

**SUPREME COURT OF THE UNITED STATES**

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DELAWARE, *Plaintiff,*

v.

Nos. 220145 & 220146 (Consolidated)

ARKANSAS, *et al., Defendants*

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April 27, 2023

**JOINT STATUS REPORT**

Pursuant to the Special Master’s March 23, 2023, case management order, the parties have met and conferred. While the parties have reached agreement on certain issues, other issues resulted in disagreement. This memorandum discusses the parties’ respective positions and areas of disagreement, as well as the parties’ proposals for next steps.

**1. CHANGES IN COUNSEL OF RECORD**

**Plaintiff Delaware**

Neal Kumar Katyal of Hogan Lovells US LLP will remain counsel of record for Delaware.

Delaware will no longer be represented by Steven Rosenthal, Marc Cohen, J.D. Taliaferro, and other attorneys of Loeb & Loeb LLP, who can be taken off the service list.

Delaware’s amended service list is as follows:

Neal Kumar Katyal	neal.katyal@hoganlovells.com
Katherine B. Wellington	katherine.wellington@hoganlovells.com
Ryan Philp	ryan.philp@hoganlovells.com
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Patricia Davis	PatriciaA.Davis@delaware.gov
Michelle Whalen	Michelle.Whalen@delaware.gov

**Defendant States**

An updated service list for Defendant States in No. 146 and Wisconsin in No. 145 is attached as Exhibit A.

## 2. IDENTIFICATION OF ISSUES OF LAW OR FACT TO BE RESOLVED

The Special Master asked the Parties to identify any remaining legal disputes, including over whether the Act provides a right to damages relating to escheat payments made prior to the institution of the lawsuits making up this litigation and after the filing of those actions.

### **Plaintiff Delaware's Position**

#### *Threshold Legal Questions*

1. Is there a cause of action for damages?<sup>1</sup>
2. Does a statute of limitations apply? Subsidiary questions include:
  - a. Is there a statute of limitations based on either state or federal law?
  - b. How long is the statute of limitations?
  - c. Does the same statute of limitations apply to each state, or does it vary by state?
  - d. When does the statute of limitations accrue?
3. Does each Defendant State have authority under the FDA to recover damages retroactively from Delaware?<sup>2</sup> Subsidiary questions include:

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<sup>1</sup> Delaware understands that Defendant States dispute whether the relief they seek is properly labeled “damages” or sounds in some other theory. Delaware disputes that it needs to deliver or pay any sum to Defendants, regardless of the label Defendants use. As the Special Master has, Delaware will refer to the relief Defendants request as “damages.” Delaware also intends to dispute Defendant States’ assertion that—even if Defendant States have no right to receive previously escheated funds under federal law—Defendant States could somehow assert the same claims against MoneyGram.

Delaware further understands that this document is intended to facilitate the upcoming case management conference, rather than argue the parties’ positions on the merits. Delaware has thus not responded to all of Defendant States’ arguments or noted every area of disagreement among the parties. Delaware does not waive or forfeit any legal or factual arguments, including by not responding to Defendant States’ arguments in this filing.

<sup>2</sup> Contrary to Defendant States’ suggestion below, Delaware does not agree that the Court or the Special Master has addressed this issue with respect to damages. To the extent Defendant States argue forfeiture or waiver of certain arguments, Delaware disputes that it has forfeited or waived any arguments. Instead, Defendant States have waived forfeiture based on their prior representations. In the Supreme Court, Delaware argued that the Court should limit the

- a. Does the FDA permit a State to recover damages retroactively against another State, when the State statute of limitations has run against the original holder and the State could not bring an enforcement action against the holder?
  - b. If the FDA and State law permits States to recover damages retroactively from Delaware—when States would otherwise not be able to pursue MoneyGram Payment Systems Inc. (“MoneyGram”)—do constitutional principles, including comity and sovereign immunity, permit this result?
  - c. Do other State law barriers deprive a State of the ability to recover damages retroactively from Delaware?
4. Does the doctrine of laches apply?
  5. Should the Court apply other equitable principles, such as fairness or administrability, to limit recovery against Delaware or hold that recovery should be prospective only?

