C.A. No. 17-1594
(District Court No. 16-609-LPS)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OFFICE DEPOT, INC. and NORTH AMERICAN CARD AND COUPON SERVICES, LLC,

Plaintiffs-Appellants,

v.

THOMAS COOK, in his capacity as the Secretary of Finance for the State of Delaware; DAVID M. GREGOR, in his capacity as the Delaware State Escheator; and MICHELLE M. WHITAKER in her capacity as the Delaware Abandoned Property Audit Manager,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF OF AMICUS CURIAE UNCLAIMED PROPERTY PROFESSIONALS ORGANIZATION IN SUPPORT OF APPELLANTS

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DISCLOSURE STATEMENT

The completed Corporate Disclosure Statement Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the Unclaimed Property Professionals Organization makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

NONE

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

NONE

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

NONE

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: (i) the debtor, if not identified in the case caption, (ii) the members of the creditors' committee or the top 20 unsecured creditors; and (iii) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant.

_____ Dated: _____

Signature of Counsel or Party

IDENTITY OF AMICUS CURIAE AND INTEREST IN CASE

The Unclaimed Property Professionals Organization ("UPPO"), which was established in 1992, is the premier national organization concentrating on all aspects of unclaimed property compliance and education, and advocating for the interests of both the holders and owners of unclaimed property. UPPO is a nonprofit organization currently comprised of over 370 members who represent nearly all segments of the U.S. economy. In furtherance of its mission, UPPO identifies ambiguities in multistate unclaimed property laws and practices, as well as issues that interfere with the legal rights of owners and holders of unclaimed property, and works with state regulators, legislators and other interested parties to resolve those issues. To its knowledge, UPPO is the only private trade association singularly dedicated to these goals.

As a result, UPPO is in a unique position to provide the perspective of the holder community with respect to the important issues presented by this dispute, including when a state has the right and jurisdiction to take custody of unclaimed or abandoned property and whether a retailer or other business has the right to structure itself to take advantage of the favorable unclaimed property laws of a particular state.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1965, the United States Supreme Court established federal common law rules dictating when states have the right to take custody of (or "escheat") unclaimed

intangible property. Under these rules, if the holder of the property does not have a record of the owner's address, then the holder's state of domicile has the sole right to escheat the property. In 1993, the Court revisited these rules, and clarified that the holder is the legal "debtor" to the owner. Thus, only the state of domicile of the debtor has the right to escheat property where the owner is unknown. Holders of unclaimed property have relied on these rules for decades in determining whether, and to which state, they have an obligation to escheat property.

In this case, Delaware argues that it is not bound by these federal common law rules and that it has the authority to escheat property from someone other than the legal debtor. Delaware's motivation for making this argument is so that it can escheat unredeemed gift cards from a Delaware-domiciled retailer—Office Depot, Inc. ("Office Depot")—even though, under the retailer's corporate structure, the legal debtor is a gift card company—North American Card and Coupon Services, LLC ("NACCS")—domiciled in a state (Virginia) that exempts the unredeemed balances of gift cards from escheat.

This Court previously considered essentially the same issue in *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3rd Cir. 2012). In that case, New Jersey similarly sought to modify the federal common law rules (here, Delaware simply ignores them) to allow it to escheat unredeemed gift card balances where the card issuer was domiciled in a state that exempts unredeemed gift cards

from escheat. This Court prohibited such action, saying that permitting it would "allow[] New Jersey to infringe on the sovereign authority of other states." *Id.* at 395. This Court further acknowledged that "States may want to incentivize companies to incorporate in their jurisdiction by choosing not to escheat abandoned property" and that retailers have a right to structure their affairs to take advantage of these exemptions. *Id*.

Identical considerations apply here. By ignoring the federal common law rules, Delaware is infringing on the sovereign authority of Florida, as the state of domicile of the legal debtor, and arbitrarily ignoring the corporate planning structure established by the parties. Delaware's suggestion that such structure might be fraudulent does not change this result. First, as this Court has recognized, there is nothing fraudulent about structuring one's affairs to take advantage of favorable escheat laws in particular states. Second, the Supreme Court was clear that the federal common law rules apply in all situations, regardless of the particular facts and circumstances. To permit a state to ignore these rules whenever the state arbitrarily alleges fraud (or, as in this case, *potential* fraud) against a holder (or in any other cases) would inject chaos and uncertainty into an area of well-settled law regarding when a state has the right to take custody of unclaimed property.

