SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*

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

ARKANSAS, *et al.*, *Defendants*

BRIEF IN SUPPORT OF DEFENDANT STATES' MOTION FOR ORDER DIRECTING PAYMENT OF ESCROW FUNDS

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Near the outset of this case, the parties and MoneyGram agreed that MoneyGram would not remit the proceeds from unclaimed Official Checks to states during this action, but instead would deposit those proceeds into the registry of the United States District Court for the Southern District of New York, pending the Supreme Court's decision on whether the common law or the Federal Disposition Act governed their escheatment. The Supreme Court held that the Federal Disposition Act, which provides for escheat to the state of purchase if the holder's books and records show the state of purchase, controls. MoneyGram's books and records *do* show the state of purchase for Official Checks.

So subject to disputes about what those records say about particular Official Checks, the escrow funds should be paid to the states listed in MoneyGram's records. Indeed, the Special Master ordered Delaware to identify—in Delaware's portion of the parties' status report filed over a month ago—the particular Official Checks it claimed were purchased in Delaware and relinquish its claim to the balance. Delaware did not do that. Instead, it merely noted that several banks that sold MoneyGram instruments only reported sales out of one location despite having branches in multiple states. Yet none of the banks it identified have a location in Delaware. So, by definition, those items could not have been purchased in Delaware and Delaware has no interest in those items. And that means that Delaware has failed to identify *any* instruments—besides those MoneyGram's records say were purchased in Delaware—in which it has an interest. Accordingly, the Special Master should order payment from the escrow to the states of purchase reflected in MoneyGram's records.

BACKGROUND

This case is about where MoneyGram should escheat the sums payable on abandoned Official Checks. Delaware claimed that under the common law they should escheat to it as MoneyGram's state of incorporation. A coalition of thirty states argued they should escheat under the Federal Disposition Act to the states of purchase identified in MoneyGram's records.

In June 2017, the parties agreed that MoneyGram should not remit proceeds from unclaimed Official Checks during this action, but should instead deposit those proceeds into the registry for the District Court for the Southern District of New York. Dkt. 38. Subsequently, the Special Master ordered the

Clerk of the District Court to accept proceeds of unclaimed Official Checks from MoneyGram for deposit in the District Court's registry. *See* Dkt. 61.

In February 2023, the Supreme Court held that MoneyGram Official Checks escheat under the Federal Disposition Act. *Delaware v. Pennsylvania*, 598 U.S. 115, 119, 140 (2023). That statute generally looks to an instrument's place of purchase, but it places particular priority on what the holder's books and records say the place of purchase was.

Indeed, the Act does not simply ask where an instrument was sold. Instead, it provides for escheat to the State where the holder's "books and records . . . show" the instrument was sold. 12 U.S.C. 2503(1). And if those books and records "do not show the State" where the instrument was sold, *id.* 2503(2), it provides for escheat to the state of the holder's principal place of business, "until another State can demonstrate by written evidence that it is the place of purchase," *id.* Defendant States and Delaware disagree on whether MoneyGram's principal place of business is Texas or Minnesota, *see* Dkt. 162 at 5-6, 10, but everyone agrees it is not Delaware.

These priority rules lead to a simple conclusion for MoneyGram Official Checks. MoneyGram Official Checks are sold by banks. *Delaware*, 598 U.S. at 125. Those banks send the proceeds of their sales to MoneyGram, *id.*, and, critically, "transmit[] information to MoneyGram that identifies where the product was sold," *id.*[1] That information can then be used to escheat unclaimed Official Check proceeds under the Disposition Act's primary rule—which, again, provides that if the holder's books and records show where an instrument was sold, that state is entitled to escheat.

The details are only slightly more complicated. When a bank sells a MoneyGram Official Check, it provides MoneyGram "financial institution address information." Declaration of Susan Johnson 2 ¶ 9, Dkt. 167 Ex. C. That information is "usually" "the physical location where the item is purchased." *Id.* at 3 ¶ 10. Occasionally, some banks with multiple locations report a large proportion of their sales of Official Checks from a single location. *Id.* at 3 ¶¶ 11-12. But that does not mean those banks' place-of-purchase

[1] Defendant States made this representation to the Court, citing MoneyGram's corporate representative's deposition testimony, *see* Reply 9, 13, 14, and Delaware did not dispute it.

reporting is inaccurate; it often merely reflects that the bank itself purchases Official Checks at that central location "for [the bank's] own disbursements." *Id.* at 3 ¶ 13. And whatever slight inaccuracies might exist, the addresses MoneyGram's seller banks report are "the most granular level of address information . . . that is available to MoneyGram." *Id.* at 3 ¶ 10.

