No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF DELAWARE,
and
Plaintiff,

STATE OF TEXAS, *et al.*,
Intervening Plaintiffs,

v.

STATE OF NEW YORK,
Defendant.

On Bill of Complaint

MOTION OF PLAINTIFF, STATE OF DELAWARE, TO STRIKE AMENDED COMPLAINTS IN INTERVENTION

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Plaintiff, State of Delaware, by its undersigned counsel, hereby respectfully moves to strike the Amended Complaints in Intervention filed by the Intervenors.[1]

[1] They are: (1) Amended Complaint in Intervention of the Plaintiff-Intervenor States of Texas, Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, Oregon, South Carolina, Tennessee, Wisconsin, and the Commonwealth of Virginia (filed July 7, 1993); (2) Amended Complaint in Intervention of the States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio,

Without authority from this Court, and beyond the scope of the Court's remand order to the Special Master (*Delaware* v. *New York,* slip op. at 16-17, 113 S. Ct. 1550, 1561-62 (March 30, 1993) (per Thomas, J.)), the Master has purported to permit the filing of Amended Complaints by the Intervenors in this case with the Clerk of this Court. Those Amended Complaints broadly expand the scope of this case, from a controversy concerning unclaimed "owner unknown" securities distributions taken by New York from Delaware-incorporated brokers, to a general inquest, covering at least the past 20 years, into every unclaimed securities distribution ever taken by New York in escheat from any and all financial intermediaries whatsoever—depositories, banks and brokers, wherever incorporated. Neither the formal requirements for such an expansion of an original jurisdiction controversy—approval by this Court itself—nor the substantive requirements—the showing of a controversy between the States of a sort that requires the exercise of this Court's original jurisdiction—have been fulfilled. The Court should reject this unauthorized action by the Special Master and strike the Amended Complaints in Intervention.

STATEMENT

Delaware commenced this action in February 1988, seeking to recover money and other intangible property wrongfully escheated by the State of New York. The substance of Delaware's claim was, and remains, that New York has taken unclaimed intangible property from Delaware-incorporated brokers in violation of the priorities

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Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming, and the Commonwealths of Kentucky and Pennsylvania (filed July 7, 1993); (3) Amended Complaint in Intervention of the State of California (filed July 9, 1993); (4) Amended Complaint by the District of Columbia (filed July 8, 1993); (5) Amended Complaint of the States of Michigan, Maryland and Nebraska (filed July 8, 1993); and (6) Commonwealth of Massachusetts' First Amended Complaint (filed July 1, 1993).

laid down in *Texas* v. *New Jersey,* 379 U.S. 674 (1965), and reaffirmed in *Pennsylvania* v. *New York,* 407 U.S. 206 (1972).

In those two cases, the Court held that unclaimed intangible property is subject to escheat "only by the State of the last known address of the creditor, as shown by the debtor's books and records." *Texas* v. *New Jersey,* 379 U.S. at 681-82 (the "primary rule"). Where there is no record of an owner or address, a "backup rule" applies: the state of the debtor's corporate domicile (determined by its state of incorporation) has the right to escheat. 379 U.S. at 682; *accord Pennsylvania* v. *New York,* 407 U.S. at 210-11.

Delaware sought leave to file a complaint invoking the Court's original jurisdiction and seeking the recovery of owner/address unknown dividends, interest, and other distributions on securities ("securities distributions") taken, systematically, by New York from Delaware-incorporated brokers. Complaint of State of Delaware (filed February 9, 1988). The claim was thus directed exclusively to New York's violation of the *Texas* case's backup rule.

The Court granted the motion for leave to file the Complaint and directed that New York file an Answer. 486 U.S. 1030 (1988). New York's primary position was, and still remains, a denial "that the creditors or their addresses cannot be determined from the books and records of the debtor corporations." Answer of New York ¶ 21 (filed July 27, 1988). Thus, New York has taken the position that the property legitimately came to it under the primary rule, even though it was reported to New York as "owner/address unknown."

After the Court appointed a Special Master, the State of Texas sought leave to file a Complaint in Intervention against New York. Like Delaware's Complaint, Texas' Complaint in Intervention sought, exclusively and unequivocally, to recover moneys under the backup rule.

Complaint in Intervention of Texas ¶¶ 10, 24 (filed January 7, 1989) (Texas seeks "unclaimed . . . intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property"). Unlike Delaware, however, Texas did not seek to recover moneys taken by New York from brokers incorporated in Texas; instead it asked the Court to change the established rules in this area in a way that would allow Texas to recover moneys that it viewed as "originating" in Texas. Texas explained, "[i]f the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer [of the security giving rise to the unclaimed distribution] should be entitled to collect the [property] under that state's unclaimed property law." Complaint in Intervention of Texas ¶ 8.

