SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*,

v. Nos. 220145 & 220146 (Consolidated)

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

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

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INTRODUCTION

An interpretation of the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act ("FDA"), 12 U.S.C. §§ 2501-2503, necessarily requires the resolution of two questions. The first question requires this Court to determine whether MoneyGram Official Checks are "money orders" within the meaning of the FDA. 12 U.S.C. § 2503. The second question requires this Court to determine whether a financial institution or business association is "directly liable" on MoneyGram Official Checks. *Id.* The only interpretation of the terms of § 2503 that is consistent with long-standing Supreme Court precedent answers both of these questions in the negative – MoneyGram Official Checks are not money orders and no financial institution or business association is directly liable on MoneyGram Official Checks. Consequently, as explained in greater detail below, the FDA does not govern the escheat of MoneyGram Official Checks, and Delaware's Motion for Summary Judgment should be granted.

With respect to the first question, the Court should reject Defendant States' contention that Congress intended the term "money order" to encompass *all* prepaid written instruments used to transmit funds to a named payee. If such a contention were an accurate expression of congressional intent, surely 12 U.S.C. § 2503 would have simply referenced sums payable on money orders and not included references to traveler's checks and similar written instruments on which

an entity is directly liable. Thus, not only does the Defendant States' proposed definition lack any support in the text of the FDA or its legislative history, the definition violates the most fundamental principle of statutory construction, the principle which requires that: "[E]very word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Nielsen v. Preap*, No. 16-1363, slip op. at 20 (U.S. March 19, 2019) (quoting Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)). "Money order" plainly cannot mean all prepaid instruments. In light of Defendant States' failure to offer any evidence defining a money order beyond a prepaid instrument, this Court can, and should, use the evidence introduced by Delaware of characteristics defining MoneyGram Money Orders in actual commercial use as the basis to define a money order or, at the very minimum, to hold that MoneyGram Official Checks are not money orders.

With respect to the second question, this Court should reject Defendant States' contention that "directly liable" indicates nothing more than whether a party is liable *at any point in time* on an instrument, thereby eviscerating any meaning of the term "directly." In the face of silence on the origin of the term "directly liable" in the legislative history of the FDA, Defendant States contend that this Court should import a meaning of "directly liable" from the 1966 Revised

Uniform Disposition of Unclaimed Property Act ("1966 UUPA"), which itself allegedly imported the definition from New York's unclaimed property law and related New York Attorney General opinions. Defendant States' contention is misplaced. Statutory terms must be interpreted based upon the common understanding of the terms and "traditional background principles" of liability, and not cherry-picked from model state laws of which there is no evidence Congress considered or was even aware of at the time the FDA was drafted. *See Burrage v. United States*, 571 U.S. 204, 214 (2014). In this country, the "traditional background principles" of liability for negotiable instruments are codified in Article 3 of the Uniform Commercial Code ("U.C.C."), currently adopted in relevant part in all fifty States. Applying these standard principles of statutory construction leads to the conclusion that "directly liable" should be construed to mean a form of liability that is unconditional and not contingent, a definition which is both consistent with the common understanding of the word "direct" and with the understanding of unconditional liability under the U.C.C. As such, no entity is "directly liable" on MoneyGram Official Checks.

Finally, if the Court does not resolve this case as a matter of law with respect to the first question and proceeds to hold that an entity is "directly liable" on MoneyGram Official Checks when considering the second question, the Court must consider the factual issue of whether a MoneyGram Official Check is

"similar" to a money order or traveler's check before determining the application of the FDA to the instruments at issue in this case. 12 U.S.C. § 2503. If no reasonable trier of fact "properly instructed, could find that the two [instruments] are substantially similar," then the case may be resolved in Delaware's favor as a matter of law. *Warner Bros. Inc. v. American Broadcasting Companies, Inc*., 720 F.2d 231, 239-40 (2d Cir. 1983) (citations omitted) (holding that the question of substantial similarity in copyright infringement is normally a matter of fact not resolvable on a motion for summary judgment unless "no reasonable jury, properly instructed, could find that the two works are substantially similar"); *see also Continental Paper Bag Co. v. Eastern Paper Bag Co*., 210 U.S. 405, 416 (1908) (in a patent infringement case, the "determination of the[] similarity or difference" between the infringing and patented machine is an "inquir[y] of fact"). On the other hand, if MoneyGram Official Checks cannot be found to be dissimilar as a matter of law, then similarity is a disputed issue of fact that may not be resolved on a motion for summary judgement. *Warner Bros. Inc.*, 720 F.2d at 239-240.

