

Nos. 145 and 146, Original

In The
Supreme Court of the United States

—◆—
STATE OF DELAWARE,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA
AND STATE OF WISCONSIN,

Defendants,

AND

STATE OF ARKANSAS, *et al.*,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

—◆—
**REPLY BRIEF IN SUPPORT OF MOTIONS
FOR LEAVE TO AMEND BILL OF COMPLAINT
AGAINST THE COMMONWEALTH OF
PENNSYLVANIA AND THE STATE OF
WISCONSIN AND TO AMEND COUNTERCLAIM
AGAINST THE STATE OF ARKANSAS ET AL.**
—◆—

MATTHEW P. DENN
Attorney General
of Delaware

AARON R. GOLDSTEIN
State Solicitor

JENNIFER R. NOEL
CAROLINE LEE CROSS
Deputy Attorneys General
DEPARTMENT OF JUSTICE
STATE OF DELAWARE

Carvel State Office Building
820 N. French Street, SLC C600
Wilmington, DE 19801
(302) 577-8842

STEVEN S. ROSENTHAL*
MARC S. COHEN
TIFFANY R. MOSELEY
JOHN DAVID TALIAFERRO
LOEB & LOEB LLP
901 New York Avenue N.W.
3rd Floor East
Washington, DC 20001
(202) 618-5000
srosenthal@loeb.com

**Counsel of Record*

February 3, 2017

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION.....	7

TABLE OF AUTHORITIES

Page

CASES

<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	4
<i>Foman v. Davis</i> , 371 U.S. 178 (1962).....	4
<i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1993).....	5
<i>Nebraska v. Wyoming</i> , 515 U.S. 1 (1995).....	4, 5
<i>State of Arkansas, et al. v. State of Delaware</i> , No. 22O146 (June 9, 2016)	1
<i>State of Delaware v. Commonwealth of Pennsyl- vania and State of Wisconsin</i> , No. 22O145 (May 26, 2016).....	1

STATUTES

12 U.S.C. § 2503 (Disposition of Abandoned Money Orders and Travelers Checks Act) ...	2, 3, 5, 6
Uniform Commercial Code.....	6

OTHER AUTHORITIES

Fed. R. Civ. P. 8.....	3
Fed. R. Civ. P. 15(a)	3
6 C. Wright & A. Miller, <i>Federal Practice & Pro- cedure</i> § 1420 (3d ed. 2016).....	6

The State of Delaware, in further support of its Motion for Leave to Amend Bill of Complaint in Original Action No. 145, and in further support of its Motion for Leave to Amend Counterclaim in Original Action No. 146, and in reply to briefs filed by the Commonwealth of Pennsylvania, the State of Wisconsin, and the State of Arkansas *et al.*, hereby submits the following Reply Brief:

◆

ARGUMENT

Original Actions Nos. 145 and 146 began with a review by a group of States of a financial instrument – MoneyGram Official Checks – which that group of States concluded were erroneously escheated to MoneyGram’s state of incorporation – Delaware – instead of the state of purchase of those financial instruments. As part of its support for this conclusion, that group of States alleged that “Official Checks” sold by “other entities,” including those offered by Integrated Payment Systems, Inc. and PNC Bank, were escheated to their state of purchase rather than the state of incorporation of the offering entity. Those States included this allegation in their original Bill of Complaint against Delaware, as did Pennsylvania in its earlier action against Delaware in the Middle District of Pennsylvania. *See* Bill of Complaint at ¶ 33, *State of Arkansas, et al. v. State of Delaware*, No. 22O146 (June 9, 2016); Bill of Complaint at A-13-14, *State of Delaware v. Commonwealth of Pennsylvania and State of Wisconsin*, No. 22O145 (May 26, 2016). Delaware’s