The Texas intervention, authorized by this Court, 489 U.S. 1005 (1989), greatly enlarged the scope of the unclaimed property *potentially* claimed under the backup rule in this case. In its original form, this case involved only the property taken by New York from the Delaware-incorporated brokers. Because Texas was claiming that property taken by New York from *all* intermediaries should be escheated to the state of incorporation of the *issuer* of the unclaimed distributions,[2] a purpose of its Complaint was to enlarge the universe of the unclaimed distributions in controversy from those taken by New York from the Delaware-incorporated brokers to those taken by New York from all intermediaries. Because most of the owner-unknown securities distributions taken by New York have historically been taken from New York-incorporated entities—the Depository Trust Company ("DTC") and the New York-incorporated clearing banks—the scope

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[2] Texas (and the other Intervenors) later changed their backup-rule theory to one that looks to the state of the chief executive office of the issuer, when the Master spontaneously embraced that theory.

of the case would have been greatly expanded had Texas' theory been accepted on the merits.[3]

Between the Court's 1989 grant of Texas' motion for leave to file its Complaint in Intervention and the Court's 1993 decision sustaining Delaware's Exceptions to the principal recommendations of the Special Master's Report in this case, *Delaware* v. *New York,* 113 S. Ct. 1550 (March 30, 1993), every other State in the Union, along with the District of Columbia, sought, by motion addressed to this Court, leave to intervene as plaintiffs. Aside from that of Massachusetts, these motions were referred to the Special Master for recommendation; he did not purport to grant or deny them but, in reports issued on September 13, 1989, and on January 28, 1992, recommended that they all be granted. With one exception, each of the Intervenors urged the Court to alter the backup rule in one way or another, so that the other States could share in the backup-rule recovery from New York of owner/address unknown unclaimed securities distributions.[4] No

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[3] *Compare* New York's Response to First Set of Interrogatories Propounded by Alabama, *et al.,* at 5-6 (Apr. 27, 1990) (showing a *five-year* total of approximately $360 million in escheats remitted to New York by all financial institutions), *with* New York's Response to Delaware's First Interrogatories, Schedule I at 3 (March 6, 1989) (showing a *seventeen-year* total of only $139 million in escheats remitted to New York by Delaware-incorporated brokers).

[4] The original Complaints in Intervention of almost every state were substantially identical to the one filed by Texas. The Complaint in Intervention filed by Alabama, *et al.,* for example, asserted that unclaimed property "should be remitted to the state in which the Corporate Issuer is incorporated." Complaint in Intervention of the States of Alabama, *et al.,* ¶ 7 at 4 (filed April 21, 1989). The Complaint sought relief on its claim "that if the Beneficial Owners are unknown, the Funds held by brokerage firms and other intermediaries attributable to Corporate Issuers and Government Issuers are subject only to the claims of the state of incorporation of the Corporate Issuer or the state of the Government Issuer." *Id.,* Prayer for Relief ¶ 2.

A few states had tendered complaints embracing a mutant of the Texas theory best described as quasi-legislative in nature. *E.g.,*

Complaint made any claim that any broker (or other intermediary) was incorporated in one of the Intervenor States but had remitted to New York unclaimed intangible property that should have been paid to another state under the traditional backup rule. Only a modified backup rule (not focusing on the domicile of the holder) was contended for in the Complaints in Intervention. Neither did any Complaint in Intervention claim that New York had improperly taken *primary-rule* property belonging to them, that is, where the creditors' addresses were *known,* but the creditors themselves were "lost," but with last-known addresses of record in one of the Intervenor States.

With the grant of leave to file the Complaint in Intervention of Texas, 489 U.S. 1005, this Court had placed two controversies on its docket, and every state seeking leave to intervene staked its claim squarely within the confines of those two controversies. *First,* Delaware asked the Court for relief from New York's violation of the Court's established backup rule, which injured Delaware in an amount now estimated by New York's Governor to be approximately $350 million.[5] *Second,* the Intervenors asked the Court to resolve a different controversy: whether the other states could recover *backup-rule property* held by brokers or other intermediaries that were not incorporated in the Intervenors' states, by way of a change in the Court's rules to focus on the issuer of the securities

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Motion of the States of California, Michigan, Ohio, and Rhode Island for Leave to File Complaint in Intervention (November 17, 1989). The Master rejected this approach and the Court overruled all Exceptions supporting it. Rep. 50-55; slip op. at 4, 113 S. Ct. at 1555.

Massachusetts, which sought leave to intervene on March 31, 1992, after the Master had issued his Report, took no position on the recommended rule changes.

