SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*,

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

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

PLAINTIFF STATE OF DELAWARE'S OBJECTIONS TO THE SPECIAL MASTER'S DRAFT FIRST INTERIM REPORT

Kathleen Jennings
Attorney General of Delaware
Aaron Goldstein
State Solicitor
Michelle Whalen
Deputy Attorney General
Delaware Department of Justice
Department of Finance
Carvel State Office Building
820 North French Street
Wilmington, DE 19801
Ph: (302) 577-8375
Eml: Michelle.Whalen@delaware.gov

Steven S. Rosenthal
Tiffany R. Moseley
John David Taliaferro
LOEB & LOEB LLP
901 New York Avenue NW
Washington, D.C. 20001
Ph: (202) 618-5000
Fax: (202) 618-5001
Eml: srosenthal@loeb.com
tmoseley@loeb.com
jtaliaferro@loeb.com

Marc S. Cohen
LOEB & LOEB LLP
10100 Santa Monica Boulevard
Suite 2200
Los Angeles, CA 90067
Ph: (310) 282-2000
Fax: (310) 282-2200
Eml: mscohen@loeb.com

Counsel for Plaintiff State of Delaware

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INTRODUCTION

The Draft First Interim Report of the Special Master (hereinafter "DIR") adopts a definition of a "money order" that is inconsistent with the text of the Federal Disposition Act, 12 U.S.C. §§ 2501-03 (hereinafter "FDA"), ignores that a money order is a commercially labeled instrument, and is so broad that it will likely require a large-scale reallocation of previously escheated prepaid instruments of all types among the States without having analyzed any instruments other than those instruments sold by MoneyGram. Additionally, because the DIR's analysis of what constitutes a "similar written instrument" is likewise flawed, it suffers from the same textual infirmities and far-ranging practical implications as the DIR's definition of a "money order." Finally, the DIR's definition of a "third party bank check" as an ordinary check is inconsistent with both the text of the FDA and the DIR's own analysis of the FDA.

Delaware disagrees with the Special Master's interpretation of the statutory text, context, and legislative history. At the Special Master's request, Delaware will not restate each of its legal arguments here and preserves those arguments for further proceedings.

OBJECTIONS

Delaware respectfully submits the following objections to the DIR:

I. DELAWARE OBJECTS TO THE "CONCESSIONS" NOTED IN THE DIR.

Delaware objects to the DIR's statement that "Delaware effectively concedes that Agent Check Money Orders are governed by the FDA." DIR at 26 n.15. Delaware likewise objects to the statement that "Delaware apparently concedes" that Agent Check Money Orders "are covered by the FDA." *Id.* at 62 n.34. The DIR states that it will not address whether other instruments fall within the FDA. *See id.* at 32 n.20. Given that this issue has not been fully briefed by the parties and may be litigated at a later date, Delaware respectfully requests that the Special Master delete these statements in the DIR.

In a similar vein, Delaware objects to the DIR's statement that "Delaware effectively concedes the invalidity of its argument that the Disputed Instruments are shown not to be money orders by the fact that they are distributed solely by financial institutions." *Id.* at 47:15-17. Delaware has not conceded this point and respectfully requests that the Special Master delete this portion of its report. Quite the opposite. The fact that the Disputed Instruments are distributed *exclusively* by financial institutions is an important reason why they do not qualify as money orders.

Delaware also objects to the statement that the "parties agree that the Disputed Instruments fall within the scope of the FDA if they are 'money orders' for the purposes of the FDA." *Id.* at 37:9-10. The DIR acknowledges that conclusion is "not necessarily correct," *id.* at 37 n.26, and Delaware argued in its briefing that "the FDA does not cover 'third party bank checks.'" Delaware Memorandum in Opposition to Defendant States' Motion for Summary Judgment and Pennsylvania's Motion for Summary Judgment ("Del. Opp. Br.") at 48.

II. THE DEFINITION OF "MONEY ORDER" ADOPTED IN THE DIR IS OVERLY BROAD.

A. The DIR's Definition of a "Money Order" is Overbroad, Capturing Every Prepaid Instrument.

The DIR's definition of a "money order" is extraordinarily broad in scope. It accepts wholesale Defendant States' definition of a "money order" as "a prepaid draft issued by a post office, bank, or some other entity and used by a purchaser to safely transmit money to a named payee." DIR at 40:9-11 (quoting Defendant States' Brief in Support of Defendants' Motion for Summary Judgment on Liability ("Defs.' Br.") at 22).