ARGUMENT

A. The Special Master should order payment to the Defendant States listed in MoneyGram's books and records.

Using MoneyGram's place-of-purchase data, Defendant States calculated the amounts due to each state from the escrowed funds—including Delaware. Defendant States respectfully request that the Special Master order payment in those amounts, as described below.

Defendant States engaged Crowe LLP, a financial accounting firm, to review the disclosures MoneyGram supplied to the parties in 2023 concerning the escrowed funds. Declaration of Michael Unger 1 ¶ 2. Crowe reviewed and analyzed the data and prepared detailed schedules that break down the unclaimed instruments reported by MoneyGram on a state-by-state and item-by-item basis. Unger Decl. 1-2 ¶ 3. Those schedules have been provided to MoneyGram and Delaware and will be made available to any other party that requests them. Crowe used that data to calculate the total principal funds owed to each state, as well as the interest attributable to each state's respective principal balance through May 2023. *Id.* at 2 ¶ 4. Crowe has also prepared a summary chart of the pertinent information related to the escrowed funds. *Id.* at 2-3 ¶ 5.

1. Calculation Summary

The simplified results of Crowe's work are displayed in the table below. Defendant States respectfully request that the Court order the Southern District of New York escrow administrator to pay funds out of the escrow account to each of Defendant States in the amounts specified in the "Adjusted Total by State with Interest" column below. Unger Decl. 2-3 ¶ 5.

State	Adjusted Total by State	Interest in Escrow (through May 2023)	Adjusted Total by State with Interest
PA	$ 6,149,078.91	$ 238,829.06	$ 6,387,907.97
OH	$ 5,387,049.07	$ 200,112.17	$ 5,587,161.24
CA	$ 5,057,129.17	$ 187,309.88	$ 5,244,439.05
TX	$ 4,998,618.89	$ 183,753.39	$ 5,182,372.28
FL	$ 4,566,416.14	$ 178,342.33	$ 4,744,758.47
MD	$ 3,547,854.48	$ 139,962.09	$ 3,687,816.57
MI	$ 2,933,807.91	$ 97,311.51	$ 3,031,119.42
IN	$ 2,369,376.92	$ 79,665.70	$ 2,449,042.62
OK	$ 2,070,081.94	$ 75,462.96	$ 2,145,544.90
AL	$ 1,862,482.08	$ 66,892.57	$ 1,929,374.65
WV	$ 1,841,429.63	$ 78,186.94	$ 1,919,616.57
WA	$ 1,748,435.66	$ 66,934.35	$ 1,815,370.01
WI	$ 1,696,080.44	$ 61,624.75	$ 1,757,705.19
VA	$ 1,607,512.27	$ 56,713.97	$ 1,664,226.24
UT	$ 1,599,447.47	$ 58,938.73	$ 1,658,386.20
LA	$ 1,351,254.97	$ 49,649.50	$ 1,400,904.47
ND	$ 1,286,765.77	$ 47,282.43	$ 1,334,048.20
SC	$ 710,244.41	$ 26,477.68	$ 736,722.09
DE	$ 628,199.34	$ 25,369.21	$ 653,568.55
MT	$ 552,619.90	$ 19,860.78	$ 572,480.68
CO	$ 509,435.06	$ 18,123.28	$ 527,558.34
OR	$ 494,969.77	$ 26,266.44	$ 521,236.21
KS	$ 489,755.90	$ 19,194.96	$ 508,950.86
WY	$ 440,896.13	$ 21,903.17	$ 462,799.30
KY	$ 372,272.23	$ 15,248.77	$ 387,521.00
AZ	$ 349,718.22	$ 13,469.99	$ 363,188.21
IA	$ 264,652.10	$ 8,899.92	$ 273,552.02
AR	$ 203,588.11	$ 7,203.39	$ 210,791.50
ID	$ 192,363.19	$ 8,486.76	$ 200,849.95
NV	$ 47,617.25	$ 2,338.05	$ 49,955.30
NE	$ -	$ -	$ -

