SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*

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

ARKANSAS, *et al.*, *Defendants*

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY

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INTRODUCTION

Almost 50 years ago, Congress recognized a problem in the law governing unclaimed intangible property. The U.S. Supreme Court had previously determined that certain unclaimed intangible property must, under the common law, be remitted to the State of the owner's last-known address; or if that address was unknown, to the State of the issuer's incorporation. But issuers often kept no record of the last-known address for owners of money orders, traveler's checks, and other prepaid instruments frequently used to securely transmit funds. In most cases, therefore, the issuer's State of incorporation—usually not the State where the instrument was sold or where its owner lived—received a windfall under the common-law rule. So Congress changed the rule to cure that inequity. In 1974, Congress enacted the Disposition of Abandoned Money Orders and Traveler's Checks Act. If certain preliminary requirements are satisfied, that Act entitles the State of purchase to take custody of unclaimed funds payable on money orders, traveler's checks, and other similar written instruments.

MoneyGram Payment Systems, Inc. has a line of products that it calls "Official Checks," all of which fall within that Act's scope. But MoneyGram has not remitted unclaimed funds payable on all its Official Check products to the State of purchase. It instead remits certain of those funds to Delaware, the State where it is incorporated. And it remits those funds to Delaware because Delaware explicitly instructed it to do so. Simply because MoneyGram chose to incorporate there, Delaware today receives a windfall—a disproportionate share of the unclaimed funds payable on MoneyGram Official Checks. This recreates the exact inequity that Congress set out to legislatively correct in the 1970s.

Thirty States now bring claims against Delaware, asking the Supreme Court to enforce that corrective legislation and require Delaware to relinquish the unclaimed funds of which it was never entitled to take custody. For the reasons detailed in this brief, Defendant States respectfully request that the Special Master recommend that the Court grant partial summary judgment to those States, declaring that the Disposition of Abandoned Money Orders and Traveler's Checks Act entitles them—and not Delaware—to unclaimed funds payable on MoneyGram Official Checks purchased within their borders.

BACKGROUND

I. Legal Background

A. History of Unclaimed-Property Law

The doctrine of escheat has roots in "feudal notions of real property rights, which were deemed to derive, directly or indirectly, from the king or the mesne lord." *Abrams v. Brady*, 573 N.E.2d 556, 558 (N.Y. 1991); *see Texas v. New Jersey*, 379 U.S. 674, 675 (1965) (discussing the "ancient origins" of escheat procedure). Under the common-law doctrine of escheat, "title to land reverted to the lord or Crown when a landowner died without heirs." *Clymer v. Summit Bancorp.*, 792 A.2d 396, 399 (N.J. 2002); *see* 27A Am. Jur. 2d *Escheat* § 1 (2019). "[A]bandoned personal property," however, "was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia*." *Delaware v. New York*, 507 U.S. 490, 497 n.9 (1993) (quoting *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 240 (1944)). Under modern law, the concept of "escheat" encompasses both real and personal property. *Id.*

Today "States as sovereigns may take custody of or assume title to abandoned personal property." *Id.* at 497. Each State has its own unclaimed-property-law scheme. Subject to constitutional limits, these unclaimed-property laws generally allow the State, after a period of time, to take possession of abandoned or unclaimed personal property. *See infra* Table A (listing Defendant States' escheat laws).

B. Escheatment Problems with Unclaimed Intangible Property

Those unclaimed-property laws have generally applied with little trouble to tangible property, whether real or personal. Regarding such property, "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." *Texas v. New Jersey*, 379 U.S. at 677. The same cannot be said for "intangible property, such as a debt which a person is entitled to collect." *Id.* By definition, intangible property "is not physical matter which can be located on a map." *Id.* So multiple States may have legitimate, competing claims to the same intangible property. *Id.*; *see W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961) (noting that escheat law's move from "land and other tangible things" into the "field of intangible transactions" had "presented problems of

great importance to the States and persons whose rights will be adversely affected by escheats").

In the middle of the 20th century, the Uniform Law Commission began to formulate solutions to the legal issues concerning unclaimed intangible property. In 1954, with the aim of promoting "symmetry" among States' laws governing the escheat of intangible property, the Commission published the Uniform Disposition of Unclaimed Property Act. App. 668 (Uniform Disposition of Unclaimed Property Act, Prefatory Note at 136 (Unif. Law Comm'n 1954)).[1] It modeled the Uniform Disposition Act on the New York Abandoned Property Law. App. 672 (*Id.* § 2 cmt.). The Uniform Disposition Act covered the disposition of "sum[s] payable . . . on written instruments issued in this state on which a banking or financial organization is directly liable," including but not limited to "traveler's checks." App. 671 (*Id.* § 2(c)). This definition did not address all the issues related to sums payable on unclaimed written instruments. In particular, it failed to account for instruments "issued by an organization not properly classified as a 'banking or financial institution.'" App. 688 (Revised Uniform Disposition of Unclaimed Property Act, Prefatory Note at 3 (Unif. Law Comm'n 1966)). As a result, the Uniform Disposition Act did not apply to instruments issued by nonbanking organizations like Western Union.

In 1966, the Commission addressed this omission. It revised the Uniform Disposition Act to explicitly include "money orders and traveler's checks" that were "issued by" a "business association." App. 688 (*Id.*). The Commission made the inclusion of business associations clear throughout the Revised Uniform Disposition Act, even in the title of section 2: "Property Held by Banking or Financial Organizations or *by Business Associations*." App. 692 (*Id.* § 2 (emphasis added)). Section 2's substantive provision similarly included "[a]ny sum payable . . . on written instruments issued in this state *on which a . . . business association is directly liable*, including . . . money orders, and traveler's checks." App. 692 (*Id.* § 2(c) (emphasis added)). Section 10 of the Revised Uniform Disposition Act was a "reciprocity" provision to avoid "multiple liability" by setting priority rules for when

[1] Citations designated "App." are to the appendix in support of Defendant States' motion for summary judgment filed concurrently with this brief. The documents in that appendix are accurate copies of the deposition exhibits, produced documents, historical sources, expert reports, deposition excerpts, and a supplemental declaration from MoneyGram.

multiple States would "demand custody" of unclaimed funds. App. 698 (*Id.* § 10, cmt.). This section provided that, if two States had a claim to the funds and the holder had a record of the last-known address of the rightful owner, the State of the owner's last-known address would take custody of the unclaimed funds. App. 698 (*Id.* § 10). These priority rules, however, had effect only if the States at issue had adopted the Revised Uniform Disposition Act. App. 698 (*Id.*).

As the Uniform Law Commission began its efforts to legislatively address issues related to the escheat of funds payable on unclaimed written instruments, the United States Supreme Court also began to confront these issues. First, in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), the Court held that the Due Process Clause requires that one State's claim to "unclaimed funds" from money orders be adjudicated in a forum where all States could present claims for consideration. *Id.* at 76. Western Union's customers used money orders to transmit money by going to a Western Union office, identifying the recipient, and giving the clerk the money to be sent and a fee for sending it. Sometimes, Western Union could neither find the recipient nor refund the sender. *Id.* at 72–73. "[L]arge sums of money due from Western Union" had "accumulate[d] over the years in the company's offices and bank accounts throughout the country." *Id.* Pennsylvania wanted custody of unclaimed sums payable on money orders purchased in Western Union's Pennsylvania offices. *Id.* at 73. The Court reversed the Pennsylvania Supreme Court's judgment in Pennsylvania's favor and held that the judgment violated Western Union's due-process rights because it could not protect the company against rival claims of other States. *Id.* at 77, 79–80. Such disputes had to be resolved in a forum where all States could present claims for consideration. *Id.* at 79–80. The Court left for another day how to answer the "difficult legal questions" presented by such claims. *Id.* at 80.

Four years after the *Western Union* decision, the Court selected from several proposed rules to decide which State was entitled to escheat unclaimed intangible property—there, debts owed by a company and left unclaimed by creditors. *Texas v. New Jersey*, 379 U.S. 674, 675 (1965). Recognizing that there was "no applicable federal statute," *id.* at 677, the Court explained that the question "should be determined primarily on principles of fairness," *id.* at 680. The Court accordingly rejected a proposal that the funds go to the State of the debtor company's incorporation because such an approach would give too much importance to a "minor factor" (*i.e.*,

where "the debtor happened to incorporate itself") at the expense of other States. *Id.* The Court instead accepted another State's proposal that the funds escheat "to the State of the creditor's last known address as shown by the debtor's books and records" for two reasons: (1) The rule will would "tend to distribute escheats among the States in the proportion of the commercial activities of their residents"; and (2) the rule would be easy to administer. *Id.* at 680–81. If there were no record of the creditor's address, the funds would escheat to the State of the debtor's incorporation "until some other State [came] forward with proof that it ha[d] a superior right to escheat." *Id.* at 682. The Court thought this situation would "arise with comparative infrequency." *Id.*

In *Pennsylvania v. New York*, 407 U.S. 206 (1972), the Court held that Pennsylvania did not have a superior right to escheat sums due on Western Union's money orders purchased there. Pennsylvania contended that, because Western Union "ha[d] not kept ledger records of addresses" for money-order purchasers, *id.* at 215, under *Texas v. New Jersey* all of the abandoned money-order proceeds would go to Western Union's State of incorporation, New York, *id.* at 212. The Court noted that this contention likely overstated the facts. *See id.* at 215 (noting that purchasers' addresses might be discernible from other records). But the Court also rejected Pennsylvania's proposed new rule on legal grounds. Pennsylvania argued that it had a superior right to escheat because "the State where the money orders are bought should be presumed to be the State of the sender's residence." *Id.* at 212. This argument "ha[d] some surface appeal" for the Court. *Id.* at 214. Under *Texas v. New Jersey*, the Court explained, New York would "receive a much larger share of the unclaimed funds" payable on instruments like money orders than the share it would receive of "other obligations, like bills for services rendered, where such records are kept as a matter of business practice." *Id.* But the "windfall" to New York was not "a sufficient reason" to carve out an exception to the *Texas v. New Jersey* rule for money orders just because money orders "involve a higher percentage of unknown addresses." *Id.* The Court worried that any new rule based on that percentage might extend to other instruments because "money orders" might not be the "only form of transaction where the percentage of unknown addresses may run high." *Id.* at 215.

C. The Federal Disposition Act

In 1974, Congress enacted the Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Federal Disposition Act" or "FDA," for short) to abrogate *Pennsylvania v. New York*. *See* Act of Oct. 28, 1974, Pub. L. No. 93-495, §§ 601–04, 88 Stat. 1500, 1525–26 (codified at 12 U.S.C. §§ 2501–03); *Delaware v. New York*, 507 U.S. 490, 510 (1993). Instead of permitting proceeds from certain types of unclaimed payment instruments to escheat to the State of incorporation when the purchaser's address was unknown, Congress provided that those proceeds generally should be remitted to the State of purchase. Under the FDA, a "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" must be remitted to the State of purchase when the "books and records of such banking or financial organization or business association show the State in which such money order, traveler's check, or similar written instrument was purchased" and when that State has "power under its own laws to escheat or take custody of such sum." 12 U.S.C. § 2503(1). In language mirroring the 1966 Uniform Disposition Act, Congress defined "banking organization," "business association," and "financial organization" to broadly include banks, credit unions, and numerous similar entities. *Compare* 12 U.S.C. § 2502, *with* App. 670 (Uniform Disposition Act § 1(a)–(c)).

Congress further provided that if the "books and records" do not show the State of purchase, the State where the "banking or financial organization or business association has its principal place of business" can take custody of the sum "until another State shall demonstrate by written evidence that it is the State of purchase." 12 U.S.C. § 2503(2). Likewise, if the State of purchase does not have the "power under its own laws" to escheat or take custody of the sums payable, the sums must be remitted to the State in which the banking or financial organization or business association has its "principal place of business," still "subject to the right of the State of purchase to recover such sum . . . if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum." *Id.* § 2503(3).

Congress adopted these provisions to provide for the equitable distribution of unclaimed proceeds of prepaid payment instruments and to avoid a windfall to States where large numbers of corporations are domiciled. *Id.* § 2501. Congress made this rationale clear in the statute itself. It "f[ound]

and declare[d] that" the "books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers." *Id.* § 2501(1). Congress further found that "a substantial majority of such purchasers reside in the States where such instruments are purchased." *Id.* § 2501(2). Accordingly, "as a matter of equity among the several States," the States where purchasers of these instruments reside should "be entitled to the proceeds of such instruments in the event of abandonment." *Id.* § 2501(3). Congress also found it a "burden on interstate commerce" that the proceeds were not distributed to the "States entitled thereto." *Id.* § 2501(4). The FDA relieved that burden by providing that the proceeds of unclaimed instruments be remitted to the State of purchase. This would "assure a more equitable distribution among the various States of the proceeds of" the instruments, as opposed to "continuing to permit a relatively few States to claim these sums solely because the seller is domiciled in that State, even though the entire transaction took place in another State." S. Rep. No. 93-505, at 1, 6 (1973).

In considering the final bill, Congress adopted technical clarifying language in response to comments from the United States Treasury Department. In a letter to the Senate Banking Committee, Treasury's General Counsel observed that the bill's reference to a "money order, traveler's check, or similar instrument on which a bank or financial organization or business association is directly liable" could be misconstrued as covering "third party payment bank checks." *Id.* (reprinting letter). Noting the bill's focus on "traveler's checks, money orders and similar instruments for transmission of money," Treasury recommended that "this ambiguity be cured by defining these terms to exclude third party payment bank checks." *Id.* The Committee adopted Treasury's "technical suggestion[]." *Id.* at 6; *see id.* at 2 (referring to "certain clarifying amendments" recommended by Treasury); Cong. Rec. 4528 (Feb. 27, 1974) (statement of Sen. Sparkman) (noting that committee reported bill favorably "after accepting some minor changes suggested by the Federal Reserve Board and the Department of the Treasury"). The final legislation included an exception for "third party bank check[s]." 12 U.S.C. § 2503.

