check” would virtually never apply. Interpreting a statutory clause as a nullity should be avoided absent evidence that this was indeed the construction intended. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Given the history of this exclusion, it appears most likely that Congress intended to exclude what Treasury intended to have excluded, and it seems highly unlikely that Treasury — which was expert in the field — would seek the addition to the statute of a functionally meaningless term.<sup>42</sup>

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<sup>42</sup> Further, the Defendant States give no explanation of why Congress or Treasury would have sought such an exclusion. They rely instead primarily on the fact that their proposed definition was adopted by the only court that appears to have previously considered the term “third party bank check.” *See United States v. Thwaites Place Assocs.*, 548 F. Supp. 94 (S.D.N.Y. 1982). But

As a secondary position, the Defendant States argue that a “third party bank check” is an ordinary personal check drawn on a checking account. Defs.’ Br. at 43. While none of the definitions suggested by the parties are completely satisfying, I conclude that Defendants’ secondary construction of “third party bank check” is the most likely to be the meaning intended by Congress.

As the Defendant States and Pennsylvania’s expert note, shortly before the FDA was enacted, federal regulators had engaged in a review of the “existing financial and regulatory structure” related to the private financial system. See Expert Report on Behalf of Pennsylvania, Dkt. No. 67, at 22 (“Clark Report”) (quoting Robert E. Knight, *The Hunt Commission: An Appraisal*, Wall St. J., July 3, 1972, at 4). In 1970, President Nixon organized the Commission on Financial Structure and Regulation (popularly known as the “Hunt Commission”) and tasked it with making recommendations to improve the nation’s financial institutions. Knight, *The Hunt Commission*, at 4. Treasury was, from the Commission’s inception, involved in identifying “issues deserving Commission attention and the approaches and methodology the Commission might use in dealing with them.” *The Report of the*

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the Defendant States’ reliance on *Thwaites Place* is not persuasive. That court used the term in passing, without discussing its meaning or considering ways that the phrase might be understood. *Id.* at 96. *Thwaites Place*, furthermore, did not concern the issue of unclaimed property, much less the applicability of the FDA. *Id.* at 95. In short, that opinion casts little or no light on what Congress intended in using the term “third party bank check.”

*President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972).

The Hunt Commission's final report (published in December 1972) used the term "third party payment services" to describe "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." *Id.* at 23 & n.1. The Report was explicit that "[c]hecking accounts are one type of third party payment service." *Id.* at n.1. Additionally, a prominent contemporary treatise demonstrates that, at the time the FDA was enacted, the term "bank check" could be used to refer generally to a check, including those drawn on a personal or business checking account at a bank. See Henry J. Bailey, *The Law of Bank Checks* 1 n.1 (4th ed. 1969) ("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.").

The Hunt Commission's contemporaneous use of the term "third party payment services" is probative of the meaning of the term "third party bank check," as used in the FDA (especially in light of the fact that Treasury's recommendation to Congress was that the FDA exclude "third party *payment* bank checks," S. Rep. No. 93-505, at 5 (emphasis added)), and supports the Defendants' argument that "third party bank check" means an ordinary check drawn on a checking account. Additionally, this definition is consistent with the evidence that Congress intended the FDA to cover prepaid instruments (or at least certain prepaid instruments) but lacked any apparent intent to bring

non-prepaid instruments drawn on a checking account (which would carry a less significant risk of abandonment) within the scope of the FDA. *See id.*, at 6; 12 U.S.C. § 2501. It would, therefore, be entirely consistent with Congress's stated purposes in enacting the FDA to exclude from coverage non-prepaid checks drawn on checking accounts, while extending coverage to certain categories of prepaid instruments.

Delaware counters that Congress should not be presumed to have adopted this meaning of "third party bank check" because no member of Congress served on the Hunt Commission, which "raises questions about the extent to which Congress had any awareness of the analysis that was undertaken in the 1970s." Pl.'s Opp. Br. 50. This argument is misguided for two reasons. First, there is substantial evidence that Congress was aware of the Report of the Hunt Commission. Indeed, the Senate Committee on Banking, Housing, and Urban Affairs — the same committee that reported on the FDA before it was enacted — issued a committee print of the Hunt Report (including the recommendations of Treasury that stemmed from the Report) in August 1973. *See* S. Comm. on Banking, Hous., and Urb. Affs., 93rd Cong., Rep. of the President's Comm'n on Fin. Structure and Regul. (Comm. Print 1972). Second, the legislative history of the FDA conclusively demonstrates that the exclusion of "third party bank checks" was inserted at the recommendation of Treasury seemingly with little additional discussion by Congress. *See* S. Rep. No. 93-505, at 5. Consequently, what Treasury intended the term to mean is probative of Congress's intent, and Treasury was indisputably involved in the Hunt Commission. *See The Report of the President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972).

Delaware is correct that the Hunt Commission's use of the term "third party payment services" is somewhat removed from the FDA's exclusion of "third party bank checks." The legislative history of the FDA demonstrates, however, that the exclusion originally recommended by Treasury was for "third party payment bank checks." S. Rep. No. 93-505, at 5. This significantly narrows the inferential leap required by the Defendants' proposed construction. It is nonetheless true that "third party payment systems" — the term used by the Hunt Commission — is different than "third party payment bank checks" — the term suggested by Treasury. In this regard, the contemporary evidence relied on by the Defendant to support their construction is somewhat imperfect. But Delaware has not provided *any* evidence contemporaneous to the enactment of the FDA to support its proposed construction, and its definition is also substantially less consistent with the purposes and legislative history of the Act. Thus, I conclude that the construction of "third party bank check" proposed by the Defendant States is the most likely to have been that which was intended by Congress.

The Disputed Instruments are not ordinary checks drawn on a checking account.<sup>43</sup> Rather, they are prepaid by the purchaser at the time of purchase; by virtue of being prepaid, payment upon presentment by the payee is not conditional on the purchaser's maintenance of sufficient funds in a deposit account at the drawee bank. Ordinary checks drawn on a checking account, on the other hand, are not typically prepaid,

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<sup>43</sup> Indeed, Delaware does not argue that the Disputed Instruments fall within the Defendants' construction of "third party bank check."

and are subject to dishonor if the drawer does not, at the time of presentment, have sufficient funds in a checking account at the drawee bank to cover the amount specified on the check. *See Clark Report 3-4.* In layman's terms, ordinary checks drawn on a checking account can bounce. Relatedly, the Disputed Instruments are not drawn upon the individual checking account of the purchaser; they are instead drawn upon the bank designated as drawee on the face of the instrument, to which Moneygram has a contractual obligation to repay for clearing the instrument. Further, an ordinary check drawn on a checking account is issued (or "drawn") by the individual or entity that uses the check to transmit funds to the order of a payee. *See Clark Report 3.* The Disputed Instruments, on the other hand, are issued by Moneygram and sold to a purchaser who determines to whom the instrument will be made payable. Because the Disputed Instruments are not ordinary checks drawn on a checking account, they are, therefore, not excluded from the scope of the FDA's priority rules as "third party bank checks."

In short, while neither side has overwhelmingly persuasive arguments as to the meaning of "third party bank check," the Defendants' interpretation is more persuasive than Delaware's.<sup>44</sup>

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<sup>44</sup> The question whether the Disputed Instruments are "third party bank checks" has no significance for this case if the Supreme Court rules, as here recommended, that the Disputed Instruments come within the FDA because they are "money orders." It is only if the Court finds that the Disputed Instruments are not "money orders" within the meaning of the FDA, but then considers whether they are "other similar written similar



## II. Whether the Defendant States Have the Power to Escheat the Disputed Instruments

Even if a written instrument is covered by the FDA and the issuer possesses a record of the State in which it was purchased, the State of purchase is entitled to take custody of the proceeds of that instrument only “to the extent of that State’s power [to do so] under its own laws.” 12 U.S.C. § 2503(1). Delaware contends that at least ten of the Defendant States,<sup>45</sup> while having the power under their own laws to escheat money orders, do not have the power to escheat instruments that are “similar” to money orders without being money orders. Thus, according to Delaware’s argument, the right of those ten States to escheat the Disputed Instruments depends on whether the Disputed Instruments *are* money orders.<sup>46</sup> If the FDA applies only because the instruments are “other similar written instruments” without being “money orders,” those States do not qualify to escheat under § 2503(1) because their own laws, as interpreted by Delaware, do not allow them to escheat the proceeds of such

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instruments,” that it could matter whether they are “third party bank checks.” Following the publication of a draft version of this Report, Delaware belatedly objected that a “money order,” — like a Similar Instrument — would not be governed by the FDA if it were a “third party bank check.” See Pl.’s Objs. 3, 13. But Delaware has supported this argument with scant analysis, and, in any case, this construction is implausible in light of the relevant statutory language.

<sup>45</sup> Alabama, Arizona, Arkansas, Indiana, Iowa, Kansas, Montana, Nevada, Texas, and West Virginia.

<sup>46</sup> Delaware does not contest that each of the Defendant States is empowered under its own laws to take possession of abandoned money orders. See Pl.’s Opp. Br. 61.

instruments. Having considered the parties' arguments, I conclude that all ten Defendant States whose laws are in dispute have the power to escheat the Disputed Instruments, even assuming that they are covered under the FDA as Similar Instruments, but not as "money orders."<sup>47</sup>

The ten States Delaware claims would not be empowered to escheat Similar Instruments include eight

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<sup>47</sup> Pursuant to 12 U.S.C. § 2503(3), if the books and records of the issuer of a Covered Instrument show the State in which a Covered Instrument was purchased, but that State does not have the power to escheat under its own laws, then the State where the issuer has its principal place of business is entitled to escheat. Consequently, Moneygram's principal place of business could be material to determining which State is entitled to escheat the proceeds from the purchase of the Disputed Instruments; this is especially so because the FDA does not provide priority rules applicable where neither the State of purchase nor the State where the issuer has its principal place of business have laws allowing them to escheat — the common law framework would presumably apply in this scenario. Unfortunately, the record on summary judgment does not allow me to reach a precise conclusion as to Moneygram's principal place of business, because admissions made by the parties point in multiple directions. In its answer to Pennsylvania's counterclaims, Delaware admitted that Texas is Moneygram's principal place of business. *See* Dkt. No. 11 ¶ 28 & Dkt. No. 18 ¶ 28. But in response to Delaware's statement of undisputed facts, the Defendants admitted that Minnesota is Moneygram's principal place of business. *See* Dkt. No. 78 ¶ 2 & Dkt. No. 98 ¶ 2. The Associate General Counsel of Moneygram's parent company also asserted, via affidavit, that Moneygram has its principal place of business in Minnesota. Dkt. No. 80 (Feinberg Aff. ¶ 3). In any case, it is not necessary to resolve this issue now, because, as discussed more fully below, I conclude that the ten States at issue have the power to escheat the Disputed Instruments, even assuming that they are covered under the FDA as Similar Instruments.

States<sup>48</sup> that have adopted the 1995 version of the Uniform Unclaimed Property Act (the “1995 Uniform Act”),<sup>49</sup> (the successor to the Uniform Disposition of Unclaimed Property Act and Revised Uniform Disposition of Unclaimed Property Act, *see* 1995 Uniform Act, Prefatory Note (Unif. L. Comm’n 1995)), plus Iowa, which has partially adopted the 1981 version of the Uniform Unclaimed Property Act, *see* Iowa Code Ann. §§ 556.1 *et seq.*, and Texas, which has its own unclaimed property law, *see* Texas Prop. Code §§ 72.101 *et seq.*<sup>50</sup>

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<sup>48</sup> Alabama, Arizona, Arkansas, Indiana, Kansas, Montana, Nevada, and West Virginia.

<sup>49</sup> The relevant State laws are Ala. Code Ann. §§ 35-12-70 *et seq.*; Ari. Rev. Stat. Ann. §§ 44-301 *et seq.*; Ark. Code Ann. §§ 18-28201 *et seq.*; Ind. Code Ann. §§ 32-34-1 *et seq.*; Kan. Stat. Ann. §§ 583934 *et seq.*; Mont. Code Ann. §§ 70-9-801 *et seq.*; W. Va. Code Ann. §§ 36-8-1 *et seq.* Nevada partially adopted the 2016 Revised Uniform Unclaimed Property Act on July 1, 2019, but previously had adopted the 1995 Uniform Act. *See* 2019 Nev. Laws Ch. 501, S.B. No. 44; Nev. Rev. Stat. Ann. §§ 120A.010 *et seq.* The changes made to Nevada’s law by the partial adoption of the 2016 Uniform Act are not relevant here except where otherwise noted.

<sup>50</sup> Because the question whether these ten States have the power to take possession of Official Checks is purely a question of their own State law, the question could be certified to the high court of each of the relevant States for adjudication. *See, e.g., Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (observing that the certification of controlling questions of State law to the appropriate State courts, while discretionary, can “save time, energy, and resources and helps build a cooperative judicial federalism.”). Nonetheless, various factors weigh forcefully against certification, including the substantial delays and costs that would result from these additional litigations, the low likelihood on the present facts that any of the State courts would rule

I begin by addressing the laws of the eight States that have adopted the 1995 Uniform Act (the "Eight States"). The structure of the 1995 Uniform Act is illustrated by Arkansas' act: one section defines the dormancy periods for varying types of property, following which property is presumed abandoned, *see* Ark. Code Ann. § 28-202; a second section describes the circumstances in which property presumed to be abandoned is subject to the custody of the State, *see id.* § 18-28-204; and other sections provide rules for reporting and delivering abandoned property to the State, *see id.* §§ 18-28-207, 18-28-208; *see also* 1995 Uniform Act §§ 2, 4, 18, 20. A section titled "Rules for Taking Custody"<sup>51</sup> provides the circumstances in which the State may take custody of property presumed to be abandoned. Ark. Code Ann. § 18-28-204. This provision tracks the common law framework established by the Supreme Court in *Texas v. New Jersey* and *Pennsylvania v. New York*, as well as the framework established by the FDA. *See* 1995 Uniform Act § 4 cmt. It provides, *inter alia*, that the State may take custody of property presumed abandoned where:

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against the State's power under its own law to escheat funds to which it is entitled by federal law, and the fact that the issue will have no importance for the resolution of the litigation unless the Supreme Court rules that the instruments in question are subject to the FDA only as "other similar written instruments," and not as "money orders." For these reasons, and in light of the fact that no party has requested or suggested certification, I do not recommend certification.

<sup>51</sup> Certain of the Eight States' laws label this provision by a different name, *see, e.g.*, Ind. Code Ann. § 32-34-1-21 ("Property Subject to Custody of State as Unclaimed Property"), without significant change in its contents.

the property is a traveler's check or money order purchased in this State, or the issuer of the traveler's check or money order has its principal place of business in this state and the issuer's records show that the instrument was purchased in a state that does not provide for the escheat or custodial taking of the property, or do not show the State in which the instrument was purchased.

Ark. Code Ann. § 18-28-204(7); *see also* 1995 Uniform Act § 4(7). The comments to the 1995 Uniform Act state that this provision "states the rule adopted by Congress in [the FDA]." 1995 Uniform Act § 4 cmt.

Delaware argues that the provision captioned "Rules for Taking Custody" does not allow enacting States to take custody of sums paid to purchase instruments covered under the FDA as Similar Instruments, because the "Rules for Taking Custody" designate only "traveler's checks or money orders" without including "other similar written instruments." *Id.* Delaware's argument is essentially that, by including "traveler's checks" and "money orders" within the "Rules for Taking Custody," but choosing not to include "other similar written instruments" amongst the forms of property of which a State may take custody, the 1995 Uniform Act should be read to exclude the latter. This argument functionally relies on the canon of statutory construction that states that the expression of one thing implies the exclusion of others. *See Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

The Defendant States respond that, even if the Eight States' laws do not explicitly identify instruments

“similar” to money orders and traveler’s checks within the “Rules for Taking Custody,” their laws should be interpreted to encompass such instruments, in part because, while expressly naming “money orders” and “traveler’s checks” in the statutory text, they state in commentary that their rule “states the rule adopted by Congress in [the FDA],” 1995 Uniform Act § 4 cmt., and in part because various other provisions of the 1995 Uniform Act (as adopted by those States) make clear the Act’s intention to cover “similar instruments.” *See* Defs. Reply Br. 21. I find that the Defendant States have the better of the argument.

If, in authorizing escheatment of “money orders or traveler’s checks,” the rule of the Uniform Act “states the rule adopted by Congress in [the FDA],” as asserted in the commentary, then, the Defendant States argue, the Act authorizes escheatment of the same instruments as are covered by the FDA, including those therein identified as “other similar written instruments.” In addition, the official notes to the 1995 Uniform Act state that “Section 2 continues the general proposition that all intangible property is within the coverage of this Act.” *Id.* § 2 cmt. If the 1995 Uniform Act excluded authority to escheat instruments that are “similar” to money orders and traveler’s checks, then, contrary to its stated intention, the 1995 Uniform Act would not cover “all intangible property.”

Furthermore, text as well as comments to the 1995 Uniform Act make express references to “similar instruments,” in contexts that give strong support to interpreting the Act’s “Rules for Taking Custody” to mean that “similar instruments” are covered. These textual provisions would make no sense if the Act did not allow enacting States to take custody of similar

instruments. For example, in providing for claims by other States to property that has already been escheated to the enacting State, *see, e.g.*, Ark. Code Ann. § 18-28-214, the Act describes one form of such already escheated property as “a sum payable on a traveler’s check, money order, *or similar instrument* that was purchased in the other state and delivered into the custody of this state under [the provision of the “Rules for Taking Custody” that relates to money orders and traveler’s checks].” *Id.* at § 18-28214(a)(5) (emphasis added); *see also* 1995 Uniform Law § 14 (same). That provision of the same Act manifests an understanding that the Act authorizes taking possession of abandoned instruments that are “similar” to money orders and traveler’s checks. The reference to “similar instruments” as previously escheated property would be a nullity, serving no purpose, if the statute did not authorize escheatment of similar instruments.

Likewise, the 1995 Uniform Act contains a provision requiring record retention by “[a] business association or financial organization that sells, issues, or provides to others for sale or issue in this state, traveler’s checks, money orders, *or similar instruments* other than third-party bank checks, on which the business association or financial organization is directly liable.” *See, e.g.*, Ark. Code Ann. § 18-28-221(b) (emphasis added); *see also* 1995 Uniform Act § 21 (same). The tracking of the FDA’s exclusion of certain “third party bank checks” makes clear an intention to conform to the provision by which the enacting State authorizes escheat of those instruments that the FDA allows the State to escheat. Furthermore, there would be little reason to require sellers of instruments to maintain records pertinent to the escheat for instruments not subject to escheat.

And another provision detailing the enacting States' obligation to notify apparent owners of abandoned property that has escheated to the enacting State also uses the phrase "a traveler's check, money order, *or similar instrument*." Ala. Code. Ann. § 35-12-78(c) (emphasis added); *see also* 1995 Uniform Act § 9 (same).<sup>52</sup> Once again, unless the authorization set forth in the "Rules for Taking Custody" to escheat "money orders" and "traveler's checks" also authorized the escheatment of "similar instruments," the inclusion of these words in the notification requirement would be a meaningless nullity. It would refer to a circumstance that could not have occurred.

Finally, Delaware offers no explanation why any of the Eight States enacting the 1995 Uniform Act, or the Act's drafters, would have intended the enacting States to forgo the right to escheat presumptively abandoned Similar Instruments consigned to them by the FDA. To the contrary, taken together in the context of an Act implementing the FDA's authorization to the enacting States to take possession of specified categories of abandoned property, the 1995 Act gives strong evidence of an intention to function in harmony with the FDA by allowing enacting States to take custody of all property that the FDA allocated to them.

For these reasons, Delaware's implicit reliance on the *expressio unius* canon has little persuasive force. As with most canons, this one applies only when its application would be sensible. *See NLRB v. S.W. Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (*expressio unius* "applies only when circumstances support a sensible

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<sup>52</sup> Arkansas has not enacted this provision. *See* Ark. Code. Ann. § 18-28-209.



inference that the term left out must have been meant to be excluded.”) (internal quotation marks, citations, and alterations omitted). A leading treatise on statutory interpretation makes the cautionary comment that, “[v]irtually all the authorities who discuss the negative implication [*expressio unius*] canon emphasize that it must be applied with great caution, since its application depends so much on context.” Scalia & Garner, *Reading Law* 107. The context here strongly suggests that the 1995 Uniform Act intended the enacting States to authorize the escheat of instruments described in the FDA as “other similar instruments.” I reject Delaware’s argument that the 1995 Uniform Act’s specification in the Rules for Taking Custody of money orders and traveler’s checks without explicit mention of similar instruments should be interpreted to mean the Act’s authorization to take custody deviates from the FDA’s authorization by not applying to instruments “similar” to money orders and traveler’s checks.<sup>53</sup>

I conclude that the language of the 1995 Uniform Act’s “Rules for Taking Custody,” as adopted in the unclaimed property laws of the Eight States, should be construed, in this context, to authorize taking

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<sup>53</sup> Delaware seems to presume that an instrument treated as a Similar Instrument under the FDA necessarily cannot be a “money order” for the purposes of any individual State’s unclaimed property law. This is incorrect. See *Yates*, 574 U.S. at 537–38 (2015) (“We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.”). An instrument could very well be covered under the FDA as a Similar Instrument but be treated under State law as a money order

custody of instruments covered by the Similar Instruments clause of the FDA.<sup>54</sup>

As for Iowa and Texas, whose unclaimed property laws differ from those of the Eight States in that they have not adopted the 1995 Uniform Act, Delaware makes the same argument based on the fact that their laws, like the Uniform Act, provide for the State to take custody of "money orders and traveler's checks," without adding "similar" instruments. The enactments of Iowa and Texas provide substantially less evidence of legislative intent to authorize the escheat of Similar Instruments than does the 1995 Uniform Act. While it is, consequently, a closer question, I conclude that the laws of these two States sufficiently share the features of the Uniform Act noted above to justify interpreting them as similarly providing for

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<sup>54</sup> Contrary to the parties' arguments, *Travelers Express Co. v. Minnesota*, 506 F. Supp. 1379, 1381 (D. Minn. 1981), does not illuminate the present dispute in any significant way. The case demonstrates that in 1981 some States either did not have an unclaimed property law covering intangible property or had a law that did not cover money orders. *Travelers*, 506 F. Supp. at 1381. The case says nothing about *why* the other States' legislatures had not passed unclaimed property laws, or why those laws did not cover money orders. *Id.* The Defendant's argument — that the case stands for the general proposition that a catchall provision treating unenumerated forms of property as abandoned after a certain period of dormancy necessarily provides a State the power to take custody of any form of property presumed abandoned — is also misplaced. The Minnesota law at issue in *Travelers* did not contain Rules for Taking Custody. *See* Minn. Laws 1969, ch. 725, H.F. No. 2618, amended by Minn. Laws 1977, ch. 137, S.F. No. 616. In the absence of such Rules, the *Travelers* court was able to presume that any property deemed abandoned under the Minnesota law was subject to the custody of the State. *See Travelers*, 506 F. Supp. at 1386. The same presumption would not apply in the context of the 1995 Uniform Act.

escheatment of instruments over which the FDA would grant them priority to escheat, and thus providing for the escheatment of Moneygram's Agent Checks and Teller's Checks, regardless of whether the FDA covers those instruments under the label "money order" or "other similar written instrument."

The section of the Iowa law that explicitly covers traveler's checks and money orders, § 556.2A, asserts Iowa's entitlement to take custody of such abandoned instruments only in precise accordance with the FDA's priority rules, supporting the inference Iowa passed its statute with the intention of making complete use of the authority granted by the FDA to take possession of unclaimed instruments. Iowa Code Ann. § 556.2A. Additionally, Iowa's provision setting forth the requirements for reporting of unclaimed property requires the funds holder to report to the State treasurer the name and last-known address of the owner of the unclaimed property at issue "[e]xcept with respect to traveler's checks, money orders, cashier's checks, official checks, or *similar instruments*." *Id.* § 556.11 (emphasis added). Explicitly applying this exclusion to "similar instruments" would be unnecessary if such instruments were not subject to Iowa's taking custody (thus necessitating their inclusion in unclaimed property reports).

