In the Supreme Court of the United States

No. 145 & 146, Original (Consolidated)

Delaware,

Plaintiff,

v.

Pennsylvania and Wisconsin,

Defendants.

****

Arkansas, et al.

Plaintiffs,

v.

Delaware,

Defendant.

On the Parties' Cross Motions for Partial Summary Judgment

[DRAFT] First Interim Report of the Special Master

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INTRODUCTION

This is a "controversy between two or more States" within the original jurisdiction of the Supreme Court. The dispute is over which State is entitled to escheat, or take custody of,[1] the proceeds of certain unclaimed monetary instruments issued by MoneyGram Payment Systems, Inc. ("Moneygram").[2] The dispute is between Delaware, the Plaintiff, and 30 other States, the Defendants.[3]

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[1] Notwithstanding that the two terms have slightly different meanings, this Report uses the terms "take custody of" and "escheat" interchangeably to refer to a State's taking possession of presumptively abandoned property. When property has "escheated," in the narrowest technical meaning of that term, the State has become legal owner of the property and has no obligation to return it to the previous owner (or any person claiming to have derived title from the previous owner). Escheat is distinct from a State's taking custody of unclaimed property, through which the State takes possession of the property at issue as custodian, for the benefit of the owner or her successors in interest, while title to the property remains in the owner. *See* Revised Uniform Unclaimed Property Act, Prefatory Note, at 2 & n.5 (Unif. Law Comm'n 2016). The disputed issues under these motions do not turn in any way on whether the State takes custody as owner or as custodian. The word "escheat" functions as either (i) a noun, as in, "The property reverted to the sovereign by escheat," to designate the process by which property can revert to the sovereign, (ii) a transitive verb, as in, "The sovereign escheated the property," to signify the sovereign's action in causing property to revert to it; and (iii) an intransitive verb, as in, "The property escheated," to designate the property's reversion to the sovereign.

[2] Moneygram Payment Systems, Inc. is a subsidiary of Moneygram International, Inc.

[3] On July 24, 2017, I issued, with the consent of the parties, an Order realigning the parties such that (1) Delaware would be deemed Plaintiff, for the purposes of its claims against the Defendants, and Counterclaim Defendant, for the purposes of Defendants' claims against Delaware; and (2) the Defendants would be considered Defendants, with respect to Delaware's claims against them, and Counterclaim Plaintiffs with respect to their claims against Delaware. Dkt. No. 40 ¶ 2.

Resolution turns in major part on the construction of the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Federal Disposition Act" or "FDA"), 12 U.S.C. §§ 2501–03. Section 2503 of the FDA establishes priority rules to determine which State is entitled to escheat certain categories of unclaimed financial instruments; the text of that Section is set forth in a footnote below.[4] I have been appointed by the Supreme Court to serve as Special

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[4] 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—

(1) if 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, that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum;

(2) if the books and records of such banking or financial organization or business association do not show the State in which such money order, traveler's check, or similar written instrument was purchased, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, until another State shall demonstrate by written evidence that it is the State of purchase; or

(3) if the books and records of such banking or financial organizations or business association show the State in which such money order, traveler's check,

Master, and, in that capacity, to make recommendations as to disposition. Before me now are cross motions for partial summary judgement on the question whether certain categories of instruments issued by Moneygram (the "Disputed Instruments") fall under the provisions of the FDA.

Under the FDA, sums 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" escheat to the State in which the instrument was purchased (if the books and records of the selling institution show the State in which the instrument was purchased), "to the extent of that State's power under its own laws to escheat or take custody of such sum." 12 U.S.C. § 2503. The FDA partially abrogated the federal common law rule that debts left unclaimed by creditors would escheat, "to the State of the creditor's last known address as shown by the debtor's books and records" (the primary common law rule) but, if no record of the creditor's address is shown by the books and records of the debtor, to the State of the

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or similar written instrument was purchased and the laws of the State of purchase do not provide for the escheat or custodial taking of the sum payable on such instrument, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum.

debtor's incorporation (the secondary common law rule). *See Texas v. New Jersey*, 379 U.S. 674, 680–82 (1965). In the context of presumptively abandoned, prepaid negotiable instruments, the Supreme Court has held that the relevant "creditor" for the purposes of the common law rule may be either the purchaser of the negotiable instrument (the payor) or the intended payee, while the relevant "debtor" is the issuer of the instrument (who, generally, holds the funds owed on the presumptively abandoned instrument). *See Delaware v. New York*, 507 U.S. 490, 503 (1993); *Pennsylvania v. New York*, 407 U.S. 206, 214 (1972).

At issue in this case is the entitlement to escheat the proceeds of instruments marketed by Moneygram as "Moneygram Official Checks." There are two subcategories of Moneygram's Official Checks involved in this dispute: Agent Checks and Teller's Checks (together, the "Disputed Instruments"). Delaware contends that those instruments do not fall within the coverage of the FDA, and are therefore subject, under the common law rule, to escheat to Moneygram's State of incorporation, which is Delaware, to the extent that Moneygram's books and records do not show the last known address of the purchaser or intended payee. The 30 Defendant States contend that the FDA applies to the Disputed Instruments, with the consequence that the States in which the instruments were purchased are entitled to escheat their value. Pennsylvania, one of the Defendants, contends in addition that, assuming no coverage under the FDA, the secondary common law rule established by the

Supreme Court should be partially overruled so that, when the books and records of the issuer do not reflect the address of the purchaser (or the payee), the Disputed Instrument's value would escheat to the State where the instrument was purchased, rather than to the issuer's State of incorporation.

On July 24, 2017, these proceedings were bifurcated, to deal in the first phase with the priorities of entitlement to escheat the Disputed Instruments, and thereafter litigating damages. Dkt. No. 43 at ¶ 6.[5] Under Supreme Court precedent,[6] this appears to be an appropriate stage in the litigation for the Supreme Court to consider the issues that have arisen in the case to date. The parties' cross motions for partial summary judgment present legal issues critical to the ultimate resolution of the case. Resolution of these issues will frame any

[5] Except where otherwise noted, references to "Dkt. No." refer to the Docket Number as listed on the docket sheet established by the Special Master for this case, http://ww2.ca2.uscourts.gov/specialmaster/special_145.html. References to "22O146 Dkt. No." refer to the docket established for use in *Arkansas v. Delaware*, No. 22O146 ORG, http://ww2.ca2.uscourts.gov/specialmaster/special_146.html. (After the two cases were consolidated, I ordered the parties to file all documents on the docket for No. 22O145 ORG.)

[6] The Supreme Court has, in several recent original proceedings, reviewed interim special master reports containing recommendations for the resolution of partial summary judgment motions on liability issues before remanding to the special master for resolution of issues related to appropriate relief. *See, e.g.*, *Montana v. Wyoming*, 136 S. Ct. 1034 (Mem) (2016); *Kansas v. Colorado*, 514 U.S. 673 (1995).

future proceedings, and, depending on the disposition adopted by the Court, could resolve this case entirely.

For the reasons explained more fully below, I am persuaded that Delaware's Motion for Partial Summary Judgment should be DENIED, that the Defendants' Motion for Partial Summary Judgment should be GRANTED, and that Pennsylvania's claim seeking amendment of the common law rule should be DISMISSED AS MOOT.

BACKGROUND

I. Legal Background

A. Unclaimed Property Law

As sovereigns, States are entitled to take custody of or escheat abandoned personal property. *See Delaware*, 507 U.S. at 497. The term "escheat" originally applied only to land; its common law origin derived from the notion that all land titles in England derived from the Crown; escheat was "the process by which tenurial land returned to the lord of the fee upon the occurrence of an event obstructing the normal course of descent." Note, *Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319, 1319 (1961). Because escheat originally applied only to real property, an analogous common law principle — *bona vacantia* — emerged to allow the sovereign to take possession of personal property deemed to have no owner. *Id.* at 1326; *see also Delaware*, 507 U.S. at 497 n.9. The term "escheat" has come to apply equally to real and personal

property. *See id.* ("Our opinions, however, have understood 'escheat' as encompassing the appropriation of both real and personal property, and we use the term in that broad sense."). The term is colloquially used to refer to the right of a government to take either custody or ownership of unclaimed property.

These common law principles were adopted into American law, with the sovereign right to escheat residing with the States. *See Christianson v. King Cnty.*, 239 U.S. 356, 365 (1915) ("The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress."). In its American incarnation, the principle of escheat has been justified by its tendency to allow unclaimed property to be "used for the general good rather than for the chance enrichment of particular individuals or organizations." *Standard Oil Co. v. New Jersey* 341 U.S. 428, 436 (1951). All 50 States currently have laws that allow for the escheat of unclaimed property following a "dormancy" period after which property is deemed abandoned. *See, e.g.*, 72 Pa. Stat. § 1301.1 *et seq*.

B. Federal Common Law Priority Rules

With respect to abandoned tangible property, "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." *Texas*, 379 U.S. at 677. Abandoned intangible property, however, "is not physical matter which can be located on a map." *Id.* As a result,

the straightforward rule governing escheatment of tangible property does not apply to intangible property. In the early twentieth century, States began to pass laws authorizing escheatment of intangible property, which the Supreme Court generally upheld as valid exercises of the sovereign power of States. *See, e.g.*, *Provident Inst. for Sav. v. Malone*, 221 U.S. 660, 666 (1911); *Sec. Sav. Bank v. California*, 263 U.S. 282, 285–86 (1923); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 252 (1944); *Connecticut Mut. Ins. Co. v. Moore*, 333 U.S. 541, 546 (1947); *Standard Oil*, 341 U.S. at 442. *But see First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 370 (1923) (holding that a California statute allowing for the escheatment of deposits at a national bank was an unconstitutional interference with the functioning of national banks). These cases did not, however, involve States' competing claims to escheat intangible property. Such competing claims became inevitable when, "[f]ollowing World War II, states, recognizing the potential for substantial revenues, began to enact broad custodial statutes encompassing all kinds of unclaimed property." Andrew W. McThenia, Jr. & David J. Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 Wash. & Lee L. Rev. 1429, 1436 (1983).

The Supreme Court first addressed such a dispute in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961). Western Union sold a telegraphic money order service, which allowed customers to send a money order across the wires to a named recipient, to be collected at another Western Union

office. A sender would pay to a Western Union clerk the amount to be sent plus a fee. *Id.* at 72. The sending office of Western Union would give the sender a receipt and would send a message to the Western Union office closest to the intended recipient, directing the office to pay the specified amount to the payee. The payee would then be notified, and upon presenting himself at the Western Union office, would be provided a negotiable instrument in the amount specified by the sender. *Id.* At times, however, Western Union would be unable either to locate the intended recipient or to refund the sender. As a result, the company accumulated "large sums of money due from Western Union for undelivered money orders and unpaid drafts." *Id.* at 73.

Pennsylvania sued Western Union in Pennsylvania State court, and, pursuant to its unclaimed property statute, obtained a judgment requiring Western Union to remit to the State all funds from unclaimed money orders purchased in Pennsylvania. *Id.* at 74. Western Union defended on the ground that the potential for another State or States to claim entitlement to escheat the same funds subjected it to the risk of double liability in violation of its Due Process rights. *Id.* (Indeed, New York had already escheated some of the funds claimed by Pennsylvania.) Noting that "rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance," the Court held that disputes between States over

the right to escheat intangibles must be adjudicated in a forum where all competing States could present their claims. *Id.* at 79. The Court therefore reversed the judgment of the Pennsylvania State court. *Id.* at 80.

Four years later, in *Texas v. New Jersey*, 379 U.S. 674 (1965) the Court directly addressed competing State claims to escheat unclaimed intangible property. Texas invoked the original jurisdiction of the Supreme Court to sue New Jersey, Pennsylvania, and the Sun Oil Company, seeking a declaration that Texas was entitled to escheat certain small debts owed by Sun Oil to approximately 1,730 creditors who had failed to claim or cash checks over approximately 40 years preceding the lawsuit. *Id.* at 675. The unclaimed debts at issue were either evidenced in the records of Sun Oil's Texas offices, or owed to creditors whose last known address was in Texas. *Id.*

The Court considered "[f]our different possible rules" to "settle[] the question of which State will be allowed to escheat." *Id.* at 677–78. Texas, relying on State court choice-of-law decisions, urged a rule by which the State with the most significant contacts with the debt at issue would be entitled to escheat. *Id.* at 678. The Court rejected this as "not really any workable test at all" given that it would require the courts "in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." *Id.* at 679.

New Jersey, Sun Oil's State of incorporation, argued that the debtor's State of incorporation should govern. *Id.* at 679. The Court rejected that argument as well. Observing that entitlement to escheat should be determined "primarily on principles of fairness," and that allowing escheat of obligations incurred all over the country to the State of incorporation "would too greatly [exalt] a minor factor." *Id.* at 680.

Pennsylvania, which housed Sun Oil's principal place of business, argued that the State in which a debtor had its principal place of business should have priority. While the Court found the principal place of business preferable to the place of incorporation, it nonetheless concluded that allowing a State to benefit from a *debt* owed by a business operating there would, anomalously, "convert a liability into an asset when the State decides to escheat." *Id.* at 680. Additionally, the Court noted that determining a company's principal place of business could be cumbersome. *Id.*

The Court opted for the rule proposed by Florida (and recommended by the Special Master) (hereinafter, the *Texas* rule), under which the right to escheat an unclaimed debt instrument is accorded to the State of the creditor's last known address as shown by the books and records of the debtor. *Id.* at 680–81. The Court found that the factual issue posed by this test would be "simple and easy to resolve," would "leave[] no legal issue to be decided," and would

fairly "tend to distribute escheats among the States in the proportion of the commercial activities of their residents." *Id.* at 681.

For the circumstance where a debtor's books showed no record of the creditor's address, or where the State of the creditor's last known address had no statute allowing it to escheat the property at issue, the Court adopted a secondary rule allowing escheat by the debtor's State of incorporation. *Id.* at 682.[7] The Court observed that this "secondary rule" was "likely to arise with comparative infrequency." *Id.* The Court noted that the issue presented was fundamentally one "of ease of administration and of equity." *Id.* at 683.