*Additional Questions That May Require Discovery At A Later Date*

6. Assuming it is determined that the FDA permits damages, but some legal limitation on damages applies, how does that limitation apply to the facts of this case? Subsidiary questions include:
  - a. When did each of the 30 Defendant States actually learn about MoneyGram’s escheatment practices?
  - b. When should each of the 30 Defendant States actually have learned about MoneyGram’s escheatment practices?
  - c. Have Defendant States taken contradictory positions with respect to the escheatment of other financial instruments, such as cashier’s checks?<sup>3</sup>
7. Assuming damages are available, how should they be allocated among the Defendant States? The scope of discovery needed to determine the answer to this question will depend on the answers to Question 1-6. Subsidiary questions include:
  - a. What is the complete list of escheated products on which damages are owed?

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retroactive effect of any decision for Defendant States. In response, Defendant States argued that the Court should “decline to consider” theories “to limit damages” because “the parties have not litigated” any damages questions before the Special Master. Defendants’ Supreme Court Response Br. at 55 (internal quotation marks omitted). Defendant States made a similar statement to Justice Gorsuch at oral argument.

<sup>3</sup> Delaware vigorously disputes Defendant States’ suggestion that Delaware acted in bad faith. Delaware’s actions reflected a good faith application of the FDA which the Special Master’s Second Interim Report recommended the Supreme Court adopt.

- b. Is accurate place of purchase information available with respect to the escheated products?
- c. What is MoneyGram Payment Systems Inc.'s principal place of business?
- d. If there are errors, omissions, or inconsistent data with respect to the escheated products, how should they be resolved?

*Issues of law and fact related to the availability of damages relating to escheat payments made after the institution of this action*

In Delaware's view, similar legal and factual issues to those described above apply with respect to the limited amount of funds that MoneyGram escheated to Delaware for a brief period after the institution of this action and which were not placed in escrow. Pennsylvania's assertion that "both the applicable law and relevant facts are certain" is simply untrue.

With respect to the funds placed in escrow, Delaware believes that the starting point is to obtain from MoneyGram as comprehensive a data set as possible. During the parties' meet-and-confer, opposing counsel for the States agreed that it would be beneficial to obtain a comprehensive data set from MoneyGram from which all parties could evaluate whether there are any legal or factual issues impacting distribution of the escrowed funds by the Court. To that end, Delaware sent a letter on Friday, April 21 to counsel for MoneyGram requesting a comprehensive data set, and the parties are awaiting MoneyGram's response.

In the event that the records provide sufficient information for a productive settlement discussion, Delaware suggested, as an interim step before briefing on any legal or factual issues or further discovery, that the parties agree to participate in a mediation. Counsel for the States declined that invitation on the expectation that the data set will be so definitive as not to require mediation. Delaware has reason to doubt that will be the case. MoneyGram has only indicated that it has information listing a "financial institution address." MoneyGram has not stated whether this information reflects the "place of purchase," and based on Delaware's very

preliminary review, the “financial institution address” does not appear to reflect the “place of purchase” in at least some cases. Once Delaware receives the records from MoneyGram, Delaware will need a reasonable amount of time to examine them to determine whether they provide sufficient information, particularly with respect to the place of purchase of the instrument, to allow funds to be distributed by the Court to specific States. If not, and absent mediation, further briefing or discovery could be required.

It is imperative that the Special Master not distribute escrowed funds based on potentially inaccurate information, particularly given that some of the funds in escrow are likely to be distributed to non-party States.

### **Defendant States’ Position**

#### **A. Escheat payments made prior to the institution of this litigation**

Defendant States believe that unclaimed instruments improperly escheated to Delaware should be returned to the State of purchase. Though these instruments have been escheated to Delaware, they also are not properly labeled “damages”; rather, they are property that should have escheated to the States of purchase, not Delaware. MoneyGram has already informed the parties that it can produce the records of all money it escheated to Delaware, so the States need only calculate the portion that should escheat to them.