The Texas law operates in a similar manner. The pertinent section, Tex. Prop. Code Ann. § 72.102(a),<sup>55</sup>

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<sup>55</sup> This provision of the Texas law states:

(a) A traveler's check or money order is not presumed to be abandoned under this chapter unless:

for example, precisely follows the priority rules set forth in the FDA, again supporting the inference that Texas passed its statute with the intention to authorize the escheat of unclaimed instruments to the full extent permitted under the FDA. And, like the 1995 Uniform Act, the Texas statute provides that, under appropriate circumstances, another State may make a claim to recover property seized by Texas under its unclaimed property law if "the property is the sum payable on a traveler's check, money order, *or other similar instrument* that was subjected to custody by this state." *Id.* § 74.508(a)(5) (emphasis added). It is extraordinarily unlikely that the Texas legislature would have included instruments similar to money orders and traveler's checks in this passage pertaining to escheated instruments if those instruments were not subject to escheat. The reference to a "similar instrument," furthermore, would have no function and

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(1) the records of the issuer of the check or money order indicate that it was purchased in this state;

(2) the issuer's principal place of business is in this state and the issuer's records do not indicate the state in which the check or money order was purchased; or

(3) the issuer's principal place of business is in this state, the issuer's records indicate that the check or money order was purchased in another state, and the laws of that state do not provide for the escheat or custodial taking of the check or money order.

Subject to the above-quoted language, a money order is treated as abandoned following three years of dormancy. Tex. Prop. Code Ann. § 72.102(c)(1). A subsequent provision of the Texas law requires, *inter alia*, that each property holder "who on March 1 holds property that is presumed abandoned under Chapter 72, 73, or 75 shall deliver the property to the comptroller on or before the following July 1." *Id.* § 74.301(a).

make no sense if such an instrument had not been subject to Texas's taking custody.

Finally, as with the Eight States, Delaware offers no reason why Iowa or Texas would have intended its law to be interpreted as not authorizing it to escheat these forms of property in the circumstances in which the FDA explicitly grants it priority. Each State's tracking of the FDA's priority provision in its statute bespeaks a clear intention that any ambiguity in its statute be interpreted to confirm its escheatment of instruments consigned to it by the FDA's priority rules.

### **III. Whether the Secondary Common Law Rule Should Be Modified As Applied to the Disputed Instruments**

Pennsylvania joins in the Defendant States' Motion for Partial Summary Judgment and independently argues that, should the Court determine that the Disputed Instruments are not subject to the priority rules set forth in the FDA, the Court should overrule the secondary rule set forth in *Texas* and declare that "when the address of a purchaser/payee on an unclaimed prepaid financial instrument is unknown, this intangible property shall escheat to the State where the instrument was purchased." Pennsylvania's Br. 3. Pennsylvania's pleadings and briefing on summary judgment are not entirely clear as to whether the State is seeking reconsideration of the secondary common law rule as applied to *all* forms of intangible property or only as applied to the Disputed Instruments. See Dkt. No. 11 ¶¶ 116–17; Pennsylvania's Br. 2. During oral argument, however, counsel for Pennsylvania clarified that Pennsylvania is advocating only a change in the common law with respect to the

property at issue in this case. *See* Tr. March 10, 2021, at 69–70.

If the Supreme Court accepts the recommendation of this Report ruling that the Disputed Instruments are covered by the FDA, Pennsylvania's claim and motion for summary judgment will be moot. If the Court so rules, I recommend that it dismiss Pennsylvania's claim for amendment of the *Texas* rule as moot. If the Court rules that the Disputed Instruments are not covered by the FDA, Pennsylvania's claim and Motion for Partial Summary Judgment can be addressed at that time.

### CONCLUSION

Having concluded that the Disputed Instruments fall within the scope of the FDA and that the Defendant States each have the power under their own laws to take custody of the proceeds of presumptively abandoned Disputed Instruments purchased in their respective States, I recommend that the Supreme Court grant the motion of the Defendant States for partial summary judgment, deny Delaware's Motion for Partial Summary Judgment, and dismiss as moot Pennsylvania's claim for modification of the secondary common law rule established in *Texas* as applied to the Disputed Instruments. A proposed decree embodying this recommendation is attached as Appendix A.<sup>56</sup>

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<sup>56</sup> The request of the Defendant States that I establish a schedule for the damages phase of this litigation is DENIED pending further action by the Supreme Court.

Respectfully Submitted,

**PIERRE N. LEVAL**

*Special Master*

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New York, NY 10007

(212) 857-2310

July 23, 2021

**APPENDIX A**  
**PROPOSED ORDER**

Nos. 145 & 146, Original (Consolidated)

DELAWARE,

v.

PENNSYLVANIA AND WISCONSIN.

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ARKANSAS, *et al.*,

v.

DELAWARE.

**ORDER**

Upon consideration of the briefs of the parties and amici curiae, and the First Interim Report of Pierre N. Leval, Special Master, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The motion of the State of Delaware for partial summary judgment is DENIED.
2. The motion of the Defendant States for partial summary judgment is GRANTED.
3. The claim of the Commonwealth of Pennsylvania for modification of the secondary common law rule established in *Texas v. New Jersey*, 379 U.S. 674 (1965), as applied to the Disputed Instruments, is DISMISSED AS MOOT.
4. The Special Master is hereby directed to address the implementation of this Decree and the resolution of disputes relating to any party's



entitlement to damages and/or other relief. The Special Master shall submit further Reports to this Court on such matters as may be raised before him or that he may direct the parties to address if he finds them pertinent to this Court's resolution of the dispute before it.

Nos. 220145 & 220146 (Consolidated)

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DELAWARE,

*Plaintiff,*

v.

PENNSYLVANIA AND WISCONSIN,

*Defendants.*

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ARKANSAS, *et al.*,

*Plaintiffs,*

v.

DELAWARE,

*Defendant.*

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**On the Parties' Cross Motions for Partial  
Summary Judgment**

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Pierre N. Leval

*Special Master*

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May 20, 2021

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**[DRAFT] FIRST INTERIM REPORT OF  
THE SPECIAL MASTER**

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**INTRODUCTION**

This is a “controversy between two or more States”  
within the original jurisdiction of the Supreme Court.

The dispute is over which State is entitled to escheat, or take custody of,<sup>1</sup> the proceeds of certain unclaimed monetary instruments issued by MoneyGram Payment Systems, Inc. (“Moneygram”).<sup>2</sup> The dispute is between Delaware, the Plaintiff, and 30 other States, the Defendants.<sup>3</sup>

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<sup>1</sup> Notwithstanding that the two terms have slightly different meanings, this Report uses the terms “take custody of and “escheat” interchangeably to refer to a State’s taking possession of presumptively abandoned property. When property has “escheated,” in the narrowest technical meaning of that term, the State has become legal owner of the property and has no obligation to return it to the previous owner (or any person claiming to have derived title from the previous owner). Escheat is distinct from a State’s taking custody of unclaimed property, through which the State takes possession of the property at issue as custodian, for the benefit of the owner or her successors in interest, while title to the property remains in the owner. See Revised Uniform Unclaimed Property Act, Prefatory Note, at 2 & n.5 (Unif. Law Comm’n 2016). The disputed issues under these motions do not turn in any way on whether the State takes custody as owner or as custodian. The word “escheat” functions as either (i) a noun, as in, “The property reverted to the sovereign by escheat,” to designate the process by which property can revert to the sovereign, (ii) a transitive verb, as in, “The sovereign escheated the property,” to signify the sovereign’s action in causing property to revert to it; and (iii) an intransitive verb, as in, “The property escheated,” to designate the property’s reversion to the sovereign.

<sup>2</sup> Moneygram Payment Systems, Inc. is a subsidiary of Moneygram International, Inc.

<sup>3</sup> On July 24, 2017, I issued, with the consent of the parties, an Order realigning the parties such that (1) Delaware would be deemed Plaintiff, for the purposes of its claims against the Defendants, and Counterclaim Defendant, for the purposes of Defendants’ claims against Delaware; and (2) the Defendants would be considered Defendants, with respect to Delaware’s claims

Resolution turns in major part on the construction of the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Federal Disposition Act" or "FDA"), 12 U.S.C. §§ 2501-03. Section 2503 of the FDA establishes priority rules to determine which State is entitled to escheat certain categories of unclaimed financial instruments; the text of that Section is set forth in a footnote below.<sup>4</sup> I have been appointed

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against them, and Counterclaim Plaintiffs with respect to their claims against Delaware. Dkt. No. 40 ¶ 2.

<sup>4</sup> 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 instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum;

(2) if the books and records of such banking or financial organization or business association do not show the State in which such money order, traveler's check, or similar written instrument was purchased, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, until another State shall demonstrate by written evidence that it is the State of purchase; or

(3) if the books and records of such banking or financial organizations or business association show the State in which such money order, traveler's check, or similar written instrument was purchased and the laws of the State of purchase do not provide

by the Supreme Court to serve as Special Master, and, in that capacity, to make recommendations as to disposition. Before me now are cross motions for partial summary judgement on the question whether certain categories of instruments issued by Moneygram (the "Disputed Instruments") fall under the provisions of the FDA.

Under the FDA, sums 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" escheat to the State in which the instrument was purchased (if the books and records of the selling institution show the State in which the instrument was purchased), "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. The FDA partially abrogated the federal common law rule that debts left unclaimed by creditors would escheat, "to the State of the creditor's last known address as shown by the debtor's books and records" (the primary common law rule) but, if no record of the creditor's address is shown by the books and records of the debtor, to the State of the debtor's incorporation (the secondary common law rule). See *Texas v. New Jersey*, 379 U.S. 674, 680-82

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for the escheat or custodial taking of the sum payable on such instrument, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum.

(1965). In the context of presumptively abandoned, prepaid negotiable instruments, the Supreme Court has held that the relevant "creditor" for the purposes of the common law rule may be either the purchaser of the negotiable instrument (the payor) or the intended payee, while the relevant "debtor" is the issuer of the instrument (who, generally, holds the funds owed on the presumptively abandoned instrument). See *Delaware v. New York*, 507 U.S. 490, 503 (1993); *Pennsylvania v. New York*, 407 U.S. 206, 214 (1972).

At issue in this case is the entitlement to escheat the proceeds of instruments marketed by Moneygram as "Moneygram Official Checks." There are two sub-categories of Moneygram's Official Checks involved in this dispute: Agent Checks and Teller's Checks (together, the "Disputed Instruments"). Delaware contends that those instruments do not fall within the coverage of the FDA, and are therefore subject, under the common law rule, to escheat to Moneygram's State of incorporation, which is Delaware, to the extent that Moneygram's books and records do not show the last known address of the purchaser or intended payee. The 30 Defendant States contend that the FDA applies to the Disputed Instruments, with the consequence that the States in which the instruments were purchased are entitled to escheat their value. Pennsylvania, one of the Defendants, contends in addition that, assuming no coverage under the FDA, the secondary common law rule established by the Supreme Court should be partially overruled so that, when the books and records of the issuer do not reflect the address of the purchaser (or the payee), the Disputed Instrument's value would escheat to the State where the instrument was purchased, rather than to the issuer's State of incorporation.

On July 24, 2017, these proceedings were bifurcated, to deal in the first phase with the priorities of entitlement to escheat the Disputed Instruments, and thereafter litigating damages. Dkt. No. 43 at ¶ 6.<sup>5</sup> Under Supreme Court precedent,<sup>6</sup> this appears to be an appropriate stage in the litigation for the Supreme Court to consider the issues that have arisen in the case to date. The parties' cross motions for partial summary judgment present legal issues critical to the ultimate resolution of the case. Resolution of these issues will frame any future proceedings, and, depending on the disposition adopted by the Court, could resolve this case entirely.

For the reasons explained more fully below, I am persuaded that Delaware's Motion for Partial Summary Judgment should be DENIED, that the Defendants' Motion for Partial Summary Judgment should be GRANTED, and that Pennsylvania's claim seeking

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<sup>5</sup> Except where otherwise noted, references to "Dkt. No." refer to the Docket Number as listed on the docket sheet established by the Special Master for this case, [http://ww2.ca2.uscourts.gov/specialmaster/special\\_145.html](http://ww2.ca2.uscourts.gov/specialmaster/special_145.html). References to "220146 Dkt. No." refer to the docket established for use in *Arkansas v. Delaware*, No. 220146 ORG, [http://ww2.ca2.uscourts.gov/specialmaster/special\\_146.html](http://ww2.ca2.uscourts.gov/specialmaster/special_146.html). (After the two cases were consolidated, I ordered the parties to file all documents on the docket for No. 220145 ORG.)

<sup>6</sup> The Supreme Court has, in several recent original proceedings, reviewed interim special master reports containing recommendations for the resolution of partial summary judgment motions on liability issues before remanding to the special master for resolution of issues related to appropriate relief. *See, e.g., Montana v. Wyoming*, 136 S. Ct. 1034 (Mem) (2016); *Kansas v. Colorado*, 514 U.S. 673 (1995).

amendment of the common law rule should be DISMISSED AS MOOT.

## BACKGROUND

### I. Legal Background

#### A. Unclaimed Property Law

As sovereigns, States are entitled to take custody of or escheat abandoned personal property. See *Delaware*, 507 U.S. at 497. The term “escheat” originally applied only to land; its common law origin derived from the notion that all land titles in England derived from the Crown; escheat was “the process by which tenurial land returned to the lord of the fee upon the occurrence of an event obstructing the normal course of descent.” Note, *Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319, 1319 (1961). Because escheat originally applied only to real property, an analogous common law principle — *bona vacantia* — emerged to allow the sovereign to take possession of personal property deemed to have no owner. *Id.* at 1326; see also *Delaware*, 507 U.S. at 497 n.9. The term “escheat” has come to apply equally to real and personal property. See *id.* (“Our opinions, however, have understood ‘escheat’ as encompassing the appropriation of both real and personal property, and we use the term in that broad sense.”). The term is colloquially used to refer to the right of a government to take either custody or ownership of unclaimed property.

These common law principles were adopted into American law, with the sovereign right to escheat residing with the States. See *Christianson v. King Cnty.*, 239 U.S. 356, 365 (1915) (“The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are



such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress.”). In its American incarnation, the principle of escheat has been justified by its tendency to allow unclaimed property to be “used for the general good rather than for the chance enrichment of particular individuals or organizations.” *Standard Oil Co. v. New Jersey* 341 U.S. 428, 436 (1951). All 50 States currently have laws that allow for the escheat of unclaimed property following a “dormancy” period after which property is deemed abandoned. *See, e.g.*, 72 Pa. Stat. § 1301.1 *et seq.*

### **B. Federal Common Law Priority Rules**

With respect to abandoned tangible property, “it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat.” *Texas*, 379 U.S. at 677. Abandoned intangible property, however, “is not physical matter which can be located on a map.” *Id.* As a result, the straightforward rule governing escheatment of tangible property does not apply to intangible property. In the early twentieth century, States began to pass laws authorizing escheatment of intangible property, which the Supreme Court generally upheld as valid exercises of the sovereign power of States. *See, e.g.*, *Provident Inst. for Sav. v. Malone*, 221 U.S. 660, 666 (1911); *Sec. Sav. Bank v. California*, 263 U.S. 282, 285-86 (1923); *Anderson Nat’l Bank v. Lockett*, 321 U.S. 233, 252 (1944); *Connecticut Mut. Ins. Co. v. Moore*, 333 U.S. 541, 546 (1947); *Standard Oil*, 341 U.S. at 442. *But see First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 370 (1923) (holding that a California statute allowing for the escheatment of deposits at a national bank was an unconstitutional

interference with the functioning of national banks). These cases did not, however, involve States' competing claims to escheat intangible property. Such competing claims became inevitable when, [f]ollowing World War II, states, recognizing the potential for substantial revenues, began to enact broad custodial statutes encompassing all kinds of unclaimed property." Andrew W. McThenia, Jr. & David J. Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 Wash. & Lee L. Rev. 1429, 1436 (1983).

The Supreme Court first addressed such a dispute in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961). Western Union sold a telegraphic money order service, which allowed customers to send a money order across the wires to a named recipient, to be collected at another Western Union office. A sender would pay to a Western Union clerk the amount to be sent plus a fee. *Id.* at 72. The sending office of Western Union would give the sender a receipt and would send a message to the Western Union office closest to the intended recipient, directing the office to pay the specified amount to the payee. The payee would then be notified, and upon presenting himself at the Western Union office, would be provided a negotiable instrument in the amount specified by the sender. *Id.* At times, however, Western Union would be unable either to locate the intended recipient or to refund the sender. As a result, the company accumulated "large sums of money due from Western Union for undelivered money orders and unpaid drafts." *Id.* at 73.

Pennsylvania sued Western Union in Pennsylvania State court, and, pursuant to its unclaimed property

statute, obtained a judgment requiring Western Union to remit to the State all funds from unclaimed money orders purchased in Pennsylvania. *Id.* at 74. Western Union defended on the ground that the potential for another State or States to claim entitlement to escheat the same funds subjected it to the risk of double liability in violation of its Due Process rights. *Id.* (Indeed, New York had already escheated some of the funds claimed by Pennsylvania.) Noting that “rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance,” the Court held that disputes between States over the right to escheat intangibles must be adjudicated in a forum where all competing States could present their claims. *Id.* at 79. The Court therefore reversed the judgment of the Pennsylvania State court. *Id.* at 80.

Four years later, in *Texas v. New Jersey*, 379 U.S. 674 (1965) the Court directly addressed competing State claims to escheat unclaimed intangible property. Texas invoked the original jurisdiction of the Supreme Court to sue New Jersey, Pennsylvania, and the Sun Oil Company, seeking a declaration that Texas was entitled to escheat certain small debts owed by Sun Oil to approximately 1,730 creditors who had failed to claim or cash checks over approximately 40 years preceding the lawsuit. *Id.* at 675. The unclaimed debts at issue were either evidenced in the records of Sun Oil’s Texas offices, or owed to creditors whose last known address was in Texas. *Id.*

The Court considered “[f]our different possible rules” to “settle[] the question of which State will be

allowed to escheat." *Id.* at 677-78. Texas, relying on State court choice-of-law decisions, urged a rule by which the State with the most significant contacts with the debt at issue would be entitled to escheat. *Id.* at 678. The Court rejected this as "not really any workable test at all" given that it would require the courts "in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." *Id.* at 679.

New Jersey, Sun Oil's State of incorporation, argued that the debtor's State of incorporation should govern. *Id.* at 679. The Court rejected that argument as well. Observing that entitlement to escheat should be determined "primarily on principles of fairness," and that allowing escheat of obligations incurred all over the country to the State of incorporation "would too greatly [exalt] a minor factor." *Id.* at 680.

Pennsylvania, which housed Sun Oil's principal place of business, argued that the State in which a debtor had its principal place of business should have priority. While the Court found the principal place of business preferable to the place of incorporation, it nonetheless concluded that allowing a State to benefit from a *debt* owed by a business operating there would, anomalously, "convert a liability into an asset when the State decides to escheat." *Id.* at 680. Additionally, the Court noted that determining a company's principal place of business could be cumbersome. *Id.*

The Court opted for the rule proposed by Florida (and recommended by the Special Master) (hereinafter, the *Texas* rule), under which the right to escheat an unclaimed debt instrument is accorded to the State of the creditor's last known address as shown by the

books and records of the debtor. *Id.* at 68081. The Court found that the factual issue posed by this test would be “simple and easy to resolve,” would “leave[] no legal issue to be decided,” and would fairly “tend to distribute escheats among the States in the proportion of the commercial activities of their residents.” *Id.* at 681.

For the circumstance where a debtor’s books showed no record of the creditor’s address, or where the State of the creditor’s last known address had no statute allowing it to escheat the property at issue, the Court adopted a secondary rule allowing escheat by the debtor’s State of incorporation. *Id.* at 682.<sup>7</sup> The Court observed that this “secondary rule” was “likely to arise with comparative infrequency.” *Id.* The Court noted that the issue presented was fundamentally one “of ease of administration and of equity.” *Id.* at 683.

The Court has, on two subsequent occasions, considered challenges to the priority rules established in *Texas*. In *Pennsylvania v. New York*, 407 U.S. 206, 214 (1972), Pennsylvania brought an original action against New York, arguing (as it had in *Western Union Telegraph*) that it was entitled to escheat unclaimed funds accumulated by Western Union when the company was able to locate neither the purchaser nor the payee of telegraphic money orders. 407 U.S. at 211-12. Pennsylvania noted that Western Union’s records often do not list an address for the sender or payee of funds and argued that application of the

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<sup>7</sup> In either case, this “secondary rule” would be subject to the right of a State to recover if and when its laws allowed, or upon evidence that the creditor’s last known address was within the State’s borders.

*Texas* rule in such cases brought an unjustified windfall to Western Union's State of incorporation, New York. Pennsylvania argued "that the State where the money order was purchased [should] be permitted to take the funds" based on the assumption that the State of purchase could be presumed to be the purchaser's State of residence. *Id.* at 212. Where "a transaction is of a type that the obligor does not make entries upon its books and records showing the address of the obligee," Pennsylvania argued, the State where the transaction occurred should be entitled to escheat. *Id.* at 213-14 (internal quotation marks omitted).

While noting that Pennsylvania's proposal had "some surface appeal," the Court rejected it. *Id.* at 214. The Court disagreed with Pennsylvania's contention that the *Texas* rule was based on an assumption that addresses of creditors are generally known by debtors. *Id.* Indeed, the Court noted that some of the debt instruments involved in *Texas* did not indicate the creditors' last known address. *Id.* The Court held that even when the address of the creditor would not typically be known, Pennsylvania's proposed rule would require the sort of case-by-case adjudication that the Court had held should be avoided. *Id.* at 215. Further, the Court observed that the likelihood of a "windfall" to a State of incorporation did not furnish adequate reason for deviating from established priority rules. *Id.* at 214.

The Court next considered competing claims of States to abandoned intangible property in *Delaware v. New York*, 507 U.S. 490 (1993). The case involved unclaimed dividends, interest, and other distributions made by the issuers of securities and held by

intermediaries on behalf of their beneficial owners.<sup>8</sup> Between 1985 and 1989, New York had escheated several hundred million dollars in such funds from intermediaries doing business in the State, notwithstanding the potential claim of either the State of the last known address of the beneficial owner or the intermediaries' State of incorporation. *Id.* at 496.

The Special Master recommended that the Court deviate from the secondary rule established in *Texas* to hold that where the creditor's or beneficial owner's last known address is not known, a corporate debtor's principal place of business — rather than its State of incorporation — should have priority to escheat. *Id.* at 505-06. The Court rejected the Special Master's recommendation, ruling that "determining the State of incorporation is the most efficient way to locate a corporate debtor." *Id.* at 506. The Court further observed that "[t]he mere introduction of any factual controversy over the location of a debtor's principal executive offices needlessly complicates an inquiry made irreducibly simple by *Texas*' adoption of a test based on the State of incorporation." *Id.* Further, the Court noted that adopting a rule based on principal place of business would be unlikely to provide for a more equitable distribution of unclaimed funds; rather, it would simply tend to shift entitlement to escheat the unclaimed distributions at issue from Delaware — where the majority of the intermediaries were incorporated — to New York — where most had their principal

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<sup>8</sup> This practice of using intermediaries "facilitates the offering of customized financial services" and allows for securities to be transferred between beneficial owners without requiring the underlying securities certificates to themselves be transferred. *Id.* at 495.

place of business. *Id.* at 507 (“A company’s arguably arbitrary decision to incorporate in one State bears no less on its business activities than its officers’ equally arbitrary decision to locate their principal executive offices in another State.”). Finally, the Court once again emphasized the importance of adhering to precedent so as to avoid uncertainty and the protracted litigation amongst the States that might result from willingness “to decide each escheat case on the basis of its particular facts.” *Id.* at 510 (quoting *Texas*, 379 U.S. at 679).

### **C. The Statutory Backdrop**

#### **1. The Uniform Disposition of Unclaimed Property Act**

In the years following the Supreme Court’s decisions upholding the States’ sovereign power to escheat (or take custody of) intangible forms of property, but before the Court first addressed the potential for competing State claims to the same intangible property in *Western Union Telegraph*, the Uniform Law Commission published the 1954 Uniform Disposition of Unclaimed Property Act (the “1954 Uniform Act”). The 1954 Uniform Act was intended both to fill the “very real need” for “comprehensive legislation covering the entire field of unclaimed property,” and to address the risk that the Court’s early decisions upholding States’ power to escheat intangible property could subject property holders to multiple liability from the competing claims of States as they enacted more and more expansive laws providing for escheat of unclaimed property. 1954 Uniform Act, Prefatory Note, at 136 (Unif. Law. Comm’n 1954) (noting that the Supreme Court’s decisions “reveal that a troublesome problem of multiple liability for the holder of unclaimed



property arises in case two or more states, each having jurisdiction over such property, enact statutes dealing with the subject”).

Section 2 of the 1954 Uniform Act set forth the criteria for the presumption of abandonment of intangible property<sup>9</sup> held by banking or financial institutions, *see* 1954 Uniform Act § 2, and specifically covered the disposition of [a]ny sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, and traveler’s checks,” *id.* § 2(c). The comments to this portion of the 1954 Uniform Act note that “Section 2 Parallels Section 300 of the New York Abandoned Property Law.” *Id.* § 2 cmt.