[5] Jeremy Zremski, *Cuomo Eyes $350 Million to Cover State's Cost from Ruling on Stocks,* The Buffalo News, March 31, 1993, at 2; *see also* Linda Saslow, *Educators Optimistic on More State Aid,* N.Y. Times, April 4, 1993, § 13 (Long Island ed.) at 1.

distributions rather than the state-law debtor and holder of the property—the intermediary.

With regard to the second question—the one put at issue by the Complaints in Intervention—the Master recommended that the Court adopt a rule change focusing on the issuer. The Court, on Exceptions, declined to do so, concluding that "[p]recedent, efficiency, and equity all dictate the rejection" of the proposal contended for by the Intervenors. *Delaware* v. *New York,* slip op. at 14, 113 S. Ct. at 1560. This Court therefore conclusively resolved the Complaints in Intervention, foreclosing the possibility that any of the relief sought in them could be granted.

At the same time, the Court granted all motions for leave to intervene that it had not previously granted. Slip op. at 4, 113 S. Ct. at 1555. We believe that the grant of these motions was to ensure that the Intervenors were to be bound by the judgment of the Court. The Court has in the past granted similar requests simultaneously with rejection of the positions asserted on the merits. *See, e.g., Washington* v. *General Motors Corp.,* 406 U.S. 109, 116 (1972) (granting states leave to join motion for leave to file complaint and denying motion for leave to file). This was of some importance here, because many of the Intervenors had, during the pendency of the case, enacted new statutes to bring their unclaimed property laws into line with their litigating position before this Court.[6] In light of the Court's decision, these statutes are unconstitutional, and the grant of the motions to intervene ensured that no state could enforce them.

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[6] A then-current list of these statutes was contained in the Appendices to Delaware's Brief in Response to the Exceptions of New York and of the Michigan group of states, filed July 27, 1992. Since then, several other states have enacted substantially identical legislation, some such enactments even coming *after* the Court's March 30, 1993, decision.

Because of his recommendation that the Court accept the position taken in the Complaints in Intervention, the Special Master did not make findings of fact or conclusions of law as to the validity of New York's response to Delaware's Complaint under the traditional rule of *Texas* v. *New Jersey*. This stemmed from the fundamental difference in approach between Delaware and the Intervenors, with Delaware making contentions under the traditional rule of *Texas* v. *New Jersey*, and the Intervenors urging (and the Master holding) that that rule should be altered to view the "issuer" as the "debtor" and the beneficial owners as "creditors." Delaware asserted that New York could not show last-known addresses of the brokers' *state-law creditors*; the Intervenors, in contrast, asserted that New York could not show last-known addresses of the *beneficial owners* of the unclaimed property. *See* pp. 3-4, 5 & n.4, *supra*.[7]

In adopting the Intervenors' position on their affirmative claim, the Master addressed New York's position on the same terms that the Intervenors did: he concluded that New York had not shown that it could identify the addresses of the beneficial owners of the unclaimed distributions. Master's Rep. 61-68. In light of his rejection of Delaware's assertion that the inquiry under the *Texas* rule is controlled by state law, the Master did not make findings of fact with regard to New York's claim that the state-law creditors' last-known addresses can be identified. Rep. 64 ("[i]n applying the primary rule . . . the goal must be to identify the *ultimate intended beneficiary* of the payments"), 67 ("locating the creditor broker is not necessarily the same as locating the beneficial owner") (emphasis by the Master). Delaware, acknowledging that the Master did not make express find-

[7] While it is possible that some beneficial owners are also state-law creditors, their status as such depends on whether they are "the parties to whom the intermediaries are contractually obligated to deliver unclaimed securities distributions." *Delaware* v. *New York*, slip op. at 15, 113 S. Ct. at 1561.

ings of fact on the point, urged the Court to enter judgment against New York on the basis of the evidence adduced before the Master and analyzed in the Master's other findings, which Delaware contended were applicable to its own theory as well.

The Court did not direct the entry of judgment, however; it remanded the case to the Special Master, presumably so that he could consider whether the identities of the "creditors," *i.e.*, "the parties to whom the intermediaries are contractually obligated [under state law] to deliver unclaimed securities distributions," could be proved "on a transaction-by-transaction basis or [by] some other proper mechanism," slip op. at 15-17, 113 S. Ct. at 1561.[8]

This Court's March 30, 1993, decision, accordingly, restored this case to its original contours of a suit involving the unclaimed securities distributions systematically taken by New York from the Delaware-incorporated brokers. Notwithstanding this, and without being in a position to state any basis for their claims, in a status conference before the Master held on June 2, 1993, the Intervenors indicated a possible desire to press both backup-rule claims and primary-rule claims. In that connection they wished to examine every unclaimed "owner unknown" securities distribution New York had ever taken—without limitation of time—from every single securities-industry intermediary that ever remitted unclaimed property to New York—depositories, banks and brokers alike.[9]

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[8] On remand, New York has expressed its desire to attempt proof on a theory similar to that which the Master and the Court rejected when applied to beneficial owners, although this time on a transaction-by-transaction basis.

