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January 19, 2018

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

Re: State of Delaware v. State of Arkansas, *et al.* Nos. 22O145 and 22O146 (consolidated)

Dear Judge Leval:

I am counsel to the Plaintiff State of Delaware in the above-captioned matter. Pursuant to S.D.N.Y. L.R. 37.2, I respectfully request a pre-motion conference to raise a discovery dispute that the parties have been unable to resolve.

### **Background**

The Federal Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. § 2501, *et seq.* (the "Act") applies "[w]here any sum is payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable...." 12 U.S.C. § 2503. The operative terms, which are not defined within the corners of the Act, include:

- money order
- traveler's check
- similar written instrument
- third party bank check

As discussed before Your Honor last year, the parties dispute whether MoneyGram Official Checks share certain characteristics with money orders such that MoneyGram Official Checks are "similar written instruments" to money orders and thus subject to treatment under the Act. The Parties also dispute whether MoneyGram Official Checks are properly considered "third party bank checks" and therefore excluded from the scope of the Act. Delaware contends that the application of the statute to MoneyGram Official Checks necessarily requires a determination of the similarity or dissimilarity of MoneyGram Official Checks to money orders and that such a comparison cannot be made in a vacuum. As a result, Delaware seeks discovery from the Defendant States related to the escheatment of a limited category of other

written instruments which are similar to, e.g. also share some of the same characteristics as, MoneyGram Official Checks and money orders because that discovery is directly relevant to how the parties in this case have defined those instruments for the purpose of applying the Act's operative terms that were not specifically defined by Congress. Such discovery is relevant and needed to determine:

- a) whether the characteristics of MoneyGram official checks, or some portion of the non-uniform universe of MoneyGram Official Checks, should bring MoneyGram Official Checks within the terms of the Act, or
- b) whether Defendant States' disparate treatment of other written instruments with the same characteristics as MoneyGram Official Checks demonstrates that MoneyGram Official Checks should not be subject to the terms of the Act.

The Defendants States object to producing this discovery on the grounds that it is irrelevant and burdensome. Defendant States assert that: "Discovery is needed to determine the objective characteristic of MoneyGram Official Checks. Based on those characteristics, the Court will then decide whether the Official Checks fall within the scope of the controlling statute." Exhibit C (January 10, 2018 Letter from Defendant States to Delaware). Delaware disagrees. The statute on its face requires a comparison to determine if MoneyGram Official Checks, a non-uniform set of written instruments, falls within a category of written instruments that are "similar" to money orders, a category which includes various written instruments that the parties to this case have been escheating for decades. The historic application of what Defendant States treat as a "similar written instrument" to a money order is relevant to the Court's determination of whether MoneyGram Official Checks are "similar written instruments" to money orders for the purposes of resolving this case.

### **Discovery Requests and Subsequent Attempts to Narrow the Dispute**

On October 27, 2017, Plaintiff State of Delaware served its First Set of Requests for Production on Defendant States. In relevant part, Delaware Requested:

- Request No. 2: All of DEFENDANT STATES' COMMUNICATIONS and DOCUMENTS related to the escheat of negotiable instruments for the [period from January 1, 2005 to present].
- Request No. 7: All of DEFENDANT STATES' holder reports where the holder filed property with the DEFENDANT STATE under PERTINENT NAUPA PROPERTY TYPE CODES [CK01 – Cashier's Checks; CK02 - Certified Checks; CK03 - Registered Checks; CK04 - Treasurer's Checks; CK05 - Drafts; CK06 - Warrants; CK07 – Money Orders; CK08 – Traveler's Checks; and CK15 – Other Outstanding Official Checks] for the [period from January 1, 2005 to present].
- Request No. 8: All of DEFENDANT STATES' advice, instructions or answers to inquiries provided to holders or potential holders regarding which NAUPA PROPERTY TYPE CODE to use for any [official check, teller's check, agent check, traveler's check, cashier's check, registered check, certified check, treasurer's check, draft, money order or agent money order].

