SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*,

v. Nos. 220145 & 220146 (Consolidated)

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

MEMORANDUM IN SUPPORT OF PLAINTIFF STATE OF DELAWARE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

A Delaware corporation, MoneyGram Payment Systems, Inc. ("MoneyGram"), provides Official Check outsourcing services to financial institutions who do not want to provide their own "bank checks, cashier's checks, and teller checks." *MoneyGram International, Inc. v. Comm'r,* 144 T.C. 1, 5 (2015), *vacated* 2016 U.S. App. LEXIS 20512 (5th Cir. Nov. 15, 2016). Plaintiff State of Delaware, on the one hand, and thirty Defendant States, on the other hand, dispute which State is entitled to take custody of the funds representing unaddressed abandoned MoneyGram Official Checks.

MoneyGram escheats unclaimed property from unaddressed Official Checks to its State of incorporation, Delaware. It does so pursuant to the general priority rules outlined by the Supreme Court in *Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972); and *Delaware v. New York*, 507 U.S. 490 (1993). Those decisions state that the entity that has possession of unclaimed intangible property (the "holder" in the parlance of unclaimed property) should escheat any such property in accordance with priority rules. First, if the address of the owner of the unclaimed intangible property is known, the property should be escheated to the State of the address of the owner. Second, if the address of the owner is not known, as is the case with MoneyGram Official Checks, the funds should be escheated to the holder's State of incorporation. MoneyGram

determined that it should escheat unclaimed property from unaddressed Official Checks to the State of Delaware, and did so from 2005 (the date when it reincorporated in Delaware) until it began paying into the registry of court in 2018. Plaintiff State of Delaware concurs in MoneyGram's determination to escheat to Delaware.

Defendant States, on the other hand, contend that the escheat of unclaimed unaddressed Official Checks is governed by the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act ("FDA"), 12 U.S.C. §§ 2501-2503. Unaddressed written instruments that fall under the FDA are not escheated to the holder's State of incorporation, but instead are escheated to the State in which any such instruments were purchased.

This case will resolve the dispute between Plaintiff State of Delaware and Defendant States regarding which State is entitled to the escheat of funds from unclaimed unaddressed MoneyGram Official Checks.

NATURE AND STAGE OF THE PROCEEDINGS

In August 2014, Pennsylvania, Wisconsin, and eighteen other States retained a third-party auditor, Treasury Services Group ("TSG"), to conduct a review of MoneyGram's Official Checks. In February 2015, TSG declared that MoneyGram Official Checks were subject to the FDA, and that the funds related to Official

Checks that MoneyGram had been escheating to Delaware instead should have been escheated to the State where the Official Checks were sold.

In the spring and summer of 2015, various Defendant States contacted Delaware to demand turnover of the Official Check funds that MoneyGram had previously escheated to it. Delaware reviewed TSG's findings and did not agree with TSG's conclusions. The parties exchanged pre-litigation communications over the ensuing months.

On February 26, 2016, the Treasury Department of the Commonwealth of Pennsylvania sued former Delaware State Escheator David M. Gregor and MoneyGram in the United States District Court for the Middle District of Pennsylvania over the dispute, and on April 27, 2016, the Wisconsin Department of Revenue filed a similar action against Mr. Gregor and MoneyGram in the United States District Court for the Western District of Wisconsin.

The Pennsylvania and Wisconsin actions were subsequently stayed, and Delaware filed an original action in the United States Supreme Court against Pennsylvania and Wisconsin on May 26, 2016 to finally and completely resolve the competing escheat claims between Delaware, as the State of domicile of MoneyGram, and Pennsylvania and Wisconsin, as the States of purchase of certain MoneyGram Official Checks. The State of Arkansas and 20 other States then filed their own original action against the State of Delaware in the United States

Supreme Court on June 9, 2016. These two actions, including all counterclaims, were consolidated on October 3, 2016 and referred to the Special Master on March 29, 2017. Additional States have since joined the action as Defendants.

Following an initial case management conference on June 5, 2017, the parties established a schedule for discovery and briefing in this case. The parties thereafter engaged in fact discovery, including the production of documents. The parties also served multiple third-party subpoenas for the production of documents and received documents in response thereto. The parties took depositions of two MoneyGram witnesses and one Treasury Services Group witness pursuant to Fed. R. Civ. P. 30(b)(6).

Following the completion of fact discovery on June 25, 2018, the parties engaged in expert discovery, including production of expert reports by Delaware's expert, Defendant States' expert, and a separate expert retained by the Commonwealth of Pennsylvania. Expert discovery closed on November 23, 2018.[1]

SUMMARY OF ARGUMENT

Nearly sixty years ago, Pennsylvania began asserting that the sums due on unclaimed money orders should be escheated to the State in which the money order

[1] Because of scheduling problems, and with the consent of all parties, the deposition of Defendant States' expert Clayton P. Gillette was taken on November 28, 2018.

was purchased. After two unsuccessful lawsuits, Pennsylvania introduced legislation in Congress now known as the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act. Under the FDA, the escheat of "any sum . . . payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" goes to the State of purchase if such instrument is unaddressed and "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. Pennsylvania was required to seek specific statutory authorization by Congress because the Supreme Court had held that to escheat money orders as Pennsylvania proposed violated the federal common law priority rules for the escheat of property. In the intervening years, the Supreme Court has had occasion to reaffirm its priority rules for the escheat of unclaimed property despite complaints that the rule for unaddressed unclaimed property unduly favors the preferred States for corporate domicile, always noting that, like in the case of the FDA, if the States object to the operation of the priority rules Congress may take action.

With respect to the FDA, at the time the legislation was passed in 1974 there were no written instruments called "Official Checks," and it would not be until years later that Official Checks would be introduced to the marketplace. Congress, therefore, cannot be said to have contemplated the instruments now before the

Court known as MoneyGram Official Checks when seeking in the FDA to specifically exclude certain types of unaddressed unclaimed property from the Supreme Court's priority rules. Defendant States are thus trying to take a 1974 statute undeniably drafted to specifically cover money orders and traveler's checks and stretch it to cover a class of instruments called Official Checks that did not exist when the FDA was drafted and that, more to the point, once introduced into commerce, was determined by the Federal Reserve Board to be a distinct class of instruments from money orders subject to different rules. *See* 72 Federal Reserve Bulletin 148-50 (Feb. 1986). The U.S. Treasury Department's Financial Crimes Enforcement Network confirmed the "distinctness" of Official Checks from money orders in a related, subsequent ruling which, based in part on the prior Federal Reserve decision, ruled that "[t]he distinction between the money orders and official checks in the FRB approval order demonstrates that a separate classification of these instruments was intended, and therefore that … official checks are not the same as money orders." Department of the Treasury Financial Crimes Enforcement Network Ruling FIN-2012-R001 (May 23, 2012), available at https://www.fincen.gov/sites/default/files/administrative_ruling/FIN-2012-R001.pdf Thus, there can be no creditable argument that Official Checks are just money orders (or for that matter traveler's checks) by another name.

Consequently, Defendant States are left to argue that the escheat of sums payable on unaddressed unclaimed Official Checks is governed by the FDA because Official Checks, although a "distinct" class of instruments, are "similar" to money orders and traveler's checks. This position not only runs contrary to the natural presumption that "similar" written instruments would by definition have to fall within the same class of instruments for the purposes of federal financial regulations, it is both untenable under the language of the FDA and does not withstand factual scrutiny. First, the plain text of the FDA governs only "similar written instrument[s] . . . on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. As explained below, there is no entity directly liable on MoneyGram Official Checks, and therefore the FDA does not govern the escheat of unaddressed, unclaimed MoneyGram Official Checks. Second, even if MoneyGram Official Checks were to be found to be instruments on which an entity was directly liable, the differences between MoneyGram Money Orders and MoneyGram Official Checks are such that no reasonable trier of fact could find that the two are "similar written instruments."

Finally, the FDA provides for the escheat of unaddressed, unclaimed money orders to the State of purchase only "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. Therefore, to the extent that Defendant States do not have state laws that give them authority to

escheat or take custody of "any sum . . . payable on a money order, traveler's check, or other similar written instrument . . . on which a banking or financial organization or a business association is directly liable," those States have no cause of action under the FDA and their claims should be dismissed. Delaware respectfully requests that this Court grant its summary judgment motion and find that the FDA does not govern the escheat of MoneyGram Official Checks and that the sum payable on unaddressed, unclaimed MoneyGram Official Checks at issue in this case escheat pursuant to the priority rules established by the Supreme Court.

STATUTORY BACKGROUND AND ADOPTION

In the late 1950s, the Commonwealth of Pennsylvania ordered Western Union Telegraph Co. to escheat to it unclaimed Western Union money orders that had been sold in Pennsylvania. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961) ("*Western Union*"). Western Union objected, and argued that because it had previously escheated the funds in question to the State of New York, an order from a Pennsylvania state court directing Western Union to escheat the same funds to Pennsylvania put Western Union at risk of double liability in violation of its due process rights. *Id*. at 73-74. The Supreme Court agreed that the Commonwealth of Pennsylvania had violated Western Union's due process rights, noting:

> there can be no doubt that Western Union has been denied due process by the Pennsylvania judgment here unless the Pennsylvania

> courts had power to protect Western Union from any other claim, including the claim of the State of New York that these obligations are property "within" New York and are therefore subject to escheat under its laws. But New York was not a party to this proceeding and could not have been made a party, and, of course, New York's claims could not be cut off where New York was not heard as a party.

Id. at 75. The Supreme Court vacated the judgment of the Pennsylvania Supreme Court. *Id.* at 80.

