SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*,

v. Nos. 220145 & 220146 (Consolidated)

ARKANSAS, *et al.*, *Defendants*.

MEMORANDUM IN OPPOSITION TO DEFENDANT STATES' MOTION FOR SUMMARY JUDGMENT AND PENNSYLVANIA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant States would have this Court adopt an interpretation of the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act ("FDA") that makes the list of written instruments identified by 12 U.S.C § 2503 superfluous and the term "directly liable" redundant. Their primary argument for this unsupportable position is that to give meaning to the entirety of the text of § 2503, as Delaware proposes, would exclude MoneyGram Official Checks from the scope of the FDA and that Congress could not possibly have intended this result. Defendant States are wrong.

The best evidence of what Congress intended is the text of the statute itself. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142-43 (2018); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). Under the FDA, the State of purchase is entitled to escheat "any sum . . . payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" if the books and records of the holder specify the state of purchase. 12 U.S.C. § 2503. Defendant States' proposed definition of the term "money order" and their proposed interpretation of the term "directly liable" would have the text of § 2503 mean: "if the books and records of a banking or financial organization or business association show the State in which any prepaid instrument was purchased, then

that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument." The obvious wholesale evisceration of the actual text of § 2503, and the fact that Congress did not select such a simplistic approach, plainly does not support Defendant States' proposed interpretation of § 2503.

This Court need not go beyond the text of the FDA to reject Defendant States' proposed interpretation of "money order" and "directly liable," but to the extent it does, Defendant States' arguments in this regard are unpersuasive. As the Supreme Court recently observed, "[i]f the text [of a statute] is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." *Encino Motorcars*, 138 S. Ct. at 1143 (citation omitted). There is no clarity to be gleaned from the legislative history of the FDA because it is silent with respect to what Congress meant by "money order" and "directly liable."

Consequently, Defendant States' entire Motion is premised on the theory that Congress's intent in the FDA can be derived from the use of those terms in the Uniform Law Commission's proposed Uniform Unclaimed Property Act ("1966 UUPA") (Defendant States' Appendix ("DS App.") 686) and the State of New York's unclaimed property law, Ch. 697 (1943) (DS App. 633). Defendant States argue Congress is "presumed" to have incorporated these two sources into the FDA, but at no point do Defendant States submit evidence demonstrating that

Congress was aware of, considered, or incorporated the meaning of any specific terms found in these sources. This Court should decline Defendant States' invitation to "presume" that the FDA incorporated the 1966 UUPA and the New York unclaimed property law based on the assertion that Congress could not possibly have intended the result that a fair reading of the text of the FDA provides. As the *Encino Motorcars* Court observed, "[e]ven if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading." 138 S. Ct. 1143 (citation omitted) [1]

Additionally, Defendant States' arguments that MoneyGram Official Checks are similar to money orders depend on assertions of disputed material facts related to specific features of the written instruments and the erroneous assertion that the scope of "similarity" under the FDA should be defined in relation to whether a type of written instrument is likely to have an associated name and address. This second assertion directly contradicts the evidence in this case and the Supreme Court's finding in *Pennsylvania v. New York*, 407 U.S. 206, 215 (1972), the decision which prompted the FDA, that names and addresses were known for

[1] Moreover, a comparison of the scope and purpose of the 1966 UUPA and the New York unclaimed property law to the text of the FDA demonstrates that they are substantially different from each other and do not support concluding that, even if Congress had been aware of them, that Congress copied or otherwise incorporated the 1966 UUPA and the New York unclaimed property law into the FDA.

money orders and traveler's checks in the 1970s. More importantly, Defendant States' proposal to make a characteristic that is irrelevant to determining whether the FDA applies to a written instrument the hallmark of "similarity" under the FDA is nonsensical. Finally, if this Court were to find that MoneyGram Official Checks were "similar" to money orders and are therefore governed under the FDA, because at least ten States are not empowered under their own laws to escheat "similar written instruments," those States have no enforceable remedy in this proceeding and should be dismissed.

LEGAL STANDARD

On a motion for summary judgment, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Summary judgment shall only be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

SUMMARY OF ARGUMENT

This Court can and should find as a matter of law that MoneyGram Official Checks are not money orders, nor are they similar written instruments on which a bank or business association is "directly liable" under the FDA. Additionally, separate and apart from an analysis of liability, MoneyGram Official Checks are

not "similar" to money orders; however, to the extent it is necessary to resolve the question of similarity as posed by Defendant States, that determination is dependent on disputed material facts and cannot be resolved on a motion for summary judgment. MoneyGram Official Checks currently escheat, and should continue to escheat going forward, pursuant to priority rules announced in *Texas v. New Jersey*, 379 U.S. 674, (1965), *Pennsylvania v. New York*, 407 U.S. 206 (1972) and *Delaware v. New York*, 507 U.S. 490 (1993) (the "*Texas* trilogy") and not the FDA. Finally, even if some or all of the MoneyGram Official Checks are found to be similar written instruments to money orders and are therefore subject to escheat under the FDA, at least ten States are not empowered under their own laws to escheat "similar written instruments," and those States should be dismissed from this proceeding. Accordingly, this Court should deny Defendant States' Motion for Summary Judgment.

I. MoneyGram Official Checks Are Not Money Orders

In an attempt to avoid the complication that some of the Defendant States do not have the power under their own laws to escheat written instruments that are "similar" to money orders, the Defendant States assert that Money Gram Official Checks are in fact themselves money orders. Defendant States' Brief in Support of Motion for Summary Judgment ("DS MSJ") at 21. In order to accomplish this definitional feat, Defendant States would have this Court define a "money order"

merely as a "prepaid draft issued by a post office, bank or some other entity and used by a purchaser to safely transmit money to a named payee" and thereby bring Money Gram Official Checks, along with every other type of draft except one drawn on the account of an individual or company, under the auspices of the FDA.[2] *Id.* at 22. Whatever Congress meant by "money order" in the FDA, it cannot credibly be argued that the term "money order" was intended to identify the entire universe of drafts except personal checks.

Defendant States' assertion that all of the MoneyGram products at issue in this case are money orders "in that they are all prepaid written instruments used to safely transmit funds to a named payee, " *id.* at 24, in the end is nothing more than a tautology based on a definition that conveniently pre-determines the conclusion. Defendant States' definition of "money order" is both incorrect as a matter of statutory interpretation and is inconsistent with the record evidence in this proceeding regarding what constitutes a money order.

[2] Drafts by definition include a named payee. U.C.C. § 3-102(b)(1972); U.C.C. § 3-103(a)(8)(current). And because Defendant States' definition of "money order" is not limited to drafts drawn on a bank, the only limitation placed on the "drafts" that are money orders under Defendant States' proposed definition is the requirement that the draft be "prepaid." As a result, only checks drawn on the accounts of an individual or company are not "money orders" under Defendant States' definition.

A. Interpreting Money Orders as all Prepaid Drafts is Inconsistent With the Text of the FDA and Not Otherwise Supported by Law

If Congress had intended the FDA to govern the escheat of all prepaid drafts as Defendant States' definition of a "money order" suggests, Congress could have simply used that broad category of written instruments when drafting the FDA. *See Gustafson v. Alloyd Co*., 513 U.S. 561, 574-75 (1995) (declining to interpret "prospectus" as used in the Securities Act of 1933 to be all written communications because it would render the statute's inclusion of "notice, circular, advertisement, [and] letter" in the definition of "prospectus" redundant). Instead, Congress drafted the FDA to exempt from federal common law a list of specified written instruments. Section 2503 of the FDA applies on its face to "any sum . . . payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Thus, the language of the FDA itself evidences an intent to exempt specific categories of written instruments from the federal common law governing the escheat of limited categories of unclaimed intangible property, not the entire universe of drafts except those drawn on an individual or company's account. While the text of the FDA is itself enough to reject Defendant States' proposed definition of "money order", *see Encino Motorcars*, 138 S. Ct. at 1143, asserting that what Congress meant when it used the term "money order" in the FDA was all "prepaid payment instruments,"

DS MSJ at 6, also belies the very legislative history cited by Defendant States which extensively references "money orders and traveler's checks." *Id.* at 7.

More importantly, defining "money order" as proposed by Defendant States would render "inoperative or superfluous, void or insignificant" the remaining categories of instruments listed in the same phrase contrary to the Supreme Court's directive that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"); *see also Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense), *superseded by statute*, 18 U.S.C. § 924.

If a money order is nothing more than "a prepaid draft issued by a post office, bank or some other entity and used by a purchaser to safely transmit money to a named payee," DS MSJ at 22, then there would be no need to separately list

"traveler's checks" which are themselves "prepaid draft[s] issued by a post office, bank or some other entity and used by a purchaser to safely transmit money to a named payee." Nor would Congress have needed to define a category of "other similar written instrument[s] (other than a third party bank check) on which a banking or financial organization or a business association is directly liable," as the Defendant States' proposed definition of "money order" is so broad as to cover every prepaid draft.[3]

If Defendant States' definition of "money order" were to be accepted, 28 of the 37 words in the first phrase of § 2503 would be rendered "inoperative or superfluous, void or insignificant." The Supreme Court counsels that courts should avoid interpreting a statute "which renders some words altogether redundant." *Gustafson*, 513 U.S. at 574 (citation omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Defendant States' definition of "money order" as simply a "prepaid draft" therefore should be rejected. Consequently, the Defendant

[3] Defendant States object to an interpretation of the FDA that would require finding a written instrument "similar" by demonstrating a difference. DS MSJ at 37. However, under the Defendant States' proposed definition of "money order," either there are no similar written instruments to money orders because all prepaid drafts are money orders (and the whole "similar" category is superfluous) or the only remaining drafts not included in the definition of "money order" that could possibly be considered "similar" are significantly different because they are not prepaid. Defendant States' proposed definition of "money order" is not only inconsistent with the FDA but produces the very interpretive result to which they object.

States' subsequent conclusion that MoneyGram Official Checks are money orders as that term is used in the FDA because the instruments "are all prepaid written instruments used to safely transmit funds to a named payee," DS MSJ at 24, should also be rejected.