The Court has, on two subsequent occasions, considered challenges to the priority rules established in *Texas*. In *Pennsylvania v. New York*, 407 U.S. 206, 214 (1972), Pennsylvania brought an original action against New York, arguing (as it had in *Western Union Telegraph*) that it was entitled to escheat unclaimed funds accumulated by Western Union when the company was able to locate neither the purchaser nor the payee of telegraphic money orders. 407 U.S. at 211–12. Pennsylvania noted that Western Union's records often do not list an address for the sender or payee of funds and argued that application of the *Texas* rule in such cases brought an unjustified windfall to Western Union's State of

[7] In either case, this "secondary rule" would be subject to the right of a State to recover if and when its laws allowed, or upon evidence that the creditor's last known address was within the State's borders.

incorporation, New York. Pennsylvania argued "that the State where the money order was purchased [should] be permitted to take the funds" based on the assumption that the State of purchase could be presumed to be the purchaser's State of residence. *Id.* at 212. Where "a transaction is of a type that the obligor does not make entries upon its books and records showing the address of the obligee," Pennsylvania argued, the State where the transaction occurred should be entitled to escheat. *Id.* at 213–14 (internal quotation marks omitted).

While noting that Pennsylvania's proposal had "some surface appeal," the Court rejected it. *Id.* at 214. The Court disagreed with Pennsylvania's contention that the *Texas* rule was based on an assumption that addresses of creditors are generally known by debtors. *Id.* Indeed, the Court noted that some of the debt instruments involved in *Texas* did not indicate the creditors' last known address. *Id.* The Court held that even when the address of the creditor would not typically be known, Pennsylvania's proposed rule would require the sort of case-by-case adjudication that the Court had held should be avoided. *Id.* at 215. Further, the Court observed that the likelihood of a "windfall" to a State of incorporation did not furnish adequate reason for deviating from established priority rules. *Id.* at 214.

The Court next considered competing claims of States to abandoned intangible property in *Delaware v. New York*, 507 U.S. 490 (1993). The case involved unclaimed dividends, interest, and other distributions made by the

issuers of securities and held by intermediaries on behalf of their beneficial owners.[8] Between 1985 and 1989, New York had escheated several hundred million dollars in such funds from intermediaries doing business in the State, notwithstanding the potential claim of either the State of the last known address of the beneficial owner or the intermediaries' State of incorporation. *Id.* at 496.

The Special Master recommended that the Court deviate from the secondary rule established in *Texas* to hold that where the creditor's or beneficial owner's last known address is not known, a corporate debtor's principal place of business — rather than its State of incorporation — should have priority to escheat. *Id.* at 505–06. The Court rejected the Special Master's recommendation, ruling that "determining the State of incorporation is the most efficient way to locate a corporate debtor." *Id.* at 506. The Court further observed that "[t]he mere introduction of any factual controversy over the location of a debtor's principal executive offices needlessly complicates an inquiry made irreducibly simple by *Texas*' adoption of a test based on the State of incorporation." *Id.* Further, the Court noted that adopting a rule based on principal place of business would be unlikely to provide for a more equitable distribution of unclaimed funds; rather, it would simply tend to shift entitlement

[8] This practice of using intermediaries "facilitates the offering of customized financial services" and allows for securities to be transferred between beneficial owners without requiring the underlying securities certificates to themselves be transferred. *Id.* at 495.

to escheat the unclaimed distributions at issue from Delaware — where the majority of the intermediaries were incorporated — to New York — where most had their principal place of business. *Id.* at 507 ("A company's arguably arbitrary decision to incorporate in one State bears no less on its business activities than its officers' equally arbitrary decision to locate their principal executive offices in another State."). Finally, the Court once again emphasized the importance of adhering to precedent so as to avoid uncertainty and the protracted litigation amongst the States that might result from willingness "to decide each escheat case on the basis of its particular facts." *Id* at 510 (quoting *Texas*, 379 U.S. at 679).

C. The Statutory Backdrop

1. The Uniform Disposition of Unclaimed Property Act

In the years following the Supreme Court's decisions upholding the States' sovereign power to escheat (or take custody of) intangible forms of property, but before the Court first addressed the potential for competing State claims to the same intangible property in *Western Union Telegraph*, the Uniform Law Commission published the 1954 Uniform Disposition of Unclaimed Property Act (the "1954 Uniform Act"). The 1954 Uniform Act was intended both to fill the "very real need" for "comprehensive legislation covering the entire field of unclaimed property," and to address the risk that the Court's early decisions upholding States' power to escheat intangible property could subject property

holders to multiple liability from the competing claims of States as they enacted more and more expansive laws providing for escheat of unclaimed property. 1954 Uniform Act, Prefatory Note, at 136 (Unif. Law. Comm'n 1954) (noting that the Supreme Court's decisions "reveal that a troublesome problem of multiple liability for the holder of unclaimed property arises in case two or more states, each having jurisdiction over such property, enact statutes dealing with the subject").

Section 2 of the 1954 Uniform Act set forth the criteria for the presumption of abandonment of intangible property[9] held by banking or financial institutions, *see* 1954 Uniform Act § 2, and specifically covered the disposition of "[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, by way of illustration but not of limitation, certificates of deposit, drafts, and traveler's checks," *id.* § 2(c). The comments to this portion of the 1954 Uniform Act note that "Section 2 Parallels Section 300 of the New York Abandoned Property Law." *Id.* § 2 cmt.

The 1954 Uniform Act "was widely but by no means universally adopted" by States. McThenia & Epstein, *supra*, at 1441. It did not put an end to conflicts between the States over unclaimed intangible property. *Id.* While the 1954 Act

[9] This section also included criteria relating to the contents of safe deposit boxes. *See* 1954 Act § 2(d).

contained a "reciprocity" provision that created priority rules for scenarios in which multiple States made a claim over the same abandoned property, the provision's operation relied on enactment of legislation by States to forgo their claim in the reciprocal circumstances described by the Act. *See* 1954 Uniform Act § 10(b).[10] Additionally, the reciprocity provision did not cover all types of property; notably, while the 1954 Uniform Act covered written financial instruments, it did so only where such instruments were issued "by a banking or financial institution." 1954 Uniform Act § 2(c).

The Revised Uniform Disposition of Unclaimed Property Act, published in 1966[11] (the "1966 Uniform Act"), aimed to address the gaps. The 1966 Uniform Act revised Section 2 to explicitly include "money orders and traveler's checks" issued by "business associations." 1966 Uniform Act § 2(c); Prefatory Note, at 3. As a result of this revision, Section 2 of the 1966 Uniform Act established criteria covering "[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 or business association is directly liable, including, by way of

[10] The priority rules set forth in the reciprocity provision provided that, if two States had a claim to unclaimed property, and the holder of that property had a record of the owner's last-known address, the State of the last-known address was entitled to custody of the property. *Id.*

[11] By which time the 1954 Act had been adopted by 12 States. *See* Revised Uniform Disposition of Unclaimed Property Act, Prefatory Note at 3 (Unif. Law Comm'n 1966).

illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." 1966 Uniform Act § 2(c). The 1966 Uniform Act did not, however, define the terms "money order" or "traveler's check."

2. The Disposition of Abandoned Money Orders and Traveler's Checks Act

In 1974, two years after the Supreme Court's decision in *Pennsylvania*, Congress enacted the FDA. *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). The FDA is the subject of this litigation. The FDA narrowed the *Pennsylvania* rule by altering the priority framework established in *Texas* as applied to certain specified financial instruments. Instead of allowing the issuer's State of incorporation to take custody of funds from the purchase of abandoned financial instruments, where the purchaser's and payee's addresses were unknown to the obligor (the secondary rule established in *Texas* and *Pennsylvania*), the FDA provides that the State in which the instrument was *purchased* is entitled to take custody of those funds (so long as the books and records of the instrument's issuer show that State, and that State's laws entitle it to take custody of the funds at issue). *See* 12 U.S.C. § 2503(1).

The FDA applies only to sums 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." *Id.* § 2503. Hereinafter, I refer to such instruments, those falling within

the coverage of the FDA, as "Covered Instruments." Forms of intangible property other than Covered Instruments continue to be governed by the priority rules established by the Supreme Court in *Texas* and *Pennsylvania*. While the FDA defines the terms "banking organization," "business association," and "financial organization," *see id.* § 2502(1)–(3), it does not define "money order," "traveler's check," "directly liable," or "third party bank check."

Where the FDA applies, the occurrence of one of three mutually exclusive scenarios, each set forth in a subsection of § 2503, determines which State is entitled to take custody of the funds at issue. *First*, "if the books and records of such banking or financial organization or business association [the issuer or obligor of the Covered Instrument] show the State in which" the Covered Instrument was purchased, then "that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum." *Id.* § 2503(1). *Second*, if the books or records of the issuer do *not* show the State in which the Covered Instrument was purchased, then the State in which the issuer "has its principal place of business shall be entitled to escheat or take custody of the sum payable," to the extent that State's laws allow it to do so, "until another State shall demonstrate by written evidence that it is the State of purchase." *Id.* at § 2503(2). *Third*, if the books and records of the issuer *do* show the State in which the Covered Instrument was purchased, but that State's laws

do not allow it to take custody of the funds, then the State in which the issuer has its principal place of business is entitled to take custody of the funds (if that State's laws authorize this), "subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum." *Id.* at § 2503(3).

The legislative history of the FDA reflects that it was passed in direct response to the Supreme Court's rejection of Pennsylvania's claim in *Pennsylvania*. Senator Hugh Scott, of Pennsylvania, submitted the proposed bill to Congress alongside a memorandum noting that "[t]he problem to which this bill is directed has been highlighted and made more severe recently by the Supreme Court in *Pennsylvania v. New York*, 407 U.S. 206 (1972)." 119 Cong. Rec. 17047 (May 29, 1973) (Sen. Scott, Memorandum in Support of Proposed Federal Disposition of Unclaimed Property Act of 1973). The memorandum likewise observed that "in the case of travelers checks and commercial money orders where addresses do not generally exist large amounts of money will, if the decision applies to such instruments, escheat as a windfall to the state of corporate domicile and not to the other 49 states where purchasers of travelers checks and money orders actually reside." *Id.* Similarly, the Senate Report for the FDA describes the bill as "designed to assure a more equitable distribution among the various States of the proceeds of [Covered Instruments]," rather

"than 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).

Additionally, Congress codified the rationale behind the FDA as part of the statute itself. In a section of the FDA titled "Congressional findings and declaration of purpose," Congress noted its finding that:

> (1) 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 of such instruments;
>
> (2) a substantial majority of such purchasers reside in the States where such instruments are purchased;
>
> (3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;
>
> (4) it is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States entitled thereto; and
>
> (5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

12 U.S.C. § 2501(1)–(5).

While the bill was in committee, the Chairman of the Senate Committee on Banking, Housing, and Urban Affairs sought the views of the Department of the Treasury ("Treasury") on the proposed legislation. *See* S. Rep. No. 93-505, at

5 (Letter from Edward C. Schmults). Treasury's General Counsel, writing on behalf of Treasury, responded with a letter stating that it did not object to the legislation, "but . . . believe[d] the language of the bill is broader than intended by the drafters." *Id.* at 5. Specifically, Treasury observed that the language "money order, traveler's check, or similar written instrument on which a bank or financial organization or business association is directly liable" could be interpreted to cover "third party payment bank checks." *Id.* Treasury recommended expressly excluding "third party payment bank checks" from the description of Covered Instruments. *Id.* Describing it as a "technical" change, the Committee adopted this suggestion, *id.* at 6, although deviating slightly from Treasury's suggested language. The final bill was enacted containing an exception for "third party bank checks," without defining that term. *See* 12 U.S.C. § 2503.[12]

D. Factual Background

As is discussed more fully below, the facts that are material to these cross motions are, with limited exceptions, not in dispute. Moneygram is a Delaware corporation. It provides prepaid financial instruments to financial institutions and retail establishments, which use these products to pay their own obligations or sell them to customers. Moneygram's parent company — Moneygram

[12] The legislative history does not reflect why the final language of the bill deviated from the language suggested by Treasury.

International, Inc. — is the second largest money transfer business in the world, with revenues exceeding $1 billion. Until 2005, Moneygram operated under the name Traveler's Express.

Moneygram markets two lines of prepaid financial instruments as part of its Financial Paper Product segment. One is marketed as "Retail Money Orders"; another is marketed as "Official Checks," which are issued in several categories. The instant dispute is over entitlement to escheat certain categories of Official Checks.

1. MoneyGram Retail Money Orders

A purchaser of a Moneygram Retail Money Order buys the instrument from a seller, which acts as an agent for Moneygram, by paying the monetary amount imprinted on the face of the instrument, plus any applicable fees. Moneygram's selling agent is not itself a party on the Retail Money Order. In exchange for payment, the purchaser receives from the selling agent a written instrument (the Retail Money Order) on which she can enter the name of desired payee. Moneygram is designated as the issuer and the drawer[13] of the Retail Money Order. The Retail Money Order can then be redeemed by the payee for its

[13] Under the Uniform Commercial Code (the "UCC") "issuer" "means a maker or drawer of an instrument." UCC § 3-105(c) (Am. L. Inst. & Unif. L. Comm'n 2017) ("2017 UCC"). "Drawer" "means a person who signs or is identified in a draft as a person ordering payment," while "maker" has the same significance with respect to a note. *Id.* § 3-103(5), (7).

face value. Moneygram markets Retail Money Orders as instruments that are accepted almost universally and are treated "as good as cash." Nonetheless, Moneygram does not guarantee payment on Retail Money Orders and may under certain situations return a Retail Money Order unpaid (for example, when fraud is suspected).

Moneygram's agents generally do not collect personal identifying information from the purchaser, regarding either the purchaser or payee.[14] Instead, Moneygram's selling agents report four pieces of information to Moneygram upon the sale of a Retail Money Order: (1) the dollar amount of the instrument; (2) the instrument's serial number; (3) the date of the sale; and (4) the selling agent's "customer identification number." The agent's customer identification number allows Moneygram to identify the State in which the instrument was sold. The value of the Retail Money Order is then transferred from the selling agent's bank account to Moneygram, which holds the funds in an intermingled account containing the balance of all outstanding Moneygram paper-based payment products. The funds remain in this account until the Retail Money Order is presented for payment, or the instrument goes uncashed for long enough that it becomes presumptively abandoned for the purposes of a

[14] If, however, a Moneygram agent becomes aware that a purchaser buys more than $3,000 worth of Moneygram Money Orders in a day, the agent collects identifying information from that purchaser, which is maintained for five years.

claiming State's abandoned property laws. When a Retail Money Order is presented for payment, it is cleared through the banking system (using routing and transit numbers listed on the face of the instrument) by a "clearing bank" listed on the front of the instrument in the "payable through" field. Moneygram then draws the funds from the commingled account to pay the clearing bank. If a Retail Money Order is not presented for payment for a sufficiently long time that it is deemed presumptively abandoned, Moneygram, following the priorities established by the FDA, remits its value to the State in which it was purchased.

