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October 2, 2023

By Electronic Mail

Hon. Pierre Leval
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Delaware v. Arkansas*, Nos. 22O145 & 22O146 (U.S.)

Dear Judge Leval,

Delaware respectfully requests that the Special Master uphold the current Case Management Order and require Defendants to engage in meaningful discovery befitting this important action between co-equal sovereigns. Defendants state (at 1) that Delaware did not "offer to narrow or withdraw any of its requests." This is false. For over a month, Delaware has repeatedly offered to work with Defendants regarding the scope of discovery, including by agreeing to specific document custodians and search terms for each request. But Defendants have refused to engage with Delaware. Defendants will not even articulate what documents they are willing to produce. Defendants' blanket refusal to provide any discovery is untenable.

Defendants' primary objection to discovery is their assertion that Delaware forfeited certain arguments for limiting liability. But at the May 4, 2023 scheduling conference, the parties discussed whether to litigate certain legal issues—including the availability of Delaware's defenses—or instead proceed to discovery. Defendants repeatedly and emphatically took the position that "everything discovery-related should just move forward," and that the availability of Delaware's defenses (such as, among other issues, whether Defendants have a cause of action) would be addressed on "cross-motions for summary judgment." Dkt. 150 at 54, 77. The Special Master adopted Defendants' proposed approach. Delaware has relied on that ruling and has begun the discovery process in good faith. The Special Master should reject Defendants' attempt to avoid all discovery and litigate—in a discovery motion—*the very issues* that Defendants expressly urged should be addressed at summary judgment.

In any event, Defendants' forfeiture argument fails. The case law is clear that in a situation like this one, where there is no prejudice to Defendants, Delaware is permitted to argue defenses

that were not initially raised in its pleadings. And there are especially strong reasons to fully litigate limitations on damages in this particular case. In briefing and at oral argument before the Supreme Court, Defendants told the Justices that these issues would be litigated on remand. The Special Master should not allow Defendants to walk back representations to the Supreme Court in important litigation between co-equal sovereigns. *See, e.g.*, Defs.' First Exceptions Reply 55 (arguing that the Court should not decide "a request to limit damages" because "the parties have not litigated any damages questions" yet (internal quotation marks omitted)); Sup. Ct. Oral Arg. Tr. at 58:13-15, 59:16-18 ("[W]e have not litigated the damages issue or the question, those kinds of arguments haven't been presented to Judge Leval . . . . I think that's something that could be resolved there [on remand].").

It would be especially dangerous for the Supreme Court to decide whether to imply a cause of action for damages, which is an indisputably live question, without also considering whether to infer a corresponding limitation on damages. Those two concepts are inextricably intertwined. And the Supreme Court has said that it is not possible to forfeit these types of arguments because of the important constitutional values at stake. Just two Terms ago, the Court rejected allegations of forfeiture in a case in which a plaintiff asked the Court to imply a cause of action. The Court explained that when the Supreme Court creates a cause of action, it "is an extraordinary act that places great stress on the separation of powers," *Egbert v. Boule*, 142 S. Ct. 1793, 1806 n.3 (2022) (quoting *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021)), and held that the Supreme Court has "a concomitant responsibility to evaluate any grounds that counsel against . . . relief." *Id.* (internal quotation marks omitted). This original jurisdiction action involves much the same separation-of-powers concerns present in *Egbert*: Defendants ask the Court to invent a cause of action that does not appear on the face of a statute. *See generally Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (explaining that the Court has "abandoned" the "*ancien regime*" of implying causes of action); *see infra* p. 21 n.9 (collecting numerous cases regarding the modern Supreme Court's refusal to invent causes of action). And this case also presents deep federalism concerns as well: Defendants seek to impose damages and State-law penalties on a sister sovereign. As in *Egbert*, these cross-cutting constitutional concerns militate in favor of the parties fully litigating and the Supreme Court addressing any grounds that counsel against the extraordinary relief Defendants seek.

Defendants also raise blanket relevancy and proportionality objections to Delaware's discovery requests. Delaware has done everything possible to negotiate with Defendants, including by repeatedly offering to agree on specific search terms and document custodians. As explained in more detail below, Delaware's requests are highly relevant. They go to the heart of the questions before the Special Master and the Supreme Court, which include not only the damages calculations that Defendants press, but also fundamental questions about whether there is an implied cause of action and, if so, what limitations the Court should place on original jurisdiction lawsuits over unclaimed property. *See* Dkt. 139 at 75:16-17 (Special Master

recognizing at second oral argument that "some limitations, statute of limitation or concept of limitation" would need to limit any damages). In particular, Delaware reasonably seeks information about what each Defendant knew, and when.

The extremely limited discovery at the first stage of this litigation—***totaling a mere 128 documents***—produced several letters demonstrating that specific Defendants affirmatively knew that MoneyGram was escheating Official Checks to Delaware, yet waited years to file suit. In a 2009 letter, for example, a bank informed Michigan that MoneyGram had changed its reporting practices for Official Checks. *See* Ex. A at 9. And in an audit conducted at some point after 2010, California acknowledged that MoneyGram "escheats unclaimed official checks after five years to the state of incorporation, i.e. Delaware." Ex. A at 1. Delaware is entitled to conduct discovery to obtain other highly relevant documents related to Defendants' knowledge. Delaware is also entitled to seek evidence to support its argument that the Supreme Court should impose clear limits on original jurisdiction actions over unclaimed property. Permitting a cause of action for retroactive damages—with no limitation on that cause of action—would create endless, destabilizing litigation in the Supreme Court between sovereign states. These kinds of concerns are the purview of the Supreme Court, and Delaware reasonably seeks evidence to support its arguments on these issues.

This Court should reject Defendants' formulaic proportionality objections. Those objections are premature at best. **In multiple meet and confers, Defendants' counsel represented to Delaware that Defendants have done *no work whatsoever* to determine whether Delaware's discovery requests are at all burdensome.** They have not talked to officials in any State about what data or documents are available. Nor have they inquired what data and documents are available from third-party vendors that host data on behalf of States. Defendants have not even attempted to determine whether the documents responsive to Delaware's requests are many or few—such as by running trial searches, a standard approach in assessing the cost of discovery. **As described in more detail below, Defendants employ sophisticated third-party vendors that maintain data and files, and Defendants should be able to reasonably produce material in this case.**

Defendants' own discovery requests require Delaware to identify custodians and run key-word searches, as well as pull data from a third-party vendor. Defendants can perform those same standard discovery activities. As Delaware has repeatedly made clear to Defendants, Delaware is willing to work with Defendants to identify custodians and search terms, as well as databases that contain relevant documents, and to seek to reach a reasonable resolution of any discovery dispute. **Defendants' refusal to engage with Delaware on this issue demonstrates that their concern is not about proportionality, but is instead an attempt to avoid producing any discovery whatsoever in a lawsuit where they seek over $150 million in damages, and seek to fundamentally destabilize the inter-State escheat regime.**

Finally, Delaware raises a troubling development for the Special Master's attention, which Delaware believes bears on the resolution of this discovery dispute. In their letter, Defendants stated that Pennsylvania no longer seeks discovery based on Delaware's "delay-based theories." Defs.' Letter at 5 n.6. The next day, Delaware received three separate FOIA requests filed by Pennsylvania's counsel in this matter. *See* Ex. B. Pennsylvania requested information regarding reporting of remittance instruments from specific holders Delaware identified in its discovery requests to Defendants.[1] Pennsylvania also requested all of Delaware's fee agreements, contracts, invoices, and records of payment with prior counsel Loeb & Loeb and with current counsel Hogan Lovells. Delaware reserves all rights and defenses regarding these FOIA requests. But it is highly improper for Defendants to abuse Delaware's FOIA procedures to seek information while at the same time asking the Special Master for permission to not even *respond* to Delaware's discovery requests. *Cf. Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. Ct. 2003) ("Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure."). Delaware stresses to the Special Master how concerning it finds Defendants' tactics.