B. The Factual Record Does Not Support the Conclusion That all Prepaid Drafts are Money Orders

First, just because a money order is a prepaid draft does not mean that all prepaid drafts are money orders. For example, a cashier's check would fall squarely into the Defendant States' proposed definition of "money orders". As the documents and testimony make clear, a cashier's check and a money order are not interchangeable – not least of which is because the payment on a cashier's check is guranteed by a bank and the payment on a money order is not guaranteed or even backed by a bank. Mann Report ¶ 28 (Ex. Z to Taliaferro Declaration ("Taliaferro Decl.")); Mann Report ¶¶ 39-41 (Ex. Z to Taliaferro Decl.); Delaware Statement of Undisputed Facts ("Delaware SOF") ¶ 28. Nor may the two instruments be used interchangeably in transactions. Yingst 147:13-24 (Ex. A to Taliaferro Decl.); Yingst 148:21-149:4 (DS App. 1169-1170); Yingst 326:13-327:13 (Ex. DD to Supplemental Taliaferro Declaration ("Supp. Taliaferro Decl.")). In attempting to sweep all MoneyGram products into the definition of a "money order," Defendant States overshoot the mark and would now have all prepaid drafts, including cashier's checks, be categorized as money orders. In the end, the fact that money

orders and Official Checks are both prepaid drafts proves both too much and not nearly enough.

Second, the fact that MoneyGram Official Checks bear the general characteristic of being "prepaid," the only characteristic necessary to make a draft into a money order according to the Defendant States, does not convert MoneyGram Official Checks into money orders for the purposes of the FDA or otherwise. *See* DS MSJ at 25. While Defendant States recite dictionary definitions for a "money order," *id.* at 21-22, Defendant States ignore the testimony and other documentary evidence in the record of this proceeding describing the MoneyGram Money Orders before the Court.[4] Thus, while it is not disputed that money orders are a type of "prepaid draft issued by a post office, bank or some other entity and used by a purchaser to safely transmit money to a named payee," *id.* at 22, as

[4] *See also* F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962) (money order is "[a] form of credit instrument calling for the payment of money to the named payee which provides a safe and convenient means of remitting funds by persons not having checking accounts."); Barkley Clark & Barbara Clark, *Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010) (defining a money order as "an instrument calling for the payment of money to a named payee and providing a safe and convenient means of remitting funds by a person not having a checking account. A money order is frequently issued with the amount printed on its face by the drawee."); *Money Order Services*, American Bankers Association Bank Management Pub. No. 140, 15-16 (1956) ("The inclusion of 'Personal Money Order' on the check serves to point out that it is a *personal* money order and not an official instrument of the bank. It may also have some effect in supporting the premise that it is a personal check of the drawer and not a **direct obligation** of the bank . . .") (emphasis added).

MoneyGram testified, MoneyGram Money Orders also: are signed by the purchaser rather than a bank employee, are not next day items pursuant to Reg CC; do not cancel the underlying obligation pursuant to Uniform Commercial Code ("U.C.C.") § 3-310, are substitutes for personal checks, are largely used by the unbanked, almost always have value limits, are available at retail locations, have terms and conditions limiting recourse in the advent of dishonor and, importantly for escheat purposes, carry services charges that have the effect of consuming the value of every MoneyGram Money Order under $126 before that money order becomes dormant and subject to escheat.[5] Yingst 178:23-179:1 (DS App. 1199-1200); Yingst 69:9-11 (Ex. A to Taliaferro Decl.); Delaware SOF ¶ 82; Delaware SOF ¶ 24; Delaware SOF ¶ 36; Delaware SOF ¶ 26; Delaware SOF ¶ 32; Delaware SOF ¶ 33.

The evidence before the Court demonstrates that money orders are more than just "prepaid drafts" but in fact have many other defining characteristics – characteristics which MoneyGram Official Checks do not have. For example, MoneyGram Official Checks: are not substitutes for personal checks, are largely

[5] Although Defendant States assert that characteristics of MoneyGram Money Orders are not indicative of money orders generally, DS MSJ at 29, MoneyGram is the largest single issuer of money orders in the United States. *MoneyGram Int'l, Inc. v. Comm'r*, 144 T.C. 1, 4, 2015 U.S. Tax Ct. LEXIS 1, at *4 (2015), *vacated and remanded by* 2016 U.S. App. LEXIS 20512 (5th Cir. Nov. 15, 2016). The characteristics of MoneyGram Money Orders are characteristics of money orders generally.

used by banked individuals, do not have any value limits, are not available at retail locations and may only be purchased at banks, have no terms and conditions limiting recourse in the advent of dishonor and, importantly for escheat purposes, carry no service charges and retain their full value until escheated. Delaware SOF ¶ 68; Delaware SOF ¶ 45; Delaware SOF ¶ 48; Delaware SOF ¶ 50; Delaware SOF ¶ 51. In short, money orders are not just prepaid drafts but are a specific type of prepaid draft that have specific characteristics that MoneyGram Official Checks do not share.

Third, not only do Official Checks not share the defining characteristics of a money order (beyond both being prepaid drafts), Official Checks have their own defining characteristics that make MoneyGram Official Checks distinct from money orders. For example, selling Official Checks subjects the seller to federal regulations that selling money orders does not. Delaware SOF ¶ 83; 12 C.F.R. § 229.10(c)(1); 12 C.F.R. § 204.2(a)(1)(iii). Additionally, MoneyGram Official Checks are signed by a financial institution employee rather than the purchaser, Yingst 185:16-17 (DS App. 1206), and MoneyGram Teller's Checks are next-day items pursuant to Reg CC and cancel the underlying debt obligation pursuant to U.C.C. § 3-310. Delaware SOF ¶ 83. While Defendant States concede some differences between MoneyGram Official Checks and money orders, DS MSJ at 24-25, Defendant States attempt to downplay these differences as "minor." The

differences between MoneyGram Official Checks and money orders are in fact quite significant, so significant that Official Checks and money orders cannot even rightly be considered "similar" for purposes of the FDA. However, the very differences recognized and conceded by the Defendant States conclusively demonstrate that while Official Checks and money orders may both be prepaid drafts, they are functionally, practically, and facially not the same and therefore cannot be fairly described as both being money orders.

Defendant States' elaborate association fallacy is clearly displayed when they assert that all of MoneyGram's written instruments are "money orders" because MoneyGram Retail Money Orders are similar to MoneyGram Agent Check Money Orders, which in turn are similar to MoneyGram Agent Checks, which in turn are similar to MoneyGram Teller's Checks. DS MSJ at 24. Although two distinct objects are equal to each other if they are both equal in every respect to the same third object, the same conclusion cannot be reached when comparing items that share characteristics but are not in fact the same as each other. For example, just because hawks fly and hawks are birds does not allow one to conclude that penguins, which are also birds, fly. In the same way, just because money orders are prepaid drafts and money orders can be purchased at Walmart does not allow one to conclude that Official Checks, which are also prepaid drafts, can be purchased at Walmart. Nor would a bank accept a money order for a down

payment on a home simply because money orders, like teller's checks, are prepaid drafts. As a formal matter, Defendant States identified a necessary condition for money orders, the state of being prepaid, but that necessary condition is not a sufficient condition. MoneyGram Official Checks are not money orders under the FDA or any other legal or regulatory regime.

II. Official Checks Are Not Similar Written Instruments To Money Orders

The FDA applies on its face to "any sum . . . payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Thus, because MoneyGram Official Checks are not money orders, traveler's checks, or written instruments on which any entity is directly liable, this Court may determine as a matter of law that the FDA does not govern the escheat of MoneyGram Official Checks. Additionally, the FDA also does not apply to MoneyGram Official Checks for the separate and independent reason that MoneyGram Official Checks are not similar to money orders. Finally, under a common sense understanding of "third party bank checks," MoneyGram Official Checks are specifically exempted from the FDA.

A. No Entity is "Directly Liable" on MoneyGram Official Checks as That Term is Used in the FDA and Therefore the FDA Does Not Govern the Escheat of Official Checks

Defendant States claim that "[a]lthough the FDA does not expressly define the phrase 'directly liable,' Congress incorporated that phrase from existing unclaimed-property law" and that "[t]hose earlier laws used 'directly liable' to refer to the entity ultimately responsible for making payment on the value of the instrument." DS MSJ at 30. Defendant States are wrong for three reasons. First, the 1954 Uniform Disposition of Unclaimed Property Act ("1954 UUPA") (DS App. 668) and 1966 Uniform Disposition of Unclaimed Property Act ("1966 UUPA") on which Defendant States rely are not laws and the cases cited by Defendant States do not stand for the proposition that Congress should be presumed to have incorporated the either the 1954 UUPA or 1966 UUPA, or the same language from a pre-dating non-uniform New York unclaimed property law, into the FDA. In fact, Defendant States present no evidence that Congress even knew of or considered the 1966 UUPA or New York's unclaimed property law when drafting the FDA, much less incorporated how those sources used the phrase "directly liable" into the FDA.

Second, the 1966 UUPA's language is substantially different from the FDA in that it applies on its face to all drafts, not a specifically enumerated list of types of drafts as provided for in the FDA, and this difference inherently alters the use

and understanding of the term "directly liable." Thus, the text of the FDA itself demonstrates that Congress clearly did not intend to incorporate the 1966 UUPA, or the definition of any particular term used in the 1966 UUPA, into the FDA. However, even if one were to assume that Congress was aware of the 1966 UUPA, Congress's use of the same words as the 1966 UUPA is not alone evidence that Congress intended to incorporate the same definition of "directly liable" that Defendant States would attribute to the 1966 UUPA into the FDA without any additional evidence of Congress's intent to do so.

Finally, it is far more likely that Congress would have had in mind the U.C.C. adopted by 49 of the 50 states in 1974, rather than the far-less accepted 1966 UUPA. Delaware's use of the U.C.C. to understand the term "directly liable" as describing a form of liability that is unconditional and not contingent is thus consistent with how that term would have been generally understood at the time the FDA was drafted. Applying the U.C.C.'s set of liability rules is also a common sense proposal for a statute governing the escheat of negotiable instruments and is consistent with Congress's contemporaneous recognition of the widespread use of the U.C.C. in other contexts. In contrast, Defendant States incorrectly attempt to impose on Congress a cherry-picked concept from a privately drafted document when there is no evidence Congress knew of the 1966 UUPA and, in fact, there is clear evidence that Congress did not adopt the same terms of the 1966 UUPA.