With that technical amendment, the FDA's escheatment rules apply to money orders, traveler's checks, and other similar written instruments on which a banking or financial organization or a business association is directly liable, but not to similar instruments that are "third party bank check[s]."

Id. And when the FDA's escheatment rules apply to an instrument, the unclaimed funds payable on that instrument are remitted to the State of purchase if the books and records of the banking or financial organization or business association show the State of purchase and that State has a law authorizing it to take custody of the unclaimed sums. *Id.* § 2503(1).

II. Factual Background

MoneyGram International, Inc. is the second largest money-transfer business in the world. *See* App. 4 (Dep. Ex. 2 at 4); App. 1064 (Yingst Dep. 21:3–7). It processes over 750,000 transactions each day; its annual revenue exceeds $1 billion; and it employs more than 2,300 employees. *See* App. 40 (Dep. Ex. 5 at 5). It is a publicly traded corporation that, as a money transmitter, is subject to extensive state regulation. *See, e.g.*, Cal. Fin. Code §§ 2000–2176; Fla. Stat. §§ 560.103–.408; Ind. Code §§ 28-8-4-1 through -61; Ohio Rev. Code §§ 1315.01–.18. This case is primarily about products sold by one of its subsidiaries, MoneyGram Payment Systems, Inc. This brief will refer to that subsidiary as MoneyGram.

MoneyGram has served financial institutions for over 75 years by providing prepaid money-transfer products for the financial institutions to sell or to use to pay their own obligations. *See* App. 40 (Dep. Ex. 5 at 5); App. 353 (Dep. Ex. 28 at 1); App. 1064 (Yingst Dep. 21:16–21). MoneyGram—which operated under the name Traveler's Express, Inc. until approximately 2005—processes those prepaid instruments sold by over 4,000 financial institutions in the United States. *See* App. 40 (Dep. Ex. 5 at 5); App. 353 (Dep. Ex. 28 at 1); App. 1064, 1145–46 (Yingst Dep. 21:16–21, 124:23–125:10). MoneyGram refers to those selling financial institutions, which consist of banks and credit unions, as its customers. *See* App. 1064, 1066–67 (Yingst Dep. 21:8–22, 28:6–29:3). MoneyGram markets two lines of prepaid money transfer products for its customers: one line that MoneyGram markets as "Retail Money Orders," and another that MoneyGram markets as "Official Checks." *See* App. 1065–66, 1106, 1114 (Yingst Dep. 27:22–28:19, 85:6–22, 93:8–23).

A. MoneyGram Retail Money Orders

Representative examples of MoneyGram Retail Money Orders sold since 2000 are included in the appendix to this brief. App. 16–343 (Dep. Ex. 4 [Exs. A–F]). MoneyGram provides its customers with a template for printing Retail Money Orders, *e.g.*, App. 34–35 (Dep. Ex. 4 [Exs. F-G]),

which are sometimes but not always sold by financial institutions, *see* App. 1102–03 (Yingst Dep. 81:17–82:22).

A purchaser buys a Retail Money Order by remitting the monetary amount imprinted on the face of the instrument, plus any applicable fee, to the seller. App. 1079, 1083–84 (Yingst Dep. 45:7–15, 49:17–50:19). The seller is an agent for MoneyGram and is not considered a party on the instrument. App. 1075–76 (Yingst Dep. 41:22–42:17). In return, the purchaser receives a written money order on which the purchaser can identify the desired recipient or payee. App. 1077 (Yingst Dep. 43:10–15). MoneyGram is designated as the "issuer" and the "drawer" of the instrument. App. 1078 (Yingst Dep. 44:1–14); App. 18–19 (Dep. Ex. 4 [Ex. A]). The Retail Money Order can then be redeemed by the recipient for the face value. App. 1075–77 (Yingst Dep. 41:22–43:24). MoneyGram typically caps the value of Retail Money Orders at $1,000, although a customer may buy more than one money order at a time. *See* App. 58 (Dep. Ex. 11 at 2); App. 1092–93 (Yingst Dep. 58:16–59:11). MoneyGram considers and markets these instruments as "safe payment mechanism[s]" that are "accepted pretty much universally" and are "as good as cash." App. 1081–82, 1084–85, 1219–21 (Yingst Dep. 47:20–48:23, 50:20–51:7, 198:21–200:3).

When a MoneyGram agent sells a Retail Money Order, it reports four pieces of information back to MoneyGram: the dollar amount of the instrument, its serial number, the date of sale, and the customer-identification number of the location that sold the instrument. App. 1247–49 (Yingst Dep. 263:5–265:6). That customer-identification number allows MoneyGram to determine the State in which the instrument was sold. App. 1249 (Yingst Dep. 265:9–21). The information conveyed back to MoneyGram does not include any information related to the person who purchased the instrument—such as the person's last-known address. App. 1091–92 (Yingst Dep. 57:17–58:4). Additionally, MoneyGram does not receive an image of the Retail Money Order until it is presented for payment. App. 1200 (Yingst Dep. 179:12–23).

The seller of a MoneyGram Retail Money Order remits the amount of the money order to MoneyGram. App. 1087 (Yingst Dep. 53:9–21). MoneyGram then holds that money in a portfolio of accounts and investments, where it commingles the funds from all of its outstanding Retail Money Orders and other MoneyGram paper-based payment products—including all of its Official Checks. App. 1088–89, 1262 (Yingst Dep. 54:5–

55:4, 278:15–22). The money then remains in that commingled portfolio until the Retail Money Order is presented for payment or remains dormant for long enough to become subject to unclaimed-property laws. App. 1089–90, 1128–29 (Yingst Dep. 55:13–56:5, 107:11–108:11).

When a Retail Money Order is presented for payment, it goes through the Federal Reserve clearing process using the routing number and transit number on the bottom of the instrument. App. 1100–01, 1130–31 (Yingst Dep. 71:4–72:20, 109:7–110:8). Those routing and transit numbers are associated with a certain "clearing bank" that MoneyGram has contracted with to use its routing and transit numbers to process the MoneyGram items. App. 1071–72, 1130–31 (Yingst Dep. 33:8–34:6, 109:7–110:8); *see also* App. 239–306 (Dep. Exs. 17–19). The clearing bank is listed as the "payable through" entity on the face of the Retail Money Order. App. 18–19 (Dep. Ex. 4 [Ex. A]); App. 1075–76, 1100–01 (Yingst Dep. 41:22–42:17, 71:10–72:11). MoneyGram then uses funds from its commingled portfolio to pay the clearing banks for the amount of the cleared Retail Money Orders. App. 1101 (Yingst Dep. 72:12–20). The clearing banks do not receive any information about the Retail Money Orders presented to them for payment, and the clearing banks have no relationship with the agents that sell Retail Money Orders. App. 1072–73, 1130–31 (Yingst Dep. 34:22–35:11, 109:7–110:8). The role of the clearing banks is simply to provide routing and transit numbers for MoneyGram's use. App. 1131–32 (Yingst Dep. 109:7–110:8).

If a Retail Money Order is not presented for payment, MoneyGram—as the holder of the unclaimed funds—is responsible for reporting the sum representing the unclaimed balance. App. 1040–41, 1053 (Petrick Dep. 131:17–132:3, 185:1–3). Neither the agent that sold the Retail Money Order nor the clearing bank plays any role in the reporting of unclaimed Retail Money Orders. App. 1042, 1048 (Petrick Dep. 133:14–16, 139:16–19). Because MoneyGram has specifically established its systems so as not to collect records that would allow it to identify the purchaser of the Retail Money Order, App. 1091–92 (Yingst Dep. 57:17–58:4), it does not even try to identify the rightful owner before reporting the unclaimed funds, App. 421 (Dep. Ex. 50 at MG004667). Pursuant to the Federal Disposition Act, MoneyGram remits the unclaimed property to the State in which the Retail Money Order was purchased. App. 1021 (Petrick Dep. 36:18–20); App. 425 (Dep. Ex. 50 at MG004671).

B. MoneyGram "Official Checks"

In addition to Retail Money Orders, MoneyGram offers another line of prepaid money-transfer products for financial institutions to sell, which it markets as "Official Checks." App. 1066 (Yingst Dep. 28:6–19). An "official check" is not a defined type of instrument in the Uniform Commercial Code; it is a proprietary label MoneyGram uses to describe the prepaid instruments processed through its "Official Check" processing platform. App. 1122 (Yingst Dep. 101:2–14); App. 182, 217 (Dep. Ex. 13 at 1, 36) ("Primelink Official Checks Operating Instructions"). It markets its Official Check processing platform to banks and credit unions. App. 1066–67 (Yingst Dep. 28:6–29:3).

In its line of Official Checks, MoneyGram offers four products: "Cashier's Checks," "Agent Check Money Orders," "Agent Checks," and "Teller's Checks." App. 1074 (Yingst Dep. 36:15–21). Because MoneyGram is not responsible for reporting any unclaimed balances payable on Cashier's Checks, those instruments are not subject to this lawsuit. *See* App. 1242 (Yingst Dep. 229:17–22).

1. MoneyGram "Agent Check Money Orders"

A representative example of the product that MoneyGram labels as an "Agent Check Money Order" is included in the appendix. App. 32–33 (Dep. Ex. 4 [Ex. E]). MoneyGram provides a template to its selling financial institutions showing what must be printed on an Agent Check Money Order. *E.g.*, App. 35 (Dep. Ex. 4 [Ex. G]); App. 1119 (Yingst Dep. 98:6–24). These documents are representative of the Agent Check Money Orders issued since 2000. App. 16–17 (Dep. Ex. 4 ¶ 5); *see* App. 53 (Dep Ex. 8) (another example of an Agent Check Money Order).

A MoneyGram Agent Check Money Order functions in the same way as a MoneyGram Retail Money Order. App. 1106, 1114–15, 1137–38 (Yingst Dep. 85:6–22, 93:24–94:17, 116:8–117:7). Agent Check Money Orders are sold by financial institutions, which act as agents for MoneyGram and are not considered parties who are liable on the instruments. App. 1195 (Yingst Dep. 174:15–22); *see* App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8); App. 226–27 (Dep. Ex. 15 § 3). An individual wishing to purchase an Agent Check Money Order pays the desired face value of the Agent Check Money Order to the selling financial institution, and then signs the instrument. App. 53 (Dep. Ex. 8); App. 64–65 (Dep. Ex. 12 at 5–6);

App. 1198–1200 (Yingst Dep. 177:14–20, 178:19–179:1). MoneyGram imposes no limits on the face value of an Agent Check Money Order or any other type of Official Check, though the selling financial institution may choose to do so. App. 1211–12 (Yingst Dep. 190:4–191:3). MoneyGram is considered both the "drawer" and the "issuer" of the Agent Check Money Order. App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8); App. 226–27 (Dep. Ex. 15 § 3); App. 1118 (Yingst Dep. 97:4–10). The purchaser then delivers the Agent Check Money Order to the intended recipient, who can redeem the instrument for its face value in the same way as the recipient of a Retail Money Order. App. 1106–07, 1114–15 (Yingst Dep. 85:6–86:15, 93:24–94:17). The selling financial institution may label its Agent Check Money Orders more generally as "personal" or "international" money orders. App. 1194–95 (Yingst Dep. 173:22–174:14); App. 53 (Dep. Ex. 8); App. 58 (Dep. Ex. 11 at 2).

The selling financial institution then submits to MoneyGram the same four pieces of information—the amount of the instrument, the date of purchase, the serial number, and the customer identification number of the financial institution that sold the Agent Check Money Order—that the seller of a Retail Money Order submits. App. 1250–51, 1254 (Yingst Dep. 266:16–267:6, 270:5–11). MoneyGram can use that information to determine the State in which the purchaser bought the Agent Check Money Order. App. 1025 (Petrick Dep. 68:2–10). The selling financial institution does not convey any information about the purchaser of the Agent Check Money Order, and MoneyGram does not receive an image of the Agent Check Money Order until it is presented for payment. App. 1139–42 (Yingst Dep. 118:24–121:12).

Also like a Retail Money Order, the selling financial institution transfers the money to satisfy the obligation to MoneyGram. App. 1253–54 (Yingst Dep. 269:12–270:4). MoneyGram then holds that money in the same commingled portfolio where it holds the funds to satisfy Retail Money Orders. App. 1136–37 (Yingst Dep. 115:15–116:6).

When an Agent Check Money Order is presented for payment, it goes through the Federal Reserve clearing process in the same manner as Retail Money Orders by using the routing and transit numbers of one of MoneyGram's clearing banks. App. 1118–19, 1138–39 (Yingst Dep. 97:8–98:5, 117:8–118:23). MoneyGram can use the same clearing bank for both Retail Money Orders and Agent Check Money Orders. App. 1121 (Yingst

Dep. 100:6–18). MoneyGram, not the selling financial institution, selects the clearing banks. App. 1120 (Yingst Dep. 99:8–15). These clearing banks are designated as the "drawees" on the Agent Check Money Orders. App. 1118 (Yingst Dep. 97:11–20); App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8).

As with Retail Money Orders, MoneyGram is the holder of the funds that represent the proceeds of unclaimed Agent Check Money Orders. App. 1023 (Petrick Dep. 66:11–23). MoneyGram does not collect information related to the purchaser of the unclaimed Agent Check Money Orders, App. 1150–52 (Yingst Dep. 129:4–131:13), so it does not, and cannot, perform any due diligence before reporting the property, App. 421 (Dep. Ex. 50 at MG004667). As with Retail Money Orders, MoneyGram reports the funds representing unclaimed Agent Check Money Orders to the State in which the Agent Check Money Order was purchased pursuant to the Federal Disposition Act. App. 1021 (Petrick Dep. 36:1–4); App. 210 (Dep. Ex. 13 at 29).