- Request No. 10: All DOCUMENTS describing, discussing or related to the characteristics and processing of [official checks, teller's checks, agent checks, traveler's checks, cashier's checks, registered checks, certified checks, treasurer's checks, drafts, money orders or agent money orders].
- Request No. 13: All COMMUNICATIONS between DEFENDANT STATES and any holders or potential holders regarding the escheat of [official checks, teller's checks, agent checks, traveler's checks, cashier's checks, registered checks, certified checks, treasurer's checks, drafts, money orders or agent money orders].

The information Delaware requested related to the limited number of property types relevant to Defendant States' claims, and it is proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, and the parties' relative access to relevant information. Fed. R. Civ. P. 26(b)(1). In particular, information related to the filing entities (financial institutions and likewise) is necessary for Delaware to seek third party discovery about the characteristics of instruments escheated by those entities.

On December 1, 2017, Defendant States objected and responded to Delaware's First Set of Requests for Production. With respect to the Requests outlined above, Defendant States refused to produce any documents responsive to these requests except for:

- Non-privileged documents and communications regarding MoneyGram Official Checks within their possession, custody, or control; and
- Any policy manual, guidance document, or other official publication regarding how holders should report their unclaimed property to the Defendant States.

On December 11, 2017, Delaware and Defendant States held a telephonic meet and confer conference regarding the disputed discovery. During that call, Delaware made significant concessions from its original discovery requests and requested the following information in lieu of its original requests:

- The identity of the entities that escheated official checks, money orders and other similar written instruments to the Defendants States between 1/1/2005 to present. At the time, Delaware indicated that identifying the entities that escheat under the six NAUPA Codes CK 01-04, CK 07 and CK 15 would provide the information it sought.
- The identity of state employee(s) with the primary oversight of the escheat of unclaimed money orders, official checks and similar written negotiable instruments between 1/1/2005 to present.
- The identity of any third party consultant retained by the State to perform an audit or examination of the escheat of unclaimed money orders, official checks and similar written negotiable instruments and any documents related to those audits or examinations between 1/1/2005 to present.

- Non-privileged communications with third parties (filing entities, consultants, other states) related to the escheat of, or an examination or audit of, unclaimed money orders, official checks and similar written negotiable instruments between 1/1/2005 to present. At the time, Delaware specifically stated that it did not intend its request to be overly broad and that it believed the information it sought could be obtained with a tailored word search of relevant custodians' files using the following five search terms: "official check(s)," "money order(s)," "teller w/2 check(s)," "cashier w/2 check(s)," and "agent w/2 check(s)."

All Defendant States, with the exception of Pennsylvania, agreed to consider producing documents and information responsive to the narrowed requests. On December 13, 2017, Delaware sent a letter to all Defendant States memorializing this discussion and agreement and reiterating the narrowed requests. Exhibit A.

On January 8, 2018, Pennsylvania sent a letter responding to Delaware's letter, indicating that it had produced its unclaimed property holder manuals for years 2005-2016. It also referred Delaware to its May 31, 2017 bench memorandum filed in this case, stating the memorandum "fully sets forth all of the relevant information Delaware seeks." In response to Delaware's four narrowed discovery requests, Pennsylvania provided the names of two Bureau of Unclaimed Property employees, but refused to provide any documents or information in response to the other three requests. Exhibit B.

On January 10, 2018, the remaining Defendant States sent a letter to Delaware in response to Delaware's four narrowed discovery requests. Although they agreed to provide Delaware with the names of state employees with primary oversight over the escheat of unclaimed property, to date, they have not provided this information to Delaware. Furthermore, although they agreed to produce "guidance documents and manuals provided to holders of unclaimed property as well as documents and communications related to MoneyGram Official Checks," to date, they have only produced the guidance documents and manuals. They refused to provide documents or information in response to Delaware's three other discovery requests. Exhibit C.