1. This Court Should Not Presume Congress Incorporated the Definition of "Directly Liable" From Privately Drafted Proposed State Law Legislation Into the FDA

Defendant States argue that "directly liable" is a "term of art from the Uniform Disposition of Unclaimed Property Act, which in turn incorporated the term from New York Law." DS MSJ at 30. As a result of incorporating this "term of art" in the FDA, Congress is "presumed to have incorporated the existing definition of [directly liable]" from "[t]hose earlier laws" into the FDA. *Id*. A "term of art" is "a word or phrase having a specific signification in a particular art, craft, or department of knowledge; a technical term." *Webster's Third New International Dictionary* (1986). If "directly liable" were truly a "term of art," the parties would not be disputing its meaning or presenting arguments to this Court necessary to resolve the ambiguity raised by Congress's use of the term "directly liable." Defendant States want "directly liable" in the FDA to mean what that term means in some New York Attorney General opinions.[6] DS MSJ at 39-40. Delaware has proposed a definition of "directly liable" consistent with the U.C.C.'s scheme of liability for negotiable instruments and as used in numerous cases and treatises, both prior to and subsequent to adoption of the FDA. *See* Delaware Memorandum

[6] Defendant States did not previously rely on the New York Attorney General opinions cited in their Motion for Summary Judgment when deposing Delaware's expert on the meaning of "directly liable," and the Defendant States' expert Prof. Gillette explicitly declined to offer an opinion on what "directly liable" means. Gillette 177:9-21 (Ex. U to Taliaferro Decl.).

in Support of Motion for Summary Judgment ("Delaware MSJ") at 28-33. In the end, Congress did not define "directly liable," and neither party has been able to identify a "precise, specialized meaning within a particular field or profession" for the term "directly liable."[7] Thus, despite Defendant States' assertion to the contrary, there is no "established meaning," DS MSJ at 32, of "directly liable" for Congress to have incorporated into the FDA.

Additionally, the 1966 UUPA is not a law. It is a proposed law published by a private organization.[8] Perhaps recognizing that reliance on the 1966 UUPA was problematic, Defendant States also attempt to argue that because the 1966 UUPA appears to have taken the term "directly liable" from New York's earlier adopted non-uniform unclaimed property law, Congress is "presumed to have incorporated the existing definition of [directly liable]" into the FDA from the New York state law and related opinions of the New York Attorney General. DS MSJ at 30. In

[7] An opinion of an Attorney General from a single State addressing how a term is to be interpreted under that State's law is not a "precise, specialized meaning within a particular field or profession," but instead is, at most, how one out of fifty States uses that term.

[8] Unlike other proposed uniform acts, the Uniform Unclaimed Property Act referenced by Defendant States has not been universally accepted. As of 2016, more than a quarter of the States have not adopted any version of the Uniform Unclaimed Property Act and, importantly for this proceeding, States that have non-uniform unclaimed property laws include California, Texas, New York, and Delaware. Revised Uniform Unclaimed Property Act, Prefatory Note (Unif. Law Comm'n 2016) (Ex. KK to Supp. Taliaferro Decl.). More importantly, in 1974, only 20 States had adopted some version of the 1954 UUPA or 1966 UUPA. 8A Uniform Laws Ann. 135, 215 (1983) (Ex. LL to Supp. Taliaferro Decl.).

addition to offering no evidence that Congress was aware of the New York state law, the two cases cited by Defendant States for the application of this presumption do not support their argument.

In *Lorillard v. Pons*, 434 U.S. 575 (1978) the Supreme Court held that there was a right to a jury trial for lost wages even though the Age Discrimination in Employment Act ("ADEA") does not expressly grant such a right. The Supreme Court found a right to a jury trial because Congress specifically provided in § 7(b) of the ADEA that the ADEA be enforced with the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA). This is because long before the ADEA was enacted, courts had uniformly interpreted the FLSA to afford a right to jury trial in private actions and Congress can be presumed to have been aware of that interpretation. By incorporating certain remedial and procedural provisions of the FLSA into the ADEA, the Supreme Court reasoned, Congress demonstrated its intention to afford a right to a jury trial. *Id.* at 580-81. Thus, when the Supreme Court held in *Lorillard* that "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute," *id.* at 581, the Supreme Court was referring to actual judicial decisions and actual statutes. That is most definitely not the situation presently before this Court.

In *Lorillard*, Congress had (1) drafted the prior incorporated law, (2) specifically referenced the prior incorporated law in the text of the new statute, and (3) did so at a time when the legislative history of the ADEA demonstrated that Congress was well aware of how the incorporated term from the old law had been interpreted by courts. None of those facts are present here. Congress did not draft either the 1966 UUPA or the New York law. Congress did not reference either the 1966 UUPA or the New York law in the FDA, nor is there any reference to the 1966 UUPA or the New York unclaimed property law in the legislative history of the FDA.[9] There is no judicial interpretation of the term "directly liable" as used in the 1966 UUPA or the New York unclaimed property law. At most, Defendant States point to opinions of the New York Attorney General that appear nowhere in the legislative history of the FDA. The decision in *Lorillard* does not support concluding that Congress may be presumed to have incorporated into the FDA any

[9] In contrast, when Congress specifically discusses the inclusion of a definition contained in a model state law in the legislative history of a federal statute, the Supreme Court has found that definition is incorporated into the federal statute. *See Rubin v. United States*, 449 U.S. 424, 430 (1981) (holding that when Congress enacted the Securities Act of 1933, Congress incorporated the definition of "sale" from the Uniform Sale of Securities Act, a model "blue sky" statute adopted in many States, because the legislative history clearly references the model act and documents Congress's intent to specifically incorporate its definition of "sale.") *See also* Federal Securities Act: Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 11 (1933). *See generally id*., at 13; Securities Act: Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 71 (1933).

term, never mind how specific terms were used, from the 1966 UUPA or the New York unclaimed property law.

Defendant States also cite *Hall v. Hall*, 138 S. Ct. 1118 (2018), for the proposition that "the FDA's text gives no indication that Congress intended to depart from the established meaning of 'directly liable'" as used in the 1966 UUPA and the New York non-uniform unclaimed property law. DS MSJ at 32. In *Hall*, the Supreme Court considered what "consolidate" means under the Federal Rules of Civil Procedure and held that cases consolidated under Fed. R. Civ. P. 42(a) retain their "independent character, at least to the extent [they are] appealable when finally resolved, regardless of any ongoing proceedings in the other cases." 138 S. Ct. at 1125. The Supreme Court observed that *Hall* did not present a "plain meaning case" and stated:

> It is instead about a term — consolidate — with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Act of July 22, 1813, § 3, 3 Stat. 21 (later codified as Rev. Stat. § 921 and 28 U.S.C. § 734 (1934 ed.)). Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together — but not the complete merger — of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of "consolidate" in subsection (a)(2).

Id. Defendant States rely on *Hall* to suggest that "directly liable" was used in a certain way in the 1966 UUPA and New York's unclaimed property law, and that

term therefore has a legal lineage which resolves any ambiguity regarding the meaning of "directly liable" in the FDA. This reliance is sorely misplaced. In truth, Defendant States' attempt to compare the legal lineage of "consolidate" as presented in *Hall* to that of "directly liable" as used in the FDA only serves to underscore how the present case is not one in which the history of the term "directly liable" supports presuming that Congress incorporated anything from the 1966 UUPA or New York's unclaimed property law into the FDA.

Defendant States' argument requires that Congress "borrowed" or "incorporated" the term "directly liable" from the 1966 UUPA and/or the New York law. This assumption is fundamental to their argument because, as Defendant States quote, only "if a word is obviously transplanted from another legal source, whether the common law or other legislation, [does] it bring[] the old soil with it." DS MSJ at 32 (quoting *Hall*, 138 S. Ct. at 1128 (citation omitted)). Defendants, however, do not present a scintilla of evidence that Congress was aware of the 1966 UUPA, the New York unclaimed property law, or the cited New York Attorney General opinions at the time the FDA was drafted. None of these alleged sources are cited in the FDA or its legislative history, unlike the statute at issue in *Lorillard*. The use of the term "directly liable" in these sources has not been authoritatively interpreted for 125 years like in *Hall*. At most, the Defendant States offer a case decided nearly a decade after the FDA was adopted that observed that

the FDA was "designed to interact with the [1966 UUPA]," but that case did not itself consider the term "directly liable" or otherwise conclude that the 1966 UUPA was "incorporated" into the FDA. *Travelers Express Co. v. Minnesota*, 506 F. Supp. 1379, 1384 (D. Minn. 1981).

There is nothing in the record suggesting that Congress was aware of the 1966 UUPA or the New York law. Moreover, the Supreme Court recently held that the text of a statute is the best evidence of what a statute means and that "silence in the legislative history cannot lend any clarity." *Encino Motorcars*, 138 S. Ct. at 1143 (citation omitted). Defendant States cite no case that supports filling this silence with the 1966 UUPA and the New York unclaimed property law. Thus, "there is no reason not to give the [FDA] text a fair reading." *Encino Motorcars*, 138 S. Ct. at 1143 (citation omitted). This Court should reject Defendant States' attempt to "incorporate" into the FDA a definition of the term "directly liable" as used in the 1966 UUPA and/or New York law without any evidence that Congress knew of, considered, or intended to incorporate that definition into the FDA.