For these reasons and the other reasons contained in our previous briefs, this Court should grant Delaware's Motion for Summary Judgment.

ARGUMENT

I. MoneyGram Official Checks Are Not Money Orders And Interpreting "Money Orders" As All Prepaid Drafts Is Legally Unsupportable And Inconsistent With the Factual Record

Despite Defendant States' assertion, Congress clearly did not "cho[o]se to use broad terminology encompassing a wide class of prepaid financial instruments" when drafting the FDA. Defendant States' Brief in Opposition to Delaware's Motion for Summary Judgment ("DS Opp. Br.") at 10. Quite to the contrary, in the FDA Congress listed two specific types of prepaid financial instruments, money orders and traveler's checks, as well as instruments similar thereto on which an entity is directly liable. 12 U.S.C. § 2503 ("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. . . ."). When Congress "undert[akes] to accomplish its purpose by dealing specifically, and in some respects differently, with different" types of written instruments, courts can neither enlarge the scope of the statute to include what was omitted or interpret certain terms in a manner that renders other terms duplicative or inconsequential. *Iselin v. United States*, 270 U.S. 245, 250-51 (1926); *see also Nielsen*, No. 16-1363 at 20. Yet this is exactly what Defendant States urge this Court to do in arguing that the term "money order" should be interpreted to include Money Gram Official Checks simply because

Official Checks are prepaid written instruments.[1] This Court should reject Defendant States' argument.

If the term "money order" were to be interpreted to "[sweep] within the FDA a broad category of prepaid instruments" as Defendant States propose, DS Opp. Br. at 3, then the FDA need not specifically list traveler's checks (or similar written instruments on which an entity is directly liable), as those prepaid instruments would have already fallen within the ambit of the FDA as a "money order." It is simply not possible for Defendant States to reconcile their proposed definition of "money order" with the text of the FDA that on its face applies to specific types of prepaid instruments and not prepaid instruments writ large. Moreover, Supreme Court jurisprudence resoundingly rejects Defendant States' proposed interpretation of "money order" on at least two separate grounds.

First, the Supreme Court has affirmed that "every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Nielsen*, No. 16-1363 at 20; *see also Kungys v. United States*, 485 U.S. 759, 778-79 (1988).

[1] Defendant States' claim that the term "money order" encompasses every prepaid instrument is belied by the fact that many of Defendant States' unclaimed property statutes contain different dormancy periods for money orders, traveler's checks, and cashier's or certified checks. *See, e.g.*, Iowa Code 556.2A (15 years for traveler's checks; 7 years for money orders); 556.2B (3 years for cashier's checks and certified checks).

To interpret the term "money order" as encompassing all prepaid instruments makes the term "traveler's check" a duplicate term with no consequence. Thus, because Congress elected to list specific types of prepaid instruments in the FDA, courts are not free to interpret one of those specific types of prepaid instruments in a manner that renders redundant the other specific types of prepaid instruments listed in the FDA. *See Gustafson v. Alloyd Co*., 513 U.S. 561, 574-75 (1995) (declining to interpret "prospectus" as used in the Securities Act of 1933 to be all written communications because it would render the statute's inclusion of "notice, circular, advertisement, [and] letter" in the definition of "prospectus" redundant). To state it another way, defining "money order" as proposed by Defendant States would render "inoperative or superfluous, void or insignificant" the remaining categories of instruments listed in the same phrase, contrary to the Supreme Court's directive that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting the word "law" broadly could render the word "regulation" superfluous in preemption clause applicable to a state "law or regulation"); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

Second, when Congress drafts a law governing specific, identified types of an item rather than governing an entire class of an item, courts cannot interpret the terms of the statute to cover those types of the item which were omitted. *Iselin*, 270 U.S. at 251. In *Iselin*, the Supreme Court held that a statute imposing a tax on theater tickets sold and re-sold at various places of business did not apply to the resale of theater tickets received by stockholders as part of their investment in the production. While the IRS argued that the clear intent of the statute was to tax all sales and resales of theater tickets, and the Supreme Court recognized such an intent, the Supreme Court held that the IRS's position proposed "an enlargement of [the statute] by the court, so that what was omitted, presumably by inadvertence, may be included within its scope" and that "[t]o supply omissions transcends the judicial function." *Id*. (citations omitted). In short, because the FDA governs the escheat of specific types of prepaid instruments, the FDA cannot be judicially enlarged to govern the escheat of all types of prepaid instruments, even if excluded inadvertently, by defining a "money order" to be any and every type of prepaid instrument.