* * *

Defendants' resistance to engaging in the normal discovery process is a strong signal that Defendants do not want to litigate this important action to its completion. Based on its prior experience in settlement discussions, the details of which Delaware is mindful it cannot disclose to the Special Master, Delaware believes the parties may benefit from formal mediation. Delaware respectfully requests that the Special Master appoint an appropriate mediator, such as a former federal judge, and order the parties to engage in mediation. *See* Cynthia J. Rapp, *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* 8 (Oct. Term 2004) ("[T]he Master cannot be involved directly in the mediation effort or in settlement discussions, but should at all times encourage settlement."). If the Special Master desires, the parties can also provide a potential list of mediators. Delaware has requested Defendants' position on mediation. As reflected in Pennsylvania's September 29 letter ("Pa. Letter"), Counsel for Pennsylvania has stated that Pennsylvania will engage in mediation if Delaware waives all arguments concerning the escrow account.[2] *Id.* at 2. Counsel for non-Pennsylvania Defendants has indicated they are

[1] The information Delaware requested is relevant to this litigation. The information Pennsylvania requested is not. Information regarding what non-MoneyGram official checks Defendants received will show Defendants' knowledge. Defendants knew holders were reporting official checks under the common law, and acquiesced to that status quo for years. By contrast, whether Delaware received other remittance instruments is irrelevant to Defendants' case.

[2] Delaware cannot divulge confidential settlement discussions. But Delaware strenuously objects to Pennsylvania's suggestion that it acted in prior discussions with anything but the utmost good faith. To the extent there has been delay in these proceedings, Defendants bear that responsibility.

open to mediation under certain conditions, but would object to staying discovery pending mediation. In light of the Special Master's October 2 notice that he will address the discovery dispute and disposition of the escrow in early November, Delaware submits that October may be a productive time for mediation.

Delaware is also concerned that Defendants' continuing refusal to respond to Delaware's discovery requests will make it impossible to complete discovery in the time allotted by the scheduling order. The parties will need time to produce documents, review them, and then conduct depositions, on top of whatever time it takes Defendants to respond to Delaware's discovery requests. But the parties' fundamental disagreement over discovery will not be resolved until November, leaving little time for the discovery process to play out. Delaware thus requests that the Special Master stay or extend all discovery deadlines pending the discovery conference. Non-Pennsylvania Defendants have previously indicated they are opposed to staying or extending the end of fact discovery pending the discovery conference, but are willing to agree to stay the parties' reciprocal obligations to respond to written discovery pending the discovery conference. (Delaware and Defendants' formal discovery responses are otherwise currently due on October 5.)

Discovery has been delayed nearly two months because Defendants will not even respond to Delaware's RFPs.

Pennsylvania's suggestion that release of the escrow funds is required to effectively reunite unclaimed property with owners is implausible. Any creditor can ask MoneyGram to honor an Official Check, and MoneyGram has sought reimbursement for these honored checks from the escrow to the tune of millions of dollars. Pennsylvania's latest attempt to manufacture urgency has no basis in reality.

Pennsylvania's desire to condition mediation on Delaware waiving its arguments is unreasonable. The proper resolution of the escrow account is disputed, and it could impact the calculation of retroactive damages, if any. Delaware believes mediation is warranted precisely so the parties can resolve this dispute, along with the dispute over retroactive damages. Delaware is also deeply concerned that Defendants will attempt to leverage any stipulation regarding the escrow into a theory that Delaware waived arguments regarding (for example) the accuracy of MoneyGram's books and records. Indeed, Delaware in good faith stipulated that MoneyGram should begin escheating funds according to the FDA. Defendants are *now* arguing that, by entering into the stipulation, Delaware waived its ability to contest whether MoneyGram's data shows the place of purchase for an instrument. *See* Dkt. 171 at 9-10. Defendants' argument is wrong, and it shows why global mediation is the best path forward. *See* Dkt. 162 at 5.

Finally, something "has changed since August." Pa. Letter 3. Defendants have made it clear they do not want to actually litigate this action, but rather desire to short-cut an appropriate and deliberate resolution of this important action between co-equal sovereigns.

Pennsylvania indicated that it objects to extending the deadline for Delaware to respond to Defendants' requests for production. Given the Special Master's recent notice, and in the interests of fairness, Delaware submits that a stay of all discovery deadlines is warranted.

I. Defendants Have Expressly Waived The Right To Litigate Their Forfeiture Arguments Prior To Summary Judgment.

Defendants primarily object to discovery based on their theory that, because Delaware failed to plead affirmative defenses, Delaware may not assert any defenses whatsoever. But at the May 4, 2023 hearing, Defendants *affirmatively asked this Court* to reserve resolution of that issue until summary judgment. Defendants have thus expressly waived the right to refuse to produce discovery on the ground that Delaware is not entitled to raise its defenses.

In the parties' April 27, 2023 status report, Delaware could not have been more clear in explaining that discovery on the damages issues in this case would require "extensive document discovery, including email communications, and depositions of all States' representatives, including but not limited to discovery related to the application of statutes of limitations, laches, and other equitable defenses, as well as any data each state has access to with respect to the escheated instruments and escheatment practices more generally." Dkt. 144 at 17. Defendants nevertheless argued that "the second phase of this litigation should proceed, just as the first phase did, with discovery followed by cross-motions for summary judgment." *Id*. at 19. According to Defendants, "discovery and briefing on all issues should be conducted simultaneously," because "the legal and factual issues might not be easily separated." *Id*. at 15.

At the May 4, 2023 hearing, Defendants again maintained their position, vigorously opposing any effort to litigate threshold legal issues prior to discovery, even after Delaware pointed out that extensive discovery would be necessary given that Defendants are seeking damages going back nearly 20 years on behalf of 30 different States. *See, e.g.*, Dkt. 150 at 8:3-5 ("[W]e're talking about discovery going back, you know, almost 20 years involving 30 different states, that's a really significant amount of discovery."). Defendants nevertheless repeatedly argued that fact issues could not be separated from legal issues, and that the parties should engage in discovery before briefing Delaware's defenses at summary judgment:

- "I think we can do discovery at the same time that we brief any legal issues that Delaware wants to raise, and we can just do that in summary judgment just as we did before. I mean, everybody agreed back in 2017 that we'd bifurcate this between the liability phase and the damages phase and now they want to bifurcate the bifurcation." *Id*. at 20:9-15.

- "I think just like in the liability phase, your Honor, there's no way to break those up and divide them separately." *Id*. at 23:8-10.

- "And we think, you know, those may be closer calls about whether there's a cause of action as opposed to the residue itself. But all of that's part of the damages phase, and we can do

discovery on that all at the same time. We simply don't see any reason to break up those proceedings." *Id*. at 24:7-12.

- "[W]e were envisioning that this would all happen together and at the end of the process, there would be cross-motions for summary judgment." *Id*. at 54:12-14.

- "Separating out those legal and factual issues I think is going to be somewhat difficult." *Id*. at 56:22-24.

- "Like, it's difficult to break out the factual stuff from the legal stuff there. I'm just not seeing a clear divide to brief those issues." *Id*. at 57:13-15.

- "I would emphasize again I think everything discovery-related should just move forward, we would file cross-motions for summary judgment . . . . We should just move forward with everything, and our position is to file cross-motions at the end." *Id*. at 77:19-21, 77:25-78:2.

- "Your Honor, the schedule we had proposed is the schedule that we had put in the status report, I believe at Page 23, which would just resolve everything together. Rather than filing a motion on some issues, not others—not entirely sure what those are at this point—you know, we just proceed forward with discovery, we brief it all at the end, the same way we did the liability phase, we wrap this thing in a bow and sent [sic] it to the Supreme Court." *Id*. at 78:17-79:1.

The Special Master expressly adopted Defendants' proposed approach after careful consideration, ordering the parties to proceed to discovery without briefing the very same legal arguments that Defendants are now apparently asking the Special Master to decide *prior to discovery*. *See id*. at 79:7-8. **Having prevailed on their proposed approach on May 4, Defendants cannot now seek the opposite process**.