In response to these letters, on January 12, 2018, Delaware sent separate letters to Pennsylvania and the other Defendant States narrowing its discovery requests even further. Delaware requested the following information:

- The names of the entities that escheated official checks, money orders and other similar written instruments to the Defendants States for the relevant time period only with respect to six limited NAUPA Codes (CK 01-04, CK 07 and CK 15).
- Non-privileged communications with third parties (filing entities, consultants, other states) related to the escheat of, or an examination or audit of, unclaimed money orders, official checks and similar written negotiable instruments.

Exhibits D & E. In both letters, Delaware indicated its intention to initiate a pre-motion discovery conference with the Court unless the States responded otherwise. Despite Delaware's good-faith effort to resolve this discovery dispute by significantly limiting the scope of its discovery

requests not once, but twice, the parties have failed to resolve their issues. On January 17, 2018, Pennsylvania sent an email to Delaware maintaining its refusal to produce information responsive to even the narrow requests proposed by Delaware. The other Defendant States have not responded to Delaware's latest letter.

### **Basis for Discovery**

Under Federal Rule of Civil Procedure 26(b)(1),

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

*McCutcheon v. Colgate-Palmolive Co.*, No. 16-CV-4170 (LGS) (KNF), 2017 U.S. Dist. LEXIS 192768, at \*14 (S.D.N.Y. Oct. 19, 2017) (citing Fed. R. Civ. P. 26(b)(1)). Information is "relevant" if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *McFarlane v. First Unum Life Ins. Co.*, No. 16-CV-7806 (RA), 2017 U.S. Dist. LEXIS 169052, at \*6-7 (S.D.N.Y. Oct. 12, 2017) (citing Fed. R. Evid. 401). "Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." *Id.* (citing *In re Weatherford Int'l Sec. Litig.*, No. 11-CV-1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 75090, at \*3 (S.D.N.Y. May 28, 2013)). "Proportionality, meanwhile, 'focuses on the marginal utility of the discovery sought.'" *Id.* (citing *Vaigasi v. Solow Mgmt. Corp.*, No. 11-CV-5088 (RMB) (HBP), 2016 U.S. Dist. LEXIS 18460, at \*11 (S.D.N.Y. Feb. 16, 2016)). "Proportionality and relevance are 'conjoined' concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate." *Id.* (citing *Vaigasi* at \*11).

Defendant States have refused to produce the requested information on the basis that it is burdensome and that the only relevant instruments in this case are the MoneyGram Official Checks. However, the position taken by Defendant States - that MoneyGram Official Checks share characteristics with money orders such that they are "similar written instruments" under the Act - directly raises the claim of similarity on which Delaware seeks discovery. As explained above and discussed with Your Honor last summer, applying the Act's scope based on the undefined category of "similar written instrument" to the undefined, non-uniform category of MoneyGram Official Checks, necessarily implicates how the states involved in this action have applied the Act in the past to "similar written instruments." Therefore, Delaware's two outstanding discovery requests, as described in more detail below, target relevant information that is central to the claim of "similarity" before the court in a manner that is proportional to both

the usefulness of the information sought and the substantial sums of money that are at issue in this case as well as not excessively burdensome.<sup>1</sup>

Production of Holder Identities: Delaware seeks the identity of holders, information within the sole possession of Defendant States, that have escheated a limited category of written instruments to Defendant States in order to determine how Defendant States have applied the Act with respect to written instruments that share characteristics with MoneyGram Official Checks. Delaware needs this information in order to obtain exemplar instruments from third party holders to show that MoneyGram Official Checks share more in common with written instruments like, for example, teller checks that holders have escheated to Defendant States based on the holder's state of incorporation – a fact that contradicts the interpretation of the Act that Defendant States urge this Court to adopt. This information is therefore directly relevant to the claim before the court and, contrary to Defendants assertion, is not burdensome to produce. All, or nearly all, of the Defendant States use the same information technology ("IT") system to store their escheat records. Delaware uses this system as well, and the information requested can be produced relatively quickly using targeted database queries. Even if the queries were more involved – which they are not – the "cojoined" concepts of proportionality and relevance indicates that the marginal utility of the requested information far exceeds the burden of producing it.