Delaware apparently seeks to relitigate whether “other State law barriers deprive a State of the ability to recover damages retroactively from Delaware.” But the Special Master already determined—to no exception by Delaware—that the Defendant States have the power to escheat the disputed instruments under their own laws. *See* First Interim Report 79-91. And Delaware law is equally clear that Delaware must return improperly escheated instruments to the States that have rightful claim to them. *See, e.g.*, Del. Code Ann. tit. 12, § 1166 (requiring the State

Escheator to turn over unclaimed property to any “claimant” who provides “evidence sufficient to establish . . . that [it] is the owner of the property”); *id.* §§ 1165, 1168 (confirming that Delaware must return unclaimed property, even if that money was deposited into its general revenue fund). Delaware should not get a second chance to relitigate a question already decided and on which it did not file any exceptions.

It appears Delaware also plans to argue that Defendant States have no cause of action to take custody of funds improperly escheated to Delaware. But Defendant States identify at least five. *First*, the FDA expressly directs the return of improperly escheated funds. *See* 12 U.S.C. § 2503(1) (where holder’s records show the State of purchase, “that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument); *id.* § 2503(3) (providing that “the State of purchase” has a “right . . . 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”). *Second*, the FDA was enacted against a common-law backdrop that recognized a cause of action for determining the proper escheatment of unclaimed funds. *See Delaware v. Pennsylvania*, 143 S. Ct. 696, 702, 706 (2023) (summarizing cases). Though the statute “abrogate[d]” some of the common law’s rules, *id.* at 702, it did not eliminate the common-law cause of action. *Cf. Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”). *Third*, the FDA arguably federalizes state-law claims in law and equity to recover improperly escheated instruments. *See* 12 U.S.C. § 2503(3) (noting that State law determines whether “the State of purchase” may “recover” escheated funds “from the State of principal place of business”). *Fourth* (and alternatively), the States’ state-law claims to recover

improperly escheated funds are pendent to their federal-law claim for a declaration that they are entitled to escheatment. Bill of Complaint, *Arkansas v. Delaware*, No. 22O146, at 17. *Fifth*, Defendant States could sue MoneyGram for improper escheatment, and Delaware has codified a promise to indemnify MoneyGram should “another state claim[] the money . . . under its [unclaimed property] laws.” Del. Code Ann. tit. 12, § 1153.

In sum, even Delaware’s own laws recognize that it must return the improperly escheated funds one way or another—whether by directly returning them to the States of purchase or by indemnifying MoneyGram for its improper escheatment. *Accord* Letter to TSG (MG0002653) (“Delaware has no interest in holding property to which another state has a superior right of escheat. Delaware will transfer to the states directly any property that we find to have been improperly escheated to us.”). Further, by filing its own lawsuit and counterclaims over the proper escheatment of the disputed instruments, Delaware has affirmatively waived any argument to the contrary. *Accord* Doc. 39 at 155 (agreeing to return improperly escheated funds pursuant to a “judgment of the Supreme Court”).

To the extent that Delaware wants to raise equitable or statute of limitations defenses, those defenses have long been waived. Delaware did not assert any equitable or statute of limitations defenses in its responses to Defendant States. *See* Doc. 14; Doc. 18. Indeed, Delaware did not raise any equitable defenses for good reason: It did not act in good faith. Many of the Defendant States wrote MoneyGram informing it that the Disputed Instruments should be escheated to those States, not Delaware. (MG0002566-2638). But Delaware accepted the improperly escheated funds anyway. By doing so, Delaware acted in bad faith and cannot now rely on equity to keep what the FDA directs to the Defendant States.

## **B. Payments escheated to Delaware after the institution of this litigation**

*Arkansas & Other States in No. 146 & Wisconsin in No. 145.* A nearly two-year period elapsed between the filing of the lawsuits that started this case and the Special Master's order opening an escrow account to hold disputed funds:

- Wisconsin filed its complaint in *Wis. Dep't of Revenue v. Gregor*, No. 16-cv-281 (W.D. Wis.), on April 27, 2016.
- Delaware moved to file an original jurisdiction complaint on May 26, 2016.
- Arkansas and the other Defendant States moved to file their original jurisdiction complaint on June 9, 2016.
- The Special Master ordered funds payable on the disputed instruments to be deposited into the registry account on February 22, 2018.