2. The 1966 UUPA is Different From the FDA and it is Clear Congress Did Not Consider or Incorporate the 1966 UUPA Into the FDA

Defendant States rely on Section 2(c) of the 1966 UUPA for the proposition that "directly liable" refers to the entity ultimately responsible for making payment on the value of the instrument because that provision broadly includes all manner

of written instruments as being written instruments "on which a banking or financial institution or business association is directly liable." DS App.692. [10]. Specifically, the sweeping language of Section 2(c) of the 1966 UUPA establishes the dormancy period and the time from which dormancy begins to run for written instruments including all "drafts," money orders, traveler's checks and certificates of deposit. DS App. 692. Section 2(c) proposes that the dormancy period for these different instruments be 7 years and that the 7 years start to run from the date the instruments were "payable" or the date of issuance if the instrument was "payable on demand."[11] *Id*. The 1966 UUPA does not concern itself with identifying a subset of "drafts" or even a subset of negotiable written instruments in Section 2(c) when establishing a dormancy period. Therefore any consideration of liability, whether direct or indirect, on any given written instrument is utterly immaterial to the proposed operation of Section 2(c). As such, the 1966 UUPA's use of "directly liable" in this provision cannot be said to be an "established meaning," *see supra* Section II.A.1, of that term.

In stark contrast to Section 2(c), the FDA identifies a list of specific written instruments, namely a "money order, traveler's check, or other similar written

[10] Section 2(c) of the 1954 and 1966 UUPAs differ in that the references to "business association" and "money orders" were added in 1966. DS App. 671.
[11] Traveler's checks have a 15 year dormancy period that begins to run from the date of issuance. *Id*.

instrument . . . on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Thus, irrespective of whether Congress was aware of the 1966 UUPA, the text of the FDA demonstrates that Congress clearly did not intend to adopt the sweeping scope of the 1966 UUPA's reference to "drafts" in the FDA. Given that Congress did not see fit to have the FDA cover "drafts" writ-large, there is no reason to believe that Congress adopted the 1966 UUPA's use of "directly liable" into the FDA either. Rather, Congress drafted the FDA to cover a specific list of written negotiable instruments, and having this different goal in mind, elected, based on the face of the statute, to differentiate between various written instruments based on whether the liability on those instruments is direct or indirect. The fact that the 1966 UUPA did not use the term "directly liable" in this manner is simply a reflection of the fact that the 1966 UUPA did not attempt to distinguish between types of written negotiable instruments at all. A simple comparison of the text of Section 2(c) of the 1966 UUPA to the text of the FDA makes it clear that Congress did not incorporate the 1966 UUPA, or the definition of the term "directly liable" as used in the 1966 UUPA, into the FDA.[12]

[12] Additionally, banks across the country would have to escheat unclaimed, unaddressed certificates of deposit pursuant to the FDA if the FDA adopted, as proposed by Defendant States, the 1966 UUPA – an outcome unlikely intended by Congress when it passed a law regarding money orders and traveler's checks.

However, even assuming that Congress was aware of the 1966 UUPA, there is no clear evidence that Congress intended to copy or otherwise incorporate the scope or meaning of "directly liable" that Defendant States would have this Court attribute to the 1966 UUPA. Even if one were tempted to conclude that because the FDA uses the same words – "directly liable" – as the 1966 UUPA, Congress imported the 1966 UUPA's definition of "directly liable" into the FDA, the use of the same words in the 1966 UUPA is not evidence that Congress intended those words to necessarily have the same meaning in the law it adopted. As one court succinctly observed "[a]n organization may publish a proposed act with a certain range of intentions and expectations as to the proposed law's effect, and a legislature may publish it in whole or in part with somewhat or totally different ranges of intentions and expectations." *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, No. 2:13-cv-00164-RCJ-NJK, 2013 U.S. Dist. LEXIS 106460, at *7-8, (D. Nev. July 30, 2013). The *Bayview* Court noted that while the text of the law and "comments to [the] actual legislation or rules approved by a legislative or rule-making body are themselves authoritative" when interpreting the law, the privately drafted proposed law and comments thereto are not. 2013 U.S. Dist. LEXIS 106460, at *7. There is nothing in the record or in the text of the FDA or its legislative history which supports presuming that Congress either in fact incorporated or intended to incorporate the term "directly liable" from the 1966

UUPA or the New York law.[13] More importantly, there is nothing in the record or in the text of the FDA or its legislative history which supports presuming that Congress intended "directly liable" to refer to the entity ultimately responsible for making payment on the value of the instrument.

3. The U.C.C. Provides a Well-Recognized, Long-Established Framework Evidencing What Would Have Been a Common Understanding of "Directly Liable"

By 1974, every State except Louisiana had adopted the Uniform Commercial Code, and Louisiana signed on to some portions by 1990. William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. Miami L. Rev.1, 10 (1967); https://www.sos.la.gov/BusinessServices/UniformCommercialCode/Pages/default.aspx. The U.C.C. was in 1974, and remains today, ubiquitous and forms the basis of nearly all commercial transactions in the United States. In fact, in 1966, well before the adoption of the FDA, Congress recognized this very fact and found that the U.C.C. "sets forth rules of law in logical order suitable for orderly comparison with the corresponding rules of other nations" and that a "comparison of all such rules of commercial law" between nations was important. *See* 112 Cong. Rec. 1656 (Feb. 1, 1966) (resolving to fund a translation of the U.C.C.).

[13] The analysis presented in this Section II.A.2 applies equally to the New York unclaimed property law and the associated New York Attorney General opinions.

In comparison, the 1966 UUPA has never been universally accepted by the States. To this day, 14 States still have not adopted the 1966 UUPA. *See* Revised Uniform Unclaimed Property Act, Prefatory Note (Unif. Law Comm'n 2016) (Ex. KK to Supp. Taliaferro Decl.). Not surprisingly, Congress did not reference the 1966 UUPA when it enacted its sole piece of legislation addressing unclaimed property issues. And the Supreme Court has never referred to the 1966 UUPA for interpretive guidance in any of the *Texas* trilogy cases, only mentioning it as a passing reference to the Revised Uniform Disposition of Unclaimed Property Act in a footnote in *Pennsylvania v. New York*, 407 U.S. 206, 215 n.8 (1972). Hence, Defendant States' initial assertion that "Professor Mann's discussion of liability concepts in the U.C.C. casts no light on the meaning of the term 'directly liable' in the FDA," DS MSJ at 35, because (i) the U.C.C. does not use the term "directly liable" and because (ii) the U.C.C. was drafted after the New York law should be rejected out of hand.

First, the U.C.C.'s scheme of liability is what gives meaning to the ambiguous term "directly liable" when the FDA uses that term to describe negotiable instruments, not because it is a draft rule, as is the case with the 1966 UUPA, but because the U.C.C. codified in an orderly fashion the long-standing, pre-existing practices and principles relevant to negotiable instruments. The concepts of conditional and unconditional liability in the U.C.C., regardless of

whether labeled direct or indirect, describe how negotiable instruments have traditionally functioned in commerce. *See Burrage v. United States*, 571 U.S. 204, 214 (2014) (in determining what type of causation is intended by Congress's use of the phrase "results from," the Court presumed that Congress was legislating against the "traditional background principles" of causation). Therefore, like in *Burrage*, this Court should presume that Congress, when it used the phrase "directly liable" in the FDA, legislated against the "traditional background principles" of liability of negotiable instruments embodied in the U.C.C.

Second, the fact that the New York law predates the U.C.C. in no way limits the light the U.C.C. may cast on the FDA, a law which was enacted years after 49 of the 50 states had adopted the U.C.C. In fact, during the two decades between the release of the U.C.C. and the adoption of the FDA, Congress had recognized the impact and importance of the U.C.C., *see, e.g.*, 112 Cong. Rec. 1656 (Feb. 1, 1966), while the 1966 UUPA received no such recognition and the New York law remained nothing more than just that – a New York law. Therefore, Delaware's proposal to use the U.C.C.'s scheme of liability to define "directly liable" as used in the FDA to mean unconditional liability not contingent on dishonor is straightforward and consistent with both the plain language of the statute and well-understood and widely accepted types of liabilities on negotiable instruments.

Finally, Defendant States' substantive objections to Delaware's proposal to use the U.C.C.'s scheme of liability to define "directly liable" to mean unconditional liability not contingent on dishonor may be largely condensed into three basic arguments. First, Defendant States object to using the U.C.C. to understand the types of liability of negotiable instruments because the negotiable instruments under review are listed in a statute intended to reallocate certain types of unaddressed, intangible unclaimed property between the States. DS MSJ at 36-37. Second, Defendant States argue that Prof. Mann's interpretation of the U.C.C. is inconsistent with the 1966 UUPA's language and the New York Attorney General opinions discussed above. DS MSJ at 38- 40. Third, the apparent crux of Defendant States' argument against Prof. Mann's interpretation is that defining "directly liable" as unconditional liability "would create internal tension in the FDA" because such an interpretation would mean that the FDA applies to some written instruments for which there is no direct liability (money orders and traveler's checks) as well as some written instruments for which there is direct liability (cashier's checks and certified checks). DS MSJ at 37-38. All three of Defendant States' arguments should be rejected.

a) This Court Must Identify the Written Instruments Properly Within the Scope of the FDA

First, Defendant States dismiss Delaware's use of the U.C.C. to interpret the term "directly liable" as used in the FDA because the FDA is an escheat statute

that "address[es] the question of who is in possession of unclaimed property and the circumstances under which the property should be remitted to the appropriate State," and it is not a statute "governing when parties can be sued to enforce an instrument." DS MSJ at 36. Defendant States' argument, however, ignores the proverbial elephant in the room, namely what property does the FDA govern the remittance of? The FDA applies to "sum[s] payable on a money order, traveler's check, or other similar written instrument . . . on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. The question of what property is covered by the FDA is thus a question only answered by determining what types of written instruments are "money orders," "traveler's checks," or "similar written instrument[s] . . . on which a banking or financial organization or a business association is directly liable." Despite Defendant States' assertion to the contrary, that determination is not a determination illuminated by, or even addressed by, unclaimed property law, but rather it is a quintessential question of what types of written instruments are described by the language used by Congress. In short, it is a question that can, and should, be answered by looking at the U.C.C. – a uniform law adopted across the nation and understood by Congress to represent our nation's commercial laws well before the FDA was drafted. *See supra*, 112 Cong. Rec. 1656 (Feb. 1, 1966).