Communications with Third Parties regarding unclaimed money orders, official checks and similar written negotiable instruments: Similarly, communications with third parties, including auditors or holders, regarding the characteristic of money orders and/or the similar written instruments identified by Delaware, and where those instruments should be escheated, is directly relevant to evaluating what written instruments the Defendant States have determined are "similar" or not "similar" for the purpose of applying 12 U.S.C. §2503.

The type of information Delaware seeks in the two above discovery requests is the type of relevant factual information necessary to conduct an analysis of similarity as required by the Act, and certainly qualifies as relevant given that "relevance, for purposes of discovery, is an extremely broad concept." *McFarlane* at \*6-7. Moreover, Courts have recognized, across a broad spectrum of statutory regimes, that if the application of a statute in a particular instance depends on whether an item in question – be it a trademark, chemical substance or negotiable instrument – is "similar" to an identified item or standard in the statute, the "similarity" inquiry is a factual question on which evidence must be presented and the predicate discovery must proceed. For example:

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<sup>1</sup> Pennsylvania cannot rely on its May 31, 2017 bench memorandum to satisfy its discovery obligations even if, as Pennsylvania contends, it "fully sets forth all of the relevant information Delaware seeks." As courts have pointed out, "[a]rguments in a brief, unsupported by documentary evidence, are not evidence." *Medallion Prods. v. McAlister*, 2008 U.S. Dist. LEXIS 80550, at \*8 (Oct. 9, 2008 N.D. Ill.) (citing *United States v. Stevens*, 500 F.3d 625, 628-29 (7th Cir. 2007) (quoting *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 853 (7th Cir. 2002) ("[I]t is universally known that statements of attorneys are not evidence.")).

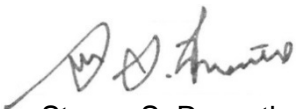


- Trademark: (“The likelihood of confusion [with a similar mark] is a highly factual issue.” *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 285 (D.N.J. 2006) (emphasis added));
- Copyright: (“[S]ubstantial similarity is customarily an extremely close question of fact.” *R.F.M.A.S., Inc. v. So*, 619 F. Supp. 2d 39, 64, 2009 U.S. Dist. LEXIS 45907, \*51 (S.D.N.Y. 2009) (citing *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980));
- municipal ordinances: (where pitbull ordinance defined pitbull as “any dog which exhibits those distinguishing characteristics which substantially conform to the [pitbull description] . . . Whether any particular animal falls within this classification is an issue of fact to be determined by the evidence presented.” *State v. Peters*, 534 So. 2d 760, 768, 1988 Fla. App. LEXIS 5034, \*22 (Fla. 3d DCA 1988)); and
- drug laws: (“[W]hether the substances listed in the indictment are, in fact, substantially similar to controlled substances is a factual issue.” *United States v. Hoyt*, 2014 U.S. Dist. LEXIS 143042, \*15-16 (W.D. Va.Oct. 8, 2014));

Delaware has so narrowed its requests in an attempt to reach a compromise with Defendant States, that it is hard to imagine how the discovery it now seeks is objectionable given scope of discovery permitted under the Federal Rules of Civil Procedure – the very rules the parties agreed should govern this case. “Relevance is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense.” *Mortgage Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, No. 15-CV-0293 (LTS) (JCF) 2016 U.S. Dist. LEXIS 91570 at \*9 (S.D.N.Y. July 14, 2016) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978); see also *McFarlane* at \*6-7. The information Delaware seeks regarding the Defendant States’ escheat of written instruments that are similar to MoneyGram Official Checks is clearly relevant “to a matter that bears on, or that reasonably could lead to other matter that could bear on” the Defendant States’ claim that MoneyGram Official Checks are similar to money orders for the purpose of escheat under 12 U.S.C. §2503. *Id.* The production of this limited information is not burdensome and the information requested is proportionate to the utility of the information sought. Delaware therefore respectfully requests that the Defendant States be required to expeditiously produce the above requested information as the close of the discovery period is rapidly approaching and the Defendant States have yet to provide the necessary information for the case to proceed.