2. MoneyGram Official Checks

MoneyGram also offers a line of prepaid financial instruments, which it processes on what it describes as its "Official Checks" platform. Whereas Retail Money Orders are sold by retail agents such as convenience stores, supermarkets, drug stores, and other nonfinancial institutions, Official Checks are sold only by financial institutions (such as banks and credit unions). Three of the four products processed on the Official Check platform are relevant to this

case: Moneygram "Agent Check Money Orders," Moneygram "Agent Checks," and Moneygram "Teller's Checks."[15]

i. Moneygram "Agent Check Money Orders"

Agent Check Money Orders function much as Retail Money Orders, with the exception that they are sold only by financial institutions. There is little difference between the two products, and, unlike Agent Checks and Teller's Checks, Agent Check Money Orders are treated for escheat purposes as money orders.[16] In the sale of Agent Check Money Orders: A financial institution acts as selling agent for Moneygram; the selling financial institution is not liable on the instrument; the purchaser pays the financial institution the face value of the Agent Check Money Order, plus any fees; Moneygram is considered both the

[15] In what is a difference merely of diction, and not a difference of legal significance to this dispute, the parties use the term Official Checks slightly differently. The Defendants use the term as encompassing Teller's Checks, Agent Checks, *and* Agent Check Money Orders, *See, e.g.*, Defs. Br. 22–23, while Delaware uses the term as covering only Agent Checks and Teller's Checks. In this Report, I use the term "Official Checks" as covering all three instruments while recognizing that the dispute concerns only Agent Checks and Teller's Checks. Delaware effectively concedes that Agent Check Money Orders are governed by the FDA, and, as discussed above, Moneygram already reports the value of these instruments pursuant to the FDA's priority rules.

[16] In fact, Delaware's Statement of Undisputed Facts generally describes the characteristics of both Retail Money Orders and Agent Check Money Orders under the generic identifier "MoneyGram Money Orders." *See* Dkt No. 78 ¶¶ 6, 21–44. (Much of the evidence that Delaware identifies in support of the characteristics it attributes to all "Moneygram Money Orders" appears, however, to refer only to Retail Money Orders. *See* Dkt. No. 102 ¶¶ 21–44.)

drawer and the issuer; and the clearing bank is designated as "drawee."[17] Funds from the purchase of Agent Check Money Orders are transferred by the selling financial institution to Moneygram, which holds the funds in the same comingled account as proceeds from the sale of Retail Money Orders. When the instrument is presented for payment, it is processed through the clearing system to the clearing bank in the same manner as in the case of Retail Money Orders. Moneygram reimburses the clearing bank for its payment of the instrument.

Personal information regarding the purchaser or payee of an Agent Check Money Order is not collected by Moneygram. Moneygram holds the funds from the sale of Agent Check Money Orders until the instrument is presented for payment or deemed presumptively abandoned. If an Agent Check Money Order is abandoned for the purposes of the unclaimed property laws, Moneygram remits the value of the unclaimed instrument to the State in which it was purchased, treating it as a money order or traveler's check pursuant to the FDA, unlike Moneygram's treatment of Agent Checks and Teller's Checks. The parties do not dispute the appropriateness of this treatment of abandoned Agent Check Money Orders. It is the treatment of abandoned Agent Checks and Teller's Checks that is the focus of this dispute.

[17] Under the UCC, "drawee" "means a person ordered in a draft to make payment." UCC § 3-103(4).

ii. Moneygram "Agent Checks"

Like Moneygram's instruments labeled as "Money Orders," Moneygram's Agent Checks are prepaid financial instruments. They are used primarily by purchasers to transmit funds to a named payee. A purchaser[18] pays the selling financial institution the face value of the Agent Check, plus any fees. The selling bank transmits the funds (minus its fees) to Moneygram. When the payee of the Agent Check cashes it at an institution, that institution forwards the instrument to Moneygram's clearing bank, receiving reimbursement for its payment of the Agent Check from the clearing bank. Moneygram then reimburses the clearing bank.

Agent Checks come in two varieties. One type of Agent Check indicates that that the financial institution signing the check signs the check as "Agent for Moneygram." A second type of Agent Check simply notes "Authorized Signature" next to the signature entered for the selling institution. Both varieties of Agent Check designate Moneygram as the issuer. Moneygram's clearing bank is

[18] Delaware disputes the notion that it is conventional for a retail "purchaser" to buy an Agent Check. It maintains that "Agent Checks are not usually purchased by consumers, but are used by banks to pay their own obligations." Dkt. 98 ¶ 70. But the proposition that Agent Checks are not *usually* purchased by consumers does not mean that they are never purchased by consumers, and the evidence cited by Delaware does not support the more extreme proposition. In fact, Delaware's own expert's report states that an Agent Check "would be purchased by a consumer from a bank selling the product." Dkt No. 70 ¶ 14 (Expert Report of Ronald Mann) ("Mann Report"). Delaware's argument on this matter does not create a "genuine dispute as to [a] material fact." Fed. R. Civ. P. 56(a).

designated as the drawee. An Agent Check is sometimes labeled simply as an "Official Check."

After an Agent Check is purchased, the same four pieces of information — amount of the Agent Check, date of purchase, serial number, and customer ID number (that is, the ID of the selling institution) — are transmitted to Moneygram. No identifying information relating to the purchaser or the payee is conveyed to Moneygram. Moneygram holds the proceeds of the sale of Agent Checks in the same intermingled account as the other Moneygram products discussed above, until the Agent Check is presented for payment or deemed abandoned. Once an Agent Check is presented for payment, it is cleared in the same manner as Retail Money Orders and Agent Check Money Orders.

Unlike the products that Moneygram markets as "Money Orders," Moneygram remits the proceeds of abandoned Agent Checks to its place of incorporation — currently Delaware — treating them as not covered by the FDA. The Defendants here contend that Agent Checks are covered by the FDA, so that the proceeds of abandoned Agent Checks should not be sent to Delaware (unless they were purchased in Delaware).

iii. Moneygram "Teller's Checks"

Moneygram Teller's Checks[19] ("Teller's Checks") are purchased in a manner substantially similar to the instruments described above, again with the qualification that, unlike Retail Money Orders but like Agent Checks, Teller's Checks and other Official Checks are sold only at financial institutions. The purchaser pays the selling financial institution the face value of the instrument, plus any associated fees, and the seller issues the prepaid written instrument. The net proceeds of the purchase of the Teller's Check are transferred to Moneygram, along with the same four pieces of information that are collected upon the sale of the other Moneygram products at issue. With rare exceptions, no personal information regarding the purchaser or payee is transmitted to Moneygram. Moneygram maintains the proceeds of the sale of Teller's Checks in the same commingled account as those from the sale of the other instruments at issue, until the Teller's Check is presented for payment and the instrument is cleared by the clearing bank. Moneygram reimburses the clearing bank for its payment of the Teller's Check. Like Agent Checks, Teller's Checks are sometimes designated only as "Official Checks" on the instrument.

[19] "Teller's check" also carries a generic meaning independent of the characteristics of any particular Moneygram product. *See* 2017 UCC § 3-104(h) (""Teller's Check' means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.").

In the case of Teller's Checks, unlike the other instruments at issue, the selling financial institution is designated as the "drawer" of the instrument. Nonetheless, Moneygram's agreements with its selling financial institution customers describe Teller's Checks as "drawn by" both the financial institution and Moneygram. Moneygram is designated as the issuer. The parties dispute the extent to which the selling institution acts as Moneygram's agent for the purpose of selling Teller's Checks. The clearing bank is designated as the drawee. When a Teller's Check is presented for payment, it is cleared in the same manner as the other instruments at issue. Unlike the other Moneygram instruments at issue, however, a Teller's Check is a "good funds" instrument under Federal Reserve Regulation CC, 12 C.F.R. § 229, with the consequence that the depositor of a Teller's Check can withdraw funds represented by the instrument the day after the check is deposited.

As with Agent Checks (but not Retail Money Orders or Agent Check Money Orders), Moneygram remits the proceeds of unclaimed Teller's Checks to Delaware, Moneygram's State of incorporation, treating them as not covered by the FDA. The Defendant States contest the propriety of that action, contending that the Teller's Checks are covered by the FDA and therefore should not be remitted to Moneygram's State of incorporation.

E. Procedural Background

This action was commenced on May 26, 2016, when Delaware sought leave to file a bill of complaint against Pennsylvania and Wisconsin within the original jurisdiction of the Supreme Court of the United States. Dkt. No. 1. Delaware's complaint sought a declaration that Moneygram's Agent Checks and Teller's Checks are not governed by the FDA, and are instead governed by federal common law principles under which, in event of abandonment, Delaware, as Moneygram's State of incorporation, may take custody of the proceeds by escheat, regardless of the State in which the instruments were purchased. *Id.*[20]

Delaware's proposed complaint was filed in response to two earlier-filed lawsuits arising from the same dispute. First, Pennsylvania sued Delaware and Moneygram in federal district court in Pennsylvania, asserting that Moneygram's practice of escheating Agent Checks and Teller's Checks violated the FDA and Pennsylvania's unclaimed property law. *See* Complaint, *Treasury Dep't of Pa. v. Gregor*, No. 1:16-cv-00351-JEJ (M.D. Pa. Feb. 26, 2016), ECF No. 1. Shortly thereafter, Wisconsin filed a similar lawsuit in federal district court in

[20] Delaware subsequently sought leave to amend its bill of complaint to assert similar claims against the Defendants with respect to the escheat of "other similar instruments" issued by Moneygram and unnamed third parties. *See* Dkt. No. 23. Following briefing by the parties, I denied this request on the basis that the proposed amendment would substantially expand the scope if this proceeding and delay resolution of the case. *See* Dkt. No. 40 ¶ 5(b).

Wisconsin. *See* Complaint, *Wisconsin Dep't of Rev. v. Gregor*, No. 3:16-cv-00281-WMC (W.D. Wis. Apr. 27, 2016), ECF No. 1. Following the filing of Delaware's action in the Supreme Court, the Pennsylvania action was dismissed without prejudice and the Wisconsin action was stayed. *See* Order, *Treasury Dep't of Pa.*, (M.D. Pa. Oct. 5, 2016), ECF No. 48; Order, *Wisconsin Dep't of Rev.* (W.D. Wis. June 21, 2016), ECF No. 12.

Approximately two weeks after Delaware submitted its request to file its complaint, Arkansas, acting also for 20 other States,[21] moved in the Supreme Court to file a complaint against Delaware, seeking a declaration that the FDA applied to all Official Checks, and seeking an order requiring 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." *See* Motion for Leave to File Bill of Complaint, *Arkansas v. Delaware*, No. 22O146 (U.S. June 9, 2016). *Id.* at 17–18. The Supreme Court allowed the filing of both complaints and consolidated the two actions. *See Arkansas v. Delaware*, 137 S. Ct. 266 (2016); Dkt. No 9. Seven additional States[22] were subsequently granted leave to join the claims brought in Arkansas' complaint. *See* Dkt. Nos. 19, 49. In response to Delaware's complaint, Pennsylvania filed a

[21] Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Kentucky.

[22] California, Iowa, Maryland, Oregon, Virginia, Washington, and Wyoming.

counterclaim seeking a declaration that the secondary rule established in *Texas* (favoring escheat to the instrument debtor's State of incorporation when the debtor's books do not reflect the purchaser's address) is "no longer equitable, and is therefore overruled." *See* Dkt. No. 11 ¶ 116.

With the agreement of the parties, I bifurcated the proceedings so that the question which State or States would have priority to take custody of the proceeds at issue would precede litigation of damages due. Dkt. No. 40 ¶ 6. During this first phase of the proceedings, the parties were entitled to seek discovery "on any issue relevant to the merits of the State's entitlement to the escheat." *Id*. The parties engaged in fact discovery, during which two corporate representatives of Moneygram (a nonparty in this action) were deposed pursuant to Rule 30(b)(6). Following the close of fact discovery, the parties engaged in expert discovery, including production of expert reports and expert depositions.

The parties have agreed that this matter should be generally governed by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Southern District of New York. *See* Sup. Ct. R. 17.2; Dkt. No. 74 (adopting Joint Proposal for Case Mgmt. Order No. 5, Dkt. No. 73). Before me now are the parties' cross motions for partial summary judgment on the question whether escheat of the Disputed Instruments is governed by the FDA.

DISCUSSION

Under the Federal Rules of Civil Procedure,[23] summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). On a motion for summary judgment, a court must view the facts "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Nonetheless, the opponent of a motion for summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A genuine issue of material fact exists if "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.* at 248. The movant bears the burden of "demonstrat[ing] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[23] Although the Federal Rules are not strictly applicable in original proceedings before the Supreme Court, the Rules, as well as the Court's precedents construing them, are "useful guides." *See Nebraska v. Wyoming*, 507 U.S. 584 (1993). And, as noted above, the parties have agreed to their use.

For the reasons set forth below, I recommend that the Defendants States' motion be granted, and Delaware's motion be denied.

II. Whether the Disputed Instruments Fall Within the Scope of the FDA

Central to this dispute is whether Moneygram's Agent Checks and Teller's Checks are Covered Instruments subject to the priority rules established by the FDA. Defendants contend that the Disputed Instruments, like Moneygram Retail Money Orders and Agent Check Money Orders, are within the scope of the FDA as "money orders," [24] or, in the alternative, as "similar written instruments (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" ("Similar Instruments"). 12 U.S.C. § 2503.[25] Delaware contends that the Disputed Instruments are neither "money orders" nor Similar Instruments, and that they do not, therefore, fall within the scope of the FDA.

The FDA does not define "money order," "similar written instrument," "directly liable," or "third party bank check." *See* 12 U.S.C. § 2501. Unsurprisingly, the parties disagree as to the meaning of each of these terms

[24] The FDA is written in the singular: "a money order, traveler's check, or other similar instrument." This Report nonetheless sometimes describes these instruments in the plural without the use of alterations, utilizing quotation marks to indicate reference to the terms' meaning as used in the FDA or related statutes.

[25] The Defendants do not contend that the Disputed Instruments are traveler's checks.

and argue that adopting their proposed construction mandates finding in their favor as a matter of law. *See* Pl.'s Br. 15–16; Defs.' Br. 20. As a result, close consideration of each of the disputed terms is important to resolving this dispute. Having considered the parties' positions, I conclude that, for the purposes of the FDA, the Disputed Instruments are "money orders," or, at the very least, are Similar Instruments.

A. Are the Disputed Instruments "Money Orders" Under the FDA?

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.[26] The parties do not dispute that "money orders" are prepaid negotiable instruments, but agree on little else regarding what constitutes a "money order" under the FDA.