ARGUMENT

I. THE FEDERAL COMMON LAW RULES CREATED BY THE UNITED STATES SUPREME COURT DETERMINE WHEN A STATE HAS THE RIGHT AND JURISDICTION TO ESCHEAT UNCLAIMED PROPERTY

All states have adopted unclaimed property laws that generally apply to intangible property owed by debtors (often referred to as "holders") to creditors (often referred to as "owners"). As this Court has held, these laws are designed to return property to rightful owners. *N.J. Retail Merchants Ass'n*, 669 F.3d at 383 ("The purpose of unclaimed property laws is to provide for the safekeeping of abandoned property and then to reunite the abandoned property with its owner.").

In *Texas v. New Jersey*, 379 U.S. 674, 680 (1965), the United States Supreme Court considered the question of which state, if any, has the "right and power" to take custody of (or "escheat") unclaimed intangible property in any given situation. For tangible property, "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." *Id*. at 677. Intangible property, however, has no fixed location. The Court had earlier held, in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961), that a holder of unclaimed intangible property cannot be subject to claims by more than one state seeking to escheat the same intangible property, as doing so would violate the Due Process Clause of the United States Constitution. Thus, in *Texas*, the Court chose

to "***adopt a rule which will settle the question of which State will be allowed to escheat this intangible property***." *Texas,* 379 U.S. at 677 (emphasis added).

In *Texas*, the Supreme Court recognized that the unclaimed property at issue was the "debt" that was owed by the debtor to the creditor. *Id*. at 680. Reasoning that a debt is the property of the creditor and not the debtor, the Court established a "primary rule" that "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." *Id*. at 680-81. The Court chose this primary rule because it "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided." *Id*. at 681. The Court then established a "secondary rule" to apply in the event that the debtor has no record of the creditor's last known address or the address is in a state that does not provide for escheat. In that event, the state of incorporation of the debtor has the right to escheat the debt. *Id.* at 682. This question, the Court noted, "is fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Id.* at 683. In creating these rules, the Court considered and expressly rejected other bases under which states may potentially assert a claim for the property, including the place where the transaction giving rise to the property occurred and the principal place of business of the debtor.

The Court affirmed the *Texas* rules in *Pennsylvania v. New York*, 407 U.S.

206 (1972), and *Delaware v. New York,* 507 U.S. 490, 498 (1993). In *Pennsylvania*, the Commonwealth of Pennsylvania sought to escheat money orders based on where the money orders were sold, rather than where the debtor was incorporated. The Court rejected Pennsylvania's claim, stating that "to vary the application of the *Texas* rule would require this Court 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. And in *Delaware,* 507 U.S. at 498, the Court again declined to modify these rules and emphasized that "[i]n *Texas v. New Jersey* . . . we adopted ***two rules*** intended to 'settle the question of which State [if any] will be allowed to escheat [abandoned] intangible property.'" (emphasis added). The Court further clarified that the federal common law rules "***cannot be severed from the law that creates the underlying creditor-debtor relationships.***" *Delaware*, 507 U.S. at 503 (emphasis added). The Court emphasized that its "examination of the holder's legal obligations not only defined the escheatable property at issue but also carefully identified the relevant 'debtors' and 'creditors'" for purposes of determining which state has the right to escheat under the secondary rule. *Id*. at 503. The Court concluded that "no State may supersede" these federal common law rules. *Id*. at 500.

Accordingly, states must defer to the underlying debtor-creditor relationship

between the parties for purposes of escheat, and cannot treat anyone other than the legal debtor as the "holder." To do so would allow a state to escheat property from someone who does not owe it, while ignoring the unclaimed property laws of the true debtor's state of domicile, which has the sole right to escheat.

II. THE FEDERAL COMMON LAW RULES APPLY TO DISPUTES BETWEEN A HOLDER AND A SINGLE STATE

In this case, the State of Delaware seeks to ignore these federal common law rules on the basis that such rules apply only to interstate disputes. Delaware argues that since the three Supreme Court decisions all involved disputes among multiple states regarding which state has the right to escheat, the federal common law rules should be limited to situations where there is such a present dispute among the states. As a result, Delaware contends that it can take custody of unclaimed property on virtually any basis whatsoever—***including from someone other than the debtor***—subject only to another state's right to claim the same property under the federal common law rules.