Finally, because Defendant States begin with the erroneous proposition that all prepaid instruments are money orders, Defendant States argue that no legal or factual differences among prepaid written instruments are relevant to an analysis of the FDA. DS Opp. Br. at 5-10. Defendant States are wrong. As discussed above,

the FDA applies to only those specific types of prepaid instruments listed in the statute and, therefore, in order to apply the FDA, this Court must both recognize and distinguish between different types of prepaid instruments. This Court cannot, as Defendant States suggest, ignore the differences between the various types of prepaid instruments before this Court and hold that because all of the MoneyGram instruments are prepaid, the escheat of all MoneyGram written instruments is governed by the term "money order" in the FDA.

Defendant States present no evidence that differences like location of sale of money orders, the cap on the value of money orders, the target customers of money orders, and whether something is called a "money order" were not the precise characteristics that led Congress to identify the specific prepaid instruments "money order" and "traveler's check" in the FDA rather than write the statute to cover "all prepaid written instruments." DS Opp. Br. at 4-10. In point of fact, these differences recognize that money orders are largely understood to be retail products, much like the Western Union products that prompted the passage of the FDA, while Official Checks are bank products not available at retail points of sale. Thus, while Defendant States are correct that some banks sell money orders, there are no examples in the record of a MoneyGram Money Order that is also a teller's check. *Compare* Ex. A to Affidavit of Jennifer Whitlock re: Money Orders ("Whitlock Money Order Aff.") *with* Ex. C to Affidavit of Jennifer Whitlock re:

Official Checks ("Whitlock Official Check Aff."). It is the specificity of prepaid instruments listed in the FDA which indicates that the FDA governs the escheat of some, but not all, prepaid instruments.

Defendant States also erroneously reject the evidence in the record regarding the differences between the types of MoneyGram prepaid instruments at issue in favor of a dictionary definition of "money order" that is contradicted by the text of the FDA. DS Opp. Br. at 2-3. Delaware's review of the differences between MoneyGram's Money Orders and Official Checks is entirely reasonable given that MoneyGram has been either the largest or one of the largest issuers of money orders. Delaware Statement of Undisputed Facts ("SOF") ¶ 2 (referring to money orders as the core of Travelers Express's business and noting that "Travelers Express is the nation's leading issuer of money orders"); *see also MoneyGram Int'l, Inc. v. Comm'r,* 144 T.C. 1, 4, 2015 U.S. Tax Ct. LEXIS 1, at *4 (2015), *vacated and remanded by* 2016 U.S. App. LEXIS 20512 (5th Cir. Nov. 15, 2016) ("MoneyGram in 2007 was the leading issuer of money orders in the United States."). This has been the case for the entire time for which Defendant States seek to recover money. This Court therefore can and should look to the difference between MoneyGram Money Orders and Official Checks as relevant to an interpretation of the FDA.

Moreover, the differences between MoneyGram Money Orders and Official Checks described at length by Delaware, Delaware Memorandum in Support of Motion for Summary Judgment ("Delaware MSJ") at 18-22; 43-54, are consistent with multiple contemporaneous definitions of "money order." *See, e.g.*, Barkley Clark & Alphonse M. Squillante, *The Law of Bank Deposits, Collections and Credit Cards* 54 (1970) (a personal money order is an "instrument, issued by and drawn upon a commercial bank without indication of either purchaser or payee, [that] is often used as a checking account substitute by the purchaser-remitter"); *Money Order Services,* American Bankers Association Bank Management Pub. No. 140, 14-15 (1956) ("[C]hecks . . . made out and signed by the customer . . . . were considered personal money orders. . . . 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."); F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962) ("[Money Order is 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."). Defendant States acknowledge the definition from *Munn's,* DS Opp. Br. at 3, but tellingly truncate the definition to eliminate the language indicating that a money order is a substitute for a checking account. More importantly, Defendant States' continued reliance on Webster's New Collegiate Dictionary and Black's Law

