SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*

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

ARKANSAS, *et al.*, *Defendants*

RESPONSE TO DELAWARE'S OBJECTIONS BY DEFENDANTS (NO. 22O146) AND WISCONSIN (NO. 22O145)

Delaware's objections do not warrant making its proposed changes to the Special Master's Draft First Interim Report. Contrary to those objections, the Report correctly identifies a number of concessions by Delaware. It also correctly interprets the terms "money order" and "third party bank check." To dispute the Report's interpretations, Delaware largely recapitulates arguments about these terms that the Special Master has already considered and rejected. For the reasons given below, Defendant States ask the Special Master to overrule all of Delaware's objections.

As instructed, Defendant States will not repeat any arguments the Special Master "recognized and rejected" (*see* Order, Dkt. No. 114), but they do not waive these arguments; instead, they reserve them for later proceedings.

I. The Report correctly identifies various concessions by Delaware.

Delaware first claims that the Report incorrectly attributes to it the concession that the FDA governs MoneyGram Agent Check Money Orders. (Del. Objs. 2; *see* Report 26 n.15, 62 n.34.) But Delaware has admitted that MoneyGram escheats

unclaimed Agent Check Money Orders to the State of purchase, as the FDA requires. (*See* Del. Resp. to Def. States' Statement of Undisputed Material Facts, Dkt. No. 98 ¶ 66.) And Delaware has never alleged that this escheatment is improper. (*See, e.g.*, Proposed Am. Counterclaim, Dkt. No. 23 ¶ 18-22 (alleging that "other companies" wrongfully escheated "unclaimed negotiable instruments" to Defendant States but not discussing Agent Check Money Orders).) Thus, "Delaware effectively concedes" that the FDA governs these instruments. (Report 26 n.15.)

Similarly, Delaware takes issue with the Special Master's conclusion that it "effectively concedes" that the umbrella term "money order" can include even instruments sold exclusively by banks or other financial institutions. (Del. Objs. 2; *see* Report 47.) But the Report supports this conclusion with citations to Delaware's legal arguments and expert evidence—citations that Delaware does not even attempt to rebut. Nor could it rebut them, because Delaware indeed describes Agent Check Money Orders (which are sold only by banks and other financial institutions) as money orders. (*See, e.g.*, Del. Statement of Undisputed Material Facts, Dkt. No. 78 ¶ 6 (describing Agent Check Money Orders as one of "two types of MoneyGram Money Orders"); *id.* ¶ 43 ("There is no legal distinction between an Agent Check Money Order and one purchased from one of MoneyGram's retail agents.").) By so doing, Delaware has conceded that even instruments sold exclusively by banks can be money orders.

Finally, Delaware contests the Report's statement that it has "agree[d]" that the disputed instruments must fall within the scope of the FDA if they are money orders. (Del. Objs. 3; *see* Report 37 & n.26.) Delaware's only support is a citation to an argument it previously made that relates to the phrase "third party bank checks." (Del. Objs. 3; *see* Del. Br. in Opp'n to Def. States' Mot. for Summ. J., Dkt. No. 97 at 48.) The cited argument appears in a portion of Delaware's opposition brief that relates solely to whether MoneyGram Official Checks are "similar written instruments" to money orders and traveler's checks. (*See generally* Dkt. No. 97 at 15-53.) Elsewhere, Delaware's opposition brief distinguishes the category "other similar written instrument[s] (other than a third party bank check)" from money orders. (*See id.* at 9.) At oral argument, Delaware did not argue that the phrase "third party bank checks" in the FDA applies to money orders. (*See, e.g.*, Tr. 11:12-17, 20:18-24, 25:13-22.) The Report correctly concludes that it does not. (Report 81 n.41.)[1] The Report is correct about this concession by Delaware, along with all the others.

[1] The Report states that "the parties are not necessarily correct" in assuming that the FDA covers all money orders, and it cross-references the Report's conclusion that even money orders and traveler's checks must satisfy the direct-liability requirement. (Report 37 n.26; *see id.* at 70-73.) At oral argument, Delaware contested only this premise but did not argue that the "third party bank check" exclusion applies to money orders. (*See* Tr. 11:7-20:3.)

II. The Special Master has already rejected Delaware's arguments about the definition of "money order."

Delaware's objections to the Report's definition of the term "money order" as used in the FDA boil down to the complaint that too many different specific categories of instrument can potentially fall within the broad category "money order." (*See, e.g.*, Del. Objs. 3 (listing seven different specific categories); *id.* at 6 (listing, again, those same seven categories); *id.* at 8-12 (focusing on one of those seven categories).) Because this objection recapitulates an argument from Delaware's summary-judgment briefing, Defendant States have already addressed it. (*See* Def. States' Reply in Supp. of Mot. for Summ. J., Dkt. No. 104 at 4; *see also id.* at 8 (addressing same argument in context of interpreting "other similar written instrument").)