2. MoneyGram "Agent Checks"

A representative example of the product that MoneyGram labels as an "Agent Check" is included in the appendix. App. 343–44 (Dep. Ex. 26 [Ex. A]); App. 1204–06 (Yingst Dep. 183:14–185:19). MoneyGram provides a template to its selling financial institutions showing what must be printed on an Agent Check. *E.g.*, App. 345–46(Dep. Ex. 26 [Ex. B]). These documents are representative of the Agent Checks issued since 2000. App. 342 (Dep. Ex. 26 ¶ 7); *see* App. 52 (Dep. Ex. 7) (another example of an Agent Check); App. 56 (Dep. Ex. 10) (same).

Just as with Retail Money Orders and Agent Check Money Orders, a purchaser remits the face value of the Agent Check to the selling financial institution. App. 64–65 (Dep. Ex. 12 at 5–6). As with those other instruments, the selling financial institution acts only as an agent for MoneyGram, which is again identified as the drawer and issuer of the Agent Checks. App. 236–38 (Dep. Ex. 16); App. 1185 (Yingst Dep. 164:13–24). MoneyGram's clearing bank is again designated as the drawee on the instrument. App. 236–38 (Dep. Ex. 16); App. 1186 (Yingst Dep. 165:6–15). An Agent Check can be labeled simply as an "Official Check" on its face. App. 56 (Dep. Ex. 10); App. 1204–05 (Yingst Dep. 183:14–184:19).

Using the same system that processes Agent Check Money Orders, the selling financial institution informs MoneyGram of the amount of the Agent Check, the date of purchase, the serial number, and the customer identification number of the selling financial institution. App. 1250–51, 1254 (Yingst Dep. 266:16–267:6, 270:5–11). Likewise, the selling financial institution does not convey any information about the purchaser of the Agent Check or an image of the Agent Check. *See* App. 1139–42 (Yingst Dep. 118:24–121:12). MoneyGram holds the money used to purchase the Agent Check in the same commingled portfolio of investments and accounts. App. 1088–89, 1136–37, 1174 (Yingst Dep. 54:17–55:7, 115:15–116:6, 153:7–16). And an Agent Check presented for payment goes through the same clearing process using a clearing bank's routing and transit number. App. 1185, 1188–92 (Yingst Dep. 164:6–12, 167:23–171:8). The backend processing that MoneyGram provides for Agent Checks is no different than the backend processing that MoneyGram provides for Agent Check Money Orders and Retail Money Orders. App. 1192 (Yingst Dep. 171:3–8). Agent Checks are so similar to Agent Check Money Orders that MoneyGram allows its customers to use the two products interchangeably. App. 219–20 (Dep. Ex. 14, § 3); App. 226–27 (Dep. Ex. 15, § 3).

Unlike with Agent Check Money Orders, however, MoneyGram reports the proceeds of all of its unclaimed Agent Checks to the State of its incorporation—Minnesota until 2005, and Delaware since then. App. 375–78 (Dep. Ex. 42); App. 210 (Dep. Ex. 13 at 29). MoneyGram does not collect any information related to the purchaser of the unclaimed Agent Check, *see* App. 1150–52 (Yingst Dep. 129:4–131:13), so it does not, and cannot, perform any due diligence before reporting the property, App. 421 (Dep. Ex. 50 at MG004667). Despite the functional equivalency of Agent Checks, Agent Check Money Orders, and Retail Money Orders, MoneyGram's corporate designee on its escheatment practices could not state the basis for MoneyGram's policy of reporting unclaimed Agent Checks to its State of incorporation. App. 1042–44 (Petrick Dep. 133:17–135:4). She testified that the decision to report unclaimed Agent Checks to MoneyGram's State of incorporation was made by MoneyGram's "attorneys and outside counsel." App. 1043 (Petrick Dep. 134:22).

3. MoneyGram "Teller's Checks"

A representative example of the product that MoneyGram labels as a "Teller's Check" is included in the appendix. App. 347–48 (Dep. Ex. 26

[Ex. C]). MoneyGram provides a template to its selling financial institutions showing what must be printed on a Teller's Check. App. 349–50 (Dep. Ex. 26 [Ex. D]). These documents are representative of the Teller's Checks issued since 2000. App. 342 (Dep. Ex. 26 ¶ 7); *see* App. 51 (Dep. Ex. 6) (another example of a Teller's Check); App. 54–55 (Dep. Ex. 9) (same).

MoneyGram Teller's Checks are issued and paid in the same way as Retail Money Orders and Agent Check Money Orders. The purchaser remits the value of the Teller's Check to the selling financial institution, which then issues the written instrument. App. 1158–60 (Yingst Dep. 137:23–139:13). The selling financial institution transfers the money and the same four pieces of information to MoneyGram. App. 1150–51 (Yingst Dep. 129:14–131:13). The selling financial institution does not report to MoneyGram any information regarding the purchaser. App. 1150–51 (Yingst Dep. 129:14–131:13). The money remains in the same commingled investment portfolio until the instrument is cleared through the Federal Reserve using the clearing bank's routing and transit numbers. App. 1174 (Yingst Dep. 153:7–16). Like Agent Checks, Teller's Checks will sometimes be labeled simply as "Official Checks" on their face. *Compare* App. 54–55 (Dep. Ex. 9) (Teller's Check), *with* App. 56 (Dep. Ex. 10) (Agent Check).

While MoneyGram continues to be identified as the issuer of its Teller's Checks, the selling financial institution is typically described as a drawer. *See* App. 347-48 (Dep. Ex. 26 [Ex. C]). MoneyGram's agreements with the financial institutions refer to these checks as being "drawn by" both the financial institution and MoneyGram. *See* App. 307–08 (Dep. Ex. 20 § 3). The drawee of the Teller's Checks remains MoneyGram's clearing bank. *See* App. 347–48 (Dep. Ex. 26 [Ex. C]). The selling financial institution's role in the process of selling a Teller's Check is limited in the same way as it is with respect to Retail Money Orders and other Official Checks; the institution issues the instrument to the purchaser, collects the purchaser's money, and forwards that money and certain information along to MoneyGram. App. 1150–51, 1177–79, 1188 (Yingst Dep. 129:14–131:13, 156:2–158:9, 167:15–19). MoneyGram's corporate representative claimed that the selling financial institutions do not act as agents for MoneyGram in selling Teller's Checks, App. 1187–88 (Yingst Dep. 166:24–167:14); however, at least some of the financial institution agreements specifically appoint the financial institution as MoneyGram's agent for purposes of selling these and other Official Checks, App. 227 (Dep. Ex. 15 § 5).

As with Retail Money Orders and Agent Check Money Orders, MoneyGram is responsible for reporting and remitting any unclaimed funds payable on Teller's Checks to the appropriate State. App. 1020–22 (Petrick Dep. 35:11–37:1). But unlike Retail Money Orders and Agent Check Money Orders, today MoneyGram reports the proceeds of unclaimed Teller's Checks to the State of its incorporation. App. 1020–22 (Petrick Dep. 35:11–37:1); App. 210 (Dep. Ex. 13 at 29). As was true of Agent Checks, MoneyGram cited only the instruction from its "attorneys and outside counsel" to explain its current reporting of Teller's Checks differently than Retail Money Orders and Agent Check Money Orders. App. 1044 (Petrick Dep. 135:5–11).

From the time that MoneyGram began offering Teller's Checks as part of its "Official Check" line of products until 2005, MoneyGram reported funds from unclaimed Teller's Checks to the States in which they were purchased or in which their financial-institution customer was incorporated. *See* App. 375–85 (Dep. Exs. 42–44). MoneyGram changed its practice in 2005 and began to report all unclaimed Teller's Check proceeds to Delaware. *See* App. 375–85 (Dep. Exs. 42–44). In doing so, MoneyGram acknowledged that its books and records do not contain information about the purchaser or intended payee of the instrument. *See* App. 375–85 (Dep. Exs. 42–44). Therefore, MoneyGram does not have to do any due diligence to try to locate the rightful owner despite the acknowledgement that the selling financial institutions may indeed have that information. *See* App. 375–85 (Dep. Exs. 42–44); App. 421 (Dep. Ex. 50 at MG004667).

III. Procedural Background

In 2014, Arkansas, Texas, and a number of other States learned of MoneyGram's practice of remitting the unclaimed funds from its Agent Checks and Teller's Checks products to its State of incorporation, Delaware. After corresponding with MoneyGram about that practice, Arkansas contacted Treasury Services Group, an unclaimed-property auditing firm, to investigate. App. 965–66 (Kauffman Dep. 25:15–26:21). Then Arkansas, along with a number of other States, hired Treasury Services Group to audit MoneyGram's books and records to determine compliance with unclaimed-property laws. *See* App. 958–65 (Kauffman Dep. 18:5–25:14); *see also* App. 583–85 (Dep. Exs. 71–73). As a result of that audit, these States discovered that, between 2002 and 2017, "[l]ess than one half of one-percent of all official check property escheated to Delaware was actually purchased

in Delaware." App. 593 (Dep. Ex. 103 at ALF00001796); *see* App. 967–68 (Kauffman Dep. 192:16–193:2). More concretely, this meant that MoneyGram should have remitted to Delaware only approximately $1 million—not the more than $250 million that Delaware in fact received from MoneyGram. App. 593 (Dep. Ex. 103 at ALF00001796).

Following the MoneyGram audit, the States sent letters to Minnesota and Delaware requesting that the property be allocated among the States pursuant to the Federal Disposition Act. *See* App. 968–69 (Kauffman Dep. 193:3–194:8). Minnesota acquiesced and began to repay those States the amount of the improperly reported and remitted property. App. 968–69 (Kauffman Dep. 193:3–194:8). But Delaware refused.

In rejecting the States' request, Delaware made no attempt to justify its actions under the FDA, which Congress had passed over 35 years earlier. When MoneyGram in 2011 asked Delaware for guidance about the State to which it should remit funds on unclaimed Official Check products, Delaware's response cited only common-law escheatment rules, not the FDA. App. 624–26 (Letter from Ed Black, MG0002373–2375). Even after Treasury Services Group audited MoneyGram's books and records, Delaware again did not explain its position by reference to the FDA. App. 628–29 (Letter from Caroline Cross, MG0002475–2476). Delaware first articulated the basis on which it believed its practices complied with the FDA in October 2015, over a year after Arkansas and other States first demanded that Delaware conform its escheatment practices to that law. App. 630–32 (Email from Cross, MG0002494–2496).

In early 2016, two separate lawsuits arose from the inability to resolve this dispute with Delaware. First, Pennsylvania sued Delaware and MoneyGram in Pennsylvania federal district court. *See* Complaint, *Treasury Dep't of Pa. v. Gregor*, No. 1:16-cv-00351-JEJ (M.D. Pa. Feb. 26, 2016), ECF No. 1. That lawsuit brought claims for violations of the FDA and Pennsylvania's own unclaimed-property law. *Id.* ¶¶ 85–109. Shortly after that lawsuit began, Wisconsin filed a substantially similar lawsuit against Delaware and MoneyGram in Wisconsin federal district court, also claiming violations of state and federal unclaimed-property law. *See* Complaint ¶¶ 43–61, *Wis. Dep't of Rev. v. Gregor*, No. 3:16-cv-00281-wmc (W.D. Wis. Apr. 27, 2016), ECF No. 1. A month later, Delaware moved for leave to file a bill of complaint in the United States Supreme Court against Pennsylvania and Wisconsin. That bill of complaint sought a declaration that MoneyGram

Official Check products are not covered by the FDA's escheatment rules. *See* Motion for Leave, Doc. No. 1.[2] By agreement of those three States, the district courts put the previously filed lawsuits on hold pending resolution of Delaware's original-jurisdiction action before the Supreme Court, dismissing Pennsylvania's without prejudice and staying Wisconsin's. *See* Order, *Treasury Dep't of Pa. v. Gregor*, No. 1:16-cv-00351-JEJ (M.D. Pa. Oct. 5, 2016), ECF No. 48; Order, *Wis. Dep't of Rev. v. Gregor*, No. 3:16-cv-00281-wmc (W.D. Wis. June 21, 2016), ECF No. 12.

Two weeks after Delaware requested leave to file its bill of complaint, a separate motion for leave to file a bill of complaint against Delaware was filed by Arkansas, on behalf of itself and 20 other States.[3] *See* Motion for Leave to File Bill of Complaint, *Arkansas v. Delaware*, No. 22O146 (U.S. June 9, 2016). The 21 States sought a judgment that:

- Declares their entitlement "to the sums payable on unclaimed and abandoned MoneyGram official checks purchased in [the 21] States and unlawfully remitted to the State of Delaware," and "to future sums payable on unclaimed and abandoned MoneyGram official checks purchased in [the 21] States"; and,

- Orders Delaware to "deliver to the [21] States sums payable on unclaimed and abandoned MoneyGram official checks purchased in those States and unlawfully remitted to Delaware." Prayer, Bill of Complaint at 17–18, *Arkansas v. Delaware*, No. 22O146 (U.S. June 9, 2016).

Despite the similarity of MoneyGram Official Checks to money orders and traveler's checks, Arkansas and the 20 other States alleged that MoneyGram has not generally remitted unclaimed funds payable on certain of its Official Check products to the State of purchase. Bill of Complaint ¶¶ 10, 12–15, 17. Instead, MoneyGram has sent those funds to the State of its incorporation—

[2] Where indicated in a citation, "Doc. No." refers to the "Docket Number" as listed on the Special Master's docket sheet, http://ww2.ca2.uscourts.gov/specialmaster/special_145.html.

[3] The 20 States that initially joined Arkansas are the States of Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and West Virginia, and the Commonwealth of Kentucky.