Dictionary to define "money order" is oddly misplaced. Defendant States' Brief in Support of Motion for Summary Judgment ("DS MSJ") at 21-22; DS Opp. Br. at 2-3. The 1967 edition of Webster's Dictionary defines a "money order" as an order to pay a specified sum at an office without any mention of a draft at all. *See* Webster's New Collegiate Dictionary (7th ed. 1967). The 1968 edition of Black's Law Dictionary defines a "money order" as a "species of draft drawn by one post-office upon another . . . payable at the second office." Black's Law Dictionary (4th ed. rev. 1968). In both instances, a money order is only payable ***at*** an office, which certainly in no way supports Defendant States' assertion that a "money order" is any prepaid written instrument.

For all the foregoing reasons, this Court should hold that the term "money order" in the FDA does not mean all prepaid instruments and that therefore MoneyGram Official Checks are not money orders.

II. MoneyGram Official Checks Are Not Similar Written Instruments On Which A Bank Or Business Association Is Directly Liable

MoneyGram Official Checks are not 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. As such, this Court may determine as a matter of law that the FDA does not govern the escheat of MoneyGram Official Checks. Additionally, under a

common sense understanding of "third party bank checks," MoneyGram Official Checks are specifically exempted from the FDA.

A. No Entity is "Directly Liable" on MoneyGram Official Checks and Therefore the FDA Does Not Govern the Escheat of Official Checks

Defendant States frame the question of how to interpret "directly liable" based on their assertion that the FDA governs the escheat of "prepaid instruments used to transmit money to a named payee." DS Opp. Br. at 23. Because Defendant States begin their analysis with what they want the FDA to say, rather than with the actual text of the FDA, Defendant States ask this Court to interpret "directly liable" to mean nothing more than an off-hand reference to a generic, all-encompassing liability associated with the sale of an instrument. DS Opp. Br. at 20. This proposed interpretation of "directly liable" is not only inconsistent with the text of the FDA, but Defendant States offer scant evidence to support it. This Court should reject Defendant States' attempt to interpret the FDA inconsistently with its terms based on external sources that were not referenced by Congress and were not recognized as providing a well-known background legal framework.

Defendant States baldly assert that Congress "borrowed" or "incorporated" the term "directly liable" from the 1966 UUPA and/or New York's unclaimed property law. Defendant States, however, do not present any evidence that Congress was aware of the 1966 UUPA, the New York unclaimed property law, or

related New York Attorney General opinions at the time the FDA was drafted. Not only are none of these alleged sources cited in the FDA or its legislative history, Defendant States cite inapposite case law in their Motion for Summary Judgment, DS MSJ at 30-32, and, apparently in tacit recognition of the dearth of evidence supporting their conclusion, cite only to their own argument in their Opposition Brief. DS Opp. Br. at 19.[2] The text of the FDA is the best evidence of what the FDA means, and "silence in the legislative history cannot lend any clarity." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) (citation omitted). This Court should reject Defendant States' attempt to "incorporate" into the FDA a definition of the term "directly liable" as used in the 1966 UUPA and/or New York unclaimed property law without any evidence that Congress knew of, considered, or intended to incorporate that definition into the FDA.

More importantly, if, as Defendant States propose, this Court were to interpret the term "directly liable" to do no more than refer to the entity ultimately responsible for making payment on the value of the instrument, there would be no

[2] Defendant States' additional assertion that the term "directly liable" had a "well-defined meaning in the unclaimed property context" is erroneous. DS Opp. Br. at 22. Not only is there no support that Congress was aware of the 1966 UUPA, there is no support that the 1966 UUPA provides a "well-defined meaning," given that in 1974 only 20 States had adopted some version of the 1954 Uniform Disposition of Unclaimed Property Act ("1954 UUPA") or 1966 UUPA. 8A Uniform Laws Ann. 135, 215 (1983) (Ex. LL to Supplemental Taliaferro Declaration ("Suppl. Taliaferro Decl.")).

difference between being "directly" liable and plain-old "liable" for the purposes of the FDA. Because Defendant States' proposed definition of "directly liable" does not distinguish between being "directly liable" and simply "liable" on a written instrument, thereby rendering "directly" redundant and ascribing to "liable" a "meaning so broad that it is inconsistent with its accompanying word[]" in the FDA, this Court should reject Defendant States' proposal. *See Gustafson*, 513 U.S. at 574-75 (declining to interpret "prospectus" as used in the Securities Act of 1933 to be all written communications because it would render the statute's inclusion of "notice, circular, advertisement, [and] letter" in the definition of "prospectus" redundant). This Court should find that Congress's inclusion of that term in the FDA must be given meaning, and that the meaning of "directly liable" should be consistent with the common understanding of unconditional liability for written instruments in the U.C.C.