We thank you for your attention to this matter.

Respectfully Yours,



Steven S. Rosenthal  
Partner



cc: Patrick K. Sweeten, Counsel to Plaintiff States in Case No. 200146 (email only)  
Matthew H. Haverstick, Counsel for Pennsylvania (email only)  
Misha Tseytlin, Counsel for Wisconsin (email only)  
Michael Rato, Counsel for MoneyGram Payment Systems, Inc. (email only)



# Exhibit A



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Via Email

December 13, 2017

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Re: *Delaware v. Arkansas, et al. No. 22O145/22O146*

Dear Todd:

I write in follow-up to our December 11, 2017 meet and confer conversation regarding the outstanding discovery requested in the above referenced litigation. Initially, while the Defendant States did not raise any issues with Delaware's responses and objections to the discovery requests propounded by the Defendant States, the Defendant States have reserved their right to meet and confer regarding Delaware's responses and objections at a future time, if needed. With respect to the Defendant States' responses and objections to the discovery requests propounded by Delaware, Delaware has requested additional discovery from the Defendant States in response to those requests. As agreed, the below memorializes the parties discussion generally and lists proposed additional discovery without tying the requested additional discovery to specific pending discovery requests.

Delaware asserts that discovery directed to examining how Defendant States treat official checks, money orders and other similar written instruments escheated to them by entities other than MoneyGram is reasonably calculated to lead to the production of documents and information directly relevant to the question of how MoneyGram instruments should be escheated in this case. Defendant States have objected to providing any discovery related to official checks, money orders and other similar written instruments escheated to them by entities other than MoneyGram. In an attempt to reach a compromise on this overarching disagreement that impacts the majority of Delaware's outstanding document requests and interrogatories, and without waiving any right to assert a contrary position should a compromise not be able to be reached, Delaware requests that each Defendant State provide the following documents and information in addition to the documents and information they have already agreed to produce:

- The identity of the entities that escheated official checks, money orders and other similar written instruments to the Defendants States between 1/1/2005 to present. Delaware believes that identifying the entities that escheat under the six NAUPA Codes CK 01-04, CK 07 and CK 15 would provide the information Delaware seeks.

- The identity of state employee(s) with the primary oversight of the escheat of unclaimed money orders, official checks and similar written negotiable instruments between 1/1/2005 to present.
- The identity of any third party consultant retained by the State to perform an audit or examination of the escheat of unclaimed money orders, official checks and similar written negotiable instruments and any documents related to those audits or examinations between 1/1/2005 to present.
- Non-privileged communications with third parties (filing entities, consultants, other states) related to the escheat of, or an examination or audit of, unclaimed money orders, official checks and similar written negotiable instruments between 1/1/2005 to present. Delaware does not intend this request to be overly broad and believes this information could be obtained with a tailored word search of relevant custodians' files using the following five search terms: "official check(s)," "money order(s)," "teller w/2 check(s)," "cashier w/2 check(s)," and "agent w/2 check(s)."

Defendant States agreed to consider producing documents and information responsive to the above categories in an attempt to reach a compromise but do not waive their right to assert a contrary position should a compromise ultimately not be reached. As I explained on the phone, Delaware intends to use the above information in order to conduct third party discovery. Given the tight timelines for discovery in this case, I am prepared to discuss this proposed compromise at your earliest convenience, including over the holidays.