Delaware. *Id.* ¶ 16. It does this because Delaware has instructed it to do so. *Id.* ¶¶ 18–22, 31. This unlawful instruction that MoneyGram remit these Official Check funds to Delaware affects a significant amount of money. In the four-year period between May 2011 and March 2015 alone, at least $162 million payable on MoneyGram Official Checks allegedly went unclaimed. *Id.* ¶ 11. Consistent with the express congressional aim of the FDA, the States that requested leave to file this bill of complaint sought a distribution of those and similar sums from other years, "as a matter of equity among the several States," to the States where the MoneyGram Official Checks were purchased. 12 U.S.C. § 2501(3).

The Court granted their request for leave to file their bill of complaint, consolidated this case with the case arising from Delaware's own bill of complaint, and appointed the Special Master to preside over the consolidated cases. *See* Order, Doc. No. 9; Order, Doc. No. 31. The Special Master subsequently bifurcated the proceedings. In this first phase of proceedings, only liability will be adjudicated. *See* Order, Doc. No. 43 ¶ 6 (limiting liability phase to "the question which State or States are entitled to escheat the so-called 'Official Checks' of MoneyGram"). The Special Master deferred ruling on damages until the issue of liability is resolved. *Id.*

After the Court granted the initial 21 States leave to file their bill of complaint, seven more States joined in the claims brought in that bill of complaint, bringing the total to 28.[4] Those 28 States, along with Pennsylvania and Wisconsin (all 30 of which are collectively the "Defendant States" in this original action), now seek a judgment from the Supreme Court declaring that the FDA's escheatment rules apply to all MoneyGram Official Check products and ordering that Delaware return to Defendant States funds that Delaware improperly collected on unclaimed Official Check products.

ARGUMENT

The Federal Rules of Civil Procedure "may be taken as guides" for the Special Master's consideration of this motion for summary judgment. Sup. Ct. R. 17.2; *see* Case Mgmt. Order No. 5, Doc. No. 74 (adopting Joint Pro-

[4] Those are the States of California, Iowa, Maryland, Oregon, Washington, and Wyoming, and the Commonwealth of Virginia. *See* Motion for Leave to Amend Bill of Complaint, Doc. No. 10; Order, Doc. No. 19; Unopposed Motion to Add Wyoming, Doc. No. 48; Order, Doc. No. 49.

posal for Case Mgmt. Order No. 5); Joint Proposal for Case Mgmt. Order No. 5, Doc No. 73 (providing that "this matter should be generally governed by the Federal Rules of Civil Procedure"). Having ordered bifurcated proceedings to resolve liability prior to damages, the Special Master should grant partial summary judgment to Defendant States on liability if Defendant States have satisfied Rule 56's requirements. *See* Fed. R. Civ. P. 56(a) (requiring grant of summary judgment on "the part of each claim" for which it is appropriate); *Montana v. Wyoming*, 136 S. Ct. 1034 (2016) (granting State's motion for partial summary judgment); *Nebraska v. Wyoming*, 507 U.S. 584, 590, 603 (1993) (same, adopting special master's recommendation). Rule 56 requires summary judgment "where there 'is no genuine issue as to any material fact' and the moving party is 'entitled to a judgment as a matter of law.'" *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010) (quoting Fed. R. Civ. P. 56(a)).

There is no genuine issue as to any fact material to Defendant States' claims. The Federal Disposition Act's escheatment rules apply as a matter of law to MoneyGram Official Checks for either of two independent, alternative reasons: because they are "money order[s]"; or alternatively, because they are "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." 12 U.S.C. § 2503. For either of these alternative reasons, there is no genuine issue of material fact that the FDA's escheatment rules apply to MoneyGram Official Checks.

Nor is there any genuine issue of material fact about Delaware's liability to Defendant States. Under the FDA's escheatment rules, each Defendant State is "entitled exclusively to escheat or take custody of" the unclaimed proceeds of Official Checks purchased within its borders as long as two conditions are met: the "books and records of [the] banking or financial organization or business association show the State in which" the Official Check "was purchased"; and the Defendant State has "power under its own laws to escheat or take custody of such sum." *Id.* § 2503(1). Because Defendant States have established those conditions, Delaware is liable as a matter of law for sums payable on unclaimed and abandoned MoneyGram Official Checks purchased in Defendant States and unlawfully remitted to Delaware. The Special Master should therefore recommend that the Court grant Defendant States' motion for summary judgment on liability.

I. Each of the products that MoneyGram markets as an Official Check is a "money order" under the Federal Disposition Act.

The FDA's escheatment rules apply to "any sum [that] is payable on a money order." 12 U.S.C. § 2503. Because MoneyGram Official Checks are "money order[s]," the Special Master should proceed to applying the FDA's escheatment rules.

To determine whether Official Checks are "money order[s]" under the FDA, the Special Master should "look first to the text of the statute." *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 739 (2017). Because the FDA does not expressly define "money order," the Court will look to the term's "ordinary meaning," as illuminated by dictionaries. *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018). If the text is clear, the inquiry ends. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). If not, then "legislative history or any other extrinsic material" may play "a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Here, these tools of statutory interpretation demonstrate that MoneyGram Official Checks are "money order[s]"with the meaning of the FDA.

A. Although Congress did not define the term "money order" in the FDA, contemporaneous dictionaries demonstrate a money order's defining features. It is a prepaid draft issued by a post office, bank, or some other entity that the purchaser uses to transmit money to a named payee. The then-current edition of Black's Law Dictionary only discussed postal money orders but made clear that they are prepaid drafts: "Under the postal regulations of the United States, a money order is a species of draft drawn by one post-office upon another for *an amount of money deposited at the first office by the person purchasing the money order*, and payable at the second office to a payee named in the order." *Money Order*, Black's Law Dictionary (4th ed. rev. 1968) (emphasis added). If a money order is "for an amount of money deposited" by the purchaser at the time of purchase, then it is by definition a prepaid instrument. And if it is a "draft," then it is "a direction to pay" someone that "must identify the person to pay with reasonable certainty." App. 774–75 (U.C.C. § 3-102(1)(b) (Am. Law Inst. & Unif. Law Comm'n 1972) ("1972 U.C.C.")); *see* App. 778 (*id.* § 3-104(2)(a)) (defining a "draft" and "order" as synonyms); *see also* U.C.C. § 3-104(e) (Am. Law

Inst. & Unif. Law Comm'n 2017) ("2017 U.C.C."). Other contemporaneous dictionaries included similar definitions for money orders issued by entities other than a post office. *See, e.g.*, *Money Order*, Webster's New Collegiate Dictionary (7th ed. 1967) ("an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another office"). Further confirmation of that fact comes from the expert testimony in this case about how payment systems work in practice. *See* App. 881 (Gillette Rep. ¶ 11) ("A money order is *a prepaid draft, or payment order*, that the seller provides to a purchaser in a specified amount that is typically imprinted on the face of the instrument." (emphasis added)).

B. Taken together, these definitions show that a "money order" is 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. "Agent Check Money Orders," "Agent Checks," and "Teller's Checks"—all of the products that MoneyGram markets as "Official Checks"—fit squarely within the definition of "money order."

Agent Check Money Orders.—MoneyGram's financial-institution customers contract with MoneyGram to sell these instruments. App. 1066 (Yingst Dep. 28:6–19); *see supra* Background Part II.B. The selling bank is an agent for MoneyGram. *E.g.*, App. 32–33 (Dep. Ex. 4 [Ex. E]); App. 53 (Dep. Ex. 8). A purchaser prepays the selling institution the face value of the instrument plus any fee. App. 64–65 (Dep. Ex. 12 at 5–6); App. 1198 (Yingst Dep. 177:14–20). The purchaser signs the Agent Check Money Order upon purchase. App. 1199–1200 (Yingst Dep 178:19–179:1). The selling institution sends funds in the amount of the face value to MoneyGram, which deposits the funds in its commingled account. App. 1136–37, 1253–54 (Yingst Dep. 115:15–116:6, 269:12–270:4). When an Agent Check Money Order is ultimately presented to the clearing bank (or drawee) identified on the order, MoneyGram provides funds equivalent to the face value "in accordance with a contract between those two institutions." App. 1138–39 (Yingst Dep. 117:8–118:23).

Agent Check Money Orders thus fit within the "money order" definition. They are drafts because they are written orders directing another person to pay a certain sum of money on demand to a named payee. The face value of these drafts is prepaid and used to transmit money, as the definition requires. Further, MoneyGram itself already treats Agent Check

Money Orders as money orders for purposes of 12 U.S.C. § 2503. App. 1021 (Petrick Dep. 36:1–4); App. 210 (Dep. Ex. 13 at 29).

Agent Checks.—MoneyGram Agent Checks are money orders for most of the same reasons. Financial institutions also contract with MoneyGram to sell these instruments. App. 226 (Dep. Ex. 15 § 3); App. 328 (Dep. Ex. 21 at MG004351); *see supra* Background Part II.B. Likewise, the financial institution selling the Agent Check acts, as the name suggests, as an agent for MoneyGram. App. 236–38 (Dep. Ex. 16); App. 1185 (Yingst Dep. 164:13–24). As with Agent Check Money Orders, an Agent Check is a draft because it is an order to pay a named payee. *See* App. 343–44 (Dep. Ex. 26 [Ex. A]). The purchaser of an Agent Check prepays its face value plus a fee, and the institution then sends the funds to MoneyGram, which deposits them in its commingled account. App. 64–65 (Dep. Ex. 12 at 5–6); App. 1088–89, 1136–37, 1174 (Yingst Dep. 54:17–55:7, 115:15–116:6, 153:7–16). When the instrument is ultimately presented for payment to the clearing bank (the drawee), MoneyGram provides funds from the commingled account "in accordance with a contract between the two institutions." App. 1185, 1188–92 (Yingst Dep. 164:6–12, 167:23–171:8).

Those facts show that MoneyGram Agent Checks are money orders—prepaid drafts for transmitting funds to a named payee—for purposes of the FDA. MoneyGram's internal documents also support this conclusion. A representative sample of its contract with its financial-institution customers indicates that "[a]t Financial Institution's option, these [*i.e.*, Agent Checks] may be used as money orders." App. 219 (Dep. Ex. 14 at MG0000011). Indeed, Agent Checks are so similar to Agent Check Money Orders that MoneyGram allows its customers to use the two products interchangeably. App. 219–20 (Dep. Ex. 14, § 3); App. 226–27 (Dep. Ex. 15, § 3); *see* App. 1266–68 (Supp. Yingst Decl. ¶¶ 2–3 & [Ex. A]) (giving example of a "blank stock" Agent Check).

Teller's Checks.—These Official Check products also fit the definition of money order discussed above. Financial institutions contract with MoneyGram to sell MoneyGram Teller's Checks. App. 1156–57 (Yingst Dep. 135:23–136:13); App. 226–27 (Dep. Ex. 15 § 3); *see supra* Background Part II.B. The purchaser prepays the financial institution the face value of the instrument plus any fee. App. 1158–60 (Yingst Dep. 137:23–139:13). While Teller's Checks describe the selling financial institution as a

drawer or co-drawer rather than an agent of MoneyGram, MoneyGram remains the issuer of the Teller's Check. App. 347–48 (Dep. Ex. 26 [Ex. C]); App. 307–08 (Dep. Ex. 20 § 3). The selling institution transfers the money to MoneyGram, where it remains in the same commingled investment portfolio until the instrument is cleared through the clearing bank (the drawee). App. 1174 (Yingst Dep. 153:7–16). And like the other Official Check products, Teller's Checks are made payable to a named payee. *See* App. 347–48 (Dep. Ex. 26 [Ex. C]).

Teller's Checks are therefore not different from Agent Check Money Orders or Agent Checks in any way that is material to the definition of a money order under the FDA. All of these instruments are prepaid drafts purchased for the purpose of safely transmitting money to a named payee. *See* App. 1266, 1269–70 (Supp. Yingst Decl. ¶¶ 2, 4 & [Ex. B]) (giving example of a "blank stock" Teller's Check).

C. As this discussion shows, Agent Check Money Orders, Agent Checks, and Teller's Checks—the three MoneyGram products at issue in this dispute—all fall within the scope of the term "money order" under the FDA. MoneyGram's own treatment of these instruments also supports this conclusion. Because Agent Check Money Orders are so functionally identical to Retail Money Orders, MoneyGram already remits these types of unclaimed instruments pursuant to the FDA. App. 1194–95 (Yingst Dep. 173:22–174:14); App. 53 (Dep. Ex. 8); App. 58 (Dep. Ex. 11 at 2). Agent Checks in turn are so similar to Agent Check Money Orders that MoneyGram's customers can use them interchangeably. App. 219–20 (Dep. Ex. 14, § 3); App. 226–27 (Dep. Ex. 15, § 3). And Teller's Checks are not materially different from Agent Checks or Agent Check Money Orders, in that they are all prepaid written instruments used to safely transmit funds to a named payee. In fact, Agent Checks and Teller's Checks may even be labeled identically and generically as "Official Checks." *See* App. 1201–05 (Yingst Dep. 180:4–184:22); *e.g.*, App. 54–56 (Dep. Exs. 9–10). As certain of the sample Agent Checks and Teller's Checks indicate, the only real difference between these types of Official Check is the label on the draft.

The primary difference cited between Teller's Checks and the other types of Official Checks—that funds paid through Teller's Checks may have next-business-day availability under the federal Expedited Funds Availability Act, *see* App. 58 (Dep. Ex. 11 at 2)—is irrelevant to the analysis. The Expedited Funds Availability Act was not even enacted until 1987, more

than a decade after the FDA, and thus does not illuminate Congress's use of the term "money order" under the 1974 FDA.

In addition, allowing minor differences like this to change the fundamental identity of MoneyGram's products would undermine the purposes of the FDA. MoneyGram is no more likely to have the purchaser's last-known address for Agent Checks and Teller's Checks than it is for Agent Check Money Orders. *See* 12 U.S.C. § 2501(1); *see also* App. 421 (Dep. Ex. 50 at MG004667). There is no indication, moreover, that purchasers of Agent Checks and Teller's Checks are any more likely to reside outside of the State of purchase. *See* 12 U.S.C. § 2501(2). And both "equity" and "interstate commerce" are served by having these "sum[s] payable" distributed across the many States "entitled thereto." *See id.* § 2501(3)–(5).