[9] Transcript of Hearing Before the Special Master at 31-32 (App. 25a-27a), 44-45, 84-88 (App. 31a-32a), 109 (June 2, 1993); *see also* Letter from Bernard Nash, Esq., to the Special Master at 3 (June 7, 1993) ("intervenors are expressly entitled under the Court's deci-

Thus, *first*, with 48 of the 49 Intervenors not identifying a single broker incorporated by them, the Intervenors proposed to examine, under the backup rule, every "owner unknown" escheat taken by New York to determine whether it had been taken from an entity incorporated in one of the Intervenor states.

Second, with similar lack of specificity, those 48 Intervenors also proposed that every last unclaimed "owner unknown" securities distribution taken by New York from any intermediary—without limitation of time or nature of the intermediary—be examined to see whether it might be possible to locate a "lost" owner having a last-known address situated in one of the intervening states, so that a claim could be made by that Intervenor for that distribution under the "primary rule," despite its having been reported as "owner unknown." [10]

These proposals were not attended by any specific assertions of the factual basis on which those claims were to be made. Indeed, they came with expressions of a desire simply to explore matters and see what might turn up. We quote in the margin a number of representative statements by the Intervenors in that regard.[11]

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sion to undertake efforts to determine [in this action] entitlement under the primary rule, and have the same rights as Delaware to determine from whom New York seized the funds at issue, for backup rule purposes"); Letter from Bernard Nash, Esq., to the Special Master (May 27, 1993).

[10] Massachusetts is somewhat differently situated. That state has (1) identified specific brokerage firms that remitted moneys to New York in contravention of Massachusetts' rights under the backup rule; and (2) disclaimed reliance on the primary rule in this proceeding, preferring instead to rely on its reciprocal agreement with New York for the resolution of any primary-rule claims it might discover. Transcript of Hearing Before the Special Master at 62-63 (June 2, 1993).

[11] Transcript of Hearing Before the Special Master at 36 (App. 29a) (June 2, 1993) (Mr. Nash, Alabama, *et al.*, counsel: "I'm not prepared to, at the moment, at least, short of discovery, and seeing what records look like, to know if anything credible can be

The Master countenanced these proposals. On June 8, 1993, he entered "Litigation Management Order No. 6" ("LMO No. 6") (App. 1a-24a hereto). Without express or, we submit, implied authority from this Court, he granted leave for the Intervenors to amend their Complaints. The Amended Complaints, as filed, were as unspecific as the reasons given by the Intervenors for their request that they be permitted to proceed with their "claims." The Amended Complaint filed by the largest group of Intervenors, Alabama, *et al.*, is illustrative. Apart from definitions of the words "Distributions" and "Intermediaries" the entirety of these Intervenors' claim was stated as follows:

> 9. New York has taken possession of a portion of these Distributions to which it is not entitled. The States are entitled to recover from New York an undetermined portion of those Distributions either

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put forth"); *id.* at 46 (App. 30a) (Mr. Mattax, of Texas: "We do not know whether [discovery] would be beneficial"), 47 (App. 30a-31a) (Mr. Mattax: "Perhaps Texas will say [after discovery] simply, we don't think it's worth our effort anymore"); Response of Alabama, *et al.*, to Scheduling Order at 3 (May 26, 1993) ("Discovery from New York is needed before the States can evaluate what mechanism(s) can be used to determine the identity and address of 'creditors' under the possible alternatives presented by the Court's opinion, and whether the time and expense of pursuing those mechanism(s) warrant the investigation"); Response of Texas to Motion for Scheduling of Status Conference ¶ 1 (May 26, 1993) ("The Texas Group is not in a position at this time to respond authoritatively to paragraph 3 of the Scheduling Order because until further discovery of New York is conducted the Texas Group cannot conclude whether a 'proper mechanism for ascertaining creditors' last known addresses' exists and, if so, whether it would be practical to pursue that mechanism through further discovery."); California's Response to Scheduling Order at 2 (May 26, 1993) ("Given the state of the evidentiary record, California is not now in a position to advise as to whether it is feasible to perform such tracing and if feasible, what mechanism it would employ. California requests that discovery be permitted to determine the nature and extent of property escheated by New York for the relevant years starting in the early 70s.") (footnotes omitted).

because (a) under this Court's primary rule, the last known addresses of the owners of the Distributions are in their respective States or, (b) under this Court's backup rule, if there is no last known address, the Distributions were taken by New York from Intermediaries incorporated in the respective intervenor States.