Finally, Delaware notes that, unlike the other Defendant States, the Commonwealth of Pennsylvania has refused to produce any documents or information in response to Delaware's First Set of Requests for Production and Delaware's First Set of Interrogatories. Delaware believes that it is reasonable and necessary for all Defendant States to provide the same documents and information and therefore requests that Pennsylvania provide the documents and information that the other Defendant States have already agreed to produce in this matter as well as any additional documents and information agreed between the parties as a result of this meet and confer process. If Pennsylvania declines to change its position, Delaware will have no choice but to bring Pennsylvania's failure to provide discovery before Judge Leval, which may delay the schedule for all.



Sincerely,

A handwritten signature in black ink that reads 'Tiff Moseley'.

Tiff Moseley  
Partner

Cc: Matthew H. Haverstick  
Misha Tseytlin  
Nicholas Bronni  
Patrick Sweeten  
Aimee Feinberg  
Craig Rust

# Exhibit B

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January 8, 2018

**VIA EMAIL**

Tiff Moseley, Esq.  
Loeb & Loeb  
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**RE: Delaware v. Arkansas, No. 220145**

Dear Ms. Moseley:

On behalf of Pennsylvania, we write in follow up to your “meet and confer” letter of December 13, 2017. As an initial point of clarification, your letter is inaccurate in saying that “Pennsylvania has refused to produce any documents or information in response” to Delaware’s initial requests for production and interrogatories. To the contrary, Pennsylvania produced all of its unclaimed property holder manuals for years 2005-2016. If you have not received them, please advise. Further, far from refusing to produce information, Pennsylvania referred Delaware to the 31-page bench memorandum that it filed on May 31, 2017, which fully sets forth all of the relevant information Delaware seeks. Indeed, to date, Pennsylvania is the *only* party to fully set forth its position on the facts and the law, including the relevant legislative history. In this way, Pennsylvania is indeed acting differently from the other states, but in a positive way and not the negative way your letter suggests.

In response to your four proposals for further discovery, Pennsylvania agrees to provide the identity of the state employee with primary oversight of escheat of unclaimed negotiable instruments. In fact, Pennsylvania will supply two: (1) Brian Munley, Director of the Bureau of Unclaimed Property; and (2) Barbara Benkovic, Division Manager, Bureau of Unclaimed Property.

As to the remainder of your proposals, Pennsylvania simply cannot agree to them. As we interpret paragraphs 5(b) and 6 of Judge Leval’s July 24, 2017 order, the issues presently in dispute and subject to discovery are liability related solely to MoneyGram “Official Checks.” Answering the liability question absolutely does not invite inquiry into the other matters you request, including what we believe to be an utter misdirection with the examination of NAUPA codes and conduct by various non-MoneyGram holders. This is a discrete case about discrete subject matter, and Delaware and MoneyGram have virtually all, if not entirely all, of the relevant information. Accordingly, Pennsylvania will stand on its objections.

Very truly yours,

MATTHEW H. HAVERSTICK

cc: Todd Disher  
Misha Tseytlin  
Nicholas Bonni  
Aimee Feinberg  
Craig Rust  
Joshua Voss  
Mark E. Seiberling

# Exhibit C





KEN PAXTON  
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January 10, 2018

Ms. Tiff Moseley  
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Re: *Delaware v. Arkansas, et al.*, Nos. 22O145/22O146

Dear Ms. Moseley:

You are correct that the Defendant States are not raising any issues with Delaware's discovery responses at this time. Our requests were narrow, and it appears that you provided most of the limited information within the scope of discovery that we requested. We do not waive our ability to take up your objections and responses later should the need arise.

As to the discovery proposed in your December 13 letter, the Defendant States agree to provide the identity of the state employees with primary oversight over the escheat of unclaimed property. We will provide that list in the coming days.

However, the other requests in your letter are still outside the scope of discovery.

As we said in our initial responses and objections, the discovery in this case is limited to information relevant to answering the one legal question in front of the Court. Discovery is needed to determine the objective characteristics of MoneyGram Official Checks. Based on those characteristics, the Court will then decide whether the Official Checks fall within the scope of the controlling statute.