If that were not enough, Defendants waived their objections a second time on August 4, 2023. **In their written discovery, Defendants expressly sought discovery from Delaware related to laches and statutes of limitations.** *See* Ex. C at 23-24, Pa. Interrogatory 5 (requesting "the complete factual basis for" any laches argument); Pa. Interrogatory 6 (requesting case law regarding laches); Pa. Interrogatory 7 (requesting Delaware identify documents, witnesses, and other information related to laches); Pa. Interrogatory 8 (requesting Delaware identify statutes for statutes of limitations defenses); Pa. Interrogatory 9 (requesting Delaware identify case law regarding statutes of limitations defenses); Pa. Interrogatory 10 (requesting date on which Delaware learned Pennsylvania "was disputing the escheat of Official Checks"). In short, Defendants sought information for themselves related to Delaware's arguments for limiting damages. They cannot complain about Delaware's discovery on the same topics.[3] **And to make**

[3] Defendants claim (at 5 n.6) that "counsel for Pennsylvania advised Delaware that it need not respond to those requests while this dispute is resolved." Counsel for Pennsylvania made no such

matters worse, as explained above, a day after Defendants submitted their letter requesting that the Special Master limit the scope of discovery Delaware may receive before the Supreme Court, counsel for Pennsylvania filed FOIA requests seeking yet more information from Delaware.

In reliance on the Special Master's order, Delaware has devoted significant resources to the discovery phase of this litigation and is complying in good faith with the Special Master's order that discovery should take place before briefing legal arguments at summary judgment. It is Delaware's position that Defendants ought to do the same. **Indeed, Defendants themselves filed 64 written discovery requests of Delaware, including improper multi-part interrogatories.** Delaware has requested documents from Defendants, has provided detailed explanations of the types of documents it seeks, and has repeatedly offered to reach an agreement on the scope of discovery, including by identifying specific custodians and search terms. It is incumbent on Defendants to work with Delaware and articulate what discovery Defendants are willing to produce. This is the basic discovery process—for which Defendants advocated.

II. Delaware Is Entitled To Raise Defenses To Defendants' Extraordinary Claims.

Given the Special Master's May 4 order regarding the structure of the damages phase, the Special Master need not and should not decide whether Delaware may raise unpleaded arguments for limiting damages at this juncture. That is set to be litigated at summary judgment. But if the Special Master does address Defendants' arguments prior to summary judgment, they will fail for at least three important reasons. *First*, as the Special Master has elsewhere explained—consistent with longstanding precedent—parties may raise unpleaded affirmative defenses in the absence of "any significant prejudice from . . . raising it." *Rinaldi v. City of New York*, 756 F. Supp. 111, 115 n.3 (S.D.N.Y. 1990) (Leval, J.). This case meets that well-trodden standard hand-in-glove. *Second*, Defendants told the Supreme Court that the legal arguments regarding limiting damages *would be litigated on remand*. Defendants thus affirmatively waived, or at a minimum forfeited, any objections to Delaware raising arguments for limiting damages. *Third*, the Supreme Court has held that it should address all arguments foreclosing relief in cases like this one where relief will stress important structural, constitutional values.

A. Federal Courts Routinely Permit Parties To Raise Affirmative Defenses At Summary Judgment.

Litigation in federal courts is not "a game of skill in which one misstep by counsel may be decisive to the outcome." *Foman v. Davis*, 371 U.S. 178, 181-182 (1962) (quotation marks

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statement. Counsel for Pennsylvania indicated that Delaware need not respond to *one* of Pennsylvania's requests about money transmitter regulators. In any event, Pennsylvania *does not dispute* that it is seeking discovery about Delaware's defenses. And the day after Defendants made their representation to the Special Master, Pennsylvania's counsel submitted FOIA requests to circumvent the discovery process in this case.

omitted). Rather, "the purpose of pleading is to facilitate a proper decision on the merits." *Id*. (quotation marks omitted). As a result, courts of appeal routinely hold that "if the affirmative defense is raised in the trial court in a manner that does not result in unfair surprise," then a "technical failure to comply precisely with Rule 8(c) is not fatal." *Motion Med. Techs., L.L.C. v. Thermotek, Inc.*, 875 F.3d 765, 771 (5th Cir. 2017) (cleaned up). "Because Rule 8(c)'s purpose is to give the plaintiff fair notice," courts consider affirmative defenses where "(1) the defendant raised the affirmative defense at a pragmatically sufficient time, and (2) the plaintiff "was not prejudiced in its ability to respond." *Id*. (cleaned up). Under this standard, courts "repeatedly reject[] waiver arguments when a defendant raised an affirmative defense for the first time at summary judgment—or even later." *Id*. at 772 (collecting numerous cases).

The Federal Reports are awash with precedent from across the Circuits affirming this commonsense approach to pleadings. *See, e.g.*, *Garofalo v. Village of Hazel Crest*, 754 F.3d 428, 436 (7th Cir. 2014) ("We will generally find that the failure to plead an affirmative defense in the answer works a forfeiture only if the plaintiff is harmed by the defendant's delay in asserting it.") (cleaned up); *Hewitt v. Mobile Rsch. Tech., Inc.*, 285 F. App'x 694, 696 (11th Cir. 2008) (per curiam) ("When a plaintiff has notice that an affirmative defense will be raised at trial, the failure of the defendant to plead the affirmative defense does not prejudice the plaintiff, and it is not error for the district court to hear evidence on the issue."); *First Union Nat'l Bank v. Pictet Overseas Tr. Corp.*, 477 F.3d 616, 622 (8th Cir. 2007) ("We have, therefore, eschewed a literal interpretation of the Rule that places form over substance."); *Balter v. United States*, 172 F. App'x 401, 403 (3d Cir. 2006) (per curiam) ("As we have noted in the past, affirmative defenses (including the statute of limitations) are not waived if raised at a pragmatically sufficient time with no prejudice to the plaintiff.") (internal quotation marks omitted); *Rose v. AmSouth Bank of Fla.*, 391 F.3d 63, 65 (2d Cir. 2004) ("We have recognized that waiver of an unpleaded defense may not be proper where the defense is raised at the first pragmatically possible time and applying it at that time would not unfairly prejudice the opposing party.") (cleaned up); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) ("In the absence of a showing of prejudice, however, an affirmative defense may be raised for the first time at summary judgment."). The precedent Defendants cite says the same thing. *See, e.g.*, *Haas Door Co. v. Haas Garage Door Co.*, No. 3:13 CV 2507, 2016 WL 1047242, at *15 (N.D. Ohio Mar. 16, 2016) (cited at Defs.' Letter 3) ("Thus, if a plaintiff receives notice of an affirmative defense by some means other than pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice." (quotation marks omitted)).[4]

[4] Defendants cite (at 5) a case in which the district court required a party to plead un-pleaded affirmative defenses. Reading that case only supports Delaware's position. That court explained that pleadings should not "promote form over substance," and it intended the pleading in that case to facilitate threshold litigation over the defense. *United States v. All Assets Held at Bank Julius Baer & Co.*, 202 F. Supp. 3d 1, 9 (D.D.C. 2016). Here, in contrast, Defendants have given ample notice of their defenses, which the Special Master indicated would be litigated at summary judgment. If the Special Master indicates that Delaware should seek to amend its pleadings,

This blackletter rule quickly resolves Defendant's objection. Defendants cannot credibly claim that they are unfairly prejudiced at this juncture, where discovery on damages has yet to begin. The Special Master bifurcated the liability phase from the damages phase, and Delaware made clear long before the damages phase began that it intends to defend against Defendants' damages claims. *See, e.g.*, Del. First Exceptions Br. 49 n.12 (Supreme Court briefing); Dkt. 139 at 47:6-12 (second oral argument before Special Master); Dkt. 144 at 2 (joint status report).[5] Under these circumstances, the Special Master should likewise allow Delaware's discovery concerning the viability of Defendants' damages claims.