Despite having previously acknowledged that it should return “property to which another state has a superior right of escheat,” (MG0002653), Delaware now apparently questions whether the Defendant States have a cause of action to recover those funds.

Defendant States' legal analysis is the same as for the funds improperly escheated before these lawsuits were filed. And to the extent Delaware would try to argue that equitable principles bar recovery of that money, its arguments would be even weaker: Delaware was on notice that the proper State of escheatment was disputed the moment the lawsuits were filed. And the Defendant States can hardly be characterized as delaying recovery when they had already sued. Further, MoneyGram agreed that it would “not remit the proceeds from any unclaimed ‘Official Checks’ to any state during the pendency of this lawsuit” and instead would be bound by the Supreme Court's decision. Doc. 38. Delaware too promised to “honor . . . any



judgment entered by the Supreme Court.” Doc. 39 at 107. There is no legitimate dispute, then, that this money should be escheated to Defendant States.

*Pennsylvania.* Pennsylvania agrees with the other Defendant States’ legal analysis but adds Pennsylvania-specific facts. It respectfully requests an order compelling immediate payment from Delaware of \$2,153,501.24. By letter dated January 25, 2016, from Pennsylvania to Delaware and MoneyGram, Pennsylvania demanded that MoneyGram cease remitting abandoned Official Checks purchased in Pennsylvania to Delaware. (MG0002405-06.) On February 26, 2016, Pennsylvania filed a complaint against Delaware and MoneyGram to, among other things, ensure this demand was satisfied. *See Reese v. Gregor*, No. 16-cv-351-JEJ, Doc. 1 (M.D. Pa.). On May 26, 2016, Delaware filed its complaint against Pennsylvania in this matter. Pennsylvania answered that complaint and filed counterclaims on October 28, 2016.

Hence, as of 2016, both MoneyGram and Delaware received formal written notice from Pennsylvania that present and future remittals to Delaware of Pennsylvania-originated funds should not be made.

Despite this, on February 27, 2017—well after this litigation commenced—Delaware entered into a formal contract with MoneyGram stating, in material part, if MoneyGram remitted unclaimed Official Checks to Delaware for report year 2016 and any future years, Delaware “agrees to defend MoneyGram against any claim and indemnify MoneyGram against any liability on any claim made by a state other than Delaware related to any reports and remittances for unclaimed Official Checks that became escheatable in 2015 and all future years until the final resolution of the above referenced Supreme Court cases.” (MG0002537-38.) In other words, Delaware assumed the risk of having to disgorge these particular funds in the wake of an adverse

decision. Notably, Delaware did not advise Pennsylvania of its contractual guarantee with MoneyGram, notwithstanding the pending litigation.

In 2017, seemingly in reliance on Delaware’s indemnification guarantee, MoneyGram remitted to Delaware abandoned Official Checks purchased in Pennsylvania totaling \$2,153,501.24, representing instruments purchased in 2010 and 2011 (and subject to report in 2016 and 2017). The foregoing total has been verified by MoneyGram.

If Delaware now refuses Pennsylvania’s demand for the above sum—despite clearly assuming the consequences of an adverse decision when it directed MoneyGram to remit the funds to Delaware during the pendency of this litigation—Pennsylvania will be without alternative except to seek leave to file a third-party complaint against MoneyGram. In light of Delaware’s guarantee to MoneyGram, however, such a complaint would result in Pennsylvania incurring needless costs and would also result in a waste of judicial resources to resolve a “dispute” where both the applicable law and relevant facts are certain.