In its second effort to "escheat part of Western Union's unclaimed money order proceeds," Pennsylvania filed an original action against the State of New York. *Pennsylvania v. New York*, 407 U.S. 206, 211 (1972). Pennsylvania asserted that "the State where the money order was purchased [should] be permitted to take the funds" and "claimed that the State where the money orders are bought should be presumed to be the State of the sender's residence." *Id.* at 212. The state of New York argued that the more general priority rules established in *Texas v. New Jersey*, 379 U.S. 674 (1965) should also apply to the escheat of unclaimed money orders. *Id.*

The Supreme Court expressly rejected Pennsylvania's position, and ordered that the State of New York's position – that the *Texas* priority rules apply to money orders – be adopted:

> Each item of property in question in this case as to which a last known address of the person entitled thereto is shown on the books and records of the defendant, Western Union Telegraph Co., is subject to escheat or custodial taking only by the State of that last known address . . . . Each item of property in question in this case as to which

> there is no address of the person entitled thereto shown on the books and records of defendant Western Union Telegraph Company is subject to escheat or custodial taking only by New York, the State in which Western Union Co. was incorporated.

Pennsylvania v. New York, 407 U.S. 223 (1972). In so doing, the Court noted that, in fact, addresses were kept by Western Union for many of the items at issue:

> Furthermore, a substantial number of creditors' addresses may in fact, be available in this case. Although Western Union has not kept ledger records of addresses, the parties stipulated, and the Special Master found, that money order applications have been retained in the company's records "as far back as 1930, in some instances, and are generally available since 1941." Report 9. To the extent that creditor addresses are available from those forms, the "windfall" to New York will, of course, be diminished.

Pennsylvania, 407 U.S. at 215.

Although the Supreme Court invited Pennsylvania to make Western Union's record-keeping requirements more explicit, *id*. at 215 ("nothing we say here prohibits the States from requiring Western Union to keep adequate address records"), Pennsylvania did not take the Court's suggestion. Instead, in its third effort to gain control over unclaimed money orders, it had one of its senators, Sen. Hugh Scott, introduced federal legislation that became the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501 *et seq*.

The background history of the FDA (not to mention its name) makes clear that it was directed at reversing Pennsylvania's failed earlier efforts regarding

money orders and traveler's checks. For example, in floor remarks introducing the legislation, Sen. Scott said:

> The difficulty with the Supreme Court's decision is 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.

119 Cong. Rec. 17047 (May 23, 1973) (emphasis added). Sen. Scott noted that the proposed legislation would "permit the state where a travelers check or money order was purchased and which is the state of the purchasers' actual residence in over 90% of the transactions to escheat the proceeds of such instruments." *Id*.

In later floor remarks regarding the bill, Sen. John Sparkman of Alabama noted that the bill "provides that the last known address of the purchaser of traveler's checks and money orders shall be presumed to be in the State wherein such instruments were purchased." 120 Cong. Rec. 4528-29 (Feb. 27, 1974). Sen. John Tower of Texas added, "in most instances of **abandoned money orders and traveler's checks**, the State of corporate domicile of the issuer is getting a windfall." *Id*. at 4529 (emphasis added).

The Senate Report regarding the bill similarly stated that "there is an annual increase in the sale of **money orders and travelers checks**," and noted that the proposed legislation was introduced "[i]n order to resolve these conflicts and

assure that each State receive its fair share of the proceeds of these instruments."

S. Rep. No. 93-505 at 1-2 (1973) (emphasis added).

The proposed bill's Whereas clauses make clear that the bill was addressing money orders and traveler's checks and do not mention any other categories of instruments:

- Whereas the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and travelers checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments, and
  . . .
- Whereas the States wherein the purchasers of money orders and travelers 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, and
  . . .
- Whereas the cost of maintaining and retrieving addresses of purchasers of money orders and travelers checks is an additional burden on interstate commerce. . .

S. 1895, 93d Cong. (1973). These Whereas clauses are largely reflected in 12 U.S.C. § 2501, which is titled "Congressional findings and declaration of purpose":

- (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;
  . . .
- (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;
  . . .
- (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.

Consequently, the bill as introduced covered a "money order, traveler's check, or similar written instrument on which a banking or financial organization or a business association is directly liable." S. 1895, 93d Cong. § 2 (1973). In comments to the proposed legislation, the Treasury Department recommended that the legislation "exclude third party payment bank checks." S. Rep. No. 93-505 at 5 (1973) (Letter from Edward C. Schmults). Thereafter, as enacted, the FDA covered "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.[2] As the foregoing legislative history makes clear, the FDA was enacted to cover Western Union money orders and American Express traveler's checks and written instrument that were basically like those money orders and traveler's check but perhaps labeled differently – not then non-existent "distinct" class of bank checks.

[2] The timing of the addition of "third party bank check" to the statute suggests that the language was added at the suggestion of the Treasury Department, but the record does not provide any explanation of the reason for the difference between "third party payment bank check" (the term used by the Treasury Department) and "third party bank check" (the term actually in the statute).

LEGAL STANDARD

Summary judgment shall be granted if "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). On a motion for summary judgment, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962) (per curiam). However, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Ricci v. DeStefano,* 557 U.S. 557, 586 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted). "[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).

Furthermore, the Supreme Court has stated that Rule 56 provides for "'the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' Where no such showing is made, 'the moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

ARGUMENT

I. MoneyGram Official Checks Are Not Covered by the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act

The FDA governs the escheat of "any sum . . . payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. The MoneyGram Official Checks at issue in this case, however, do not fall into one of the three enumerated categories listed in the FDA. First, MoneyGram Official Checks are not money orders by another name. Second, MoneyGram Official Checks are not traveler's checks. Third,

Official Checks are not "similar written instrument[s] . . . on which a banking or financial organization or a business association is directly liable." *Id.* Consequently, the FDA does not govern the escheat of MoneyGram Official Checks and the sum payable on unaddressed, unclaimed MoneyGram Official Checks at issue in this case escheat pursuant to the priority rules established by the Supreme Court in the *Texas* line of cases. *See infra* at Section II.

A. MoneyGram Official Checks are not Money Orders

There is no single legal definition of a money order. Pennsylvania's expert has defined 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. A money order is frequently issued with the amount printed on its face by the drawee." Barkley Clark & Barbara Clark, *Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010). The version of Munn's Encyclopedia of Finance in effect at the time the FDA was drafted defines 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." F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962). The Uniform Commercial Code. provides no definition of money order but instead recognizes the term "money order" as a commercial term used to describe a negotiable instrument labeled as

such on its face. Mann 84:18-85:8 (Ex. AA to Taliaferro Decl.); U.C.C. § 3-104(f). Consistent with these definitions, Delaware believes that the parties do not dispute that money orders are at a minimum pre-paid instruments.

Turning to the MoneyGram Money Orders in the record, MoneyGram's testimony describes MoneyGram Money Orders as:

> "A money order is a specific document that has language on the back of it. It's got purchaser payee document -- purchaser payee language on the back, some service charge language. It is a -- issued by an agent of MoneyGram, so it says agent for MoneyGram on the face of it. It is payable through one of our clearing banks. It is a document or an item that a consumer purchases at one of our agent locations and uses for specific payment purposes, whatever their need is." Yingst 42:6-17 (Ex. A to Declaration of John David Taliaferro ("Taliaferro Decl.")).

According to MoneyGram, in order to purchase a Money Order, a customer "would typically go to a MoneyGram agent location which could be a retail store, it could be a convenience store, it could be a financial institution, any of our agents that sell money orders." Yingst 45:10-15 (Ex. A to Taliaferro Decl.). MoneyGram agents include "mom and pop" stores as well as large chains like Walmart. Statement of Undisputed Facts ("SOF") ¶ 26. All MoneyGram Money Orders have a $1,000 max value limit except those sold by financial institutions, which have the option to sell a MoneyGram "Agent Check Money Order" in a higher amount. SOF ¶ 36; SOF ¶ 43.

Thus, the characteristics that make a pre-paid negotiable instrument a MoneyGram Money Order are: (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. According to MoneyGram these characteristics of MoneyGram Money Orders have not materially changed from 2000 to 2017 and all of the provided sample MoneyGram Money Orders conform to these requirements. *See* Affidavit of Jennifer Whitlock re: Money Orders ("Whitlock Money Order Aff.") ¶4-5. [3]

In reviewing the above characteristics that make a negotiable instrument a MoneyGram Money Order it becomes clear why MoneyGram Official Checks are not in fact MoneyGram Money Orders by another name and, therefore, are not "money orders" for the purposes of the FDA.

[3] This understanding is consistent with MoneyGram's practice of offering Retail Money Orders as well as Money Orders from financial institutional frequently labeled "Agent Check Money Orders." Regardless of where purchased, MoneyGram Money Orders of both the retail and financial institution variety share the same, identified money order characteristics and are escheated by MoneyGram to the State of purchase pursuant to the FDA. SOF ¶ 43; SOF ¶ 92; Whitlock Official Check Aff. ¶¶ 4-5. The same cannot be said of MoneyGram Official Checks. Yingst 161:6-162:16 (Ex. A to Taliaferro).

1. MoneyGram Official Checks do not have the words "Money Order" on their face. Exs. A, C to Affidavit of Jennifer Whitlock re: Official Checks ("Whitlock Official Check Aff."); Yingst 161:6-162:16 (Ex. A to Taliaferro Decl.).
2. MoneyGram Official Checks need not indicate the agent status of MoneyGram and, in fact, MoneyGram is not an agent for its "Teller Check" official checks. Ex. C to Whitlock Official Check Aff.); Yingst 164:16-24 (Ex. A to Taliaferro Decl.).
3. There is no service charge contract on the back of MoneyGram Official Checks and therefore, unlike MoneyGram Money Orders, if a MoneyGram Official Check goes unclaimed the entire value of the instrument is escheated. SOF ¶ 50; SOF ¶ 51.
4. MoneyGram Official Checks are sold exclusively through financial institutions and cannot be purchased at retail locations. SOF ¶ 48.
5. MoneyGram Official Checks are not limited to a maximum value of $1,000 and may be issued for any amount. SOF ¶ 68.