The DIR sweeps into the definition of "money order" in the FDA every type of prepaid draft including cashier's checks, teller's checks, certified checks, items denominated on their face as money orders, traveler's checks, agent checks, and USPS money orders. And while the DIR spends some time considering the

characteristics of MoneyGram Money Orders, it reaches its conclusion regarding the expansive definition of "money orders" without considering the characteristics of any of the other types of prepaid instruments that would be captured by the DIR's definition.[1] By using distinct terms for specific instruments—"money order" and "traveler's check"—Congress did not intend to include *every form of prepaid draft* in the FDA. Statutes adopted in derogation of the common law should be narrowly construed. *See Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 900 F.3d 377, 385 (7th Cir. 2018). The DIR's definition of "money order" is far too broad.

B. The DIR Incorrectly Rejects Crucial Differences Among Prepaid Instruments as "Superficial and Trivial."

The DIR incorrectly concludes that the differences between MoneyGram Official Checks and money orders are "superficial and trivial — not the sort of characteristics that define a commercial instrument for purposes of its legal classification." DIR at 41:10-12. In rejecting these differences, the DIR undermines

[1] Delaware initially sued Pennsylvania and Wisconsin in Original Action 145. After various other States, led by Arkansas and Texas, filed their own original action (No. 146), Delaware sought leave to amend its Complaint and Counterclaim in order to capture "certain unclaimed negotiable instruments that Delaware believes have been wrongly escheated to [Defendant States]." Motion for Leave to Amend Bill of Complaint at 2; Motion for Leave to Amend Counterclaim at 2. These motions to amend were eventually denied by the Special Master. *See* Order of the Special Master (July 24, 2017) ("Such a pleading might expand enormously the scope of the case and significantly delay its resolution to an unknown extent . . . . Delaware's motion to amend is therefore DENIED.")

the distinctions drawn in the FDA itself between money orders and other types of prepaid instruments, including traveler's checks and third party bank checks.

First, the DIR's identification of differences between MoneyGram Official Checks and other prepaid instruments as "trivial" is inconsistent with the treatment of the other named instrument in the FDA – a traveler's check. Under U.C.C. § 3-104(i), one of the four defining characteristics of a traveler's check is that it is "designated by the term 'traveler's check' or by a substantially similar term." At least with regard to one of the listed instruments in the FDA, then, the name of the instrument is not a trivial characteristic. *Cf.* DIR at 41:12-42:1 ("While the fact that the term 'money order' is written on one instrument and not another undoubtedly has some relevance to whether they should be considered money orders, such a distinction goes only so far.").

Second, the DIR relies on the language in U.C.C. § 3-104 cmt. 4 that a traveler's check "may be in the form of a note or draft." *Id.* at 52:8-13. But that language <u>was not added to the U.C.C. until 1991</u>. *Compare* U.C.C. § 3-104 cmt. 4 (1991) ("Traveler's checks are issued both by banks and nonbanks and may be in the form of a note or draft."), *with* U.C.C. § 3-104 cmt. 4 (1972) (noting only that traveler's checks are negotiable instruments "when they have been completed by the identifying signature"). That language could not have been relied upon by the drafters of the FDA in choosing to separately delineate traveler's checks. The DIR

does not identify any reason why a traveler's check's potential disparate treatment as a note or a draft would necessitate its separate listing in the FDA.[2] To the contrary, its separate listing suggests – strongly – that there are multiple categories of prepaid instruments not captured by the term "money order."

Third, under the DIR, a feature must "materially affect the rights and obligations of users" in order to be a defining characteristic of the "essence of money orders," DIR at 44:7-8, and the DIR finds that the "fundamental nature of money orders" 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." *Id.* at 44:9-10; 40:9-10. Of course, this is the fundamental nature of any number of prepaid instruments, including cashier's checks, teller's checks, certified checks, items denominated on their face as money orders, traveler's checks, agent checks, and USPS money orders—each called by different names. These instruments are separately defined and recognized written negotiable instruments under the U.C.C.. *See, e.g.*, U.C.C. § 3-104. The drafters of the FDA, and the drafters of the Uniform Unclaimed Property Act which followed shortly thereafter, clearly recognized that these are each separate categories of written instruments that nevertheless, under the DIR, have improperly all been categorized as "money orders."