### **C. Funds in escrow**

Delaware suggests mediation to determine the distribution of funds in escrow. Of course, Defendant States are open to mediation about the issues that are reasonably in dispute, but it is unclear what purpose mediation about the escrow funds would serve, aside from causing further delay. No party disputes that the funds in escrow should be escheated to the States of purchase. MoneyGram not only has all the information about the funds in escrow, but it has regularly transmitted that information to the parties.

Delaware also hints that MoneyGram’s information may not be sufficient and it may need to go digging elsewhere for information about the States of purchase (though it does not identify what additional information it might need). But Delaware is also receiving this

information regularly; if it was dissatisfied with what MoneyGram produced, it could have objected long ago. Besides, Delaware relies on the holder's report when it escheats in the normal course; it does not generally go digging for additional information. *See, e.g.*, Del. Code Ann. tit. 12, § 1142. If Delaware would like to hire an expert to double-check MoneyGram's and Microsoft Excel's math, it certainly is free to do so. But there is no reasonable basis for Delaware's request that the parties mediate the math. And Delaware's arguments to the contrary are little more than an attempt to delay the escheatment of the escrow funds to the States of purchase.

Pennsylvania requests that the order issue immediately and that the Special Master also order MoneyGram to report to Pennsylvania going forward (within 30 days of the Court's order).

### **3. ISSUES ON WHICH THE PARTIES AGREE**

The Parties agree and ask the Special Master to issue an order directing MoneyGram to begin reporting and escheating funds payable on unclaimed disputed instruments on a going-forward basis pursuant to the FDA.

The Parties also agree that funds payable on the disputed instruments that have been deposited into the registry account pursuant to the Special Master's February 22, 2018, order should be paid as provided by the FDA consistent with the Supreme Court's February 28, 2023, decision. The parties disagree about the process.

#### 4. DISPUTED ISSUES

The Parties dispute whether escheat payments made prior to the institution of the lawsuits making up this litigation should be returned to the States of purchase and the appropriate procedure for resolving this dispute.

##### **Plaintiff Delaware's Position**

The parties dispute the proper approach to the remand proceedings. Delaware's position is that the Special Master should resolve any threshold legal issues that can be addressed without discovery before proceeding to discovery on damages issues. Resolution of these threshold questions could obviate the need for further discovery, or importantly, could limit or shape the scope of that discovery. For instance, if the Court were to rule that there is no cause of action for retroactive damages—an issue that Justice Gorsuch raised at oral argument—there would be no need for discovery with respect to damages. If the Court were to rule that there is a statute of limitations, that would likewise limit the scope of discovery, which is important in a case where Defendant States' claims could date back to 2006. If the Court were to rule that laches or other equitable defenses applied, that would likewise affect how the parties conduct discovery.

By contrast, during the parties' meet-and-confer, counsel for the States appeared to take the position that there are no threshold legal issues impacting the assessment of damages—or at least no significant legal issues that render it prudent for this matter to proceed in stages. Delaware views this position as untenable. If the parties do not first clarify the availability of damages and for what time frame, it is Delaware's position that the parties will need to conduct extensive discovery on a wide range of factual questions, including the knowledge and notice of each of the 30 Defendant States dating back to the early 2000s as to the potential escheatment of the checks at issue, as well as equitable issues such as fairness and administrability. Delaware

anticipates that this will require both document discovery and depositions of representatives of each of the 30 States, as well as discovery of MoneyGram and potentially discovery of third-party financial institutions to determine the place of purchase of individual financial instruments. This would require a tremendous expenditure of party resources to address issues that may be rendered moot or otherwise resolved by a ruling on the threshold legal issues identified by Delaware. It also inevitably would involve a significant expenditure of the Special Master's resources to resolve discovery disputes regarding this vast scope of discovery, which, again, may be entirely moot or at least curtailed by a ruling on the threshold legal issues. Thus, in order to avoid a potentially significant waste of resources, Delaware proposes that the Special Master resolve all threshold legal questions first, such that it may be determined what if any discovery is necessary.