The 1954 Uniform Act “was widely but by no means universally adopted” by States. McThenia & Epstein, *supra*, at 1441. It did not put an end to conflicts between the States over unclaimed intangible property. *Id.* While the 1954 Act contained a “reciprocity” provision that created priority rules for scenarios in which multiple States made a claim over the same abandoned property, the provision’s operation relied on enactment of legislation by States to forgo their claim in the reciprocal circumstances described by the Act. *See* 1954 Uniform Act § 10(b).<sup>10</sup> Additionally, the

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<sup>9</sup> This section also included criteria relating to the contents of safe deposit boxes. *See* 1954 Act § 2(d).

<sup>10</sup> The priority rules set forth in the reciprocity provision provided that, if two States had a claim to unclaimed property, and the holder of that property had a record of the owner’s last-known address, the State of the last-known address was entitled to custody of the property. *Id.*

reciprocity provision did not cover all types of property; notably, while the 1954 Uniform Act covered written financial instruments, it did so only where such instruments were issued "by a banking or financial institution." 1954 Uniform Act § 2(c).

The Revised Uniform Disposition of Unclaimed Property Act, published in 1966<sup>11</sup> (the "1966 Uniform Act"), aimed to address the gaps. The 1966 Uniform Act revised Section 2 to explicitly include "money orders and traveler's checks" issued by "business associations." 1966 Uniform Act § 2(c); Prefatory Note, at 3. As a result of this revision, Section 2 of the 1966 Uniform Act established criteria covering "[a]ny sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization or business association is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." 1966 Uniform Act § 2(c). The 1966 Uniform Act did not, however, define the terms "money order" or "traveler's check."

## **2. The Disposition of Abandoned Money Orders and Traveler's Checks Act**

In 1974, two years after the Supreme Court's decision in *Pennsylvania*, Congress enacted the FDA. See Act of Oct. 28, 1974, Pub. L. No. 93-495, §§ 601-04, 88 Stat. 1500, 1525-26 (codified at 12 U.S.C. §§ 2501-03). The FDA is the subject of this litigation. The FDA narrowed the *Pennsylvania* rule by altering the priority

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<sup>11</sup> By which time the 1954 Act had been adopted by 12 States. See Revised Uniform Disposition of Unclaimed Property Act, Prefatory Note at 3 (Unif. Law Comm'n 1966).

framework established in *Texas* as applied to certain specified financial instruments. Instead of allowing the issuer's State of incorporation to take custody of funds from the purchase of abandoned financial instruments, where the purchaser's and payee's addresses were unknown to the obligor (the secondary rule established in *Texas* and *Pennsylvania*), the FDA provides that the State in which the instrument was *purchased* is entitled to take custody of those funds (so long as the books and records of the instrument's issuer show that State, and that State's laws entitle it to take custody of the funds at issue). See 12 U.S.C. § 2503(1).

The FDA applies only to sums 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." *Id.* § 2503. Hereinafter, I refer to such instruments, those falling within the coverage of the FDA, as "Covered Instruments." Forms of intangible property other than Covered Instruments continue to be governed by the priority rules established by the Supreme Court in *Texas* and *Pennsylvania*. While the FDA defines the terms "banking organization," "business association," and "financial organization," see *id.* § 2502(1)–(3), it does not define "money order," "traveler's check," "directly liable," or "third party bank check."

Where the FDA applies, the occurrence of one of three mutually exclusive scenarios, each set forth in a subsection of § 2503, determines which State is entitled to take custody of the funds at issue. *First*, "if the books and records of such banking or financial organization or business association [the issuer or obligor of

the Covered Instrument] show the State in which" the Covered Instrument was purchased, then "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." *Id.* § 2503(1). *Second*, if the books or records of the issuer do *not* show the State in which the Covered Instrument was purchased, then the State in which the issuer "has its principal place of business shall be entitled to escheat or take custody of the sum payable," to the extent that State's laws allow it to do so, "until another State shall demonstrate by written evidence that it is the State of purchase." *Id.* at § 2503(2). *Third*, if the books and records of the issuer *do* show the State in which the Covered Instrument was purchased, but that State's laws do not allow it to take custody of the funds, then the State in which the issuer has its principal place of business is entitled to take custody of the funds (if that State's laws authorize this), "subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum." *Id.* at § 2503(3).

The legislative history of the FDA reflects that it was passed in direct response to the Supreme Court's rejection of Pennsylvania's claim in *Pennsylvania*. Senator Hugh Scott, of Pennsylvania, submitted the proposed bill to Congress alongside a memorandum noting that "[t]he problem to which this bill is directed has been highlighted and made more severe recently by the Supreme Court in *Pennsylvania v. New York*, 407 U.S. 206 (1972)." 119 Cong. Rec. 17047 (May 29, 1973) (Sen. Scott, Memorandum in Support of Proposed Federal Disposition of Unclaimed Property Act

of 1973). The memorandum likewise observed that "in the case of travelers 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." *Id.* Similarly, the Senate Report for the FDA describes the bill as "designed to assure a more equitable distribution among the various States of the proceeds of [Covered Instruments]," rather "than continuing to permit a relatively few States to claim these sums solely because the seller is domiciled in that State, even though the entire transaction took place in another State." S. Rep. No. 93-505, at 1, 6 (1973).

Additionally, Congress codified the rationale behind the FDA as part of the statute itself. In a section of the FDA titled "Congressional findings and declaration of purpose," Congress noted its finding 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.

12 U.S.C. § 2501(1)—(5).

While the bill was in committee, the Chairman of the Senate Committee on Banking, Housing, and Urban Affairs sought the views of the Department of the Treasury ("Treasury") on the proposed legislation. See S. Rep. No. 93-505, at 5 (Letter from Edward C. Schmults). Treasury's General Counsel, writing on behalf of Treasury, responded with a letter stating that it did not object to the legislation, "but . . . believe[d] the language of the bill is broader than intended by the drafters." *Id.* at 5. Specifically, Treasury observed that the language "money order, traveler's check, or similar written instrument on which a bank or financial organization or business association is directly liable" could be interpreted to cover "third party payment bank checks." *Id.* Treasury recommended expressly excluding "third party payment bank checks" from the description of Covered Instruments. *Id.* Describing it as a "technical" change, the Committee adopted this suggestion, *id.* at 6, although deviating slightly from Treasury's suggested language. The final bill was enacted containing an exception for "third

party bank checks,” without defining that term. *See* 12 U.S.C. § 2503.<sup>12</sup>

### **D. Factual Background**

As is discussed more fully below, the facts that are material to these cross motions are, with limited exceptions, not in dispute. Moneygram is a Delaware corporation. It provides prepaid financial instruments to financial institutions and retail establishments, which use these products to pay their own obligations or sell them to customers. Moneygram’s parent company — Moneygram International, Inc. — is the second largest money transfer business in the world, with revenues exceeding \$1 billion. Until 2005, Moneygram operated under the name Traveler’s Express.

Moneygram markets two lines of prepaid financial instruments as part of its Financial Paper Product segment. One is marketed as “Retail Money Orders”; another is marketed as “Official Checks,” which are issued in several categories. The instant dispute is over entitlement to escheat certain categories of Official Checks.

#### **1. MoneyGram Retail Money Orders**

A purchaser of a Moneygram Retail Money Order buys the instrument from a seller, which acts as an agent for Moneygram, by paying the monetary amount imprinted on the face of the instrument, plus any applicable fees. Moneygram’s selling agent is not itself a party on the Retail Money Order. In exchange for payment, the purchaser receives from the selling

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<sup>12</sup> The legislative history does not reflect why the final language of the bill deviated from the language suggested by Treasury.

agent a written instrument (the Retail Money Order) on which she can enter the name of desired payee. Moneygram is designated as the issuer and the drawer<sup>13</sup> of the Retail Money Order. The Retail Money Order can then be redeemed by the payee for its face value. Moneygram markets Retail Money Orders as instruments that are accepted almost universally and are treated “as good as cash.” Nonetheless, Moneygram does not guarantee payment on Retail Money Orders and may under certain situations return a Retail Money Order unpaid (for example, when fraud is suspected).

Moneygram’s agents generally do not collect personal identifying information from the purchaser, regarding either the purchaser or payee.<sup>14</sup> Instead, Moneygram’s selling agents report four pieces of information to Moneygram upon the sale of a Retail Money Order: (1) the dollar amount of the instrument; (2) the instrument’s serial number; (3) the date of the sale; and (4) the selling agent’s “customer identification number.” The agent’s customer identification number allows Moneygram to identify the State in which the instrument was sold. The value of the Retail Money Order is then transferred from the selling agent’s

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<sup>13</sup> Under the Uniform Commercial Code (the “UCC”) “issuer” “means a maker or drawer of an instrument.” UCC § 3-105(c) (Am. L. Inst. & Unif. L. Comm’n 2017) (“2017 UCC”). “Drawer” “means a person who signs or is identified in a draft as a person ordering payment,” while “maker” has the same significance with respect to a note. *Id.* § 3-103(5), (7).

<sup>14</sup> It however, a Moneygram agent becomes aware that a purchaser buys more than \$3,000 worth of Moneygram Money Orders in a day, the agent collects identifying information from that purchaser, which is maintained for five years.



bank account to Moneygram, which holds the funds in an intermingled account containing the balance of all outstanding Moneygram paper-based payment products. The funds remain in this account until the Retail Money Order is presented for payment, or the instrument goes uncashed for long enough that it becomes presumptively abandoned for the purposes of a claiming State's abandoned property laws. When a Retail Money Order is presented for payment, it is cleared through the banking system (using routing and transit numbers listed on the face of the instrument) by a "clearing bank" listed on the front of the instrument in the "payable through" field. Moneygram then draws the funds from the commingled account to pay the clearing bank. If a Retail Money Order is not presented for payment for a sufficiently long time that it is deemed presumptively abandoned, Moneygram, following the priorities established by the FDA, remits its value to the State in which it was purchased.

## **2. MoneyGram Official Checks**

MoneyGram also offers a line of prepaid financial instruments, which it processes on what it describes as its "Official Checks" platform. Whereas Retail Money Orders are sold by retail agents such as convenience stores, supermarkets, drug stores, and other nonfinancial institutions, Official Checks are sold only by financial institutions (such as banks and credit unions). Three of the four products processed on the Official Check platform are relevant to this case: Moneygram "Agent Check Money Orders,"

Moneygram “Agent Checks,” and Moneygram “Teller’s Checks.”<sup>15</sup>

### **i. Moneygram “Agent Check Money Orders”**

Agent Check Money Orders function much as Retail Money Orders, with the exception that they are sold only by financial institutions. There is little difference between the two products, and, unlike Agent Checks and Teller’s Checks, Agent Check Money Orders are treated for escheat purposes as money orders.<sup>16</sup> In the sale of Agent Check Money Orders: A financial institution acts as selling agent for Moneygram; the selling financial institution is not liable on the instrument; the purchaser pays the financial institution the face value of the Agent Check Money Order, plus any fees; Moneygram is considered both the drawer and the

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<sup>15</sup> In what is a difference merely of diction, and not a difference of legal significance to this dispute, the parties use the term Official Checks slightly differently. The Defendants use the term as encompassing Teller’s Checks, Agent Checks, and Agent Check Money Orders, *See, e.g.*, Defs. Br. 22-23, while Delaware uses the term as covering only Agent Checks and Teller’s Checks. In this Report, I use the term “Official Checks” as covering all three instruments while recognizing that the dispute concerns only Agent Checks and Teller’s Checks. Delaware effectively concedes that Agent Check Money Orders are governed by the FDA, and, as discussed above, Moneygram already reports the value of these instruments pursuant to the FDA’s priority rules.

<sup>16</sup> In fact, Delaware’s Statement of Undisputed Facts generally describes the characteristics of both Retail Money Orders and Agent Check Money Orders under the generic identifier “MoneyGram Money Orders.” *See* Dkt No. 78 ¶¶ 6, 21-44. (Much of the evidence that Delaware identifies in support of the characteristics it attributes to all “Moneygram Money Orders” appears, however, to refer only to Retail Money Orders. *See* Dkt. No. 102 ¶¶ 21-44.)

issuer; and the clearing bank is designated as "drawee."<sup>17</sup> Funds from the purchase of Agent Check Money Orders are transferred by the selling financial institution to Moneygram, which holds the funds in the same comingled account as proceeds from the sale of Retail Money Orders. When the instrument is presented for payment, it is processed through the clearing system to the clearing bank in the same manner as in the case of Retail Money Orders. Moneygram reimburses the clearing bank for its payment of the instrument.

Personal information regarding the purchaser or payee of an Agent Check Money Order is not collected by Moneygram. Moneygram holds the funds from the sale of Agent Check Money Orders until the instrument is presented for payment or deemed presumptively abandoned. If an Agent Check Money Order is abandoned for the purposes of the unclaimed property laws, Moneygram remits the value of the unclaimed instrument to the State in which it was purchased, treating it as a money order or traveler's check pursuant to the FDA, unlike Moneygram's treatment of Agent Checks and Teller's Checks. The parties do not dispute the appropriateness of this treatment of abandoned Agent Check Money Orders. It is the treatment of abandoned Agent Checks and Teller's Checks that is the focus of this dispute.

## **ii. Moneygram "Agent Checks"**

Like Moneygram's instruments labeled as "Money Orders," Moneygram's Agent Checks are prepaid financial instruments. They are used primarily by

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<sup>17</sup> Under the UCC, "drawee" "means a person ordered in a draft to make payment." UCC § 3-103(4).

purchasers to transmit funds to a named payee. A purchaser<sup>18</sup> pays the selling financial institution the face value of the Agent Check, plus any fees. The selling bank transmits the funds (minus its fees) to Moneygram. When the payee of the Agent Check cashes it at an institution, that institution forwards the instrument to Moneygram's clearing bank, receiving reimbursement for its payment of the Agent Check from the clearing bank. Moneygram then reimburses the clearing bank.

Agent Checks come in two varieties. One type of Agent Check indicates that the financial institution signing the check signs the check as "Agent for Moneygram." A second type of Agent Check simply notes "Authorized Signature" next to the signature entered for the selling institution. Both varieties of Agent Check designate Moneygram as the issuer. Moneygram's clearing bank is designated as the drawee. An Agent Check is sometimes labeled simply as an "Official Check."

After an Agent Check is purchased, the same four pieces of information — amount of the Agent Check,

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<sup>18</sup> Delaware disputes the notion that it is conventional for a retail "purchaser" to buy an Agent Check. It maintains that "Agent Checks are not usually purchased by consumers, but are used by banks to pay their own obligations." Dkt. 98 ¶ 70. But the proposition that Agent Checks are not *usually* purchased by consumers does not mean that they are never purchased by consumers, and the evidence cited by Delaware does not support the more extreme proposition. In fact, Delaware's own expert's report states that an Agent Check "would be purchased by a consumer from a bank selling the product." Dkt No. 70 ¶ 14 (Expert Report of Ronald Mann) ("Mann Report"). Delaware's argument on this matter does not create a "genuine dispute as to [a] material fact." Fed. R. Civ. P. 56(a).

date of purchase, serial number, and customer ID number (that is, the ID of the selling institution) — are transmitted to Moneygram. No identifying information relating to the purchaser or the payee is conveyed to Moneygram. Moneygram holds the proceeds of the sale of Agent Checks in the same intermingled account as the other Moneygram products discussed above, until the Agent Check is presented for payment or deemed abandoned. Once an Agent Check is presented for payment, it is cleared in the same manner as Retail Money Orders and Agent Check Money Orders.

Unlike the products that Moneygram markets as “Money Orders,” Moneygram remits the proceeds of abandoned Agent Checks to its place of incorporation — currently Delaware — treating them as not covered by the FDA. The Defendants here contend that Agent Checks are covered by the FDA, so that the proceeds of abandoned Agent Checks should not be sent to Delaware (unless they were purchased in Delaware).

### **iii. Moneygram “Teller’s Checks”**

Moneygram Teller’s Checks<sup>19</sup> (“Teller’s Checks”) are purchased in a manner substantially similar to the instruments described above, again with the qualification that, unlike Retail Money Orders but like Agent Checks, Teller’s Checks and other Official Checks are sold only at financial institutions. The purchaser pays the selling financial institution the face value of the instrument, plus any associated fees, and

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<sup>19</sup> “Teller’s check” also carries a generic meaning independent of the characteristics of any particular Moneygram product. See 2017 UCC § 3-104(h) (“Teller’s Check’ means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.”).

the seller issues the prepaid written instrument. The net proceeds of the purchase of the Teller's Check are transferred to Moneygram, along with the same four pieces of information that are collected upon the sale of the other Moneygram products at issue. With rare exceptions, no personal information regarding the purchaser or payee is transmitted to Moneygram. Moneygram maintains the proceeds of the sale of Teller's Checks in the same commingled account as those from the sale of the other instruments at issue, until the Teller's Check is presented for payment and the instrument is cleared by the clearing bank. Moneygram reimburses the clearing bank for its payment of the Teller's Check. Like Agent Checks, Teller's Checks are sometimes designated only as "Official Checks" on the instrument.

In the case of Teller's Checks, unlike the other instruments at issue, the selling financial institution is designated as the "drawer" of the instrument. Nonetheless, Moneygram's agreements with its selling financial institution customers describe Teller's Checks as "drawn by" both the financial institution and Moneygram. Moneygram is designated as the issuer. The parties dispute the extent to which the selling institution acts as Moneygram's agent for the purpose of selling Teller's Checks. The clearing bank is designated as the drawee. When a Teller's Check is presented for payment, it is cleared in the same manner as the other instruments at issue. Unlike the other Moneygram instruments at issue, however, a Teller's Check is a "good funds" instrument under Federal Reserve Regulation CC, 12 C.F.R. § 229, with the consequence that the depositor of a Teller's Check can withdraw funds represented by the instrument the day after the check is deposited.

As with Agent Checks (but not Retail Money Orders or Agent Check Money Orders), Moneygram remits the proceeds of unclaimed Teller's Checks to Delaware, Moneygram's State of incorporation, treating them as not covered by the FDA. The Defendant States contest the propriety of that action, contending that the Teller's Checks are covered by the FDA and therefore should not be remitted to Moneygram's State of incorporation.

### **E. Procedural Background**

This action was commenced on May 26, 2016, when Delaware sought leave to file a bill of complaint against Pennsylvania and Wisconsin within the original jurisdiction of the Supreme Court of the United States. Dkt. No. 1. Delaware's complaint sought a declaration that Moneygram's Agent Checks and Teller's Checks are not governed by the FDA, and are instead governed by federal common law principles under which, in event of abandonment, Delaware, as Moneygram's State of incorporation, may take custody of the proceeds by escheat, regardless of the State in which the instruments were purchased. *Id.*<sup>20</sup>

Delaware's proposed complaint was filed in response to two earlier-filed lawsuits arising from the same dispute. First, Pennsylvania sued Delaware and Moneygram in federal district court in Pennsylvania,

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<sup>20</sup> Delaware subsequently sought leave to amend its bill of complaint to assert similar claims against the Defendants with respect to the escheat of "other similar instruments" issued by Moneygram and unnamed third parties. *See* Dkt. No. 23. Following briefing by the parties, I denied this request on the basis that the proposed amendment would substantially expand the scope of this proceeding and delay resolution of the case. *See* Dkt. No. 40 ¶ 5(b).

asserting that Moneygram's practice of escheating Agent Checks and Teller's Checks violated the FDA and Pennsylvania's unclaimed property law. *See* Complaint, *Treasury Dep't of Pa. v. Gregor*, No. 1:16-cv-00351-JEJ (M.D. Pa. Feb. 26, 2016), ECF No. 1. Shortly thereafter, Wisconsin filed a similar lawsuit in federal district court in Wisconsin. *See* Complaint, *Wisconsin Dep't of Rev. v. Gregor*, No. 3:16-cv-00281-WMC (W.D. Wis. Apr. 27, 2016), ECF No. 1. Following the filing of Delaware's action in the Supreme Court, the Pennsylvania action was dismissed without prejudice and the Wisconsin action was stayed. *See* Order, *Treasury Dep't of Pa.*, (M.D. Pa. Oct. 5, 2016), ECF No. 48; Order, *Wisconsin Dep't of Rev.* (W.D. Wis. June 21, 2016), ECF No. 12.

Approximately two weeks after Delaware submitted its request to file its complaint, Arkansas, acting also for 20 other States,<sup>21</sup> moved in the Supreme Court to file a complaint against Delaware, seeking a declaration that the FDA applied to all Official Checks, and seeking an order requiring Delaware to "deliver to the [21] States sums payable on unclaimed and abandoned MoneyGram official checks purchased in those States and unlawfully remitted to Delaware." *See* Motion for Leave to File Bill of Complaint, *Arkansas v. Delaware*, No. 220146 (U.S. June 9, 2016). *Id.* at 17-18. The Supreme Court allowed the filing of both complaints and consolidated the two actions. *See Arkansas v. Delaware*, 137 S. Ct. 266 (2016); Dkt. No 9.

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<sup>21</sup> Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Kentucky.



Seven additional States<sup>22</sup> were subsequently granted leave to join the claims brought in Arkansas' complaint. See Dkt. Nos. 19, 49. In response to Delaware's complaint, Pennsylvania filed a counterclaim seeking a declaration that the secondary rule established in *Texas* (favoring escheat to the instrument debtor's State of incorporation when the debtor's books do not reflect the purchaser's address) is "no longer equitable, and is therefore overruled." See Dkt. No. 11 ¶ 116.

With the agreement of the parties, I bifurcated the proceedings so that the question which State or States would have priority to take custody of the proceeds at issue would precede litigation of damages due. Dkt. No. 40 ¶ 6. During this first phase of the proceedings, the parties were entitled to seek discovery "on any issue relevant to the merits of the State's entitlement to the escheat." *Id.* The parties engaged in fact discovery, during which two corporate representatives of Moneygram (a nonparty in this action) were deposed pursuant to Rule 30(b)(6). Following the close of fact discovery, the parties engaged in expert discovery, including production of expert reports and expert depositions.

The parties have agreed that this matter should be generally governed by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Southern District of New York. See Sup. Ct. R. 17.2; Dkt. No. 74 (adopting Joint Proposal for Case Mgmt. Order No. 5, Dkt. No. 73). Before me now are the parties' cross motions for partial

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<sup>22</sup> California, Iowa, Maryland, Oregon, Virginia, Washington, and Wyoming.

summary judgment on the question whether escheat of the Disputed Instruments is governed by the FDA.

### DISCUSSION

Under the Federal Rules of Civil Procedure,<sup>23</sup> summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). On a motion for summary judgment, a court must view the facts “in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Nonetheless, the opponent of a motion for summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A genuine issue of material fact exists if “the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party.” *Id.* at 248. The movant bears the burden of “demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

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<sup>23</sup> Although the Federal Rules are not strictly applicable in original proceedings before the Supreme Court, the Rules, as well as the Court’s precedents construing them, are “useful guides.” *See Nebraska v. Wyoming*, 507 U.S. 584 (1993). And, as noted above, the parties have agreed to their use.

For the reasons set forth below, I recommend that the Defendants States' motion be granted, and Delaware's motion be denied.

## **II. Whether the Disputed Instruments Fall Within the Scope of the FDA**

Central to this dispute is whether Moneygram's Agent Checks and Teller's Checks are Covered Instruments subject to the priority rules established by the FDA. Defendants contend that the Disputed Instruments, like Moneygram Retail Money Orders and Agent Check Money Orders, are within the scope of the FDA as "money orders,"<sup>24</sup> or, in the alternative, as "similar written instruments (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" ("Similar Instruments"). 12 U.S.C. § 2503.<sup>25</sup> Delaware contends that the Disputed Instruments are neither "money orders" nor Similar Instruments, and that they do not, therefore, fall within the scope of the FDA.

The FDA does not define "money order," "similar written instrument," "directly liable," or "third party bank check." See 12 U.S.C. § 2501. Unsurprisingly, the parties disagree as to the meaning of each of these terms and argue that adopting their proposed construction mandates finding in their favor as a matter of law. See Pl.'s Br. 15-16; Defs.' Br. 20. As a result,

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<sup>24</sup> The FDA is written in the singular: "a money order, traveler's check, or other similar instrument." This Report nonetheless sometimes describes these instruments in the plural without the use of alterations, utilizing quotation marks to indicate reference to the terms' meaning as used in the FDA or related statutes.