Almost a decade before the adoption of the FDA, Congress had recognized that the U.C.C. had codified in an orderly fashion the long-standing, pre-existing practices and principles relevant to negotiable instruments. *See, e.g.*, 112 Cong. Rec. 1656 (Feb. 1, 1966) (resolving to fund a translation of the U.C.C.). Thus, when Congress used the phrase "directly liable" in the FDA, it legislated against the "traditional background principles" of liability of negotiable instruments. *See Burrage*, 571 U.S. at 214 (in determining what type of causation is intended by

Congress's use of the phrase "results from," the Court presumed that Congress was legislating against the "traditional background principles" of causation). Thus, as recognized in *Burrage*, Congress legislated against the background concepts of conditional and unconditional liability in the U.C.C., regardless of whether that liability was labeled direct or indirect, when drafting the FDA. This Court should reject Defendant States' definition of "directly liable" and instead should find that Congress's inclusion of that term in the FDA must be given meaning, and that the meaning of "directly liable" should be consistent with the common understanding of unconditional liability for written instruments in the U.C.C. As such, because no entity is directly liable on MoneyGram Official Checks, this Court should hold that the FDA does not govern the escheat of MoneyGram Official Checks.

For a more exhaustive discussion of the interpretation of "directly liable," Delaware refers the Court to Delaware's Memorandum in Support of Motion for Summary Judgment at 27-37, and Delaware's Memorandum in Opposition to Defendant States' Motion for Summary Judgment ("Delaware Opp. Br.") at 16-38.

B. MoneyGram Official Checks Are Not Similar Written Instruments to Money Orders

In their Brief in Opposition to Delaware's Motion for Summary Judgment, Defendant States make several different arguments in asserting that MoneyGram Teller's Checks and MoneyGram Agent Checks are "similar written instruments" to money orders under the FDA. First, Defendant States apply an unduly simplistic

definition of "money order." Second, they claim that the numerous differences between MoneyGram Agent Checks and MoneyGram Teller's Checks, on the one hand, and MoneyGram Money Orders, on the other hand, are not relevant to Defendant States' self-imposed question of whether those instruments are prepaid drafts used to transmit money to a named payee.[3] DS Opp. Br. at 5, 14. Third, Defendant States completely ignore the origin of MoneyGram Teller's Checks and Agent Checks, as provided in MoneyGram's and its predecessor's Annual Reports, that demonstrates that MoneyGram Teller's Checks and Agent Checks are bank checks that have a completely different usage and history. None of Defendant States' arguments, or absence thereof, undermines the crucial differences between MoneyGram Teller's Checks and MoneyGram Agent Checks, on one hand, and MoneyGram Money Orders, on the other hand– differences that suffice to make the instruments at issue not "similar written instruments" under the FDA.

[3] As discussed in greater detail above and below, Defendant States' definition is the quintessential example of question begging. Defendant States assert that the "relevant question" is whether the contested instruments are "prepaid drafts used to transmit money to a named payee." DS Opp. Br. at 5. That is the question Defendant States are answering because that is the question they want to answer. It is not, however, the question that requires an answer in order to properly construe the FDA.

1. Defendant States' Money Order Definition is Unduly Simplistic

Defendant States assert that money orders are prepaid instruments for the transmission of money, and that this definition captures every prepaid instrument of any variety within its reach. DS MSJ at 21-22, 26-27; DS Opp. Br. at 2-3. However, Defendant States have at times truncated even their own self-selected definitions of "money order," and have done so in a way that ignores the crucial difference between money orders and the instruments at issue in this case. "Money orders," using the limited definition offered by Defendant States, are orders payable at an post office or other given location. Webster's New Collegiate Dictionary, *supra* ("an order issued by a post office, bank or telegraph office for payment of a specified sum of money **at another office**") (emphasis added); Black's Law Dictionary, *supra* ("[A] money order is a species of draft drawn by one post-office upon another for an amount of money deposited at the first office by the person purchasing the money order, and payable at the second office to a payee named in the order."). Delaware offers a definition of "money order" that makes clear that its purpose is for use "by persons not having checking accounts." *Munn's Encyclopedia of Banking and Finance*, *supra*; *see also* Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010). One of the defining characteristics of money orders, as illustrated by all four definitions, is significant. Money orders are for unbanked populations –