The parties also dispute the appropriate approach to the funds in escrow. As noted above, Delaware has asked MoneyGram for complete records of the funds in escrow, but has not yet received those records. Once Delaware receives a complete set of records, Delaware will need to analyze those records to determine whether they are complete and accurate. Delaware proposes that the parties continue to work to resolve any issues with respect to the funds in escrow, and that the Special Master schedule a status conference in two months to address next steps with respect to the funds in escrow. If the parties are unable to resolve any disputes, the Special Master may need to set a briefing schedule with respect to the funds in escrow and discovery may be necessary. Delaware remains open to discussing a potential mediation in the event the States change their position or a mediation is ordered by the Special Master.

### **Defendant States' Position**

On the funds in escrow, MoneyGram has all the relevant information about States of purchase and has been transmitting it to the parties upon each deposit. The parties do not need anything further. MoneyGram also has all information on the escheated funds and has represented that it would turn that information over promptly to the parties.

As for the rest of the process, Defendant States believe that—as in the earlier phase of this litigation—discovery and briefing on all issues should be conducted simultaneously. The Parties already agreed to bifurcate the case into liability and monetary phases; bifurcating the already-bifurcated proceedings would needlessly delay final resolution and appears to be an attempt to delay return of funds that Delaware has no right to hold onto. Moreover, the legal and factual issues might not be easily separated.

## 5. ANTICIPATED DISCOVERY PROCESS

### **Plaintiff Delaware's Position**

#### **A. Discovery regarding money in escrow**

It is unclear at this time whether there may be disputes between the parties regarding the funds in escrow. Delaware has requested a complete copy of MoneyGram's records with respect to the funds in escrow. Once Delaware has had a chance to examine those records, Delaware can determine whether further discovery is necessary regarding the funds in escrow. As noted above, MoneyGram did not state in its letter to the parties that it possesses information about the place of purchase. Instead, MoneyGram has identified information which it refers to as the "financial institution address," which may not reflect the place of purchase in at least some cases.

Delaware would thus suggest that the parties engage in analysis of the data and dialogue for the next two months. The Special Master could then hold a status conference where the parties can either present a joint proposal or present their views on the appropriate next steps and schedule to accomplish those steps. The parties likewise could discuss at the status conference whether a mediation would be productive.

#### **B. Discovery regarding damages**

Delaware's position is that the Court should first decide threshold legal questions regarding the availability of damages before permitting further discovery. If the Court adopts that approach, the Court should defer adopting a schedule for discovery because there are far too many variables impacting the question of what reasonable deadlines might look like. Indeed, discovery may be unnecessary—or may be far more limited in scope or focused on different issues—depending on the outcome of the Court's decision on these threshold legal questions.



If the Court determines that it is appropriate to conduct discovery before briefing whether damages are available, Delaware anticipates that *at least* 9-12 months of discovery would be required given that discovery would need to go back to at least 2006 and would encompass a number of fact intensive issues that will require extensive document discovery, including email communications, and depositions of all States' representatives, including but not limited to discovery related to the application of statutes of limitations, laches, and other equitable defenses, as well as any data each state has access to with respect to the escheated instruments and escheatment practices more generally. Delaware also expects that it may need to conduct depositions of MoneyGram, and potentially of individual financial institutions to determine whether MoneyGram's records are accurate.

Once document discovery and depositions are complete, Delaware expects that a period for expert reports and expert discovery will be required.

Given the vast discovery necessary absent resolution of the threshold legal issues, Delaware believes it is premature to attempt to set interim discovery deadlines, the reasonableness of which will hinge on variety of factors, including whether document discovery is required for periods going back nearly 20 years, the difficulty of scheduling 30 depositions of state representatives from states across the country, the accuracy of the data provided by MoneyGram regarding the escheated instruments, the complexity of the data analysis regarding the escheated documents, and the need for expert analysis of large data sets.