More importantly, the Special Master has already rejected it. The Report discusses at length Delaware's arguments about the breadth of the term "money order." (*See* Report 50-55.) Yet Delaware's objections mostly ignore this part of the Report's analysis, not even attempting to explain why it believes this analysis is wrong.

Indeed, the current Uniform Commercial Code, on which Delaware relies in other contexts, supports the Report's definition of "money order." Because money orders "vary in form and their form determines how they are treated," it is unsurprising that a variety of specific categories of instruments can at times be classified as money orders. UCC 3-104 cmt. 4. Though this particular UCC language postdates

the FDA, the Report also discusses contemporary sources that support this broad definition of "money order." (*See* Report 39-41 (summarizing these sources).)

In any event, Delaware is incorrect that the Report "sweeps" all cashier's checks into the definition of money order. (Del. Objs. 3, 8-12.) Cashiers' checks, which are issued by a bank and drawn on itself, are used in many ways. They are not at issue in this case, and the Report need not specify, and has not specified, in what situations cashier's checks might fall within the definition of "money order."

Separately, Delaware argues that entities who are not parties to this lawsuit have taken positions in unrelated litigation that undermine the Report's analysis. (*See id.* at 8-12.) But Delaware points only to allegations from two complaints—just one sentence from each (*see id.* at 9)—and a series of quotations from one brief written by one party in one of those other cases (*id.* at 10-12). As Delaware admits, these quotations "parallel, in large part, the arguments that Delaware made in the present case." (*Id.* at 12.) Which is to say, these quotations parallel arguments that the Special Master has already considered and rejected.[2]

[2] Contrary to the suggestions in Delaware's footnote, Ohio is not a party to any of those cases, and no party in those cases—whether JPMorgan Chase or anyone else—purports to represent Ohio's interests or legal positions. Delaware gives no support for imputing to Ohio the legal arguments made by a private entity in an unrelated case, nor for asserting that Ohio accepts unclaimed cashier's checks based upon the *Texas* priority rules. Ohio has a specific reporting rule for unclaimed cashier's checks that differs from the common law. *See* Ohio Rev. Code 169.02(F). Delaware also does not explain why, if it thought JPMorgan Chase's April 2020 letter raised issues relevant to this case, it "remained markedly silent" on the topic until now—

Beyond relitigating which specific instruments can also fall within the general category of "money order," Delaware faults the Report for citing UCC language added in 1991 stating that traveler's checks may take the form of a draft or a note. (*Id.* at 5-6.) But Delaware does not argue that this language was an innovation in how traveler's checks were understood to operate. Indeed, the Report already states that pre-1991 sources recognized that traveler's checks, at times, took the form of notes. (Report 52.)

Regarding Delaware's objection to the Report's discussion of historical money orders (Del. Objs. 7-8), the Report already explains why the Western Union evidence in the record does not help Delaware's arguments. (*See* Report 43 n.29 (highlighting distinction between MoneyGram money orders and Western Union money orders).)

Delaware closes this section of its objections by simply reiterating arguments from its prior briefing. (*See* Del. Objs. 7-8.) Defendant States have already explained why the definition of "money order" does not turn on the points that Delaware recapitulates here. (*See* Def. States' Opp'n to Del.'s Mot. for Summ. J., Dkt. No. 100 at 5-10, 15.) And the Report already correctly rejects these points. (*See*,

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saying nothing for over year—despite the opportunity to raise this issue at or before oral argument. (Del. Objs. 10 n.3.)

e.g., Report 44.) The Special Master should overrule Delaware's objections to the Report's definition of "money order."

III. Repeating arguments from prior briefing, Delaware continues to propose a definition of "third party bank check" that even its expert rejected.

Delaware's objections reiterate its proposed definition of "third party bank check," which the Special Master has already considered and rejected. In fact, as the Report highlights, Delaware's own retained expert "did not endorse this definition of 'third party bank check.'" (Report 74.) Delaware does not explain why the Special Master should ignore that expert's opinion—particularly given his concession that no MoneyGram products at issue "fit[] with any ordinary sense of what [third party bank check] should mean." (Report 75 (quoting Defs.' App. 1010).) There is no need to revisit this argument.

Finally, Delaware suggests that the Special Master should delete the Report's determination that the term "third party bank check" only qualifies "other similar written instrument" and not "money order." (Del. Objs. 12-13; *see* Report 81 n.41.) Delaware's request is inconsistent with its briefing, where Delaware took the position that "other similar written instrument (other than a third party bank check)" constitutes a separate category from money orders. (*See, e.g.*, Del.'s Br. in Supp. of Mot. for Summ. J., Dkt. No 79 at 24, 26, 37, 39; Dkt. No. 97 at 9.) The Special Master should not change the Report in response to this objection—or any other.

CONCLUSION

Delaware's objections to the Report should be overruled.

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Respectfully submitted,

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