B. Defendants Told The Supreme Court That The Parties Would Litigate Limitations On Damages.

Defendants have also repeatedly waived, and at a minimum forfeited, any alleged failure on Delaware's part to raise defenses against Defendants' damages claims. Before the Supreme Court, Delaware noted that because of the "procedural posture, the parties ha[d] not litigated whether the Court should impose a statute of limitations or other equitable restriction on a remedy for incorrectly escheated products." Del. First Exceptions Br. 49 n.12. Delaware then argued that, if the Court ruled for Defendants, it should "limit Defendants to prospective relief only." *Id.* In response, Defendants argued *only* that the Court should not consider "a request to limit damages" because "the parties have not litigated any damages questions" yet. Defs.' First Exceptions Reply 55 (internal quotation marks omitted). At no point did Defendants assert that Delaware *forfeited* all arguments for limiting damages. Quite the opposite: **Defendants' brief strongly implied that all such legal issues would receive a full hearing on remand.**

Delaware can do so, but based on Delaware's review of the case law on this issue, such amendment is unnecessary in these circumstances and would simply delay resolution of the parties' dispute.

[5] In Delaware's September 5, 2023 letter to Defendants (at 1 n.1), for the avoidance of doubt going forward, Delaware reiterated its intent to raise at least the following arguments for precluding or limiting damages, penalties, interest, or other claims by Defendants: (1) Defendants lack a cause of action; (2) Defendants lack authority to escheat under state law, and thus under the FDA, where state statutes of limitations have run or where other state law barriers prevent escheat (such as acquiescence, laches, etc.); (3) a statute or statutes of limitations apply to the FDA and bar or limit Defendants' claims; (4) Defendants are barred by constitutional principles including federalism, comity, and sovereign immunity from pursuing Delaware for damages; (5) state statutes of limitations and other state law principles (such as acquiescence, laches, etc.) bar or limit Defendants' claims; (6) Defendants acquiesced to Delaware's escheat, and so cannot recover damages; (7) Defendants' claims are barred by laches; (8) Defendants' request for damages is barred by general equitable principles; (9) Defendants are unable to recover damages because their hands are unclean; and (10) the Supreme Court's decision in this matter, or any remedy based on that decision, should not apply retrospectively.

Defendants made this explicit at oral argument before the Supreme Court. When Justice Gorsuch asked about the lack of a cause of action in the FDA, Defendants' counsel stated that the parties had "not litigated the damages issue" or "arguments" regarding limiting damages, expressly recognizing that Delaware's defenses would be litigated at a later stage of the proceedings. Sup. Ct. Oral Arg. Tr. 58:11-18. **Defendants specifically agreed that the cause of action question "could be resolved" by the Special Master—and again never suggested that Delaware forfeited legal arguments against paying damages.** *Id.* at 59:9-18 (emphasis added).

A couple of months later, a similar pattern occurred when the Special Master heard supplemental oral argument on the Draft Second Interim Report. *See* Dkt. 139. The Special Master asked Delaware a question that mentioned the possibility of damages and "some limitations, statute of limitation or concept of limitation." *Id.* at 75:16-17. In answering the Special Master's question, and elsewhere at oral argument, Delaware's counsel noted that Defendants' counsel had "suggested to the Supreme Court when Justice Gorsuch raised this, that this was actually an issue for damages." *Id.* at 76:3-5; *see id.* at 47:6-12. **Defendants counsel *never* contested the fact that these issues would receive a full hearing in the damages phase of the litigation.**

In short, Defendants represented to the Supreme Court and the Special Master that Delaware's defenses would be litigated in the damages phase of this litigation. The Special Master should not permit Defendants to backtrack on their representations.

C. The Supreme Court Excuses Forfeiture When The Requested Relief Stresses Fundamental Constitutional Values.

Defendants' forfeiture argument fails for a third important reason: As the Supreme Court recently explained, it is imperative for the Court to address all arguments for limiting relief when the relief sought impacts fundamental constitutional values. Defendants ask the Supreme Court to recognize a judicially invented cause of action. Inventing a cause of action "is an extraordinary act that places great stress on the separation of powers," and the Court has "a concomitant responsibility to evaluate any grounds that counsel against . . . relief." *Egbert*, 142 S. Ct. at 1806 n.3 (quotation marks omitted) (quoting *Nestlé USA*, 141 S. Ct. at 1938). In addition, the relief Defendants seek also stresses important federalism values: Defendants ask the Court to award an extraordinary amount of damages and state-law penalties against a fellow sovereign. These additional federalism concerns further militate in favor of the Supreme Court evaluating every ground to prevent the extraordinary and unconstitutional relief Defendants seek. Indeed, it is telling that the Supreme Court precedent on which Defendants rely (at 5) expressly confirmed that "a court may consider a statute of limitations or other threshold bar the State failed to raise in answering" a complaint. *Wood v. Milyard*, 566 U.S. 463, 466 (2012).[6]

[6] Defendants' forfeiture argument fails for additional reasons, including because some of Delaware's arguments for limiting damages do not qualify as affirmative defenses. In this informal

Finally, as the Special Master has recognized, the question of whether to infer a cause-of-action for damages is inextricably intertwined with the question of whether to infer a corresponding limitation on damages. *See* Dkt. 139 at 75:16-17 (recognizing that "some limitations, statute of limitation or concept of limitation" would need to apply if the FDA permits damages). It makes little sense for the Court to decide the former question (which is indisputably live) and not address the latter.

III. Delaware Seeks Relevant Documents.

Under Rule 26, a party is entitled to discovery "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Relevancy and proportionality are distinct principles, and Delaware understands Defendants to object to Delaware's RFPs on both grounds. Before addressing these objections, **Delaware stresses how unusual it is for a party to seek a protective order to avoid even *responding* to written discovery. This is not the normal discovery process contemplated by the Federal Rules.** Under that normal process, Defendants would indicate what discovery they are willing to produce and object to specific RFPs where necessary. The parties would then confer regarding specific areas of disagreement and seek to reach consensus regarding the scope and nature of discovery. For multiple weeks, in the spirit of the Federal Rules and to try to move this litigation forward, Delaware has sought to negotiate with Defendants regarding the scope of discovery, including by discussing specific search terms and custodians. But Defendants have declined to engage in that process or clearly explain what discovery they would be willing to produce.

Defendants' relevancy objections have no merit. "Discovery rules are to be accorded a broad and liberal treatment to effectuate their purpose that civil trials in the federal courts no longer need be carried on in the dark." *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170 (2d Cir. 2003) (cleaned up). In particular, "Rule 26 relevance is an 'obviously broad rule' that is 'liberally construed.' " *During v. City Univ. of N.Y.*, No. 05 Civ. 6992(RCC), 2006 WL 2192843, at *2 (S.D.N.Y. Aug. 1, 2006) (quoting *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991)). "A request for discovery should be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party." *Sugar v. Tackett*, No.

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letter, Delaware does not waive or forfeit any additional arguments, including arguments with respect to whether it is entitled to raise specific defenses. Additionally, Defendants have elsewhere suggested that Delaware forfeited its ability to argue that MoneyGram's principal place of business is Minnesota—a verifiable fact to which Defendants *agreed* in the liability phase. *See* Dkt. 122 at 81 n.47. For the avoidance of doubt, and to facilitate any discovery Defendants believe necessary, Delaware intends to prove that Minnesota is MoneyGram's principal place of business. *See also Bennett v. Sterling Planet, Inc.*, 546 F. App'x 30, 34 (2d Cir. 2013) (per curiam) (explaining that court should relieve party of mistake in pleading where it will aid presentation on the merits and no prejudice results).

1:20-cv-00331-KWR-LF, 2021 WL 5769463, at *4 (D.N.M. Dec. 6, 2021) (quotation marks omitted); *Reagan v. Okmulgee Cnty. Crim. Just. Auth.*, No. CIV-20-243-RAW, 2021 WL 4315753, at *2 (E.D. Okla. Sept. 22, 2021) ("Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." (quotation marks omitted)).