2. Principal Calculations

By way of explanation, the column "Adjusted Total by State" in the table above is the principal currently in escrow for each state. Unger Decl. 3

¶ 6. Crowe began by assigning to each state the abandoned instruments for which MoneyGram identified that state as the place of purchase. Unger Decl. 3 ¶ 7. Crowe then subtracted each of the abandoned instruments that have been reimbursed to MoneyGram pursuant to the Special Master's orders. *Id.* at 3 ¶ 8.

The total also reflects adjustments made by MoneyGram in January 2022 and in declarations MoneyGram submitted to the parties in 2023, along with a handful of very minor adjustments made by Crowe (which were less than $3,500 total) to entries in which the listed state did not correspond to the street address and city identified as the place of purchase for an instrument. Unger Decl. 3 ¶ 9.

3. Interest Calculations

Interest was calculated based on the June 2023 "Case History Report" prepared by the escrow administrator, which reports the amount of interest that the escrow account earned each month. Crowe divided the monthly interest payments into three time periods that correspond to the dates of the deposits made by MoneyGram: April 6, 2018, to March 9, 2021 ("First Time Period"); March 10, 2021, to August 29, 2022 ("Second Time Period"); and August 30, 2022, to May 31, 2023 ("Third Time Period"). Unger Decl. 3-4 ¶ 10. The Case History Report indicates that the escrow account earned $868,914.58 in interest in the First Time Period; $238,286.17 in the Second Time Period; and $2,579,959.37 in the Third Time Period. *Id.*

Crowe calculated the pro rata interest earned by each abandoned instrument across its total time in escrow. Every instrument deposited by MoneyGram was assigned a weight for each time period that corresponds to the value associated with that instrument at the beginning of that time period. Unger Decl. 4 ¶ 11. The interest earned during each time period was then assigned to the instruments pro rata based on their weight for that time period. *Id.*

For a particular time period, if an instrument had not yet been deposited, its weight would be $0. Unger Decl. 4 ¶ 12. If the instrument was deposited at the beginning of the time period, the weight would be the value of the instrument. *Id.* If the instrument was deposited in a prior time period, then the weight would be the value of the instrument plus the interest that it had accrued as of the beginning of the time period. *Id.* And if an instrument was

reimbursed to MoneyGram after earning some interest, then the weight for the time period would be the interest remaining in escrow associated with that instrument at the beginning of the time period. *Id.*

Crowe then assigned the interest earned during each time period to each instrument pro rata based on its weight. The "Interest in Escrow (through May 2023)" column provides, for each state, the sum of interest earned on each instrument that was assigned to that state by Crowe and that was not the subject of a MoneyGram reimbursement request. Unger Decl. 4 ¶ 13.

4. Calculation Totals

The "Adjusted Total by State with Interest" is the sum of the adjusted total column and the interest column. Unger Decl. 4-5 ¶ 14. The "Adjusted Total by State with Interest" reflects the proceeds of the abandoned instruments that the books and records of MoneyGram indicate were purchased in each of Defendant States, minus reimbursed items, and plus interest. *Id.*

Defendant States recognize that some questions remain unanswered, including what to do with funds associated with jurisdictions that are not parties to this action; what to do about interest that was earned on items prior to being reimbursed to MoneyGram, and the interest subsequently earned on that interest; and what to do about interest earned after June 1, 2023. *See* Unger Decl. 2 ¶ 5 n.1, 5 ¶ 14 n.2. But those questions do not affect the amounts due to Defendant States as reflected in the table above. These funds rightfully belong to Defendant States and have been sitting in escrow for years; there is no valid reason to further delay their distribution. Defendant States therefore respectfully request that the Special Master order payment to Defendant States in the amounts described above.