<sup>25</sup> The Defendants do not contend that the Disputed Instruments are traveler's checks.

close consideration of each of the disputed terms is important to resolving this dispute. Having considered the parties' positions, I conclude that, for the purposes of the FDA, the Disputed Instruments are "money orders," or, at the very least, are Similar Instruments.

### **A. Are the Disputed Instruments "Money Orders" Under the FDA?**

The parties agree that the Disputed Instruments fall within the scope of the FDA if they are "money orders" for the purposes of the FDA.<sup>26</sup> The parties do not dispute that "money orders" are prepaid negotiable instruments, but agree on little else regarding what constitutes a "money order" under the FDA.

A court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). Delaware, while acknowledging that "[t]here is no single legal definition of a money order," Pl.'s Br. 16, argues that the Disputed Instruments are different from money orders. *See* Pl.'s Br. 16-21.

Delaware identifies several respects in which differences can be observed between the instruments Moneygram designates as its "money orders" and the Disputed Instruments that Moneygram markets on its Official Checks platform. It contends that those differences demonstrate that the Disputed Instruments are not money orders within the meaning of the FDA.

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<sup>26</sup> Notwithstanding their agreement, the parties are not necessarily correct in so assuming. *See infra* Section II(B)(2).

Delaware points to the following observable characteristics of Moneygram's instruments designated as money orders, which are not found in the Disputed Instruments.

(i) the words "Money Order" appearing somewhere on the face of the instrument, (ii) the words "agent of MoneyGram" appearing somewhere on the face of the instrument, (iii) the inclusion of purchaser payee language creating a contract including service charges on the back of the instrument, (iv) the instrument can be acquired at retail locations like a convenience store, and (v) many of the instruments have a maximum value limit of \$1,000.

Pl.'s Br. 18; Pl.'s Reply Br. 10.

For starters, the argument suffers from a fundamental logical flaw. It assumes that the characteristics found today in the instruments Moneygram markets under the name "money order" are defining characteristics of the type of instrument Congress had in mind over 40 years ago when it enacted the FDA's references to "money orders." Delaware seeks to bolster this flawed argument by pointing out that MoneyGram is "either the largest or one of the largest issuers of money orders" in the United States and has been for the entire time period for which the Defendant States are seeking to recover. Pl.'s Reply Br. 10 (citing *MoneyGram Int'l, Inc. v. Comm'r*, 144 T.C. 1, 4 (2015) ("MoneyGram in 2007 was the leading issuer of money orders in the United States.")). But this merely underlines many flaws in the logic of Delaware's argument. Delaware has not shown that the characteristics of contemporary Moneygram money orders to which it points were present in money orders in 1974.

Furthermore, if Congress had in mind the money orders of any particular issuer in 1974, in all likelihood it would have been Western Union, not Moneygram, as the legislative history of the FDA makes clear that the statute was passed in response to the Supreme Court's decision in *Pennsylvania v. New York*, which involved money orders issued by Western Union. See 119 Cong. Rec. 17047 (May 29, 1973) (Sen. Scott, Memorandum in Support of Proposed Federal Disposition of Unclaimed Property Act of 1973); *Pennsylvania*, 407 U.S. at 21112.

The Defendants are on sounder ground in interpreting the FDA's use of the term by reference to definitions and usages in contemporary sources. They cite the 1968 Black's Law Dictionary (which was current at the time that the FDA was enacted in 1974) discussing postal money orders and making clear that "they are prepaid drafts." Defs.' Br. 21; see also *Money Order*, Black's Law Dictionary (4th ed. rev. 1968) ("Under the postal regulation of the United States, a money order is a species of draft drawn by one post-office upon another by for an amount of money deposited at the first office by the person purchasing the money order, and payable at the second office to a payee named in the order.")). Defendants cite also the then-contemporary Webster's New Collegiate Dictionary (7th ed. 1967), which defined "money order" as "an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another named office." As some of these sources classified money orders as "drafts," Defendants point to the 1972 UCC definition of "draft" as "a direction to pay" someone that "must identify the person to pay with reasonable certainty." 1972 UCC § 3-102(1)(b); see also 2017 UCC § 3-104(e) (the current version). Drawing from

such sources, Defendants contend that the ordinary meaning of "money order" is "a prepaid draft issued by a post office, bank, or some other entity and used by a purchaser to safely transmit money to a named payee." Defs.' Br. 22.

Defendants point out that "all of the products that MoneyGram markets as 'Official Checks' . . . fit squarely within the definition of 'money order.'" Defs.' Br. 22. They assert that Moneygram's Agent Checks, like its Agent Check Money Orders, fit within this definition of "money order." "[T]hey are [prepaid] written orders directing another person to pay a certain sum of money on demand to a named payee."<sup>27</sup> Defs.' Br. 22. The purchaser of an Agent Check prepays the value of the instrument to the selling institution, which sends the proceeds to Moneygram, which holds those funds until the instrument is presented for payment, at which point Moneygram transfers the funds representing the prepaid value of the instrument to the clearing bank (the drawee). Teller's Checks are not different in "any way that is material to the definition of money order under the FDA." Defs' Br. 24.<sup>28</sup>

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<sup>27</sup> The Defendants also point out that at least some of Moneygram's contracts with the distributing financial institutions state that Agent Checks "may be used as money orders" at the financial institution's option. Defs.' Br. 3.

<sup>28</sup> Delaware notes and the Defendants concede that Teller's Checks are listed as a "good funds" instrument that has next business day availability under the Expedited Funds Availability Act, 12 U.S.C. § 4001 *et seq.*, and Regulation CC implementing it, see 12 C.F.R. Part 229. But the Expedited Funds Availability Act (the "EFAA") was not enacted until 1987, more than a decade after the FDA, and does not relate to the same subject matter as the FDA. See Expedited Funds Availability Act, Pub. L. 100-86,

I find the Defendants' position considerably more persuasive than Delaware's. Apart from the already noted logical flaws in Delaware's arguments, the characteristics of the instruments Moneygram expressly labels as "money orders" that Delaware identifies as not found in Moneygram's so-called "Agent Checks" and "Teller's Checks" are superficial and trivial — not the sort of characteristics that define a commercial instrument for purposes of its legal classification. While the fact that the term "money order" is written on one instrument and not another undoubtedly has some relevance to whether they should be considered money orders, such a distinction goes only so far. If the unlabeled instrument serves the same commercial purpose, and is recognized in law as having the same effects as the one bearing the legend "money order," the absence of the name appearing as a legend on the instrument is an insufficient reason not to deem it what it is for purposes of laws governing that class of instrument. By the same token, the fact that an instrument identifies itself on its face as a particular sort of instrument would not make it such if the instrument does not have the fundamental characteristics of that sort of instrument. To pound the obvious, writing "Money Order" on the face of an employment contract would not make the document a money order.

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101 Stat. 635 (1987). The EFAA does not shed any light on the meaning of "money order" within the context of the FDA, because Congress could not possibly have intended for the scope of the FDA to turn on the effects of then-unenacted future legislation relating to a subject matter other than unclaimed property. *Cf. Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.").



The other differences Delaware points to have even less capacity to determine whether the Disputed Instruments are money orders. Whether the issuer distributes its instruments through agents or entities with which it has a different relationship, and whether it markets them through retail locations such as convenience stores, as opposed to financial, or other types of establishments, are marketing decisions that do not determine the rights and duties that arise from use of the instrument in commerce. Such marketing decisions surely do not determine whether the instruments are money orders, much less whether the issuer prints on the face of the instrument that the seller of the issuer's instrument is its "agent." Delaware is correct that some of the terms and conditions applicable to the Disputed Instruments differ from those applicable to Moneygram's money orders, but those differing terms and conditions relate to matters such as certain fees charged and the procedure for a purchaser to receive reimbursement. They do not affect defining characteristics of the instrument. As for Delaware's observation that "many of [Moneygram's money orders] have a maximum value limit of \$1000 (which is not maintained for Official Checks)," Delaware does not even claim that this limitation is observed for all of Moneygram's money orders, thus implicitly acknowledging that an instrument with a face value exceeding \$1000 can be a money order. Pl's Br. 18.

Nor does Delaware assert that the characteristics it identifies in Moneygram's money orders that are not found in the Disputed Instruments are necessarily

found in the money orders of other issuers.<sup>29</sup> And to the extent that Delaware points to terms of Moneygram's so-identified money orders that are not applicable to the Disputed Instruments (such as a \$1.50 per month fee imposed in specified circumstances), Delaware neither asserts that this fee has always applied to Moneygram's so-identified money orders, nor that this fee is charged by other issuers of money orders.<sup>30</sup>

Delaware, it appears, has simply pointed to every observable feature of Moneygram's instruments that bear a printed legend "money order" that is not also true of those it sells under the names "Agent Check" and "Teller's Check," no matter how inconsequential and regardless of whether those features materially affect the rights and obligations of users, treating

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<sup>29</sup> At oral argument, Delaware suggested that, at around the time the FDA was enacted, Western Union money orders had a maximum value of \$1000. *See* Tr. March 10, 2021, at 9-10 ("[W]e do include a Western Union money order . . . from 1966 . . . They were limited to a thousand dollars."). But the sample Western Union money order cited in support of this assertion does not evidence any such \$1,000 dollar limit. *See* Dkt. No. 86 (Taliaferro Decl., Ex. W). To the contrary, the rules and conditions governing Western Union money orders as of September 1, 1939 explicitly contemplate money orders of at least \$3,500. *See* Dkt. No 86 (Taliaferro Decl., Ex. X, at 5).

<sup>30</sup> While it may be of some significance that the fees applicable to Moneygram money orders would consume the entire value of any such money order valued at \$126 or less before the instrument would ever become dormant, *see* Pl.'s Br. 46, Delaware has provided no basis to conclude that these fees are charged by any other issuers, or that such fees were charged at the time the FDA was enacted. In fact, the record demonstrates that such fees may differ based on service charge exceptions imposed by State law. *See* Dkt. No. 81 (Whitlock Aff. #1, Ex. A).

them as if they served to define the essence of money orders. The Defendants' focus on the ways in which the Disputed Instruments conform to the fundamental nature of money orders (as that term was generally understood at the time of the passage of the FDA), is far more persuasive as demonstrating that the Disputed Instruments fall within the FDA's reference to money orders than Delaware's identification of trivial and superficial distinctions between Moneygram's marketing of what it labels "money orders" and what it labels "Agent Checks" and "Teller's Checks" as demonstrating that the latter are not covered by the FDA's reference to "money orders."

Delaware advances several further arguments. I do not find them persuasive. It argues, for example, that an essential, defining characteristic of a money order is that it is marketed to individuals who do not have checking accounts and therefore cannot send payments by personal check. The Disputed Instruments, in contrast, are sold only by financial institutions, primarily to their own customers (people who have a checking account). In support, Delaware cites sources that mention that money orders are used by "unbanked" individuals as a safe way to transfer funds. See F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962) (defining a money order as "[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"); Barkley Clark & Alphonse M. Squillante, *The Law of Bank Deposits, Collections and Credit Cards* 54 (1970) (a personal money order is an "instrument, issued by and drawn upon a commercial bank without indication of either purchaser or payee . . . often used as a checking account

substitute by the purchaser-remitter”) Barkley Clark & Barbara Clark, *Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010) (describing a money order as “an instrument calling for the payment of money to a named payee and providing a safe and convenient means of remitting funds by a person not having a checking account.”); *see also* 72 Fed. Rsrv. Bull. 149 n.5 (Feb. 1986) (“Money orders are *primarily* used to transmit money by consumers who do not or cannot maintain checking accounts.”) (emphasis added).

The argument is not persuasive. Delaware’s cited sources do not suggest that marketing to unbanked persons is an essential characteristic of a money order — only that money orders are particularly useful to such persons because of their inability to send money via personal check. The fact that a money order “provid[es] a safe and convenient means of remitting funds by persons not having checking accounts” does not mean that it does not also provide a safe and convenient means of remitting funds by persons who do have checking accounts but prefer not to use them for whatever reason in a particular circumstance. Indeed, the Federal Reserve Bulletin quoted above, stating that money orders “are *primarily* used to transmit money by consumers who do not or cannot maintain checking accounts,” by use of the word “primarily” implicitly acknowledges that money orders are also used by persons who do have bank accounts. 72 Fed. Rsrv. Bull. 149 n.5 (Feb. 1986) (emphasis added). That a money order “provid[es] a safe and convenient means of remitting funds by a person not having a checking account” is undoubtedly true but does not exclude a money order’s provision of an alternative “safe and convenient means of remitting funds by a person [who

does have] a checking account.” Further, a money order would be useful to a person who does have a bank account who wishes to send money to a person that does not, or to a person who, for whatever reason, prefers that her receipt of the payment not be reflected in her bank account. While it appears to be true that a large percentage of the purchasers of money orders are persons who do so because they have no checking accounts, it does not follow that an instrument having the same capability and legal effect cannot also be useful to persons who use them for a different reason. When the utility and legal effect of two instruments are the same, the mere fact that one is marketed to persons whose reason for using them differs from that of a larger number of customers for the other would not, absent further reason, justify treating the two otherwise identical instruments as legally different. Finally, Delaware’s argument that an instrument sold by a banking institution cannot be a money order is undermined by the fact that Moneygram’s Agent Check Money Orders — which Moneygram already treats as governed by the FDA, and which Delaware frequently describes as “money orders” — are only sold by financial institutions. *See e.g.*, Pl.’s Br. 18 n.3, 22; Mann Report ¶ 18. In this regard, Delaware effectively concedes the invalidity of its argument that the Disputed Instruments are shown not to be money orders by the fact that they are distributed solely by financial institutions.<sup>31</sup> The more important point, however, is that, except where such a consequence is

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<sup>31</sup> One of the authorities relied upon heavily by Delaware also notes that money orders are sold “by some commercial and savings banks, and savings and loan institutions.” F.L. Garcia, *Munn’s Encyclopedia of Banking and Finance* 458 (6th ed. 1962).

specified by law, an issuer's choices of how to market its instruments does not change the rights and obligations that inhere in them, nor change their nature.

As a further flaw in Delaware's argument, it suggests no logical connection between the characteristics it describes as definitional features of "money orders" and Congress's objectives in enacting the FDA. Delaware asserts that there is "no evidence" that the defining characteristics it has proposed "were not the precise characteristics that led Congress to identify the specific prepaid instruments 'money order' and 'traveler's check' in the FDA." Pls.' Reply Br. 9. This statement is contrary to the plain text of the FDA. As noted above, Congress included in the text of the statute a section titled "Congressional findings and declaration of purpose." This section of the statute makes no reference to any of the definitional characteristics identified by Delaware. See 12 U.S.C. § 2501. It explains what were the characteristics of "money orders" and "traveler's checks" that motivated Congress to impose the priorities established by the FDA. In this section, "Congress finds and declares:"

- (1) that the issuers of money orders and traveler's checks do not generally maintain records of the purchasers' address;

- (2) that purchasers ordinarily reside in the State the instrument is 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.

12 U.S.C. § 2501(1)–(5). Contrary to Delaware's argument, Congress made clear explanation of its purposes, and none of them depended on the characteristics Delaware argues are definitional of money orders. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning.").

Accepting the characteristics that Delaware points to as definitional of money orders would do nothing to further the stated purposes of the FDA. In fact, it might even foster the type of "inequity" that the FDA was designed to prevent by allowing issuers of money orders to choose which State will have escheat priority by making otherwise inconsequential, cosmetic changes to the face of the instrument. See *The Emily & The Caroline*, 22 U.S. (9 Wheat.) 381, 390 (1824) (concluding that construction of an ambiguous statute in a manner that would render "evasion of the law . . . almost certain" should not be adopted); Scalia & Garner, *Reading Law* 63 ("A textually permissible interpretation that furthers rather than obstructs the [statute]'s purpose should be favored.").

The Defendants are more persuasive in pointing out that the stated purposes of the FDA are served by

treating the Disputed Instruments as “money orders,” because Moneygram does not maintain records of the addresses of purchasers (or payees) of the Disputed Instruments and there is no contention that purchasers of the Disputed Instruments are any more likely to reside outside the State of purchase than what Congress noted with respect to purchasers of money orders. See 12 U.S.C. § 2501(1)–(2).

In response to the Defendants’ interpretation of the statutory term “money order” as a “prepaid draft issued by a post office, bank, or some other entity and used by a purchaser to safely transmit money to a named payee,” Defs.’ Br. 22, Delaware argues that Congress must have intended something more narrow because, if Congress had intended that the FDA govern the escheat of all prepaid drafts, it could have simply used that term:

[T]he language of the FDA itself evidences an intent to exempt specific categories of written instruments from the federal common law governing the escheat of limited categories of unclaimed intangible property, not the entire universe of drafts except those drawn on an individual or company’s account.

Pl.’s Opp. Br. 7. The argument is not persuasive. It is certainly true that, if Congress considered the terms “money order” and “prepaid draft issued by a post office or business enterprise” as equivalent, it could indeed have used either term in drafting the statute. The fact that it used the shorter, simpler term, “money order,” in preference to the longer, more complex descriptive does not suggest that it meant something different or narrower.



Delaware next invokes the canon against statutory surplusage, arguing that the Defendant's construction of "money order" as encompassing all forms of prepaid drafts issued by banks, businesses, or other entities would render the statute's additional covered terms unnecessary surplusage, which, Delaware asserts, compels a narrower interpretation of "money order," so as to preserve an independent meaning for the other covered terms, "traveler's check" and "other similar instrument."

The surplusage canon (*verba cum effectu accipienda sunt*, or "words are to be taken as having effect") states that "the courts must lean . . . in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 58 (1868); see also *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879). The canon presumes that legal drafters *should not* include in legal texts words that have no effect. Courts in turn, should assume that legislatures have observed this exhortation and, therefore, should avoid construing statutes in a manner that render words redundant. See, e.g., *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

Delaware's first argument is that interpreting "money order" to mean "prepaid draft[s] issued by a post office, bank or some other entity" renders redundant Congress's additional inclusion of "traveler's check" in § 2503, because a traveler's check would be included within the definition of "money order." Pl.'s

Opp. Br. 8-9. This argument relies on the incorrect assumption that all traveler's checks are "drafts." In fact, a traveler's check can be either a draft or a note. See 2017 UCC § 3-104 cmt. 4 ("Instruments are divided into two general categories: drafts and notes. A draft is an instrument that is an order. A note is an instrument that is a promise. . . . Traveler's checks are issued both by banks and nonbanks *and may be in the form of a note or draft.*") (emphasis added); see also 1972 UCC § 3-102 cmt. 4 (describing traveler's checks as "negotiable instruments" rather than as "drafts"); William D. Hawkland, *American Travelers Checks*, 15 Buff. L. Rev. 501, 510 (1966) (observing that a traveler's check can operate as a note). Because a traveler's check need not be a draft, interpreting "money order" as the Defendants propose does not cause the FDA's use of the term "traveler's check" to be redundant, and the canon against surplusage is not implicated.

Delaware then argues that the Defendants' construction makes the statutory phrase "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" surplusage, somehow requiring that courts give a narrower meaning to "money order." Pl.'s Opp. Br. 9. Delaware argues that there is no instrument that is similar to either a money order or a traveler's check that would not be covered by Defendants' definition of money order. The absence of any such instrument, which is similar, and yet is not a money order (or traveler's check), according to Delaware's argument, renders the Similar Instrument clause surplusage. *Id.* at 8-9.

The argument has no validity. The absence of any existing similar instrument does not render the "similar instrument" phrase surplusage. The logical inference from Congress's use of "other similar instrument" is that, while Congress was not aware of any such similar instrument, it wanted to ensure that if, by reason of future changes in State laws or business practices, or for any reason, such similar instruments came into existence in the future, they would be governed by the terms of the statute. If Congress had known of such similar instruments, it would have had every reason to name them explicitly, rather than rely on a vague invocation of similarity. It is precisely because Congress did not know of any such instrument, but suspected that some such instrument might emerge in time, that it extended the statute's coverage beyond the scope of the known instruments that are expressly covered to other similar instruments. Regardless of the present non-existence of such instruments (if indeed there are none), that does not render the clause redundant. The clause means something different from either "money order" or "traveler's check." That it refers to an instrument that is not a money order or traveler's check is clearly communicated by the word "other." The clause refers to an instrument, regardless of whether such an instrument exists at any particular time, that is not a money order or traveler's check but is sufficiently similar to warrant being treated the same way under the FDA. It is clear from the face of the clause that it is not surplusage.

In any event, precedents explaining the canon against surplusage caution against its application to broad residual clauses that may be enacted when Congress wishes at once to cover specific dangers that are precisely known, while also using a broader, vaguer

catchall phrase to cover “known unknowns.” See *Yates v. United States*, 574 U.S. 528, 551 (2015) (Alito, J., concurring in the judgment) (observing that a statutory construction that risks some surplusage may nonetheless be appropriate because “Congress ‘enacts catchall[s]’ for ‘known unknowns.’” (quoting *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009))); *Begay v. United States*, 553 U.S. 137, 153 (2008) (Scalia, J. concurring in the judgment) (“[T]he canon against surplusage has substantially less force when it comes to interpreting a broad residual clause.”); *United States v. Perschilli*, 608 F.3d 34, 41 (1st Cir. 2010) (“Congress may well have wanted to add specificity about known dangers while keeping the catch-all clause in the statute to be sure that other purposes, not readily imagined, were also encompassed.”); Linda D. Jellum, *Mastering Statutory Interpretation* 104 (2008) (“Legal drafters often include redundant language on purpose to cover any unforeseen gaps or for no good reason at all.”).

On the question whether Moneygram’s Agent Checks and Teller’s Checks are money orders under the FDA, I find that the Defendants’ arguments have considerable force and that Delaware’s arguments are not persuasive. I conclude that the Disputed Instruments are “money orders” within the meaning of the FDA.

### **B. Are the Disputed Instruments “Other Similar Written Instruments” Under the FDA?**

In addition to covering a “money order” or “traveler’s check,” the FDA’s priority rules also cover the escheatment of any “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" (herein "Similar Instruments"). 12 U.S.C. § 2503. Assuming, *arguendo*, that, for some reason, the Disputed Instruments are not "money orders" under the FDA, they would still be covered by the statute as Similar Instruments.

To come within the Similar Instruments clause, (1) an instrument in question must be similar to a money order and traveler's check, (2) it must not be a "third party bank check;" and (3) a "banking or financial organization" or "business association" must be "directly liable" on it. Other than agreeing that Moneygram is a "banking or financial organization or business association" under the FDA, the parties disagree as to whether the Disputed Instruments fall under the Similar Instruments clause. Three issues are disputed: First, whether the Disputed Instruments are "similar" to "money orders" and "traveler's checks"; second, whether the Disputed Instruments are instruments "on which a banking or financial organization or a business association is directly liable"; third, whether a Disputed Instrument is a "third party bank check," which is explicitly excluded. I have considered these issues in turn.

### **1. Whether the Disputed Instruments are "Similar" to "Money Orders" and "Traveler's Checks"**

"Similarity," as explained by the Supreme Court, is "resemblance between different things." *United States v. Raynor*, 302 U.S. 540, 547 (1938) (noting that "similarity is not identity"). Delaware's first argument is that, while a court can determine dissimilarity as a matter of law, similarity is inherently factual and cannot be decided as a matter of law on a motion for

summary judgment. I find no validity in this argument. Here, the material facts are essentially undisputed, and the question of similarity turns on the applicable statutory standard under the FDA. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991) ("It is for the court to define the statutory standard. . . . [S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion."); *Rousey v. Jacoway*, 544 U.S. 320, 334 (2005) (determining that IRAs are "similar," for the purpose of the Bankruptcy Code, to "stock bonus, pension, profitsharing, [and] annuity" plans or contracts).