The information Delaware seeks is critical to proving its core case. As described in more detail below, Delaware has requested documents regarding Defendants' actual and constructive knowledge of MoneyGram's escheat practices to prove that Defendants long knew about—and affirmatively acquiesced—to Delaware's receipt of Official Checks. The limited evidence Delaware has is striking. Documents MoneyGram provided show that the State of Ohio definitively knew about MoneyGram's reporting of Official Checks in 2006—the very beginning of the claims period in this case. *See* Ex. A at 4-5. In response to Ohio's inquires, MoneyGram told Ohio that Official Checks "are third party bank checks and therefore are not within the scope of the exception." Ex. A at 7. Ohio then acquiesced to MoneyGram's legal analysis, which was Delaware's position in the liability phase of this litigation and which is the legal conclusion the Special Master largely adopted in his second interim report. *See* Dkt. 140 at 3, 24-27. Other documents MoneyGram provided show that California's money transmitter regulator *twice* audited MoneyGram, once in 2009 and once later. In the course of those audits, California expressly acknowledged MoneyGram's reporting of Official Checks to Delaware. *See* Ex. A at 1. Similarly, a *multistate audit* of MoneyGram's money transmitter licenses around 2011 again acknowledged MoneyGram's reporting of Official Checks to Delaware. *See* Ex. A at 3 ("[M]ultiple states indicated that these items should not be escheated to Delaware in its capacity as the Holder's state of incorporation. Instead, these states contend that such items are escheatable to the state of purchase as in accordance with applicable state law."). Delaware has other evidence showing that California and Michigan communicated with banks and MoneyGram regarding the reporting of Official Checks as early as 2009. *See* Ex. A at 9, 12, 16, 19-20. **This information is likely the tip of the iceberg in Defendants' possession, given that that Defendants produced only *128 documents* in the initial phase of the litigation.**

Delaware has also requested documents regarding Defendants' imposition of damages, penalties, and interest on private holders to prove that Defendants rarely if ever impose these measures on private companies. According to basic principles of federalism and comity, Defendants cannot treat a fellow sovereign with less solicitude than they show a private party. Delaware has requested information regarding the movement of funds between states to debunk Defendants' false premise that States routinely redistribute funds amongst themselves. And Delaware has requested information regarding Defendants' current interpretation of the FDA to prove that Defendants have taken inconsistent positions, supporting Delaware's equity defenses, and to show that Defendants' refusal to admit any limits on their damages theories would lead to

endless and destabilizing litigation among sovereign states over unclaimed property. Such concerns are properly before the Supreme Court in an original jurisdiction case.

For the Special Master's benefit, Delaware has grouped its discovery requests into categories and explained why each category of information is relevant. Delaware reiterates that, for each category, Delaware stands ready to negotiate over the scope of the requests, including by identifying specific search terms and custodians. That process, however, can only proceed if Defendants indicate what information they are willing to produce.

1. MoneyGram

Discovery involving MoneyGram is critical to several of Delaware's arguments, including statute of limitations, laches, acquiescence, and other equitable defenses. Through Defendants' communications and documents regarding MoneyGram, Delaware seeks to show that each Defendant possessed actual or constructive knowledge about MoneyGram's practices for years, sat on their hands, and cannot now seek an unjust windfall from Delaware.

MoneyGram reincorporated in Delaware in 2005, and MoneyGram changed some of its reporting practices for Teller's Checks at that time. *See* Ex. A at 23. Delaware has therefore requested discovery involving MoneyGram going back to 2000 so that it can demonstrate what Defendants knew before and after MoneyGram's reincorporation. In addition, even before its incorporation, MoneyGram was reporting Agent Checks to its state of incorporation. Information dating back to 2000 is thus relevant to proving Defendants' knowledge of MoneyGram's policies regarding Agent Checks prior to MoneyGram's incorporation in Delaware.

These requests should come as no surprise to Defendants. In 2006 correspondence between Ohio and MoneyGram, which MoneyGram produced in the liability phase, Ohio indicated it actually knew about MoneyGram's escheat of Official Checks to Delaware, and MoneyGram told Ohio these instruments were third party bank checks. *See* Ex. A at 4 ("MoneyGram has instructed financial institutions that as they have been reincorporated in Delaware, that unclaimed teller and agent checks will now be reported to Delaware."); Ex. A at 7 ("Teller's checks and agent's checks are third party bank checks . . . ."). Similarly, in 2011 correspondence with MoneyGram, Michigan indicated it knew about MoneyGram's escheat of Official Checks to Delaware. *See* Ex. A at 12 ("This office has been made aware of cashier's checks and official checks, sold by First State Bank of East Detroit, that have not been presented for payment."). **In a nutshell, Delaware is seeking to uncover similar relevant correspondence about MoneyGram as well as the internal documents demonstrating Defendants' acquiescence to MoneyGram's reporting practices.**

To determine Defendants' actual and constructive knowledge, Delaware has requested the following documents regarding MoneyGram:

- Communications between Defendants' state agencies and MoneyGram, which will show what Defendants knew about MoneyGram's reporting practices, products, and State of incorporation (Del. RFP 1);

- Internal documents regarding MoneyGram, which will show the same (Del. RFP 2);

- Holder reports MoneyGram filed with Defendants, which will show what MoneyGram told Defendants about its reporting, and which properties MoneyGram reported to each State before and after MoneyGram's reincorporation (Del. RFP 3);

- Documents and communication regarding third party claims submitted to Defendants for MoneyGram instruments (*i.e.* correspondence from an owner seeking to recover unclaimed MoneyGram instruments), which will show Defendants' knowledge as to MoneyGram's reporting practices, products, and State of incorporation (Del. RFPs 4-5);

- Defendants' audits of MoneyGram, which will show the same (Del. RFPs 13-14); and

- Any other documents showing when Defendants became aware of MoneyGram's escheat practices (Del. RFP 15).

Delaware has requested discovery about MoneyGram more broadly, rather than MoneyGram "Official Checks," for at least two reasons. First, Defendants' general knowledge about MoneyGram, MoneyGram's business and practices, and the products it was escheating to each Defendant will inform when that Defendant had actual knowledge or was on inquiry notice that MoneyGram was not escheating all of its products under the FDA. Thus, if a Defendant's unclaimed property office contacted MoneyGram about MoneyGram's reporting of money orders or other products, that information would show that the Defendant could have and should have also asked MoneyGram about its other instruments. Because such materials may not expressly mention "Official Checks," these materials may only be found if Defendants search for "MoneyGram."

Second, it is very likely Defendants' employees and other actors frequently used the word "MoneyGram," and not some other term such as "Official Checks," when discussing the escheatment of MoneyGram Official Checks. Delaware thus believes it is appropriate to produce discovery regarding MoneyGram more broadly to capture documents related to MoneyGram Official Checks, rather than searching solely for terms like "Official Check," which is a term of art used in this litigation but may not have been used by unclaimed property offices or other state officials. As Delaware has repeatedly mentioned to Defendants, it is willing to work with Defendants to create a list of search terms and custodians.

Finally, Delaware requested documents from relevant state agencies. In the meet and confers with Defendants, Delaware explained its request: In many States, unclaimed property offices are *not* the only agencies that ensure compliance with state laws regarding unclaimed property.[7] As is particularly relevant here, state money transmission regulators routinely audit compliance with unclaimed property laws, including MoneyGram's compliance with unclaimed property laws. Thus, for example, in a "multi-state review" of MoneyGram's "money transfer licenses" circa 2011, "multiple states indicated that" Official Checks "should not be escheated to Delaware." Ex. A at 3. This is highly relevant to Delaware's defenses. If a Defendant participated in that 2011 audit, that audit and the documents surrounding it will demonstrate that the Defendant had actual or constructive knowledge of MoneyGram's escheat practices. Delaware is reasonably seeking information about this multi-state audit, as well as any similar audits by state money transmitter regulators. Indeed, based on limited information MoneyGram disclosed, it appears California's Department of Financial Institutions audited MoneyGram's escheat practices in or around 2009 and then *again* at a later date, learned about MoneyGram's practice of reporting Official Checks to Delaware, yet California acquiesced to MoneyGram's practices until it filed this lawsuit. *See* Ex. A at 1 ("Also, it was noted during the current examination that MPSI escheats unclaimed official checks after five years to the state of incorporation, i.e. Delaware . . . . California Department of Financial institutions contends that official checks that were purchased in the State of California . . . should be escheated to the State of California . . . ."). California should disclose information about this audit, and other States should do likewise.