In addition to the above undisputed factual differences between the instruments themselves, a key difference between Money Orders and Official Checks is that Money Orders are marketed to the public and used predominately by unbanked individuals while Official Checks are sold exclusively through financial

institutions predominately to their own bank customers. SOF ¶ 27; SOF ¶ 25; SOF ¶ 45; SOF ¶ 48. As MoneyGram testified, Money Orders are marketed directly to the public, are sold through a "whole realm of nonfinancial institutions" such as "retail agents, convenience stores, Walmart, CVS, [and] mom and pop stores" and are purchased by individuals who don't use banks. SOF ¶ 26. In contrast, MoneyGram official checks are not marketed to the public, may only be purchased through a financial institution, and are instruments predominately purchased by individuals who have bank accounts at the financial institution selling the official check. SOF ¶ 45.

This difference is not merely one of happenstance or market segment preference but, according to Defendant States' experts, is instead a feature of the instrument itself. In point of fact, Prof. Barkley Clark includes this very difference in his definition of 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.**" Barkley Clark & Barbara Clark, *Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010) (emphasis added). Munn's Encyclopedia of Finance similarly defines a money order as an instrument for "remitting funds **by persons not having checking accounts**." F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962) (emphasis added). *See also*, Gillette Expert Report ¶ 11 (Ex. S to

Taliaferro Decl.) (acknowledging that a money order is a substitute for a check drawn on a checking account). Consequently, to the extent that money orders at large are generically understood to be a retail product for the unbanked who are unable or unwilling to send cash, MoneyGram Official Checks undisputedly do not share that definitional characteristic.

Finally, rule-making and opinion letters from federal regulatory authorities make clear that Official Checks are not money orders. For example, an issuer of Official Checks received a ruling from the Financial Crimes Enforcement Network on whether the issuer was a "money services business" ("MSB") under applicable U.S. Department of Treasury ("Treasury") regulations. Department of the Treasury Financial Crimes Enforcement Network Ruling FIN-2012-R001. The ruling noted an earlier determination from the Federal Reserve Board that "money orders and official checks were distinct classes of instruments subject to different rules." *Id*. at 2. The Treasury ruling concluded that

> [t]he distinction between the money orders and official checks in the FRB approval order demonstrates that a separate classification of these instruments was intended, and therefore that **the Company's official checks are not the same as money orders**.

Id. at 2-3 (emphasis added).[4] As a result, the issuance of Official Checks did not define the issuer as a MSB under Treasury regulations. *Id*. at 3.

As the above makes clear, because MoneyGram Official Checks of both the "Agent" and "Teller" variety lack the characteristics that make a pre-paid negotiable instrument a money order – whether a MoneyGram Retail Money Order or MoneyGram Agent Check Money Order – MoneyGram Official Checks are not money orders by another name and do not fall into the "money order" category of the FDA.

B. MoneyGram Official Checks are not Traveler's Checks

Delaware does not believe that the Defendant States are asserting that MoneyGram Official Checks are "traveler's checks" and therefore subject to the FDA under the statute's second category of "traveler's checks." To avoid any confusion, Delaware states simply that Money Gram Official Checks are not, and cannot, be fairly described as "traveler's checks." While a traveler's check is a pre-paid instrument that is both payable on demand and is drawn on or payable at

[4] The Federal Reserve Board's analysis included, as Delaware does above, that "[m]oney orders are primarily used to transmit money by consumers who do not or cannot maintain checking accounts. Traditionally, money orders have a maximum face value printed on the instrument . . . . Official checks can be used as a substitute for a variety of payment instruments, such as cashier's checks, and could be used by businesses as part of their cash management strategy." 72 Federal Reserve Bulletin 149 n.5 (Feb. 1986).

or through a bank, a traveler's check is designated by the term "traveler's check" or by a substantially similar term on its face and, more importantly, requires, as a condition to payment, a countersignature by the purchaser whose specimen signature appears on the instrument. U.C.C. § 3-104(i). Money Gram Official Checks are not labeled as traveler's checks, are not countersigned by the purchaser at the time of use, and therefore payment on an Official Check cannot be conditioned on a countersignature of the purchaser.

C. No Entity Is Directly Liable on MoneyGram Official Checks

Under the plain language of the FDA only those "similar written instrument[s]. . . on which a banking or financial organization or a business association is directly liable" fall under the purview of the FDA's escheat provisions. As review of the MoneyGram Official Check samples makes clear, there is no entity that is directly liable on MoneyGram Official Checks for either the "Agent" or "Teller" variety of Official Check. Consequently, MoneyGram Official Checks are not "similar written instrument[s]. . . on which a banking or financial organization or a business association is **directly liable,**" and therefore they fall outside the scope of the FDA's third category of covered instruments.

1. The "Directly Liable" Limiting Clause Applies Only To "Other Similar Written Instruments"

The FDA provides that "any sum . . . payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on

which a banking or financial organization or a business association is directly liable" escheats to the State of purchase if such instrument is unclaimed and unaddressed. 12 U.S.C. § 2503. As the structure of the sentence makes clear, the phrase "on which a banking or financial organization or a business association is directly liable" only limits the immediately preceding term "other similar written instrument (other than a third party bank check)" and does not limit the two prior terms, "money order" or "traveler's check." By limiting the term "other similar written instruments" in this manner, the FDA's third category of instruments includes only those written instruments on which banks and financial instruments have direct liability, the most common example of which is the cashier's check, but excludes the MoneyGram Official Checks at issue in this case.[5] On the other hand, because money orders and traveler's checks are expressly designated in 12 U.S.C. § 2503, their coverage by the FDA is not dependent upon the existence of the direct liability of another party.

First, unlike the Official Check instruments at issue which were not available prior to 1979, money orders and traveler's checks were common descriptors for written instruments in every day usage at the time the FDA was

[5] While it is widely recognized that a bank has direct liability on cashier's checks, there are other categories of written negotiable instruments including, for example, certified checks, bills of exchange and banker's acceptance, on which a banking or financial organization or a business association is directly liable. Mann 79:21-80:8 (Ex. AA to Taliaferro Decl.).

enacted in 1974. *See, e.g*., *Hong Kong Importers, Inc. v. American Express Co*., 301 So. 2d 707 (La. Ct. App. 1974) ("money order"); *Venable v. American Express Co.*, 217 N.C. 548, 8 S.E. 2d 804 (N.C. 1940) ("traveler's check"). Indeed, the legislative history of the FDA is replete with the use of both terms since it is undisputed that the principal objective of the FDA was to designate the state of purchase as the state entitled to escheat the sums payable on unaddressed unclaimed money orders and traveler's checks. 119 Cong. Rec. 17046 (May 23, 1973); 120 Cong. Rec. 4528 (Feb. 27, 1974); H.R. Rep. No. 93-1429 (1974) (Conf. Rep.); S. Rep. No. 93-505 (1973). Moreover, "it's a 'fundamental canon of statutory constriction' that words generally should be 'interpreted as taking their ordinary . . .meaning . . . at the time Congress enacted the statute,'" *New Prime, Inc. v. Oliveira*, 2019 U.S. LEXIS 724, at *14 (Jan. 15, 2019) (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018), (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))). Thus, the ordinary meaning of the terms "money order" and "traveler's check," as evidenced by the legislative history of the FDA, lead to the conclusion that all money orders and traveler's checks are within the coverage of the FDA without any limitation. There is simply no basis for concluding that Congress intended to limit the statutory coverage of money orders and traveler's checks based on how their liability is determined; however, that plainly leaves the limiting phrase "on which a banking or financial

organization or a business association is directly liable" applicable to the FDA's third category, namely "other similar written instrument[s] (other than a third party bank check)."

This understanding of 12 U.S.C. § 2503 is also consistent with the ordinary rules of grammar. The Supreme Court has frequently relied upon "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) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.")[6] The Court in *Barnhart* references its prior application of the rule of the last antecedent to a statute which is structured strikingly similar to the FDA. *Barnhart*, 540 U.S. at 26-27. In that prior application, in *FTC v. Mandel Brothers, Inc*., 359 U.S. 385, 386 (1959), the statute at issue defined "invoice" as "a written account, memorandum, list or catalog . . . delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs." The Third Circuit had "interpreted the phrase "any other" as rendering the relative

[6] The Court recognized that the rule "is not an absolute and can assuredly be overcome by other indicia of meaning." *Barnhart*, 540 U.S. at 26.

clause ("who is engaged in dealing commercially") applicable to all the specified listed categories. *Id.* at 389. The Court in *Mandel Brothers* unanimously reversed the Third Circuit, holding that the limiting clause applied only to "any other person." *Id.*

Applying the rule of the last antecedent as the Supreme Court did in *Barnhart* and *Mandel Brothers* to the FDA leads to the conclusion that the FDA's limiting clause ("on which a banking or financial organization or a business association is directly liable") only refers to the immediate antecedent "other similar written instrument (other than a third party bank check)." Consequently, as explained in greater detail below, because there is no entity that is directly liable on MoneyGram Official Checks, MoneyGram Official Checks do not fall under the FDA's category of "other similar written instrument[s]" and the escheat of unclaimed sums payable on MoneyGram Official Checks is not governed by the FDA.

2. A Written Instrument On Which An Entity Is "Directly Liable" Has No Conditions Required For Payment

While the FDA does not define the term "directly liable," the limiting clause "on which a banking or financial organization or a business association is directly liable" in 12 U.S.C. § 2503 must nevertheless be given effect. The Supreme Court is clear that "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) (quoting

Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)). In fact, the Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 404 (2000) described the duty to give meaning to every clause of a statute as a "cardinal principle of statutory construction." (citations omitted). *See also, Duncan v. Walker*, 533 U.S. 167, 174 (2001). Therefore, in combining this "cardinal principle" to give meaning to a phrase with the "fundamental cannon" that "words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute,'" *New Prime, Inc.*, 2019 U.S. LEXIS 724, at *14, Delaware looked to the widely recognized and accepted legal framework for establishing liabilities on written instruments that was in place in 1974 and today, the Uniform Commercial Code ("U.C.C"), to interpret the term "directly liable." The U.C.C.'s framework supports a simple, common-sense understanding of "direct liability" as a form of "liability that's categorical and non-conditional, as opposed to liability that's dependent on dishonor, or some other external fact." Mann 26:19-23 (Ex. AA to Taliaferro Decl.).