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[2] It is also not clear why a traveler's check classified as a note – *i.e.*, "a written undertaking to pay money signed by the person undertaking to pay," U.C.C. § 3-103(a)(12) – would be prepaid at all or be subject to escheat.

Fourth, the DIR errs in its conclusion that the teller's check version of the MoneyGram Official Check does not materially affect the rights and obligations of users. The DIR rejects the "next day funds" argument, DIR at 41 n.28, but ignores that the reason a MoneyGram Teller's Check is a next-day item is that it is "low-risk," signed by a bank, and carries the reliability of a bank check. Delaware Memorandum in Support of Motion for Summary Judgment at 46-50. In addition, unlike a money order, a teller's check, like a MoneyGram Teller's Check, discharges an obligation when it is accepted in payment of the obligation. *See* U.C.C. § 3-310 (1991); *see also* U.C.C. § 3-802(1)(a) (1972) ("the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument"); Del. Opp. Br. at 12, 13. The DIR omits the source of the fact that MoneyGram Agent Checks are typically used by banks to pay their own obligations. *See* DIR at 28 n.18. While this is a position Delaware "maintains," it does so because this was the undisputed testimony of MoneyGram's 30(b)(6) witness, who is clearly in the best position to understand the use of MoneyGram's products. *See* Delaware Statement of Undisputed Facts ("SOF") ¶ 90 (citing MoneyGram's 30(b)(6) witness Eva Yingst).

Fifth, the DIR is incorrect when it asserts that Delaware "has not shown that the characteristics of contemporary MoneyGram money orders to which it points were present in money orders in 1974." DIR at 39:3-5. The record contains an image of a 1968 Western Union Money Order. *See* Exhibit V to Taliaferro

Declaration; SOF ¶ 17. That money order both has the words "Money Order" on the face of the instrument and indicates that the person signing is doing so as a "Money Order Agent." The back of the instrument was not provided by Western Union.

Sixth, the DIR's definition of a "money order" is a tautology. If the only features that matter are those that "materially affect the rights and obligations of users," then having defined "money orders" to be all "prepaid drafts issued by a post office, bank, or some other entity and used by a purchaser to safely transmit money to a named payee," there are no prepaid drafts capable of being anything other than a "money order." Such a tautology is in contrast to the structure of the FDA, which contemplates that there is some category of prepaid instrument that is not covered by its terms.

C. The DIR's Definition of a "Money Order" Operates in Stark Contradiction to Positions At Least One Defendant State Has Functionally Taken in Receiving Escheated Cashier's Checks.

Despite advocating for the definition of "money orders" as encompassing all prepaid drafts, at least one Defendant State has received cashier's checks escheated under the general priority rules articulated by the *Texas* trilogy. In so doing, at least one Defendant State appears to acknowledge that the definition of a "money order" does not capture all prepaid drafts.

1. Ohio Receives Cashier's Checks Under the *Texas* Priority Rules.

To take but two examples, JPMorgan Chase and U.S. Bank both escheat all of their cashier's checks to the State of Ohio, which is a Defendant State in this case. *See, e.g.,* Complaint ¶ 8, *Dill v. JPMorgan Chase Bank, N.A.*, Case No. 1:19-cv-10947-KPF (S.D.N.Y. Nov. 26, 2019) ("[JPMorgan Chase] deliberately failed to comply with the requirements under the abandoned property laws of the States of Purchases and under 12 U.S.C. § 2503. Instead, [JPMorgan Chase] improperly delivered all of the funds from the Checks to Ohio, where [JPMorgan Chase's] 'home office' is located, which does not, under any circumstances, comport with Section 2503."); Second Amended Complaint ¶ 27, *Illinois ex rel. Elder v. U.S. Bank, N.A.,* Case No. 2019-L-013262 (Ill. Cir. Ct., L. Div., Cook Cty. Jan. 6, 2021), removed to federal court on February 18, 2021, Case No. 1:21-cv-00926 (N.D. Ill.) ("Defendant [U.S. Bank] has, since 2014 (and, on information and belief, in years prior thereto) and continuing to date, wrongly determined to falsely exploit the favorable aspects of Ohio's escheatment laws applicable to unclaimed cashier's checks by fraudulently asserting that the unclaimed cashier's checks it is holding that are properly subject to escheatment to the State of Illinois pursuant to the UPA and to other non-Ohio States pursuant to those States' unclaimed property laws are subject to Ohio's escheatment laws . . . .").