Moreover, because Congress specifically included the concept of "directly liable" to describe one of the categories of written instruments in the FDA, understanding whether the liability on a written instrument is direct or indirect is necessary to properly apply the FDA's rules for remittance of unclaimed property. Therefore, while Defendant States enumerate all the reasons why Congress selected the remittance rules it selected in the FDA, DS MSJ at 36-37, none of those reasons negate having to first determine what property is subject to the FDA or having to give meaning to the term "directly liable" in order to properly apply the FDA.[14] And if "directly liable" does nothing more than refer to the entity ultimately responsible for making payment on the value of the instrument, as Defendant States propose, then what is the difference between being "directly liable" and simply "liable" on a written instrument? Delaware will explain in more detail below why Defendant States' proposed interpretation of "directly liable" renders "directly" superfluous and should be rejected, but as a practical matter reading "directly" out of "directly liable" alters the liability of written instruments for escheat purposes in a manner inconsistent with how the same liability on written instruments is understood in other laws governing those very same written

[14] Interestingly, Defendant States accept the U.C.C. liability scheme Prof. Mann describes, but they assert that Congress would not have used the concept of direct/indirect liability to describe the U.C.C.'s scheme of unconditional vs. conditional liability. Instead,, according to the Defendant States, Congress would have used the concept of primary/secondary to so refer. DS MSJ at 35-36.

instruments. *See. e.g.,* 12 C.F.R 229.2(i)(3)(Regulation CC); *Ward v. Fed. Kemper Ins. Co.,* 62 Md. App. 351, 358, 489 A.2d 91, 95 (Md. Ct. Spec. App. 1985) ("The conditions are that the check be presented and honored. Until those conditions are met, no one is **directly liable** on the check itself.") (citing Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶ 1.3 (rev.ed.1981))(emphasis added). None of the historical record surrounding the FDA cited by Defendant States supports concluding that Congress intended this perverse result. Using the U.C.C.'s scheme of liability to interpret the term "directly liable," however, avoids this inconsistency, recognizes the wide-spread adoption and application of the U.C.C. in 1974, and avoids reading "directly" out of the FDA.

b) The Scope of the FDA is Different From and Therefore Not Inconsistent With the 1966 UUPA

Second, Defendant States criticize Prof. Mann's application of the U.C.C.'s liability scheme to give meaning to the term "directly liable" as used in the FDA because it results in an interpretation of "directly liable" that is allegedly inconsistent with the 1966 UUPA and New York's law and related Attorney General opinions. This criticism is premised on the assumption that the FDA is somehow modeled on the 1966 UUPA or that the FDA incorporated the 1966 UUPA and the New York law, but as shown above, this premise is wrong – there is no evidence that Congress was even aware of the 1966 UUPA. *See supra* Section II.A.1-2. Moreover, the 1966 UUPA and the New York law were drafted to

establish the dormancy period for all "drafts," and the FDA established a remittance scheme for a narrow list of specified written instruments. Given the difference in the scope and purpose of the FDA on the one hand, and the scope of purpose of the 1966 UUPA and New York law on the other hand, it is not surprising or alarming to conclude that "directly liable" may not have the same meaning in those three acts. This is especially true given that the 1966 UUPA does not attempt to distinguish between various types of drafts whereas the FDA does. *See supra* Section II.A.2. Finally, the question before the Court is what does "directly liable" mean in the FDA when it is used as a qualifier on the subset of "similar written instruments." Delaware submits that an interpretation of "directly liable" as a qualifier in the context of the FDA has no impact on the application of the 1966 UUPA's dormancy provision because that dormancy provision applies to all "drafts." There is simply no inconsistency concern presented by using the U.C.C.'s liability scheme for written instruments to define "directly liable" in the FDA.

c) "Directly Liable" in the FDA is Properly Understood to Mean Unconditionally Liable

Third, Defendant States criticize Prof. Mann's interpretation of "directly liable" as unconditional liability because it "creates internal tension in the FDA" in that the statute would be interpreted to cover both written instruments on which there is conditional liability, money orders and traveler's checks, and written

instruments on which there is unconditional liability, cashier's checks. DS MSJ at 37-38. It is not, however, at all clear that Defendant States' conclusion follows from this supposed result. Posit that what Congress intended when it included the term "directly liable" in the FDA was that "similar written instruments" had to have direct liability, or at least not indirect liability, or in other words unconditional liability, then the alleged "tension" evaporates – Congress simply intended to cover those specified written instruments. The alleged "tension" Defendant States identify is only the result of their contention that this could not possibly be what Congress intended; however, the bulk of that argument relies on references to the 1966 UUPA and the New York law without ever presenting any evidence that Congress was aware of those two alleged "sources." But even if one were to agree, for the sake of argument, that interpreting the FDA to cover money orders, traveler's checks and cashier's checks seems odd, that interpretation at least gives meaning to the entirety of the text Congress passed when it enacted the FDA. In contrast, Defendant States would interpret "directly liable" right out of the FDA all together, and that is a significantly more problematic result.

If Defendant States are correct and "directly liable" does nothing more than refer to the entity ultimately responsible for making payment on the value of the instrument, then there is no difference between being "directly" liable and plain-old "liable." Defendant States' proposed definition strikes "directly liable" out of

the FDA and, as discussed at length above, *see* Section I.A., statutes should not be interpreted to render words superfluous or "altogether redundant." *Gustafson*, 513 U.S. at 574. In *Gustafson*, the plaintiff argued that the Securities Act of 1933's definition of a prospectus as "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security" meant that "any written communication that offers a security for sale is a 'prospectus.'" *Id*. at 573-74. The Supreme Court rejected this definition and stated:

> If "communication" included every written communication, it would render "notice, circular, advertisement, [and] letter" redundant, since each of these are forms of written communication as well. Congress with ease could have drafted § 2(10) to read: "The term 'prospectus' means any communication, written or by radio or television, that offers a security for sale or confirms the sale of a security." Congress did not write the statute that way, however, and we decline to say it included the words "notice, circular, advertisement, [and] letter" for no purpose.
>
> The constructional problem is resolved by the second principle [plaintiff] overlooks, which is that a word is known by the company it keeps (the doctrine of *noscitur a sociis*). This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving "unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co*., 367 U.S. 303, 307 (1961).

Id. at 574-75.

Just like the plaintiff in *Gustafson*, Defendant States propose a definition of "directly liable" that does not distinguish between being "directly liable" and simply "liable" on a written instrument, thereby rendering "directly" redundant and

ascribing to "liable" a "meaning so broad that it is inconsistent with its accompanying word[]" in the FDA, namely "directly". Defendant States' proposed definition of "directly liable" thus fails for the same reason its proposed definition of "money order" fails – Defendant States' interpretation of both terms renders words in the FDA superfluous and redundant as well as "ascribes a meaning so broad" to certain terms ("money order" and "directly liable") that those meanings are "inconsistent with [the] accompanying words" in the FDA. This Court should reject Defendant States' definition of "directly liable" (and "money order"), and instead should find that Congress's inclusion of that term in the FDA must be given meaning, and that the meaning of "directly liable" should be consistent with the common understanding of unconditional liability for written instruments in the U.C.C.[15]

B. MoneyGram Official Checks Are Not Similar Written Instruments to Money Orders

After unpersuasively arguing that Official Checks should be considered "money orders" under the FDA, the Defendant States next argue that MoneyGram Official Checks are instead "similar written instruments" under the FDA. However, much like its money order analysis, Defendant States' "similar written

[15] Such a definition is also consistent with the Black's Law Dictionary definition of "directly." In Black's Law Dictionary "directly" is defined as "1. In a straightforward manner. 2. in a straight line or course. 3. Immediately." *Black's Law Dictionary* (9th ed. 2009).

instrument" analysis suffers from serious defects. Additionally, Defendant States rely on facts, among others, regarding how MoneyGram instruments are accepted in the marketplace and whether the addresses of purchasers of those instruments are collected in order to argue that MoneyGram Official Checks are "similar" to money orders. Delaware disputes these material facts and to the extent that the resolution of this case depends on a finding of "similarity" between money orders and Official Checks, that issue may not be resolved on a motion for summary judgment.

1. Money Orders and MoneyGram Teller's Checks and Agent Checks Are Not Market Substitutes

First, Defendant States are incorrect to assert that money orders, on the one hand, and MoneyGram Teller's Checks and MoneyGram Agent Checks, on the other hand, have equivalent acceptance in the marketplace. Defendant States use the phrase "as good as cash," DS MSJ at 26, to imply that the two groups are substitutes for each other. They are not. To the contrary, money orders are substitutes for personal checks and are typically used by individuals who do not have checking accounts. Delaware SOF ¶¶ 8, 24. Consumers use money orders in lieu of cash or personal checks. Delaware SOF ¶ 21. In contrast, MoneyGram Official Checks are used as substitutes for bank checks or cashier's checks. Delaware SOF ¶ 59. They are used "by consumers where a payee **requires a check drawn on a bank**." Yingst Ex. 29 at 6 (Taliaferro Exhibit M at 6) (emphasis

added). MoneyGram's Fed. R. Civ. P. 30(b)(6) witness explained that a money order (unlike a MoneyGram Official Check) is a "reliable payment method. It is not a guaranteed payment method. It is not a next day availability payment method." Yingst 148:16-150:4 (DS App. 1169-1171). In contrast, a MoneyGram Teller's Check is a "good funds check." Yingst 142:9-13 (Ex. A to Taliaferro Decl.). A money order is not a "good funds" item. Yingst 143:10-17 (Ex. A to Taliaferro Decl.).[16] Each of these differences demonstrate the ways in which MoneyGram Teller's Checks and MoneyGram Agent Checks are not "similar written instruments" to money orders.