As explained by Delaware's expert Prof. Ronald Mann, under the U.C.C., the liability of a drawer on most checks is indirect and conditional, contingent on the lack of customer funds or the refusal of the drawee bank to honor the check. Mann Expert Report ¶¶ 23-27 (Ex. Z to Taliaferro Decl.); U.C.C. §§ 3-408 & 3-409; U.C.C. § 3-414. Thus, while in excess of 99% of all checks are honored, a

bank is free to decline payment on a check "for any reason or indeed for no reason at all." Mann Expert Report ¶ 24 (Ex. Z to Taliaferro Decl.). Under the U.C.C., however, there is a common check that has no conditional or contingent actions necessary for the drawer to be obligated to pay the instrument on its terms – a cashier's check. Mann Expert Report ¶ 28 (Ex. Z to Taliaferro Decl.); U.C.C. § 3-412. As Prof. Mann explains "[t]he point of a cashier's check is to give the payee an enforceable assurance that a bank is directly obligated on the instrument." Mann Expert Report ¶ 28 (Ex. Z to Taliaferro Decl.). In addition to cashier's checks, other written negotiable instruments such as certified checks, bills of exchange and banker's acceptances, would also be recognized as written negotiable instruments "on which a banking or financial organization or a business association is directly liable" because in each of those examples the bank, or the business association in the case of a bill of exchange, has accepted liability on the instrument and is unconditionally obligated to make payment on the terms of the instrument. Mann 79:21-80:8 (Ex. AA to Taliaferro Decl.).

Therefore, while the U.C.C. does not use the term "direct liability," Mann 78:14-17 (Ex. AA to Taliaferro Decl.), the understanding of the term "direct liability" as a form of "liability that's categorical and non-conditional, as opposed to liability that's dependent on dishonor, or some other external fact" is utterly consistent with the U.C.C.'s most basic understanding of the obligations and

liabilities created by various types of written instruments. Mann 26:19-23 (Ex. AA to Taliaferro Decl.). More to the point, the U.C.C.'s distinction between indirect, conditional liability and direct, non-conditional liability on written instruments is not arcane or obscure, but would have been well-understood in 1974, as this framework of obligations was then, and is now, needed "to support [the] practical use of the instruments." Mann Expert Report ¶ 22 (Ex. Z to Taliaferro Decl.). Thus, using the U.C.C.'s framework to provide an understanding of "direct liability" as a form of liability that is unconditional and "not dependent on dishonor, or some other external fact" to interpret the FDA's phase "on which a banking or financial organization or a business association is directly liable" gives the words in that phrase "their ordinary . . . meaning . . . at the time Congress enacted the statute." *New Prime, Inc.*, 2019 U.S. LEXIS 724, at *14.

In addition to the U.C.C., other sources also support interpreting the FDA's limiting clause "on which a banking or financial organization or a business association is directly liable" as governing only those written instruments for which an entity has unconditional liability "not dependent on dishonor, or some other external fact." For example, when promulgating regulations under the Expedited Funds Availability Act, 12 U.S.C. §§ 4001 *et seq*., the Federal Reserve Board defined a cashier's check in the regulation commonly known as Regulation CC as check that is a "direct obligation of the bank." 12 CFR 229.2(i)(3). This

definition in Regulation CC thus explicitly uses the term "direct" to describe the type of liability the U.C.C. establishes for a cashier's check.

Also, while Defendant States' expert Prof. Clayton Gillette conceded that there is the "occasional" use of the term "direct liability" as proposed by Prof. Mann, Gillette Rebuttal Report n.3 (Ex. T to Taliaferro Decl.), there is, in fact, more than just the "rare" or "unique" reference to "direct liability" or "direct obligation" in case law and scholarly treatises. *Id.* In addition to the three cases identified by Prof. Gillette at n.3 to his Rebuttal Report, a non-exhaustive review of available materials indicates that numerous additional cases, treatise, and other materials – including those drafted by Pennsylvania's expert in this case – interpret "directly liable" or "direct obligation" to mean just that – a liability that is direct and unconditional.[7] Therefore, using the U.C.C.'s scheme of liability for written

[7] Barkley Clark & Alphonse M. Squillante, *The Law of Bank Deposits, Collections and Credit Cards* 61 (1970) ("the drawee bank is not liable to the holder of a draft 'until he accepts it . . .'"); *id* at 68 ("**Another way** in which the payor bank can become **directly liable** to the payee . . . is by retaining [the check] beyond the deadlines . . ."); (emphasis added); Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶ 1.3 (rev. ed.1981) ("Until these conditions [of presentment, dishonor and notice of dishonor] are satisfied with the help of the bank collection system, no one is **directly liable** on a bank check.") (emphasis added); *id*. at ¶ 3.1[2][e ("we can identify at least three special situations in which the drawee will be **directly liable** to the holder. The first is written acceptance of an item, such as certification of a check. The second is conversion in case of a forged payee's indorsement. And the third is undue retention of a check . . .") (emphasis added); 5B *Michie on Banks and Banking* § 256a (2018) ("Upon the certification of a check, the bank ceases to be the debtor of the drawer for the amount represented by the check, and becomes **directly liable** to the holder until

discharged by payment, release, or the statute of limitations.") (emphasis added); 1 Glenn G. Munn, *Encyclopedia of Banking and Finance* 134 (1935) ("Cashier's Check: A bank's own check; a check drawn upon a bank and signed by its cashier, or assistant cashier, being a **direct obligation** of the bank.") (emphasis added); *Check . . . Cashier's Check*, *Black's Law Dictionary* (6th ed. 1990) ("A bank's own check drawn on itself and signed by the cashier or other authorized official. It is a **direct obligation** of the bank.") (emphasis added); Paul M. Shupack, *Cashier's Checks, Certified Checks, and True Cash Equivalence*, 6 Cardozo L. Rev. 467, 470 (1985) ("Whichever theory [of cash equivalence for cashier's checks] a court chooses to use, the result will generally remain the same: The bank, not the remitter, has a **direct obligation** on a cashier's check.") (emphasis added); *Money Order Services*, American Bankers Association Bank Management Pub. No. 140, 15-16 (1956) ("Money Order Services") ("The inclusion of 'Personal Money Order' on the check serves to point out that it is a *personal* money order and not an official instrument of the bank. It may also have some effect in supporting the premise that it is a personal check of the drawer and not a **direct obligation** of the bank . . .") (emphasis added); Office of the Comptroller of the Currency, Press Release, NR 2007-2 (Jan. 8, 2007), available at https://www.occ.treas.gov/news-issuances/news-releases/2007/nr-occ-2007-2.html ("A cashier's check, which is issued by a bank and sold to a consumer or other purchaser, represents a **direct obligation** of the bank.") (emphasis added); *La. Health Serv. & Indem. Co. v. Tarver*, 635 So. 2d 1090, 1095 (La. 1994) ("banking and financial organizations which are **directly liable** to another on a check, draft or similar instrument such as a cashier's or certified check . . . may also be obligated under the 1986 law to periodically report and to pay or deliver such abandoned property to the State.") (emphasis added); *Ward v. Fed. Kemper Ins. Co.*, 62 Md. App. 351, 358, 489 A.2d 91, 95 (Md. Ct. Spec. App. 1985) ("The conditions are that the check be presented and honored. Until those conditions are met, no one is **directly liable** on the check itself.") (citing Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶ 1.3 (rev.ed.1981))(emphasis added); *State, Dep't of Treasury v. Bank of Commonwealth*, 111 Mich. App. 553, 556, 314 N.W.2d 688, 690 (Mich. Ct. App. 1981) ("A cashier's check is: 'A bank's own check; a check drawn upon a bank and signed by its cashier, or assistant cashier, being a **direct obligation** of the bank.'") (citing Garcia, *Munn's Encyclopedia of Banking and Finance* (7th ed, 1973)) (emphasis added); *Clark v. Hawkeye Fed. Sav. Bank*, 423 N.W.2d 891, 893 (Iowa Ct. App. 1988) ("A cashier's check is the bank's own check; it is a **direct obligation** of the bank. When issued it is a credit and when returned a debit to the cashier's account.") (citation omitted) (emphasis added).

instruments to give meaning, as this Court must, to the FDA's use of the term "directly liable" as a form of liability that is unconditional and "not dependent on dishonor, or some other external fact" is consistent with both existing federal regulations and the common use of that term generally.

Finally, to the extent Defendant States argue that interpreting 12 U.S.C. § 2503 to impose a "direct liability" requirement on "similar written instruments" that is not imposed on money orders and traveler's checks renders the statute somehow inconsistent with the FDA's objectives, such an argument is unpersuasive. First, Defendant State's expert Prof. Gillette rejects using the U.C.C.'s scheme of liability for written instruments as a means for understanding what Congress could have meant by "directly liable" in the FDA. He reaches that conclusion "[b]ecause the term 'directly liability[*sic*]' is not utilized or defined in the relevant portions of the text of the UCC or applicable case law, and because equating the term with 'unconditional liability' is inconsistent with the stated objectives of Federal Disposition Act." Gillette Rebuttal Report ¶ 1 (Ex. T to Taliaferro Decl.). Given that Prof. Gillette explicitly testifies that he is not an expert on the FDA nor is he giving a legal opinion as to the interpretation of the FDA, he has no basis for stating an opinion on the "stated objectives of the FDA" or for the conclusion he reaches based on his assessment of what is or is not

allegedly consistent with the "stated objectives of the FDA." Gillette 177:15-21 (Ex. U to Taliaferro Decl.).