I recognize, of course, that the term "similar" is unavoidably ambiguous. Items can be similar and dissimilar in innumerable ways. Whether undisputed dissimilarities affect the answer to whether the items are "similar" to one another within the meaning of a particular statute is a question of law. The answer to it depends on analysis of the statute and its purposes, and determination of what features are of significance for the purposes of the statute. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). For some statutes, the fact that one object is green while the other is red may be a crucial dissimilarity that is incompatible with a finding of similarity, whereas under another statute such a difference may have zero significance. If the similarities are of crucial importance and the dissimilarities are without importance to the purposes of the statute, a court would be compelled to find similarity, as a matter of law, and to reject a jury's contrary verdict. The court in such

circumstances should grant summary judgment finding similarity. There is simply no merit to Delaware's argument that, while a court may grant summary judgment rejecting similarity, it may not grant summary judgment finding similarity. *See, e.g., Strubel v. Comenity Bank*, 842 F.3d 181, 197 (2d Cir. 2016) (granting summary judgment to the defendant on claims brought under the Truth In Lending Act on the basis that the defendant's billing rights form was "substantially similar," as a matter of law, to the model form promulgated by the CFPB); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 123 (2d Cir. 2021) (holding that silkscreen prints and illustrations created by Andy Warhol were substantially similar, as a matter of law, to the photograph on which they were based); *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 53 (1st Cir. 2012) (holding that modified versions of translated religious texts were substantially similar, as a matter of law, to the original translations); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010) ("The question of substantial similarity is by no means exclusively reserved for resolution by a jury . . ."); *Segret's, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 62 (1st Cir. 2000) (holding that two clothing designs were substantially similar as a matter of law); *Twin Peaks Prods., Inc. v. Publ'ns Int'l*, 996 F.2d 1366, 1372 (2d Cir. 1993) (affirming the district court's holding that a book and a television show were similar as a matter of law); *Castle Rock Entm't v. Carol Pub. Grp.*, 955 F. Supp. 260, 266 (S.D.N.Y. 1997) (Sotomayor, J.) (granting summary judgment on plaintiffs' copyright infringement claim and holding that defendant's book was substantially

similar, as a matter of law, to plaintiffs' television show); cf. *Rousey*, 544 U.S. at 334-45.

The structure of the FDA, by referring to a "money order, traveler's check, or other similar written instrument" manifests a clear intent for the word "similar" to refer to the shared characteristics of "money orders" and "traveler's checks." That is, the characteristics to which a written instrument must be "similar" to fall within the scope of the FDA are those features that are common to a "money order" and a "traveler's check," and are of significance to the purposes of the FDA. See *Rousey*, 544 U.S. at 329-31 (holding that the correct construction of a statute applying to a "stock bonus, pension, profitsharing, annuity, or similar plan or contract" turns on similarity to "[t]he common feature of all [the enumerated items]").<sup>32</sup>

On the question whether the Disputed Instruments are similar to money orders and traveler's checks, the parties make substantially the same arguments as they make with respect to the question whether the Disputed Instruments are money orders. The Defendant States point out in support of similarity that the Disputed Instruments, like money orders, are prepaid drafts issued by a financial or official entity, providing for payment of an exact sum of money to a named individual (making them useful as a convenient, secure method for one person to transmit funds to another). They argue that these features conform to the fundamental characteristics of a money order that Congress

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<sup>32</sup> By way of illustration, if a tax deduction were available for the purchase of a "car, boat, airplane, or other similar vehicle," an individual could not reasonably expect to receive the deduction for the purchase of a toy car, despite that a toy car is, in many respects, similar to a car.



would have envisaged in 1974, and, furthermore, that the Disputed Instruments share with money orders features that motivated Congress to enact the FDA: to wit, the issuer maintains records showing the State in which the instrument was purchased, but not of the address of the purchaser (or payee); purchasers, therefore, do not ordinarily receive notification from the issuer when the payee cashes the order, which increases the likelihood of abandonment; purchasers usually reside in the State where they make the purchase; and the cost of maintaining and retrieving addresses of purchasers would be a burden on commerce.

Delaware likewise raises substantially the same arguments as it did in arguing the Disputed Instruments are not money orders. It points to differences between the Disputed Instruments and the instruments that Moneygram now labels as money orders. Apart from the logical deficiencies of Delaware's assumption that the instruments Moneygram now labels as money orders are exactly what Congress had in mind in 1974 in passing the FDA, which is discussed at length above, the more serious flaw in Delaware's argument is, once again, that the differences it points to relate to superficial, inconsequential issues. These are factual differences that have no material bearing on the rights or obligations arising from the use of the instruments, on their character as instruments in commerce, or on the purposes Congress sought to achieve in enacting the FDA. With respect to the differences that Delaware notes, the Defendants do not dispute their existence. Those differences are, however, too trivial and unrelated to the rights and obligations inhering in the instruments when used in commerce.

For example, Delaware again counters by pointing to a number of facial, technical, operational, and marketing differences between the instruments Moneygram markets as money orders and the Disputed Instruments, arguing that, in the aggregate, these differences defeat similarity. Delaware points, for example, to the fact "Moneygram Money Orders generally remain outstanding for approximately six days" while "Official Checks generally remain outstanding for approximately four days," Pl.'s Br. 53, and the fact that MoneyGram maintains an internet database of selling locations for its MoneyGram Retail Money Orders, but does not maintain such a database for the Disputed Instruments, Pl.'s Br. 52. It notes also that Teller's Checks are listed as "low risk items" under the Expedited Funds Availability Act, 12 U.S.C. § 4001, and Regulation CC implementing it, 12 C.F.R. Part 229, while Moneygram's instruments labeled as money orders are not so listed. Pl.'s Br. 48.<sup>33</sup>

Delaware's arguments suffer from the same flaws as noted above. Most significantly, the differences it points to are trivial matters relating to the appearance of the face of the instrument or the manner of its marketing or administration by the issuer, without bearing on the rights and obligations arising from its use. A further logical flaw, once again, is that comparing the Disputed Instruments to the instruments Moneygram now issues under the label "money orders" does not necessarily compare them to the money orders, many marketed by other issuers, that

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<sup>33</sup> A further flaw in Delaware's argument is that neither the EFAA nor Regulation CC existed at the time the FDA was introduced. *See* Expedited Funds Availability Act, Pub. L. 100-86, 101 Stat. 635 (1987).

Congress would have had in mind over 40 years ago, in enacting the FDA.<sup>34</sup>

And with respect to Delaware's argument that Congress was not motivated in passing the FDA by the fact that holders of unclaimed money orders do not maintain the addresses of purchasers, Delaware skates on thin ice in view of the statute's express recitation, under "Congressional findings and declaration of purpose," that "(1) the books and records of banking institutions 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." 12 U.S.C. § 2501(1). Further, Delaware's assertion that the "congressional record is devoid of any basis for asserting that addresses are not kept for money orders," Pl.'s Opp. Br. 45, is beside the point. Regardless of whether support for this finding is found in the legislative history, Congress expressly so found, and recited this fact as part of its explanation of its purpose in passing the statute regulating escheatment of money orders. Because that fact is also true of the Disputed Instruments, we have every reason to believe that Congress would have considered this aspect of the Disputed Instruments pertinent to deciding whether they should be deemed Similar Instruments subject to § 2503. Furthermore, while asserting that

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<sup>34</sup> In addition, many of the dissimilarities Delaware notes between the instruments Moneygram labels as money orders and its Teller's Checks and Agent Checks also distinguish them from Moneygram's Agent Check Money Orders, which Delaware apparently concedes are covered by the FDA. For example, Agent Check Money Orders are sold only at financial institutions, and are marketed to the customers of such institutions.

support for this Congressional finding is not contained in the legislative history, Delaware has not made a showing that Congress's finding was factually incorrect. In any case, the issue here is whether Congress's express legislative findings may serve as an interpretive aid to assist the Court in construing the FDA, not whether the statute's legislative history reflects support for Congress's findings. Delaware's citations to cases that involved challenges to a statute's constitutionality, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989), are therefore inapposite.

In short, the Defendant States have made forceful arguments that, as a matter of law, the Disputed Instruments either *are* "money orders" within the meaning of the FDA or, at the very least, are sufficiently similar to money orders and traveler's checks to qualify as "other similar written instruments." In contrast, Delaware's arguments to the contrary are insubstantial and unpersuasive. Employing the ordinary meaning of the word "similar," viewed in light of the characteristics that the Disputed Instruments share with money orders and traveler's checks, and considering Congress's purposes in passing the FDA, I find that, if the Disputed Instruments do *not* come within the FDA by *being* money orders, they undoubtedly come within the statute's coverage of "other similar written instruments."

## **2. Whether "a Banking or Financial Organization or a Business Association is Directly Liable" on the Disputed Instruments**

Under the terms of § 2503, a written instrument that is "similar" to a "money order" or "traveler's

check” comes within the statutory coverage only if “a banking or financial organization or a business association is directly liable” on the instrument. Delaware argues that neither Moneygram nor any other party is “directly liable” on the Disputed Instruments because liability on a Teller’s Check or Agent Check is “conditional,” that is, “dependent on dishonor or some other external fact.” Pl.’s Br. 28 (quoting Mann Dep. 26:22-23 (Ex. AA to Taliaferro Decl.)). Under the UCC, the drawee of a check or other draft is “not liable on the instrument until he accepts it.” 1972 UCC § 3-409(1); *see also* 2017 UCC § 3-408, 3-409 (the current version).

Delaware and its expert assert that the statutory term “directly liable,” must be read as synonymous with the concept of unconditional liability under the UCC, because the UCC’s distinction between conditional and unconditional liability was a background legal principle relevant to negotiable instruments that would have been well-understood by Congress at the time the FDA was enacted. Delaware’s expert asserts, and the Defendant States do not contest, that, under the terms of the UCC, neither Moneygram nor any other party is unconditionally liable on an Agent Check or Teller’s Check. *See* Mann Report ¶¶ 30-37.

Delaware’s position is somewhat undermined by the fact that the FDA employs the term “directly liable,” not “unconditionally liable.” 12 U.S.C. § 2503. If, as Delaware argues, Congress wished its statute to adopt from the UCC the standard of unconditional liability, why would Congress have employed a different term in preference to what it meant? Delaware’s argument is further undermined by convincing evidence that the FDA took the statutory term “directly liable” from the 1966 Revised Uniform Disposition of

Unclaimed Property Act (the “1966 Uniform Act”), under which that term had, at the time Congress passed the FDA, been interpreted to mean “ultimately liable.”

“When administrative and judicial interpretations have settled the meaning of an existing statutory provision,” adoption of that same language in a new statute normally indicates an “intent to incorporate its administrative and judicial interpretations as well.” *Bragdon v. Abott*, 524 U.S. 624, 645 (1998); *see also Lorillard v. Pons*, 434 U.S. 575, 581 (1978); Scalia & Garner, *Reading Law* 323 (“[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field . . . it is reasonable to believe that the terminology bears a consistent meaning.”).

The 1954 Uniform Disposition of Unclaimed Property Act (the “1954 Uniform Act”) was written in order to fill the need for comprehensive unclaimed property legislation. 1954 Uniform Act, Prefatory Note, at 136. Section 2 of the 1954 Act states that covered instruments include “[a]ny sum payable on checks certified in this state or on written instruments issued in this state on *which a banking or financial organization is directly liable*, including, by way of illustration but not of limitation, certificates of deposit, drafts, and traveler’s checks.” *Id.* § 2(c) (emphasis added). The notes to the 1954 Uniform Act are explicit that “Section 2 Parallels Section 300 of the New York Abandoned Property Law.” *Id.* § 2 cmt. The New York Abandoned Property Law, 1943 N.Y. Laws 1390, in turn, used the phrase “directly liable” in a manner that had been, in the years prior to the promulgation of the 1954 Uniform Act, consistently interpreted (in a series of New York Attorney General opinions) to mean “ultimately

liable." See *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at \*1-2 (Sept. 4, 1947); *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at \*1 (Dec. 23, 1946). And if the instrument at issue under the New York law was a draft, the drawer was considered "the party ultimately liable for its payment." *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at \*2. In 1966, the Uniform Law Commission published the 1966 Uniform Act, which revised Section 2 of the 1954 Uniform Act to cover [a]ny sum payable on checks certified in this state or on written instruments issued in this state on *which a banking or financial organization or business association is directly liable*, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." 1966 Uniform Act § 2(c) (emphasis added). Moreover, the definitions of "banking organization," "business association," and "financial organization" contained within the FDA precisely mirror the definitions of those very same terms contained within the 1966 Uniform Act. Compare 12 U.S.C. § 2502 and 1966 Uniform Act § 1(a)—(c).

Absent an indication of contrary intent, Congress's use of nearly identical language in the FDA is strong evidence that "directly liable" was intended to be interpreted as it was understood under the 1966 Uniform Act. This is especially so because the FDA and the 1966 Uniform Act both relate to the escheatment of unclaimed property. And, the legislative history of the FDA supports (if somewhat obliquely), rather than contradicts, the implication that Congress intended that "directly liable" be interpreted as in the 1966 Uniform Act. See S. Rep. No. 93-505, at 1 (1973).

(describing the FDA as “designed to assure a more equitable distribution among the various States of the proceeds of abandoned money orders, traveler’s checks or other similar written instruments on which a banking organization, other financial institution, or other business organization, is directly liable *through its having sold said instrument*”) (emphasis added).

Delaware’s arguments as to why Congress should not be understood to have intended “directly liable” to carry the meaning it had in the 1966 Uniform Act are not persuasive. First, there is no basis for Delaware’s argument that Congress cannot incorporate the meaning of a term used in statutory draft prepared for use as a uniform law by a private organization, unless it has become a “law.” Delaware cites no authority for this proposition, nor does it make any logical sense.<sup>35</sup> In any event, the 1966 Uniform Act was “law” at the time the FDA was enacted by Congress, having been adopted by several States.

Second, Delaware is incorrect in stating that there is “no evidence that Congress was even aware of the 1966 [Uniform Act].” Pl.’s Opp. Br. 34. The fact that, in drafting the FDA, Congress was dealing with the same subject as covered by the 1966 Uniform Act, escheatment of unclaimed property, coupled with Congress’s adoption of word patterns precisely identical with those found in the 1966 Uniform Act, strongly suggests that Congress *was* aware of the terms of the earlier Uniform Act. Without such awareness, it

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<sup>35</sup> Indeed, Delaware’s position is difficult to square with its argument that the correct interpretation of “directly liable” can be derived from the UCC, which is a uniform act published by a private organization.



would be an extraordinary coincidence for the later act to adhere so precisely to verbal formulations of the earlier act. This is evidence of Congress's awareness.

Third, Delaware argues that the Defendant States' proposed construction of "directly liable" creates surplusage by rendering the word "directly" redundant. In fact, the New York Attorney General opinions regarding the meaning of "directly liable" as used in the New York Unclaimed Property Law (which parallels the 1954 Uniform Act) clarify that the word "directly" is used in contemplation of a distinction between the "direct" liability of the drawer holding the amount owed for payment on a draft and the *contractual* liability owed from the drawee to the drawer. *Aband. Prop. Law*, § 300, Subd. 1, Par. (c) & § 301, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at \*1.

Once again, Delaware's theory regarding the meaning of the term "directly liable" is difficult to square with the explicit purpose of the FDA. Under the construction proposed by Delaware and its expert, the only common written instrument that would be covered under the FDA as a Similar Instrument is a cashier's check, because, under the UCC, a bank's liability on a cashier's check is unconditional. See Mann Report ¶ 28; 2017 UCC § 3-412. Delaware provides no explanation as to why Congress would have chosen to target (in a highly indirect manner) cashier's checks, while excluding all other manner of "similar" instruments that share the characteristics that motivated enactment of the FDA. Ultimately, Delaware has not provided a sufficient basis to ignore the strong evidence that Congress incorporated the established meaning of "directly liable" from the 1966 Uniform Act.

Even if I were not persuaded that Congress incorporated the meaning of “directly liable” from the earlier Uniform Act, Delaware’s proposed construction would not be persuasive. This is because the overall structure of § 2503 also seriously undermines Delaware’s argument that “directly liable” means “unconditionally liable.” Neither a traveler’s check nor a money order is an instrument on which the issuer is unconditionally liable. Consequently, it makes no sense at all to treat “directly liable” as equivalent to “unconditionally liable” *unless* the FDA’s “directly liable” restriction is *not* intended to apply to either money orders or traveler’s checks. That is, if unconditional liability of “a banking or financial organization or a business association” is a requirement applicable to “money orders” or “traveler’s checks,” then the FDA would largely be a nullity, because it would never cover the two types of instruments it is explicitly intended to address.

Delaware anticipates this issue by arguing that the syntactic structure of § 2503’s opening clause<sup>36</sup> compels the conclusion that the “directly liable” restriction “only limits the immediately preceding term ‘other similar written instrument (other than a third party bank check)’ and does not limit the two prior terms, ‘money order’ or ‘traveler’s check.’” Pl.’s Br. 24. Delaware reaches this conclusion by relying on “the grammatical ‘rule of the last antecedent,’ according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it

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<sup>36</sup> 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 . . .” 12 U.S.C. § 2503.

immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (citing 2A N. Singer, Sutherland on Statutory Construction § 47.33, p. 369 (6th rev. ed. 2000)).<sup>37</sup>

It is true that the absence of a comma between “similar written instrument (other than a third party bank check)” and “on which a banking or financial organization or a business association is directly liable,” lends support to Delaware’s contention that the “directly liable” limitation applies only to “other similar written instruments.” See *Am. Int’l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781-82 (2d Cir. 2013). As a result, if the first clause of § 2503 existed in isolation, Delaware’s argument would make good sense. But that clause does not exist in a vacuum — it interacts with the three numbered subsections that follow, which describe the priority rules for the instruments described in the opening clause. See 12 U.S.C. § 2503(1)—(3). Each of these subsections begins with the clause, “if the books and records of *such banking or financial organization or business association*” — language that precisely mirrors the opening clause’s use of the phrase “on which a *banking or financial organization or a business association* is directly liable” *Id.* (emphases added).

The subsection of § 2503 that applies to a given sum covered by the FDA is determined by looking to what, precisely, “the books and records of *such banking or financial organization or business association* show.”

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<sup>37</sup> The Defendant States take no position on whether the “directly liable” limitation applies only to “other similar instruments” or all of the instruments listed in § 2503. Tr. March 10, 2021, at 48.

*Id.* (emphasis added). By use of the word “such,” these subsections refer back to the opening clause’s reference to “a banking or financial organization or a business association,” a phrase that is used *only* in the context of the “directly liable” limitation. Section 2503 describes no other “banking or financial organization or . . . business association” to which the word “such” could refer. Consequently, if the “directly liable” limitation does not apply to “money orders” or “traveler’s checks” — as Delaware contends — there would be no basis on which to determine which subsection of the statute applies to a sum payable on a “money order” or “traveler’s check,” because the term “such banking or financial organization or business association” would have no meaning at all. Read in this manner, the FDA would direct the disposition by escheat of “other similar written instruments,” but would be a nullity with respect to “money orders” and “traveler’s checks.” This cannot be what Congress intended. Thus, the text and structure of the FDA make clear that the “directly liable” limitation applies to “money orders” and “traveler’s checks,” as well as “other similar written instruments,” further undermining Delaware’s argument that “directly liable” means unconditionally liable.

Because Moneygram is ultimately liable on all Disputed Instruments, I conclude that they are instruments “on which a banking or financial organization or a business association is directly liable.” 12 U.S.C. § 2503.

### **3. Whether the Disputed Instruments are “Third Party Bank Checks”**

Even if otherwise covered, a “similar written instrument” is excluded from the scope of the FDA if it is “a third party bank check.” *Id.* The history of the phrase’s

inclusion in the FDA is more clear than its meaning. While the bill was in committee, the General Counsel of Treasury sent the committee chairman a letter stating that “the language of the bill is broader than intended,” and suggested that it could be interpreted to cover “third party payment bank checks.” See S. Rep. No. 93-505, at 5. Treasury recommended expressly excluding “third party payment bank checks,” the committee adopted this “technical suggestion[],” *id.* at 6, and the final bill was enacted containing an exception for “third party bank checks,” see 12 U.S.C. § 2503. It is unclear why the final language of the exclusion differs from the language suggested by Treasury, but there is no evidence to suggest that the change of wording was intended to exclude anything other than what Treasury sought to exclude.

Both “third party bank check” and “third party payment bank check” are obscure terms with no established legal meaning. The parties offer three possible interpretations of the meaning of “third party bank check,” as used in the FDA.

Delaware argues that “third party bank check” means a bank check that is offered through a third party, and that the Disputed Instruments — which are “a means for banks to outsource their bank check offerings” — fit this description. Pl.’s Br. 37-38.<sup>38</sup> This

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<sup>38</sup> Delaware’s expert suggests that a “third party bank check” could mean a bill payment check that a bank issues on behalf of its customers. Mann Report ¶¶ 69-70. Delaware has not argued that this is the correct construction of the term, likely because it would not exclude the Disputed Instruments from the scope of the FDA. Delaware’s expert also comments that “third party bank check” could, possibly, mean a traditional teller’s check, but

construction is not persuasive because neither the text nor legislative history of the FDA suggests that Congress considered the difference between bank checks offered by third parties and bank checks issued directly by banks to be material to the purposes of the FDA. Delaware provides no explanation as to why Congress (or Treasury) would have considered it desirable to exclude bank checks offered by third parties from coverage. Indeed, Delaware's own expert did not endorse this definition of "third party bank check." See Mann Report ¶¶ 65-69. In fact, when asked at his deposition whether he had studied "any Moneygram instrument that could be a third-party bank check," Delaware's expert responded that he "didn't study any products that [struck him] as fitting with any ordinary sense of what those terms should mean." Defs.' App. 1010.

The Defendant States argue that the most natural meaning of "third party bank check" is "a check drawn by a bank on a bank that has been indorsed over to a new (or 'third party') payee." Defs.' Br. 41. But, as Delaware notes, this definition would be a nullity in operation. Once a check is in the marketplace, it is impossible to determine whether it has been "indorsed to a third party" without looking at the instrument itself, and an abandoned check — one which has not been presented for payment — under almost all circumstances is not available for inspection to determine whether it has been indorsed to a third party. It is generally impossible to know this of an abandoned check. Thus, under the Defendant States' primary proposed

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he notes numerous reasons why this definition is unlikely. *Id.* ¶ 68.

construction, the statutory exclusion of a “third party bank check” would virtually never apply. Interpreting a statutory clause as a nullity should be avoided absent evidence that this was indeed the construction intended. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Given the history of this exclusion, it appears most likely that Congress intended to exclude what Treasury intended to have excluded, and it seems highly unlikely that Treasury — which was expert in the field — would seek the addition to the statute of a functionally meaningless term.<sup>39</sup>

As a secondary position, the Defendant States argue that a “third party bank check” is an ordinary personal check drawn on a checking account. Defs.’ Br. at 43. While none of the definitions suggested by the parties are completely satisfying, I conclude that Defendants’ secondary construction of “third party bank check” is the most likely to be the meaning intended by Congress.

As the Defendant States and Pennsylvania’s expert note, shortly before the FDA was enacted, federal

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<sup>39</sup> Further, the Defendant States give no explanation of why Congress or Treasury would have sought such an exclusion. They rely instead primarily on the fact that their proposed definition was adopted by the only court that appears to have previously considered the term “third party bank check.” *See United States v. Thwaites Place Assocs.*, 548 F. Supp. 94 (S.D.N.Y. 1982). But the Defendant States’ reliance on *Thwaites Place* is not persuasive. That court used the term in passing, without discussing its meaning or considering ways that the phrase might be understood. *Id.* at 96. *Thwaites Place*, furthermore, did not concern the issue of unclaimed property, much less the applicability of the FDA. *Id.* at 95. In short, that opinion casts little or no light on what Congress intended in using the term “third party bank check.”

regulators had engaged in a review of the "existing financial and regulatory structure" related to the private financial system. See Expert Report on Behalf of Pennsylvania, Dkt. No. 67, at 22 ("Clark Report") (quoting Robert E. Knight, *The Hunt Commission: An Appraisal*, Wall St. J., July 3, 1972, at 4). In 1970, President Nixon organized the Commission on Financial Structure and Regulation (popularly known as the "Hunt Commission") and tasked it with making recommendations to improve the nation's financial institutions. Knight, *The Hunt Commission*, at 4. Treasury was, from the Commission's inception, involved in identifying "issues deserving Commission attention and the approaches and methodology the Commission might use in dealing with them." *The Report of the President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972).

The Hunt Commission's final report (published in December 1972) used the term "third party payment services" to describe "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." *Id.* at 23 & n.1. The Report was explicit that "[c]hecking accounts are one type of third party payment service." *Id.* at n.1. Additionally, a prominent contemporary treatise demonstrates that, at the time the FDA was enacted, the term "bank check" could be used to refer generally to a check, including those drawn on a personal or business checking account at a bank. See Henry J. Bailey, *The Law of Bank Checks* 1 n.1 (4th ed. 1969) ("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.”).

The Hunt Commission's contemporaneous use of the term “third party payment services” is probative of the meaning of the term “third party bank check,” as used in the FDA (especially in light of the fact that Treasury's recommendation to Congress was that the FDA exclude “third party *payment* bank checks,” S. Rep. No. 93-505, at 5 (emphasis added)), and supports the Defendants' argument that “third party bank check” means an ordinary check drawn on a checking account. Additionally, this definition is consistent with the evidence that Congress intended the FDA to cover prepaid instruments (or at least certain prepaid instruments) but lacked any apparent intent to bring non-prepaid instruments drawn on a checking account (which would carry a less significant risk of abandonment) within the scope of the FDA. *See id.*, at 6; 12 U.S.C. § 2501. It would, therefore, be entirely consistent with Congress's stated purposes in enacting the FDA to exclude from coverage non-prepaid checks drawn on checking accounts, while extending coverage to certain categories of prepaid instruments.

