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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF DELAWARE,

*Plaintiff,*

STATE OF TEXAS,

*Plaintiff in Intervention,*

*V.*

STATE OF NEW YORK,

*Defendant.*

MOTION OF THE COMMONWEALTH OF VIRGINIA FOR  
LEAVE TO INTERVENE AND ADOPT COMPLAINT AND  
BRIEF OF THE COMMONWEALTH OF VIRGINIA IN  
SUPPORT OF MOTION FOR LEAVE TO INTERVENE  
AND ADOPT COMPLAINT

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MOTION OF THE COMMONWEALTH OF VIRGINIA  
FOR LEAVE TO INTERVENE AND  
ADOPT COMPLAINT

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Pursuant to Rule 9 of the Rules of the Supreme Court, the Commonwealth of Virginia, a sovereign state of the United States of America, by and through its Attorney General, Mary Sue Terry, moves the Court for an order permitting it to intervene in the above-entitled cause, and permitting it to adopt, to the extent appropriate, the complaint in intervention heretofore filed by the State of Texas, Plaintiff in Intervention. In support of this motion, the Commonwealth of Virginia would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of monies and other intangible property ("excess receipts"),<sup>1</sup> held or formerly held

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<sup>1</sup> In its complaint in intervention, Texas has defined certain terms. The Commonwealth of Virginia incorporates those definitions herein by reference.

by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master in this case.

3. On or about February 21, 1989, the Court granted the motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its complaint in intervention in this case.

4. As set forth in detail in its complaint, Texas claims a portion of the excess receipts that constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of excess receipts held or formerly held by securities brokerage houses incorporated in Delaware that are attributable to issuers incorporated in Texas.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company and excess receipts that have arisen in connection with distributions made by Texas municipal and other governmental issuers ("additional excess receipts") that are now being demanded by or remitted to New York. It is the understanding of the Commonwealth of Virginia ("Virginia") that the Court intends to consider claims to both the excess receipts originally at issue and the additional excess receipts identified by Texas.

6. Texas claims a portion of the excess receipts and the additional excess receipts for the reason that they constitute a debt owed by the issuer to the securities' beneficial owner. If the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the state of incorporation of the issuer under that state's unclaimed property law.

7. Virginia claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional excess receipts attributable to issuers incorporated in Virginia and that portion attributable to Virginia municipalities and other Virginia governmental entities.

8. The amount of excess receipts and additional excess receipts that Virginia is entitled to claim is currently unknown. Virginia has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess receipts. However, it is probable that at least one issuer incorporated in Virginia has generated excess receipts and additional excess receipts. Moreover, it is a virtual certainty that bonds issued by Virginia municipalities and other Virginia governmental

entities have generated additional excess receipts subject to the claim of Virginia.

9. Virginia asserts its claim pursuant to Title 55, Chapter 11.1 of the Code of Virginia which provides, in essence, for the custodial taking of abandoned or unclaimed tangible and intangible personal property that is held, issued, or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for a specified dormancy period, usually five years.

10. Virginia supports and adopts, as if fully set forth by Virginia in its own pleadings, Texas' complaint in intervention, and the factual and legal arguments set forth therein, to the extent the same are applicable and relevant to the claims of Virginia set forth in Paragraphs 7-9 above.

11. Although Virginia adopts the complaint in intervention filed by Texas, it is essential that Virginia be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law that will conclusively determine the future right of Virginia to claim and take possession of unclaimed property similar or identical in nature to the excess receipts and additional excess receipts at issue herein. Additionally, if Virginia is to establish its claim and right to take custodial possession of a portion of the property currently at issue, it must have access to the discovery process in order to identify those excess receipts and additional excess receipts attributable to issuers incorporated in Virginia. As a party, Virginia can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to Virginia.

12. Based on the foregoing, Virginia is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, Virginia urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b).

13. The intervention of Virginia in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to coordinate the effort among those states, including Virginia, wishing to intervene and represent themselves in this case. The addition of Virginia as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

## II.

14. The Court, in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which “all the states that want to do so can present their claims for consideration and final, authoritative determination.” *Id.* at 79. *See also Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity to present its claim that Virginia seeks by urging this Court to grant leave to intervene herein.