individuals who purchase these instruments at their neighborhood convenience store or grocery store to pay bills, SOF ¶¶ 24, 25, 26, or under Defendant States' definitions, at a post office or redeemable only at a given location. MoneyGram Teller's Checks and Agent Checks, on the other hand, are bank instruments marketed to a bank's own customers, and are used when a person is making a significant purchase such an automobile or a down payment on a house. SOF ¶¶ 45, 73.[4]

[4] In its proposed Statement of Undisputed Facts, Delaware submitted five instances describing the use of money orders and MoneyGram Official Checks. *See* SOF ¶¶ 5, 24, 74, 75, 90. Each of these proposed Undisputed Facts was taken from the sworn deposition testimony of MoneyGram's Fed. R. Civ. P. 30(b)(6) witness Eva Yingst. The vast majority of testimony cited by Delaware in the challenged Statements of Undisputed Facts **was elicited by Defendant States**. On any of Ms. Yingst's offered answers, Defendant States could have asked follow-up questions to determine whether Ms. Yingst's responses lacked foundation or were speculative. They did not. Ms. Yingst's testimony on why a given individual would purchase a MoneyGram Money Order or a MoneyGram Official Check is well-within her expertise. Indeed, the reasons why an individual might obtain a company's products is foundational to marketing those products, and Ms. Yingst's testimony on these points was covered, at a minimum, by Deposition Notice Topics 1-10. Moreover, Ms. Yingst's testimony is corroborated by publicly filed SEC documents and MoneyGram's contemporaneous business records. *See, e.g.,* Exs. F, L, M to Declaration of John David Taliaferro. Defendant States' objections should be overruled and Delaware's Undisputed Facts ¶¶ 5, 24, 74, 75, 90 should be admitted. These facts stand as additional evidence of the different usages of money orders and MoneyGram Official Checks.

2. Comparisons Between MoneyGram's Various Products are Appropriate for Interpreting the FDA

It is correct that Delaware made comparisons between MoneyGram Money Orders and MoneyGram Teller's Checks and Agent Checks. DS Opp. Br. at 13-14. However, it did so because MoneyGram has been either the largest or one of the largest issuers of money orders in the United States, and has been so since the time the FDA was passed. SOF ¶ 2 (referring to money orders as the core of Travelers Express's business); *id*. ("Travelers Express is the nation's leading issuer of money orders."). *See also MoneyGram Int'l, Inc.*, 144 T.C. at 4 ("MoneyGram in 2007 was the leading issuer of money orders in the United States."). It is therefore entirely appropriate to reference MoneyGram Money Orders as examples of what money orders as an industry looked like and how they functioned.

Moreover, it is not correct that Delaware's sole comparison was between MoneyGram Money Orders and MoneyGram Teller's Checks and Agent Checks. As cited above, Delaware provided contemporaneous definitions of money orders that demonstrate that the items are substitutes for personal checks and are typically used by individuals who do not have a checking account. *See Munn's Encyclopedia of Banking and Finance, supra* (money order is "[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."); Clark & Clark, *supra* (defining 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."). This significant difference then manifests itself in the various operating differences identified by Delaware. Additionally, Delaware included in its Statement of Undisputed Facts an example of an historical money order from Western Union. SOF ¶ 17; Declaration of Erin C. Schol. These additional examples and definitions support Delaware's position – money orders are not similar written instruments to MoneyGram Teller's Checks or Agent Checks.

To take but one significant difference, money orders, even those produced by Western Union in this case, are not signed by any representative or employee of the establishment where they were purchased. To the contrary, all money orders are signed by the person who purchased the money order. *See* Exs. A-E to Whitlock Money Order Aff.; SOF ¶¶ 17, 18. In this way, they are all "single-use" checking accounts. This is entirely consistent with the way "money order" is defined by both Defendant States and by Delaware. In contrast, all MoneyGram Teller's Checks and MoneyGram Agent Checks are signed by employees of the financial institution where the instrument was sold. The bank employee usually, but not always, signs a MoneyGram Agent Check as an agent for MoneyGram, and

the bank employee signs a MoneyGram Teller's Check as the drawer of the instrument.[5] Exs. A and C to Whitlock Official Check Aff.; SOF ¶¶ 80, 87.