A court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). Delaware, while acknowledging that "[t]here is no single legal definition of a money order," Pl.'s Br. 16, argues that the Disputed Instruments are different from money orders. *See* Pl.'s Br. 16–21.

[26] Notwithstanding their agreement, the parties are not necessarily correct in so assuming. *See infra* Section II(B)(2).

Delaware identifies several respects in which differences can be observed between the instruments Moneygram designates as its "money orders" and the Disputed Instruments that Moneygram markets on its Official Checks platform. It contends that those differences demonstrate that the Disputed Instruments are not money orders within the meaning of the FDA. Delaware points to the following observable characteristics of Moneygram's instruments designated as money orders, which are not found in the Disputed Instruments.

> (i) the words "Money Order" appearing somewhere on the face of the instrument, (ii) the words "agent of MoneyGram" appearing somewhere on the face of the instrument, (iii) the inclusion of purchaser payee language creating a contract including service charges on the back of the instrument, (iv) the instrument can be acquired at retail locations like a convenience store, and (v) many of the instruments have a maximum value limit of $1,000.

Pl.'s Br. 18; Pl.'s Reply Br. 10.

For starters, the argument suffers from a fundamental logical flaw. It assumes that the characteristics found today in the instruments Moneygram markets under the name "money order" are defining characteristics of the type of instrument Congress had in mind over 40 years ago when it enacted the FDA's references to "money orders." Delaware seeks to bolster this flawed argument by pointing out that MoneyGram is "either the largest or one of the largest issuers of money orders" in the United States and has been for the entire time period for which the Defendant States are seeking to recover. Pl.'s Reply Br. 10 (citing *MoneyGram Int'l, Inc. v. Comm'r*, 144 T.C. 1, 4 (2015)

("MoneyGram in 2007 was the leading issuer of money orders in the United States.")). But this merely underlines many flaws in the logic of Delaware's argument. Delaware has not shown that the characteristics of contemporary Moneygram money orders to which it points were present in money orders in 1974. Furthermore, if Congress had in mind the money orders of any particular issuer in 1974, in all likelihood it would have been Western Union, not Moneygram, as the legislative history of the FDA makes clear that the statute was passed in response to the Supreme Court's decision in *Pennsylvania v. New York*, which involved money orders issued by Western Union. *See* 119 Cong. Rec. 17047 (May 29, 1973) (Sen. Scott, Memorandum in Support of Proposed Federal Disposition of Unclaimed Property Act of 1973); *Pennsylvania*, 407 U.S. at 211–12.

The Defendants are on sounder ground in interpreting the FDA's use of the term by reference to definitions and usages in contemporary sources. They cite the 1968 Black's Law Dictionary (which was current at the time that the FDA was enacted in 1974) discussing postal money orders and making clear that "they are prepaid drafts." Defs.' Br. 21; *see also Money Order*, Black's Law Dictionary (4th ed. rev. 1968) ("Under the postal regulation of the United States, a money order is a species of draft drawn by one post-office upon another by 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.")).

Defendants cite also the then-contemporary Webster's New Collegiate Dictionary (7th ed. 1967), which defined "money order" as "an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another named office." As some of these sources classified money orders as "drafts," Defendants point to the 1972 UCC definition of "draft" as "a direction to pay" someone that "must identify the person to pay with reasonable certainty." 1972 UCC § 3-102(1)(b); *see also* 2017 UCC § 3-104(e) (the current version). Drawing from such sources, Defendants contend that the ordinary meaning of "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." Defs.' Br. 22.

Defendants point out that "all of the products that MoneyGram markets as 'Official Checks' . . . fit squarely within the definition of 'money order.'" Defs.' Br. 22. They assert that Moneygram's Agent Checks, like its Agent Check Money Orders, fit within this definition of "money order." "[T]hey are [prepaid] written orders directing another person to pay a certain sum of money on demand to a named payee."[27] Defs.' Br 22. The purchaser of an Agent Check prepays the value of the instrument to the selling institution, which sends the proceeds to

[27] The Defendants also point out that at least some of Moneygram's contracts with the distributing financial institutions state that Agent Checks "may be used as money orders" at the financial institution's option. Defs.' Br. 3.

Moneygram, which holds those funds until the instrument is presented for payment, at which point Moneygram transfers the funds representing the prepaid value of the instrument to the clearing bank (the drawee). Teller's Checks are not different in "any way that is material to the definition of money order under the FDA." Defs' Br. 24.[28]

I find the Defendants' position considerably more persuasive than Delaware's. Apart from the already noted logical flaws in Delaware's arguments, the characteristics of the instruments Moneygram expressly labels as "money orders" that Delaware identifies as not found in Moneygram's so-called "Agent Checks" and "Teller's Checks" are superficial and trivial — not the sort of characteristics that define a commercial instrument for purposes of its legal classification. While the fact that the term "money order" is written on one instrument and not another undoubtedly has some relevance to whether they

[28] Delaware notes and the Defendants concede that Teller's Checks are listed as a "good funds" instrument that has next business day availability under the Expedited Funds Availability Act, 12 U.S.C. § 4001 *et seq.*, and Regulation CC implementing it, *see* 12 C.F.R. Part 229. But the Expedited Funds Availability Act (the "EFAA") was not enacted until 1987, more than a decade after the FDA, and does not relate to the same subject matter as the FDA. *See* Expedited Funds Availability Act, Pub. L. 100–86, 101 Stat. 635 (1987). The EFAA does not shed any light on the meaning of "money order" within the context of the FDA, because Congress could not possibly have intended for the scope of the FDA to turn on the effects of then-unenacted future legislation relating to a subject matter other than unclaimed property. *Cf. Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.").

should be considered money orders, such a distinction goes only so far. If the unlabeled instrument serves the same commercial purpose, and is recognized in law as having the same effects as the one bearing the legend "money order," the absence of the name appearing as a legend on the instrument is an insufficient reason not to deem it what it is for purposes of laws governing that class of instrument. By the same token, the fact that an instrument identifies itself on its face as a particular sort of instrument would not make it such if the instrument does not have the fundamental characteristics of that sort of instrument. To pound the obvious, writing "Money Order" on the face of an employment contract would not make the document a money order.

The other differences Delaware points to have even less capacity to determine whether the Disputed Instruments are money orders. Whether the issuer distributes its instruments through agents or entities with which it has a different relationship, and whether it markets them through retail locations such as convenience stores, as opposed to financial, or other types of establishments, are marketing decisions that do not determine the rights and duties that arise from use of the instrument in commerce. Such marketing decisions surely do not determine whether the instruments are money orders, much less whether the issuer prints on the face of the instrument that the seller of the issuer's instrument is its "agent." Delaware is correct that some of the terms and conditions applicable to the Disputed Instruments differ from those

applicable to Moneygram's money orders, but those differing terms and conditions relate to matters such as certain fees charged and the procedure for a purchaser to receive reimbursement. They do not affect defining characteristics of the instrument. As for Delaware's observation that "many of [Moneygram's money orders] have a maximum value limit of $1000 (which is not maintained for Official Checks)," Delaware does not even claim that this limitation is observed for all of Moneygram's money orders, thus implicitly acknowledging that an instrument with a face value exceeding $1000 can be a money order. Pl's Br. 18.

Nor does Delaware assert that the characteristics it identifies in Moneygram's money orders that are not found in the Disputed Instruments are necessarily found in the money orders of other issuers.[29] And to the extent that Delaware points to terms of Moneygram's so-identified money orders that are not applicable to the Disputed Instruments (such as a $1.50 per month fee imposed in specified circumstances), Delaware neither asserts that this fee has

[29] At oral argument, Delaware suggested that, at around the time the FDA was enacted, Western Union money orders had a maximum value of $1000. *See* Tr. March 10, 2021, at 9–10 ("[W]e do include a Western Union money order . . . from 1966 . . . They were limited to a thousand dollars."). But the sample Western Union money order cited in support of this assertion does not evidence any such $1,000 dollar limit. *See* Dkt. No. 86 (Taliaferro Decl., Ex. W). To the contrary, the rules and conditions governing Western Union money orders as of September 1, 1939 explicitly contemplate money orders of at least $3,500. *See* Dkt. No 86 (Taliaferro Decl., Ex. X, at 5).

always applied to Moneygram's so-identified money orders, nor that this fee is charged by other issuers of money orders.[30]

Delaware, it appears, has simply pointed to every observable feature of Moneygram's instruments that bear a printed legend "money order" that is not also true of those it sells under the names "Agent Check" and "Teller's Check," no matter how inconsequential and regardless of whether those features materially affect the rights and obligations of users, treating them as if they served to define the essence of money orders. The Defendants' focus on the ways in which the Disputed Instruments conform to the fundamental nature of money orders (as that term was generally understood at the time of the passage of the FDA), is far more persuasive as demonstrating that the Disputed Instruments fall within the FDA's reference to money orders than Delaware's identification of trivial and superficial distinctions between Moneygram's marketing of what it labels "money orders" and what it labels "Agent Checks" and "Teller's Checks" as demonstrating that the latter are not covered by the FDA's reference to "money orders."

[30] While it may be of some significance that the fees applicable to Moneygram money orders would consume the entire value of any such money order valued at $126 or less before the instrument would ever become dormant, *see* Pl.'s Br. 46, Delaware has provided no basis to conclude that these fees are charged by any other issuers, or that such fees were charged at the time the FDA was enacted. In fact, the record demonstrates that such fees may differ based on service charge exceptions imposed by State law. *See* Dkt. No. 81 (Whitlock Aff. #1, Ex. A).

Delaware advances several further arguments. I do not find them persuasive. It argues, for example, that an essential, defining characteristic of a money order is that it is marketed to individuals who do not have checking accounts and therefore cannot send payments by personal check. The Disputed Instruments, in contrast, are sold only by financial institutions, primarily to their own customers (people who have a checking account). In support, Delaware cites sources that mention that money orders are used by "unbanked" individuals as a safe way to transfer funds. *See* F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962) (defining a money order as "[a] form of credit instrument calling for the payment of money to the named payee which provides a safe and convenient means of remitting funds by persons not having checking accounts"); Barkley Clark & Alphonse M. Squillante, *The Law of Bank Deposits, Collections and Credit Cards* 54 (1970) (a personal money order is an "instrument, issued by and drawn upon a commercial bank without indication of either purchaser or payee . . . often used as a checking account substitute by the purchaser-remitter") Barkley Clark & Barbara Clark, *Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010) (describing a money order as "an instrument calling for the payment of money to a named payee and providing a safe and convenient means of remitting funds by a person not having a checking account."); *see also* 72 Fed. Rsrv. Bull. 149 n.5 (Feb. 1986)

("Money orders are *primarily* used to transmit money by consumers who do not or cannot maintain checking accounts.") (emphasis added).

The argument is not persuasive. Delaware's cited sources do not suggest that marketing to unbanked persons is an essential characteristic of a money order — only that money orders are particularly useful to such persons because of their inability to send money via personal check. The fact that a money order "provid[es] a safe and convenient means of remitting funds by persons not having checking accounts" does not mean that it does not also provide a safe and convenient means of remitting funds by persons who do have checking accounts but prefer not to use them for whatever reason in a particular circumstance. Indeed, the Federal Reserve Bulletin quoted above, stating that money orders "are *primarily* used to transmit money by consumers who do not or cannot maintain checking accounts," by use of the word "primarily" implicitly acknowledges that money orders are also used by persons who do have bank accounts. 72 Fed. Rsrv. Bull. 149 n.5 (Feb. 1986) (emphasis added). That a money order "provid[es] a safe and convenient means of remitting funds by a person not having a checking account" is undoubtedly true but does not exclude a money order's provision of an alternative "safe and convenient means of remitting funds by a person [who does have] a checking account." Further, a money order would be useful to a person who does have a bank account who wishes to send money to a person that does not, or to a person who, for whatever

reason, prefers that her receipt of the payment not be reflected in her bank account. While it appears to be true that a large percentage of the purchasers of money orders are persons who do so because they have no checking accounts, it does not follow that an instrument having the same capability and legal effect cannot also be useful to persons who use them for a different reason. When the utility and legal effect of two instruments are the same, the mere fact that one is marketed to persons whose reason for using them differs from that of a larger number of customers for the other would not, absent further reason, justify treating the two otherwise identical instruments as legally different. Finally, Delaware's argument that an instrument sold by a banking institution cannot be a money order is undermined by the fact that Moneygram's Agent Check Money Orders — which Moneygram already treats as governed by the FDA, and which Delaware frequently describes as "money orders" — are only sold by financial institutions. *See e.g.*, Pl.'s Br. 18 n.3, 22; Mann Report ¶ 18. In this regard, 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.[31] The more important point, however, is that, except where such a consequence is specified by law, an issuer's choices

[31] One of the authorities relied upon heavily by Delaware also notes that money orders are sold "by some commercial and savings banks, and savings and loan institutions." F.L. Garcia*, Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962).

of how to market its instruments does not change the rights and obligations that inhere in them, nor change their nature.

As a further flaw in Delaware's argument, it suggests no logical connection between the characteristics it describes as definitional features of "money orders" and Congress's objectives in enacting the FDA. Delaware asserts that there is "no evidence" that the defining characteristics it has proposed "were not the precise characteristics that led Congress to identify the specific prepaid instruments 'money order' and 'traveler's check' in the FDA." Pls.' Reply Br. 9. This statement is contrary to the plain text of the FDA. As noted above, Congress included in the text of the statute a section titled "Congressional findings and declaration of purpose." This section of the statute makes no reference to any of the definitional characteristics identified by Delaware. *See* 12 U.S.C. § 2501. It explains what were the characteristics of "money orders" and "traveler's checks" that motivated Congress to impose the priorities established by the FDA. In this section, "Congress finds and declares:"

> (1) that the issuers of money orders and traveler's checks do not generally maintain records of the purchasers' address;
>
> (2) that purchasers ordinarily reside in the State the instrument is purchased;
>
> (3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;

> (4) it is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States entitled thereto; and
>
> (5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

12 U.S.C. § 2501(1)–(5). Contrary to Delaware's argument, Congress made clear explanation of its purposes, and none of them depended on the characteristics Delaware argues are definitional of money orders. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning.").