The Defendant States have agreed to produce the guidance documents and manuals provided to holders of unclaimed property as well as documents and communications related to MoneyGram Official Checks. Additionally, you have sent third-party subpoenas to MoneyGram, another financial service provider, and an outside auditor.

Delaware now seeks the identities of all holders who have reported six different types of negotiable instruments to 30 different states over the course of thirteen years. That would include potentially thousands of holders—every local bank, credit union, financial service provider, and other institution that has remitted such common types of products going back more than a decade. You also seek the identities of all consultants who audited or even examined the remittance of money orders, official checks, and other similar instruments over that same time period. And you seek all communications from 30 different email systems going back thirteen years that contain such broad phrases as “money order(s)” and “agent w/2 check(s).” Such requests are overly broad, unduly burdensome, and seek information that is outside the scope of discovery.

We are committed to providing Delaware with the discovery that it is entitled to, and our understanding is that Pennsylvania is going to stand on its initial objections. We look forward to clarifying the scope of discovery in this case.

Sincerely,



Todd Lawrence Disher

Special Counsel for Civil Litigation  
Office of the Attorney General of Texas

*On behalf of the 28 states and commonwealths in 22O146 and the State of Wisconsin*

# Exhibit D



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January 12, 2018

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Re: *Delaware v. Arkansas, et al. No. 22O145/22O146*

Dear Todd:

I write regarding your January 10, 2018 meet and confer letter in the above referenced litigation. Delaware disagrees with your assertion that the only discovery needed in this case relates to the objective characteristics of Money Gram Official Checks. The controlling statute at issue applies only to “a money order, traveler’s check, or other similar written instrument (other than a third party bank check) ...” and not an “official check.” 12 U.S.C. §2503. Consequently, at a minimum and leaving aside an application of the third party bank check exemption, the application of the statute to Money Gram Official Checks depends on the similarity or dissimilarity of the concededly non-uniform written instrument titled Money Gram Official Check to money orders and other similar written instruments, specifically to the extent those written instruments have been interpreted to fall under (or not) the scope of 12 U.S.C. §2503 by the States. Across a broad spectrum of statutory regimes from intellectual property laws to municipal ordinances to federal drug laws, courts have consistently held that if the application of a statute in a particular instance depends on whether an item in question – be it a trademark, chemical substance or negotiable instrument – is “similar” to an identified item or standard in the statute, the “similarity” inquiry is a factual question on which evidence must be presented and the predicate discovery must proceed.

Therefore, while I thank you for agreeing to provide the identity of the state employees with primary oversight over the escheat of unclaimed property, Delaware still seeks two additional categories of information requested in my December 13, 2017 letter:

- First, as the Defendant States recognized during the December 11, 2017 meet and confer conversation, because States do not have copies of the money orders, official checks and other similar written instruments escheated to them, Delaware seeks the names of the entities that escheated official checks, money orders and other similar written instruments to the Defendants States for the relevant time period only with respect to six limited NAUPA Codes (CK 01-04, CK 07 and CK 15) so that Delaware may seek copies of these instruments from those entities. This information is directly



relevant to determine what written instruments the States have historically determined to be “similar” such that the terms of 12 U.S.C. §2503 apply. As I indicated during our meet and confer teleconference, Delaware believes this information resides in a database that can be queried and we are willing to work with the Defendant States to avoid a situation in which “potentially thousands of holders” would be identified.

- Second, Delaware seeks non-privileged communications with third parties (filing entities, consultants, other states) related to the escheat of, or an examination or audit of, unclaimed money orders, official checks and similar written negotiable instruments. Delaware specifically indicated that it did not intend this request to be overly broad; however, the Defendant States’ non-privileged communications about the escheat of official checks and similar written instruments is directly relevant to the issue of whether the States have determined that “similar” written instruments are subject to 12 U.S.C. §2503.