10. The States further claim entitlement to recover from New York such Distributions taken by New York as to which there are no last known addresses of the owners and which were held by Intermediaries not incorporated in any State, according to equitable principles determined or to be determined by the Court.

11. Alternatively, the States claim entitlement to recover pursuant to any ruling of the Court in this case an undetermined portion of Distributions taken by the State of New York.

And the entire prayer for relief was as follows:

WHEREFORE, the States pray:

1. That judgment be entered for that portion of the Distributions to which each State is entitled under applicable principles of law, plus prejudgment interest at the prevailing rate; and

2. Such other and further relief as this Court deems just and proper.

In keeping with the vague and general nature of the Amended Complaints and the general "fishing expedition" approach of the proceedings, the Master in LMO No. 6 ordered New York to produce a log of each and every securities distribution escheat taken by it since 1972, whether from depositories, banks, brokers or other intermediaries, the log to include:

the remitter's name, listed address, the amount of the remittance, the date, the security or account identified as the source of the funds (if any is listed), and the remitters' jurisdiction of incorporation.

LMO No. 6, § 5, App. 12a. This "log" was to be used in assisting the Intervenors to determine whether in fact they had any backup-rule claims against New York, based on incorporation of an intermediary in a particular Intervenor state.[12] The log also served to "commence discovery into primary rule claim issues." LMO No. 6, § 5, App. 13a. In this regard, it was to be followed by discovery, conducted by the Intervenors, to see if they had a basis for any primary-rule claims, using two sample "test periods" and third-party discovery from five selected sample intermediaries, with the prospect of a general enlargement if this expedition proved fruitful. LMO No. 6, § 5, App. 13a-15a. New York initially proposed to produce 135 boxes of documents in response to this order.[13]

Delaware and New York, the Plaintiff and Defendant in this case, protested this enlargement of the case before the Master and later moved before the Master for a modification of the portions of LMO No. 6 that expanded the case beyond the Delaware-incorporated brokers.[14] The Master denied these motions in Litigation Management Order No. 7 ("LMO No. 7"), dated August 4, 1993. App. 33a.

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[12] As the Master put it in Litigation Management Order No. 7 ("LMO No. 7"), "the log was to be the basis by which other parties determined whether they might have backup rule claims." LMO No. 7, at 3. Only one Intervenor, Massachusetts, identified any intermediary incorporated in its state from which New York had taken unclaimed securities distributions in escheat.

[13] Affidavit of Robert Griffin, sworn to July 7, 1993, ¶¶ 4, 5, 10. The scope of the initially-required information was later modified. *See* p. 24, n.28, *infra.*

[14] *See* Response of Plaintiff, State of Delaware, to Scheduling Proposals of Defendants and Intervenors at 7-9, 15-19 (June 1, 1993); Transcript of Hearing Before the Special Master at 20 (June 2, 1993); Motion by Defendant, State of New York, to Modify Litigation Management Order No. 6, ¶¶ 1-9 (July 7, 1993); Response by Plaintiff, State of Delaware, to New York's Motion to Modify Litigation Management Order No. 6 at 2-5 (July 15, 1993).

Thus, the Master has, without authority from this Court, permitted amendments to the Complaints of the Intervenors that have radically changed the scope of the controversy, expanding it from an adjudication of New York's response to Delaware's claim into a roving inquest into every owner-unknown securities distribution escheat taken by New York, at least in the past 21 years, from intermediaries of every nature and of every domicile. This action greatly prejudices Delaware by immersing its crisply defined claim, which it was expressly permitted by this Court to assert more than five years ago, 486 U.S. 1030 (1988), in the murky waters of a universal fishing expedition being conducted by the Intervenors. New York has already asserted the burdens of the discovery being conducted in connection with the Intervenors' and the Master's great expansion of the case as a method of seeking delay in the adjudication of Delaware's specific claims.[15] Delaware is accordingly being prejudiced by the action of the Master in permitting amendments to the Intervenors' Complaints, without express or implied authority by this Court. By directing the filing of Amended Complaints that greatly expand the matters to be considered on remand,[16] the Master has permitted the invocation of this Court's original jurisdiction in a way neither sanctioned nor historically permitted by this Court.

The Master's action is not "interlocutory"; it involves not simply the course of delegated proceedings before the Master himself, but the filing of Amended Complaints before this Court, a matter reserved to the Court itself; this Motion is thus properly addressed to the Court.