2. Defendant States Incorrectly Assert That the FDA Captures Every Prepaid Instrument in the United States

Second, Defendant States assert that the "similar written instrument" requirement of the FDA applies to MoneyGram Teller's Checks and Agent Checks because "[m]oney orders, traveler's checks, and Official Checks are prepaid instruments for transmitting funds." DS MSJ at 26. Of course, Delaware does not dispute this. Money orders, traveler's checks, and Official Checks are each prepaid instruments for transmitting funds. However, the Defendant States' broad reading

[16] Delaware refers the Special Master to the complete list of the market differences between money orders and MoneyGram Teller's and Agent Checks contained in its Opening Memorandum. Delaware MSJ at 50-54.

does not stop with the disputed MoneyGram instruments. Under Defendant States' reading, all prepaid instruments would be subject to the FDA. That would include:

- All cashier's checks, as defined under U.C.C. § 3-104(g)
- All teller's checks, as defined under U.C.C. § 3-104(h)[17]
- All certified checks, as defined under U.C.C. § 3-409(d)
- All postal money orders, as defined under the U.S.P.S. Domestic Mail Manual, § 509.3.0 *et seq*.

Defendant States' position proves far too much. If Congress had wanted to capture all prepaid instruments, then they had myriad drafting options available to them to do that. Most straightforwardly, they could have simply stated "if the books and records of such banking or financial organization or business association show the State in which **any prepaid instrument** was purchased, that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument." That would have clearly accomplished what Defendant States now assert was the goal of the FDA. However, the FDA did not use the phrase, "any prepaid instrument," or anything approaching that level of comprehensive coverage. In fact, the exact opposite is true. The statute's congressional findings

[17] Of course, all MoneyGram Teller's Checks meet the definition of a teller's check under the U.C.C. and the Expedited Funds Availability Act, 12 U.S.C. § 4001 *et.seq.*, but the Defendant States' sweeping definition would capture every teller's check in the country.

and declaration of purpose references only two instruments – money orders and traveler's checks. 12 U.S.C. § 2501. Congress made no findings and had no

declaration of purpose for any other kind of written instrument, and the statute should be construed accordingly. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371(1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear.") (citation omitted).

The legislative history and declaration of purpose in the FDA relate only to money orders and traveler's checks. Defendant States' attempts to drastically expand the statute find no support in the FDA, and can be rejected as overly broad and outside the "holistic" scope of the statute.

3. Defendant States Incorrectly Assert That the Critical Aspect of Similarity Under the FDA is Whether Addresses are Maintained by the Holder of the Unclaimed Property

Defendant States next assert that the key criterion of similarity under the FDA is whether the issuing entity of a prepaid instrument did not collect the purchaser's address, and as a result, would escheat unclaimed items to the holder's State of incorporation. DS MSJ at 27. This possible interpretation is wrong on at least two fronts. First, the operative provision, 12 U.S.C. § 2503, does not incorporate the supposed findings from § 2501. If, for example, Congress was concerned about prepaid instruments for which the holder did not maintain owner addresses, then it would have been a straightforward legislative drafting exercise to

have the statute cover those instruments. The statute, of course, does not state that it covers "any prepaid instrument for which the holder lacks owner addresses" or similar language.

Secondly, and perhaps more importantly, the record in this case is replete with evidence that issuers of money orders and traveler's checks do, in many instances, keep the names and addresses of the owners of those instruments. In fact, the Supreme Court has explicitly found that, in the case of money orders, the holder of the unclaimed property frequently has the addresses of the holders. In *Pennsylvania v. New York*, 407 U.S. 206, 215(1972), the Supreme Court rejected Pennsylvania's argument to the contrary, noting:

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

Contemporary business records produced by Western Union in this case show that it, too, collects addresses when selling money orders. Delaware SOF ¶¶ 17-18. Discovery suggests that traveler's check issuers such as American Express also collect addresses. Delaware SOF ¶ 19. Even MoneyGram, although it does not as a general rule collect addresses from purchasers of Retail Money Orders, collects and maintains purchaser addresses if the purchaser exceeds certain limits.

Delaware SOF ¶ 20. Here, the congressional record is devoid of any basis for asserting that addresses are not kept for money orders, and is in fact contradicted by other statements in the congressional record. 119 Cong. Rec. 17046 (May 29, 1973); 120 Cong. Rec. 4528-29 (Feb. 27, 1974). Thus, the supposed declaration in § 2501 is not entitled to any deference. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994) (Congressional findings are not "insulated from meaningful judicial review altogether."); *see also Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 129-30 (1989) ("[A]side from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, . . . the congressional record presented to us contains no evidence as to *how* effective or ineffective [the alternative regulatory proposal] might prove to be.") (footnotes omitted).[18]

The operative section of the FDA – 12 U.S.C. § 2503 – does not contain any limitation on the similarity that is to be considered in determining whether an

[18] Similarly, an agency's factual conclusions are not entitled to any deference when they consist of "naked intuition, unsupported by conceivable facts or policies." *Beach Commc'ns, Inc. v. FCC*, 965 F.2d 1103, 1105 (D.C. Cir. 1992) (citation omitted), *rev'd on other grounds*, 508 U.S. 307 (1993); *Century Commc'ns Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987) ("FCC adduces literally no evidence. . . . Such a guess about consumer instincts hardly presents the sort of issue where, 'if complete factual support . . . for the Commission's judgment or prediction is not possible,' we should defer to the Commission's expert judgment.") (citation omitted).

instrument is "similar" under the FDA. Moreover, the Defendant States' proffered test – whether addresses are maintained – is contrary to the language of the statute and more importantly, contrary to the Supreme Court's finding in *Pennsylvania* and in discovery in this case.

C. Both of Defendant States' Proposed Definitions of Third Party Bank Checks are Inconsistent With the FDA

As Delaware acknowledged in its opening Memorandum in Support of Motion for Summary Judgment, the origin of the phrase "third party bank check" in the FDA is "obscure." Delaware MSJ at 37-38. Defendant States agreed with this assessment, noting that all three experts in this case – Delaware's, Pennsylvania's, and the remainder of the Defendant States' – agree that the term is not commonly used and did not have a universally accepted definition. DS MSJ at 40.

However, rather than accept Delaware's common-sense interpretation that "third party bank check" refers to a bank check provided by a third party, Delaware MSJ at 38-39, Defendant States propose two alternative definitions. DS MSJ at 40-41. Defendant States propose that "third party bank check" either refers to a check "drawn by and on a bank that the original payee has indorsed to another party" or that it refers to an ordinary personal check written from a checking account. *Id*. Neither of these proposed definitions survive scrutiny.

1. A Bank Check Indorsed to a Third Party is a Meaningless Distinction for the FDA

In proposing their first definition of third party bank check, Defendant States assert that a third party check is a check indorsed over to third party by the original payee, and that a bank check is a check drawn by and on a bank. There are only two kinds of checks under the U.C.C. that are both drawn by and on a bank. The first, a cashier's check, is created when the drawer bank and the drawee bank are the same. U.C.C. § 3-104(g). The second type, a teller's check, is created when the drawer bank and the drawee bank are different entities. U.C.C. § 3-104(h). Moreover, Defendant States assert that a "third party check" is a check indorsed by the original payee over to a third party. Combining the two phrases yields Defendant States' first proposed definition – a check drawn by a bank on a bank that has been indorsed over to a third party. DS MSJ at 41.

Defendant States' definition has one fatal flaw, and one which they have been aware of for some time. **A holder of an unclaimed bank check has no way of knowing whether or not it has been indorsed over to a third party**. If a check is drawn by a bank, and then never presented for payment, it could potentially become dormant and subject to escheat. Alternatively, if a check is drawn on a bank, and then the original payee indorses it over to another party, the bank only becomes aware of this endorsement when the check is presented for payment, at which point it ceases to be unclaimed and subject to escheat. This

problem with Defendant States' proposed definition was explained in pre-litigation correspondence more than three years ago, and Defendant States still have not provided any counter-argument to respond to Delaware. *See* DS App. 594.

Defendant States' expert Prof. Gillette acknowledged that Delaware's criticism of this possible definition of third party bank check was essentially correct, and said that he had "no reason" to disagree with Delaware's criticism of Defendant State's proffered position. Gillette 154:15-155:15 (Ex. EE to Supp. Taliaferro Decl.). In other words, even though Defendant States disagree with Delaware's proposed definition and continue to assert that a third party bank check simply means a check indorsed to a third party, they admit, as they must, that their proposed exemption of third party bank checks **would never actually occur**. A statute cannot be read in such a way to render a nonsensical result. *HUD v. Rucker*, 535 U.S. 125, 131 (2002).

Defendant States' proposed interpretation of "third party bank check" has practical implications as well. According to Defendant States, the FDA covers all prepaid instruments. *See* Section I, *supra*. And Defendant States admit, as they must, that the FDA does not cover "third party bank checks." If a third party bank check means any bank check indorsed to a third party, then any State seeking escheat of a bank check must make a determination, on a check-by-check basis, of whether such a check had been indorsed over to a third party. As explained above,

it is not possible to know whether such an instrument has been so indorsed without looking at the instrument itself, which renders a check-by-check review impossible because, of course, unclaimed instruments cannot be reviewed to determine if they were indorsed to a third party. This practical limitation is yet another reason why Defendant States' first proffered definition of "third party bank check" must be rejected.[19]

2. "Third Party Bank Check" Does Not Mean "Personal Check"

Defendant States' second proposed definition is that "third party bank check" simply means a "personal check" drawn on an ordinary checking account. However, this definition suffers from the same flaws as their first proposed definition and can also be rejected.

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[19] Defendant States' cited case, *United States v. Thwaites Place Assocs.*, 548 F. Supp. 94 (S.D.N.Y. 1982), DS MSJ at 41-42, also does not support their desired definition of "third party bank check." The *Thwaites* opinion is clear that what made the check at issue of interest was that it had been indorsed two times and was therefore a "doubly indorsed check." 548 F. Supp. at 95. *See also id.* at 96 n.2 (Original payee "Sorkin would have indorsed the checks over to Dedvukaj and Dedvukaj in turn would have indorsed them over to the Marshal."). The checks at issue in *Thwaites*, therefore, were checks made out to a payee, who a) indorsed them to another party (the first indorsement); b) who subsequently indorsed them to yet another party (the second indorsement). The *Thwaites* opinion also makes clear that the checks were not bank checks (at least in the way Defendant States have defined the term) and were instead "certified checks." *Id*. at 95; *see also* U.C.C. § 3-409 ("'acceptance' means the drawee's signed agreement to pay a draft as presented."). A certified check has no requirement to be drawn by a bank, and there is no indication that the checks in *Thwaites* were drawn by a bank. Defendant States' sole example thus does not support their proposed definition.