Delaware has significantly narrowed the scope of discovery it is seeking and made sincere and repeated efforts to reach a compromise with all Defendant States. The information sought by Delaware in the above outstanding requests is directly relevant to the case and is not overly broad or unduly burdensome. Unless Defendant States indicate otherwise, Delaware will seek to initiate a pre-motion discovery conference before Judge Leval pursuant to Local Civil Rule 37.2 in order to resolve the outstanding discovery issues.

Sincerely,

A handwritten signature in black ink that reads "Tiff Moseley".

Tiff Moseley  
Partner

Cc: Matthew H. Haverstick  
Misha Tseytlin  
Nicholas Bronni  
Patrick Sweeten  
Aimee Feinberg  
Craig Rust

# Exhibit E



**TIFF MOSELEY**  
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Via Email

January 12, 2018

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Re: *Delaware v. Arkansas, et al. No. 22O145/22O146*

Dear Matt and Josh:

I write regarding your January 8, 2018 meet and confer letter in the above referenced litigation. The controlling statute at issue applies only to “a money order, traveler’s check, or other similar written instrument (other than a third party bank check) ...” and not an “official check.” 12 U.S.C. §2503. Consequently, at a minimum and leaving aside an application of the third party bank check exemption, the application of the statute to Money Gram Official Checks depends on the similarity or dis-similarity of the concededly non-uniform written instrument titled Money Gram Official Check to money orders and other similar written instruments, specifically to the extent those written instruments have been interpreted to fall under (or not) the scope of 12 U.S.C. §2503 by the States. Across a broad spectrum of statutory regimes from intellectual property laws to municipal ordinances to federal drug laws, courts have consistently held that if the application of a statute in a particular instance depends on whether an item in question – be it a trademark, chemical substance or negotiable instrument – is “similar” to an identified item or standard in the statute, the “similarity” inquiry is a factual question on which evidence must be presented and the predicate discovery must proceed.

Therefore, while I thank you for providing the identity of the state employees with primary oversight over the escheat of unclaimed property and unclaimed property guidance materials, Delaware still seeks two additional categories of information requested in my December 13, 2017 letter:

- First, as the Defendant States recognized during the December 11, 2017 meet and confer conversation, because States do not have copies of the money orders, official checks and other similar written instruments escheated to them, Delaware seeks the names of the entities that escheated official checks, money orders and other similar written instruments to the Defendants States for the relevant time period only with respect to six limited NAUPA Codes (CK 01-04, CK 07 and CK 15) so that Delaware





may seek copies of these instruments from those entities. This information is directly relevant to determine what written instruments the States have historically determined to be “similar” such that the terms of 12 U.S.C. §2503 apply. As I indicated during our meet and confer teleconference, Delaware believes this information resides in a database that can be queried and we are willing to work with the Defendant States to avoid a situation in which “potentially thousands of holders” would be identified.

- Second, Delaware seeks non-privileged communications with third parties (filing entities, consultants, other states) related to the escheat of, or an examination or audit of, unclaimed money orders, official checks and similar written negotiable instruments. Delaware specifically indicated that it did not intend this request to be overly broad; however, the Defendant States’ non-privileged communications about the escheat of official checks and similar written instruments is directly relevant to the issue of whether the States have determined that “similar” written instruments are subject to 12 U.S.C. §2503.

It is my understanding that Pennsylvania is unwilling to produce additional documents and instead refers Delaware to its unsolicited 31-page bench memorandum prepared by counsel as being sufficient to provide the information Delaware seeks in discovery. Unless indicated otherwise, Delaware will initiate a pre-motion discovery conference before Judge Leval in accordance with Local Civil Rule 37.2 in order to resolve the outstanding discovery issues.

Sincerely,

A handwritten signature in black ink that reads "Tiff Moseley".

Tiff Moseley  
Partner

Cc: Todd Disher  
Misha Tseytlin  
Nicholas Bronni  
Patrick Sweeten  
Aimee Feinberg  
Craig Rust