Wherefore, Virginia prays that it be permitted to intervene as a party plaintiff in this case, and to adopt, as its own and as if fully set forth by Virginia in its own pleading, Texas’ complaint in intervention, and the factual and legal arguments set forth therein, to the extent the same are relevant and applicable to the claims of Virginia; alternatively, Virginia prays that it be permitted to file its own complaint in intervention setting forth the factual and legal arguments asserted by Texas in its complaint and seeking, on behalf of Virginia, relief of the same nature as Texas.

Respectfully submitted,

Commonwealth of Virginia  
Mary Sue Terry, Attorney General

By: \_\_\_\_\_  
E. Suzanne Darling  
Assistant Attorney General  
Counsel of Record

Mary Sue Terry  
Attorney General

H. Lane Kneedler  
Chief Deputy Attorney General

Gail Starling Marshall  
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Mary Yancey Spencer  
Senior Assistant Attorney General

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BRIEF OF THE COMMONWEALTH OF VIRGINIA IN  
SUPPORT OF MOTION FOR LEAVE TO INTERVENE  
AND ADOPT COMPLAINT

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**BRIEF OF THE COMMONWEALTH OF VIRGINIA  
IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE  
AND ADOPT COMPLAINT**

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On May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York. On February 21, 1989, the Court granted the motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its complaint in intervention in this case. Texas claims a portion of the unclaimed property at issue as well as additional unclaimed property that is of the same nature and arises in the same way as the property already at issue. The Commonwealth of Virginia ("Virginia") also claims a portion of the original property and the additional property at issue in this case. Virginia now seeks leave to intervene as a plaintiff in this suit and to adopt the complaint previously filed by Texas.

**JURISDICTION**

The Court has accepted original jurisdiction of this action pursuant to Article III, Section 2 of the Constitution of the United States and under United States Code Title 28, Section 1251(a).

## STATEMENT OF THE CASE

The Commonwealth of Virginia seeks leave to intervene in this action, adopting the complaint filed by the State of Texas, Plaintiff in Intervention, as its own. That complaint and the motion for leave to intervene filed by Virginia set forth in detail the character of the property at issue and the entitlement of Virginia, Texas, and the remaining states to claim a portion of that property. Generally, the property consists of excess receipts and additional excess receipts,<sup>1</sup> which result from the complex system of securities trading, involving brokerage firms incorporated in Delaware and trading in New York and the Depository Trust Company, a New York corporation. The owner of the property at issue is unknown, and the property itself has become abandoned. Under current practice, the property is held for three years and then remitted to the State of New York.

The parties to this action all claim the property, or a portion thereof, pursuant to the rules of priority established by this Court in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). The parties differ, however, in their views of how the debt which becomes unclaimed property arises and to whom it is owed. As a result, each party has a different theory concerning who is the "owner" and who is the "holder" or "issuer" of the debt. Delaware's position is that the unclaimed property results from a debt owed by brokers incorporated in Delaware to beneficial owners whose addresses are unknown. Under this theory, all the property escheats to Delaware as the state of incorporation of the "holders."<sup>2</sup> New York claims that the property results from a debt owed by brokers to other brokers and banks which, for the most part, have trading addresses in New York. Under this theory, all the property escheats to New York as the state of last known address of the "holders." Texas takes the position that the unclaimed property is a result of a debt owed by the issuer of the security to the beneficial owner. If the address of the beneficial owner is unknown, the property goes to the "issuer's" state of incorporation. Under this theory, all 50 states share in the distribution of the property. Virginia supports the Texas theory and seeks leave to intervene and to adopt the Texas complaint as its own.

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<sup>1</sup> In its complaint in intervention, Texas has defined certain terms. Virginia incorporates those definitions herein by reference.

<sup>2</sup> Delaware's brief does not address property held by the Depository Trust Company ("DTC"), a New York corporation. Under the Delaware theory, the DTC property would escheat to New York.