This Court considered and rejected this exact argument in *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d at 383. In that case, this Court upheld a preliminary injunction sought ***by private litigants*** against the State of New Jersey, which enjoined the enforcement of a New Jersey escheat statute on the basis that it was inconsistent with the *Texas* rules. *Id.* at 391-96. The New Jersey statute at issue would have permitted the state in which gift cards were sold, rather than the state

where the debtor was incorporated, to escheat the cards. The Third Circuit held the statute invalid because it "allows New Jersey to infringe on the sovereign authority of other states." *Id.* at 395. This was true even though the other states had not yet tried to escheat the gift cards: "***When fashioning the priority rules, the Supreme Court did not intend such a result, which would give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat.***" *Id.* (emphasis added).

The Tenth Circuit reached a similar conclusion in *American Petrofina Co. of Texas v. Nance*, 697 F. Supp. 1183, 1190 (W.D. Okla. 1986), *aff'd*, 859 F.2d 840 (10th Cir. 1988), involving a suit ***by over thirty private litigants*** against one state—*i.e.*, the Oklahoma Tax Commission. In that case, the federal district court declared an Oklahoma statute to be "invalid and unenforceable pursuant to *the supremacy clause of the United States Constitution*, because it is inconsistent with the federal common law set forth in *Texas v. New Jersey*." (emphasis in original). 697 F. Supp. at 1190. "State laws are preempted to the extent they conflict with federal common law," the court noted, and thus ***"[t]he Supreme Court's decision in* Texas v. New Jersey*, may be relied upon to prevent state officials from enforcing a state law in conflict with the* Texas v. New Jersey *scheme for escheat or custodial taking of unclaimed property."*** *Id.* at 1187 (emphasis added). On appeal, the Tenth Circuit

affirmed, stating that "the district court's reasoning is in accord with our views." 859 F.2d at 842.[1]

These are the only two federal appellate courts to have addressed this issue, but lower courts have also reached the same result. *See, e.g., Nellius v. Tampax, Inc.*, 394 A.2d 233, 237 (Del. Ch. 1978) (holding that "the Delaware State Escheator has no present standing to claim the property under the Delaware escheat statutes" where Delaware was attempting to do so in a manner inconsistent with the *Texas* rules); *State ex rel. Higgins v. SourceGas, LLC*, 2012 WL 1721783, at *3 (Del. Supr.) (applying the *Texas* rules in a false claims action); *Delaware v. Card Compliant, LLC*, 2015 WL 11051006, at *6 (Del. Supr.) (holding that, based on the federal common law rules, the "debtor" is the person that is obligated to escheat unclaimed intangible property); *Temple-Inland, Inc. v. Cook*, 2016 WL 3536710, at 23, 30-33 (D. Del.) (applying the *Texas* rules in a dispute between a private company and the state to limit the state's ability to escheat unclaimed property); *State of New Jersey v. Amsted Industries*, 226 A.2d 715 (N.J. 1967) (holding that New Jersey

[1] It is also not unusual for federal common law developed under the Supreme Court's Article III jurisdiction (for resolving interstate disputes) to apply in other cases that do not involve such disputes. *See, e.g., Hinderlider v. LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 110-11 (1938) (applying, in suit between private litigants, rules of federal common law developed in the Court's original jurisdiction cases between states). *See also Boyle v. United Techs. Corp*., 487 U.S. 500, 506 (1988) (applying federal common law in action between private litigants); *EIJ, Inc. v. United Parcel Serv., Inc*., 233 F. App'x 600, 601-02 (9th Cir. 2007) (applying federal common law related to duties of air carriers in dispute between private litigants). Otherwise, significant inconsistencies in the law may arise.

could not escheat property under the secondary rule where the holder had a record of the owner's address, because only one state has the right to claim unclaimed property in any given situation, and if it does not—or cannot—exercise that right, then another state may not step in and claim the property); *TXO Production Corp. v. Oklahoma Corp. Commission*, 829 P.2d 964 (Okla. 1992) (holding that Oklahoma could take custody of unclaimed property only if it was either the state of domicile of the holder of such property or the state of last known address of the owner of such property).