B. Delaware's counterarguments fail.

In its status report on the escrow and its opposition to Pennsylvania's motion for withdrawal of escrow funds, Delaware has opposed any release of escrow funds to the Defendant States. Citing a number of supposed anomalies in MoneyGram's data that affect only a small fraction of the escrowed instruments, Delaware argues that MoneyGram's records are largely inadequate to determine Official Checks' place of purchase and must be supplemented by discovery from third-party banks.

But those supposed anomalies do not justify discarding MoneyGram's records or continuing to delay the release of escrowed funds. First, perfect or not, the Disposition Act says that MoneyGram's records control. The Disposition Act does not contemplate using extra-records evidence to impeach the records; alternative evidence of place of purchase only becomes relevant when the holder's records do not speak to place of purchase. And Delaware's agreement that MoneyGram could properly report and escheat sums payable on unclaimed Official Checks using that same data going forward recognizes as much. Delaware's blanket objections to MoneyGram's records thus simply fall flat.

Second, though the Special Master instructed Delaware to identify instruments in which *it* had an interest, the anomalies Delaware claims exist in MoneyGram's records have nothing to do with Delaware. Instead, they largely concern banks that have locations in multiple states, *none of which are Delaware*, but for whatever reason report a large proportion of their Official Check sales from one location. Even if some of those sales were reported inaccurately, Delaware has no interest in them, and has no standing to contest or seek an audit of unclaimed property reports that have no connection with Delaware. Defendant States are entitled to receive custody of the unclaimed Official Checks currently held in escrow consistent with the terms of the Disposition Act and MoneyGram's records.

Third, even if the supposed anomalies Delaware raises were legally relevant—and even if Delaware had standing to raise them—they would only affect a small fraction of escrow funds. And that does not mean, as Delaware suggests, MoneyGram's records as a whole are unusable. While Delaware purports to cast doubt on all the records, its real concern is that less than a tenth of the money Defendant States seek is associated with multi-branch banks that report a large proportion of sales from a single location, and that another $1 million is associated with online banks that report from their headquarters. Delaware raises no concern about the 90 percent of the escrowed funds that remain. If the Special Master has concerns about any of the banks whose reporting Delaware questions, the proper approach is to not release the funds associated with those banks—not to deny release as to the overwhelming majority of funds about which there is no question.

1. The purported anomalies Delaware raises are legally irrelevant.

The Disposition Act conditions escheat on what the holder's "books and records . . . show" about place of purchase, not on some ultimate judicial determination of where an instrument was purchased. 12 U.S.C. 2503(1). As the Special Master observed at the status conference, the Act "expresses particular concern for the books and records of the holder of the funds," and does not "envision[] extensive inquiry into what's behind the information received by the holder of the funds." Transcript of May 4, 2023, Conference at 47:7-11.

Indeed, the Act only allows a court to consider other "written evidence" about the place of purchase if the holder's "books and records . . . do not show" where an instrument was purchased. 12 U.S.C. 2503(2). If a holder's books and records were rebuttable, Congress would not have confined the use of secondary evidence of place of purchase to situations where a holder's books and records are silent. For there is no practical way for a state to rebut the holder's books and records without extra-record evidence—like the MoneyGram declarations and bank websites Delaware has attempted to use to impugn MoneyGram's records. It follows that, so long as a holder's books and records speak to place of purchase, Congress intended them to be conclusive.

Though the bulk of Delaware's briefing on this issue merely contests the accuracy of small parts of MoneyGram's records, at times Delaware has suggested that MoneyGram's records do not even purport to show places of purchase. Quite to the contrary, MoneyGram's declarant explained that its institution-address records normally reflect the physical location of purchase, Johnson Decl. 3 ¶ 10, and are "the most granular level of address information" that MoneyGram has, *id.* The possibility that MoneyGram client banks occasionally do not report place-of-purchase data at the branch level does not mean MoneyGram's records are not meant to reflect place-of-purchase information.

Moreover, Delaware has stipulated to the use of MoneyGram's records for escheatment going forward, and the Supreme Court's decision recognized those records are reliable. Beginning with Delaware, it, along with MoneyGram, stipulated that on July 31, "MoneyGram will begin to report and remit unclaimed Official Check proceeds in accordance with each State's unclaimed property laws and the Federal Disposition Act." Dkt. 152 at 1. That means MoneyGram would escheat to each state according to its records. And

if MoneyGram's records are a valid basis on which to escheat going forward, they are a valid basis on which to escheat escrowed funds.