Delaware's expert, Professor Ronald Mann, asserts that some Agent Checks and all Teller's Checks are not money orders under the FDA because they do not have two "terms and conditions printed on the back of a standard MoneyGram money order." App. 814 (Mann Rep. ¶ 57). (He makes no such argument for Agent Check Money Orders.) One term states that "the only 'recourse' on the money order is 'against the presenter.'" App. 814 (Mann Rep. ¶ 58). A second term states that a service charge of $1.50 per month is deducted from the value of the MoneyGram money order if it is not used within a year. App. 814 (Mann Rep. ¶ 59). But there is no evidence that the FDA's definition of "money order" hinges on MoneyGram's choice to include these terms on its products. For example, none of the contemporaneous sources cited above for definitions of "money order" requires that a monthly service charge be deducted after a year for an instrument to qualify as a money order. *See* App. 618 (Dep. Ex. 126) (example of contemporaneous money order without these conditions). And the existence of these terms has nothing to do with Congress's central purpose in adopting the FDA—to ensure an equitable distribution of abandoned proceeds of prepaid instruments when the issuing company does not, as a matter of standard business practice, record the last-known address of the purchaser. *See* 12 U.S.C. § 2501.

Because all of MoneyGram's Official Check products bear the characteristics of "money order" as that term is used in the FDA, they are subject to its escheatment rules.

II. Alternatively, if the Special Master concludes that at least some Official Checks are not money orders, they fit squarely within the "similar written instrument" provision.

Even if some Official Checks are not "money orders" as understood in the FDA, they still fall within the scope of that statute. The FDA's escheatment rules apply where "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. MoneyGram's Official Checks satisfy all three of these requirements. First, they are "written instruments" "similar" to money orders and traveler's checks. Not only do they share general characteristics with money orders and traveler's checks, but they are identical to money orders and traveler's checks on the specific dimensions that Congress identified as important in the FDA. Second, MoneyGram (a "business association") is "directly liable" on Official Checks because it is ultimately responsible for payment of the instruments' value.[5] Third and finally, Official Checks are not "third party bank checks" under any proposed definition of that phrase, including the most natural one, and including the one proposed by Delaware's expert witness.

A. Official Checks are "similar" to money orders and traveler's checks.

Whether or not Official Checks are "money order[s]" under the FDA, they are, at a minimum, "other similar written instrument[s]" that fall within its scope. *See* 12 U.S.C. § 2503. Money orders, traveler's checks, and Official Checks are prepaid instruments for transmitting funds, considered in the market to be cash equivalents or "as good as cash." App. 1084–85, 1219–21 (Yingst Dep. 50:20–51:7, 198:21–200:3); *see* App. 1004–05 (Mann Dep. 137:22–138:3). *See also* 2017 U.C.C. § 3-104(i) (defining "traveler's check").

[5] The only other party that could be ultimately responsible for payment of the instruments' value—MoneyGram's selling financial institution—is a "banking or financial organization." Thus, that element of the FDA is met even if MoneyGram is not ultimately responsible for payment of Official Checks.

In light of these shared characteristics, entitling States of purchase to take custody of unclaimed sums payable on Agent Checks and Teller's Checks fits comfortably within the purpose of the FDA: ensuring equitable distribution of unclaimed property. *See* 12 U.S.C. § 2501 (listing Congress's purposes for FDA). The FDA covers money orders, traveler's checks, and other similar written instruments—prepaid instruments that when unclaimed would often, under the common-law rule, end up remitted to a State where the purchaser did not live and where the sale did not take place because the issuing entity kept no information about the purchaser's address. Congress found that the "books and records" of the "issuing" "business association[]" did not "show the last known addresses of purchasers of such instruments," 12 U.S.C. § 2501(1), but recognized that they might show the State of purchase, *see id.* § 2503(1). By mandating that the "sum[s] payable" on such instruments be remitted to the State of purchase, *id.*, the FDA prevents a windfall to the business association's State of incorporation, *id.* § 2501(3)–(4). *See supra* Background Part I.C.

Agent Checks and Teller's Checks share the characteristics that led Congress to apply the FDA to money orders and traveler's checks. *See supra* Background Part II.B & Argument Part I. Like money orders and traveler's checks, Agent Checks and Teller's Checks are both prepaid written instruments. As with Retail Money Orders, MoneyGram is ultimately liable for paying the value of these instruments after they are sold, and the process by which they are settled and paid is identical. App. 1174, 1185, 1188–92 (Yingst Dep. 153:7–16, 164:6–12, 167:23–171:8). Agent Checks and Teller's Checks are widely accepted by creditors as near cash, just as with money orders. App. 1219–20, 1227 (Yingst Dep. 198:21–199:25, 206:4–17); App.64–65 (Dep. Ex. 12 at 5–6); *see* App. 847–48 (Clark Rep. at 15–16). Further, because Agent Checks and Teller's Checks are instruments that are paid from MoneyGram's account—just like money orders and traveler's checks would be paid from the issuer's account—and the purchasers do not receive notification that the instruments have been cashed, there is an increased risk the instruments will be forgotten and abandoned. App. 1096, 1178 (Yingst Dep. 62:8–15, 157:2–20); *see* App. 847–48 (Clark Rep. at 15–16). And MoneyGram does not retain information regarding the purchaser of its money orders or Official Checks but can ascertain the location where those instruments were purchased. App. 421 (Dep. Ex. 50 at MG004667); App. 1021, 1025 (Petrick Dep. 36:18–20, 68:2–13).

Delaware's expert, Professor Mann, concedes that Agent Check Money Orders are "money orders within the language of the statute." App. 806 (Mann Rep. ¶ 20); *see* App. 1006–08 (Mann Dep. 147:1–8, 150:3–10, 151:16–22). But he argues that Agent Checks and Teller's Checks "differ" from "money orders" because, in his view, "*a bank* ordinarily is indirectly liable on" MoneyGram's Teller's Checks and "some" Agent Checks, App. 811–12 (Mann Rep. ¶ 47) (emphasis added), whereas he asserts that *MoneyGram* ordinarily is indirectly liable on its money orders, App. 812 (Mann Rep. ¶ 49); *see* App. 928–29 (Rebuttal Rep. ¶ 1). Professor Mann suggests that this difference matters because banks might be more "solven[t]" than MoneyGram and therefore a recipient of an Agent Check or Teller's Check would purportedly have more confidence that the instrument would be honored. App. 812 (Mann Rep. ¶¶ 49–50.)

This argument fails. As an initial matter, Professor Mann offers no authoritative support for his definitions of "direct" and "indirect liability" from the U.C.C., cases, or commentators around the time of the FDA, and his definitions are incorrect. *See* App. 928–35 (Rebuttal Rep. ¶¶ 1–10); *see infra* Argument Part II.B.2. In any event, the FDA never mentions "indirect" liability. *See* 12 U.S.C §§ 2501–03. And the FDA's plain text makes it clear that Congress was unconcerned with the relative solvency of banks and other companies that issue money orders, traveler's checks, and other similar instruments. The FDA explicitly covers instruments issued by both bank and nonbank entities, including "business associations" in general, demonstrating that Congress expressly intended to cover instruments that were issued by institutions federally regulated as banks and those not federally regulated as banks. 12 U.S.C. § 2501(1); *see id.* §§ 2502(1)–(3), 2503(1)–(3). Further, Professor Mann's suggestion that MoneyGram's products are less trustworthy than those sold by a federally regulated bank or credit union lacks support in the record. Money transmitters like MoneyGram are themselves highly regulated entities. *See, e.g.*, Cal. Fin. Code §§ 2000–2176; Fla. Stat. §§ 560.103–.408; Indiana Code §§ 28-8-4-1 through -61; Ohio Rev. Code §§ 1315.01–.18. And MoneyGram in particular is the second-largest money-transfer company in the world with annual revenues exceeding $1 billion, and has been in business for over 70 years. App. 4 (Dep. Ex. 2 at 4); App. 40 (Dep. Ex. 5 at 5); App. 1063 (Yingst Dep. 21:3–7). There is no evidence suggesting that MoneyGram is considered to have a heightened risk of insolvency relative to banks or that its products are considered less trustworthy than alternatives issued by banks; to the contra-

ry, MoneyGram testified that its products are treated as cash equivalents in the marketplace. App. 1084–85, 1219–21 (Yingst Dep. 50:20–51:7, 198:21–200:3).

Professor Mann finally points to two contractual provisions on "a standard MoneyGram money order"[6] that do not appear on MoneyGram's Agent Checks and Teller's Checks: that MoneyGram's money orders state that the only "recourse" is against the "presenter" and that a monthly service charge is deducted after a year of non-use. *See* App. 814 (Mann Rep. ¶¶ 57–59). Whether MoneyGram tends to include these provisions on its own money orders says nothing about whether, as a general matter, money orders must include these provisions. Nor does it demonstrate that Congress intended the phrase "money order" as used in the FDA to cover only instruments bearing MoneyGram's chosen provisions.

Most important of all, even if these two provisions were necessary for an instrument to be a "money order," MoneyGram Agent Checks and Teller's Checks would still be "similar written instruments" under the FDA. Specifically, purchasers prepay the face value, and the institutional obligors who retain the money do not have records of those purchasers' addresses. *See supra* Background Part II.B. Indeed, the FDA covers instruments similar to both money orders *and* traveler's checks, and traveler's checks contain a number of technical differences from money orders, such as their "countersignature" requirement. *See* 12 U.S.C. § 2503; 2017 U.C.C. § 3-104(i); *see also* App. 879–82, 890–900 (Gillette Rep. ¶¶ 9–13, 26–44) (discussing relevant characteristics of money orders and traveler's checks, and explaining how Official Checks are similar to those other instruments). Money orders, traveler's checks, and MoneyGram Official Checks are, at very least, "similar written instruments." That is enough. The FDA applies here.

B. A banking or financial organization or a business association is directly liable on MoneyGram Official Checks products.

For the FDA's escheatment rules to apply to instruments, like Official Checks, that are "similar" to money orders and traveler's checks, they must be instruments "on which a banking or financial organization or a business

[6] He apparently is referring to an Agent Check Money Order as a "standard" money order. App. 814 (Mann Rep. ¶ 57); *see also* App. 53 (Dep. Ex. 8).

association is directly liable." 12 U.S.C. § 2503. Although the FDA does not expressly define the term "directly liable," the statute's most natural reading, its history, and its purpose all make clear that the phrase refers to the party ultimately responsible for payment of the value of the instrument. Here, the undisputed evidence shows that MoneyGram (or at the very least the selling financial institutions) is ultimately responsible for paying the value of all the instruments that MoneyGram dubs Official Checks. There is no dispute, moreover, that MoneyGram is a "business association" and that the financial institutions that sell Official Checks are "banking or financial organization[s]" within the meaning of the statute. Accordingly, a banking or financial organization, or a business association, is directly liable on the Official Checks at issue in this case, and this element of the statute is satisfied.

1. The term "directly liable" in the FDA refers to the party ultimately responsible for payment on the instrument.

Although the FDA does not expressly define the phrase "directly liable," Congress incorporated that phrase from existing unclaimed-property law. By incorporating a term of art from the Uniform Disposition of Unclaimed Property Act, which in turn incorporated the term from New York law, Congress is presumed to have incorporated the existing definition of that term along with it. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (holding 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"). Those earlier laws used "directly liable" to refer to the entity ultimately responsible for making payment on the value of the instrument. Because nothing in the FDA suggests that Congress intended to depart from that established meaning, the Special Master should apply that meaning in this case.

As early as 1943, the New York Abandoned Property Law defined presumptively unclaimed property in part as "[a]ny amounts held or owing by a banking organization for the payment of a negotiable instrument or a certified check whether negotiable or not on which such organization is directly liable." App. 641 (1943 N.Y. Laws 1390). The term "directly liable" was consistently interpreted to refer to "the banking organization which is ultimately liable for the payment of the negotiable instrument or certified check." *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at *1–2 (Sept. 4, 1947); *Aband. Prop. Law*,

§ 300, Subd. 1, Par. (c) & § 301, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at *1 (Dec. 23, 1946). And when the instrument in question was a draft, "the drawer" was deemed to be "the party ultimately liable for its payment." *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at *2.

When the Uniform Law Commission promulgated the Uniform Disposition of Unclaimed Property Act in 1954, the Commission modeled its definition of presumptively abandoned property on this provision of the New York Abandoned Property Law. App. 672 (Unif. Disposition of Unclaimed Prop. Act § 2 cmt. (Unif. Law Comm'n 1954)). Section 2 of the Uniform Act states that presumptively abandoned property includes "[a]ny sum payable on checks certified in this state or on written instruments issued in this state *on which a banking organization or financial organization is directly liable*, including, by way of illustration but not of limitation, certificates of deposit, drafts, and traveler's checks." App. 671 (*Id.* § 2(c)) (emphasis added). The Commission revised the Uniform Act in 1966, modifying Section 2 to include "a banking or financial organization or business association" as entities that could be directly liable on the written instruments subject to the Act, and again acknowledging New York law as the template for this section. App. 692-93 (Rev. Unif. Disposition of Unclaimed Prop. Act § 2(c), cmt. (Unif. Law Comm'n 1966)). Thirty-one states and the District of Columbia subsequently enacted either the 1954 or the 1966 version of the Uniform Act. App. 709 (Uniform Unclaimed Property Act p. 2 (Unif. Law Comm'n 1981)).