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[15] Affidavit of Robert Griffin, sworn to July 7, 1993, ¶¶ 5, 8, 10; *see* Motion by Defendant, State of New York, to Modify Litigation Management Order No. 6, ¶¶ 8-9, 11, 20 (July 7, 1993).

[16] Counsel for most of the Intervenors described the proposed expansion of the case as constituting a "new beginning" of the case. Transcript of Hearing Before the Special Master at 84 (June 2, 1993) (App. 31a).

ARGUMENT

We respectfully submit that allowing the filing of the Amended Complaints by the Intervenors is beyond the scope of the Master's authority, is not consistent with the Court's remand to the Master, does not comport with this Court's standards for the exercise of its original jurisdiction, and, even in a district court case, would not be allowed. Although in form seeking no relief against Delaware, the Amended Complaints are prejudicial to Delaware because they threaten to delay the adjudication of Delaware's claims, already pending before this Court for more than five years. We therefore move that the Court strike the Amended Complaints and direct the preparation of an appropriate decree dismissing the Complaints in Intervention.[17] In the alternative, the Amended Complaints should be stricken and the Master should be directed to allow the Intervenors to pursue only those primary-rule claims involving securities distributions taken by New York from Delaware-incorporated brokers.[18]

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[17] In light of the concrete factual allegations in Massachusetts' First Amended Complaint, accompanied by a statement that was to be treated as a motion for leave to file, Delaware takes no position on whether the Court should deem the Statement of Massachusetts accompanying its First Amended Complaint a motion for leave to file and grant the motion.

[18] Should the Court take the latter course, Delaware would not raise any issue as to the failure of the Intervenors to make cross-claims against Delaware asserting, under the primary rule, a right superior to Delaware's to take and hold the unclaimed securities distributions taken by New York from the Delaware-incorporated brokers. (For some reason the Intervenors have not pleaded such cross-claims in respect of their primary-rule claims to the extent that they relate to moneys taken by New York from the Delaware-incorporated brokers.) Of course, we submit that the best course of action would be for the Court to order dismissal of the Complaints in Intervention.

I. THE MASTER HAD NO AUTHORITY, EXPRESS OR IMPLIED, TO PERMIT AMENDMENT OF THE COMPLAINTS IN INTERVENTION

The Master's Order (LMO No. 6, § 3, App. at 8a-11a) permitting the Intervenors to file amended complaints with the Clerk of the Court exceeded the scope of his authority. The Master merely has authority to make *recommendations* about the scope of the action. The Court reserves for itself the exclusive control over its docket, as has been true since the earliest days of the Court's exercise of the original jurisdiction.[19] The Court's current rule governing procedure in original actions confirms that the *Court,* not the Master, directs the course of the proceedings: after detailing the procedure for seeking leave to file a complaint, Rule 17 states that "[t]he Court may thereafter grant or deny the motion, set it down for oral argument, direct that additional pleadings be filed, or require that other proceedings be conducted."

The uniform practice in original actions has therefore been for leave to amend the pleadings or otherwise expand the scope of the case to be sought from—and granted or denied by—the *Court* itself, not the Master. The Court often refers such motions to the Master for

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[19] *See* Hannis Taylor, *Jurisdiction & Procedure of the Supreme Court of the United States* § 68 at 102 (1905) ("in the weighty cases justiciable by reason of the original jurisdiction, the court should, at every stage of the proceeding, hold in its own hands the right to direct and control it by the granting or withholding of special orders"); *Grayson* v. *Virginia,* 3 U.S. (3 Dall.) 320, 320 (1796) (adopting rule for the service of process, but retaining for the Court the "discretionary authority, however, to deviate from that rule, where its application would be injurious and impractical"); *Hayburn's Case,* 2 U.S. (2 Dall.) 408, 412-13 (1792). The Court's firm control of the scope of the proceedings on its original docket continues to the present day. *See* Robert L. Stern, *et al., Supreme Court Practice* § 10.11 at 492 (6th ed. 1986) ("The Court itself will determine what subsequent steps are to be taken" after the motion for leave to file the complaint, the supporting brief, and the brief in opposition are submitted to the Court).