Second, and more curious however, is Prof. Gillette's rejection of using the U.C.C.'s scheme of liability for written instruments to interpret the term "directly liable" based on that fact that the U.C.C. does not utilize the term "directly liable." Gillette Rebuttal Report ¶ 1 (Ex. T to Taliaferro Decl.); Gillette 176:8-16 (Ex. U to Taliaferro Decl.). Presumably if there was a contemporaneous 1974 source that defined or used the term "directly liable," the parties would not be contesting what that term means in the FDA; however, there is no such source so it is self-evident that the parties ***must*** look to sources addressing various types of liabilities on written instruments that do not themselves "utilize" the term "directly liable" in order to give meaning to the term "directly liable" as used by Congress. *See Williams v. Taylor*, 529 U.S. 362 (2000), *New Prime, Inc. v. Oliveira*, 2019 U.S. LEXIS 724 (Jan. 15, 2019), *supra.* Therefore, the U.C.C.'s lack of utilizing the term "directly liable" can hardly be the basis for rejecting the U.C.C.'s well-established, commonly recognized and contemporaneously available scheme of liabilities for written instruments as the basis with which to give meaning to Congress's use of the term "directly liable" in the FDA.

Moreover, Prof. Gillette does not dispute the U.C.C.'s scheme of liability as explained by Prof. Mann nor does he even suggest that the U.C.C.'s scheme is

inconsistent with interpreting the term "directly liable" as a form of unconditional liability. Gillette Rebuttal Report ¶ 2 (Ex. T to Taliaferro Decl.). Even more tellingly, Prof. Gillette and the Defendant States offer no alternative definition of "directly liable," nor do they argue that when the Federal Reserve Board uses the term "direct obligation of a bank" in its definition of a cashier's check that the Federal Reserve Board is not referencing the exact same type of liability for cashier's checks described in the U.C.C. Gillette 177:15-21 (Ex. U to Taliaferro Decl.); Clark 110:6-13 (Ex. CC to Taliaferro Decl.) (acknowledging indirect liability on a teller's check). Given that the U.C.C.'s scheme of liabilities for written instruments, available case law and scholarly articles, and federal regulations relating to negotiable instruments all support interpreting "direct liability" as a type of liability that is unconditional and "not dependent on dishonor, or some other external fact," it is both reasonable and appropriate to give that meaning to the term "directly liable" in the FDA's limiting phrase "on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503.

3. No Entity has "Direct Liability" On MoneyGram Official Checks and Therefore Official Checks Are Not Covered by 12 U.S.C. § 2503

Based on a review of sample MoneyGram Official Checks in the record, Prof. Mann concluded that for both the "Agent Check" and "Teller's Check"

varieties of MoneyGram's Official Checks no banking or financial organization or business association is directly liable on those instruments because neither MoneyGram nor the banks have unconditional liability not "dependent on dishonor, or some other external fact" to pay the instruments. Mann Expert Report ¶¶ 19-20 (Ex. Z to Taliaferro Decl.); Mann 11:24-12:3 (Ex. AA to Taliaferro Decl.); Mann 26:16-27:3 (Ex. AA to Taliaferro Decl.). Neither of the experts presented by the Defendant States contradict the conclusion that under the U.C.C. neither MoneyGram nor the banks have an unconditional liability not "dependent on dishonor, or some other external fact" to pay on MoneyGram official checks. Rather Defendants appear to argue that this lack of unconditional liability does not preclude a finding that somehow MoneyGram Official Checks are similar written instruments "on which a banking or financial organization or a business association is directly liable" under the FDA. In contrast, Delaware submits that any reasonable interpretation of "directly liable" cannot be so broad as to encompass a form of conditional liability, like the undisputed conditional liability on MoneyGram's Official Checks, in which a bank is free to decline payment on a check "for any reason or indeed for no reason at all." Mann Expert Report ¶ 24 (Ex. Z to Taliaferro Decl.).

As explained above, the limiting phrase "on which a banking or financial organization or a business association is directly liable" in 12 U.S.C. § 2503

applies only to the FDA's third category of covered instruments, namely a "similar written instrument (other than a third party bank check)." Further, in giving effect to this limiting phrase, the term "direct liability" restricts the category of "similar written instruments" to those written instruments on which a bank or business association's liability is "direct" or unconditional and not "dependent on dishonor, or some other external fact." Therefore, because no entity is unconditionally or "directly liable" on MoneyGram Official Checks, MoneyGram Official Checks are not "similar written instrument[s] (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" and the escheat of MoneyGram Official Checks is not governed by the FDA.

4. The FDA's Reference to "Third Party Bank Check" is Obscure

Consistent with the Supreme Court's admonition to both give meaning to every clause of a statute and to interpret the words of a statute as they would have been ordinarily understood at the time Congress enacted the statute, Delaware has scoured contemporaneous sources and not uncovered a definition of the phrase "third party bank check." It is clear that the phrase "third party bank check" came out of a letter sent by the Treasury Department, S. Rep. No. 93-505, 4-5 (1973) (Letter from Edward C. Schmults), but beyond identifying the apparent source of the phrase, the Schmults letter is little help in understanding what was meant by the phrase. *See supra* n.2. What is completely clear, however, is that MoneyGram's

Official Check program is a means for banks to outsource their bank check offerings to a third party, namely MoneyGram, *see e.g. MoneyGram International, Inc. v. Comm'r,* 144 T.C. 1, 5 (2015), and therefore MoneyGram Official Checks are in fact bank checks offered through a third party or, in short form, "third party bank checks." In light of the paucity of contemporaneous sources and definition of "third party bank check," this is a more than reasonable interpretation of the FDA, and therefore Delaware believes that, to the extent this Court determines it is necessary to interpret the phase "third party bank check" in order to resolve the current dispute, a clear reading of the plain language of the statute would find that MoneyGram Official Checks are specifically excluded from the FDA.

Delaware is cognizant of other interpretations of "third party bank check." Pennsylvania has suggested the definition from a Washington state statute be used to define "third party bank check," RCW § 63.29.010(17), but a single state law that post-dates the FDA hardly seems to provide any meaningful guidance on what Congress meant by "third party bank check." Prof. Gillette argues that MoneyGram Official Checks of the "Teller's Check" variety cannot be considered "third party bank checks," but offers no definition of "third party bank check." Gillette Expert Report ¶¶ 70-80 (Ex. S to Taliaferro Decl.). Delaware's expert Prof. Mann suggests the phrase "third party bank check" could mean the bill payment checks that banks issue on behalf of their customers. Mann Expert

Report ¶¶ 60-70 (Ex. Z to Taliaferro Decl.). Although less than clear, Prof. Clark's discussion of bank payment services and the Hunt Report leaves open the possibility, consistent with Prof. Mann's view, that "third party bank check" is a possible reference to a form of bank payment offered on behalf of bank customers. *See, e.g.*, Clark Expert Report at 24 (Ex. BB to Taliaferro Decl.) ("Third party payment services, as here defined, include 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.") (citing the first draft of the Hunt Commission Report at n.1).

If, however, the phrase "third party bank check" is going to be interpreted to mean something other than a bank check offered by a third party that is not the bank, as is the case with MoneyGram Official Checks, then "third party bank check" must be interpreted in a manner consistent with the remainder of the phase "similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." Prof. Mann's understanding of "third party bank check" as a reference to bill payment checks that banks issue on behalf of their customers, consistent with Prof. Clark's testimony, at least has the benefit of providing an internally consistent interpretation for both "third party bank check" and "directly liable" in that the effect of the entire phrase is to exclude specific instruments on which a bank is

directly liable from a larger category of instruments "on which a banking or financial organization or a business association is directly liable." Fortunately, given that the remaining words of the phrase "on which a banking or financial organization or a business association is directly liable" are subject to a clear interpretation and independently resolve the issue before the Court, a precise understanding of "third party bank check" may not be necessary to resolve the pending dispute and grant summary judgment to Delaware. 12 U.S.C. § 2503.

D. MoneyGram Official Checks Are Not Similar Written Instruments to Money Orders or Traveler's Checks as a Matter of Law

If this Court does not resolve this case on other grounds, including the strictly legal issue of direct liability, and decides that resolution of this case requires a determination on the issue of whether MoneyGram Official Checks are "similar written instruments" to money orders or traveler's checks, it is Delaware's position that the issue of similarity is inherently factual and requires resolution by the Special Master in his capacity as a trier of fact. *See New York v. United States*, 98 F. Supp. 855, 860 (N.D.N.Y. 1951), *aff'd per curiam*, 342 U.S. 882 (1951) ("When similarity exists is a question of fact."). The only exception would be if the issue of similarity can be resolved as a matter of law because no reasonable trier of fact could find, on the basis of the existing factual record, that either MoneyGram Official Checks were, or were not, similar. Thus, in the event the

issue of similarity becomes dispositive and Delaware has not succeeded in persuading this Court that similarity does not exist as a matter of law, then both motions for summary judgment must be denied and the issue of similarity must be set for resolution as a matter of fact. Delaware contends, however, given all of the differences identified below, that a reasonable trier of fact could not find that MoneyGram Official Checks are "similar written instruments" to money orders or traveler's checks, and therefore MoneyGram Official Checks are not subject to the FDA.

In construing a statute that prohibited possession of "similar paper adapted to making" any obligations and other securities of the United States, the Court noted, "[s]imilarity is not identity, but resemblance between different things."[8] *United States v. Raynor*, 302 U.S. 540, 546-47 (1938). In that case, the Court upheld the conviction of respondents for possessing paper, that although not the same as the paper on which U.S. currency was printed, nevertheless had

> practically the same color, weight, thickness and appearance as this distinctive government paper and cut to the dimensions of twenty dollar government obligations; respondents' paper rattled like genuine

[8] Black's Law Dictionary and Webster's New International Dictionary provide equivalent definitions of similar. Black's Law Dictionary 1240 (5th ed.) ("[n]early corresponding; resembling in many respects; somewhat alike; having a general likeness."); Webster's New International Dictionary (2d ed.) (same). *See, e.g., United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980); *United States v. Hersh*, 297 F.3d 1233, 1241 (11th Cir. 2002); *Duckworth v. Allianz Life Ins. Co. of N. Am.*, 706 F.3d 1338, 1343 (11th Cir. 2013).