Against this backdrop, Congress adopted the FDA in 1974. Section 2503 of that statute copied verbatim from Section 2(c) of the 1966 Uniform Act the language "on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Further, the definitions of "banking organization," "business association," and "financial organization" contained in § 2502—the parties that must be "directly liable" on the instruments within the FDA's scope—mirror the definitions of those terms contained in Sections 1(a)–(c) of the 1966 Uniform Act.[7] As one court

[7] The only differences between the FDA's definitions and those in the Uniform Act, apart from the references to the United States rather than the State enacting the model law, are that the 1966 Uniform Act's definition of "banking organization" also includes industrial and land banks, and that the definition of "financial organization" also references cooperative banks. *Compare*

explained, "Section 2503 [of the FDA] was . . . plainly designed to interact with the Uniform Act." *Travelers Express Co. v. Minnesota*, 506 F. Supp. 1379, 1384 (D. Minn. 1981); *see id.* (concluding that FDA and Uniform Act "should be construed to function harmoniously").

In borrowing the "directly liable" language from the Uniform Act, which in turn was based on the New York Abandoned Property Law, Congress incorporated those earlier authorities' meaning of the term. When Congress adopts a new statute incorporating sections of existing law, it "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." *Lorillard*, 434 U.S. at 581. And the FDA's text gives no indication that Congress intended to depart from the established meaning of "directly liable." *Cf. Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947))).

Interpreting "directly liable" to refer to the party ultimately responsible for payment on an instrument, such as a drawer, also makes sense in the unclaimed-property context. As the New York Attorney General noted, the drawer of a draft is the party that holds and controls the funds that will be used to pay that draft. *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at *1–2 (Dec. 23, 1946). The only other party arguably in possession of the proceeds, the drawee bank, merely owes a contractual obligation to the drawer and does not independently owe payment on the draft. *Id.*; *see* 2017 U.C.C. § 3-408 (drawee not liable until it has accepted the draft). That also holds true here. From the moment an Official Check is purchased, either MoneyGram or its financial-institution client holds the funds used to purchase the instrument. App. 1088–90, 1174, 1262, 1264 (Yingst Dep. 54:17–56:5, 153:7–16, 278:15–22, 280:12–17).[8] Only MoneyGram and those financial institutions

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App. 691 (Rev. Unif. Disposition of Unclaimed Prop. Act § 1(a)–(c)), *with* 12 U.S.C. § 2502(1)–(3). Otherwise, the cited definitions in the 1966 Uniform Act and the FDA are identical.

[8] As discussed previously, the financial institution client only temporarily holds the Official Check proceeds before forwarding them to MoneyGram. *See, e.g.*, App. 1253–54 (Yingst Dep. 269:12–270:4).

have records regarding the specific instruments purchased. *See, e.g.*, App. 1130–31, 1177, 1179–80 (Yingst Dep. 109:7–110:8, 156:2–17, 158:10–159:2). They are thus the only parties that could be considered "directly liable" for seeing those Official Check funds delivered to the appropriate payee, or eventually remitted to the State if the instrument goes unclaimed and the rightful owner cannot be found. No other party controls the funds that go unclaimed and thus no other party is in a position to bear the ultimate responsibility for remitting them to the States.

2. MoneyGram is ultimately responsible for payment.

The undisputed evidence shows that MoneyGram is ultimately responsible for payment of its Agent Checks and Teller's Checks. Under the terms the arrangement with its selling financial institutions, MoneyGram holds the money that will be used to satisfy the obligation in its comingled investment account until the instruments are presented for payment. App. 1088–89, 1136–37, 1174 (Yingst Dep. 54:17–55:7, 115:15–116:6, 153:7–16). Additionally, MoneyGram describes itself as the "drawer" of its Agent Checks on the face of the checks, in its agreements with its financial-institution clients, and in its marketing and internal documents. *E.g.*, App. 52, 56, 343–46 (Dep. Exs. 7, 10, 26 [Exs. A, B]) (sample Agent Checks); App. 219, 226, 307, 331 (Dep. Exs. 14, 15, 20, 24) (agreements with financial institutions, each defining "Agent Checks" as "[c]hecks drawn by" MoneyGram or its predecessor); App. 236–38, 328–30 (Dep. Exs. 16, 21) (MoneyGram documents comparing and describing Official Check products); App. 1238 (Yingst Dep. 217:5–11).

As for Teller's Checks, on sample instruments, agreements with its financial-institution clients, and internal documents, MoneyGram is identified as either the codrawer or the "issuer," a term synonymous with drawer under the 2017 U.C.C. § 3-105(c). *E.g.*, App. 51, 54–55, 347–50 (Dep. Exs. 6, 9, 26 [Exs. C, D]) (sample Teller's Checks); App. 220, 227, 308, 332 (Dep. Exs. 14, 15, 20, 24) (agreements with financial institutions, each defining "Teller's Checks" as "[c]hecks drawn by Financial Institution and [MoneyGram or Travelers Express] on [MoneyGram's or Travelers Express's] bank"); App. 236–38 (Dep. Ex. 16) (MoneyGram's comparison of its Official Check products); App. 1156–57, 1172, 1240 (Yingst Dep. 135:23–136:13, 151:5–14, 219:8–15); App. 1051–52 (Petrick Dep. 177:12–178:8); App. 978–80 (Mann Dep. 50:16–52:9). As explained above, a "drawer" of a financial instrument, which is the party that "signs or is identi-

fied in a draft as a person ordering payment," 2017 U.C.C. § 3-103(a)(5), is ultimately responsible for payment on that instrument. Because MoneyGram is a drawer (or at the very least a codrawer) on both the Agent Checks and Teller's Checks, it is directly liable on those instruments within the meaning of the FDA.

Even if MoneyGram is not the party that is ultimately responsible for payment of the instruments' value—or if there are multiple parties with such responsibility—the only other party that could be ultimately responsible for payment of the instruments' value is MoneyGram's selling financial institution.

3. MoneyGram and the selling banks are banking, financial, or business organizations within the meaning of the statute.

MoneyGram and the banks or credit unions that sell or issue Official Checks—the only two potentially "directly liable" parties—are also either a "banking or financial organization" or a "business association" as defined in the FDA. Through its expert, Delaware appears to concede as much. *See* App. 806 (Mann Rep. ¶ 21) (stating he "see[s] no reason to doubt that MoneyGram is a business association and that the various banks that market the [Official Checks] and on which they are drawn qualify as banking organization[s]").

That concession is correct. MoneyGram and its financial-institution customers all clearly satisfy the definition of either a "business association" or a "banking or financial organization." 12 U.S.C. § 2503. A "business association" is a "any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals." *Id.* § 2502(2). MoneyGram is a corporation as was its predecessor company, Travelers Express. *See, e.g.*, App. 353 (Dep. Ex. 28 at 1) (stating that MoneyGram is a corporation, as was Travelers Express); App. 1050 (Petrick Dep. 154:10–18) (agreeing that MoneyGram is "a business association for unclaimed property reporting"). A "banking organization" is "any bank, trust company, savings bank, safe deposit company, or a private banker," while a "financial organization" is "any savings and loan association, building and loan association, credit union, or investment company." 12 U.S.C. §§ 2502(1), (3). MoneyGram's Official Check program clients are banks and credit unions. App. 1066–67 (Yingst Dep. 28:6–29:3).

Because there is no real dispute that MoneyGram and its financial-institution customers are "banking or financial organization[s]" or "business association[s]," and because one or more of those entities are "directly liable" on MoneyGram Official Checks, this element of the FDA is satisfied. 12 U.S.C. § 2503.

4. Delaware's proffered definition of the term "directly liable" as equivalent to "unconditionally liable" is not correct.

Delaware has put forward a different definition of "directly liable" through its expert witness, Professor Mann. Relying on liability concepts in the U.C.C., Professor Mann opines that the FDA's use of the term "directly liable" is synonymous with "unconditionally liable," and that no party is unconditionally liable on the Official Checks at issue in this case. App. 806–11 (Mann Rep. ¶¶ 19(a), 20–45). Based on these premises, Professor Mann concludes that MoneyGram Official Checks do not fall within the scope of the FDA. App. 806–11 (Mann Rep. ¶¶ 19(a), 20–45). This conclusion is incompatible with the U.C.C.'s own liability framework, the FDA, and longstanding interpretations of the term "directly liable" in unclaimed-property law.

As an initial matter, Delaware errs in even looking to the U.C.C. to discern the meaning of "directly liable" under the FDA. As Delaware's own expert acknowledges, that phrase does not appear in any version of the U.C.C. with respect to the liability of drawers, indorsers, or drawees. App. 986 (Mann Dep. 78:14–20); *see also* App. 928–31 (Rebuttal Rep. ¶¶ 1, 3). Moreover, the first version of the U.C.C. was not promulgated until the 1950s, which was *after* the enactment of the New York statute on which the Uniform Disposition of Unclaimed Property Acts and ultimately the FDA were based. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 Colum. L. Rev. 798, 800 (1958); *see supra* Background Part I.A. Accordingly, 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.

Even if the U.C.C. were relevant, it would not support Delaware's position. Based on his analysis of the U.C.C., Professor Mann concludes that "directly liable" means that there are no prerequisites to holding an entity liable on an instrument. App. 806–08 (Mann Rep. ¶¶ 22–28). As stated above, the U.C.C. never uses the phrase "directly liable" in this context at all. And Professor Mann admits that he has never authored a paper, taught a

class, or proffered an expert opinion in which he used the phrase "directly liable" to express that concept. App. 976–77 (Mann Dep. 35:23–36:17). When the U.C.C. did express the idea of unconditional liability—and to distinguish it from conditional liability—the U.C.C. used entirely different terms. *See* Henry J. Bailey, *The Law of Bank Checks* 218 (4th ed. 1969) ("[T]he [U.C.C.] declares that, unless excused, presentment is necessary to charge secondary parties to an instrument such as the drawer . . . of a check."); *see also* App. 929–31 (Rebuttal Rep. ¶ 3) ("the principle of indirect liability described by Professor Mann was expressed" in prior versions of the U.C.C. "by calling drawers 'secondary parties,' based on the understanding that they were only liable if the drawee dishonored an instrument"); App. 775 (1972 U.C.C. § 3-102(1)(d)). Likewise, at the time Congress enacted the Federal Disposition Act, courts and commentators described drawees who were "liable on issuance, such as issuers of cashier's checks, or drawees that had accepted checks and thus satisfied any condition to liability on the instrument," as "primarily liable." App. 929–33 (Rebuttal Rep. ¶¶ 3–5) (citing cases and treatises). If Congress had intended the FDA to turn on the conditional or unconditional nature of a party's liability, or to have followed the U.C.C.'s liability scheme, Congress would have relied on these much more widely used and accepted terms.

The FDA did not borrow concepts of liability from the U.C.C. The liability scheme in the U.C.C. has an entirely different purpose than unclaimed property law, in which Professor Mann does not claim any expertise. App. 974–75 (Mann Dep. 30:16–31:6). The provisions of Article 3 of the U.C.C. relied upon by Professor Mann address the question of when and under what conditions parties are obligated to pay an instrument, *see* 2017 U.C.C. §§ 3-412 to -415; unclaimed property statutes like the FDA address the question of who is in possession of unclaimed property and the circumstances under which the property should be remitted to the appropriate State. The U.C.C. liability concepts discussed by Professor Mann do not address the latter issue.

The congressional findings and declaration of purpose explicitly stated in 12 U.S.C. § 2501 illustrate that the FDA is concerned with requiring unclaimed property to be remitted to the appropriate State, not with the technical details governing when parties can be sued to enforce an instrument. Congress's statutory findings are focused on recordkeeping. The statute is intended, "as a matter of equity among the several States," to distribute unclaimed funds in cases where the entities issuing and selling the

instruments have information regarding the location of purchase but not regarding the addresses of specific purchasers. *Id.* § 2501(1)–(5). Professor Mann does not claim that an issuer's conditional or unconditional liability on an instrument plays any role in how that issuer maintains records relating to the purchase. Thus, Professor Mann's restrictive interpretation of the statute's scope is entirely divorced from the FDA's stated purpose. *See* App. 934–35 (Rebuttal Rep. ¶ 10).

Reading the statute in line with Professor Mann's interpretation would create internal tension in the FDA, because money orders and at least some traveler's checks—instruments that Congress specifically decided to include—are not instruments on which a party is directly liable in Professor Mann's view. 12 U.S.C. § 2503. Thus, under Professor Mann's proposed interpretation of § 2503, a party seeking to show that a given instrument was "similar" to a money order would also have to demonstrate that the instrument has a characteristic (the direct liability of a party) that *no* money order shares.

According to Professor Mann, the only instruments on which a bank or business association can be directly liable are those where the drawee has agreed, in a writing appearing on or attached to the instruments, to accept liability. App. 987, 991–92 (Mann Dep. 79:21–25, 83:25–84:5). There are only four examples of such instruments involving a bank or business association: a cashier's check, a certified check, a banker's acceptance, and a bill of exchange on which the bill's drawee agreed to accept liability.[9] App. 987–88, 990–91, 1009 (Mann Dep. 79:14–80:8, 82:1–83:8, 154:6–25); App. 806–08 (Mann Rep. ¶¶ 20, 28). Money orders sold by MoneyGram would not qualify. App. 973, 983, 992 (Mann Dep. 12:4–10, 75:2–10, 84:14-17); App. 806 (Mann Rep. ¶ 19(a)); App. 934 (Rebuttal Rep. ¶ 9). Nor would Western Union money orders, which were at issue in *Pennsylva-*

[9] Professor Mann defines a "banker's acceptance" as "a time draft that is accepted by a bank." App. 990 (Mann Dep. 82:10–15). He defines a "bill of exchange" as "a type of draft on which the drawee is a business . . . that's been accepted by the business on which it's drawn." App. 1010 (Mann Dep. 155:1–6). It should be noted that traditionally, a "bill of exchange" was considered synonymous with the term "draft," and did not require that the drawee have accepted liability on the instrument, so Professor Mann's usage of the term here is atypical and more specific than the traditional definition. Henry J. Bailey, *The Law of Bank Checks* 2 (4th ed. 1969).

nia v. New York, 407 U.S. 206 (1972). App. 995–99 (Mann. Dep. 94:21–96:2, 97:17–98:12); App. 617, 620–23 (Dep. Exs. 125, 128).[10] Yet *Pennsylvania v. New York*, as discussed above, is one of the two cases that prompted Congress to enact the FDA and modify common-law priority rules with respect to these and similar instruments. *Disposition of Abandoned Money Orders and Traveler's Checks*, S. Rep. No. 93-505, at 2–3 (1973); 120 Cong. Rec. 4528 (Feb. 27, 1974) (statement of Sen. Sparkman). Professor Mann also opined that at least some traveler's checks do not carry direct liability as he defines that term. App. 1000 (Mann Dep. 99:17–20). Those instruments are also expressly included within the scope of the FDA. Thus, according to Professor Mann, the very instruments that prompted the enactment of the FDA are not ones on which an entity is directly liable. Professor Mann does not explain why Congress—which was focused on abrogating *Pennsylvania v. New York*'s application of the common law rule—would impose a direct liability requirement on "similar" instruments that had no relationship to the money orders or traveler's checks discussed in the relevant case law.