Defendant States suggest that certain financial regulators were using the term "third party payment services" in the 1970s to refer to personal checking accounts, and that this term, which is allegedly related to the use of personal checks, somehow resulted in the term "third party bank check" in the FDA. DS MSJ at 42-43. There are several significant problems with this theory. First and foremost, there is not a single bit of evidence in the record, or even outside of the record, to link these two terms. It is pure supposition by Defendant States. Second, the supposed "financial reforms" that supposedly led to new legislation in the 1970s all did so after the FDA was passed. Clark 205:17-207:1 (Ex. HH to Supp. Taliaferro Decl.). This raises questions about the extent to which Congress had any awareness of the analysis that was undertaken in the 1970s.[20] Third, even if some financial regulator, or even the Department of Treasury General Counsel himself, had some definition of "third party bank check" in mind, there is no indication that Congress had the same definition in mind when it adopted the FDA. It is thus far from "reasonable to interpret" the phrase in the manner suggested by Defendant States.[21] DS MSJ at 43.

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[20] The Hunt Commission, for example, did not have any members of Congress serving on the committee. Clark Deposition at 207:2-4 (Ex. HH to Supp. Taliaferro Decl.) ("Q.· ·Okay.· Were there any senators who were members of the Hunt Commission? A.· ·No.· It was primarily corporate leaders.").

[21] This portion of Defendant States' brief relies heavily on a portion of the report provided by Barkley Clark. *See* DS MSJ at 42-43 (citing Clark Rep. at 21-25; Clark Rep. at 23; Clark Rep. at 24-25; Clark Report at 25-26). This entire portion

3. MoneyGram Teller's Checks are "Real" Teller's Checks Under the U.C.C.

Defendant States appear to be responding to pre-litigation correspondence with Delaware's former State Escheator in asserting that MoneyGram Teller's Checks are not teller's checks under the U.C.C., and are therefore not "third party bank checks." *See* DS MSJ at 45-46. However, in asserting that MoneyGram Teller's Checks are not "true" teller's checks, Defendant States assert that an extraneous document – the services contract between MoneyGram and its financial institution customers, can change the classification of certain MoneyGram instruments. DS MSJ at 43-45. This is incorrect and inherently relies on disputed issues of material fact, and therefore may not be resolved on a motion for summary judgment.

The underlying financial contract between MoneyGram and its customer financial institution does not have any bearing at all on how MoneyGram Teller's Checks are treated under the U.C.C. To the contrary, the essence of the U.C.C. is that all parties to a negotiable instrument, or any party who accepts a negotiable instrument as payment, can do so on the basis of the face of the instrument. No

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of Prof. Clark's report "originated" with Pennsylvania's counsel, Clark 213:13-19 (Ex. HH to Supp. Taliaferro Decl.), and then Prof. Clark "tried in the report to expand" on Pennsylvania's counsel's analysis. *Id.* at 212:1-5 (Ex. HH to Supp. Taliaferro Decl.).

party has to resort to external documents, nor would any such documents have any effect on the treatment of the instrument under the U.C.C.

The U.C.C. makes no allowance for the possibility of a "secret" agent, the role in which Defendant States alleged MoneyGram is acting with respect to MoneyGram Teller's Checks. The U.C.C. makes no provision for "secret" or undisclosed agents because such an undertaking would completely undermine the purpose of the U.C.C. and the purpose of negotiable instruments under the U.C.C.

To the contrary, the essence of a negotiable instrument under the U.C.C. is that it "does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor." U.C.C. § 3-104(a)(3). The face of a MoneyGram Teller's Check shows a financial institution drawer, which is sufficient to make it a teller's check under the U.C.C. Whatever role MoneyGram has in the back-office processing of a bank check is irrelevant.

Another governing principle of negotiable instrument law under the U.C.C. is that parol evidence cannot be introduced to contradict the unambiguous terms of

a note. *See, e.g.*, *Tamman v. Schinazi*, No. 00 CV 9404 (GBD), 2004 U.S. Dist. LEXIS 13896, at *9 (S.D.N.Y. July 20, 2004) ("Parol evidence may not be relied upon to contradict the unambiguous terms of a note.") (citing *Royal Bank of Canada v. Mahr*, 818 F. Supp. 60 (S.D.N.Y. 1993); *Hogan & Co. v. Saturn Management, Inc.*, 78 A.D.2d 837, 433 N.Y.S.2d 168, 169 (N.Y. App. Div. 1980)); *Peoples Nat'l Bank v. Bryant*, 774 F.2d 682, 684 (5th Cir. 1985) ("The rule in Texas on this matter leaves no room for doubt: '[A] negotiable instrument which is clear and express in its terms cannot be varied by parol agreements or representations of a payee that a maker or surety will not be liable thereon.'") (quoting *Town North National Bank v. Broaddus*, 569 S.W.2d 489, 491 (Tex. 1978); *Dacus v. Grimes*, 624 S.W.2d 298, 299 (Tex. Civ. App.-Tyler 1982, no writ)). Defendant States cannot refer to an extraneous services contract to contradict the unambiguous terms of a negotiable instrument that identify a financial institution as the drawer of the instrument. The MoneyGram Teller's Checks at issue in this case are "real" teller's checks under the U.C.C., with all of the attributes appertaining thereunto.[22]

[22] In any event, the general language contained in MoneyGram's standard services contract does not create an agency relationship with respect to MoneyGram Teller's Checks specifically. The language in a single cited dated contract references serving as MoneyGram's "limited agent . . . for the sole purpose of using and selling" a small number of financial instruments, including MoneyGram Money Orders and Agent Checks. Yingst Ex. 15 (Ex. I to Taliaferro Decl.). At least two other versions of the MoneyGram Financial Institution Contract make no

III. Unclaimed Official Checks Escheat Pursuant To Priority Rules

If this Court finds that the escheat of MoneyGram Official Checks is not governed by the FDA, then the unclaimed property represented by uncashed unaddressed MoneyGram Official Checks escheats pursuant to the priority rules established by the Supreme Court in a line of cases commonly referred to as the *Texas* trilogy. In *Texas v. New Jersey*, 379 U.S. 674, 677 (1965) ("*Texas*"), the Supreme Court established priority rules to resolve competing escheat claims by multiple States over abandoned intangible property. It granted first priority to the State of the last known address of the creditor as shown in the debtor's books and records. *Id.* at 681-82. When there is no record of any address for the creditor or the last known address is in a State which does not provide for the escheat of the unclaimed property, the Supreme Court granted second priority to the State of the debtor's incorporation to escheat the unclaimed, unaddressed property. *Id.* at 682. Two subsequent cases, *Pennsylvania v. New York*, 407 U.S. 206 (1972) and *Delaware v. New York*, 507 U.S. 490 (1993) challenged the application of these

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reference to "agency" or "agents." Yingst 14 (Ex. H to Taliaferro Decl.); Yingst 20 (DS App. 307). MoneyGram's Fed. R. Civ. P. 30(b)(6) witness expressly disclaimed agency with respect to MoneyGram Teller's Checks. Yingst 166:24-167:14 (DS App.1187-1188) ("Q. In the instance of a teller's check is Elizabethton Federal considered an agent of MoneyGram? A. No. . . . they are not an agent of MoneyGram. They're not defined as an agent of MoneyGram. They are issuing that check. They are the drawer of that check, people who are getting payment, and we are the issuer of the item, but they are not an agent.").

bright line priority rules, but in both instances the Supreme Court upheld and confirmed the application of the *Texas* rules. Under these priority rules, Delaware is entitled to escheat unclaimed unaddressed MoneyGram Official Checks because it is the State of incorporation of MoneyGram and because MoneyGram is the debtor holding the funds due and owning on unclaimed Official Checks for which its books and records do not contain the names and addresses of the creditors.

A. The *Texas* Priority Rules Are Not Before the Court and Should Not be Altered in any Event

The Commonwealth of Pennsylvania, alone among the Defendant States, is asking this Court to take an action that is misguided on multiple grounds. Pennsylvania is asking that not one, but three decisions of the U.S. Supreme Court be overruled. Pennsylvania Memorandum in Support of Motion for Summary Judgment at 4-13. Moreover, Pennsylvania appears to be asking that this existing, controlling Supreme Court case law be overruled with respect to all forms of intangible property, even though there has been no discovery or other litigation activity directed to any forms of intangible property other than MoneyGram Official Checks.

In *Texas*, the Supreme Court laid down rules of priority among the States governing the escheat of all forms of intangible property. These rules were recently well-set forth by the U.S. Court of Appeals for the Third Circuit as follows:

> The Supreme Court considered several possible rules to govern the order of priority among the states. [*Texas*, 379 U.S.] at 678. It emphasized the importance of adopting bright line rules rather than a test that would require case-by-case analysis. *Id*. at 679-80. Using the terms "debtor" and "creditor" to designate, respectively, the "holder" and the "owner" of unclaimed property, the Supreme Court granted first priority to the state of the last known address of the creditor, according to the debtor's books and records. *Id*. at 680-82. The Supreme Court emphasized that such a rule was fair because "a debt is property of the creditor, not of the debtor[.]" *Id*. at 680. Moreover, such a rule would involve factual questions that are "simple and easy to resolve." *Id*. at 681. And the rule would "tend to distribute escheats among the [s]tates in the proportion of the commercial activities of their residents . . . , rather than technical legal concepts of residence and domicile[.]" *Id*.
>
> Having determined which state had first priority, the Supreme Court then considered which state should have priority when there is no record of any address for the creditor, or when the "last known address is in a [s]tate which does not provide for escheat of the property owed[.]" *Id*. at 682. The Court concluded that in such cases the state of the debtor's state of incorporation would be entitled to escheat the property. *Id*. at 683. The Court acknowledged that the "case could have been resolved otherwise." *Id*. But it emphasized that "the rule [it] adopt[ed] is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the [s]tates." *Id*

Marathon Petroleum Corp. v. Sec'y of Finance for Del., 876 F.3d 481, 489-90 (3d Cir. 2017) (footnotes omitted).