2. <u>MoneyGram's Client Banks</u>

Defendants' communications with and documents regarding banks that sold MoneyGram Official Checks are similarly relevant to demonstrating what Defendants knew or ought to have known regarding MoneyGram's reporting practices. For example, formal and informal audits of these banks will reveal that Defendants learned about MoneyGram's escheat practices well before initiating this litigation. Additionally, MoneyGram modified its escheat practices upon reincorporation in 2005. Instead of the banks or MoneyGram reporting Teller's Checks to Defendants, MoneyGram began reporting those instruments to Delaware. As a result, holder reports from banks, as well as Defendants' electronic records showing the amounts of unclaimed

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[7] Defendants are completely off base when they suggest (at 8) that Delaware is requesting information from state agencies unrelated to "unclaimed property reporting procedures." **The regulators in question audited MoneyGram and analyzed compliance with unclaimed property laws**. That information is plainly relevant to the question of when Defendants had actual or constructive notice of MoneyGram's reporting of Official Checks to Delaware.

property reported to each State by those banks, will likely show a drop-off in reported MoneyGram Official Checks between the period before 2006 and the period after 2006.[8]

Here too, the limited information in Delaware's possession provides examples of the type of highly relevant material Delaware seeks. According to limited materials MoneyGram disclosed, **Ohio contacted MoneyGram in 2006 because Ohio learned of MoneyGram's practices during an audit of a client bank**. *See* Ex. A at 4 (noting that Ohio learned "teller and agent checks will now be reported to Delaware" from materials "located during an audit" of a client bank). Correspondence between California and a bank that sold MoneyGram Official Checks shows that **in 2012 California confronted MoneyGram's practice of reporting Official Checks to Delaware**. *See* Ex. A at 16 (letter from bank indicating that MoneyGram "takes the position that it is obligated to escheat the unclaimed funds to . . . Delaware"). Yet more correspondence between California and a different bank shows that **in 2013 California *again* addressed the same issue in a formal audit.** *See* Ex. A at 19-20. In that correspondence, California acknowledged that because the bank did not "transmit, nor does MoneyGram request, any information regarding the . . . payees of outstanding checks," the checks "have been remitted to the State of Delaware." Ex. A at 19. Similar correspondence between Michigan and a bank shows that **Michigan learned of MoneyGram's practices as early as 2009**, if not earlier, in the course of an informal inquiry. *See* Ex. A at 9 (bank informing Michigan that the bank previously "would escheat the sums to [the] State of Michigan" but MoneyGram is "refusing to return the funds to be escheated").

To find similar highly relevant information, Delaware has thus requested the following materials from Defendants dating to 2000:

- Communications between Defendants' unclaimed property offices and banks selling MoneyGram products in each Defendant State, which will show knowledge about MoneyGram's products and reporting practices (Del. RFP 6);

- Documents and communications regarding the reporting of unclaimed property by banks selling Official Checks, including from state banking regulators, which will show the same (Del. RFPs 7-8);

- Holder reports showing the products each bank escheated to each Defendant by year, which may show a drop in escheatment around 2006 that provided actual or constructive notice of the change in MoneyGram's practices (Del. RFP 9).

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[8] To be clear, MoneyGram escheated at least some Official Checks to Minnesota, its prior state of incorporation. Thus, even before 2006, Defendants may have had actual or constructive knowledge of MoneyGram's escheat of those Official Checks. *See* Ex. A at 25.

3. Defendants' Audit Policies and Practices.

Defendants' audit policies and practices related to unclaimed property for the time periods relevant to this lawsuit are likewise relevant to proving Defendants' actual or constructive knowledge. For example, where a Defendant audited a bank that sold Official Checks, the fact of the audit coupled with the State's audit practices will show that Defendants gained actual or constructive knowledge of MoneyGram's practices. Training materials, manuals, and procedures regarding how to conduct audits will demonstrate the kind of inquiry the auditors conducted, or at a minimum should have conducted. Similarly, such materials may demonstrate what each State viewed as sufficiently suspicious to warrant an audit—including a decrease in a bank's reporting of unclaimed property. Coupled with information showing that a bank's reporting changed, this information will demonstrate that Defendants knew or should have known about any change in MoneyGram's escheat practices that occurred in 2006.

Defendants (at 9) assert that they provided these documents in the prior liability phase. That is not true. Defendants produced documents regarding instructions States provided to holders regarding how to report property. Those instructions to holders are akin to directions to taxpayers about how to fill out and file a tax return. They are completely different from a State's internal policies regarding how to audit tax returns, which is akin to the type of information Delaware is seeking.

To uncover this relevant information, Delaware requested:

- Documents regarding the engagement of third-party auditors, which will show that Defendants conducted audits (Del. RFP 11).

- Documents relating to audit outlines, procedural manuals, and reports of findings from prior audits dating to 2000, which will show the kinds of audits Defendants conducted and the kinds of information that Defendants sought and obtained in audits (Del. RFPs 10, 12).

4. Audits of MoneyGram's Competitors IPS and PNC

How Defendants handled the escheatment of products sold by MoneyGram's competitors is relevant to Delaware's defenses. For example, as Defendants' own complaint makes clear, before filing this lawsuit, Defendants knew that other "entities—including Integrated Payment Systems, Inc., and PNC Bank N.A.—also issue[d] official checks," and "report[ed] and remit[ted] sums payable on unclaimed and abandoned official checks to the State of purchase." Defs.' Bill of Complaint ¶ 33 (No. 22O146). It is Delaware's understanding that Integrated Payment Systems ("IPS") provided similar services for client banks. Documents related to IPS may show that Defendants knew or should have known that, unlike IPS, MoneyGram was reporting its official checks under the common law secondary rule.

Delaware has thus requested:

- Documents regarding audits involving the reporting of unclaimed property by IPS, IPS's related corporations (First Data Corp and American Express), and PNC bank (Del. RFP 15).

5. Audits Of Banks Selling Remittance Instruments

Audits of banks selling remittance instruments are similarly relevant to Delaware's defenses and arguments for limiting damages. These audits may demonstrate that individual Defendants knew that banks in their states were escheating Official Checks or other remittance instruments in accordance with the common law, rather than the FDA. This will show that Defendants were on notice of, and acquiesced to, holders like MoneyGram escheating remittance instruments under the common law. It is Delaware's understanding that audit information may be readily available from third-party vendors, and audit information may be particularly likely to have been maintained over the period relevant to this litigation.

Delaware has thus requested:

- Documents regarding audits involving the reporting of unclaimed property by entities selling remittance instruments (Del. RFP 15).

6. Defendants' Waiver of Damages, Penalties, and Interest Assessed Against Holders.

Defendants seek to impose state-law damages, penalties, and interest on Delaware, a sovereign state. The FDA does not provide a cause of action for damages—let alone a cause of action that permits another State to impose *its own state laws* on a sister sovereign. States are sovereigns of equal dignity, and one State cannot reach over its borders and impose its laws on another. *See generally Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497-98 (2019) ("States may not supply rules of decision governing disputes implicating their conflicting rights.") (cleaned up). But Defendants' claims are even more constitutionally suspect: Many of Defendants rarely, if ever, impose these very same penalties on non-compliant private holders that they seek from Delaware. To be clear, Delaware does not believe it is analogous to a private holder. But it violates bedrock principles of comity and federalism for Defendants to treat Delaware's public fisc with less solicitude than Defendants treat a private company. *Cf. United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (striking down as unconstitutional a state law "singling out the Federal Government for unfavorable treatment"); *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (striking down state law taxing out-of-state residents as violating "the structural balance essential to the concept of federalism").

It is necessary that Defendants disclose information regarding their actual practices, in addition to their formal policies. Delaware has reason to believe that—where States nominally

maintain strict policies mandating the collection of damages, penalties, and interest—States frequently waive these policies in practice. **Notably, in their letter, Defendants concede that any "interest or penalties owed under any applicable state laws" are "legitimate subjects for discovery."** Defs.' Letter at 2.