recommendation, which the Court considers. *See, e.g., Nebraska* v. *Wyoming,* 113 S. Ct. 1941, 1941 (1993) (directing the Master to "provide a recommendation to the Court as to whether the motion for leave to file an amended petition should be granted"); *California v. Nevada,* 447 U.S. 125, 132-33 (1980) (declining to expand scope of reference to Master, even though he recommended granting leave to file an amended complaint that would have done so); *Ohio* v. *Kentucky,* 410 U.S. 641, 644, 651-52 (1973) (adopting recommendation of Master that leave to amend complaint be denied); *California* v. *Nevada,* 438 U.S. 913, 913 (1978) (adopting Master's recommendation that leave to amend complaint be granted); *New York* v. *Illinois,* 361 U.S. 927, 927 (1960) (referring motion for leave to file supplemental and amended complaint to Master "for an expression of his views"). Indeed, we have found no case in which the Court has authorized (or a Master has employed) the kind of procedure employed by the Master here—authorizing the parties to file, with the Clerk of this Court, amended complaints grossly expanding the scope of the action.[20] Certainly such a process was forbidden

[20] The prior proceedings in this action do not comport with this procedure, either. As is the Court's practice, the motion of every state for leave to *intervene* was granted by the *Court* on the Master's recommendation (in all cases except that of Texas), and without exception from any party; and although Texas filed (with the *Court*) a motion for leave to amend its Complaint in various technical and nonsubstantive matters, and the motion was referred to the Master, 493 U.S. 929 (1989), that motion was never acted upon by the Court, Texas did not file the proposed Amended Complaint with the Court, and Texas' newly filed "Amended Complaint" does not purport to be a "Second Amended Complaint." We note that in the early stage of the proceedings the Master authorized putative intervenors—whose motions for leave to file complaints had not then been passed on by the Court—who wished to do so to file with him amendments to their proposed complaints (LMO No. 1, October 18, 1989). Although several putative intervenors filed various documents with the Master, alternatively styled "amended complaints," "motions for leave to amend complaints," and "motions

under the old equity rules of pleading,[21] and the modern cases continue to caution the district courts that masters lack the powers of the courts themselves: "[t]he use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the court.' " *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957) (quoting *Ex parte Peterson*, 253 U.S. 300, 312 (1920)); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168 (D.C. Cir. 1991) (R. Ginsburg, J.) (rules authorize "the appointment of special masters to *assist*, not to replace, the adjudicator") (emphasis by the Court).

Finally, we note that the Order of the Court appointing the Master contains the powers "customarily granted in litigation of this kind," *Georgia* v. *South Carolina*, 497 U.S. 376, 379 (1990), granting the Master "authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings." 488 U.S. 990, 990 (1988). This stock language should not be read as a limitation on the Court's ability to control its own docket. The orders of appointment in original cases for many years have routinely contained such language, and the practice remains that the *Court*, not the Master, decides whether to allow amendments to the pleadings.[22] In some original jurisdiction cases, the Court

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for leave to amend motions for leave to intervene," none of them purported to effect a substantive change in the scope of the issues to be decided by the Court. These documents were thus proposed amendments of complaints that the Court had not permitted to be filed. Neither these documents nor New York's answers to them were filed with the Court.

[21] *Shapiro* v. *Engel*, 257 F. 854, 855-56 (E.D.N.Y. 1919) ("The master did not have the power to allow such an amendment [enlarging] the issues. . . . Such application could be made only to the Court.").

[22] For several examples of cases in which orders of appointment contained identical language, and in which the Court retained for itself the authority to allow amendments, see *Nebraska* v. *Wyoming*,

has itself granted or denied motions for leave to amend complaints; in other cases it has accepted or rejected recommendations by a Master as to amendments to complaints; but we find no case where the Court has approved a course of proceedings in which a Master has undertaken to permit, in his or her own discretion, the filing of amended complaints with the Court, let alone those greatly expanding the scope of the proceedings.

II. THE AMENDED COMPLAINTS EXPAND THE CASE BEYOND THE LETTER AND SPIRIT OF THE COURT'S REMAND INSTRUCTIONS, TO DELAWARE'S PREJUDICE

(a) *The Expansion.*—The Master's Report made express findings of fact only with respect to whether New York's factual position was tenable under the theory of the case tendered by the Intervenors—a theory that the Master recommended, but that the Court did not adopt. He made no findings on whether the beneficial owners are or are not "the parties to whom the intermediaries are contractually obligated [under state law] to deliver unclaimed securities distributions." Slip op. at 15, 113 S. Ct. at 1561. Accordingly, the remand appears to have been ordered to afford the Court the benefit of specific findings of fact by the Master on the controlling question not reached by him—whether New York can offer proof of last-known addresses of the state-law creditors of the Delaware-incorporated brokers. It was not ordered to commence a roving inquest into all items of unclaimed securities distributions ever remitted to New York.