The Court reconsidered the rules it established in *Texas* on two subsequent occasions and on each occasion reaffirmed the rules. In the first case, *Pennsylvania v. New York*, 407 U.S. 206 (1972), Pennsylvania sought to escheat unclaimed funds from money orders purchased within the State, making similar or identical arguments to those being presented in the present motion, including the argument

that the secondary rule is inequitable because it produces a windfall for the States of corporate domicile. *Id.* at 214. In the second case, *Delaware v. New York*, 507 U.S. 490 (1993), the Court rejected efforts to loosen or change the priority rules by broadening the concept of a property-holding "debtor," *id*. at 502, or by allowing the State of the debtor's principal place of business to escheat the property. *Id*. at 506. The Court in *Delaware* emphasized the importance of "adhering to our precedent" to "resolve escheat disputes between States in a fair and efficient manner." *Id*. at 510. The Court in *Delaware* further noted that relief could be sought from Congress by States that wished changes to "the Court's interstate escheat rules," specifically identifying the fact that "Congress overrode *Pennsylvania* by passing a specific statute concerning abandoned money orders and traveler's checks." *Id*.

This Court is, thus, bound by the Court's thrice-considered interstate escheat rules, regardless of the arguments Pennsylvania may present as to why those rules should be overturned. *Cf. Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (holding that even where the Supreme Court overrules its prior decision, rather than anticipate the overruling of precedent, "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Moreover, the fact that Congress passed the FDA, rather than being an argument for overruling precedent as

Pennsylvania suggests, supports respecting existing precedent (as Delaware suggests), given the availability of legislative remedies.

Additionally, there is no basis to conclude that the Supreme Court intended that this proceeding be a vehicle for the reconsideration of *Texas v. New York* and its progeny. The Motions for Leave to File Bill of Complaint filed by the State of Delaware, 22O145 and by the States of Arkansas, *et al*., 22O146, were granted by the Court on October 3, 2016, and did not include any claims or counterclaims seeking to overrule *Texas v. New Jersey*. Those Bills of Complaint and Counterclaims by Delaware and by Arkansas, *et al.* were limited to the application of the FDA to amounts payable on abandoned MoneyGram Official Checks. It was only thereafter, on October 28, 2016, that Pennsylvania obliquely sought in Counterclaim II "a declaration that the secondary rule in *Texas* is no longer equitable and is therefore overruled." Pennsylvania Answer and Counterclaims ¶ 116. That claim is beyond the scope of this proceeding and has not been the subject of litigation or discovery in this case, and, therefore, should either be struck or not the subject of further consideration.

As this Court will recall, Delaware sought, by way of amendment, to raise additional (far narrower issues) concerning Official Checks issued other than by MoneyGram. In rejecting those amendments by Delaware, this Court stated: "Such a pleading might expand enormously the scope of the case and significantly delay

its resolution to an unknown extent." Order ¶ 5(b) (July 24, 2017). The same can be said about the issue upon which Pennsylvania seeks a ruling. Given this Court's prior ruling that this proceeding was to be strictly limited to the application of the FDA to amounts payable on abandoned MoneyGram Official Checks, this Court should similarly reject the effort by Pennsylvania to introduce issues relating to other forms of intangible property and to legal issues other than the construction and application of the FDA and the principles of *Texas v. New Jersey* to amounts payable on abandoned MoneyGram Official Checks.

On its merits, Pennsylvania undertakes none of the analysis, and cites none of the case law, with respect to when the Court should adhere or depart from *stare decisis.* "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) (citation omitted). All four of these factors support adherence to *Texas v. New Jersey*. First, Pennsylvania does not contend that the bright-line rules of *Texas* are unworkable. No evidence has been adduced in this case to that effect, nor has the workability of the *Texas* rules been the subject of testimony, expert reports, or discovery. Indeed, it is the workability of the bright-line rules of *Texas* that the Court has advanced as its primary virtue. *Delaware*, 507 U.S. at 498-99.

Second, the precedent is now over a half century old. This, in turn, results in the third factor favoring adherence to the *Texas* rules. Extensive financial systems and practices have been put into place by the business community and by the States to comply with the current *Texas* rules. There may be few better examples than the escheat of all types of unclaimed intangible property, which includes many types of property not at issue in this litigation, of practices and policies having been put into place in reliance upon a set of legal rules. Again, no evidence has been adduced in this case concerning the costs, risks, and other harms that might result from overruling *Texas*, nor does Pennsylvania even discuss the reliance interests at stake under the *Texas* rules.

Fourth, and perhaps most remarkably, Pennsylvania does not make a case that the *Texas* case law is badly reasoned. The Court's most recent reiteration of the *Texas* rules in *Delaware* was extensively reasoned, including due consideration of the potential windfall created by the secondary rule (which is Pennsylvania's rationale for departing from the *Texas* rules). Tellingly, the dissent in *Delaware* consisted of only two sentences. In short, none of the factors that the Supreme Court has identified as relevant support overruling the *Texas* line of cases.

If this Court were to give serious consideration to Pennsylvania's effort to overrule the *Texas* line of cases, fairness and the ability of the Court to have before it a sufficient factual record would require a reopening of discovery to permit

gathering of evidence on relevant factual issues. These issues include, without limitation, the workability of the *Texas* rules and the workability of the change in law being advocated by Pennsylvania, the reliance interests created by the current legal regime, and the costs, risks, and other harms that might arise from the change in law that Pennsylvania is seeking, including the existence *vel non* of alleged windfalls under the current legal regime versus the regime being advocated by Pennsylvania. Delaware submits that the opportunity to change the *Texas* rules has long since passed, and that this case should be limited, as the Court intended, to the applicability of the FDA to Official Checks.

B. Not all States Have the Power to Escheat Similar Written Instruments

Defendant States categorically declare that they "each have laws that authorize them to take custody of unclaimed sums payable on MoneyGram Official Checks." DS MSJ at 48; Table A. However, as noted in Delaware's opening Memorandum in Support of Motion for Summary Judgment, Delaware MSJ at 55-58, at least ten of these States do not have "power under [their] own laws" allowing them to take possession of dormant written instruments found to be "similar written instrument[s] . . . on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503.

Defendant States' citation of Arkansas's law is illustrative of the inability of these ten States to take possession of dormant "similar written instruments" under

the FDA. Defendant States assert that States like Arkansas have "catch-all" provisions, DS MSJ at 48, which provide the requisite authority under the FDA. However, the "catch-all" provision cited by Defendant States, Ark. Code Ann. § 18-28-202(a)(14), is a provision that relates solely to the dormancy period for given types of property. Ark. Code Ann. § 18-28-202(a) ("Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below . . ."). In contrast, Ark. Code Ann. § 18-28-204 separately provides that "property that is presumed abandoned, whether located in this or another state, ***is subject to the custody of this state if*** . . ." (emphasis added) and lists property types without reference to "similar written instruments to money orders or traveler's checks." Therefore, under its unclaimed property law, Arkansas may have deemed Official Checks dormant under a catch-all dormancy statute, but then it did not include "similar written instruments" as a property type that is "subject to the custody of [the] state." As Defendant States must recognize, the power to escheat includes the power not to escheat and just because a State determines that all property types become dormant under a catch-all dormancy provision, States may still reserve the right to escheat only some of those property types. *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 395 (3d Cir. 2012) ("The ability to escheat necessarily entails the ability not to escheat. To say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of

sovereignty. Various considerations might motivate states not to exercise custodial escheat."). As a result, Arkansas, and the other States identified in Delaware's opening Memorandum, have no operative provision actually providing for the escheat of "similar written instruments" under the FDA.[23]

This limitation on the right of the ten States to take sums payable on MoneyGram Official Checks, even if those instruments are covered by the FDA, is not just theoretical.[24] In the early 1980s, the State of Minnesota demanded a sum from Travelers Express (MoneyGram's predecessor company) including "outstanding money orders sold in other states or territories for which there is no applicable escheat or custodial taking law in effect," and "outstanding money orders sold in states other than Minnesota that are, for various reasons, not subject to that state's escheat or custodial taking law." *Travelers Express Co. v. Minnesota*,

[23] The ten states are Alabama, Arizona, Arkansas, Indiana, Iowa, Kansas, Montana, Nevada, Texas, and West Virginia.

[24] Defendant States assert that if a State's unclaimed property law mentions money orders or traveler's checks, then that State's provision "mirrors the language of the FDA," and "ipso facto" that State has the right to take custody of MoneyGram Official Checks. DS MSJ at 48. At most, this provision would only apply if MoneyGram Official Checks are classified as money orders. If MoneyGram Official Checks are not money orders, then these ten States cannot take custody of the unclaimed sums, even if the MoneyGram Official Checks are classified as similar written instruments. Moreover, if anything, this alleged "mirroring" of the FDA in the States' unclaimed property laws that do not include a reference to "similar written instrument" but instead reference solely money orders and traveler's checks, indicates that the FDA was intended to cover money orders, traveler's checks, and nothing more.

506 F. Supp. 1379, 1381 (D. Minn. 1981). The court, in a holding later affirmed by the Eight Circuit, determined that Minnesota had the right to escheat the sums payable on the unclaimed money orders at issue. *Id.* at 1389; *Travelers Express Co. v. Minnesota*, 664 F.2d 691 (8th Cir. 1981). This case makes clear that Travelers Express was not escheating unclaimed money orders to some number of States because those money orders were "not subject to that state's escheat" law. *Travelers Express*, 506 F. Supp. at 1381. To the same extent that some number of States did not have laws applying specifically to "money orders" in 1981, and therefore could not escheat sums related to unclaimed money orders, the ten States that do not have laws applying specifically to "similar written instruments" cannot take custody of any instruments classified as "similar written instruments."

CONCLUSION

For all the reasons set forth above, this Court should deny Defendant States' Motion for Summary Judgment and Pennsylvania's Motion for Summary Judgment and grant summary judgment in Delaware's favor on each claim in Delaware's Bill of Complaint.

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