Delaware counters that Congress should not be presumed to have adopted this meaning of “third party bank check” because no member of Congress served on the Hunt Commission, which “raises questions about the extent to which Congress had any awareness of the analysis that was undertaken in the 1970s.” Pl.'s Opp. Br. 50. This argument is misguided for two reasons. First, there is substantial evidence that Congress was aware of the Report of the Hunt Commission. Indeed, the Senate Committee on Banking, Housing, and Urban Affairs — the same committee

that reported on the FDA before it was enacted — issued a committee print of the Hunt Report (including the recommendations of Treasury that stemmed from the Report) in August 1973. *See S. Comm. on Banking, Hous., and Urb. Affs., 93rd Cong., Rep. of the President's Comm'n on Fin. Structure and Regul. (Comm. Print 1972)*. Second, the legislative history of the FDA conclusively demonstrates that the exclusion of “third party bank checks” was inserted at the recommendation of Treasury seemingly with little additional discussion by Congress. *See S. Rep. No. 93-505*, at 5. Consequently, what Treasury intended the term to mean is probative of Congress's intent, and Treasury was indisputably involved in the Hunt Commission. *See The Report of the President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972).

Delaware is correct that the Hunt Commission's use of the term “third party payment services” is somewhat removed from the FDA's exclusion of “third party bank checks.” The legislative history of the FDA demonstrates, however, that the exclusion originally recommended by Treasury was for “third party payment bank checks.” *S. Rep. No. 93-505*, at 5. This significantly narrows the inferential leap required by the Defendants' proposed construction. It is nonetheless true that “third party payment systems” — the term used by the Hunt Commission — is different than “third party payment bank checks” — the term suggested by Treasury. In this regard, the contemporary evidence relied on by the Defendant to support their construction is somewhat imperfect. But Delaware has not provided any evidence contemporaneous to the enactment of the FDA to support its proposed construction, and its definition is also substantially less consistent with the purposes and legislative history of

the Act. Thus, I conclude that the construction of "third party bank check" proposed by the Defendant States is the most likely to have been that which was intended by Congress.

The Disputed Instruments are not ordinary checks drawn on a checking account.<sup>40</sup> Rather, they are prepaid by the purchaser at the time of purchase; by virtue of being prepaid, payment upon presentment by the payee is not conditional on the purchaser's maintenance of sufficient funds in a deposit account at the drawee bank. Ordinary checks drawn on a checking account, on the other hand, are not typically prepaid, and are subject to dishonor if the drawer does not, at the time of presentment, have sufficient funds in a checking account at the drawee bank to cover the amount specified on the check. *See Clark Report 3-4.* In layman's terms, ordinary checks drawn on a checking account can bounce. Relatedly, the Disputed Instruments are not drawn upon the individual checking account of the purchaser; they are instead drawn upon the bank designated as drawee on the face of the instrument, to whom Moneygram has a contractual obligation to repay for clearing the instrument. Further, an ordinary check drawn on a checking account is issued (or "drawn") by the individual or entity that uses the check to transmit funds to the order of a payee. *See Clark Report 3.* The Disputed Instruments, on the other hand, are issued by Moneygram and sold to a purchaser who determines to whom the instrument will be made payable. Because the Disputed Instruments are not ordinary checks drawn on a checking

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<sup>40</sup> Indeed, Delaware does not argue that the Disputed Instruments fall within the Defendants' construction of "third party bank check."

account, they are, therefore, not excluded from the scope of the FDA's priority rules as "third party bank checks."

In short, while neither side has overwhelmingly persuasive arguments as to the meaning of "third party bank check," the Defendants' interpretation is more persuasive than Delaware's.<sup>41</sup>

### **III. Whether the Defendant States Have the Power to Escheat the Disputed Instruments**

Even if a written instrument is covered by the FDA and the issuer possesses a record of the State in which it was purchased, the State of purchase is entitled to take custody of the proceeds of that instrument only "to the extent of that State's power [to do so] under its own laws." 12 U.S.C. § 2503(1). Delaware contends that at least ten of the Defendant States,<sup>42</sup> while having the power under their own laws to escheat money orders, do not have the power to escheat instruments that are "similar" to money orders without being money orders. Thus, according to Delaware's argument, the right of those ten States to escheat the Disputed Instruments depends on whether the Disputed

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<sup>41</sup> The question whether the Disputed Instruments are "third party bank checks" has no significance for this case if the Supreme Court rules, as here recommended, that the Disputed Instruments come within the FDA because they are "money orders." It is only if the Court finds that the Disputed Instruments are not "money orders" within the meaning of the FDA, but are "other similar written similar instruments," that it could matter whether they are "third party bank checks."

<sup>42</sup> Alabama, Arizona, Arkansas, Indiana, Iowa, Kansas, Montana, Nevada, Texas, and West Virginia.

Instruments *are* money orders.<sup>43</sup> If the FDA applies only because the instruments are “other similar written instruments” without being “money orders,” those States do not qualify to escheat under § 2503(1) because their own laws, as interpreted by Delaware, do not allow them to escheat the proceeds of such instruments. Having considered the parties’ arguments, I conclude that all ten Defendant States whose laws are in dispute have the power to escheat the Disputed Instruments, even assuming that they are covered under the FDA as Similar Instruments, but not as “money orders.”<sup>44</sup>

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<sup>43</sup> Delaware does not contest that each of the Defendant States is empowered under its own laws to take possession of abandoned money orders. *See* Pl.’s Opp. Br. 61.

<sup>44</sup> Pursuant 12 U.S.C. § 2503(3), if the books and records of the issuer of a Covered Instrument show the State in which a Covered Instrument was purchased, but that State does not have the power to escheat under its own laws, then the State where the issuer has its principal place of business is entitled to escheat. Consequently, Moneygram’s principal place of business could be material to determining which State is entitled to escheat the proceeds from the purchase of the Disputed Instruments; this is especially so because the FDA does not provide priority rules applicable where neither the State of purchase nor the State where the issuer has its principal place of business have laws allowing them to escheat — the common law framework would presumably apply in this scenario. Unfortunately, the record on summary judgment does not allow me to reach a precise conclusion as to Moneygram’s principal place of business, because admissions made by the parties point in multiple directions. In its answer to Pennsylvania’s counterclaims, Delaware admitted that Texas is Moneygram’s principal place of business. *See* Dkt. No. 11 ¶ 28 & Dkt. No. 18 ¶ 28. But in response to Delaware’s statement of undisputed facts, the Defendants admitted that Minnesota is Moneygram’s principal place of business. *See* Dkt. No. 78 ¶ 2 &

The ten States Delaware claims would not be empowered to escheat Similar Instruments include eight States<sup>45</sup> that have adopted the 1995 version of the Uniform Unclaimed Property Act (the “1995 Uniform Act”),<sup>46</sup> (the successor to the Uniform Disposition of Unclaimed Property Act and Revised Uniform Disposition of Unclaimed Property Act, *see* 1995 Uniform Act, Prefatory Note (Unif. Law. Comm’n 1995)), plus Iowa, which has partially adopted the 1981 version of the Uniform Unclaimed Property Act, *see* Iowa Code Ann. §§ 556.1 *et seq.*, and Texas, which has its own

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Dkt. No. 98 ¶ 2. The Associate General Counsel of Moneygram’s parent company also asserted, via affidavit, that Moneygram has its principal place of business in Minnesota. Dkt. No. 80 (Feinberg Aff. ¶ 3). In any case, it is not necessary to resolve this issue now, because, as discussed more fully below, I conclude that the ten States at issue have the power to escheat the Disputed Instruments, even assuming that they are covered under the FDA as Similar Instruments.

<sup>45</sup> Alabama, Arizona, Arkansas, Indiana, Kansas, Montana, Nevada, and West Virginia.

<sup>46</sup> The relevant State laws are Ala. Code Ann. §§ 35-12-70 *et seq.*; Ari. Rev. Stat. Ann. §§ 44-301 *et seq.*; Ark. Code Ann. §§ 18-28-201 *et seq.*; Ind. Code Ann. §§ 3234-1 *et seq.*; Kan. Stat. Ann. §§ 58-3934 *et seq.*; Mont. Code Ann. §§ 70-9-801 *et seq.*; W. Va. Code Ann. §§ 36-8-1 *et seq.* Nevada partially adopted the 2016 Revised Uniform Unclaimed Property Act on July 1, 2019, but previously had adopted the 1995 Uniform Act. *See* 2019 Nev. Laws Ch. 501, S.B. No. 44; Nev. Rev. Stat. Ann. §§ 120A.010 *et seq.* The changes made to Nevada’s law by the partial adoption of the 2016 Uniform Act are not relevant here except where otherwise noted.

unclaimed property law, *see* Texas Prop. Code §§ 72.101 *et seq.*<sup>47</sup>

I begin by addressing the laws of the eight States that have adopted the 1995 Uniform Act (the "Eight States"). The structure of the 1995 Uniform Act is illustrated by Arkansas' act: one section defines the dormancy periods for varying types of property, following which property is presumed abandoned, *see* Ark. Code Ann. § 28-202; a second section describes the circumstances in which property presumed to be abandoned is subject to the custody of the State, *see id.* § 18-28-204; and other sections proscribe rules for reporting and delivering abandoned property to the State, *see id.* §§ 18-28-207, 18-28-208; *see also* 1995 Uniform Act §§ 2, 4, 18, 20. A section titled "Rules for Taking

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<sup>47</sup> Because the question whether these ten States have the power to take possession of Official Checks is purely a question of their own State law, the question could be certified to the high court of each of the relevant States for adjudication. *See, e.g., Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (observing that the certification of controlling questions of State law to the appropriate State courts, while discretionary, can "save time, energy, and resources and helps build a cooperative judicial federalism."). Nonetheless, various factors weigh forcefully against certification, including the substantial delays and costs that would result from these additional litigations, the low likelihood on the present facts that any of the State courts would rule against the State's power under its own law to escheat funds to which it is entitled by federal law, and the fact that the issue will have no importance for the resolution of the litigation unless the Supreme Court rules that instruments in question are subject to the FDA only as "other similar instruments," and not as "money orders." For these reasons, and in light of the fact that no party has requested or suggested certification, I do not recommend certification.

Custody”<sup>48</sup> provides the circumstances in which the State may take custody of property presumed to be abandoned. Ark. Code Ann. § 18-28-204. This provision tracks the common law framework established by the Supreme Court in *Texas v. New Jersey* and *Pennsylvania v. New York*, as well as the framework established by the FDA. See 1995 Uniform Act § 4 cmt. It provides, *inter alia*, that the State may take custody of property presumed abandoned where:

the property is a traveler’s check or money order purchased in this State, or the issuer of the traveler’s check or money order has its principal place of business in this state and the issuer’s records show that the instrument was purchased in a state that does not provide for the escheat or custodial taking of the property, or do not show the State in which the instrument was purchased.

Ark. Code Ann. § 18-28-204(7); see also 1995 Uniform Act § 4(7). The comments to the 1995 Uniform Act state that this provision “states the rule adopted by Congress in [the FDA].” 1995 Uniform Act § 4 cmt.

Delaware argues that the provision captioned “Rules for Taking Custody” does not allow enacting States to take custody of sums paid to purchase instruments covered under the FDA as Similar Instruments, because the “Rules for Taking Custody” designate only “traveler’s checks or money orders” without including “other similar written instruments.” *Id.* Delaware’s

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<sup>48</sup> Certain of the Eight States’ laws label this provision by a different name, see, e.g., Ind. Code Ann. § 32-34-1-21 (“Property Subject to Custody of State as Unclaimed Property”), without significant change in its contents.



argument is essentially that, by including “traveler’s checks” and “money orders” within the “Rules for Taking Custody,” but choosing not to include “other similar written instruments” amongst the forms of property of which a State may take custody, the 1995 Uniform Act should be read to exclude the latter. This argument functionally relies on the canon of statutory construction that states that the expression of one thing implies the exclusion of others. *See Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (“*Expressio unius est exclusio alterius.*”).

The Defendant States respond that, even if the Eight States’ laws do not explicitly identify instruments “similar” to money orders and traveler’s checks within the “Rules for Taking Custody,” their laws should be interpreted to encompass such instruments, in part because, while expressly naming “money orders” and “traveler’s checks” in the statutory text, they state in commentary that their rule “states the rule adopted by Congress in [the FDA],” 1995 Uniform Act § 4 cmt., and in part because various other provisions of the 1995 Uniform Act (as adopted by those States) make clear the Act’s intention to cover “similar instruments.” *See* Defs. Reply Br. 21. I find that the Defendant States have the better of the argument.

If, in authorizing escheatment of “money orders or traveler’s checks,” the rule of the Uniform Act “states the rule adopted by Congress in [the FDA],” as asserted in the commentary, then, the Defendant States argue, the Act authorizes escheatment of the same instruments as are covered by the FDA, including those therein identified as “other similar written instruments.” In addition, the official notes to the 1995

Uniform Act state that "Section 2 continues the general proposition that all intangible property is within the coverage of this Act." *Id.* § 2 cmt. If the 1995 Uniform Act excluded authority to escheat instruments that are "similar" to money orders and traveler's checks, then, contrary to its stated intention, the 1995 Uniform Act would not cover "all intangible property."

Furthermore, text as well as comments to the 1995 Uniform Act make express references to "similar instruments," in contexts that give strong support to interpreting the Act's "Rules for Taking Custody" to mean that "similar instruments" are covered. These textual provisions would make no sense if the Act did not allow enacting States to take custody of similar instruments. For example, in providing for claims by other States to property that has already been escheated to the enacting State, *see, e.g.*, Ark. Code Ann. § 18-28-214, the Act describes one form of such already escheated property as "a sum payable on a traveler's check, money order, or *similar instrument* that was purchased in the other state and delivered into the custody of this state under [the provision of the "Rules for Taking Custody" that relates to money orders and traveler's checks]." *Id.* at § 18-28-214(a)(5) (emphasis added); *see also* 1995 Uniform Law § 14 (same). That provision of the same Act manifests an understanding that the Act authorizes taking possession of abandoned instruments that are "similar" to money orders and traveler's checks. The reference to "similar instruments" as previously escheated property would be a nullity, serving no purpose, if the statute did not authorize escheatment of similar instruments.

Likewise, the 1995 Uniform Act contains a provision requiring record retention by "[a] business

association or financial organization that sells, issues, or provides to others for sale or issue in this state, traveler's checks, money orders, *or similar instruments* other than third-party bank checks, on which the business association or financial organization is directly liable." *See, e.g., Ark. Code Ann. § 18-28-221(b)* (emphasis added); *see also* 1995 Uniform Act § 21 (same). The tracking of the FDA's exclusion of certain "third party bank checks" makes clear an intention to conform to the provision by which the enacting State authorizes escheat of those instruments that the FDA allows the State to escheat. Furthermore, there would be little reason to require sellers of instruments to maintain records pertinent to the escheat for instruments not subject to escheat.

And another provision detailing the enacting States' obligation to notify apparent owners of abandoned property that has escheated to the enacting State also uses the phrase "a traveler's check, money order, *or similar instrument.*" *Ala. Code. Ann. § 35-12-78(c)* (emphasis added); *see also* 1995 Uniform Act § 9 (same).<sup>49</sup> Once again, unless the authorization set forth in the "Rules for Taking Custody" to escheat "money orders" and "traveler's checks" also authorized the escheatment of "similar instruments," the inclusion of these words in the notification requirement would be a meaningless nullity. It would refer to a circumstance that could not have occurred.

Finally, Delaware offers no explanation why any of the Eight States enacting the 1995 Uniform Act, or the Act's drafters, would have intended the enacting

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<sup>49</sup> Arkansas has not enacted this provision. *See Ark. Code Ann. § 18-28-209.*

States to forgo the right to escheat presumptively abandoned Similar Instruments consigned to them by the FDA. To the contrary, taken together in the context of an Act implementing the FDA's authorization to the enacting States to take possession of specified categories of abandoned property, the 1995 Act gives strong evidence of an intention to function in harmony with the FDA by allowing enacting States to take custody of all property that the FDA allocated to them.

For these reasons, Delaware's implicit reliance on the *expressio unius* canon has little persuasive force. As with most canons, this one applies only when its application would be sensible. See *NLRB v. S.W. Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (*expressio unius* "applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.") (internal quotation marks, citations, and alterations omitted). A leading treatise on statutory interpretation makes the cautionary comment that, "[v]irtually all the authorities who discuss the negative implication [*expressio unius*] canon emphasize that it must be applied with great caution, since its application depends so much on context." Scalia & Garner, *Reading Law* 107. The context here strongly suggests that the 1995 Uniform Act intended the enacting States to authorize the escheat of instruments described in the FDA as "other similar instruments." I reject Delaware's argument that the 1995 Uniform Act's specification in the Rules for Taking Custody of money orders and traveler's checks without explicit mention of similar instruments should be interpreted to mean the Act's authorization to take custody deviates from the FDA's authorization by not applying to

instruments “similar” to money orders and traveler’s checks.<sup>50</sup>

I conclude that the language of the 1995 Uniform Act’s “Rules for Taking Custody,” as adopted in the unclaimed property laws of the Eight States, should be construed, in this context, to authorize taking custody of instruments covered by the Similar Instruments clause of the FDA.<sup>51</sup>

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<sup>50</sup> Delaware seems to presume that an instrument treated as a Similar Instrument under the FDA necessarily cannot be a “money order” for the purposes of any individual State’s unclaimed property law. This is incorrect. See *Yates v. United States*, 574 U.S. 528, 537-38 (2015) (“We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.”). An instrument could very well be covered under the FDA as a Similar Instrument but be treated under State law as a money order.

<sup>51</sup> Contrary to the parties’ arguments, *Travelers Express Co. v. Minnesota*, 506 F. Supp. 1379, 1381 (D. Minn. 1981), does not illuminate the present dispute in any significant way. The case demonstrates that in 1981 some States either did not have an unclaimed property law covering intangible property or had a law that did not cover money orders. *Travelers*, 506 F. Supp. at 1381. The case says nothing about *why* the other States’ legislatures had not passed unclaimed property laws, or why those laws did not cover money orders. *Id.* The Defendant’s argument — that the case stands for the general proposition that a catchall provision treating unenumerated forms of property as abandoned after a certain period of dormancy necessarily provides a State the power to take custody of any form of property presumed abandoned — is also misplaced. The Minnesota law at issue in *Travelers* did not contain Rules for Taking Custody. See Minn. Laws 1969, ch. 725, H.F. No. 2618, amended by Minn. Laws 1977, ch. 137, S.F. No. 616. In the absence of such Rules, the *Travelers* court was able to presume that any property deemed abandoned under the Minnesota law was subject to the custody

As for Iowa and Texas, whose escheatment laws differ from those of the Eight States in that they have not adopted 1995 Uniform Act, Delaware makes the same argument based on the fact that their laws, like the Uniform Act, provide for the State to take custody of "money orders and traveler's checks," without adding "similar" instruments. The enactments of Iowa and Texas provide substantially less evidence of legislative intent to authorize the escheat of Similar Instruments than does the 1995 Uniform Act. While it is, consequently, a closer question, I conclude that the laws of these two States sufficiently share the features of the Uniform Act noted above to justify interpreting them as similarly providing for escheatment of instruments over which the FDA would grant them priority to escheat, and thus providing for the escheatment of Moneygram's Agent Checks and Teller's Checks, regardless of whether the FDA covers those instruments under the label "money order" or "other written similar instrument."

The section of the Iowa law that explicitly covers traveler's checks and money orders, § 556.2A, asserts Iowa's entitlement to take custody of such abandoned instruments only in precise accordance with the FDA's priority rules, supporting the inference Iowa passed its statute with the intention of making complete use of the authority granted by the FDA to take possession of unclaimed instruments. Iowa Code Ann. § 556.2A. Additionally, Iowa's provision setting forth the requirements for reporting of unclaimed property requires the funds holder to report to the State treasurer

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of the State. See *Travelers*, 506 F. Supp. at 1386. The same presumption would not apply in the context of the 1995 Uniform Act.

the name and last-known address of the owner of the unclaimed property at issue “[e]xcept with respect to traveler’s checks, money orders, cashier’s checks, official checks, or *similar instruments*.” *Id.* § 556.11 (emphasis added). Explicitly applying this exclusion to “similar instruments” would be unnecessary if such instruments were not subject to Iowa’s taking custody (thus necessitating their inclusion in unclaimed property reports).

The Texas law operates in a similar manner. The pertinent section, Tex. Prop. Code Ann. § 72.102(a),<sup>52</sup> for example, precisely follows the priority rules set forth in the FDA, again supporting the inference that Texas passed its statute with the intention to authorize the escheat of unclaimed instruments to the full

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<sup>52</sup> This provision of the Texas law states:

(a) A traveler’s check or money order is not presumed to be abandoned under this chapter unless:

(1) the records of the issuer of the check or money order indicate that it was purchased in this state;

(2) the issuer’s principal place of business is in this state and the issuer’s records do not indicate the state in which the check or money order was purchased; or

(3) the issuer’s principal place of business is in this state, the issuer’s records indicate that the check or money order was purchased in another state, and the laws of that state do not provide for the escheat or custodial taking of the check or money order.

Subject to the above-quoted language, a money order is treated as abandoned following three years of dormancy. Tex. Prop. Code Ann. § 72.102(c)(1). A subsequent provision of the Texas law requires, *inter alia*, that each property holder “who on March 1 holds property that is presumed abandoned under Chapter 72, 73, or 75 shall deliver the property to the comptroller on or before the following July 1.” *Id.* § 74.301(a).

extent permitted under the FDA. And, like the 1995 Uniform Act, the Texas statute provides that, under appropriate circumstances, another State may make a claim to recover property seized by Texas under its unclaimed property law if “the property is the sum payable on a traveler’s check, money order, *or other similar instrument* that was subjected to custody by this state.” *Id.* § 74.508(a)(5) (emphasis added). It is extraordinarily unlikely that the Texas legislature would have included instruments similar to money orders and traveler’s checks in this passage pertaining to escheated instruments if those instruments were not subject to escheat. The reference to a “similar instrument,” furthermore, would have no function and make no sense if such an instrument had not been subject to Texas’s taking custody.

Finally, as with the Eight States, Delaware offers no reason why Iowa or Texas would have intended its law to be interpreted as not authorizing it to escheat these forms of property in the circumstances in which the FDA explicitly grants it priority. Each State’s tracking of the FDA’s priority provision in its statute bespeaks a clear intention that any ambiguity in its statute be interpreted to confirm its escheatment of instruments consigned to it by the FDA’s priority rules.

#### **IV. Whether the Secondary Common Law Rule Should Be Modified As Applied to the Disputed Instruments**

Pennsylvania joins in the Defendant States’ Motion for Partial Summary Judgment and independently argues that, should the Court determine that the Disputed Instruments are not subject to the priority rules set forth in the FDA, the Court should overrule the



secondary rule set forth in *Texas* and declare that “when the address of a purchaser/payee on an unclaimed prepaid financial instrument is unknown, this intangible property shall escheat to the State where the instrument was purchased.” Pennsylvania’s Br. 3. Pennsylvania’s pleadings and briefing on summary judgment are not entirely clear as to whether the State is seeking reconsideration of the secondary common law rule as applied to *all* forms of intangible property or only as applied to the Disputed Instruments. See Dkt. No. 11 ¶¶ 116-17; Pennsylvania’s Br. 2. During oral argument, however, counsel for Pennsylvania clarified that Pennsylvania is advocating only a change in the common law with respect to the property at issue in this case. See Tr. March 10, 2021, at 69-70.

If the Supreme Court accepts the recommendation of this Report ruling that the Disputed Instruments are covered by the FDA, Pennsylvania’s claim and motion for summary judgment will be moot. If the Court so rules, I recommend that it dismiss Pennsylvania’s claim for amendment of the *Texas* rule as moot. If the Court rules that the Disputed Instruments are not covered by the FDA, Pennsylvania’s claim and Motion for Partial Summary Judgment can be addressed at that time.

## CONCLUSION

Having concluded that the Disputed Instruments fall within the scope of the FDA and that the Defendant States each have the power under their own laws to take custody of the proceeds of presumptively abandoned Disputed Instruments purchased in their respective States, I recommend that the Supreme Court grant the motion of the Defendant States for partial

summary judgment, deny Delaware's Motion for Partial Summary Judgment, and dismiss as moot Pennsylvania's claim for modification of the secondary common law rule established in *Texas* as applied to the Disputed Instruments. A proposed decree embodying this recommendation is attached as Appendix A.<sup>53</sup>

Respectfully Submitted,

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May 20, 2021

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<sup>53</sup> The request of the Defendant States that I establish a schedule for the damages phase of this litigation is DENIED pending further action by the Supreme Court.