Delaware protests it took no position on whether MoneyGram would use its records or escheat to its principal place of business. Dkt. 162 at 5. But everyone understood MoneyGram would escheat according to its records and did not view them as inadequate. On the same date that Delaware entered into the stipulation, counsel for MoneyGram wrote to Delaware and said its recordkeeping suffered from a mere 0.035% error rate, Dkt. 167, Ex. B at 2, which it had since accounted for, Johnson Decl. 4 ¶ 18. So there was no doubt about whether MoneyGram intended to use its records to escheat starting July 31. And had Delaware really doubted their reliability— rather than merely seeking to delay payment to Defendant States—it would have litigated their use going forward rather than stipulating to it.

The Supreme Court has also already spoken on this issue. In its opinion, it said without qualification that MoneyGram's client banks "transmit[] information to MoneyGram that identifies where the product was sold." *Delaware*, 598 U.S. at 125. Defendant States made that representation to the Court, and Delaware did not dispute it. And far from an idle observation, the Court's understanding that MoneyGram had place-of-purchase information was a critical part of the factual context that informed its decision.

As the Court understood the choice before it, under the common law MoneyGram Official Check proceeds "would escheat inequitably" to Delaware, *id.* at 131, while if the Disposition Act's "solution for th[at] problem" applied, *id.* at 131, they would "escheat to the State of purchase," *id.* at 120; *see also id.* at 132 n.7 (comparing amounts Delaware would receive under the Act and common law). That comparison drove the Court's conclusion that Official Checks were "relevant[ly] similar[]" to money orders, which also escheated inequitably under the common law. *Id.* at 127; *see id* at 129 ("[T]he Disputed Instruments are similar to the 'money orders' that the FDA targets because they inequitably escheat in the manner that . . . the FDA specifically identifies as warranting statutory intervention."). But if Delaware were right and MoneyGram's records did not "show" places of purchase, the Court would have been faced with a choice between two inequities: escheat to Delaware under the common law, or escheat to MoneyGram's principal place of business under the Disposition Act. So the Court's understanding that MoneyGram had reliable place-of-purchase records—which Delaware did not dispute—was essential to its decision.

2. Delaware has no interest in the instruments it challenges.

At the May 4 status conference, the Special Master repeatedly instructed Delaware to file a status report identifying escrowed Official Checks it claimed there was a "reasonable possibility" were purchased in Delaware, and to relinquish its claim to the balance. Transcript 82:16-24; *see also id.* at 45:7-14. Delaware promised to do so. *Id.* at 45:16, 82:25.

But Delaware did not keep that promise. Instead, it generically asserted that there "is insufficient data" to determine whether Delaware has an interest in any of the instruments in escrow, Dkt. 162 at 2—even those sold by banks with no branches in Delaware, and even those sold by banks that report sales on a branch-by-branch basis, as "most [MoneyGram] Clients" do, Johnson Decl. 3 ¶ 12. This is a nonsensical position. Absent locations in Delaware, there is no "reasonable possibility" a bank sold Official Checks in Delaware, even online; a bank with no branches in Delaware is unlikely to have Delaware customers. And absent some anomaly in a bank's reporting, there is no reasonable basis on which to doubt its reporting's accuracy. Whatever Delaware's doubts about MoneyGram's data, Delaware cannot rationally assert it potentially has an interest in every instrument in escrow.

In its response to Pennsylvania's motion for withdrawal of escrow funds, Delaware did develop a somewhat more specific set of objections. But they are objections that Delaware has no standing to make. First, Delaware identified approximately $6 million associated with six banks that it says report Official Check sales solely or disproportionately from a single location, though they have branches in multiple states. Dkt. 166 at 12-14. Two of those banks, representing about $1.5 million in Official Check proceeds, have nothing to do with this motion; their sales are attributed in MoneyGram's records to non-party states, Rhode Island and South Dakota, that are outside Defendant States' request. *Id.* at 14 n.8. Second, Delaware identified approximately $2 million associated with what it claims are two online-only banks that report from a corporate office, but may make sales in other states. *Id.* at 15. Of that amount, only $1 million is at issue here; MoneyGram attributes the sales of the first bank Delaware identifies to Illinois, which is not a party. *Id.* Third, Delaware raised the issue of Official Checks issued by one institution with another listed as a "care of" address. *Id.* at 17.