Accepting the characteristics that Delaware points to as definitional of money orders would do nothing to further the stated purposes of the FDA. In fact, it might even foster the type of "inequity" that the FDA was designed to prevent by allowing issuers of money orders to choose which State will have escheat priority by making otherwise inconsequential, cosmetic changes to the face of the instrument. *See The Emily & The Caroline*, 22 U.S. (9 Wheat.) 381, 390 (1824) (concluding that construction of an ambiguous statute in a manner that would render "evasion of the law . . . almost certain" should not be adopted); Scalia & Garner, *Reading Law* 63 ("A textually permissible interpretation that furthers rather than obstructs the [statute]'s purpose should be favored.").

The Defendants are more persuasive in pointing out that the stated purposes of the FDA are served by treating the Disputed Instruments as "money orders," because Moneygram does not maintain records of the addresses of purchasers (or payees) of the Disputed Instruments and there is no contention that purchasers of the Disputed Instruments are any more likely to reside outside the State of purchase than what Congress noted with respect to purchasers of money orders. *See* 12 U.S.C. § 2501(1)–(2).

In response to the Defendants' interpretation of the statutory term "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," Defs.' Br. 22, Delaware argues that Congress must have intended something more narrow because, if Congress had intended that the FDA govern the escheat of all prepaid drafts, it could have simply used that term:

> [T]he language of the FDA itself evidences an intent to exempt specific categories of written instruments from the federal common law governing the escheat of limited categories of unclaimed intangible property, not the entire universe of drafts except those drawn on an individual or company's account.

Pl.'s Opp. Br. 7. The argument is not persuasive. It is certainly true that, if Congress considered the terms "money order" and "prepaid draft issued by a post office or business enterprise" as equivalent, it could indeed have used either term in drafting the statute. The fact that it used the shorter, simpler term,

"money order," in preference to the longer, more complex descriptive does not suggest that it meant something different or narrower.

Delaware next invokes the canon against statutory surplusage, arguing that the Defendant's construction of "money order" as encompassing all forms of prepaid drafts issued by banks, businesses, or other entities would render the statute's additional covered terms unnecessary surplusage, which, Delaware asserts, compels a narrower interpretation of "money order," so as to preserve an independent meaning for the other covered terms, "traveler's check" and "other similar instrument."

The surplusage canon (*verba cum effectu accipienda sunt*, or "words are to be taken as having effect") states that "the courts must lean . . . in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 58 (1868); *see also Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879). The canon presumes that legal drafters *should not* include in legal texts words that have no effect. Courts in turn, should assume that legislatures have observed this exhortation and, therefore, should avoid construing statutes in a manner that render words redundant. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two

terms because it intended each term to have a particular, nonsuperfluous meaning.").

Delaware's first argument is that interpreting "money order" to mean "prepaid draft[s] issued by a post office, bank or some other entity" renders redundant Congress's additional inclusion of "traveler's check" in § 2503, because a traveler's check would be included within the definition of "money order." Pl.'s Opp. Br. 8–9. This argument relies on the incorrect assumption that all traveler's checks are "drafts." In fact, a traveler's check can be either a draft or a note. *See* 2017 UCC § 3-104 cmt. 4 ("Instruments are divided into two general categories: drafts and notes. A draft is an instrument that is an order. A note is an instrument that is a promise. . . . Traveler's checks are issued both by banks and nonbanks *and may be in the form of a note or draft*.") (emphasis added); *see also* 1972 UCC § 3-102 cmt. 4 (describing traveler's checks as "negotiable instruments" rather than as "drafts"); William D. Hawkland, *American Travelers Checks*, 15 Buff. L. Rev. 501, 510 (1966) (observing that a traveler's check can operate as a note). Because a traveler's check need not be a draft, interpreting "money order" as the Defendants propose does not cause the FDA's use of the term "traveler's check" to be redundant, and the canon against surplusage is not implicated.

Delaware then argues that the Defendants' construction makes the statutory phrase "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" surplusage, somehow requiring that courts give a narrower meaning to "money order." Pl.'s Opp. Br. 9. Delaware argues that there is no instrument that is similar to either a money order or a traveler's check that would not be covered by Defendants' definition of money order. The absence of any such instrument, which is similar, and yet is not a money order (or traveler's check), according to Delaware's argument, renders the Similar Instrument clause surplusage. *Id.* at 8–9.

The argument has no validity. The absence of any existing similar instrument does not render the "similar instrument" phrase surplusage. The logical inference from Congress's use of "other similar instrument" is that, while Congress was not aware of any such similar instrument, it wanted to ensure that if, by reason of future changes in State laws or business practices, or for any reason, such similar instruments came into existence in the future, they would be governed by the terms of the statute. If Congress had known of such similar instruments, it would have had every reason to name them explicitly, rather than rely on a vague invocation of similarity. It is precisely because Congress did not know of any such instrument, but suspected that some such instrument might emerge in time, that it extended the statute's coverage beyond the scope of the known instruments that are expressly covered to other similar instruments. Regardless of the present non-existence of such instruments (if indeed there are

none), that does not render the clause redundant. The clause means something different from either "money order" or "traveler's check." That it refers to an instrument that is not a money order or traveler's check is clearly communicated by the word "other." The clause refers to an instrument, regardless of whether such an instrument exists at any particular time, that is not a money order or traveler's check but is sufficiently similar to warrant being treated the same way under the FDA. It is clear from the face of the clause that it is not surplusage.

In any event, precedents explaining the canon against surplusage caution against its application to broad residual clauses that may be enacted when Congress wishes at once to cover specific dangers that are precisely known, while also using a broader, vaguer catchall phrase to cover "known unknowns." *See Yates v. United States*, 574 U.S. 528, 551 (2015) (Alito, J., concurring in the judgment) (observing that a statutory construction that risks some surplusage may nonetheless be appropriate because "Congress 'enacts catchall[s]' for 'known unknowns.'" (quoting *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009)); *Begay v. United States*, 553 U.S. 137, 153 (2008) (Scalia, J. concurring in the judgment) ("[T]he canon against surplusage has substantially less force when it comes to interpreting a broad residual clause."); *United States v. Perschilli*, 608 F.3d 34, 41 (1st Cir. 2010) ("Congress may well have wanted to add specificity about known dangers while keeping the catch-all clause in the statute to be sure that other purposes, not readily imagined, were also encompassed."); Linda D.

Jellum, *Mastering Statutory Interpretation* 104 (2008) ("Legal drafters often include redundant language on purpose to cover any unforeseen gaps or for no good reason at all.").

On the question whether Moneygram's Agent Checks and Teller's Checks are money orders under the FDA, I find that the Defendants' arguments have considerable force and that Delaware's arguments are not persuasive. I conclude that the Disputed Instruments are "money orders" within the meaning of the FDA.

B. Are the Disputed Instruments "Other Similar Written Instruments" Under the FDA?

In addition to covering a "money order" or "traveler's check," the FDA's priority rules also cover the escheatment of any "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" (herein "Similar Instruments"). 12 U.S.C. § 2503. Assuming, *arguendo*, that, for some reason, the Disputed Instruments are not "money orders" under the FDA, they would still be covered by the statute as Similar Instruments.

To come within the Similar Instruments clause, (1) an instrument in question must be similar to a money order and traveler's check, (2) it must not be a "a third party bank check;" and (3) a "banking or financial organization" or "business association" must be "directly liable" on it. Other than agreeing that Moneygram is a "banking or financial organization or business association"

under the FDA, the parties disagree as to whether the Disputed Instruments fall under the Similar Instruments clause. Three issues are disputed: First, whether the Disputed Instruments are "similar" to "money orders" and "traveler's checks"; second, whether the Disputed Instruments are instruments "on which a banking or financial organization or a business association is directly liable"; third, whether a Disputed Instrument is a "third party bank check," which is explicitly excluded. I have considered these issues in turn.

1. Whether the Disputed Instruments are "Similar" to "Money Orders" and "Traveler's Checks"

"Similarity," as explained by the Supreme Court, is "resemblance between different things." *United States v. Raynor*, 302 U.S. 540, 547 (1938) (noting that "similarity is not identity"). Delaware's first argument is that, while a court can determine *dis*similarity as a matter of law, similarity is inherently factual and cannot be decided as a matter of law on a motion for summary judgment. I find no validity in this argument. Here, the material facts are essentially undisputed, and the question of similarity turns on the applicable statutory standard under the FDA. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991) ("It is for the court to define the statutory standard. . . . [S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion."); *Rousey v. Jacoway*, 544 U.S. 320, 334 (2005) (determining that IRAs are "similar," for the purpose of the Bankruptcy Code, to "stock bonus, pension, profitsharing, [and] annuity" plans or contracts).

I recognize, of course, that the term "similar" is unavoidably ambiguous. Items can be similar and dissimilar in innumerable ways. Whether undisputed dissimilarities affect the answer to whether the items are "similar" to one another within the meaning of a particular statute is a question of law. The answer to it depends on analysis of the statute and its purposes, and determination of what features are of significance for the purposes of the statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). For some statutes, the fact that one object is green while the other is red may be a crucial dissimilarity that is incompatible with a finding of similarity, whereas under another statute such a difference may have zero significance. If the similarities are of crucial importance and the dissimilarities are without importance to the purposes of the statute, a court would be compelled to find similarity, as a matter of law, and to reject a jury's contrary verdict. The court in such circumstances should grant summary judgment finding similarity. There is simply no merit to Delaware's argument that, while a court may grant summary judgment rejecting similarity, it may not grant summary judgment finding similarity. *See, e.g.*, *Strubel v. Comenity Bank*, 842 F.3d 181, 197 (2d Cir. 2016) (granting summary judgment to the defendant on claims brought under the Truth In Lending Act on the basis that the defendant's

billing rights form was "substantially similar," as a matter of law, to the model form promulgated by the CFPB); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 123 (2d Cir. 2021) (holding that silkscreen prints and illustrations created by Andy Warhol were substantially similar, as a matter of law, to the photograph on which they were based); *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 53 (1st Cir. 2012) (holding that modified versions of translated religious texts were substantially similar, as a matter of law, to the original translations); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010) ("The question of substantial similarity is by no means exclusively reserved for resolution by a jury . . . ."); *Segret's, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 62 (1st Cir. 2000) (holding that two clothing designs were substantially similar as a matter of law); *Twin Peaks Prods., Inc. v. Publ'ns Int'l*, 996 F.2d 1366, 1372 (2d Cir. 1993) (affirming the district court's holding that a book and a television show were similar as a matter of law); *Castle Rock Entm't v. Carol Pub. Grp.*, 955 F. Supp. 260, 266 (S.D.N.Y. 1997) (Sotomayor, J.) (granting summary judgment on plaintiffs' copyright infringement claim and holding that defendant's book was substantially similar, as a matter of law, to plaintiffs' television show); *cf. Rousey*, 544 U.S. at 334–45.

The structure of the FDA, by referring to a "money order, traveler's check, or other similar written instrument" manifests a clear intent for the word

"similar" to refer to the shared characteristics of "money orders" *and* "traveler's checks." That is, the characteristics to which a written instrument must be "similar" to fall within the scope of the FDA are those features that are common to a "money order" and a "traveler's check," and are of significance to the purposes of the FDA. *See Rousey*, 544 U.S. at 329–31 (holding that the correct construction of a statute applying to a "stock bonus, pension, profitsharing, annuity, or similar plan or contract" turns on similarity to "[t]he common feature of all [the enumerated items]").[32]

On the question whether the Disputed Instruments are similar to money orders and traveler's checks, the parties make substantially the same arguments as they make with respect to the question whether the Disputed Instruments are money orders. The Defendant States point out in support of similarity that the Disputed Instruments, like money orders, are prepaid drafts issued by a financial or official entity, providing for payment of an exact sum of money to a named individual (making them useful as a convenient, secure method for one person to transmit funds to another). They argue that these features conform to the fundamental characteristics of a money order that Congress would have envisaged in 1974, and, furthermore, that the Disputed Instruments share with

[32] By way of illustration, if a tax deduction were available for the purchase of a "car, boat, airplane, or other similar vehicle," an individual could not reasonably expect to receive the deduction for the purchase of a toy car, despite that a toy car is, in many respects, similar to a car.

money orders features that motivated Congress to enact the FDA: to wit, the issuer maintains records showing the State in which the instrument was purchased, but not of the address of the purchaser (or payee); purchasers, therefore, do not ordinarily receive notification from the issuer when the payee cashes the order, which increases the likelihood of abandonment; purchasers usually reside in the State where they make the purchase; and the cost of maintaining and retrieving addresses of purchasers would be a burden on commerce.

Delaware likewise raises substantially the same arguments as it did in arguing the Disputed Instruments are not money orders. It points to differences between the Disputed Instruments and the instruments that Moneygram now labels as money orders. Apart from the logical deficiencies of Delaware's assumption that the instruments Moneygram now labels as money orders are exactly what Congress had in mind in 1974 in passing the FDA, which is discussed at length above, the more serious flaw in Delaware's argument is, once again, that the differences it points to relate to superficial, inconsequential issues. These are factual differences that have no material bearing on the rights or obligations arising from the use of the instruments, on their character as instruments in commerce, or on the purposes Congress sought to achieve in enacting the FDA. With respect to the differences that Delaware notes, the Defendants do not dispute their existence. Those differences are, however, too

trivial and unrelated to the rights and obligations inhering in the instruments when used in commerce.