> money; it did not have red and blue silk fibers throughout, but red and blue marks were so expertly designed upon its surface that one judge, dissenting below, after a careful examination of these marks with a magnifying glass, was still wholly uncertain whether they were actually woven in the fabric or were traced on the surface.

Id. at 542-43.

While the judge in the lower *Raynor* court had difficulty discerning the difference between the two types of paper at issue with a magnifying glass, no such difficulties are presented by a review of MoneyGram Official Checks. Money Orders must have the term "Money Order" printed on the face of the instrument. U.C.C. § 3-104(f); SOF ¶ 31; SOF ¶ 91. In contrast, a MoneyGram Official Check does not have "Money Order" appear on the face of the instrument. Yingst 161:6-162:16 (Ex. A to Taliaferro Decl.). Thus, the differences between Money Orders and Official Checks are obvious from the start and, as the below demonstrates, grow only more vivid as one understands the additional legal, contractual, regulatory, operational and marketing differences between MoneyGram Official Checks and MoneyGram Money Orders which make it impossible to conclude that MoneyGram Official Checks and MoneyGram Money Orders are "practically the same." *Raynor*, 302 U.S. at 542. In short, it does not take a magnifying glass to observe the lack of "resemblance between" Money Orders and Official checks and therefore MoneyGram Official Checks are not "similar written instruments" covered by the FDA.

1. MoneyGram Official Checks are Not Similar Written Instruments to Traveler's Checks

"Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term 'traveler's check' or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument. U.C.C. § 3-104(i).

MoneyGram Teller's Checks and MoneyGram Agent Checks are not similar written instruments to traveler's checks for several reasons. First, although they are payable on demand and drawn on a bank, they are not designated by the term "traveler's check." They are also not designated by any term substantially similar to traveler's check, such as "Eurocheque." Second, and more importantly, MoneyGram Teller's Checks and MoneyGram Agent Checks do not require a countersignature by an individual whose specimen signature appears on the instrument.

2. MoneyGram Official Checks are Not Similar Written Instruments to Money Orders

By the same token, MoneyGram Teller's Checks and MoneyGram Agent Checks are not similar written instruments to Money Orders. As noted above, MoneyGram Money Orders have a number of distinctive characteristics. *See*, Section I.A., *supra*. MoneyGram Teller's Checks and MoneyGram Agent Checks

lack these characteristics, are treated as distinct classes of instruments under applicable federal regulations, and are also sold and marketed differently from MoneyGram Money Orders. These differences collectively make MoneyGram Teller's Checks and MoneyGram Agent Checks not "similar written instruments" to money orders.

a) MoneyGram Teller's Checks and Agent Checks have Facial and Contractual Differences from MoneyGram Money Orders

MoneyGram Teller's Checks and MoneyGram Agent Checks have a number of facial differences from MoneyGram Money Orders. First, and admittedly most categorically, MoneyGram Teller's Checks and MoneyGram Agent Checks are not designated anywhere on their face by the term "Money Order." SOF ¶ 91; Exs. A, C to Whitlock Official Check Aff.. A Money Order has a specific market segment usage that has developed over time and is treated distinctively by purchasers. SOF ¶ 24; SOF ¶ 25. MoneyGram Teller's Checks and MoneyGram Agent Checks, because they do not contain the designation "Money Order" anywhere on their face, do not share the market segment usage and distinctive treatment given to Money Orders.

Second, MoneyGram Money Orders contain specific purchaser-payee language that creates a contract between MoneyGram and the purchaser. The contractual language includes a limitation on liability on behalf of MoneyGram.

Ex. A to Whitlock Money Order Aff. It includes a warning to the recipient of a MoneyGram Money Order that, "This Money Order will not be paid if it has been forged, altered, or stolen, and recourse is only against the presenter. This means that persons receiving this money order should accept it only from those known to them and against whom they have effective recourse." Ex. A to Whitlock Money Order Aff. A MoneyGram Money Order also limits the manner in which a purchaser of a MoneyGram Money Order can request a refund. SOF ¶ 23; Ex. A to Whitlock MO Decl., MG 002691. ("A Claim Card is REQUIRED to process a refund or a claim on a lost or stolen money order.") According to MoneyGram's corporate designee, "as the issuer of this [MoneyGram] money order, we want to include these specific things related to the characteristics of the money order . . . these items are on here because we've determined that we want these legal requirements to be part of this document." Yingst 311:3-14 (Ex. A to Taliaferro Decl.).[9]

In contrast, a MoneyGram Teller's Check and Agent Check are not subject to any purchaser-payee terms and conditions which create a contract between

[9] While MoneyGram offers "blank stock" paper on which negotiable instruments may be printed and which may, in certain instances, result in MoneyGram official checks having purchaser-payee language on the back of the check, in the case of MoneyGram Official Checks the purchaser-payee language is not operative because the Official Check is not designated on its face as a Money Order. Yingst Declaration ¶¶2-4; SOF ¶77.

MoneyGram and the purchaser, or that would create any obligations between MoneyGram and a recipient of a MoneyGram Teller's Check or a MoneyGram Agent Check. SOF ¶ 50.

Third, a MoneyGram Money Order is assessed a service charge of $1.50/month once the Money Order remains uncashed for 12 months past the date of its issuance, retroactive to the date of issuance. SOF ¶ 33; As a result, a MoneyGram Money Order can be completely consumed by service charge fees if the face value of the MoneyGram Money Order is less than $126. SOF ¶ 33. In contrast, MoneyGram Teller's Checks and MoneyGram Agent Checks do not contain any service charge language and are not assessed a service charge even if they remain uncashed for an extended period of time. SOF ¶ 51.

Collectively, these facial and contractual differences make MoneyGram Teller's Checks and MoneyGram Agent Checks not "similar written instruments" to MoneyGram Money Orders.

b) MoneyGram Teller Checks and Some MoneyGram Agent Checks Have Different Funds Availability and Reserve Requirements than Money Orders

MoneyGram Teller's Checks, and some portion of MoneyGram Agent Checks, by virtue of their status as teller's checks under the Uniform Commercial Code, have different funds availability requirements under Federal Reserve Regulation CC and reserve requirements under Federal Reserve Regulation D.

A MoneyGram Teller's Check is a type of MoneyGram Official Check issued by a financial institution. SOF ¶ 80. All MoneyGram Official Check Teller's Checks indicate that the drawer of the instrument is the financial institution that sells the MoneyGram Official Check Teller's Checks. SOF ¶ 80. The drawee on a MoneyGram Teller's Check is a different financial institution than the financial institution that sells the MoneyGram Official Check Teller's Checks. SOF ¶ 81.

Similarly, at least one type of MoneyGram Agent Check does not explicitly state that the financial institution that signs the Agent Check is doing so as "agent for MoneyGram." In the absence of such an explicit statement, the financial institution's status as drawer of the check is inferred by the position of its signature on the check. SOF ¶ 88.

Because a MoneyGram Teller's Check and the above-described variety of MoneyGram Agent Checks are checks drawn by a bank on another bank, they are a teller's check under the U.C.C. U.C.C. § 3-104(h). Regulation CC, which governs how quickly certain negotiable instruments must be honored, contains an identical definition of a teller's check. 12 C.F.R. § 229.2(gg) ("Teller's check means a check provided to a customer of a bank or acquired from a bank for remittance purposes, that is drawn by the bank, and drawn on another bank or payable through or at a bank.").

MoneyGram Teller's Checks' and the above-described variety of MoneyGram Agent Checks' status as teller's checks makes them a "low risk item" under both the Expedited Funds Availability Act, 12 U.S.C. §4001 *et seq.*, and the implementing regulations contained in Regulation CC. 12 C.F.R. Part 229. Because a teller's check is a low risk item, any depository bank is required to make funds deposited by any teller's check, including a MoneyGram Teller's Check or the above-described variety of MoneyGram Agent Check, "available for withdrawal not later than the business day after the banking day on which the funds are deposited." 12 C.F.R. § 229.10(c)(1).

In contrast, a depository institution is not required to make funds available on the next business day when those funds are deposited by money order. The Federal Reserve noted that the exclusion of money orders from the next day availability requirements was self-evident, noting that because money orders "are generally signed by the purchasing customer, not by an officer of the issuing bank and therefore are not cashier's checks subject to the [low-risk rules]." 53 Fed. Reg. 19372, 19396 (May 27, 1988).[10]

Similarly, a MoneyGram Teller's Check and the above-described variety of Agent Check are subject to certain reserve requirements under the Federal

[10] In contrast, a U.S. Postal Money Order is a low risk item subject to next-day availability. 12 C.F.R. § 229.10(c)(1)(ii).

Reserve's Regulation D. 12 C.F.R Part 204. Under Regulation D, certain deposits of bank customers must be maintained in reserve in the event that the customer demands his funds. One of the categories of deposit that is subject to Regulation D is a teller's check. 12 C.F.R. § 204.2(a)(1)(iii). In contrast, a MoneyGram Money Order is not subject to the reserve requirements of Regulation D, because no bank draws those instruments.

MoneyGram recognizes both of these significant distinctions, both in how it operates itself and how it advises its financial institution clients. For example, MoneyGram's Fed. R. Civ. P. 30(b)(6) witness testified that a MoneyGram Teller's Check is considered a "good funds check" and is accepted as a "good funds check." SOF ¶ 82. MoneyGram operationally recognizes the difference between a MoneyGram Teller's Check, which is a next day "good funds" item, and a MoneyGram Money Order, which is not. SOF ¶ 82

Similarly, informational materials distributed to MoneyGram's financial institution clients advises them that a MoneyGram Teller's Check is subject to Regulation CC and Regulation D. SOF ¶ 83.