Delaware does not have an interest in these funds. Delaware claimed that several banks have locations in multiple states but only or disproportionately report Official Check sales from one. But Delaware stopped short of claiming that any of those banks have branches in Delaware. That is because, as Pennsylvania showed in its reply, none of them do. Dkt. 165 at 10-11. So Delaware has no standing to object to the release of proceeds from those banks' sales. And Defendant States are willing to abide by MoneyGram's records regarding those banks for purposes of this motion. Any concerns about the accuracy of those particular records can be addressed between the states with plausible claims to the proceeds.

Delaware also raises the issue of MoneyGram records that list "care of" addresses—sometimes because the selling bank was subsequently acquired by an institution that was listed in place of the original bank and MoneyGram's records were updated to reflect the acquisition. To begin with, MoneyGram's declarations specify what adjustments, if any, should be made on account of those "care of" addresses. *See* Johnson Decl. 4 ¶ 18. And Defendant States' accounting firm already made the appropriate adjustments, which are reflected in the figures listed above. Moreover, none of these adjustments, which only affect 0.035% of the total in escrow, *see* Dkt. 167 Ex. B at 2, concern Delaware. In every case, the actual place of purchase was a state other than Delaware. Johnson Decl. 4 ¶ 18. So there is no basis to exclude banks with "care of" addresses from any payment from the escrow.

Finally, with respect to the allegedly online-only banks Delaware has identified, only approximately $1 million in Official Checks that Delaware claims was sold by an online bank based in Utah are relevant. Dkt. 166 at 15. And even here, Delaware lacks standing to object to the payment of those funds. Delaware claims MoneyGram's records do not show where that bank's Official Checks were purchased and that it is possible that some small portion of them were purchased by Delaware residents. Yet if Delaware is right and MoneyGram's records do not show where that bank's Official Checks were purchased, they would escheat to MoneyGram's principal place of business "until" Delaware could "demonstrate by written evidence that it is the State of purchase." 12 U.S.C. 2503(2). Delaware has offered no evidence that it is a state of purchase, only speculation that it might be. Until it does, its objection is merely that Texas (or Minnesota) should receive the proceeds, not Utah.

3. Even if credited, Delaware's arguments are not a basis to delay the distribution of the bulk of escrow funds.

As Defendant States explained above, Delaware's quibbles with MoneyGram's recordkeeping assume a different statute than Congress wrote—one that asks where an instrument was purchased in light of any available evidence, not where the holder's books and records say it was. Under the statute we actually have, MoneyGram's books and records control so long as they show place of purchase information.

Moreover, even if Delaware's objections were cognizable, none of them concern Delaware. Delaware has no interest in the distribution of Official Checks that are sold by banks without Delaware branches. And absent evidence that Delaware is a state of purchase, Delaware has no interest in its claims that MoneyGram's records do not show the place of purchase of online sales; that would merely mean that MoneyGram's principal place of business would escheat.

Yet even if the Special Master should disagree, Delaware still has not offered a justification for delaying the release of the vast majority of escrowed funds. Defendant States seek the payment of approximately $55 million of escrowed funds. Delaware's only, even remotely, colorable objection to that payment concerns just $1 million associated with one allegedly online bank. Apart from that bank, Delaware's main attack on MoneyGram's records is that MoneyGram permits banks to report from a single location, though most do not. Yet though Delaware has had months to scour MoneyGram's records for such banks, it has been unable to find a single one with a Delaware branch. And even the supposedly suspect reporting Delaware has identified does not amount to very much—less than a tenth of the total Defendant States seek. So whatever the merits of Delaware's objections to individual banks' reporting, Delaware has not come close to casting doubt on the reliability of MoneyGram's records as a whole. Instead, the paucity of Delaware's objections simply confirms that the overwhelming majority of MoneyGram's records accurately reflect Official Checks' place of purchase.

CONCLUSION

The Special Master should grant Defendant States' motion for an order directing payment of escrow funds to Defendant States.

September 26, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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