### **Defendant States' Position**

Defendant States believe that the parties can easily obtain all the relevant discovery for the case: MoneyGram has advised the parties of the information readily available for production. More specifically, it confirmed that in the event the Special Master orders discovery relating to

the disputed instruments that were reported and remitted to Delaware, or reclaimed from Delaware (after MoneyGram honored and paid the original item), MoneyGram is prepared to produce the following information:

1. Excel spreadsheets identifying (by date, check number, amount, product type, financial institution name, and financial institution address) all Official Checks reported and remitted to the State of Delaware during the period 2006 through 2017. Subsequently, unclaimed Official Checks have been deposited with the Court.
2. Excel spreadsheets identifying (by date, check number, amount, product type, financial institution name, and financial institution address) all Official Checks deposited with the U.S. District Court for the Southern District of New York pursuant to the order issued by the Special Master.
3. Excel spreadsheets and supporting information identifying all Official Checks MoneyGram previously deposited with the U.S. District Court for the Southern District of New York but were subsequently honored and paid by MoneyGram and the proceeds for which were netted out of later deposits pursuant to the 2020 and 2022 stipulations among the parties.
4. Information regarding unclaimed Official Checks that were remitted to Delaware during the relevant time period, but later reclaimed by MoneyGram (after MoneyGram honored and paid the original item). MoneyGram is still in the process of determining what information relating to these reclaims is available and in what form.

MoneyGram acknowledged there may be additional reasonable requests for discovery in the future and advised it would comply.

MoneyGram's willingness to produce information means that discovery can be conducted quickly and efficiently:

*1. Funds in Escrow.* MoneyGram has all the information about States of purchase, will turn it over promptly, and indeed has been transmitting that information to the parties regularly. Now is not the time for Delaware to suddenly object to that information.

Nor do the parties need mediation about these funds. No party disputes that the funds in escrow should be escheated to the States of purchase. The parties need only calculate the

amount of money that should escheat to each State—which should be simple, with MoneyGram’s calculations. There is no reason to delay distribution.

Pennsylvania requests an order directing the Clerk of Court of the United States District Court for the Southern District of New York to remit to Pennsylvania the sum of \$6,331,070.91 (plus a proportionate share of any interest earned on the deposit) out of the Court Registry Investment System (CRIS). MoneyGram—the “holder,” under law—has already supplied to the parties information regarding the instruments deposited into the CRIS over the lifetime of this matter, including, specifically, on those instruments purchased in Pennsylvania that are now deemed abandoned by law. That holder-information shows the above sum should have been reported to Pennsylvania consistent with the Supreme Court’s February 8, 2023, opinion in *Delaware v. Pennsylvania* and consistent with the Pennsylvania Unclaimed Property Act, 72 P.S. § 1301.1 *et seq.*

2. *Escheat payments made both before and after the institution of this litigation.* As with the funds in escrow, Defendant States disagree that any legal issues exist to delay discovery on any escheat payments made to Delaware. The information regarding these monies is readily available to MoneyGram, and it has agreed to produce that information. Therefore, Defendant States believe this matter can be resolved expeditiously, after discovery, on cross-motions for summary judgment. Or, if disputed factual issues remain after discovery, at trial. As for the process, Defendant States again believe the second phase of this litigation should proceed, just as the first phase did, with discovery followed by cross-motions for summary judgment.

## **6. PROCESS FOR COMPLETION AND APPROVAL OF THE CASE MANAGEMENT PLAN**

### **Plaintiff Delaware's Position**

Delaware defers to the Special Master's views on the appropriate process for completion and approval of the case management plan. Delaware notes, however, that it is of course preferable for the parties to present an agreed-schedule, which does not appear to be possible until the Special Master resolves certain threshold issues regarding how this matter should proceed. In particular, in order for the parties to productively discuss a Case Management Plan, Delaware submits that the Special Master will need to assess and resolve how to handle the numerous threshold legal issues that will determine the necessity or scope of any discovery and, relatedly, whether this case should proceed in phases.

### **Defendant States' Position**

Defendant States believe there is no reason why the parties could not prepare and submit a case management plan within 15 days. Again, there is no basis for Delaware's request that the Special Master bifurcate an already bifurcated proceeding or require the parties to mediate math.