Delaware has thus requested:

- Documents and communications regarding policies and the actual assessment and waiver of penalties and interest, which Delaware expects will show that Defendants do not regularly assess and instead regularly waive penalties and interest (Del. RFPs 17, 18, 22, 23);

- Documents and communications regarding the application of statutes of limitations to late reporting holders, which is relevant to Delaware's claim that a statute of limitations is appropriate in this case, as well as to the broader question of whether a sovereign state should be treated differently from a private holder (Del. RFP 27);

- Documents and communications regarding decisions to forgo enforcement, which is relevant to Delaware's claim that it should be treated no worse than a private entity (Del. RFP 29);

- Documents and communications regarding settlement agreements with private holders over late-reported remittance instruments similar to Official Checks, which is relevant to the same issue (Del. RFP 31); and

- Documents allowing Delaware to calculate the actual amount and proportion of penalties, interest, and damages which Defendants waive or do not collect in practice, which is relevant to the same issue (Del. RFPs 19, 20, 21, 24, 25, 26, 28, 30).

7. <u>Movement of Funds Between States (Or Lack Thereof).</u>

Defendants' case for implying a cause of action for damages, penalties, and interest into the FDA is built on a fiction that States often redistribute unclaimed funds amongst themselves. That is misleading: The funds that move between States are typically extremely limited. For example, States may enter into a reciprocal agreement under which, if a holder reports property to one State intentionally or in error, that State will subsequently forward property to the appropriate States. But the first State simply acts as a conduit. That kind of reciprocal claim pales in comparison to the massive retroactive redistribution that Defendants seek, in which one State accepted property in good faith for years, its sister States acquiesced to the practice for years, and now those States seek a windfall payment. And States certainly do not pay penalties and interest on the limited funds that move between States.

It is particularly important for the Supreme Court to have an accurate picture of the status quo of interstate relations when deciding whether to imply a cause of action into the FDA—and whether to craft corresponding limitations. The Supreme Court has repeatedly cautioned courts against implying causes of action that—like the one Defendants seek—do not appear on the face of the statute. Implying causes of action requires judges to balance competing policy goals, a fundamentally legislative task which the Constitution assigns to the legislative branch.[9] If "there is *any* rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed," the Court will not infer a cause of action. *Egbert*, 142 S. Ct. at 1805 (internal quotation marks omitted). But if the Supreme Court is to eschew decades of its own precedent and take on the fundamentally legislative task of crafting a cause of action to award Defendants damages, penalties, and interest, the Court will be forced to balance competing policy values. The Supreme Court can only effectively engage in that inquiry if the Court knows that ruling for Defendants will massively disrupt the status quo governing interstate escheat.

Delaware accordingly requested various documents related to the movement of funds between States dating back to 1965. (Del. RFPs 39, 40, 41-53). As Delaware explained to Defendants, Delaware's request for documents dating to 1965 was intended to request all records in Defendants' possession dating back to *Texas v. New Jersey*, 379 U.S. 674 (1965), to the extent they exist and are reasonably available. It is Delaware's understanding that Defendants' unclaimed

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[9] *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576-77 (2022) (Kavanaugh, J., concurring) ("Congress, not this Court, creates new causes of action. And with respect to existing implied causes of action, Congress, not this Court, should extend those implied causes of action and expand available remedies." (citation omitted)); *Egbert*, 142 S. Ct. at 1803 ("If there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, the courts must refrain from creating it.") (cleaned up); *id*. at 1810 (Gorsuch, J., concurring in the judgment) ("To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation."); *Nestlé USA*, 141 S. Ct. at 1938 ("[J]udicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers"); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (recognizing the Court no longer assumes "it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017)); *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) ("[W]hen a court recognizes an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power."); *id*. at 742 ("[F]inding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers."); *cf. SSH Co. v. Shearson Lehman Bros. Inc.*, 678 F. Supp. 1055, 1058 (S.D.N.Y. 1987) (Leval, J.) ("Plaintiff cites no precedent to justify the implication of a private right of action. Defendants' arguments are in accordance with Supreme Court authority.").

property databases often contain records regarding property reported well before 2000. It is Delaware's further understanding that information from these unclaimed property databases can be readily produced, including in many states through third-party vendors.

8. Retention of Unclaimed Property.

A closely related issue involves States' current retention of property to which they are obviously not entitled under any priority rule or statute. Defendants claim that Delaware is improperly retaining unclaimed property where the relevant address—here, the place of purchase—lists an address in another State. It is Delaware's belief and understanding that Defendants are likewise retaining unclaimed property where the relevant address—in particular, the creditor's last known address—lists another State. It is also Delaware's belief and understanding that Defendants are similarly retaining unclaimed property for which there is no relevant address, and the holder is not incorporated in the State and may in fact be incorporated in Delaware.

This data—which Delaware understands can be readily produced from Defendants' unclaimed property databases—is highly relevant because it confirms that States typically do not redistribute escheated funds, even when the receipt of those funds conflicted with either the FDA or the common-law priority rules. As discussed above, if the Supreme Court reverses its recent precedent and infers a cause of action into the FDA, the Court will need to have an accurate picture of the movement of funds between states to engage in what is fundamentally a legislative inquiry whether to permit retroactive damages actions, and whether to impose limits on such actions. The potential for massive redistribution of funds among States is an important policy concern for the Supreme Court to consider. This data is also relevant to Delaware's equitable arguments, in particular Delaware's argument that it is unfair to require Delaware to pay over $150 million to Defendant States that are also retaining property where the associated address record or similar data field lists another State, or indicates that the property lacks an address and the State is not the holder's State of incorporation. *Cf. Kansas v. Nebraska*, 574 U.S. 445, 456 (2015). Indeed, the fact that Defendants appear to be targeting Delaware for the retention of unclaimed property, while simultaneously retaining property that belongs to another State, is contrary to basic federalism and equity principles.

Delaware accordingly requested:

- Documents showing the total amount of property collected by the state, for which property there was no owner address or there is a foreign owner address, where the holder is not incorporated in the state but which is reflected by the state's recordkeeping as still being retained by the state (Del. RFPs 63, 64);

- Documents showing the total amount of property collected by the state for which property there was an owner address in another state, but which is reflected by the state's recordkeeping as still being retained by the state (Del. RFPs 65, 66);

- Other data, documents and communications reflecting policies or practices concerning the retention of property, which will confirm the extent to which States do not return or redistribute funds (Del. RFPs 57, 56, 61, 67);

- Documents regarding lawsuits in which property was reported to one State, and another State asserted a higher claim to property under any legal theory, which will show that such lawsuits do not occur at present (Del. RFP 68).

9. <u>Defendants' Understanding Of And Guidance On The FDA.</u>

Defendants' internal understanding of the FDA and guidance to holders is highly relevant to Delaware's defenses, including Delaware's defense that it is unfair to require Delaware to pay over $150 million based on a good-faith understanding of the FDA that individual Defendant States may have shared. **Indeed, Defendants have asked Delaware to produce information regarding its guidance to holders, specifically including information from 2016 to the present regarding "instructions, guidance, or advice" "regarding the Federal Disposition Act."** Ex. C at 24, Pa. Interrogatory 13 (emphasis added); *see* Ex. C at 11, Defs.' RFP 14 (requesting "guides, handbooks, or manuals" regarding "reporting or escheatment of unclaimed property to Delaware"). Delaware has reason to believe that specific states, such as Ohio, may have taken contradictory positions on the interpretation of the FDA during the course of this lawsuit, given ongoing litigation over the FDA in Ohio. Delaware believes it is highly likely that non-privileged records from Ohio's unclaimed property office will show that Ohio knowingly adopted two contradictory positions regarding the FDA in the course of this litigation. Delaware has a good faith belief that similar records exist in the other States.

It is similarly important that the Supreme Court understand the States' current interpretation of the scope of the FDA. The Supreme Court will need to determine whether to infer a cause of action into the statute and to impose limits on retroactive damages. If Defendants are currently taking the position that the FDA applies—retroactively—to large swaths of instruments aside from the Official Checks at issue in this case, it is imperative that the Court has this information when it considers whether to permit damages, upset longstanding reliance interests, and invite a parade of future lawsuits. Delaware is also concerned that Defendants have reached agreements amongst themselves to target Delaware in the future, and potentially to forgo actions against one another (in particular, against Ohio for its retention of JP Morgan and US Bank's instruments). Delaware will argue that federalism principles prevent the intentional targeting of a sister state, and counsel against the Court permitting damages in this action.