Professor Mann's interpretation is also at odds with the Uniform Acts and the laws of the many States that have adopted them. Both the original and Revised Uniform Disposition of Unclaimed Property Acts state that direct liability instruments include, "by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." App. 692 (Rev. Unif. Disposition of Unclaimed Prop. Act § 2(c)); *see* App. 671 (Unif. Disposition of Unclaimed Prop. Act § 2(c)). The use of "drafts" as an illustrative example of an instrument carrying direct liability is particularly noteworthy, as a "draft" is broadly defined as an instrument ordering payment. 2017 U.C.C. § 3-104(e) & cmt. 4; *see* App. 993–94 (Mann Dep. 85:18–86:12). There is no requirement that any party be unconditionally liable on a draft. 2017 U.C.C. § 3-104 cmt. 4. Professor

[10] Professor Mann left open the possibility that the Western Union money order displayed in Deposition Exhibit 125 could carry direct liability if it were countersigned at the time of purchase by an authorized representative of Chase Manhattan Bank, the drawee on the instrument. App. 996 (Mann Dep. 95:8–23). Professor Mann also admitted, however, that it was unlikely that Chase Manhattan Bank representatives would be present at Western Union locations for the purpose of countersigning such instruments. App. 996 (Mann Dep. 95:8–23).

Mann's interpretation of "directly liable" is thus at odds with the Uniform Acts and the laws of the many States that adopted them. *See, e.g.*, *First Union Nat. Bank of Ga. v. Collins*, 471 S.E.2d 892, 893 (Ga. Ct. App. 1996) (noting parties' stipulation that "'official' bank checks, including cashiers' and certified checks, dividend and interest checks, escrow checks, money orders, and drafts" were instruments on which the bank was directly liable under Georgia law); *Cory v. Golden State Bank*, 157 Cal. Rptr. 538, 539 (Cal. Ct. App. 1979) (holding bank directly liable for payment of a money order, and therefore subject to unclaimed property statute prohibiting bank from unlawfully assessing service charges); Conn. Gen. Stat. § 3-57a(a)(4) (applying presumption of abandonment to "[a]ny sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization is directly liable, including, but not limited to, money orders, *drafts* and traveler's checks" (emphasis added)). In fact, Professor Mann admits that many of the Official Checks are "drafts," and thus would explicitly qualify as direct liability instruments under these laws. App. 1001–02 (Mann Dep. 134:14–135:3).

Finally, Professor Mann's theory is contradicted by the historical interpretation of the "directly liable" language used in other related unclaimed property laws. Indeed, Professor Mann's theory that "directly liable" means "unconditionally liable" was explicitly rejected by the New York Attorney General in a formal opinion interpreting the original New York law on which the Uniform Act and the FDA were based. There, the Attorney General responded to an argument that, in the case of a draft drawn on a third party, "the obligation of a drawer bank is 'contingent' rather than 'direct' since no action could be successfully prosecuted against the drawer bank until such instrument had been presented to the drawee bank, dishonored and due notice thereof given to the drawer." *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at *1 (Dec. 23, 1946).

Professor Mann's report makes precisely the same assertion with respect to the Official Checks. App. 808–09 (Mann Rep. ¶¶ 31, 35). The New York Attorney General opinion squarely rejected this argument, concluding that the "directly liable" language was not intended to exempt property from being deemed abandoned simply because "suit on such instrument could not be successfully maintained . . . except upon a showing that certain conditions precedent had been satisfied." *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at *1. Such an

interpretation "would be contrary to the plain import of the section and also contrary to the declared purpose of the Abandoned Property Law as a whole," as the goal of unclaimed property law is to use unclaimed property "for the benefit of all the people of the State," and to that end the law "should be liberally construed." *Id.* at *2. Another New York Attorney General opinion expressly found that a "bank's draft upon a second bank"—*i.e.*, a teller's check—was an instrument on which an organization had a direct obligation and thus was directly liable, which again is contrary to the view expressed by Professor Mann here. *Aband. Prop. Law, § 300, Subd. 1, Par. 1, subd. B*, 1944 N.Y. Op. Att'y Gen. No. 147, 1944 WL 41907, at *1–2 (Apr. 1, 1944). Because these formal opinions existed prior to the Uniform Law Commission's and Congress's subsequent adoption of the "directly liable" language, Congress presumably intended to incorporate these interpretations of that language into subsequent legislation that used it. *See Lorillard*, 434 U.S. at 581.

For these reasons, MoneyGram and the banks and credit unions that sell Official Checks are directly liable on those checks as that term is used in the FDA, and Professor Mann's theory that no entity is directly liable on these instruments is wrong.

C. MoneyGram Official Checks are not "third party bank checks."

Even if the instrument in question satisfies the "other similar written instrument" and "directly liable" provisos, the FDA's escheatment rules do not apply if that instrument is a "third party bank check." 12 U.S.C. § 2503. (This exception, however, does not apply to "money orders"; if Official Checks are money orders, then the Special Master need not consider whether they are "third party bank checks.") Congress did not define the phrase "third party bank check." Nor has any court construed the phrase as used in the FDA. And although three experts in the field of payment systems opined about what it might mean, they all agreed it was not commonly used and did not have a universally accepted definition. Delaware's own expert called the phrase "obscure." App. 802 (Mann Rep. ¶ 2(c)); *see* App. 900 (Gillette Rep. ¶ 45) ("In my opinion, the term has no clear meaning and is not widely used in the law or practice of payment systems.").

But the language of the statute and its legislative history suggest that the best reading of the phrase "third party bank check" is either a check drawn by and on a bank that the original payee has indorsed to another

party; or alternatively, a personal check written from a checking account. In any event, all three experts ultimately offered opinions that converge on a single point: Whatever Congress meant by "third party bank check," that phrase as understood by commercial practice does not apply to MoneyGram Official Checks. As a result, Official Checks are not excluded from the FDA's escheatment rules.

1. The phrase "third party bank check" refers either to a check drawn by and on a bank that has been indorsed to a third party or to a personal check.

Although Congress did not define "third party bank check," *see* 12 U.S.C. § 2502 (defining certain other terms in the FDA), the phrase has only two plausible meanings. Its most natural meaning is a check drawn by and on a bank that the original payee has indorsed to a third party. Alternatively, there is some evidence that Congress meant the phrase to refer to a personal check.

The phrases "third party check" and "bank check" both have commonly accepted definitions that support the first, most natural interpretation of "third party bank check." "Third party check" is "a commonly used term" that means "a check indorsed by the original payee and transferred to a third party." *See* App. 902 (Gillette Rep. ¶ 49) (discussing *Von Gohren v. Pac. Nat'l Bank of Wash.*, 505 P.2d 467, 470 (Wash. Ct. App. 1973)). And a "bank check" is generally considered to mean a check drawn by a bank and on a bank; the drawee and drawer banks may be the same bank but need not be. *See* App. 902 (Gillette Rep. ¶ 50); App. 815 (Mann Rep. ¶ 63). Combining these two commonly used and well-defined phrases, the most natural meaning of a "third party bank check" is a check drawn by a bank on a bank that has been indorsed over to a new (or "third party") payee. App. 902 (Gillette Rep. ¶ 49).

Indeed, this is the definition given to the term by the only court to have substantively discussed a "third party bank check." *See United States v. Thwaites Place Assocs.*, 548 F. Supp. 94 (S.D.N.Y. 1982). That case related to a foreclosure auction administered by the U.S. marshal. *Id.* at 95. The court used the phrase "third party bank check" to refer to a "certified check" that was "doubly indorsed"—*i.e.*, one that the original payee had indorsed to a new payee. *Id.* Although this case postdates the Federal Disposition Act and does not discuss that statute, it provides some support

for defining a "third party bank check" under federal law as a bank check that has been indorsed to someone other than the original payee.

Other traditional tools of statutory construction suggest another plausible interpretation of "third party bank checks": ordinary checks, those "drawn on ordinary demand deposit accounts." *See* App. 858–59 (Clark Rep. at 26–27). The original draft of the text that would become the FDA did not contain the term "third party bank check." *See* S. 1895, 93d Cong. § 2 (1973) (containing same opening clause as 12 U.S.C. § 2503, except for "third party bank check" phrase). As explained above, the Senate Banking Committee added it when the general counsel of the Department of the Treasury reviewed the draft bill and said, "[W]e believe the language of the bill is broader than intended by the drafters." S. Rep. N. 93-505 at 5 (reproducing November 1973 letter from Treasury to Senate). Treasury worried that "the introductory language" might "be interpreted to cover *third party payment bank checks*." *Id.* (emphasis added). As long as the Senate "defin[ed] these terms to exclude third party payment bank checks," Treasury would not object to the bill's passage. *Id.* Ultimately, the Senate committee decided to "adopt[] the technical suggestions of . . . the Department of Treasury." *Id.* at 6 (describing committee's changes to draft bill).

Although Treasury did not explain what it meant by "third party payment bank check," contemporaneous usage by federal regulators may shed light on the intended meaning. In the early 1970s, financial regulators, including those in contact with the drafting Senate, were using the "third-party" terminology to describe an ordinary checking account at a bank. *See* App. 791–92 (*The Report of the President's Commission on Financial Structure and Regulation* 23 & n.1 (Dec. 1971)); *see also* App. 798 (Robert E. Knight, *The Hunt Commission: An Appraisal*, Wall St. J., July 3, 1972, at 4) (discussing report of the President's Commission, also known as the "Hunt Commission"); App. 799 (James L. Rowe, Jr., *Nixon Administration Readies Bank System Overhaul*, Wash. Post, Jan. 14, 1973, at G2) (same); App. 853–57 (Clark Rep. at 21–25). One significant regulatory review effort—President Richard Nixon's Commission on Financial Structure and Regulation (which is often referred to as the "Hunt Commission")—published a final report in 1973. App. 855 (Clark Rep. at 23). In the first draft of the Hunt Commission's wide-ranging report, which was published in December 1971, it included recommendations on the "[t]axation of financial institutions" and "[d]eposit insurance," and referred throughout the report to "ordinary checking accounts" as "third party payment services." App. 856–

57 (Clark Rep. at 24–25). The Department of the Treasury published a summary of the Hunt Commission's final report in 1973, which defined "[c]hecking accounts" as third-party payment services. App. 857–58 (Clark Rep. at 25–26). Because the Senate adopted the phrase "third party bank check" in response to comments from Treasury, it is reasonable to interpret that phrase as Treasury would have interpreted it at the time it was adopted. And the evidence suggests that Treasury would have understood the phrase to refer to ordinary, personal checks.

2. Under either interpretation, none of MoneyGram's Official Check products are "third party bank checks."

Neither of the two plausible interpretations of "third party bank check" applies to MoneyGram Official Checks. For starters, if "third party bank checks" are simply "ordinary checks drawn on ordinary demand deposit accounts," then MoneyGram Official Checks plainly do not qualify. App. 859 (Clark Rep. at 27); *see* App. 949 (Clark Dep. 202:8–19). No party to this lawsuit has alleged that MoneyGram Official Checks are "ordinary" checks.

The more natural reading of "third party bank check"—"a check drawn by and on a bank, but that the original payee has indorsed to another person," App. 903 (Gillette Rep. ¶ 53)—similarly does not encompass either of the two MoneyGram Official Check products relevant to this lawsuit. Neither MoneyGram Agent Checks nor MoneyGram Teller's Checks are even "bank checks" at all, let alone "third party bank checks." App. 909–11, 914 (Gillette Rep. ¶¶ 68, 71, 78). That is because MoneyGram is the drawer of these instruments, and a "bank check" must be drawn by a bank. App. 902 (Gillette Rep. ¶ 50); App. 815 (Mann Rep. ¶ 63).

The status of MoneyGram Agent Checks is particularly clear. On the face of these instruments, they identify MoneyGram as the drawer. *See* App. 343–44 (Dep. Ex. 26 [Ex. A]). MoneyGram's contracts with its agent financial institutions state explicitly that the "Financial Institution is not a party to Agent Checks even though its name may appear on the Agent Checks." App. 226–27 (Dep. Ex. 15 § 3). MoneyGram, and not its agent financial institutions, therefore bears liability as the drawer of an Agent Check. *See* 2017 U.C.C. § 3-402(b)(1) ("If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument."). Because MoneyGram is the drawer of Agent Checks and

is not a bank, these instruments are not bank checks and thus cannot be "third party bank checks." *See* App. 910 (Gillette Rep. ¶ 69).