The twelve differences between these two categories of instruments, as identified by Delaware, DE MSJ at 19-21, 50-54, are all illustrative of this critical difference between money orders writ large and MoneyGram Teller's Checks and Agent Checks. For example, given the long course of usage of the phrase "money order", the label "money order" on the face of the instrument indicates that the item is available for purchase to the unbanked population and can be used when they need a substitute for a personal check. SOF ¶¶ 24, 25, 31. The lack of reference to the selling institution on the face of a MoneyGram Money Order

[5] Defendant States completely misread the scope of Regulation D ("Reg D"). DS Opp. Br. at 15. Reg D covers a teller's check (which by definition is a check drawn by a bank on another bank) along with certain other instruments "drawn on the depository institution [itself]." 12 C.F.R. § 204.2(a)(1)(iii). In other words, Reg D covers teller's checks, along with instruments which a bank issues on itself and which are direct obligations of the bank. 12 C.F.R. § 229.2(i)(3); Glenn G. Munn, *Encyclopedia of Banking and Finance* 134 (1935). *See also* DE MSJ at 31-32 n.7. To correct Defendant States' characterization, Reg D captures teller's checks (of any variety) along with the small subset of money orders and traveler's checks drawn on the issuing bank itself. 12 C.F.R. § 204.2(b)(1)(iii). Of course, the use of "direct obligation" in this context is at the crux of Delaware's "directly liable" argument. *See* Section II, *supra*. The vast majority of money orders and traveler's checks (including every single variety of money order produced in this case) are not direct obligations of an issuing bank. Reg D therefore stands as yet another example of a difference between MoneyGram Teller's Checks and money orders. Additionally, in making this argument, Defendant States are acknowledging that there are some money orders on which a financial institution is directly liable, and that Delaware's proposed definition is not as anomalous as Defendant States argue.

combined with the MoneyGram logo demonstrates that MoneyGram, not the retail store or corner grocery selling the instrument, is the principal behind a MoneyGram Money Order. SOF ¶¶ 31, 38; *see also* Ex. A to Whitlock Money Order Aff. The place of purchase – retail establishment versus bank – demonstrates the different markets that these two instruments serve.[6] SOF ¶¶ 26, 48. The lower dollar limit for money orders is yet another indication of the different market placement for these two types of instruments.[7] SOF ¶¶ 36, 68.

3. Defendant States Ignore the History of MoneyGram Teller's Checks and Agent Checks

Defendant States' imprecise definition of "money order," which allows it to assert that every prepaid instrument in existence is a "money order," is further illustrated by the fact that it completely ignores the history of MoneyGram Agent Checks and Teller's Checks, as described in Annual Reports issued by MoneyGram and its predecessor entities. For example, in 1981, Travelers

[6] As Defendant States note, money orders are not exclusively purchased at retail establishments. DS Opp. Br. at 7. However, this misses the point – MoneyGram Teller's Checks and Agent Checks are *exclusively* purchased at financial institutions. SOF ¶ 48. Moreover, the fact that a money order can be purchased at a financial institution does not change where it is usually, or primarily, purchased – a non-bank retail establishment. SOF ¶ 26

[7] Defendant States are simply incorrect when they assert that the dollar limit placed on money orders is not legal in nature. DS Opp. Br. at 7. Although MoneyGram's witness was unclear on the reason of the limitation, it is clear from Money Services Business Regulations that the $1000 limit on MoneyGram Retail Money Orders allows retail establishments to avoid registering as money services businesses. 31 C.F.R. § 1010.100(ff)(3).