For example, Delaware again counters by pointing to a number of facial, technical, operational, and marketing differences between the instruments Moneygram markets as money orders and the Disputed Instruments, arguing that, in the aggregate, these differences defeat similarity. Delaware points, for example, to the fact "Moneygram Money Orders generally remain outstanding for approximately six days" while "Official Checks generally remain outstanding for approximately four days," Pl.'s Br. 53, and the fact that MoneyGram maintains an internet database of selling locations for its MoneyGram Retail Money Orders, but does not maintain such a database for the Disputed Instruments, Pl.'s Br. 52. It notes also that Teller's Checks are listed as "low risk items" under the Expedited Funds Availability Act, 12 U.S.C. § 4001, and Regulation CC implementing it, 12 C.F.R. Part 229, while Moneygram's instruments labeled as money orders are not so listed. Pl.'s Br. 48.[33]

Delaware's arguments suffer from the same flaws as noted above. Most significantly, the differences it points to are trivial matters relating to the appearance of the face of the instrument or the manner of its marketing or

[33] A further flaw in Delaware's argument is that neither the EFAA nor Regulation CC existed at the time the FDA was introduced. *See* Expedited Funds Availability Act, Pub. L. 100–86, 101 Stat. 635 (1987).

administration by the issuer, without bearing on the rights and obligations arising from its use. A further logical flaw, once again, is that comparing the Disputed Instruments to the instruments Moneygram now issues under the label "money orders" does not necessarily compare them to the money orders, many marketed by other issuers, that Congress would have had in mind over 40 years ago, in enacting the FDA.[34]

And with respect to Delaware's argument that Congress was not motivated in passing the FDA by the fact that holders of unclaimed money orders do not maintain the addresses of purchasers, Delaware skates on thin ice in view of the statute's express recitation, under "Congressional findings and declaration of purpose," that "(1) the books and records of banking institutions 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 of such instruments." 12 U.S.C. § 2501(1). Further, Delaware's assertion that the "congressional record is devoid of any basis for asserting that addresses are not kept for money orders," Pl.'s Opp. Br. 45, is

[34] In addition, many of the dissimilarities Delaware notes between the instruments Moneygram labels as money orders and its Teller's Checks and Agent Checks also distinguish them from Moneygram's Agent Check Money Orders, which Delaware apparently concedes are covered by the FDA. For example, Agent Check Money Orders are sold only at financial institutions, and are marketed to the customers of such institutions.

beside the point. Regardless of whether support for this finding is found in the legislative history, Congress expressly so found, and recited this fact as part of its explanation of its purpose in passing the statute regulating escheatment of money orders. Because that fact is also true of the Disputed Instruments, we have every reason to believe that Congress would have considered this aspect of the Disputed Instruments pertinent to deciding whether they should be deemed Similar Instruments subject to § 2503. Furthermore, while asserting that support for this Congressional finding is not contained in the legislative history, Delaware has not made a showing that Congress's finding was factually incorrect. In any case, the issue here is whether Congress's express legislative findings may serve as an interpretive aid to assist the Court in construing the FDA, not whether the statute's legislative history reflects support for Congress's findings. Delaware's citations to cases that involved challenges to a statute's constitutionality, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989), are therefore inapposite.

In short, the Defendant States have made forceful arguments that, as a matter of law, the Disputed Instruments either *are* "money orders" within the meaning of the FDA or, at the very least, are sufficiently similar to money orders and traveler's checks to qualify as "other similar written instruments." In contrast, Delaware's arguments to the contrary are insubstantial and unpersuasive. Employing the ordinary meaning of the word "similar," viewed in

light of the characteristics that the Disputed Instruments share with money orders and traveler's checks, and considering Congress's purposes in passing the FDA, I find that, if the Disputed Instruments do *not* come within the FDA by *being* money orders, they undoubtedly come within the statute's coverage of "other similar written instruments."

2. Whether "a Banking or Financial Organization or a Business Association is Directly Liable" on the Disputed Instruments

Under the terms of § 2503, a written instrument that is "similar" to a "money order" or "traveler's check" comes within the statutory coverage only if "a banking or financial organization or a business association is directly liable" on the instrument. Delaware argues that neither Moneygram nor any other party is "directly liable" on the Disputed Instruments because liability on a Teller's Check or Agent Check is "conditional," that is, "dependent on dishonor or some other external fact." Pl.'s Br. 28 (quoting Mann Dep. 26:22–23 (Ex. AA to Taliaferro Decl.)). Under the UCC, the drawee of a check or other draft is "not liable on the instrument until he accepts it." 1972 UCC § 3-409(1); *see also* 2017 UCC § 3-408, 3-409 (the current version).

Delaware and its expert assert that the statutory term "directly liable," must be read as synonymous with the concept of unconditional liability under the UCC, because the UCC's distinction between conditional and unconditional liability was a background legal principle relevant to negotiable instruments

that would have been well-understood by Congress at the time the FDA was enacted. Delaware's expert asserts, and the Defendant States do not contest, that, under the terms of the UCC, neither Moneygram nor any other party is unconditionally liable on an Agent Check or Teller's Check. *See* Mann Report ¶¶ 30–37.

Delaware's position is somewhat undermined by the fact that the FDA employs the term "directly liable," not "unconditionally liable." 12 U.S.C. § 2503. If, as Delaware argues, Congress wished its statute to adopt from the UCC the standard of unconditional liability, why would Congress have employed a different term in preference to what it meant? Delaware's argument is further undermined by convincing evidence that the FDA took the statutory term "directly liable" from the 1966 Revised Uniform Disposition of Unclaimed Property Act (the "1966 Uniform Act"), under which that term had, at the time Congress passed the FDA, been interpreted to mean "ultimately liable."

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision," adoption of that same language in a new statute normally indicates an "intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abott*, 524 U.S. 624, 645 (1998); *see also Lorillard v. Pons*, 434 U.S. 575, 581 (1978); Scalia & Garner, *Reading Law* 323 ("[W]hen a statute uses the very same terminology as an earlier statute—

especially in the very same field . . . it is reasonable to believe that the terminology bears a consistent meaning.").

The 1954 Uniform Disposition of Unclaimed Property Act (the "1954 Uniform Act") was written in order to fill the need for comprehensive unclaimed property legislation. 1954 Uniform Act, Prefatory Note, at 136. Section 2 of the 1954 Act states that covered instruments include "[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, by way of illustration but not of limitation, certificates of deposit, drafts, and traveler's checks." *Id.* § 2(c) (emphasis added). The notes to the 1954 Uniform Act are explicit that "Section 2 Parallels Section 300 of the New York Abandoned Property Law." *Id.* § 2 cmt. The New York Abandoned Property Law, 1943 N.Y. Laws 1390, in turn, used the phrase "directly liable" in a manner that had been, in the years prior to the promulgation of the 1954 Uniform Act, consistently interpreted (in a series of New York Attorney General opinions) to mean "ultimately liable." *See 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 if the instrument at issue under the New York law was a draft, the drawer was considered "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. In 1966, the Uniform Law Commission published the 1966 Uniform Act, which revised Section 2 of the 1954 Uniform Act to cover "[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 or business association is directly liable*, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." 1966 Uniform Act § 2(c) (emphasis added). Moreover, the definitions of "banking organization," "business association," and "financial organization" contained within the FDA precisely mirror the definitions of those very same terms contained within the 1966 Uniform Act. *Compare* 12 U.S.C. § 2502 *and* 1966 Uniform Act § 1(a)–(c).

Absent an indication of contrary intent, Congress's use of nearly identical language in the FDA is strong evidence that "directly liable" was intended to be interpreted as it was understood under the 1966 Uniform Act. This is especially so because the FDA and the 1966 Uniform Act both relate to the escheatment of unclaimed property. And, the legislative history of the FDA supports (if somewhat obliquely), rather than contradicts, the implication that Congress intended that "directly liable" be interpreted as in the 1966 Uniform Act. *See* S. Rep. No. 93-505, at 1 (1973) (describing the FDA as "designed to assure a more equitable distribution among the various States of the proceeds of abandoned money orders, traveler's checks or other similar written instruments on which a

banking organization, other financial institution, or other business organization, is directly liable *through its having sold said instrument*") (emphasis added).

Delaware's arguments as to why Congress should not be understood to have intended "directly liable" to carry the meaning it had in the 1966 Uniform Act are not persuasive. First, there is no basis for Delaware's argument that Congress cannot incorporate the meaning of a term used in statutory draft prepared for use as a uniform law by a private organization, unless it has become a "law." Delaware cites no authority for this proposition, nor does it make any logical sense.[35] In any event, the 1966 Uniform Act was "law" at the time the FDA was enacted by Congress, having been adopted by several States.

Second, Delaware is incorrect in stating that there is "no evidence that Congress was even aware of the 1966 [Uniform Act]." Pl.'s Opp. Br. 34. The fact that, in drafting the FDA, Congress was dealing with the same subject as covered by the 1966 Uniform Act, escheatment of unclaimed property, coupled with Congress's adoption of word patterns precisely identical with those found in the 1966 Uniform Act, strongly suggests that Congress *was* aware of the terms of the earlier Uniform Act. Without such awareness, it would be an

[35] Indeed, Delaware's position is difficult to square with its argument that the correct interpretation of "directly liable" can be derived from the UCC, which is a uniform act published by a private organization.

extraordinary coincidence for the later act to adhere so precisely to verbal formulations of the earlier act. This is evidence of Congress's awareness.

Third, Delaware argues that the Defendant States' proposed construction of "directly liable" creates surplusage by rendering the word "directly" redundant. In fact, the New York Attorney General opinions regarding the meaning of "directly liable" as used in the New York Unclaimed Property Law (which parallels the 1954 Uniform Act) clarify that the word "directly" is used in contemplation of a distinction between the "direct" liability of the drawer holding the amount owed for payment on a draft and the *contractual* liability owed from the drawee 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.

Once again, Delaware's theory regarding the meaning of the term "directly liable" is difficult to square with the explicit purpose of the FDA. Under the construction proposed by Delaware and its expert, the only common written instrument that would be covered under the FDA as a Similar Instrument is a cashier's check, because, under the UCC, a bank's liability on a cashier's check is unconditional. *See* Mann Report ¶ 28; 2017 UCC § 3-412. Delaware provides no explanation as to why Congress would have chosen to target (in a highly indirect manner) cashier's checks, while excluding all other manner of "similar" instruments that share the characteristics that motivated enactment of the FDA. Ultimately, Delaware has not provided a sufficient basis to ignore the

strong evidence that Congress incorporated the established meaning of "directly liable" from the 1966 Uniform Act.

Even if I were not persuaded that Congress incorporated the meaning of "directly liable" from the earlier Uniform Act, Delaware's proposed construction would not be persuasive. This is because the overall structure of § 2503 also seriously undermines Delaware's argument that "directly liable" means "unconditionally liable." Neither a traveler's check nor a money order is an instrument on which the issuer is unconditionally liable. Consequently, it makes no sense at all to treat "directly liable" as equivalent to "unconditionally liable" *unless* the FDA's "directly liable" restriction is *not* intended to apply to either money orders or traveler's checks. That is, if unconditional liability of "a banking or financial organization or a business association" is a requirement applicable to "money orders" or "traveler's checks," then the FDA would largely be a nullity, because it would never cover the two types of instruments it is explicitly intended to address.

Delaware anticipates this issue by arguing that the syntactic structure of § 2503's opening clause[36] compels the conclusion that the "directly liable" restriction "only limits the immediately preceding term 'other similar written

[36] "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.

instrument (other than a third party bank check)' and does not limit the two prior terms, 'money order' or 'traveler's check.'" Pl.'s Br. 24. Delaware reaches this conclusion by relying on "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (citing 2A N. Singer, Sutherland on Statutory Construction § 47.33, p. 369 (6th rev. ed. 2000)).[37]

It is true that the absence of a comma between "similar written instrument (other than a third party bank check)" and "on which a banking or financial organization or a business association is directly liable," lends support to Delaware's contention that the "directly liable" limitation applies only to "other similar written instruments." *See Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013). As a result, if the first clause of § 2503 existed in isolation, Delaware's argument would make good sense. But that clause does not exist in a vacuum — it interacts with the three numbered subsections that follow, which describe the priority rules for the instruments described in the opening clause. *See* 12 U.S.C. § 2503(1)–(3). Each of these subsections begins with the clause, "if the books and records of *such banking or*

[37] The Defendant States take no position on whether the "directly liable" limitation applies only to "other similar instruments" or all of the instruments listed in § 2503. Tr. March 10, 2021, at 48.

financial organization or business association" — language that precisely mirrors the opening clause's use of the phrase "on which a *banking or financial organization or a business association* is directly liable" *Id.* (emphases added).

The subsection of § 2503 that applies to a given sum covered by the FDA is determined by looking to what, precisely, "the books and records of *such* banking or financial organization or business association show." *Id.* (emphasis added). By use of the word "such," these subsections refer back to the opening clause's reference to "a banking or financial organization or a business association," a phrase that is used *only* in the context of the "directly liable" limitation. Section 2503 describes no other "banking or financial organization or . . . business association" to which the word "such" could refer. Consequently, if the "directly liable" limitation does not apply to "money orders" or "traveler's checks" — as Delaware contends — there would be no basis on which to determine which subsection of the statute applies to a sum payable on a "money order" or "traveler's check," because the term "such banking or financial organization or business association" would have no meaning at all. Read in this manner, the FDA would direct the disposition by escheat of "other similar written instruments," but would be a nullity with respect to "money orders" and "traveler's checks." This cannot be what Congress intended. Thus, the text and structure of the FDA make clear that the "directly liable" limitation applies to "money orders" and "traveler's checks," as well as "other similar written

instruments," further undermining Delaware's argument that "directly liable" means unconditionally liable.

Because Moneygram is ultimately liable on all Disputed Instruments, I conclude that they are instruments "on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503.

3. Whether the Disputed Instruments are "Third Party Bank Checks"

Even if otherwise covered, a "similar written instrument" is excluded from the scope of the FDA if it is "a third party bank check." *Id.* The history of the phrase's inclusion in the FDA is more clear than its meaning. While the bill was in committee, the General Counsel of Treasury sent the committee chairman a letter stating that "the language of the bill is broader than intended," and suggested that it could be interpreted to cover "third party payment bank checks." *See* S. Rep. No. 93-505, at 5. Treasury recommended expressly excluding "third party payment bank checks," the committee adopted this "technical suggestion[]," *id.* at 6, and the final bill was enacted containing an exception for "third party bank checks," *see* 12 U.S.C. § 2503. It is unclear why the final language of the exclusion differs from the language suggested by Treasury, but there is no evidence to suggest that the change of wording was intended to exclude anything other than what Treasury sought to exclude.

Both "third party bank check" and "third party payment bank check" are obscure terms with no established legal meaning. The parties offer three

possible interpretations of the meaning of "third party bank check," as used in the FDA.

Delaware argues that "third party bank check" means a bank check that is offered through a third party, and that the Disputed Instruments — which are "a means for banks to outsource their bank check offerings" — fit this description. Pl.'s Br. 37–38.[38] This construction is not persuasive because neither the text nor legislative history of the FDA suggests that Congress considered the difference between bank checks offered by third parties and bank checks issued directly by banks to be material to the purposes of the FDA. Delaware provides no explanation as to why Congress (or Treasury) would have considered it desirable to exclude bank checks offered by third parties from coverage. Indeed, Delaware's own expert did not endorse this definition of "third party bank check." *See* Mann Report ¶¶ 65–69. In fact, when asked at his deposition whether he had studied "any Moneygram instrument that could be a third-party bank check," Delaware's expert responded that he "didn't study any products

[38] Delaware's expert suggests that a "third party bank check" could mean a bill payment check that a bank issues on behalf of its customers. Mann Report ¶¶ 69–70. Delaware has not argued that this is the correct construction of the term, likely because it would not exclude the Disputed Instruments from the scope of the FDA. Delaware's expert also comments that "third party bank check" could, possibly, mean a traditional teller's check, but he notes numerous reasons why this definition is unlikely. *Id.* ¶ 68.

that [struck him] as fitting with any ordinary sense of what those terms should mean." Defs.' App. 1010.