Finally, the specific treatment of a MoneyGram Teller's Check under Regulation CC and Regulation D is reflected in the way in which MoneyGram refers to a MoneyGram Teller's Check versus how it refers to a MoneyGram Money Order. According to MoneyGram, Official Checks are understood to be a

type of "bank check." Yingst 138:12-20 (Ex. A to Taliaferro Decl.); Yingst 144:15-23(Ex. A to Taliaferro Decl.); Yingst 169:17-170:8(Ex. A to Taliaferro Decl.); SOF ¶70.

c) MoneyGram Official Checks Have Different Marketing and Operational Differences

In addition to the contractual and regulatory differences discussed above, there are myriad marketing and operational differences between MoneyGram Money Orders, on the one hand, and MoneyGram Teller's Checks and Agent Checks, on the other hand. These differences are discussed in more detail in the Statement of Facts, but in summary form:

- **Branding**: A MoneyGram Teller's Check or MoneyGram Agent Check is branded exclusively with the logo of the issuing financial institution, while a MoneyGram Money Order is generally branded with MoneyGram's logo. SOF ¶ 52; SOF ¶ 31.
- **Marketing**: Money Orders are marketed as more reliable substitutes for a personal check. MoneyGram markets this service directly to the public through methods including digital and social media, point-of-sale materials and global branding to increase market awareness of MoneyGram. SOF ¶ 27. Unlike MoneyGram Money Orders, MoneyGram Teller's Checks and MoneyGram Agent Checks are not marketed to the public. To the contrary, all MoneyGram marketing of official checks is to financial institutions but that marketing is

limited in nature, for example, credit union magazine ads. SOF ¶¶ 45-46. However, the financial institution customers of MoneyGram market MoneyGram's Official Checks to their customers. SOF ¶ 45.

- **Use and Acceptability of Instruments**: Consumers use MoneyGram Money Orders to make payments in lieu of cash or personal checks. SOF ¶ 21. A consumer would use a Money Order instead of a personal checking account because there is a segment of the population that does not use or does not want to use a personal checking account to make payments, so that person has a regular habit of using money orders to pay their bills instead of checks. SOF ¶ 24. Official checks are used by consumers where a payee requires a check drawn on a bank. Official Checks have no denominational limit and can be issued in any amount. SOF ¶ 68. A customer typically acquires a MoneyGram Official Check when they need a "good funds check," such as to make a deposit on a car or down payment on the purchase of a home. A bank check is typically accepted as a good funds check. SOF ¶ 73. A MoneyGram Teller Check is used by a consumer that has a need for a bank check where a money order would not be acceptable since it does not have next day funds availability. SOF ¶ 74. An Official Check has a different level of acceptability than a money order does. SOF ¶ 74

- **Size of Market**: MoneyGram Money Orders are offered through significantly more institutions than MoneyGram Teller's Checks and Agent Checks. MoneyGram issues money orders through its network of approximately 17,500 agents and financial institution locations in the U.S. and Puerto Rico as well as through company operated retail locations. SOF ¶ 21. In contrast, approximately 800 financial institutions at 5,600 branch locations in the United States offer MoneyGram Official Checks. SOF ¶ 66.
- **Public Availability of Information**. MoneyGram maintains an internet database if consumers want to locate a retail location to purchase a MoneyGram Retail Money Order. SOF ¶ 22. In contrast, there is no internet database if consumers want to locate a financial institution to purchase a MoneyGram Official Check. SOF ¶ 49.
- **Competitors**: MoneyGram Money Order competitors include a small number of large money order providers and a large number of regional and niche money order providers. MoneyGram's largest competitors in the money order industry are Western Union and the U.S. Postal Service. SOF ¶ 30. Official Check competitors include financial institution solution providers, such as core data processors and corporate credit unions. MoneyGram also generally competes against a financial institution's desire to perform these processes in-house with support from these types of organizations. SOF ¶ 72.

- **Processing of Refunds**: A purchaser of a MoneyGram Money Order can contact MoneyGram directly and complete a claim card if he or she wants to receive a refund on an uncashed money order. SOF ¶ 23. A purchaser of a MoneyGram Official Check cannot contact MoneyGram directly to request a refund of an Official Check. Instead, they must contact the bank that issued the Official Check. SOF ¶ 53.
- **Split of Interest on Uncashed Instruments**: A financial institution that sells MoneyGram Official Checks shares interest earnings on the balance of uncashed Official Checks that it has sold. SOF ¶ 56. In contrast, with the exception of one major retailer, agents that sell MoneyGram Retail Money Orders do not earn any interest on the outstanding balance of their uncashed MoneyGram Retail Money Orders. SOF ¶ 40.
- **Average Time Until Redemption**: MoneyGram Money Orders generally remain outstanding for approximately six days. SOF ¶ 34. MoneyGram Official Checks generally remain outstanding for approximately four days. SOF ¶ 71.
- **Dollar Limits**: MoneyGram Money Orders are typically not issued in amounts exceeding $1,000, although some individual agents could have their maximum permissible amount set at a lower level. SOF ¶ 36. Official Checks have no denominational limit and can be issued in any amount. SOF ¶ 68.

- **Processing of Proceeds**: MoneyGram usually directly debits the bank account of agents that sell Retail Money Orders in order to receive the proceeds of those sales. SOF ¶ 39. A financial institution that sells MoneyGram Official Checks typically transmits the proceeds of the sale of those Official Checks by wiring payment to MoneyGram. SOF ¶ 54.
- **Right to Stop Payment**: A MoneyGram Money Order agent has limited operational rights, and has no legal right to stop payment on a money order. SOF ¶ 41. A financial institution that sells MoneyGram Official Checks has a number of operational rights that a seller of a MoneyGram Retail Money Order does not have. SOF ¶ 55.

As the above factual, contractual and regulatory differences make clear, MoneyGram Official Checks are a distinct category of written instruments that are separate from and so unlike MoneyGram Money Orders as not to be similar to one another.[11] Therefore, while any one of the above factual, contractual and

[11] Pennsylvania's expert, Prof. Clark asserts that "similar written instruments" in 12 U.S.C. § 2503 applies to all "remittance instruments." Clark Expert Report at 2 (Ex. BB to Taliaferro Decl.). "Remittance Instrument" is not a term defined in the U.C.C., *id.* at 6, and the only two sources cited by Clark are Clark's own treatise and Clark's own compliance guide. *Id.* (citing Clark, *The Law of Bank Deposits, Collections and Credit Cards*, Ch. 24 and Clark, *Compliance Guide to Payment Systems*, Ch. 7). Clark was unaware of any other legal treatise or book that used the term "remittance instrument" in the same manner he used it in his expert report. Clark 91:3-7 (Ex. CC to Taliaferro Decl.). According to Clark, remittance instruments (and therefore instruments covered by the "similar written instrument" language of 12 U.S.C. § 2503) include: 1) Cashier's Checks; 2) Teller's Checks; 3)

regulatory differences viewed in isolation may be dismissed as not significant, collectively the differences demonstrate that MoneyGram Official Checks are not properly considered within the scope of the FDA's third category of "similar written instruments."

E. To the Extent State Laws Do Not Provide for the Escheat of MoneyGram Official Checks, the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act is Inapplicable

The FDA contains an additional limitation beyond those discussed above. Under 12 U.S.C. § 2503, a State is only entitled to take escheat of items otherwise subject to the FDA "to the extent of that State's power under its own

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Certified Check; 4) Money Order; 5) Traveler's Check; 6) Agent Check; and 7) Postal Money Order. Clark Expert Report at 6-10 (Ex. BB to Taliaferro Decl.); Clark 53:18-54:2 (Ex. CC to Taliaferro Decl.). By Clark's own admission, his reading of § 2503 would capture every form of negotiable instrument other than "ordinary bank checks," Clark 56:16-20 (Ex. CC to Taliaferro Decl.), which Clark asserts is a term synonymous with "check." Clark Expert Report at 11 (Ex. BB to Taliaferro Decl.); Clark 168:12-17 (Ex. CC to Taliaferro Decl.). At his deposition, Clark admitted that the term "remittance instruments" does not appear in the text of the FDA or its legislative history, and was not a term in common usage at the time of the Act's passage. Clark 82:5-8 (Ex. CC to Taliaferro Decl.). Clark further admitted that his own definition of "remittance instruments" was narrower in his 1970, 1981, and 1990 treatises, and that in 2010 Clark "expanded [his] definition of remittance instruments" to include the broad categories he identified in his expert report. Clark 87:22-90:8 (Ex. CC to Taliaferro Decl.). Putting to one side the myriad problems with Prof. Clark's report and testimony, if Congress had intended to capture every form of negotiable instrument other than a "regular" check, then it could have done so in any number of ways. It did not use such sweepingly broad language, which necessarily means that the universe of similar instruments captured by the FDA is much narrower than Prof. Clark proposes.

laws to escheat or take custody of such sum." At a minimum, at least ten (10) Defendant States do not have the "power under [their] own laws" to take possession of "similar written instruments." Therefore, even if this Court were to determine that MoneyGram Teller's Checks and MoneyGram Agent Checks are instruments on which a financial institution or business organization is directly liable, and that they are similar written instruments to money orders or traveler's checks, the claims of at least those 10 States would fail as a matter of law and Delaware would be entitled to summary judgment with respect to the claims of those States.