Motion for Leave to Amend Bill of Complaint in Original Action No. 145 and its Motion for Leave to Amend Counterclaim in Original Action No. 146 seek to amend its claims against that group of States to include “Official Checks” sold by “other entities,” including those offered by Integrated Payment Systems, Inc. and PNC Bank, that were described by the group of States now opposing Delaware’s motions.¹

At paragraph 33 of their Bill of Complaint in Original Action No. 146, Arkansas *et al.* state the following:

33. Other entities – including Integrated Payment Systems, Inc., and PNC Bank N.A. – also issue official checks. Unlike MoneyGram, Delaware has not directed those entities to remit sums payable on unclaimed and abandoned official checks to Delaware and they do not remit those sums to Delaware. Instead, under relevant State laws and consistent with the Federal Disposition Act, those entities report and remit sums payable on unclaimed and abandoned official checks to the State of purchase.

Delaware, having had an opportunity to evaluate this allegation, believes that the additional financial instruments identified by Arkansas *et al.*, and any additional financial instruments with the same characteristics, were, contrary to Arkansas *et al.*’s allegation,

¹ The State of Arkansas *et al.* do not oppose Delaware’s Motion to Amend its Counterclaim to add California, Iowa, Maryland, Oregon, Virginia, and Washington to its original Counterclaim.

improperly escheated to their state of purchase. Delaware further believes that its motions to amend its Bill of Complaint against Wisconsin and Pennsylvania and its Counterclaim against Arkansas *et al.* should be granted to allow Delaware to recover funds from these instruments that were wrongfully escheated to the other States to prevent the potential for unnecessary and highly duplicative litigation over the proper escheatment of these other financial instruments in the future.

First, Delaware easily meets the pleading standard of Fed. R. Civ. P. 8 which requires only “a short and plain statement of the claim showing that the pleader is entitled to relief” and “a demand for the relief sought.” It also meets the requirements for amendments pursuant to Fed. R. Civ. P. 15(a). Delaware seeks leave to amend its Bill of Complaint in Original Action 145 and its Counterclaim in Original Action 146 to assert claims for certain unclaimed negotiable instruments that Delaware believes have been wrongly escheated to the other States which are parties to this action. These unclaimed negotiable instruments, which were issued by entities other than MoneyGram, do not fall within the definition of 12 U.S.C. § 2503 and should therefore have been escheated to Delaware, the domicile of the holder of this unclaimed property. Delaware’s Motion to Amend Bill of Complaint at 2; Delaware’s Motion to Amend Counterclaim at 2.

The allegation contained in Delaware’s proposed Amended Counterclaim and its proposed Amended

Bill of Complaint contains “a short and plain statement of the claim showing that the pleader is entitled to relief.” Delaware’s claim – that these unclaimed negotiable instruments were wrongly escheated to their state of purchase – provides “enough facts to state a claim to relief that is plausible on its face” and makes factual allegations that “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Its proposed amendments are therefore not futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). And given the allegation in *Arkansas et al.*’s Bill of Complaint regarding financial instruments that are similar to MoneyGram’s Official Checks but were sold by “other entities,” and Pennsylvania’s similar allegation in its earlier Complaint against Delaware in the Middle District of Pennsylvania, the other group of States can hardly claim that Delaware’s proposed amendment to its claims is speculative, fails to state grounds on which relief may be granted, or expands the case beyond the scope of what the parties had already contemplated.

Second, the factual circumstances and procedural posture are markedly different in this circumstance than in the case cited by Wisconsin, *Nebraska v. Wyoming*, 515 U.S. 1 (1995). In that case, the Court issued a decree in 1945 regarding apportionment of water rights from the North Platte River. In 1986, Nebraska sought additional relief from the consent decree. *Id.* at 4. In 1995, nearly a decade after first referring the case to a Special Master, and after already considering the