## 7. TENTATIVE DATES FOR COMPLETION OF THE PHASES OF LITIGATION

### **Plaintiff Delaware's Position**

Delaware would propose a two-phase process for resolving the parties' dispute. In the first phase, the parties would brief threshold legal questions. This will define the scope of any further discovery—and may obviate the need for that discovery entirely.

In the second phase, the parties would conduct any necessary discovery and then submit additional briefing on any remaining legal or factual issues. If those factual issues cannot be resolved on the briefs, and if the parties otherwise cannot reach a resolution of any remaining disputes, a trial may be necessary.

#### *Phase 1*

Phase 1a: Briefing on threshold legal issues.

- The parties file briefs regarding the threshold legal issues described above.
- The parties do not brief issues that require further fact development.
- Delaware would propose the following briefing schedule, which allows time for Delaware to research and develop its legal arguments, including researching individual legal issues with respect to each of the 30 Defendant States, while also seeking to determine whether a resolution is achievable regarding the funds in escrow:
  - Delaware files a brief on threshold legal issues 90 days after the briefing schedule is set.
  - Defendant States file opposition brief(s) 60 days later.
  - Delaware files a reply brief 45 days later.

Phase 1b: Accounting of money in escrow.

- In parallel with Phase 1a, the parties conduct an accounting of the funds in escrow. The parties have requested a complete set of records from MoneyGram, and can meet and confer regarding next steps once all parties have had an opportunity to receive and review that data. In the event there is a dispute among the parties with respect to the funds in

escrow, Delaware is open to mediation or a settlement conference prior to submitting briefing.

- The parties report their progress at a status conference with the Special Master in approximately two months.
- If the parties cannot resolve the proper distribution of the funds in escrow, the parties discuss next steps and the schedule for such next steps at a status conference, including discovery, expert analysis, and briefing, if necessary.

At the end of Phase 1, the Special Master rules on threshold legal issues. In Delaware's view, this would be an appropriate time for the Special Master to submit a report to the Supreme Court so that the Supreme Court may rule on the threshold legal issues raised in the parties' briefing.

### *Phase 2*

Phase 2a: Discovery on any remaining fact questions, including document and deposition discovery, and expert discovery if necessary. In Delaware's view, discovery may take 9-12 months or more, depending on the legal and factual questions remaining for resolution.

Phase 2b: Summary judgment briefing on any remaining legal or factual questions. The schedule for this briefing depends on what legal and factual issues remain to be resolved. The Special Master issues a decision with respect to any remaining legal issues. The Special Master may order, or the parties may agree, to settlement and/or mediation prior to summary judgment briefing or prior to the Special Master issuing a report.

Phase 2c (if necessary): If necessary, the parties conduct a trial on any remaining factual questions.

At the end of Phase 2, the Special Master submits a final report to the Supreme Court, and the Supreme Court issues a final decision.

### **Defendant States' Position**

Defendant States believe that this part of the litigation should track the division of funds.

*1. Funds in escrow.* MoneyGram has that information and has already transmitted it regularly to the parties. To the extent that a comprehensive dataset would be useful, Defendant States propose that MoneyGram produce that information 15 days after the May 4 Conference. The parties may evaluate that information for 30 days. At the end of the 30-day period, the parties will each submit a proposal to the Court listing the money that should be escheated to

each State. If there are differences between the parties' calculations, the Court may resolve those in its distribution order.

2. *Other funds.* Defendant States propose a case schedule that tracks the Case Management Order set during the liability phase of the case:

- **Initial written discovery to be served:** 45 days from the entry of the Case Management Order.
- **Discovery, including fact depositions and third party practice, to be completed by:** 150 days following the initial service of written discovery.
- **Reports from Retained Experts Due:** 60 days following the close of discovery.
- **Expert Report Deadlines:** 60 days following the filing of expert reports.
- **Dispositive Motions Due:** 45 days following the close of expert depositions
- **Tentative Trial Date:** Q2 2024

After ruling on dispositive motions or holding trial, the Special Master then submits a report to the Supreme Court to which the parties can take exceptions.

## **8. OTHER MATTERS**

There are no additional matters to be considered by the Special Master at this time.



Respectfully submitted,

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