**APPENDIX A**  
**PROPOSED ORDER**

DELAWARE,

v.

PENNSYLVANIA AND WISCONSIN.

\*\*\*\*\*

ARKANSAS, et al.,

v.

DELAWARE,

Nos. 145 & 146, Original (Consolidated)

**ORDER**

Upon consideration of the briefs of the parties and amici curiae, and the First Interim Report of Pierre N. Leval, Special Master, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The motion of the State of Delaware for partial summary judgment is DENIED.
2. The motion of the Defendant States for partial summary judgment is GRANTED.
3. The claim of the Commonwealth of Pennsylvania's for modification of the secondary common law rule established in *Texas v. New Jersey*, 379 U.S. 674 (1965), as applied to the Disputed Instruments, is DISMISSED AS MOOT.
4. The Special Master is hereby directed to address the implementation of this Decree and the resolution of disputes relating to any party's

entitlement to damages and/or other relief. The Special Master shall submit further Reports to this Court on such matters as may be raised before him or that he may direct the parties to address.

IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF DELAWARE,

*Plaintiff,*

v.

COMMONWEALTH OF PENNSYLVANIA  
AND STATE OF WISCONSIN,

*Defendants.*

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**MOTION FOR LEAVE TO FILE BILL OF  
COMPLAINT**

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Comes now the State of Delaware, by and through its Attorney General, Matthew P. Denn, pursuant to authority vested in him under the laws of Delaware, and moves the Court for leave to file the accompanying Bill of Complaint.

In support of its Motion, the State of Delaware asserts that its claims arise from the interpretation of a federal statute, its claims are serious and dignified, and there is no alternative forum in which adequate relief may be had. For the reasons more fully stated in the accompanying Brief in Support, the Motion of the State of Delaware for Leave to File Bill of Complaint should be granted.

Respectfully submitted,

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May 2016

IN THE  
SUPREME COURT OF THE UNITED STATES

---

STATE OF DELAWARE,

*Plaintiff,*

v.

COMMONWEALTH OF PENNSYLVANIA

AND STATE OF WISCONSIN,

*Defendants.*

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**BILL OF COMPLAINT**

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The State of Delaware, by and through its Attorney General, Matthew P. Denn, brings this suit against defendants, the Commonwealth of Pennsylvania and the State of Wisconsin, and for its cause of action states:

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

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

3. The State of Delaware has been sued by the Commonwealth of Pennsylvania and the State of Wisconsin in federal district court over the right to escheat certain unclaimed and abandoned monetary instruments pursuant to the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-2503.

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

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

6. In *Texas*, the Supreme Court initially established what have become known as the "priority rules," whereby the first opportunity to escheat the property belongs to the State of the last known address of the creditor as shown by the debtor's books and records (the "primary rule"), and if there is no record of any address for a creditor, or because the creditor's last known address is in a State which does not provide for the escheat of abandoned property, the property escheats to the State in which the debtor is incorporated (the "secondary rule"). *Texas*, 379 U.S. at 682.

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



held that the priority rules first established in *Texas* should continue to apply. *Id.* at 214-15.

8. Following the Supreme Court's decision in *Pennsylvania*, in 1974 Congress adopted the Disposition of Abandoned Money Orders and Traveler's Checks Act, which had the effect of reversing the Supreme Court's holding in *Pennsylvania* for certain types of property. Specifically, for a "money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable," the State in which such an instrument was purchased has the exclusive right to escheat or take custody of sums payable on such instruments. 12 U.S.C. § 2503. If the State in which such instruments were purchased is not known, then unclaimed property associated with such instruments escheats to the State in which the banking or financial organization or business association has its principal place of business. *Id.*

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

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

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

12. Official Checks differ from money orders in many respects, including, without limitation: (i) Official Checks are not labeled as money orders, (ii) Official Checks are generally issued by financial institutions and not by convenience stores and similar small businesses, (iii) Official Checks are capable of being issued in substantially larger dollar amounts than money orders, and (iv) Official Checks are treated differently under various federal regulations relating to monetary instruments.

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

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

15. Pennsylvania, Wisconsin, and eighteen other States recently retained a third-party auditor, Treasury Services Group ("TSG"), to conduct a review of

MoneyGram's Official Checks. At the conclusion of that audit, TSG declared that MoneyGram Official Checks were subject to the Disposition of Abandoned Money Orders and Traveler's Checks Act, and that the funds related to Official Checks that MoneyGram had been escheating to Delaware instead should have been escheated to the State where the Official Checks were sold.

16. On February 26, 2016, the Treasury Department of the Commonwealth of Pennsylvania sued Delaware State Escheator David M. Gregor and MoneyGram in the United States District Court for the Middle District of Pennsylvania. *See* Appendix A-5. In that Complaint, Pennsylvania sought from MoneyGram a sum equal to the amount previously escheated to Delaware for Official Checks that Pennsylvania asserts were purchased in Pennsylvania from 2000-2009, estimated to be \$10,293,869.50, and a declaration interpreting the Disposition of Abandoned Money Orders and Traveler's Checks Act such that all future sums payable on abandoned MoneyGram Official Checks that were purchased in Pennsylvania should be remitted to Pennsylvania.

17. On April 27, 2016, the Wisconsin Department of Revenue sued Delaware State Escheator David M. Gregor and MoneyGram in the United States District Court for the Western District of Wisconsin. *See* Appendix A-27. In that Complaint, Wisconsin sought from MoneyGram a sum equal to the amount previously escheated to Delaware for MoneyGram Official Checks that Wisconsin asserts were purchased in Wisconsin beginning in 2000, estimated to be in excess of \$13,000,000, and a declaration interpreting the Disposition of Abandoned Money Orders and Traveler's

Checks Act such that all future sums payable on abandoned MoneyGram Official Checks that were purchased in Wisconsin should be remitted to Wisconsin.

18. Delaware filed a motion to dismiss the Pennsylvania action for lack of personal jurisdiction and lack of subject matter jurisdiction on April 20, 2016, arguing that the suit is, in fact, a dispute between States implicating core sovereign functions, and, as such the suit is subject to the original and exclusive jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. § 1251(a), the Eleventh Amendment, and relevant case law. Delaware also argued that defendant David Gregor lacks the “minimum contacts” with Pennsylvania necessary for the Pennsylvania district court to exercise personal jurisdiction over him. On May 23, 2016, the Honorable Judge John E. Jones III placed the Pennsylvania action, at the request of Pennsylvania, in administrative suspension pending a ruling from this Court on a motion for leave to file a Bill of Complaint to resolve the dispute.

19. Delaware is required to answer or otherwise respond to Wisconsin’s complaint in the Western District of Wisconsin no later than July 5, 2016. At this time, Delaware intends to move to dismiss the Wisconsin action on the same grounds as the motion to dismiss in Pennsylvania.

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

21. The State of Delaware has no adequate remedy at law to enforce its superior right to that of the State of Wisconsin and the Commonwealth of Pennsylvania to receive abandoned property related to MoneyGram Official Checks.

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

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

- A. Declare that MoneyGram Official Checks are not "a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable," pursuant to 12 U.S.C. § 2503.
- B. Issue its Decree commanding the State of Wisconsin and the Commonwealth of Pennsylvania not to assert any claim over abandoned and unclaimed property related to MoneyGram Official Checks.
- C. Issue its Decree that all future sums payable on abandoned MoneyGram Official Checks should be remitted to the State of Delaware.
- D. Grant such costs and other relief as the Court deems just and proper.

Respectfully submitted,

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May 2016

No. 22O145 & 22O146, Original (Consolidated)

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DELAWARE,

*Plaintiff,*

v.

PENNSYLVANIA AND WISCONSIN,

*Defendants.*

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ARKANSAS, et al.,

*Plaintiffs,*

v.

DELAWARE,

*Defendant.*

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**STIPULATION TO REALIGN THE PARTIES**

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The parties to this action hereby stipulate as follows:

From the date of entry of the Court's order on this stipulation, and going forward, the title of this action shall be: "*Delaware v. Arkansas, et al.*" The parties further stipulate that the Court and the parties shall refer to the State of Delaware as the "Plaintiff" and the States of Arkansas, Texas, Alabama, Arizona, California, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Washington, West Virginia and Wisconsin collectively as "Defendants." While the parties discussed

possibly reassigning the various complaints, counter-complaints and answers, there is no practical way to re-characterize the pleadings at this stage. Finally, the parties stipulate to the form of the caption in this matter as it appears below.

No. 22O145 & 22O146, Original (Consolidated).

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DELAWARE,

*Plaintiff,*

v.

ARKANSAS, ET AL.,

*Defendants*

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## SUPREME COURT OF THE UNITED STATES

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DELAWARE,*Plaintiff,*

v.

ARKANSAS, ET AL.,

*Defendants.*

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Nos. 22O145 &amp; 22O146 (Consolidated)

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July 24, 2017

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**ORDER**

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PIERRE N. LEVAL, *Special Master*:

1. All proceedings in Nos. 145 and 146 will henceforth be consolidated under No. 145. No further entries will be made under No. 146.

2. For all purposes, Delaware will be regarded as Plaintiff against all of the other States that are parties to either proceeding, as well as Counterclaim Defendant with regard to the claims asserted against it by the States in the two proceedings. All of the States that are parties in either proceeding will be considered Defendants with respect to the claims of Delaware against them, as well as Counterclaim Plaintiffs with respect to their claims against Delaware.

3. Accordingly, the claims filed by various States against Delaware in No. 146 will be considered counterclaims filed in No. 145, and the counterclaims filed by Delaware in No. 146 will be considered claims in No. 145.

4. The Special Master understands the filing of the Stipulation relating to MoneyGram in No. 145, Docket No. 38, to be in satisfaction of Pennsylvania's motion for Leave to File Bill of Third Party Complaint against MoneyGram, Docket No. 17, and that Pennsylvania's motion is therefore **WITHDRAWN**.

5(a). Delaware moves to amend its Counterclaim in No. 146 (henceforth deemed its Claim in No. 145) to also assert claims against California, Iowa, Maryland, Oregon, Virginia, and Washington. That aspect of Delaware's motion to amend is **GRANTED**.

5(b). Delaware also moves to amend to assert similar claims against the other States with respect to the escheat of "other similar instruments" issued by MoneyGram and other unnamed issuers. Such a pleading might expand enormously the scope of the case and significantly delay its resolution to an unknown extent. The Supreme Court has cautioned that "the solicitude for liberal amendment of pleadings animating Federal Rules of Civil Procedure, Rule 15(a) . . . does not suit cases within [the Supreme Court's] original jurisdiction." *Nebraska v. Wyoming*, 115 S. Ct. 1933, 1938 (1995). Delaware's motion to amend is therefore **DENIED**.

6. By letter dated April 26, 2017, Texas advocated bifurcation of the proceedings, so that liability would be adjudicated in a first phase, and damages deferred. All parties have agreed that such bifurcation is desirable. It is therefore **ORDERED** that the question which State or States are entitled to escheat the so-called "Official Checks" of MoneyGram will be first presented to the Special Master in a liability phase,

prior to presentation of evidence on damages.<sup>1</sup> During the liability phase, parties may demand discovery on any issue relevant to the merits of a State's entitlement to the escheat. Discovery that relates only to the potential amount of damages may not be sought during the liability phase.

**IT IS SO ORDERED.**

/s/

PIERRE N. LEVAL, *Special Master*  
Thurgood Marshall United States  
Courthouse  
40 Foley Square, Room 1901  
New York, New York 10007  
(212) 857-2310

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<sup>1</sup> Pennsylvania urged at the June 5, 2017, conference that the Special Master should first "define what Congress meant by the term 'third-party bank check,'" and that, only after a decree is rendered on that question, would the proceedings advance to "a next stage where we compare [the] hallmarks of what each of those things mean against eight particular instruments." Docket No. 39, at 76-77. Delaware objected. The Special Master will not bifurcate the proceedings in the manner suggested by Pennsylvania.

**COVINGTON**

BEIJING BRUSSELS DUBAI FRANKFURT  
JOHANNESBURG LONDON LOS ANGELES  
NEW YORK PALO ALTO SAN FRANCISCO  
SEOUL SHANGHAI WASHINGTON

**Beth S. Brinkmann**

Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 5312  
bbrinkmann@cov.com

April 22, 2020

Hon. Pierre N. Leval, Special Master  
Thurgood Marshall United States Courthouse  
40 Foley Square, Room 1901  
New York, NY 10007

**Re: Delaware v. Arkansas, et al., 22O145 &  
22O146 (consolidated)**

Dear Judge Leval,

We respectfully seek leave to submit this letter to bring to the Court's attention the fact that the briefing to this Court in *Delaware v. Arkansas* uses the term "cashier's checks" imprecisely and suggests that the Court rely on unsupported assumptions about cashier's checks in resolving the case. We recognize that the issue of cashier's checks is not before the Court for adjudication in this case and write in the spirit of an



amicus curiae to reinforce that point, and do not present any additional legal argument.

Legal analysis of the scope and nature of cashier's checks would require development of a record and briefing relevant to that issue, which is lacking here. Reliance on the unsupported assumptions about cashier's checks could inadvertently affect the rights of entities not before the Court, including in other pending litigation. We submit this letter consistent with the CMO procedures for submissions to the Special Master to provide this relevant information that may be of assistance to the Court.

Respectfully submitted,

/s/

---

Beth S. Brinkmann  
*Counsel of Record for*  
*JPMorganChase Bank, N.A.*

cc: counsel for parties (list attached)

SUPREME COURT OF THE UNITED STATES

DELAWARE,

*Plaintiff,*

**V.**

ARKANSAS, ET AL.,

*Defendants.*

Docket Nos. 220145 &amp; 220146 (Consolidated)

Filed February 1, 2019

# AFFIDAVIT OF JENNIFER WHITLOCK

COUNTY OF HENNEPIN )  
 ) ss.  
STATE OF MINNESOTA )

**JENNIFER WHITLOCK**, being first duly sworn,  
hereby deposes and says.

1. I am the Head of Global Supply Chain for MoneyGram International ("MoneyGram"). I make this affidavit from my own personal knowledge and from my review of documents and records maintained by MoneyGram.

2. Attached as Exhibits A, B, C, D, and E hereto are sample templates of a MoneyGram "Money Order."

3. Attached as Exhibits F and G hereto are MoneyGram templates for a "Money Order" setting forth the printing specifications for a Money Order.

4. The attached print specifications for Money Orders have not been materially changed or altered from 2000 to 2017. For example, the “Issuer/Drawer” terminology and “Payable through” nomenclature have generally not changed, though the financial institution through which the items are payable has changed over the years.

5. To the best of my knowledge, all MoneyGram Money Orders issued between 2000 and 2017 would be substantially similar to the sample item attached hereto, with the exception that there have been changes to the terms and conditions on the back of the money order relating to service fees and the like during this period.

/s/\_\_\_\_\_

Sworn to before me this  
6<sup>th</sup> day of November, 2017

---

Notary Public

212

**EXHIBIT A**

177 1525 600

**EXHIBIT A**

**NON-NEGOTIABLE**

177 15256000#

177 1525 600

REFER TO THIS NUMBER FOR PROMPT SERVICE


DATE \_\_\_\_\_  
PURCHASER'S RECEIPT


MONEY ORDER WAS PAID TO \_\_\_\_\_  
**NON-NEGOTIABLE**  
AMOUNT \_\_\_\_\_ DOLLARS

TERMS: PLEASE READ THE TERMS OF THIS MONEY ORDER ON THE REVERSE SIDE.

10 54143-1 494 1/15 2650020


Valid Money Order Includes: 1. Heat sensitive, red stop sign. 2. Contains a True Watermark held up to light to view.



 **MoneyGram.**  
INTERNATIONAL MONEY ORDER

To Validate: Touch the stop sign, then watch it fade and reappear 

**MONEY ORDER** 78-53  
177 1525 600 \$19  
VOID OVER \$1000.00

DATE \_\_\_\_\_

PAY THE SUM OF 

PAY TO THE ORDER OF / PAGAR A LA ORDEN DE:  


**SAMPLE**

ISSUER/DRAWER: MONEYGRAM PAYMENT SYSTEMS, INC.  
Dorothy J. Ingram  
P.O. Box 999, N.A.  
P.O. Box 999

SIGNATURE \_\_\_\_\_  
PURCHASER, SIGNER FOR DRAWER/  
COMPRADOR, FIRMA DEL LIBRADOR

ADDRESS / DIRECCIÓN: \_\_\_\_\_

BY SIGNING YOU AGREE TO THE SERVICE CHARGE AND OTHER TERMS ON THE REVERSE SIDE.



CONFIDENTIAL 1091900533177 15256000# 90 MG 002690

**TERMS OF THIS MONEY ORDER****PURCHASER'S AGREEMENT:**

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money Order, signing, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

**SERVICE CHARGE:**

If this Money Order is not used or cashed (presented for payment) within one year of the purchase date, there will be a non-refundable service charge assessed where not prohibited by law. The service charge will be deducted from the face amount of this Money Order. The amount of the service charge is one dollar and fifty cents (\$1.50) per month from the date of purchase, not to exceed \$126 in total or such lesser amounts as may otherwise be permitted by applicable law.

**STATE SERVICE CHARGE EXCEPTIONS:**

CA: Twenty-five cents (\$0.25) per month if not used or cashed within three years of the purchase date; not to exceed \$21.

**RESTRICTIONS ON USE**

The business or person selling this Money Order cannot use it to pay personal or business obligations

**LIMITED RECOURSE:**

**This Money Order will not be paid if it has been forged, altered, or stolen, and recourse is only 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.**

**Purchaser's Proof of Purchase**

It is the purchaser's responsibility to keep a copy of this stub for their records. A Claim Card is **REQUIRED** to process a refund or a claim on a lost or stolen money order. Claim Cards may be downloaded from our web site at [www.moneygram.com/moneyorder](http://www.moneygram.com/moneyorder) or from the location where the money order was purchased or any MoneyGram money order agent. Complete the entire form and mail it with a copy of this stub to the address on the claim card.

For additional questions, please call 1-800-542-3590.

Para recibir esta información en español, por favor llamar al 1-800-542-3590.

MONEYGRAM PAYMENT SYSTEMS, INC.

P.O. BOX 9476, MINNEAPOLIS, MN 55480

1-800-542-3590

[www.moneygram.com](http://www.moneygram.com)

**LIMITED RECOURSE:**

**This Money Order will not be paid if it has been forged, altered, or stolen, and recourse is only 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.**

---

**Payee's Endorsement:**

**For information concerning this Money Order, contact: MONEYGRAM PAYMENT SYSTEMS, INC. P.O. BOX 9476 MINNEAPOLIS, MN 55480 1-**

**800-542-3590**  
**eyorder**

**www.moneygram.com/moneyorder**

**PURCHASER'S AGREEMENT:**

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money Order, signing, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

**SERVICE CHARGE:**

If this Money Order is not used or cashed (presented for payment) within one year of the purchase date, there will be a non-refundable service charge assessed where not prohibited by law. The service charge will be deducted from the face amount of this Money Order. The amount of the service charge is one dollar and fifty cents (\$1.50) per month from the date of purchase, not to exceed \$126 in total or such lesser amounts as may otherwise be permitted by applicable law.

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**RESTRICTIONS ON USE**

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**Purchaser's Proof of Purchase**

It is the purchaser's responsibility to keep a copy of this stub for their records. A Claim Card is **REQUIRED** to process a refund or a claim on a lost or stolen money order. Claim Cards may be downloaded

from our web site at [www.moneygram.com/moneyorder](http://www.moneygram.com/moneyorder) or from the location where the money order was purchased or any MoneyGram money order agent. Complete the entire form and mail it with a copy of this stub to the address on the claim card.

For additional questions, please call 1-800-542-3590.

Para recibir esta información en español, por favor llamar al 1-800-542-3590.



**EXHIBIT B**

Valid Money Order includes: 1. Heat sensitive, red stop sign AND 2. Contains a True Watermark hold up to light to view

**MoneyGram.** INTERNATIONAL MONEY ORDER 75-53 910

To Validate: Touch the stop sign, then watch it fade and reappear

1463046400  
VOID OVER \$1000.00

DATE \_\_\_\_\_

PAY THE SUM OF \_\_\_\_\_

PAY TO THE ORDER OF / PAGAR A LA ORDEN DE: \_\_\_\_\_

ISSUED/DRAWN: MONEYGRAM PAYMENT SYSTEMS, INC.

Payable Through: WELLS FARGO BANK, N.A. Hartford, CT

BY SIGNING YOU AGREE TO THE SERVICE CHARGE AND OTHER TERMS ON THE REVERSE SIDE

SIGNATURE: \_\_\_\_\_ PURCHASER'S SIGNATURE / COMPROMISOR, FIRMA DEL COMPRADOR: \_\_\_\_\_

ADDRESS / DIRECCIÓN: \_\_\_\_\_

VOID - ALTERED ITEM

@091900533146 30464000# 90

**LIMITED RECOURSE:**

This Money Order will not be paid if it has been forged, altered, or stolen, and recourse is only 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.

**Payee's Endorsement:**

For information concerning this Money Order, contact: MONEYGRAM PAYMENT SYSTEMS, INC. P.O. BOX 9476 MINNEAPOLIS, MN 55480 1-800-542-3590 [www.moneygram.com/moneyorder](http://www.moneygram.com/moneyorder)

**PURCHASER'S AGREEMENT:**

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money

Order, signing, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

**SERVICE CHARGE:**

If this Money Order is not used or cashed (presented for payment) within one year of the purchase date, there will be a non-refundable service charge assessed where not prohibited by law. The service charge will be deducted from the face amount of this Money Order. The amount of the service charge is one dollar and fifty cents (\$1.50) per month from the sale of purchase, not to exceed \$126 in total or such lesser amounts as may otherwise be permitted by applicable law.

**STATE SERVICE CHARGE EXCEPTIONS:**

CA: Twenty-five cents (\$0.25) per month if not used or cashed within three years of the purchase date; not to exceed \$21.

**RESTRICTIONS ON USE**

The business or person selling this Money Order cannot use it to pay personal or business obligations

**Purchaser's Proof of Purchase**


It is the purchaser's responsibility to keep a copy of this stub for their records. A Claim Card is REQUIRED to process a refund or a claim on a lost or stolen money order. Claim Cards may be downloaded from our web site at [www.moneygram.com/moneyorder](http://www.moneygram.com/moneyorder) or from the location where the money order was purchased or any MoneyGram money order agent. Complete the entire form and mail it with a copy of this stub to the address on the claim card.

For additional questions, please call 1-800-542-3590.

Para recibir esta información en español, por favor llamar al 1-800-542-3590.

MoneyGram Payment Systems, Inc.	<b>FILE COPY NON-NEGOTIABLE</b>	<b>1463046400</b>	AGENT DETACH THIS COPY
<small>NOTICE TO PURCHASER: THIS COPY OF YOUR MONEY ORDER WAS GIVEN TO YOU IN ERROR. PLEASE RETURN IT IMMEDIATELY TO THE PLACE WHERE YOU BOUGHT IT. THANK YOU.</small>		DATE _____	
<small>FILE PLEASE RETAIN THIS COPY FOR YOUR RECORDS AND/OR USE WHEN REPORTING SQUAT ITENS VIA TELEPOST.</small>			

1463046400C\*

<small>NOT A POSTAL ORDER M 12080-V</small>	 <b>MoneyGram.</b>	INTERNATIONAL MONEY ORDER
		<b>1463046400</b>
	<b>PAY THE SUM OF</b>  PAY TO THE ORDER OF / PAGAR A LA ORDEN DE: _____	DATE _____ PURCHASER'S RECEIPT
	NON-NEGOTIABLE	

ADDRESS / DIRECCIÓN: \_\_\_\_\_ CONTRACT  
 TERMS: PLEASE READ THE TERMS OF THIS MONEY ORDER ON THE REVERSE SIDE.  
[www.moneygram.com](http://www.moneygram.com)

## TERMS OF THIS MONEY ORDER

### PURCHASER'S AGREEMENT:

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money Order, signing, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

**SERVICE CHARGE:**

If this Money Order is not used or cashed (presented for payment) within one year of the purchase date, there will be a non-refundable service charge assessed where not prohibited by law. The service charge will be deducted from the face amount of this Money Order. The amount of the service charge is one dollar and fifty cents (\$1.50) per month from the date of purchase, not to exceed \$126 in total or such lesser amounts as may otherwise be permitted by applicable law.