The same is true of MoneyGram Teller's Checks. Although Teller's Checks identify the selling financial institution as the nominal drawer, that institution functionally operates as MoneyGram's agent in selling these instruments. MoneyGram Teller's Checks designate the selling financial institution as the drawer, a different bank as the drawee, and MoneyGram as the "issuer." App. 347–48 (Dep. Ex. 26 [Ex. C]). Because the U.C.C. does not distinguish between an "issuer" and a "drawer," MoneyGram Teller's Checks have, at least as a technical matter, two drawers: one a bank or financial institution, the other not. *See* 2017 U.C.C. § 3-105(c) ("'Issuer' . . . means a maker or drawer of an instrument."). Thus, the Teller's Checks are drawn by—at least in part—a nonbank (MoneyGram), and are therefore not bank checks. *See* App. 911 (Gillette Rep. ¶ 71).

Even putting aside MoneyGram's role as a drawer on the Teller's Checks, the instruments still are not bank checks because the selling financial institution is functionally acting as MoneyGram's agent, even if that agency relationship is not explicitly disclosed to the purchaser. As with MoneyGram Agent Checks, the language of the financial institution's contracts with MoneyGram leads to this conclusion. Those contracts provide: "MoneyGram hereby appoints Financial Institution as its limited agent and authorized delegate for the sole purpose of using and selling the Products as set forth in this Agreement." App. 226–27 (Dep. Ex. 15 § 5); *see* App. 226 (Dep. Ex. 15 § 2) (listing Teller's Checks and other MoneyGram Official Checks as "Products" that a given financial institution might sell). The selling financial institution plays the same limited role in the issuance of Teller's Checks as it does with the issuance of Agent Checks—the institution collects the money from the customer and transfers that money to MoneyGram, along with certain information about the transaction. App. 1150–52, 1158–60 (Yingst Dep. 129:14–131:13, 137:23–139:13). The selling financial institution plays no further role in the processing of the Teller's Checks, and has no relationship with MoneyGram's clearing banks that make payment on these instruments after they have been presented. App. 1174, 1178–79 (Yingst Dep. 153:7–16, 157:22–158:9); *see* App. 226–27 (Dep. Ex. 15 § 5) (agreement appointing selling financial institution as MoneyGram's agent for purposes of selling Official Checks).

As a result, although MoneyGram Teller's Checks identify a financial institution as the nominal drawer, that institution functions merely as MoneyGram's agent in selling these instruments. Because a "bank check" must be drawn by a bank, and a nonbank (MoneyGram) functionally serves as the sole drawer, these instruments cannot be bank checks, "third party" or otherwise.

3. Even adopting the implausible interpretations proposed by Delaware, no MoneyGram Official Check product is a "third party bank check."

Whichever of the two plausible interpretations that the Special Master adopts, MoneyGram Official Checks are not "third party bank checks." But even under the two unsupportable interpretations offered by Delaware, the phrase does not apply here.

One of those interpretations comes from Delaware's expert, Professor Mann, who offers the theory that "the term refers to the checks that banks write at the direction of their customers through their bill-payment services." App. 817 (Mann Rep. ¶ 69). But Professor Mann never established that these bill-payment services were commonly offered when the FDA was enacted in 1974. Even if they were, those payments would have been made using cashier's checks or teller's checks issued by the banks, a fact that Professor Mann acknowledges. App. 817 (Mann Rep. ¶ 70). If Congress had meant those two commonly used instruments to be exempted from the statute, it would have named them specifically. In all events, Professor Mann admits that he "didn't study any [MoneyGram] products that strike [him] as fitting with any ordinary sense of what [third party bank check] should mean." App. 1010 (Mann Dep. 155:18–25). Thus, taken on its own terms, Professor Mann's proposed definition of "third party bank check" does not apply to the MoneyGram Official Check products in this case.

Delaware's other unsupportable interpretation came in a letter from its state escheator sent before this lawsuit began. In that letter, Delaware argued that "third party bank checks" are synonymous with teller's checks. *See* App. 596 (Dep. Ex. 123 at 3); App. 981–82 (Mann Dep. 69:22–70:20). Delaware's own expert thought that this interpretation "seem[ed] a little odd." App. 816–17 (Mann Rep. ¶ 68).

It is both "odd" and wrong. When Congress adopted the FDA, teller's checks were well-recognized payment instruments. *See* App. 907–08 (Gil-

lette Rep. ¶¶ 63–64); App. 850–51 (Clark Rep. at 18–19); *see also* Henry J. Bailey, *The Law of Bank Checks* 10, 34 & n.152 (4th ed. 1969). If Congress meant to exclude teller's checks from the FDA, then it would have used the "standard legal terminology" for such checks instead of referring obscurely to "third party bank checks." *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537 (1994). Congress's choice not to use the standard phrase "teller's check" is strong evidence that it did not mean to refer to teller's checks. *Cf. id.* (interpreting congressional failure to use phrase "fair market value" to "mean[] that fair market value cannot—or at least cannot *always*—be the benchmark"). And Congress would not view the proposal to amend the FDA to exclude such a well-known instrument as a "technical suggestion[]," S. Rep. No. 93-505, at 6, and a "minor change[]," Cong. Rec. 4528 (Feb. 27, 1974) (statement of Sen. Sparkman). Interpreting "third party bank check" to mean "teller's check" is thus inconsistent with the FDA's text and history.

Even if Delaware were right—that Congress used the term "third party bank check" when it instead meant to use the term "teller's check"—the FDA's exception for third party bank checks still would not apply to any of the MoneyGram Official Check products. A teller's check is "a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank." 2017 U.C.C. § 3-104(h). As explained in the previous section, neither MoneyGram Agent Checks nor MoneyGram Teller's Checks are checks drawn by a bank.

An operational comparison of MoneyGram Teller's Checks to traditional teller's checks illustrates the crucial differences between the two kinds of instruments. *See supra* Background Part II.B. With traditional teller's checks, the drawer bank maintains an account with the drawee bank. App. 912 (Gillette Rep. ¶ 73). When the drawee bank pays a teller's check, it debits the amount from the drawer bank's account. App. 912 (Gillette Rep. ¶ 73). With MoneyGram Teller's Checks, by contrast, the nominal drawer sells the instrument on behalf of MoneyGram and then sends to MoneyGram the funds that it received from the purchaser. App. 912–13 (Gillette Rep. ¶ 74). Because the nominal drawer maintains no account with the drawee bank, the drawee receives the instrument only as "MoneyGram's clearing bank." App. 912–13 (Gillette Rep. ¶ 74). "MoneyGram provides funds in the amount of the presented items" to the drawee bank; no funds are ever drawn from any of the nominal drawer's accounts. App. 912–13 (Gillette Rep. ¶ 74). With a MoneyGram Teller's Check, "once the nominal

'drawer' issues the instrument, it plays no role whatsoever in the check collection, payment, or escheatment process." App. 912–13 (Gillette Rep. ¶ 74); *see* App. 913 (Gillette Rep. ¶¶ 75–76). The nominal drawer of a MoneyGram Teller's Check "essentially plays no role other than to sell checks on behalf of MoneyGram and send the proceeds to MoneyGram." App. 913–14 (Gillette Rep. ¶ 77). With these instruments no less than with MoneyGram Agent Checks, the selling bank simply serves as MoneyGram's agent. MoneyGram Teller's Checks cannot, therefore, be "third party bank checks," even under Delaware's unfounded reading of that phrase.

Read most naturally, the phrase "third party bank check" refers to checks drawn by a bank on a bank that the original payee indorses to someone else. Alternatively, the phrase could mean a check drawn from an ordinary checking account. At various stages in this litigation, Delaware has offered two alternative definitions of that phrase, both of which are implausible given the FDA's text and legislative history. But of all the possible meanings of "third party bank checks," one thing is certain: None of the MoneyGram Official Check products are "third party bank checks."

III. The FDA requires escheatment of MoneyGram Official Checks to the State of purchase.

Having established that the FDA's escheatment rules apply to MoneyGram Official Checks, Defendant States are entitled to take custody of unclaimed Official Check funds if: (1) "the books and records of such banking or financial organization or business association show the State in which" the Official Check "was purchased"; and (2) the State of purchase has the "power under its own laws to escheat or take custody of" those funds. 12 U.S.C. § 2503(1). Both of those conditions are met here.

A. MoneyGram's books and records show the State in which Official Checks were purchased.

MoneyGram's deposition testimony confirms that the company's books and records show the State of purchase for its Official Checks. MoneyGram designated Kate Petrick to testify regarding its "books and records concerning states where Official Checks were purchased or issued." App. 370 (Dep. Ex. 37 at 2); *see* App. 1013–17 (Petrick Dep. 12:18–13:5, 17:11–19:4). Ms. Petrick testified that MoneyGram already collects information about the State of purchase for money orders, and that MoneyGram is currently reporting and remitting money orders "to the state where they're

sold." App. 1018–19 (Petrick Dep. 30:15–31:10); *accord* App. 1133–34 (Yingst Dep. 112:20–113:5); *see* App. 1054–55 (Petrick Dep. 228:14–20, 229:10–23) (Retail Money Orders); App. 1055–56 (Petrick Dep. 229:24–230:3) (Agent Check Money Orders). When it came to MoneyGram Teller's Checks, Ms. Petrick testified that MoneyGram's "system knows where they are sold," and believed that the same was true for the other types of Official Checks at issue. App. 1023–24 (Petrick Dep. 66:24–67:10); *see* App. 386–415 (Dep. Ex. 47); App. 1032–39 (Petrick Dep. 104:20–111:4) (describing Dep. Ex. 47, a 2017 Official Check report created for the Special Master).

B. Defendant States have the power under their own laws to escheat or take custody of sums payable on MoneyGram Official Checks.

Defendant States each have laws that authorize them to take custody of unclaimed sums payable on MoneyGram Official Checks. Arkansas's statutory scheme is illustrative. It first lays out a series of "presumptions of abandonment" that apply to specific categories of property. *See, e.g.*, Ark. Code Ann. § 18-28-202(a)(1)–(2) (applying to traveler's checks and money orders). These also include broadly worded, catch-all provisions like the one providing that "[a]ll other property" is presumed abandoned "three (3) years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs." *Id.* § 18-28-202(a)(14).

Once property is presumed abandoned a separate provision creates "rules for taking custody." *Id.* § 18-28-204. Most relevant here, that provision specifies that abandoned property "is subject to the custody of [Arkansas] if . . . the property is a traveler's check or money order purchased in this state, or the issuer of the traveler's check or money order has its principal place of business in this state and the issuer's records show that the instrument was purchased in a state that does not provide for the escheat or custodial taking of the property, or do not show the state in which the instrument was purchased." *Id.* § 18-28-204(7). As is clear, this provision mirrors the language of the FDA. *Compare id.*, *with* 12 U.S.C. § 2503(1). In other words, if a MoneyGram Official Check purchased in Arkansas satisfies the FDA, then ipso facto Arkansas has authority under its own law to take custody of any unclaimed sums payable on that Official Check.

The law of the other Defendant States is similar. In fact, comparable provisions in other States expressly invoke the FDA. *See*, *e.g.*, Utah Code § 67-4a-306 (allowing Utah to "take custody of sums payable on a traveler's check, money order, or similar instrument presumed abandoned to the extent permissible under 12 U.S.C. Secs. 2501 through 2503"). A list of the relevant provisions is attached as Table A to this brief.

CONCLUSION

For these reasons, Defendant States respectfully request that the Special Master recommend that the Court grant partial summary judgment declaring: their entitlement to sums payable on unclaimed and abandoned MoneyGram Official Checks purchased in Defendant States and unlawfully remitted to the State of Delaware; and their entitlement to future sums payable on unclaimed and abandoned MoneyGram Official Checks purchased in Defendant States.

As contemplated by the Special Master's July 24, 2017 order, Doc. No. 43 ¶ 6, Defendant States further request that the Special Master enter an order establishing a case schedule for the damages phase of this lawsuit.

February 1, 2019

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TABLE A:
State-Law Provisions Entitling Defendant States to Take Custody of Sums Payable on Unclaimed MoneyGram Official Check

State	Relevant State-Law Provision
Alabama	• Alabama Code §§ 35-12-72, -74
Arkansas	• Arkansas Code §§ 18-28-202, -204
Arizona	• Arizona Revised Statutes § 44-304
California	• California Civil Procedure Code § 1511
Colorado	• Colorado Revised Statutes §§ 38-13-103, -104, -105, -106, -112, -113
Florida	• Florida Statutes §§ 717.101–.102, .104–.105
Idaho	• Idaho Code §§ 14-501-506, -514
Indiana	• Indiana Code §§ 32-34-1-13, -17, -21, -23
Iowa	• Iowa Code §§ 556.1–556.30
Kansas	• Kansas Statutes §§ 58-3935, -3936, -3953, -3964
Kentucky	• Kentucky Revised Statutes §§ 393.020, .030, .040–.050, .068, .170, 393A.200
Louisiana	• Louisiana Statutes §§ 9:154, :156
Maryland	• Maryland Code, Commercial Law §§ 17-301, -310, -312, -323
Michigan	• Michigan Compiled Laws § 567.225
Montana	• Montana Code § 70-9-805
Nebraska	• Nebraska Revised Statutes §§ 69-1312, -1313
Nevada	• Nevada Revised Statutes §§ 120A.500, .570
North Dakota	• North Dakota Century Code §§ 47-30.1-03, -04
Ohio	• Ohio Revised Code §§ 169.02–.03
Oklahoma	• 60 Oklahoma Statutes § 651.1
Oregon	• Oregon Revised Statutes §§ 98.302–.436

State	Relevant State-Law Provision
Pennsylvania	• 72 Pa. Stat. § 1301.1 *et seq.*
South Carolina	• S.C. Code § 27-18-10 *et seq.*
Texas	• Texas Property Code §§ 72.001, .101–.102
Utah	• Utah Code §§ 67-4a-305, -306
Virginia	• Virginia Code § 55-210.3:02
Washington	• Washington Revised Code § 63.29.040(4)(a)
West Virginia	• West Virginia Code §§ 36-8-2, -4
Wisconsin	• Wisconsin Statutes §§ 177.03–.04
Wyoming	• Wyoming Statutes §§ 34-24-103, -104, -105, -118, -120, -133, -134