The Defendant States argue that the most natural meaning of "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." Defs.' Br. 41. But, as Delaware notes, this definition would be a nullity in operation. Once a check is in the marketplace, it is impossible to determine whether it has been "indorsed to a third party" without looking at the instrument itself, and an abandoned check — one which has not been presented for payment — under almost all circumstances is not available for inspection to determine whether it has been indorsed to a third party. It is generally impossible to know this of an abandoned check. Thus, under the Defendant States' primary proposed construction, the statutory exclusion of a "third party bank check" would virtually never apply. Interpreting a statutory clause as a nullity should be avoided absent evidence that this was indeed the construction intended. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Given the history of this exclusion, it appears most likely that Congress intended to exclude what Treasury intended to have excluded, and it seems

highly unlikely that Treasury — which was expert in the field — would seek the addition to the statute of a functionally meaningless term.[39]

As a secondary position, the Defendant States argue that a "third party bank check" is an ordinary personal check drawn on a checking account. Defs.' Br. at 43. While none of the definitions suggested by the parties are completely satisfying, I conclude that Defendants' secondary construction of "third party bank check" is the most likely to be the meaning intended by Congress.

As the Defendant States and Pennsylvania's expert note, shortly before the FDA was enacted, federal regulators had engaged in a review of the "existing financial and regulatory structure" related to the private financial system. *See* Expert Report on Behalf of Pennsylvania, Dkt. No. 67, at 22 ("Clark Report") (quoting Robert E. Knight, *The Hunt Commission: An Appraisal*, Wall St. J., July 3, 1972, at 4). In 1970, President Nixon organized the Commission on Financial Structure and Regulation (popularly known as the "Hunt

[39] Further, the Defendant States give no explanation of why Congress or Treasury would have sought such an exclusion. They rely instead primarily on the fact that their proposed definition was adopted by the only court that appears to have previously considered the term "third party bank check." *See United States v. Thwaites Place Assocs.*, 548 F. Supp. 94 (S.D.N.Y. 1982). But the Defendant States' reliance on *Thwaites Place* is not persuasive. That court used the term in passing, without discussing its meaning or considering ways that the phrase might be understood. *Id.* at 96. *Thwaites Place*, furthermore, did not concern the issue of unclaimed property, much less the applicability of the FDA. *Id.* at 95. In short, that opinion casts little or no light on what Congress intended in using the term "third party bank check."

Commission") and tasked it with making recommendations to improve the nation's financial institutions. Knight, *The Hunt Commission*, at 4. Treasury was, from the Commission's inception, involved in identifying "issues deserving Commission attention and the approaches and methodology the Commission might use in dealing with them." *The Report of the President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972).

The Hunt Commission's final report (published in December 1972) used the term "third party payment services" to describe "any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party or to the account of a third party upon the negotiable or non-negotiable order of the depositor." *Id.* at 23 & n.1. The Report was explicit that "[c]hecking accounts are one type of third party payment service." *Id.* at n.1. Additionally, a prominent contemporary treatise demonstrates that, at the time the FDA was enacted, the term "bank check" could be used to refer generally to a check, including those drawn on a personal or business checking account at a bank. *See* Henry J. Bailey, *The Law of Bank Checks* 1 n.1 (4th ed. 1969) ("The term 'bank check' as used in this volume is, unless the context specifies otherwise, interchangeable with the term 'check' and does not necessarily denote a direct bank obligation, such as a cashier's check, certified check, or bank draft.").

The Hunt Commission's contemporaneous use of the term "third party payment services" is probative of the meaning of the term "third party bank

check," as used in the FDA (especially in light of the fact that Treasury's recommendation to Congress was that the FDA exclude "third party *payment* bank checks," S. Rep. No. 93-505, at 5 (emphasis added)), and supports the Defendants' argument that "third party bank check" means an ordinary check drawn on a checking account. Additionally, this definition is consistent with the evidence that Congress intended the FDA to cover prepaid instruments (or at least certain prepaid instruments) but lacked any apparent intent to bring non-prepaid instruments drawn on a checking account (which would carry a less significant risk of abandonment) within the scope of the FDA. *See id.*, at 6; 12 U.S.C. § 2501. It would, therefore, be entirely consistent with Congress's stated purposes in enacting the FDA to exclude from coverage non-prepaid checks drawn on checking accounts, while extending coverage to certain categories of prepaid instruments.

Delaware counters that Congress should not be presumed to have adopted this meaning of "third party bank check" because no member of Congress served on the Hunt Commission, which "raises questions about the extent to which Congress had any awareness of the analysis that was undertaken in the 1970s." Pl.'s Opp. Br. 50. This argument is misguided for two reasons. First, there is substantial evidence that Congress was aware of the Report of the Hunt Commission. Indeed, the Senate Committee on Banking, Housing, and Urban Affairs — the same committee that reported on the FDA before it was enacted —

issued a committee print of the Hunt Report (including the recommendations of Treasury that stemmed from the Report) in August 1973. *See* S. Comm. on Banking, Hous., and Urb. Affs., 93rd Cong., Rep. of the President's Comm'n on Fin. Structure and Regul. (Comm. Print 1972). Second, the legislative history of the FDA conclusively demonstrates that the exclusion of "third party bank checks" was inserted at the recommendation of Treasury seemingly with little additional discussion by Congress. *See* S. Rep. No. 93-505, at 5. Consequently, what Treasury intended the term to mean is probative of Congress's intent, and Treasury was indisputably involved in the Hunt Commission. *See The Report of the President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972).

Delaware is correct that the Hunt Commission's use of the term "third party payment services" is somewhat removed from the FDA's exclusion of "third party bank checks." The legislative history of the FDA demonstrates, however, that the exclusion originally recommended by Treasury was for "third party payment bank checks." S. Rep. No. 93-505, at 5. This significantly narrows the inferential leap required by the Defendants' proposed construction. It is nonetheless true that "third party payment systems" — the term used by the Hunt Commission — is different than "third party payment bank checks" — the term suggested by Treasury. In this regard, the contemporary evidence relied on by the Defendant to support their construction is somewhat imperfect. But

Delaware has not provided *any* evidence contemporaneous to the enactment of the FDA to support its proposed construction, and its definition is also substantially less consistent with the purposes and legislative history of the Act. Thus, I conclude that the construction of "third party bank check" proposed by the Defendant States is the most likely to have been that which was intended by Congress.

The Disputed Instruments are not ordinary checks drawn on a checking account.[40] Rather, they are prepaid by the purchaser at the time of purchase; by virtue of being prepaid, payment upon presentment by the payee is not conditional on the purchaser's maintenance of sufficient funds in a deposit account at the drawee bank. Ordinary checks drawn on a checking account, on the other hand, are not typically prepaid, and are subject to dishonor if the drawer does not, at the time of presentment, have sufficient funds in a checking account at the drawee bank to cover the amount specified on the check. *See* Clark Report 3–4. In layman's terms, ordinary checks drawn on a checking account can bounce. Relatedly, the Disputed Instruments are not drawn upon the individual checking account of the purchaser; they are instead drawn upon the bank designated as drawee on the face of the instrument, to whom Moneygram has a contractual obligation to repay for clearing the instrument.

[40] Indeed, Delaware does not argue that the Disputed Instruments fall within the Defendants' construction of "third party bank check."

Further, an ordinary check drawn on a checking account is issued (or "drawn") by the individual or entity that uses the check to transmit funds to the order of a payee. *See* Clark Report 3. The Disputed Instruments, on the other hand, are issued by Moneygram and sold to a purchaser who determines to whom the instrument will be made payable. Because the Disputed Instruments are not ordinary checks drawn on a checking account, they are, therefore, not excluded from the scope of the FDA's priority rules as "third party bank checks."

In short, while neither side has overwhelmingly persuasive arguments as to the meaning of "third party bank check," the Defendants' interpretation is more persuasive than Delaware's.[41]

III. Whether the Defendant States Have the Power to Escheat the Disputed Instruments

Even if a written instrument is covered by the FDA and the issuer possesses a record of the State in which it was purchased, the State of purchase is entitled to take custody of the proceeds of that instrument only "to the extent of that State's power [to do so] under its own laws." 12 U.S.C. § 2503(1).

[41] The 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 similar instruments," that it could matter whether they are "third party bank checks."

Delaware contends that at least ten of the Defendant States,[42] while having the power under their own laws to escheat money orders, do not have the power to escheat instruments that are "similar" to money orders without being money orders. Thus, according to Delaware's argument, the right of those ten States to escheat the Disputed Instruments depends on whether the Disputed Instruments *are* money orders.[43] If the FDA applies only because the instruments are "other similar written instruments" without being "money orders," those States do not qualify to escheat under § 2503(1) because their own laws, as interpreted by Delaware, do not allow them to escheat the proceeds of such instruments. Having considered the parties' arguments, I conclude that all ten Defendant States whose laws are in dispute have the power to escheat the

[42] Alabama, Arizona, Arkansas, Indiana, Iowa, Kansas, Montana, Nevada, Texas, and West Virginia.

[43] Delaware does not contest that each of the Defendant States is empowered under its own laws to take possession of abandoned money orders. *See* Pl.'s Opp. Br. 61.

Disputed Instruments, even assuming that they are covered under the FDA as Similar Instruments, but not as "money orders."[44]

The ten States Delaware claims would not be empowered to escheat Similar Instruments include eight States[45] that have adopted the 1995 version

[44] Pursuant 12 U.S.C. § 2503(3), if the books and records of the issuer of a Covered Instrument show the State in which a Covered Instrument was purchased, but that State does not have the power to escheat under its own laws, then the State where the issuer has its principal place of business is entitled to escheat. Consequently, Moneygram's principal place of business could be material to determining which State is entitled to escheat the proceeds from the purchase of the Disputed Instruments; this is especially so because the FDA does not provide priority rules applicable where neither the State of purchase nor the State where the issuer has its principal place of business have laws allowing them to escheat — the common law framework would presumably apply in this scenario. Unfortunately, the record on summary judgment does not allow me to reach a precise conclusion as to Moneygram's principal place of business, because admissions made by the parties point in multiple directions. In its answer to Pennsylvania's counterclaims, Delaware admitted that Texas is Moneygram's principal place of business. *See* Dkt. No. 11 ¶ 28 & Dkt. No. 18 ¶ 28. But in response to Delaware's statement of undisputed facts, the Defendants admitted that Minnesota is Moneygram's principal place of business. *See* Dkt. No. 78 ¶ 2 & Dkt. No. 98 ¶ 2. The Associate General Counsel of Moneygram's parent company also asserted, via affidavit, that Moneygram has its principal place of business in Minnesota. Dkt. No. 80 (Feinberg Aff. ¶ 3). In any case, it is not necessary to resolve this issue now, because, as discussed more fully below, I conclude that the ten States at issue have the power to escheat the Disputed Instruments, even assuming that they are covered under the FDA as Similar Instruments.

[45] Alabama, Arizona, Arkansas, Indiana, Kansas, Montana, Nevada, and West Virginia.

of the Uniform Unclaimed Property Act (the "1995 Uniform Act"),[46] (the successor to the Uniform Disposition of Unclaimed Property Act and Revised Uniform Disposition of Unclaimed Property Act, *see* 1995 Uniform Act, Prefatory Note (Unif. Law. Comm'n 1995)), plus Iowa, which has partially adopted the 1981 version of the Uniform Unclaimed Property Act, *see* Iowa Code Ann. §§ 556.1 *et seq*, and Texas, which has its own unclaimed property law, *see* Texas Prop. Code §§ 72.101 *et seq*.[47]

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[46] The relevant State laws are Ala. Code Ann. §§ 35-12-70 *et seq*.; Ari. Rev. Stat. Ann. §§ 44-301 *et seq*.; Ark. Code Ann §§ 18-28-201 *et seq*.; Ind. Code Ann. §§ 32-34-1 *et seq*.; Kan. Stat. Ann. §§ 58-3934 *et seq*.; Mont. Code Ann. §§ 70-9-801 *et seq*.; W. Va. Code Ann. §§ 36-8-1 *et seq*. Nevada partially adopted the 2016 Revised Uniform Unclaimed Property Act on July 1, 2019, but previously had adopted the 1995 Uniform Act. *See* 2019 Nev. Laws Ch. 501, S.B. No. 44; Nev. Rev. Stat. Ann. §§ 120A.010 *et seq*. The changes made to Nevada's law by the partial adoption of the 2016 Uniform Act are not relevant here except where otherwise noted.

[47] Because the question whether these ten States have the power to take possession of Official Checks is purely a question of their own State law, the question could be certified to the high court of each of the relevant States for adjudication. *See, e.g.*, *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (observing that the certification of controlling questions of State law to the appropriate State courts, while discretionary, can "save time, energy, and resources and helps build a cooperative judicial federalism."). Nonetheless, various factors weigh forcefully against certification, including the substantial delays and costs that would result from these additional litigations, the low likelihood on the present facts that any of the State courts would rule against the State's power under its own law to escheat funds to which it is entitled by federal law, and the fact that the issue will have no importance for the resolution of the litigation unless the Supreme Court rules that instruments in question are subject to the FDA only as "other similar instruments," and not as "money orders." For these reasons, and in light of the fact that no party has requested or suggested certification, I do not recommend certification.

I begin by addressing the laws of the eight States that have adopted the 1995 Uniform Act (the "Eight States"). The structure of the 1995 Uniform Act is illustrated by Arkansas' act: one section defines the dormancy periods for varying types of property, following which property is presumed abandoned, *see* Ark. Code Ann. § 28-202; a second section describes the circumstances in which property presumed to be abandoned is subject to the custody of the State, *see id.* § 18-28-204; and other sections proscribe rules for reporting and delivering abandoned property to the State, *see id.* §§ 18-28-207, 18-28-208; *see also* 1995 Uniform Act §§ 2, 4, 18, 20. A section titled "Rules for Taking Custody"[48] provides the circumstances in which the State may take custody of property presumed to be abandoned. Ark. Code Ann. § 18-28-204. This provision tracks the common law framework established by the Supreme Court in *Texas v. New Jersey* and *Pennsylvania v. New York*, as well as the framework established by the FDA. *See* 1995 Uniform Act § 4 cmt. It provides, *inter alia*, that the State may take custody of property presumed abandoned where:

> 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.

[48] Certain of the Eight States' laws label this provision by a different name, *see, e.g.*, Ind. Code Ann. § 32-34-1-21 ("Property Subject to Custody of State as Unclaimed Property"), without significant change in its contents.