In the district court case below, Judge Stark carved out an exception to the federal common law rules in the event that a state alleges the holder might be engaged in fraud. *Office Depot, Inc. et al. v. Cook et al.*, Civ. No. 16-609-LPS, at 12, n.4 (D. Del. Mar. 3, 2017).[2] But there is no authority to support such an exception. Indeed, Judge Stark apparently relied heavily on Judge Robinson's ruling on a motion to dismiss in *Temple-Inland, Inc. v. Cook*, 82 F. Supp. 3d 539 (D. Del. 2015), where she similarly concluded that the federal common law rules apply only to interstate disputes. However, (1) Judge Robinson was apparently unaware of this Court's on-point decision in *N.J. Retail Merchants Association*, as it is referenced nowhere in her opinion; and (2) her ruling was superseded by a later opinion in that

[2] Judge Stark reached the same conclusion in the similar case, *Marathon Petroleum v. Cook*, 2016 WL 5348572 (U.S.D.C., D. Del., Sept. 23, 2016).

case by Judge Sleet recognizing the applicability of the federal common law rules. *Temple-Inland, Inc.*, No. 1:14-cv-00654, at 23, 30-33.

Judge Robinson's justification for her ruling is also sorely lacking. She stated that her "finding is in accord with a number of state court opinions addressing the applicability of the *Texas* Cases." *Temple-Inland, Inc.*, 82 F. Supp. 3d at 549-50. Not only does this ignore the vast majority of cases finding that the federal common law rules ***do*** apply in disputes between a single state and a holder of unclaimed property, but it also overstates the authorities finding the opposite result. Two of those cases—*State v. Elsinore Shore Associates*, 592 A.2d 604 (N.J. Super. Ct. App. Div. 1991), *and State v. The Chubb Corporation*, 570 A.2d 1313 (N.J. Super. Ct. Ch. Div. 1989)—are New Jersey lower court cases which are trumped by the New Jersey Supreme Court's decision in *Amsted Industries*. Thus, they should be given no weight whatsoever. The only other case we are aware of holding that the *Texas* rules apply only to interstate disputes is *State v. Liquidating Trustees of Republic Petroleum Co.*, 510 S.W.2d 311 (Tex. 1974), which found that the holder's state of domicile could escheat property even though the holder had a record of the owner's address and the state in which the address was located required escheat of the property but had not asserted a claim. Thus, that decision is not only an outlier, but it also carved out a relatively uncontroversial exception from the holder's perspective, as the holder would have been required to escheat the property in any

event. By contrast, Delaware in this case seeks to override escheat exemptions created by other states (here, Florida) by designating, in direct contravention of the *Texas* rules, the retailer's parent company rather than its gift card issuer as the holder of unredeemed gift card balances. Judge Robinson was not faced with that issue in *Temple-Inland*, and Judge Stark can provide no justification why Delaware should be allowed to infringe on the sovereign authority of another state, simply because that state is not yet party to the present dispute.

The great weight of authority thus supports this Court's conclusion in *N.J. Retail Merchants Association,* which respects and furthers the clear intention of the Supreme Court as articulated in *Texas v. New Jersey* and reiterated in *Pennsylvania v. New York* and *Delaware v. New York* to establish two clear, easy-to-apply rules to govern which state (if any) has jurisdiction to escheat an unpaid debt. This conclusion also is the only one that respects the sovereign authority of other states, without affirmatively requiring those states to be parties to litigation. As discussed in detail below, that conclusion is also consistent with sound public policy. UPPO thus urges the Court to affirm its prior ruling that the federal common law rules governing states' rights to take custody of unclaimed intangible property are applicable not only to disputes involving conflicting claims among the states, but also to cases involving a dispute between a holder and a single state.