The ten Defendant States that do not have the requisite language in their enacting statutes are:

- **Alabama:** Code of Ala. § 35-12-74 ("[P]roperty that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if any of the following occur: . . . (7) The property is a traveler's check or money order purchased in this state . . .")
- **Arizona**: A.R.S. § 44-304 ("[P]roperty that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if any of the following applies: . . . 7. The property is a traveler's check or money order that was purchased in this state . . .")
- **Arkansas:** A.C.A. § 18-28-204 ("[P]roperty that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if: . . . (7) the property is a traveler's check or money order purchased in this state . . .")
- **Indiana**: Ind. Code Ann. § 32-34-1-21 ("[P]roperty located in Indiana or another state is subject to the custody of this state as unclaimed property if

the property is presumed abandoned and if: . . . (7) the property is a traveler's check or money order: (A) purchased in Indiana. . .").

- **Iowa**: IA Code §556.2A ("A sum payable on a traveler's check or money order described in subsection 1 or 2 shall not be subjected to the custody of this state as unclaimed property unless any of the following apply: a. The records of the issuer show that the traveler's check or money order was purchased in this state.")

- **Kansas:** K.S.A. § 58-3936 ("[P]roperty that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if: . . . (g) the property is a traveler's check or money order purchased in this state. . .")

- **Montana**: Mont. Code Ann. § 70-9-805 ("[P]roperty that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if: . . . (7) the property is a traveler's check or money order purchased in this state . . . .").

- **Nevada**: Nev. Rev. Stat. Ann. § 120A.530 ("[P]roperty that is presumed abandoned, whether located in this or another state, is subject to the custody of this State if: . . . 7. The property is a traveler's check or money order purchased in this State . . . .").

- **Texas**: Tex. Property Code Ann. § 72.102 ("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 . . . .).

- **West Virginia**: W. Va. Code § 36-8-4 ("[P]roperty that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if: . . . (7) The property is a traveler's check or money order purchased in this state . . . .").

These States do not have state laws that empower them to escheat "similar written instruments" because these States' laws do not mention any negotiable instruments other than money orders or traveler's checks in their empowering statutes. Other States may also be precluded from claiming the authority to escheat "similar

written instruments" depending on an interpretation of their state escheat statutes. At a minimum, however, the above 10 States cannot take possession of any "similar written instruments" and Delaware is entitled to summary judgment with respect to these 10 States.

II. MoneyGram Official Checks Properly Escheat to Delaware Under the *Texas* Trilogy

If this Court finds that the escheat of MoneyGram Official Checks is not governed by the FDA, then the unclaimed property represented by uncashed unaddressed MoneyGram Official Checks escheats pursuant to the priority rules established by the Supreme Court in a line of cases commonly referred to as the *Texas* trilogy. In *Texas v. New Jersey*, 379 U.S. 674, 677 (1965) and subsequent cases, the Supreme Court established priority rules to resolve competing escheat claims by multiple States over abandoned intangible property. Under the *Texas* priority rules, Delaware is entitled to escheat unclaimed unaddressed MoneyGram Official Checks because it is the State of incorporation of MoneyGram and because MoneyGram is the debtor holding the funds due and owning on unclaimed Official Checks for which its books and records do not contain the names and addresses of the creditors.

A. The *Texas* Trilogy

The Supreme Court in *Texas* emphasized the importance of establishing bright line rules governing the escheat of intangible property. *Id*. at 679-81. Using

the terms "debtor" and "creditor" to designate, respectively, the "holder" and the "owner" of unclaimed property, the Supreme Court in *Texas* granted first priority to the State of the last known address of the creditor as shown in the debtor's books and records. *Id*. at 681-82. When there is no record of any address for the creditor or the last known address is in a State which does not provide for the escheat of the unclaimed property, the Supreme Court granted second priority to the State of the debtor's incorporation to escheat the unclaimed, unaddressed property. *Id*. at 682.

Two subsequent cases challenged the application of these bright-line priority rules. *See Pennsylvania v. New York*, 407 U.S. 206 (1972); *Delaware v. New York*, 507 U.S. 490 (1993). In *Pennsylvania*, the Supreme Court rejected altering the priority rules based on the fact that the addresses of many of the creditors were unknown and held that "to vary the application of the *Texas* rule according to the adequacy of the debtor's records would require [us] to do precisely what we said should be avoided—that is, '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.'" 407 U.S. at 215 (quoting *Texas*, 379 U.S. at 679). In *Delaware*, the Supreme Court rejected an attempt to change the priority rules by expanding the concept of a property-holding "debtor" or by implementing a "principal place of business" test to supplant the State of incorporation rule. 507

U.S. at 502, 505-06. In both instances the Supreme Court upheld and confirmed the application of the *Texas* bright-line priority rules and reiterated the importance of "adhering to [its] precedent" to "resolve escheat disputes between States in a fair and efficient manner." *Id*. at 510. The *Delaware* Supreme Court also held that "no State may supersede [the rules] by purporting to prescribe a different priority under state law." *Id*. at 500.

As the Third Circuit recently noted, the Supreme Court in *Delaware* "succinctly summarized the priority rules from *Texas* in three steps." *Marathon Petroleum Corporation, et al. v. Secretary of Finance for the State of Delaware, et al.,* 876 F.3d 481, 490 (3d Cir. 2017). Those three steps are:

> First, one must "determine the precise debtor-creditor relationship as defined by the law that creates the property at issue." *Delaware*, 507 U.S. at 499. "Second . . . the primary rule gives the first opportunity to escheat to the state of 'the creditor's last known address as shown by the debtor's books and records.'" *Id.* at 499-500 (quoting *Texas*, 379 U.S. at 680-81). "Finally, if the primary rule fails because the debtor's records disclose no address for a creditor or because the creditor's last known address is in a [s]tate whose laws do not provide for escheat, the secondary rule awards the right to escheat to the [s]tate in which the debtor is incorporated." *Id*. at 500.

Marathon, 876 F.3d at 490-91. An application of these three steps demonstrates that Delaware is entitled to escheat unclaimed MoneyGram Official Checks because (i) MoneyGram is the debtor holding the unclaimed Official Check funds, (ii) MoneyGram's books and records show no names or addresses for the individual creditors who purchased the Official Checks and (iii) Delaware it is the

State of MoneyGram's domicile and therefore Delaware is entitled to escheat unclaimed unaddressed Official Check funds under the second priority rule.

1. MoneyGram is the Holder of Unclaimed Official Checks

As the Third Circuit explained "[i]n the context of escheat, the holder of unclaimed property such as the money owed to the bearer of an uncashed check or a gift card is called a 'debtor,' while the owner of the check or gift card is called a 'creditor' because he is entitled to the money on demand." *Marathon*, 876 F.3d at 490 n.12. In the present case, MoneyGram is the entity that holds the money "owed to the bearer of an uncashed check." While various financial institutions sell Official Check instruments, it is not the financial institutions that hold the funds used to pay the obligation created by the Official Check but rather MoneyGram.

As MoneyGram testified, while the financial institutions that sell Official Checks collect the funds for those checks from individuals, those funds are quickly transmitted to MoneyGram who then holds the funds between the time of issuance of the check and either the cashing of the check or, in the event the check goes uncashed, until such time as those funds are escheated as unclaimed property. Yingst 106:10-19 (Ex. A to Taliaferro Decl.) ("Those -- so when an institution issues a check and that check -- the time between when that check is issued and when it comes in to clear to the clearing bank, we have those funds during that

time and we -- we track on an institution level what their outstanding items are, so those balances represent the outstanding checks at any given time for their official check program."); Yingst 114:22-115:14 (Ex. A to Taliaferro Decl.) ("**Q.** Okay. And those funds there, are they also being transmitted to MoneyGram from the financial institution? **A.** Yes. **Q.** Okay. And how long does MoneyGram hold on to that money? **A**. Until the item either comes in to clear or until that item is -- becomes unclaimed property."). Thus, it is MoneyGram that holds "the money owed to the bearer" of an Official Check and it is MoneyGram – not the selling financial institutions – that pays for an Official Check cashed through the relevant clearing bank process or ultimately escheats any unclaimed funds. *See also* Yingst 117:1-7 (Ex. A to Taliaferro Decl.). As such, MoneyGram is the relevant debtor for the application of the *Texas* priority rules in this case.

2. MoneyGram's Books and Records Do Not Show Names and Addresses for the Purchasers of Official Checks

As MoneyGram's 30(b)(6) witnesses made clear, MoneyGram does not request or retain any information regarding the individuals who purchase Official Checks from MoneyGram's financial institution customers. Petrick 65:5-11 (Ex. O to Taliaferro Decl.), Petrick 62:12-18 (Ex. O to Taliaferro Decl.); Yingst 120:17-20 (Ex. A to Taliaferro Decl.) ("We never have. We do not ask for that information or retain that information."). In point of fact, MoneyGram testified that "[t]oday there is not a mechanism for us to receive nor retain that

information." Yingst 121:11-12 (Ex. A to Taliaferro Decl.). As a result, the books and records of MoneyGram, the relevant debtor for the *Texas* priority rule analysis, do not show the name and address information of the individual creditors who purchased Official Checks and the MoneyGram Official Checks at issue in the present litigation are properly understood to be "unaddressed" unclaimed property which escheats pursuant to the second *Texas* priority rule.

3. As MoneyGram's State of Incorporation, Delaware is Entitled to Escheat Unclaimed Unaddressed Official Checks Under the Second Priority Rule

It is not disputed that MoneyGram reincorporated in Delaware in 2005 and began filling unclaimed property reports with Delaware's Office of Unclaimed Property in 2005. SOF ¶ 94. Therefore, because Delaware has been the domiciliary state of MoneyGram for at least the past 15 years, if this Court determines that the FDA does not govern the escheat of MoneyGram Official Checks, Delaware is entitled to escheat all of the unaddressed, unclaimed Official Check funds at issue in the present case under the second *Texas* priority rule consistent with MoneyGram's current practice. SOF ¶ 93.

CONCLUSION

For all the reasons set forth above, this Court should grant summary judgment in Delaware's favor on each claim in Delaware's Bill of Complaint.

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