Express's parent company, Greyhound Corporation, stated that "While money orders are still the core of [Travelers Express], the company is now processing more credit union share drafts than any other processor in the nation and has developed a substantial volume of official check processing for a variety of financial institutions." SOF ¶ 2. This was repeated in subsequent Annual Reports. *See id*. ("Travelers Express is the nation's leading issuer of money orders, issuing approximately 236 million money orders in 1993. . . . Travelers Express also provides processing services for more than 4,500 credit unions and other financial institutions which offer share drafts (the credit union industry's version of a personal check) or official checks (used by financial institutions in place of their own bank check or teller check)."); *id*. at ¶ 63 ("Travelers Express also provides processing services for approximately 5,000 banks, credit unions and other financial institutions which offer official checks (used by financial institutions in place of their own bank check or cashier's check) and share drafts (the credit union industry's version of a personal check). . . . The Payment Services segment sells money orders through agents, performs official check and negotiable instrument clearing services for banks and credit unions."). It is therefore clear that MoneyGram, even when developing the Official Check product beginning just a few years after the FDA was passed, did not consider these instruments to be "money orders" or even "similar written instruments" to money orders.

As outlined in Delaware's Opening Brief, there are numerous differences between money orders and the instruments at issue in this case. These differences collectively make MoneyGram Teller's Checks and MoneyGram Agent Checks not "similar written instruments" for purposes of the FDA.

C. Defendant States' Proposed Definitions of "Third Party Bank Checks" Should Be Rejected

As explained in Delaware's Memorandum in Opposition to Defendant States' Motion for Summary Judgment, the supposed "most natural way" to read "third party bank check," DS Opp. Br. at 25, suffers from a fatal flaw. Delaware Opp. Br. at 47. That proffered definition, a bank check that has been indorsed to a third party, would never result in a check that is known to be unclaimed and therefore subject to (or exempted from) the FDA. A holder of sums owed on an unclaimed bank check would never know that it has been indorsed to a third party, and would therefore have no way of determining where such a check should be escheated. Alternatively, if a check is presented for payment, and the holder learns at that point that the check has been indorsed, the holder would have no need to escheat the property. Defendant States' proposed exemption of third party bank checks would never actually occur.

Defendant States' other proposed definition of "third party bank check" – a personal check – also suffers from fatal flaws. DS Opp. Br. at 25. This proffered definition requires borrowing a similar but distinct term, "third party payment

services," from some unrelated financial reforms that were passed years after the FDA. *See* Delaware Opp. Br. at 50. This proposed definition is pure supposition by Defendant States. On the other hand, the proposed definition for "third party bank check" offered by Delaware is a straightforward and common-sense interpretation of the term: a "third party bank check" refers to a bank check provided by a third party. Delaware MSJ at 37-38. Therefore, because MoneyGram Official Checks are bank checks offered by a third party, this Court should find that the escheat of those instruments is specifically exempted from the FDA.

III. Not All States Have Laws Empowering Them To Take Custody Of Abandoned Similar Written Instruments

Under 12 U.S.C. § 2503, a State may only take possession of items covered by the FDA "to the extent of that State's power under its own laws to escheat or take custody of such sum." At least ten Defendant States do not have laws that permit them to take possession of "similar written instruments." Therefore, those ten States lack the power "under [their] own laws to take custody" of "similar written instruments," and they would not be entitled to recover any funds for abandoned MoneyGram Official Checks if those instruments are covered under the FDA as "similar written instruments."

Defendant States essentially make two arguments in response. First, they assert that "drafts" are covered within each State's definition of property and further assert that "[a]ll other property" is presumed abandoned if it is unclaimed

after a given period. DS Opp. Br. at 26-27. However, unlike the other States at issue, these ten States do not have statutes that include language empowering the State to take custody of abandoned "similar written instruments." Merely defining a category of "property" that may become abandoned without a corresponding operative statute empowering the State to take possession of such abandoned property is not a sufficient empowering statute to meet the FDA's requirement.

Second, Defendant States assert that the Uniform Law Commission's **comments** to the 1995 Uniform Unclaimed Property Act ("1995 UUPA") state its intent to follow the FDA. DS Opp. Br. at 27. There is no indication that any of the ten States at issue considered, much less incorporated, the comments to the 1995 UUPA. In fact, Texas has not adopted any version of the UUPA, and therefore has specifically indicated an intent not to conform to the UUPA. Revised Uniform Unclaimed Property Act, Prefatory Note (Unif. Law Comm'n 2016) (Ex. KK to Supp. Taliaferro Decl.). Moreover, if anything, the 1995 UUPA's reference to money orders and traveler's checks, without reference to "similar written instruments," shows the narrow scope of the FDA. The fact remains that ten Defendant States lack the power under their own laws to take custody of abandoned "similar written instruments."

CONCLUSION

For all the reasons set forth above, this Court should grant Delaware's summary judgment motion.

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