III. HOLDERS WILL FACE UNCERTAINTY AND CONFLICTING CLAIMS WITHOUT THE PROTECTION OF THE FEDERAL COMMON LAW RULES

A holder's ability to rely upon the federal common law rules is vital because, without this guidestar, a holder may potentially be subject to regulatory uncertainty, or worse, dozens of conflicting state claims for the same property. States have become increasingly reliant on unclaimed property as a source of revenue, and some have been clear in their motive in enacting legislation in furtherance of this goal. *See e.g.*, *American Express Travel Related Services v. Kentucky*, 641 F.3d 685 (6th Cir. 2011) (upholding unclaimed property legislation notwithstanding clear legislative objective "was to raise revenue rather than to reunite citizens with lost property") *American Express Prepaid Card Mgt. Corp. v. Sidamon-Eristoff*, 669 F.3d 374, 398 (3d Cir. 2012) (noting that raising state revenue could be one of many purposes for implementing escheat laws).

Delaware is perhaps the worst offender in this regard. Although unclaimed property laws were intended to return unclaimed property to its rightful owner, the vast majority of property escheated by Delaware is never returned, but remains in State coffers for use as general revenue. As a result, unclaimed property has now become "Delaware's third largest revenue source, making it a 'vital element' in the State's operating budget." *Temple-Inland*, 2016 WL 3536710, at *2 (ellipses added).

Indeed, from 2000-2014, Delaware has escheated over $5.6 billion, but has returned less than 5% of that amount to owners.

This issue is particularly problematic as applied to unredeemed balances on gift cards of the type at issue in this case. NACCS does not have a record of the identities or addresses of the owners of the gift cards. Thus, under the secondary rule, Virginia, as NACCS's state of domicile, has the sole right to escheat. Virginia law affirmatively exempts unredeemed gift card balances from escheat if they "are redeemable in merchandise, in services, or through future purchases." Va. Code Ann. § 55-210.8:1. Consequently, Delaware's attempt to suggest that it might treat Office Depot as the holder of the unredeemed gift card balances and assert its own claim to such balances under the Delaware Escheats Law, even though Office Depot is not the debtor obligated to the cardholders, would effectively "create" unclaimed property where none exists by requiring Office Depot to remit money that rightly belongs to NACCS and that NACCS would have no obligation to escheat to any state.

It also effectively deprives the owners of the unredeemed cards of their ability to access the remaining balances on the cards. The gift cards issued by NACCS do not expire, so the owners of the cards may present them for redemption at any time in the future, no matter how remote, and Office Depot will honor them pursuant to its agreement with NACCS. However, if the unredeemed balances are required to

be remitted to Delaware, Office Depot would have no further obligation to honor the gift cards and the rights of the cardholders are effectively forfeited to Delaware.[3]

As states have taken an increased interest in using unclaimed property to patch budget holes, they have become correspondingly aggressive in auditing businesses in the hope of locating unclaimed property. According to one trade group, the amount of unclaimed property in state fiscs nearly doubled over a recent ten year period. Council on State Taxation, *The Best and Worst of State Unclaimed Property Laws: COST Scorecard on State Unclaimed Property Statutes* at 2 (2013) (noting increase from $22.8 billion to over $40 billion held by states over 2003-2013 period). Perhaps unavoidably, as states rush to fill their coffers with unclaimed funds held by national and multi-national businesses and amend their laws to broaden their scope, more and more holders find themselves in the midst of potential (or actual) conflicts between states regarding which state has the right to escheat. These conflicts, in turn, create regulatory burdens, compliance uncertainty and ultimately the specter of punishing interest and penalty assessments—or, as in this case, potential deprivation of property that otherwise would not be escheatable at all. All of these concerns derive from holders' inability to rely on the clear and unambiguous common law rules set forth half a century ago by the Supreme Court.

[3] 12 Del. Code §1153(a). Because the card balances will necessarily be reported to Delaware without any associated owner names or address information, the ability of owners to recover any escheated balances back from Delaware is essentially *nil.*

A. Application of the Federal Common Law Rules to Holder/State Relationships Provides Clarity With Regard to Multiple State Claims For the Same Property

As noted by the Supreme Court in *Texas v. New Jersey*, one of the main virtues of the federal common law rules is that they provide "clarity and ease of application" in situations where multiple states have actual or potential escheat claims to the same property. *Texas*, 379 U.S. at 680. While the Supreme Court was dealing with the desirability of such clarity with regard to a state-vs.-state dispute over unclaimed property, the need for a stable, unambiguous and predictable framework for deciding what state has an interest in the potential reporting and delivery of unclaimed property is even more vital for holders. Unlike the interstate conflicts that make their way to the Supreme Court on the average of every decade or two,[4] holders must report and remit property every single year. While there are certainly some similarities, each of those states has its own dormancy periods, reporting dates, reporting formats, notification requirements, and the like. And, as in this case, some states may require the reporting of certain types of property that other states affirmatively and intentionally exempt. The ability to determine clearly, and in advance, which states' law is applicable is invaluable from a regulatory compliance perspective.