Delaware accordingly requested:

- Documents and communications regarding guidance on the FDA and future claims States may assert under the FDA, which will show that permitting a cause of action in this case could unleash an avalanche of future litigation (Del. RFPs 32, 33, 68);

- Information regarding the total amounts of cashier's checks and teller's checks reported to each State by entities incorporated in that State, which will show the same (Del. RFP 38);

- Defendants guidance to holders regarding the scope of the FDA, which will show the same (Del. RFP 54);

- Non-privileged documents and communications regarding ongoing *qui tam* litigation over the status of remittance instruments issued by J.P. Morgan Chase & Co. and U.S. Bank, and communication regarding the status of those instruments under the FDA (Del. RFPs 34-37); and

- Documents regarding Defendants' inequitable and intentional targeting of Delaware (Del. RFPs 59, 60, 62).

Delaware also requested two other pieces of information that do not fall within the above nine categories. First, Delaware requested information about data retention policies, to determine what documents are available (Del. RFP 55). This is a standard request in any litigation. Second, Delaware requested information showing the total unclaimed property collected by each Defendant from 2000 to the present (Del. RFP 58). This information is trivially easy for Defendants to produce by querying their databases. It will show that Defendants benefit from the current escheat regime and rebut Defendants' suggestion that an implied cause of action for damages is necessary to promote equity.

IV. Defendants' Blanket Proportionality Objection Is Premature And Meritless.

In addition to sweeping relevancy objections, Defendants assert that essentially *any* production is disproportionate to the needs of the case. But their boilerplate proportionality objections are pure speculation. **In the meet and confers, Defendants' counsel confirmed that they have not talked to the relevant state agencies whose records Delaware seeks.** Defendants' counsel have not even identified the nature of the records their States possess. They have not identified *any* custodians, nor asked their clients how many (or few) documents and communications those custodians possesses. Nor have Defendants' counsel contacted the sophisticated unclaimed property vendors that maintain many of Defendants' audit records, files, and databases to inquire about the difficulty (or ease) of production. And Defendants have not conducted any trial searches to determine how many documents a search for "MoneyGram" (for

example) returns. These are the basic ways of assessing proportionality in any case. Indeed, this is what Delaware has done in response to Defendants' 64 written discovery requests.

Instead of proceeding with the ordinary discovery process, Defendants speculate about how difficult it *might* be to produce documents. Delaware has good reason to believe that Defendants' speculations bear little relationship to reality. Consider just one example: Like Delaware, Defendants work with sophisticated third-party vendors that maintain the State's unclaimed property databases and records. With a few clicks, those vendors can produce datafiles (for example) showing the funds MoneyGram and its client banks reported to each Defendant over time. As explained above, that information may show a drop in reported funds around 2006, when MoneyGram reincorporated in Delaware and changed some of its reporting practices. Defendants and their sophisticated vendors also likely maintain audit files indexed by holders, and Defendants can easily determine (for example) whether they audited a MoneyGram client bank. But because Defendants' counsel have not even contacted the relevant State custodians to determine what information exists, and because counsel refuse to indicate what information they would be willing to produce, it is impossible to negotiate over the scope of discovery.

Defendants bear the burden of providing actual information substantiating their proportionality concerns, but have not offered the Special Master (or Delaware) any such evidence. Federal courts routinely reject boilerplate proportionality objections, and the Special Master should as well. *See* Fed. R. Civ. P. 26 Committee Notes on Rules—2015 Amendment (explaining that a party may not "refuse discovery simply by making a boilerplate objection that it is not proportional"); *First Am. Bankcard, Inc. v. Smart Bus. Tech., Inc*., No. CV 15-638, 2017 WL 2267149, at *1 (E.D. La. May 24, 2017) ("In this instance, defendant has offered nothing more than a boilerplate proportionality objection, without providing any information concerning burden or expense that the court would expect to be within defendant's own knowledge.").

The other proportionality factors also favor Defendants. The stakes of this case are enormous. *See* Fed. R. Civ. P. 26(b)(1). The financial "issues at stake" on their own are considerable. *Id*. Defendants seek more than $150 million from a fellow sovereign, plus penalties and interest. But this case implicates more than just money: Defendants are asking the Supreme Court to authorize a judicially created implied cause of action, which the Court has said "is an extraordinary act that places great stress on the separation of powers." *Nestlé USA*, 141 S. Ct. at 1938. Judicially amending the FDA to include a cause of action will fundamentally upend the interstate escheat regime. These are the kind of "vitally important" "public values" that merit meaningful discovery. Fed. R. Civ. P. 26 Committee Notes on Rules—2015 Amendment. Defendants also have unique "access to" the "relevant information" Delaware seeks—*e.g.*, which Defendants knew what and when. Fed. R. Civ. P. 26(b)(1). Delaware has no other effective means of obtaining that information. Defendants also have the "resources" to engage in the reasonable

discovery Delaware seeks, discovery is necessary "in resolving the issues" in this case, and the "likely benefit" "outweighs" the reasonable cost Delaware is asking Defendants to incur. *Id.*

Finally, Defendants suggest that, because they previously produced a **mere 128 documents** during the liability phase—less than a banker's box—they need not produce any discovery now. That argument is unfounded and unreasonable. The prior discovery in this case was directed at the proper interpretation of the FDA. The discovery relevant at this stage of the case is different, and it includes questions such as Defendants' actual and constructive knowledge and what is an equitable outcome in this case.

And it bears emphasis: Defendants did everything they could to withhold discovery in the liability phase. Thus, on January 24, 2018, Defendants told the Special Master that "discovery in the liability phase" was of "limited scope," and that any discovery would be "of minimal probative value at best" in interpreting the FDA. Dkt. 58 at 2. Pennsylvania likewise argued that discovery should be "rather discrete" because the "Disposition Act means what it means as a matter of law." Dkt. 57 at 2. Indeed, Defendants argued that the Special Master should bifurcate the proceedings because in their words, the liability phase involved a pure "question of law" which "may be decided through dispositive motions following a limited and expedited period of discovery." Dkt. 33 at 1. It was because of Defendants' narrow view on permissible discovery that all 30 Defendants provided a grand total of 128 documents.[10] This *de minimis* production amounted to about four documents per State; was not focused on Defendants' actual or constructive knowledge; did not involve obvious repositories of information (such as state regulators that audit MoneyGram's compliance with unclaimed property laws); and was extremely limited in both time and scope. The suggestion that, at Delaware's request, Defendants would have willingly produced additional information in 2018 regarding their knowledge, audit practices, and policies that was not relevant to that stage of the litigation is as facially implausible as it sounds.

Delaware stands ready to work with Defendants to address meaningful proportionality concerns, including identifying specific custodians and search terms. Delaware repeatedly explained the type of information it seeks, sought to engage with Defendants to address any concerns, asked Defendants to describe the information they would be willing to provide, and offered to go through each of Delaware's RFPs to find a common ground. **But Defendants have refused to answer Delaware's RFPs and refuse to articulate what discovery they would be willing to produce. At the same time, Defendant Pennsylvania has filed improper FOIA requests of Delaware. This is not how discovery works in any case, let alone in an important public matter before the Supreme Court of the United States.**

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[10] In addition to these 128 documents, Defendants provided lists of holders who reported certain instruments by NAUPA code. This latter production underscores how Defendants and their unclaimed property vendors can readily search Defendants' unclaimed property databases.

V. Conclusion

Delaware stands ready to discuss with Defendants in good faith the scope of individual discovery requests. But it is also apparent that Defendants do not want to engage in the discovery necessary to meaningfully litigate this important dispute. Delaware thus respectfully requests that the Special Master appoint a mediator to facilitate the consensual resolution of this matter. Delaware also respectfully requests that the Special Master stay or extend the October 5 deadline for the parties' responses to initial discovery requests as well as the fact discovery deadline. In Delaware's view, it is fundamentally unfair to require Delaware to expend the time and expense to respond to Defendants' discovery requests and begin producing documents when Defendants refuse to do the same.

Respectfully submitted,

/s/ Katherine B. Wellington

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Enclosures