Special Master’s First and Second Interim Reports, *Nebraska v. Wyoming*, 507 U.S. 584 (1993), the Supreme Court considered exceptions to the Special Master’s Report on amendments to the pleadings. 515 U.S. at 4. In stark contrast to the *Nebraska* case, Original Actions Nos. 145 and 146 have barely begun. The cases have not yet been referred to a Special Master, much less has the Special Master issued any reports. Delaware’s request to amend its Bill of Complaint and Counterclaim has been made at the very outset of this matter, and the request relates specifically to the allocation of unclaimed negotiable financial instruments sold by “other entities” as described by the Arkansas *et al.* States which are parties to this matter. Consequently, Delaware’s proposed amendment does not “take the litigation beyond what [this Court] reasonably anticipated when [this Court] granted leave to file the initial pleadings.” *Id.* at 8.

Moreover, even if *Nebraska* were to be considered, Delaware meets the guidance laid out in in that case. The crucial distinction in *Nebraska* is whether the proposed modifications are of a “character and dignity which makes the controversy a justiciable one under our original jurisdiction.” *Id.* at 9. Delaware’s request to include in Original Actions Nos. 145 and 146 financial instruments which were erroneously escheated pursuant to the Federal Disposition of Money Orders Act is within the character and dignity of this Court’s original jurisdiction. The Court has already granted jurisdiction over the disposition of certain negotiable financial instruments sold by MoneyGram which States

allege should have been escheated pursuant to the Federal Disposition of Money Orders Act but were not. An examination of other similar instruments sold by entities other than MoneyGram which Delaware alleges should not have been escheated pursuant to the Federal Disposition of Money Orders Act but were, is likewise within the character and dignity of this Court's jurisdiction.

Third, Delaware's proposed Amended Bill of Complaint and its proposed Amended Counterclaim would not "unduly complicate the litigation." Arkansas *et al.*'s Response to Motion to Amend Counterclaim at 7 (citing 6 C. Wright & A. Miller, Federal Practice & Procedure § 1420 (3d ed. 2016)). To the contrary, it would avoid the Court having to address the proper disposition of these other financial instruments in a new future original action.

Additionally, the Arkansas States wrongly assume that the Complaints as presently constituted raise a "discrete legal question about sums payable on a specific instrument." Arkansas *et al.*'s Response at 5. As Delaware has maintained from the beginning, the proper classification of MoneyGram's Official Check instruments involves a number of factual determinations about the treatment of the instruments under a number of regulatory and statutory regimes, including the Uniform Commercial Code and various U.S. Treasury regulations. Even within the larger category of "MoneyGram Official Checks," subsets of MoneyGram Official Checks may have different characteristics that need to be evaluated. As a result, Wisconsin's assertion

that MoneyGram's Official Checks are simply higher denominated money orders is simply factually incorrect. Wisconsin's Response to Motion to Amend Bill of Complaint at 2. Addressing in this proceeding the same factual determinations for *all* financial instruments labeled "Official Checks," including those sold by entities other than MoneyGram, would allow the Court to make determinations about all of these instruments in the same action, rather than addressing each instrument *seriatim* in a series of original actions.

◆

CONCLUSION

The State of Delaware respectfully requests that its Motion for Leave to Amend Bill of Complaint and its Motion for Leave to Amend Counterclaim be granted.

Respectfully submitted,
MATTHEW P. DENN
Attorney General of Delaware
AARON R. GOLDSTEIN
State Solicitor
JENNIFER R. NOEL
CAROLINE LEE CROSS
Deputy Attorneys General
DEPARTMENT OF JUSTICE
STATE OF DELAWARE
Carvel State Office Building
820 N. French Street, SLC C600
Wilmington, DE 19801
(302) 577-8842

STEVEN S. ROSENTHAL*
MARC S. COHEN
TIFFANY R. MOSELEY
JOHN DAVID TALIAFERRO
LOEB & LOEB LLP
901 New York Avenue N.W.
3rd Floor East
Washington, DC 20001
(202) 618-5000
srosenthal@loeb.com

**Counsel of Record*

February 3, 2017