[4] *See e.g.*, *Texas*, 379 U.S. 674, *Pennsylvania*, 407 U.S. 206, *Delaware*, 507 U.S. 490, *Delaware v. Pennsylvania*, Supreme Court Docket No. 22-O-145 (ongoing).

To the contrary, if the federal common law rules do not apply to the holder/state paradigm, then it necessarily follows that any business could find itself subject to a demand that it turn over unclaimed property to a particular state, even in situations where the federal common law rules clearly accord that right to another state. That is precisely the reason why this Court and other courts have applied the federal common law rules to the holder/state relationship. *N.J. Retail Merchants Ass'n*, 669 F.3d 374; *Am. Petrofina Co.*, 859 F.2d at 842.

In today's modern and increasingly virtual commercial world, this ambiguity has only increased. For example, dozens of states have enacted a so-called "transactional" rule that brings within a state's grasp property not subject to the laws of the holder's domicile where "the transaction out of which the property arose occurred in this State." *See e.g.,* NCCUSL, Uniform Unclaimed Property Act, at § 4(6) (1995 ed).[5] While the place where a transaction "occurred" may have been a straightforward analysis in 1995, in modern commerce, it is a question that raises

[5] For state-specific analogues, *see* Ala. Code §35-12-74; Alaska Stat. §34.45.120; Ariz. Rev. Stat. § 44-304; Ark. Code § 18-28-204; Colo. Rev. Stat. § 38-13-104; Conn. Gen. Stat. § 3-66b; D.C. Code § 41-104; Fla. Stat. Ann. § 717.103; Ga. Code Ann. § 44-12-194; Haw. Rev. Stat. § 523A-5; Idaho Code § 14-503; Ind. Code §32-34-1-21; Kan. Stat. Ann. § 58-3936; La. Rev. Stat. § 9:156; Me. Rev. Stat., tit. 33, § 1955; Md. Code, Com. Law §17-301; Mich. Comp. Laws § 567.224; Mont. Code § 70-9-805; Nev. Rev. Stat. § 120A.530; N.H. Rev. Stat. §471-C:3; N.J. Stat. Ann. §46:30B-10; N.M. Stat. § 7-8A-4; N.D. Cent. Code § 47-30.1-03; Okla. Stat. tit. 60, § 659; Or. Rev. Stat. §98.304; R.I. Gen. Laws § 33-21.1-3; S.C. Code § 27-18-40; S.D. Codified Laws § 43-41B-3; Tenn. Code § 66-29-103; Tex. Prop. Code § 72.001; Utah Code Ann. § 67-4a-103; Vt. Stat. tit. 27, § 1245; Va. Code § 55-210.2:2; Wash. Rev. Code § 63.29.030; W. Va. Code § 36-8-4; Wis. Stat. §177.03; Wyo. Stat. § 34-24-104.

myriad possible answers. Take the purchase of an online gift card by an unknown owner from a seller domiciled in a state where gift card balances are exempt: Did the transaction take place where the purchaser's Internet Protocol address is located? Where the purchaser's billing address is located? Where the seller's headquarters is? Where the servers upon which the transaction "took place" are located? Where the funds were transmitted?

The virtue of the federal common law scheme is that it sets a black-and-white, easy-to-apply rule to determine which state (if any) has the potential right to take custody of property in any particular situation. An item escheats to the state of the owner's last-known address, to the holder's state of incorporation, or not at all. Allowing holders to rely on these rules saves a holder from having to review 50+ separate acts for potential application.[6] It also provides finality. A holder can know whether property is exempt or reportable at the time of a transaction, without having to wait years (or even decades) for an unexpected state with at best a tangential connection to the underlying relationship to assert a claim for the property. The alternative to allowing holders to rely on the common law rules is to force them to

[6] While it is obviously to a holder's benefit to have simple, easy to apply rules governing state escheat claims, that certainty is to the states' benefit as well. As this Court has recognized, interstate disputes over unclaimed property have the potential to generate "so much expensive litigation that the States might find that they would lose more in litigation expenses than they might gain in escheats." *N.J. Retail Merchants Ass'n*, 669 F.3d at 396 (quoting *Texas v. New Jersey*, 379 U.S. at 683).

make compliance determinations on a "case-by-case basis"—something the common law rules were designed expressly to avoid. *Delaware*, 507 U.S. at 506-07.