Ark. Code Ann. § 18-28-204(7); *see also* 1995 Uniform Act § 4(7). The comments to the 1995 Uniform Act state that this provision "states the rule adopted by Congress in [the FDA]." 1995 Uniform Act § 4 cmt.

Delaware argues that the provision captioned "Rules for Taking Custody" does not allow enacting States to take custody of sums paid to purchase instruments covered under the FDA as Similar Instruments, because the "Rules for Taking Custody" designate only "traveler's checks or money orders" without including "other similar written instruments." *Id.* Delaware's argument is essentially that, by including "traveler's checks" and "money orders" within the "Rules for Taking Custody," but choosing not to include "other similar written instruments" amongst the forms of property of which a State may take custody, the 1995 Uniform Act should be read to exclude the latter. This argument functionally relies on the canon of statutory construction that states that the expression of one thing implies the exclusion of others. *See Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

The Defendant States respond that, even if the Eight States' laws do not explicitly identify instruments "similar" to money orders and traveler's checks within the "Rules for Taking Custody," their laws should be interpreted to encompass such instruments, in part because, while expressly naming "money orders" and "traveler's checks" in the statutory text, they state in commentary

that their rule "states the rule adopted by Congress in [the FDA]," 1995 Uniform Act § 4 cmt., and in part because various other provisions of the 1995 Uniform Act (as adopted by those States) make clear the Act's intention to cover "similar instruments." *See* Defs. Reply Br. 21. I find that the Defendant States have the better of the argument.

If, in authorizing escheatment of "money orders or traveler's checks," the rule of the Uniform Act "states the rule adopted by Congress in [the FDA]," as asserted in the commentary, then, the Defendant States argue, the Act authorizes escheatment of the same instruments as are covered by the FDA, including those therein identified as "other similar written instruments." In addition, the official notes to the 1995 Uniform Act state that "Section 2 continues the general proposition that all intangible property is within the coverage of this Act." *Id.* § 2 cmt. If the 1995 Uniform Act excluded authority to escheat instruments that are "similar" to money orders and traveler's checks, then, contrary to its stated intention, the 1995 Uniform Act would not cover "all intangible property."

Furthermore, text as well as comments to the 1995 Uniform Act make express references to "similar instruments," in contexts that give strong support to interpreting the Act's "Rules for Taking Custody" to mean that "similar instruments" are covered. These textual provisions would make no sense if the Act did not allow enacting States to take custody of similar instruments. For

example, in providing for claims by other States to property that has already been escheated to the enacting State, *see, e.g.*, Ark. Code Ann. § 18-28-214, the Act describes one form of such already escheated property as "a sum payable on a traveler's check, money order, *or similar instrument* that was purchased in the other state and delivered into the custody of this state under [the provision of the "Rules for Taking Custody" that relates to money orders and traveler's checks]." *Id.* at § 18-28-214(a)(5) (emphasis added); *see also* 1995 Uniform Law § 14 (same). That provision of the same Act manifests an understanding that the Act authorizes taking possession of abandoned instruments that are "similar" to money orders and traveler's checks. The reference to "similar instruments" as previously escheated property would be a nullity, serving no purpose, if the statute did not authorize escheatment of similar instruments.

Likewise, the 1995 Uniform Act contains a provision requiring record retention by "[a] business association or financial organization that sells, issues, or provides to others for sale or issue in this state, traveler's checks, money orders, *or similar instruments* other than third-party bank checks, on which the business association or financial organization is directly liable." *See, e.g.*, Ark. Code Ann. § 18-28-221(b) (emphasis added); *see also* 1995 Uniform Act § 21 (same). The tracking of the FDA's exclusion of certain "third party bank checks" makes clear an intention to conform to the provision by which the enacting State authorizes escheat of those instruments that the FDA allows the State to

escheat. Furthermore, there would be little reason to require sellers of instruments to maintain records pertinent to the escheat for instruments not subject to escheat.

And another provision detailing the enacting States' obligation to notify apparent owners of abandoned property that has escheated to the enacting State also uses the phrase "a traveler's check, money order, *or similar instrument*." Ala. Code. Ann. § 35-12-78(c) (emphasis added); *see also* 1995 Uniform Act § 9 (same).[49] Once again, unless the authorization set forth in the "Rules for Taking Custody" to escheat "money orders" and "traveler's checks" also authorized the escheatment of "similar instruments," the inclusion of these words in the notification requirement would be a meaningless nullity. It would refer to a circumstance that could not have occurred.

Finally, Delaware offers no explanation why any of the Eight States enacting the 1995 Uniform Act, or the Act's drafters, would have intended the enacting States to forgo the right to escheat presumptively abandoned Similar Instruments consigned to them by the FDA. To the contrary, taken together in the context of an Act implementing the FDA's authorization to the enacting States to take possession of specified categories of abandoned property, the 1995 Act gives strong evidence of an intention to function in harmony with the FDA

[49] Arkansas has not enacted this provision. *See* Ark. Code. Ann. § 18-28-209.

by allowing enacting States to take custody of all property that the FDA allocated to them.

For these reasons, Delaware's implicit reliance on the *expressio unius* canon has little persuasive force. As with most canons, this one applies only when its application would be sensible. *See NLRB v. S.W. Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (*expressio unius* "applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.") (internal quotation marks, citations, and alterations omitted). A leading treatise on statutory interpretation makes the cautionary comment that, "[v]irtually all the authorities who discuss the negative implication [*expressio unius*] canon emphasize that it must be applied with great caution, since its application depends so much on context." Scalia & Garner, *Reading Law* 107. The context here strongly suggests that the 1995 Uniform Act intended the enacting States to authorize the escheat of instruments described in the FDA as "other similar instruments." I reject Delaware's argument that the 1995 Uniform Act's specification in the Rules for Taking Custody of money orders and traveler's checks without explicit mention of similar instruments should be interpreted to mean the Act's authorization to take custody deviates from the FDA's

authorization by not applying to instruments "similar" to money orders and traveler's checks.[50]

I conclude that the language of the 1995 Uniform Act's "Rules for Taking Custody," as adopted in the unclaimed property laws of the Eight States, should be construed, in this context, to authorize taking custody of instruments covered by the Similar Instruments clause of the FDA.[51]

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[50] Delaware seems to presume that an instrument treated as a Similar Instrument under the FDA necessarily cannot be a "money order" for the purposes of any individual State's unclaimed property law. This is incorrect. *See Yates v. United States*, 574 U.S. 528, 537–38 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."). An instrument could very well be covered under the FDA as a Similar Instrument but be treated under State law as a money order.

[51] Contrary to the parties' arguments, *Travelers Express Co. v. Minnesota*, 506 F. Supp. 1379, 1381 (D. Minn. 1981), does not illuminate the present dispute in any significant way. The case demonstrates that in 1981 some States either did not have an unclaimed property law covering intangible property or had a law that did not cover money orders. *Travelers*, 506 F. Supp. at 1381. The case says nothing about *why* the other States' legislatures had not passed unclaimed property laws, or why those laws did not cover money orders. *Id.* The Defendant's argument — that the case stands for the general proposition that a catchall provision treating unenumerated forms of property as abandoned after a certain period of dormancy necessarily provides a State the power to take custody of any form of property presumed abandoned — is also misplaced. The Minnesota law at issue in *Travelers* did not contain Rules for Taking Custody. *See* Minn. Laws 1969, ch. 725, H.F. No. 2618, amended by Minn. Laws 1977, ch. 137, S.F. No. 616. In the absence of such Rules, the *Travelers* court was able to presume that any property deemed abandoned under the Minnesota law was subject to the custody of the State. *See Travelers*, 506 F. Supp. at 1386. The same presumption would not apply in the context of the 1995 Uniform Act.

As for Iowa and Texas, whose escheatment laws differ from those of the Eight States in that they have not adopted 1995 Uniform Act, Delaware makes the same argument based on the fact that their laws, like the Uniform Act, provide for the State to take custody of "money orders and traveler's checks," without adding "similar" instruments. The enactments of Iowa and Texas provide substantially less evidence of legislative intent to authorize the escheat of Similar Instruments than does the 1995 Uniform Act. While it is, consequently, a closer question, I conclude that the laws of these two States sufficiently share the features of the Uniform Act noted above to justify interpreting them as similarly providing for escheatment of instruments over which the FDA would grant them priority to escheat, and thus providing for the escheatment of Moneygram's Agent Checks and Teller's Checks, regardless of whether the FDA covers those instruments under the label "money order" or "other written similar instrument."

The section of the Iowa law that explicitly covers traveler's checks and money orders, § 556.2A, asserts Iowa's entitlement to take custody of such abandoned instruments only in precise accordance with the FDA's priority rules, supporting the inference Iowa passed its statute with the intention of making complete use of the authority granted by the FDA to take possession of unclaimed instruments. Iowa Code Ann. § 556.2A. Additionally, Iowa's provision setting forth the requirements for reporting of unclaimed property requires the

funds holder to report to the State treasurer the name and last-known address of the owner of the unclaimed property at issue "[e]xcept with respect to traveler's checks, money orders, cashier's checks, official checks, *or similar instruments*." *Id.* § 556.11 (emphasis added). Explicitly applying this exclusion to "similar instruments" would be unnecessary if such instruments were not subject to Iowa's taking custody (thus necessitating their inclusion in unclaimed property reports).

The Texas law operates in a similar manner. The pertinent section, Tex. Prop. Code Ann. § 72.102(a),[52] for example, precisely follows the priority rules

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[52] This provision of the Texas law states:

> (a) A traveler's check or money order is not presumed to be abandoned under this chapter unless:
>
> (1) the records of the issuer of the check or money order indicate that it was purchased in this state;
>
> (2) the issuer's principal place of business is in this state and the issuer's records do not indicate the state in which the check or money order was purchased; or
>
> (3) the issuer's principal place of business is in this state, the issuer's records indicate that the check or money order was purchased in another state, and the laws of that state do not provide for the escheat or custodial taking of the check or money order.

set forth in the FDA, again supporting the inference that Texas passed its statute with the intention to authorize the escheat of unclaimed instruments to the full extent permitted under the FDA. And, like the 1995 Uniform Act, the Texas statute provides that, under appropriate circumstances, another State may make a claim to recover property seized by Texas under its unclaimed property law if "the property is the sum payable on a traveler's check, money order, *or other similar instrument* that was subjected to custody by this state." *Id.* § 74.508(a)(5) (emphasis added). It is extraordinarily unlikely that the Texas legislature would have included instruments similar to money orders and traveler's checks in this passage pertaining to escheated instruments if those instruments were not subject to escheat. The reference to a "similar instrument," furthermore, would have no function and make no sense if such an instrument had not been subject to Texas's taking custody.

Finally, as with the Eight States, Delaware offers no reason why Iowa or Texas would have intended its law to be interpreted as not authorizing it to escheat these forms of property in the circumstances in which the FDA explicitly

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Subject to the above-quoted language, a money order is treated as abandoned following three years of dormancy. Tex. Prop. Code Ann. § 72.102(c)(1). A subsequent provision of the Texas law requires, *inter alia*, that each property holder "who on March 1 holds property that is presumed abandoned under Chapter 72, 73, or 75 shall deliver the property to the comptroller on or before the following July 1." *Id.* § 74.301(a).

grants it priority. Each State's tracking of the FDA's priority provision in its statute bespeaks a clear intention that any ambiguity in its statute be interpreted to confirm its escheatment of instruments consigned to it by the FDA's priority rules.

IV. Whether the Secondary Common Law Rule Should Be Modified As Applied to the Disputed Instruments

Pennsylvania joins in the Defendant States' Motion for Partial Summary Judgment and independently argues that, should the Court determine that the Disputed Instruments are not subject to the priority rules set forth in the FDA, the Court should overrule the secondary rule set forth in *Texas* and declare that "when the address of a purchaser/payee on an unclaimed prepaid financial instrument is unknown, this intangible property shall escheat to the State where the instrument was purchased." Pennsylvania's Br. 3. Pennsylvania's pleadings and briefing on summary judgment are not entirely clear as to whether the State is seeking reconsideration of the secondary common law rule as applied to *all* forms of intangible property or only as applied to the Disputed Instruments. *See* Dkt. No. 11 ¶¶ 116–17; Pennsylvania's Br. 2. During oral argument, however, counsel for Pennsylvania clarified that Pennsylvania is advocating only a change in the common law with respect to the property at issue in this case. *See* Tr. March 10, 2021, at 69–70.

If the Supreme Court accepts the recommendation of this Report ruling that the Disputed Instruments are covered by the FDA, Pennsylvania's claim

and motion for summary judgment will be moot. If the Court so rules, I recommend that it dismiss Pennsylvania's claim for amendment of the *Texas* rule as moot. If the Court rules that the Disputed Instruments are not covered by the FDA, Pennsylvania's claim and Motion for Partial Summary Judgment can be addressed at that time.

CONCLUSION

Having concluded that the Disputed Instruments fall within the scope of the FDA and that the Defendant States each have the power under their own laws to take custody of the proceeds of presumptively abandoned Disputed Instruments purchased in their respective States, I recommend that the Supreme Court grant the motion of the Defendant States for partial summary judgment, deny Delaware's Motion for Partial Summary Judgment, and dismiss as moot Pennsylvania's claim for modification of the secondary common law rule

established in *Texas* as applied to the Disputed Instruments. A proposed decree embodying this recommendation is attached as Appendix A.[53]

Respectfully Submitted,

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Special Master
40 Foley Square, Room 1901
New York, NY 10007
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May 20, 2021

[53] The request of the Defendant States that I establish a schedule for the damages phase of this litigation is DENIED pending further action by the Supreme Court.

APPENDIX A

PROPOSED ORDER

Delaware,

v.

Pennsylvania and Wisconsin,

****

Arkansas, et al.

v.

Delaware,

No. 145 & 146, Original (Consolidated)

ORDER

Upon consideration of the briefs of the parties and amici curiae, and the First Interim Report of Pierre N. Leval, Special Master, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The motion of the State of Delaware for partial summary judgment is DENIED.
2. The motion of the Defendant States for partial summary judgment is GRANTED.
3. The claim of the Commonwealth of Pennsylvania's for modification of the secondary common law rule established in *Texas v. New Jersey*, 379 U.S.

674 (1965), as applied to the Disputed Instruments, is DISMISSED AS MOOT.

4. The Special Master is hereby directed to address the implementation of this Decree and the resolution of disputes relating to any party's entitlement to damages and/or other relief. The Special Master shall submit further Reports to this Court on such matters as may be raised before him or that he may direct the parties to address.