2. JPMorgan Chase Advanced Arguments Identical to Those Made by Delaware With Respect to Cashier's Checks.

In its motion to dismiss, JPMorgan Chase argued, with Ohio as the beneficiary of those arguments, that

> Plaintiffs are wrong as a matter of law that the Disposition Act required JPMorgan Chase to escheat their cashier's checks elsewhere. *See, e.g.,* SAC ¶¶ 4-5 (claiming § 2503 is "the federal priority rule for the escheatment of cashier's checks"). The Disposition Act creates a narrow exception to the Supreme Court's priority rules and expressly applies only to "any sum . . . payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Notably absent from this list of instruments are cashier's checks. Indeed, the primary section of the Act, which recites the "Congressional findings and declaration of purpose" for the statute, repeatedly refers to "money orders and traveler's checks" alone, while making no mention of cashier's checks. *Id.* § 2503(1), (5).

JPMorgan Chase Memorandum of Law in Support of Its Motion to Dismiss ("JPMorgan Chase Br.") at 15 (Nov. 5, 2020).[3]

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[3] Ohio remained markedly silent in this case where it is taking precisely the opposite position that JPMorgan Chase and U.S. Bank are taking in *Dill*, *Elder*, and related cases, all while receiving likely tens of millions of dollars in escheated cashier's checks from JPMorgan Chase and U.S. Bank that those banks, and purportedly Ohio, contend are not subject to the FDA. JPMorgan Chase did write to the Special Master in April 2020, opaquely warning the Special Master that "[l]egal analysis of the scope and nature of cashier's checks would require development of a record and briefing relevant to that issue, which is lacking here. Reliance on the unsupported assumptions about cashier's checks could inadvertently affect the right of entities not before the Court, including in other pending litigation." Letter from Counsel of Record for JPMorgan Chase Bank, N.A. (Apr. 22, 2020). The Letter from JPMorgan Chase's counsel did not reference *Dill*, although with the benefit of hindsight, *Dill* is clearly the case being referenced. Ohio, of course, **is** an entity before the Court.

JPMorgan Chase goes on to explain a number of reasons why cashier's checks are also not similar written instruments to money orders. *See* JPMorgan Chase Br. at 15-20. Those reasons include:

- The FDA lists instruments, of which cashier's checks are notably absent.
- The Congressional findings repeatedly reference money orders and traveler's checks, while making no mention of cashier's checks.
- "Given the widespread and long standing usage of cashier's checks . . . , Congress would have expressly identified cashier's checks in the Disposition Act if it wanted to change the priority rules as to them."
- "Cashier's checks actually differ from money orders and traveler's checks in significant respects that reinforce that the Disposition Act does not apply."
- "[C]ashier's checks are made payable to a single named payee when issued. *See, e.g.,* Personal Money Orders & Teller's Checks, 67 Colum. L. Rev. 524, 525 n.5 (1967). By contrast, '[a] prominent attribute' of the money order is that its pay-to line is typically left blank and is filled out by the purchaser at a later date. *Id.* at 526."
- "[C]ashier's checks purchased by bank customers are typically issued in a specific, and frequently large, amount for purposes such as purchasing cars or making mortgage down payments, and are used by the banked population. By contrast, money orders are typically used by persons without checking accounts and, at the time the Disposition Act was adopted, were typically issued with the amount filled out by checkwriter impression and were not valid in excess of a specified sum (usually $100-250). *See, e.g.*, Brady on Bank Checks, § 1.7 (4th ed. 1969); 67 Colum. L. Rev. at 526."
- The 1981 and 1995 Uniform Unclaimed Property Acts expressly provide for different treatment of "Checks, Drafts and Similar Instruments Issued or Certified by Banking and Financial

> Organizations," which demonstrates that the "1981 Uniform Act thus recognized that the Supreme Court priority rules governed cashier's checks, and that cashier's checks are not 'similar instruments' to money orders and travelers checks."