B. Without Reliance on the Federal Common Law Rules, Holders Bear the Burden of State Overreach and Interstate Conflicts

Uniform application of the federal common law rules also prevents holders from getting caught in the middle of state-vs.-state conflicts over unclaimed property. Due process does not permit a situation where a holder is potentially liable to multiple states for the same property. *See, e.g.*, *Western Union Tel. Co. v. Commonwealth of Pennsylvania*, 368 U.S. 71, 74 (1961) (subjecting a holder to multiple state demands for the same property amounts to such a taking without due process of law); *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 443 (1951) ("[T]he same debts or demands [taken by New Jersey] against appellant cannot be taken by another state."); *Texas v. New Jersey*, 379 U.S. at 676 ("[T]he Due Process Clause of the Fourteenth Amendment prevents more than one State from escheating a given item of property.").

If the federal common law rules do not apply to the holder/state relationship, then a holder cannot rely on those rules as a defense to a subsequent state's claim that it should have received property escheated to a sister state. While a rational person might assume that states would settle such matters among themselves, in practice, the holder often gets caught in the middle of interstate escheat disputes.

See e.g. Complaint, *Treasury Department of Pennsylvania v. Delaware State Escheator*, Case No. 1:16-cv-00351 (M.D. Pa. 2016) (seeking money judgment, including interest and penalties, against holder for property Pennsylvania acknowledged was "sent to the Delaware State Escheator" by the holder).

Nor does the process of indemnification by the remittance state provide the holder with a reliable source of protection. As an initial matter, state indemnification statutes are often limited to damages that occur after the property is turned over and might not apply to the interest and penalties that a secondary state may impose, especially where the secondary state has a shorter dormancy period. In addition, if there is a determination that the holder escheated to the property to the "wrong" state, there is the possibility that a request for indemnification will not be honored. *See, e.g., Azure Limited v. I-Flow Corp.*, 210 P.3d 1110 (Cal. 2009). For these reasons, permitting holders to raise the federal common law rules in the event of a subsequent state claim should be an inherent part of the holder/state relationship.

IV. CORPORATE PLANNING TO TAKE ADVANTAGE OF STATE EXEMPTIONS IS NOT FRAUDULENT

Delaware's position in this case is ultimately grounded on the presumption that corporate planning geared toward taking advantage of favorable escheat laws in other states somehow constitutes fraud. This is ironic given that Delaware has long recognized that companies may structure their affairs to take advantage of attractive

laws in Delaware, notwithstanding corresponding adverse impacts on other states. For example, Delaware regularly encourages companies to be formed in Delaware to take advantage of Delaware's favorable corporate or securities laws.[7] Delaware has been tremendously successful in this self–promotion, receiving approximately $911 million in fiscal year 2015 from corporation franchise tax and other annual entity existence fees, which accounts for nearly a quarter of the entire annual budget.[8] In addition, in an example quite analogous to gift card planning structures, Delaware has defended the right of non-Delaware businesses to set up Delaware special-purpose entities to hold intangible property to generate state tax benefits under Delaware's favorable tax regime at a cost to the tax revenues of other states.[9]

Indeed, this Court has recognized that it is no more improper for businesses to seek the benefits of other states' escheat laws as they relate to unused gift cards

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[7] *See, e.g., Why Incorporate in Delaware?*, http://corplaw.delaware.gov/eng/index.shtml (last visited Apr. 15, 2017); *Why Businesses Choose Delaware*, http://corplaw.delaware.gov/eng/why_delaware.shtml (last visited Apr. 15, 2017); Lewis S. Black, Jr., Del. Dep't of State, Div. of Corps., *Why Corporations Choose Delaware* (2007), *available at* http://corp.delaware.gov/whycorporations_web.pdf (touting the benefits of incorporating in Delaware).