## SUMMARY OF ARGUMENT

I. Virginia claims an interest in the property that is the subject of this suit and satisfies the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure and the standards set out in *Texas v. New Jersey*. Virginia is entitled to intervene as a matter of right.

II. Virginia claims an interest in the property that is the subject of this suit, and the intervention of Virginia will not unduly delay this action or prejudice the rights of the original parties. Having satisfied the requirements for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, Virginia's motion for leave to intervene should be granted.

## ARGUMENT

I. VIRGINIA IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2), FEDERAL RULES OF CIVIL PROCEDURE, AND THE STANDARDS ESTABLISHED IN *TEXAS V. NEW JERSEY*, 379 U.S. 674 (1965).

Rule 9.2 of the Rules of the Supreme Court provides that “[t]he form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court.” Rule 24 of the Federal Rules of Civil Procedure governs intervention generally. That rule provides that anyone who applies timely shall be permitted to intervene in an action:

[W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

Virginia seeks leave of Court to intervene in this case precisely because it claims an interest in the property that is the subject of this action. Virginia claims all excess receipts that were issued by corporations domiciled in Virginia. Likewise, Virginia claims all additional excess receipts that were issued by Virginia domiciliaries and governmental

entities. Although the amount of property subject to claim by Virginia is currently unknown,<sup>3</sup> it is substantial and sufficient to entitle Virginia to intervene as a matter of right.

In the case of *Texas v. New Jersey*, a case decided even before adoption of Rule 9.2 of the Rules of the Supreme Court, this Court set a standard allowing any state that claimed an interest in the subject property to intervene in original actions involving unclaimed property. Because it claims a significant interest in the excess receipts and additional excess receipts at issue in this case, Virginia has satisfied the test of *Texas v. New Jersey* and should be allowed to intervene.

The Court's decision in this case will determine conclusively Virginia's rights to the property at issue in this case. It is, therefore, important that Virginia be allowed to intervene and to participate in the discovery process to identify the specific property to which it is entitled. Although Virginia seeks to adopt the Texas complaint, it is also important that Virginia be allowed to advocate its own claim before the Court.

The standards for intervention as a matter of right have been satisfied, and Virginia should be granted leave to intervene.

## II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 24(b) of the Federal Rules of Civil Procedure gives the Court discretion to allow permissive intervention where appropriate. As a sovereign state with an unquantified but substantial interest in the outcome of this litigation, Virginia should be allowed to intervene. Virginia does not seek to interject a new theory of the case, but, rather, to join in the Texas complaint and to coordinate its efforts with Texas toward the ultimate resolution of this litigation. It is apparent, therefore, that intervention by Virginia will not unduly delay this action or prejudice the rights of the original parties. Virginia has satisfied the standards for permissive intervention, and the Court should exercise its discretion to allow Virginia to intervene.

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<sup>3</sup> For a discussion of the difficulties in obtaining an estimate of the property involved in this case, see Texas Complaint at 30-35. In its motion for leave to intervene, Virginia seeks to adopt the Texas complaint, to the extent relevant and applicable, as its own.

## CONCLUSION

For all these reasons, the motion of the Commonwealth of Virginia for leave to intervene as a plaintiff in this action and to adopt the complaint filed by the State of Texas should be granted. In the alternative, Virginia should be granted leave to intervene and permitted to file its own complaint in intervention.

Respectfully submitted,

Commonwealth of Virginia  
Mary Sue Terry, Attorney General

By: \_\_\_\_\_  
E. Suzanne Darling  
Assistant Attorney General  
Counsel of Record

Mary Sue Terry  
Attorney General

H. Lane Kneedler  
Chief Deputy Attorney General

Gail Starling Marshall  
Deputy Attorney General

Mary Yancey Spencer  
Senior Assistant Attorney General

E. Suzanne Darling  
Assistant Attorney General

## **PROOF OF SERVICE**

I, Mary Yancey Spencer, Senior Assistant Attorney General for the Commonwealth of Virginia, certify that I am a member of the bar of the Supreme Court of the United States, and that on the 11th day of May, 1989, I served copies of the Commonwealth of Virginia's motion for leave to intervene and adopt complaint and brief in support of motion for leave to intervene and adopt complaint on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

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