**STATE SERVICE CHARGE EXCEPTIONS:**

CA: Twenty-five cents (\$0.25) per month if not used or cashed within three years of the purchase date; not to exceed \$21.

**RESTRICTIONS ON USE**

The business or person selling this Money Order cannot use it to pay personal or business obligations

**LIMITED RECOURSE:**

This Money Order will not be paid if it has been forged, altered, or stolen, and recourse is only 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.

**Purchaser's Proof of Purchase**

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was purchased or any MoneyGram money order agent. Complete the entire form and mail it with a copy of this stub to the address on the claim card.

For additional questions, please call 1-800-542-3590.

Para recibir esta información en español, por favor llamar al 1-800-542-3590.

MONEYGRAM PAYMENT SYSTEMS, INC.  
P.O. BOX 9476, MINNEAPOLIS, MN 55480  
1-800-542-3590  
[www.moneygram.com](http://www.moneygram.com)

This Money Order will not be paid if it has been forged, altered, or stolen, and recourse is only 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.

For information concerning this Money Order, contact: MONEYGRAM PAYMENT SYSTEMS, INC. P.O. BOX 9476 MINNEAPOLIS, MN 55480 1-800-542-3590 [www.moneygram.com/moneyorder](http://www.moneygram.com/moneyorder)

If this Money Order is not used or cashed (presented for payment) within one year of the purchase date,

there will be a non-refundable service charge assessed where not prohibited by law. The service charge will be deducted from the face amount of this Money Order. The amount of the service charge is one dollar and fifty cents (\$1.50) per month from the date of purchase, not to exceed \$126 in total or such lesser amounts as may otherwise be permitted by applicable law.

#### STATE SERVICE CHARGE EXCEPTIONS:

CA: Twenty-five cents (\$0.25) per month if not used or cashed within three years of the purchase date; not to exceed \$21.

#### RESTRICTIONS ON USE

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#### PURCHASER'S AGREEMENT:

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#### Purchaser's Proof of Purchase

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For additional questions, please call 1-800-542-3590.

Para recibir esta información en español, por favor llamar al 1-800-542-3590.



**EXHIBIT D**

M 13172-V  
014 2005000 1/12  
PURCHASER  
PLEASE  
COMPLETE  
AT ONCE

FILL IN  
THE DATE

WHOM ARE  
YOU PAYING?

ENTER  
THE AMOUNT

SIGN, PRINT  
YOUR ADDRESS

Valid Money Order includes: 1. Heat sensitive, red stop sign AND 2. Contains a True Watermark hold up to light to view.

**MoneyGram.**

INTERNATIONAL MONEY ORDER  
000 0000 000

ISSUED/DRAWER:  
MONEYGRAM PAYMENT SYSTEMS, INC.

DATE 75-63  
819

To Validate: Touch the stop sign,  
then watch it fade and reappear

PAY TO THE  
ORDER OF /  
PAGAR A LA  
ORDEN DE:

AMOUNT

PURCHASER, SIGNER FOR DRAWER / COMPRADOR, FIRMA DEL LIBRADOR

Payable Through  
Wells Fargo Bank, N.A.  
Fallsburg, MN

SIGNATURE

ADDRESS /  
DIRECCIÓN:

BY SIGNING YOU AGREE TO THE SERVICE CHARGE AND OTHER TERMS ON THE REVERSE SIDE.

1:09 1900533:000 0000000C1# 90

**LIMITED RECOURSE:**

This Money Order will not be paid if it has been forged, altered, or stolen, and recourse is only 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.

**Payee's Endorsement:**

For information concerning this Money Order, contact: MONEYGRAM PAYMENT SYSTEMS, INC. P.O. BOX 9476 MINNEAPOLIS, MN 55480 1-800-542-3590 [www.moneygram.com/moneyorder](http://www.moneygram.com/moneyorder)

**PURCHASER'S AGREEMENT:**

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money

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**STATE SERVICE CHARGE EXCEPTIONS:**

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**Purchaser's Proof of Purchase**

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For additional questions, please call 1-800-542-3590.

Para recibir esta información en español, por favor llamar al 1-800-542-3590.

<b>MoneyGram Payment Systems, Inc.</b>	<b>FILE COPY</b> <b>NON-NEGOTIABLE</b>	<b>000 0000 000</b>	<b>AGENT DETACH THIS COPY</b>
FEE \$ _____	NOTICE TO PURCHASER: THIS COPY OF YOUR MONEY ORDER WAS GIVEN TO YOU IN ERROR. PLEASE RETURN IT IMMEDIATELY TO THE PLACE WHERE YOU BOUGHT IT. THANK YOU.		
FILE: PLEASE RETAIN THIS COPY FOR YOUR RECORDS AND/OR USE WHEN REPORTING SOLD ITEMS VIA TELEPORT.	DATE _____		
AMOUNT			
0000000000CII*			

 <b>MoneyGram.</b>	<b>INTERNATIONAL MONEY ORDER</b> <b>000 0000 000</b> <small>REFER TO THIS NUMBER FOR PROMPT SERVICE</small>
PAY TO THE ORDER OF / PAGAR A LA ORDEN DE: _____	DATE _____ <b>PURCHASER'S RECEIPT</b>
NON-NEGOTIABLE	
AMOUNT _____	DOLLARS _____
TERMS: PLEASE READ THE TERMS OF THIS MONEY ORDER ON THE REVERSE SIDE. <a href="http://www.moneygram.com">www.moneygram.com</a>	

## TERMS OF THIS MONEY ORDER

### PURCHASER'S AGREEMENT:

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money Order, signing, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

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was purchased or any MoneyGram money order agent. Complete the entire form and mail it with a copy of this stub to the address on the claim card.

For additional questions, please call 1-800-542-3590.

Para recibir esta información en español, por favor llamar al 1-800-542-3590.

**MONEYGRAM PAYMENT SYSTEMS, INC.**

**P.O. BOX 9476, MINNEAPOLIS, MN 55480**

**1-800-542-3590**

**[www.moneygram.com](http://www.moneygram.com)**

**EXHIBIT E**

THIS DOCUMENT HAS AN ARTIFICIAL WATERMARK PRINTED ON THE BACK. THE FRONT OF THE DOCUMENT HAS A HOLOGRAM & A HEAT REACTIVE THERMOCHROMIC INK. ABSENCE OF THESE FEATURES WOULD INDICATE A COPY.

12345678  
AGENT CHECK MONEY ORDER

AGENT FOR MONEYGRAM

PAY

TO  
THE  
ORDER  
OF

SAMPLE-VOID

DRAWER: MONEYGRAM PAYMENT SYSTEMS, INC.  
PO BOX 9888 MINNEAPOLIS, MINN 55409  
DRAWER: THE BANK OF NEW YORK MELLON  
BROOKLYN, NY

PURCHASER, SIGNER FOR DRAWER

2345678 10070920170012345678

IF THIS INSTRUMENT IS DESIGNATED ON ITS FACE AS A MONEY ORDER THE FOLLOWING APPLIES:

### TERMS OF THIS MONEY ORDER

#### PURCHASER'S AGREEMENT:

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money Order, signing, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

#### SERVICE CHARGE:

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**LIMITED RECOURSE:**

This Money Order will not be paid if it has been forged, altered or stolen, and recourse is only 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.

If the need arises to trace this Money Order, return to the place of purchase to fill out the proper forms.

**IF THIS INSTRUMENT IS DESIGNATED ON ITS FACE AS A MONEY ORDER THE FOLLOWING APPLIES:**

**LIMITED RECOURSE:**

This Money Order will not be paid if it has been forged, altered or stolen, and recourse is only 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.

---

**Payee's Endorsement**

For Information concerning this Money Order, contact MONEYGRAM PAYMENT SYSTEMS, INC.

**PURCHASER'S AGREEMENT:**

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money Order, signing, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

**SERVICE CHARGE:**

If this Money Order is not used or cashed (presented for payment) within one year of the purchase date, there will be a non-refundable service charge assessed where not prohibited by law. The service charge will be deducted from the face amount of this Money Order. The amount of the service charge is one dollar and fifty cents (\$1.50) per month from the date of purchase, not to exceed \$126 in total or such lesser amounts as may otherwise be permitted by applicable law.

**STATE SERVICE CHARGE EXCEPTIONS:**

CA: Twenty-five cents (\$0.25) per month if not used or cashed within three years of the purchase date; not to exceed \$21.

**RESTRICTIONS ON USE:**

The business or person selling this Money Order cannot use it to pay personal or business obligations.





[illegible]

*Plaintiff,*

V.

ARKANSAS, ET AL.,

*Defendants.*

Docket Nos. 22O145 &amp; 22O146 (Consolidated)

Filed February 1, 2019

## AFFIDAVIT OF JENNIFER WHITLOCK

COUNTY OF HENNEPIN )  
 )  
 ) ss.  
STATE OF MINNESOTA )

**JENNIFER WHITLOCK**, being first duly sworn,  
hereby deposes and says.

1. I am the Head of Global Supply Chain for MoneyGram International ("MoneyGram"). I make this affidavit from my own personal knowledge and from my review of documents and records maintained by MoneyGram.

2. Attached as Exhibit A hereto is a sample template of a MoneyGram Official Check known as an "Agent Check."

3. Attached as Exhibit B hereto is a MoneyGram template for an Official Check "Agent Check," setting forth the printing specifications for an Official Check - Agent Check.

4. Attached as Exhibit C hereto is a sample template of a MoneyGram Official Check known as a "Teller's Check."

5. Attached as Exhibit D hereto is a MoneyGram template for an Official Check "Teller's Check," setting forth the printing specifications for an Official Check – Tellers Check.

6. The attached print specifications for Official Checks have not been changed or altered from 2000 to 2017.

7. To the best of my knowledge, all MoneyGram Official Checks issued between 2000 and 2017 would be substantially similar to either the Official Check – Agent Item or Official Check – Teller's Check items attached hereto.

/s/ \_\_\_\_\_

Sworn to before me this  
3<sup>rd</sup> day of October, 2017

\_\_\_\_\_  
Notary Public

## EXHIBIT A

THIS CHECK MUST BE DEPOSITED IN A DEPOSIT BOX OR IN THE MAIL. THE FRONT OF THE CHECK MUST BE A PHOTOGRAPH OF A REAL AGENT.

DRIVER: MONEYGRAM PAYMENT SYSTEM, INC.  
P.O. BOX 800, MINNEAPOLIS, MN 55402  
DINER: FIRST INTERSTATE BANK  
BANK OF

1234567890  
AGENT CHECK

AGENT FOR MONEYGRAM

Pay  
To The  
Order Of

SAMPLE-VOID

AUTHORIZED SIGNATURE

1234567890 0920054110153456789123

[illegible]







SUPREME COURT OF THE UNITED STATES

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DELAWARE,

*Plaintiff,*

v.

ARKANSAS, ET AL.,

*Defendants.*

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Nos. 22O145 & 22O146 (Consolidated)

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Philadelphia, Pennsylvania

May 23, 2018

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**DEPOSITION OF EVA YINGST**

[pp. 8:19-24; 28:6-30:16; 32:11-33:18; 42:2-45:15;  
47:20-50:19; 52:16-61:10; 68:1-69:24; 82:8-86:15;  
112:10-113:19; 120:1-121:18; 136:4-156:1; 160:18-  
179:23; 180:19-182:9; 184:9-187:4; 190:10-196:15;  
198:21-201:20; 264:16-267:22; 278:8-279:24; 305:22-  
306:22; 310:3-312:24; 315:9-20; 317:19-318:19; 327:3-  
13; 419:4-420:21]

\* \* \*

EVA YINGST, after having been duly sworn, was  
examined and testified as follows:

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**EXAMINATION**

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\* \* \*

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?

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 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 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 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. . . . 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 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.

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 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. 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.

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 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 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. 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 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 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 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]

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. 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 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 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, 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.

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 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 in the top left right next to that it says "Pay to the order of." What's expected to be placed there?

A. That is where the purchaser would write the payee of the money order.

Q. Okay. So that could be a person, for example?

A. It could be.

Q. It could be a utility, for example?

A. Yes.

Q. Is that right? Okay. So that's the payee we talked about; is that right?

A. Yes.

Q. If had you look underneath that, it says purchaser, signer for drawer, and then it looks like it's in Spanish. Who is the purchaser?

A. That is the consumer who purchased the money order.

Q. Okay. And then it says here "Signer for drawer." Who is the drawer?

A. The drawer of the money order is MoneyGram.

Q. Okay. What does it mean it's signer for drawer?

MR. RATO: Object to the form to the extent it calls for a legal conclusion. You can answer.

THE WITNESS: I don't know exactly what that term is referencing. I know that is the place where the purchaser is to sign the money order.

BY MS. AHUMADA:

Q. Okay. So here it says, you know, purchaser and then, "Signer for drawer." Does that mean the purchaser is taking on some sort of agency role with the drawer which you said is MoneyGram?

MR. RATO: Object to the form to the extent it calls for a legal conclusion. You can answer.

MR. TALIAFERRO: Join.

THE WITNESS: To the best of my knowledge, no agency relationship.

\* \* \*

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 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 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 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.

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.

\* \* \*



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 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. 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.

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.

\* \* \*

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.

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 -- contractually 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 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.

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 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 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, 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 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.

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 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 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 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.

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 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 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.

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]

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?

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 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 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 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 differences.

\* \* \*

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 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 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.

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 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.

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 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 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 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 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 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 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 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, 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?

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 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 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.

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.

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 remitter and an address. What's expected to be there?

A. I believe that remitter 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 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.

\* \* \*

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?

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 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 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 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 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.

Q. So this document that's an agent check is no different than the agent check we've previously reviewed?

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:

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 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 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?

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 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 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.

\* \* \*

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 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"?

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 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. 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?

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?

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 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. 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 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.

\* \* \*

Q. Okay. And so if a person wants to buy a MoneyGram money order, they can look on MoneyGram's web page and find an agent nearby; is that correct?

A. Yes.

Q. Is there a similar resource for a person who has a desire to buy a MoneyGram official check?

A. No.

Q. If a person really wanted to buy a MoneyGram official check, how would they go about doing that?

A. They wouldn't typically want to buy a MoneyGram official check. They would want to get an official check from their banking institution.

Q. So they would go to their bank looking for some sort of official check product; is that correct?

A. Yes.

Q. And if it turned out that their bank used a MoneyGram product, they would end up with a MoneyGram product; is that correct?

A. Yes.

\* \* \*

Q. . . . And this is an agent check money order that we looked at earlier?

A. Yes.

Q. And I greatly apologize for this, but are you able to read the terms and conditions that are listed to the right of that document?

A. Could you be more specific?

Q. Are you -- it's just -- it's a procedural question. Are you capable of reading that fine print on the copy that's in front of you?

A. Yes.

Q. Okay. Now, when you were talking with Mr. Disher, you noted that an agent check money order has these terms and conditions associated with that; is that correct?

A. Yes.

Q. And do you understand generally why -- let me rephrase the question. Why does MoneyGram include terms and conditions on its money orders?

A. I guess my understanding is that as the issuer of this money order, we want to include these specific things related to the characteristics of the money order including the fact that we assessed a service charge and including that the purchaser, you know, is, that there is an agreement related to that and anything else. I think these, in my understanding, these items are on here because we've determined that we want these legal requirements to be part of this document.

Q. And these legal requirements that relate to an agent check money order also relate to a retail money order, correct?

A. Yes.

Q. And these terms and conditions do not appear on a MoneyGram official check cashier's check, do they?

A. No.

Q. And these terms and conditions do not appear on a MoneyGram official check teller's check, do they?

A. No.

Q. And these terms and conditions do not appear on a MoneyGram official check agent check, do they?

A. No.

MR. RATO: I'll just instruct the witness to let counsel, even if you know what the question is going to be, let him finish before you answer.

BY MR. TALIAFERRO:

Q. The first term and condition listed on Yingst Exhibit 8 is titled "Limited Recourse." Do you see that?

A. Yes.

Q. And it says, "This money order will not be paid if it has been forged, altered or stolen." And, I'm sorry, I can't --

MR. RATO: "And recourse is only against the endorser," I believe.

\* \* \*

Q. Do you understand from the limited recourse language that someone to whom this money order is presented has, for lack of a better term, limited options as to what their right to recover the money would be?

MR. DISHER: Objection to the form.

MR. RATO: Objection to the extent it calls for a legal conclusion. You can answer.

THE WITNESS: Yes.

\* \* \*

BY MR. TALIAFERRO:

Q. Now, in looking through the four exhibits to the Whitlock declaration, are there any terms and conditions to which a customer becomes subject when he or she purchases a MoneyGram official check?

MR. DISHER: Objection to form.

THE WITNESS: No.

MR. RATO: I'll join that objection. You can answer.

THE WITNESS: No, not that I'm aware of.

BY MR. TALIAFERRO:

Q. And just to clarify, because there has been some, a lot of discussion about that, a person who buys an agent check money order would become subject to terms and conditions, correct?

MR. DISHER: Objection to form.

MR. RATO: Join. You can answer.

THE WITNESS: Yes, yes.

\* \* \*

Q. And the last sentence in that paragraph says, "Official checks are used by consumers where a payer requires a check drawn on a bank and by financial institutions to pay their own obligations."

Do you see that?

A. Yes.

Q. Is that your understanding of how official checks are used?

A. Yes.

\* \* \*

# EXAMINATION

---

BY MR. RATO:

Q. If you can pull out Exhibit Yingst-10.

A. (Witness complies.)

Q. So that's the independent bank official check. We looked at this earlier. I will -- you were asked a question about whether this was an agent item -- an agent check or a teller's check. I will represent to you that you said it was an agent check. Obviously the transcript will speak for itself. I just wanted to ask, is there anything on here that says "Agent for MoneyGram" on the check?

A. There is not.

Q. Okay. And would this check have been printed by the bank client?

A. This -- some aspects. It's hard to tell.

Q. Right.

A. It's quite possible that -- that they are, that some of it is printed by them, yes.

Q. Okay. Can you tell me why you think it's an agent check and not -- you know, it doesn't make a difference to me.

A. The only -- if I had looked at this without seeing the 015 number at the bottom.

Q. Where?

A. In the MICR line of the item where it starts with 015, I believe that is the agent check product number designation.

Q. Okay.

A. And that's the reason that I believe this is intended to be an agent check.

\* \* \*



# DEPOSITION OF EVA YINGST— EXHIBIT 6

Teller's Check

<b>EF</b>		<b>ELIZABETHTON FEDERAL</b>		382223	
SAVINGS BANK		112-114 NORTH SYCAMORE STREET ELIZABETHTON, TENNESSEE 37843		09/13/2010	
PAY FIVE THOUSAND AND 00/100		DOLLARS \$ 15,000.00			
TO THE ORDER OF		26		TELLER'S CHECK	
DRAWER ELIZABETHTON FEDERAL SAVINGS BANK					
ISSUED BY ELIZABETHTON FEDERAL SAVINGS BANK P.O. BOX 1000, ELIZABETHTON, TENNESSEE 37843 PRIVATE: 615-688-1111		382223		100709210160040545024602	

1568008411717 - 0963 - 031413 - 8254271288

For Deposit Only By  
Elizabethton Federal Sav Bank  
By 09/13/2010  
By 2009-71288

**DEPOSITION OF EVA YINGST—  
EXHIBIT 7**

⑈ 921000 ⑆		⑆ 5011-0000 ⑆		⑈ 2000039 ⑆	
DRAWER ACME GAMMATH SYSTEMS INC P.O. BOX 8476 MINNEAPOLIS MN 55480 BRIDGE PLAZA EUPATULA CA					
DATE		CHECK NO.		AMOUNT	
				15.35	
				1001	
No. 921000					
AGENT FOR MONEYGRAM		VOID		EXPENSE CHECK	
PAY		TO THE ORDER OF			

921000

# DEPOSITION OF EVA YINGST— EXHIBIT 8

**MERCER SAVINGS\***  
**BANK**  
AGENT FOR MONEYGRAM

**PERSONAL MONEY ORDER**  
113403

ISSUED BY  
DRAWER  
MONEYGRAM PAYMENT SYSTEMS, INC.  
4000 W. 10TH AVE., SUITE 100  
DENVER, COLORADO 80202

DATE  
September 13, 2010

AMOUNT  
\$32.70

PAY TO THE ORDER OF  
\*\*\$32 DOLLARS AND 70 CENTS\*\* CH902578068640274  
NOT VALID FOR AMOUNTS OVER \$1,000.00

REMITTER  
[REDACTED]

ADDRESS  
[REDACTED]

113403\* 406110305560170010542150\*

IF THIS INSTRUMENT IS DESIGNATED ON ITS FACE AS A MONEY ORDER THE FOLLOWING APPLIES:

## LIMITED RECOURSE

This Money Order will not be paid if it has been forged, altered or stolen, and recourse is only against the issuer. This means that persons receiving this Money Order should accept it only from those known to them and against whom they have effective recourse.

## Payee's Endorsement

For information concerning this Money Order, contact MONEYGRAM PAYMENT SYSTEMS, INC.

**PURCHASE INSTRUCTIONS:**  
You, the purchaser, must sign the front of the Money Order, signing it as the back of the Money Order. The Money Order must be cashed by the payee, who must sign the back of the Money Order. The Money Order must be cashed by the payee, who must sign the back of the Money Order.

**DEPOSIT CHARGE:**  
If this Money Order is used in cash (immediately for payment) at a bank, there will be a non-refundable service charge of \$1.00. The service charge will be deducted from the amount of payment shown on the Money Order. The service charge is the same (whether the cash is in CA) and must be paid at the time of purchase, but not more than \$12.00 (\$21 in CA).

**RESTRICTIONS ON USE:**  
This instrument is not valid for the Money Order cannot be used to pay personal or business obligations.

Agent Check Money Order

# DEPOSITION OF EVA YINGST— EXHIBIT 9

<b>Official CHECK</b>		2731200
<b>BancorpSouth</b>		ISSUED BY HOME-CORP PAYMENT SYSTEMS, INC. P.O. BOX 1471, MINNEAPOLIS, MN 55401 DRAWN BY: ECUA, IA EQUA, IA DATE
<b>VOID</b>		
PAY TO THE ORDER OF	NAME OF BENEFITARY	ADDRESS
DRAWER: BANCORPSOUTH		<b>PROOF</b>
AUTHORIZED SIGNATURE		

\*2731200\* 1031005510160011959386\*

<b>Official CHECK</b>		2731200
<b>BancorpSouth</b>		ISSUED BY HOME-CORP PAYMENT SYSTEMS, INC. P.O. BOX 1471, MINNEAPOLIS, MN 55401 DRAWN BY: ECUA, IA EQUA, IA DATE
PAY TO THE ORDER OF	NAME OF BENEFITARY	ADDRESS
DRAWER: BANCORPSOUTH		<b>NON NEGOTIABLE</b>
AUTHORIZED SIGNATURE		<b>CREDIT COPY</b>

\*2731200\* 15533-0000 32722530\*

<b>Official CHECK</b>		2731200
<b>BancorpSouth</b>		ISSUED BY HOME-CORP PAYMENT SYSTEMS, INC. P.O. BOX 1471, MINNEAPOLIS, MN 55401 DRAWN BY: ECUA, IA EQUA, IA DATE
PAY TO THE ORDER OF	NAME OF BENEFITARY	ADDRESS
DRAWER: BANCORPSOUTH		<b>NON NEGOTIABLE</b>
AUTHORIZED SIGNATURE		<b>CUSTOMER COPY</b>




THIS DOCUMENT HAS AN OFFICIAL WATERMARK PRINTED ON THE BACK. THE FRONT OF THE DOCUMENT HAS A MICRO-PRINT SIGNATURE LINE. ABBREVIATION OF THESE FEATURES WILL INDICATE A COPY.

8724

**OFFICIAL CHECK**


VOID AFTER 90 DAYS

REMITTER 


DATE February 04, 2010

FIVE THOUSAND DOLLARS AND ZERO CENTS


PAY \$ 45,000.00

TO THE ORDER OF 

DRIVER: MONEYGRAM PAYMENT SYSTEMS, INC.  
P.O. BOX 878, MANASSAS, VA 20108  
DRIVER: NATIONAL BANK N.A., RUMFORD, ME

 **Independent Bank**

No. 1587035



AUTHORIZED SIGNATURE


66-229  
811

⑆1587035⑆ ⑆061103056⑆0150010371004⑆

INDEPENDENT BANK 012242152  
519 COVERED VILLAGE HALL  
RUMFORD ME 04862 20100914 1 0 49

ENDORSE HERE

DO NOT WRITE IN THESE SPACES  
OR SIGNATURES WILL BE  
INVALIDATED



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