[8] *See* Delaware Economic Financial Advisory Council General Fund Revenue Worksheet (June 24, 2016), *available at* http://www.finance.delaware.gov; *see also* Jeff Mordock "Delaware Sets Record for New Businesses," Wilmington News Journal (January 6, 2015).

[9] In *Surtees v. VFJ Ventures, Inc.*, 8 So. 3d 950 (Ala. Civ. App.), *aff'd*, 8 So. 3d 983 (Ala. 2008), Delaware argued that Alabama could not negate the tax benefits that Delaware provided for Delaware-incorporated intangible holding companies. *See* Brief of the State of Delaware as Amicus Curiae in Support of Petitioner, *VFJ Ventures, Inc. v. Surtees*, No. 08-916, 2009 WL 481241, at *7 (Feb. 23, 2009) ("Alabama disagrees with Delaware's corporate-tax policy. That much is clear. . . . . ***What Alabama may not do is impose its own tax policy on Delaware.***") (ellipses added) (emphasis added). Yet, Delaware hypocritically here contends that it may impose its escheat policy on other states.

than it is for businesses to seek the benefits of Delaware's corporate or tax laws. *N.J. Retail Merchant Ass'n,* 669 F.3d at 395 ("[B]ecause companies might find the absence of State custodial escheat attractive, States may want to incentivize companies to incorporate in their jurisdiction by choosing not to escheat abandoned property.").

It should also be noted that Delaware's position in this case contradicts its own historical practice with respect to gift card planning structures. In *Delaware v. Card Compliant, LLC*, 2015 WL 11051006, at *6, Delaware recently made similar allegations challenging the gift card planning structure utilized by the defendants in that case. However, for well over a decade, Delaware has consistently approved the same or similar gift card planning structures in both audits and in the state's voluntary disclosure program. Affidavits of Jennifer Borden, Cathleen Bucholtz and James Ryan, *Delaware ex rel. French v. Card Compliant, LLC*, No. N13c-06-289 PRW (Del. Super. Ct. Aug. 12, 2016). Delaware has now apparently changed its mind regarding the validity of these structures, but it is duplicitous for Delaware to accuse companies (such as Office Depot) of possible fraud, when they simply relied on Delaware's longstanding historical practice of accepting such structures when they structured their gift card programs.

V. EVEN IF CORPORATE PLANNING WERE TO BE DEEMED FRAUDULENT, THE FEDERAL COMMON LAW RULES STILL APPLY

Finally, even if a retailer did fraudulently structure its gift card program,[10] the federal common law rules would still apply. If the federal common law rules are thrown out the window whenever a state alleges (or even proves) fraud, then this "would require [the Supreme] Court to do precisely what [it] 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.'" *Pennsylvania*, 407 U.S. at 215. Thus, regardless of whether fraud is involved, the secondary rule permits only the state of domicile of the debtor to escheat the property. *Texas*, 379 U.S. at 682. Of course, if the gift card entity was not in fact validly formed or maintained, then the gift card entity could not be the debtor, and so the identity of the actual debtor would need to be determined. However, absent such an unusual scenario, Delaware must defer to the underlying debtor-creditor relationship and respect the retailer's corporate structure.

CONCLUSION

UPPO respectfully requests that this Court affirm its prior decision in *N.J. Retail Merchants Association* and hold that (1) the federal common law

[10] It is difficult to imagine what such a fraudulent program would look like, given that Delaware has consistently respected gift card structures in the past, regardless of the facts. However, one possibility would be if the gift card entity was never in fact formed and yet the retailer intentionally produced false documents designed to deceive Delaware into thinking the entity had been formed.

jurisdictional escheat rules apply to disputes between a single state and a holder of unclaimed property; and (2) businesses may lawfully structure their affairs to take advantage of a particular state's favorable unclaimed property laws.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B)(i) and 32 of the Federal Rules of Appellate Procedure. It contains ____ words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the type-face requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on April __, 2017, the forgoing *amicus* brief was filed with the Clerk of the United States Court of Appeals, Third Circuit via electronic mail in a .PDF format. I also certify that on the same date, an original and nine (9) copies of the same identical brief were forwarded to the Clerk by overnight mail. Additionally, a copy of the foregoing amicus brief is being served, by first-class United States mail, postage prepaid, upon:

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