JPMorgan Chase's arguments about why cashier's checks are dissimilar to money orders parallel, in large part, the arguments that Delaware made in the present case regarding whether MoneyGram Official Checks are money orders or "similar written instruments" to money orders. Ohio's acceptance of these instruments, along with likely many cashier's checks accepted by other Defendant States based on the *Texas* rules, demonstrates that "money order" in the FDA cannot encompass all prepaid drafts.

III. THE DIR'S DEFINITION OF A "THIRD PARTY BANK CHECK" IS INCONSISTENT WITH THE TEXT OF THE FDA AND ITS OWN ANALYSIS.

Delaware objects to footnote 41 on page 81 of the DIR. That footnote states that

> [t]he question whether the Disputed Instruments are "third party bank checks" has no significance for this case if the Supreme Court rules, as here recommended, that the Disputed Instruments come within the FDA because they are "money orders." It is only if the Court finds that the Disputed Instruments are not "money orders" within the meaning of the FDA, but are "other similar written instruments," that it could matter whether they are "third party bank checks."

That statement is incorrect. The question whether the Disputed Instruments are "third party bank checks" remains relevant for at least two reasons. First, the

Supreme Court may determine that "third party bank checks" are excluded from the FDA *even if* they qualify as "money orders." Second, even if the phrase "other than a third party bank check" only modifies "other similar written instrument," the Supreme Court may determine that it should interpret the term "money order" *in light of* Congress's decision that a "third party bank check" should not be included under the FDA as a "similar written instrument." Under this analysis, the interpretation of "third party bank check" and "money order" is interrelated.

Given that the DIR's adopted definition of a "third party bank check" as an ordinary check relies on "somewhat imperfect" evidence of Congressional intent, DIR at 79:20-21, and is inconsistent with both the text of the FDA and the DIR's own analysis of the text of the FDA, Delaware also objects to the DIR's conclusion that Defendant States' interpretation of a "third party bank check" is "more persuasive than Delaware's." DIR at 81:9-10. When a statute does not define a term, the Supreme Court "look(s) first to the word's ordinary meaning." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012) (citation omitted). When multiple meanings are possible, the words "are given content . . . by their surroundings." *Id.* at 457 (citation omitted). Defining a "third party bank check" to be a personal check—which is clearly not a similar written instrument to money orders and traveler's checks—"makes for an awkward fit in the context of the" FDA. *Id.* This is particularly striking in this case because Defendant States have offered no reason

why Congress would refer to well-known, commonly used personal checks as "third party bank checks." *See* DIR at 73:21-22; 81:8-9.

While the DIR faults Delaware's proposed definition of a "third party bank check" as a bank check offered through a third party, Delaware's definition, unlike Defendant States', is consistent with the ordinary meaning of the words. *Mohamad*, 566 U.S. at 454. The term "third party bank check" as used in the FDA should be interpreted to mean a bank check that is offered through a third party as proposed by Delaware, and Defendant States' proposed interpretation should be rejected.

Dated: June 8, 2021

Respectfully submitted,

/s/ *Steven S. Rosenthal*
Steven S. Rosenthal
Tiffany R. Moseley
John David Taliaferro
LOEB & LOEB LLP
901 New York Avenue NW
Washington, D.C. 20001
Ph: (202) 618-5000
Fax: (202) 618-5001
Eml: srosenthal@loeb.com
tmoseley@loeb.com
jtaliaferro@loeb.com

Marc S. Cohen
LOEB & LOEB LLP
10100 Santa Monica Boulevard
Suite 2200
Los Angeles, CA 90067

Kathleen Jennings
Attorney General of Delaware
Aaron Goldstein
State Solicitor
Michelle Whalen
Deputy Attorney General
Delaware Department of Justice
Department of Finance
Carvel State Office Building
820 North French Street
Wilmington, DE 19801
Ph: (302) 577-8375
Eml: Michelle.Whalen@delaware.gov

Ph: (310) 282-2000
Fax: (310) 282-2200
Eml: mscohen@loeb.com

Counsel for Plaintiff State of Delaware