The text of the remand instructions confirms that the Court appears to contemplate a bilateral adjudication on remand:

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113 S. Ct. 1941 (1993), and 483 U.S. 1002 (1987); *California* v. *Nevada*, 447 U.S. 125, 132-33 (1980), 438 U.S. 913 (1978), and 433 U.S. 918 (1977); and *Ohio* v. *Kentucky*, 410 U.S. 641 (1973), and 385 U.S. 803 (1966).

> [1] Despite our refusal to adopt New York's proposal for statistical analysis of creditors' addresses under the primary rule, we decline Delaware's invitation to enter judgment against New York on the basis of the Master's findings. Exceptions and Brief for Plaintiff Delaware 85. [2] On remand, if New York can establish by reference to debtors' records that the creditors who were owed particular securities distributions had last known addresses in New York, New York's right to escheat under the primary rule will supersede Delaware's right under the secondary rule. [3] As we noted in *Texas,* "the State of corporate domicile should be allowed to . . . retai[n] the property for itself only until some other State comes forward with proof that it has a superior right to escheat." 379 U.S. at 682. Accord, *Pennsylvania,* 407 U.S. at 210-11. [4] If New York or any other claimant State fails to offer such proof on a transaction-by-transaction basis or to provide some other proper mechanism for ascertaining creditors' last known addresses, the creditor's State will not prevail under the primary rule, and the secondary rule will control. *Id.* at 215.

Slip op. at 16-17, 113 S. Ct. at 1561-62 (bracketed numbers supplied).

The first sentence serves to alert the parties to the need for further proceedings. It mentions only Delaware and New York. The specific instructions of the Court then follow: "[o]n remand, if *New York* can establish" last-known addresses, it will "supersede *Delaware's* right under the secondary rule." Slip op. at 16, 113 S. Ct. at 1561 (sentence [2] (emphasis supplied)). The remaining two sentences are most naturally read as an explanation of the applicability of the general presumptions set out in the *Texas* and *Pennsylvania* cases to the remand proceedings and scope of the available judgment in this case: there is a presumption that the state of corporate domicile holds the property until another state comes forward with proof of its superior right to custody (sentence [3] (quot-

ing *Texas* and citing *Pennsylvania*)); and such proof must be offered on a transaction-by-transaction basis (sentence [4] (citing *Pennsylvania*)).[23]

The Intervenors argued to the Master, however, that the passing reference to "any other claimant State" in the final sentence [4] allows them to make *any claims they wish* in the remand proceedings: their Amended Complaints seek not only to adjudicate in this proceeding whether any of the items remitted by the Delaware-incorporated brokers are traceable to "lost" creditors having addresses in the Intervening Plaintiff states, but also to make claims to *all property ever seized by New York, from any intermediary,* within the context of *both* the primary rule and the backup rule.[24]

Surely these additions are beyond any proper reading of the Court's opinion. Delaware acknowledges that the remand instructions *could* be construed as allowing participation by the Intervenors in the remaining issue expressly remanded for resolution—whether last-known addresses of state-law creditors *of Delaware-incorporated brokers from which New York had taken moneys* can be identified, so that the moneys pass under the primary rule. But nowhere does the Court suggest that Intervenors might pursue backup-rule claims on remand; and even the most expansive reading of the remand instructions limits the scope of the case to property that Delaware-incorporated brokers have remitted to New York ("supersed[ing] Delaware's right under the secondary rule").

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[23] New York's proofs in the proceedings before the Master prior to his Report were of a statistical nature. The Court rejected this approach. Slip op. at 15-16. 113 S. Ct. at 1560-61.

[24] *See* pp. 9-10, n.9, *supra*; *see also* Motion of Alabama, *et al.*, to Strike Certain Portions of Motion by Defendant, State of New York, to Modify Portions of Litigation Management Order No. 6 at 6-9 (July 21, 1993); [Sur]Reply of Alabama, *et al.*, to Delaware's Reply to the Response of Alabama, *et al.*, to New York's Motion to Modify Litigation Management Order No. 6 at 3 (July 28, 1993) ("the Court's opinion allows all States to make claims").

We suggest that it is not even open on remand for the Intervenors to make primary-rule claims *in this proceeding* to the distributions taken by New York from the Delaware-incorporated brokers. A better reading of the remand instructions recognizes that the Court was explaining the way in which its general rules were to be applied on remand and in fashioning an appropriate decree. The mention of "any other claimant state" serves as a reminder of the limitations inherent in a decree in a case such as this: here, there are no statutes of limitations, and Delaware's right to custody of property taken under the backup rule will *always* be subject to the superseding, primary-rule claims of "any other claimant state," if such a claimant comes forward with specific proof of actual last-known addresses demonstrating a superior right of custody.[25] A remand was necessary here so that the Master could make findings of fact on New York's response to Delaware's claim, thus giving the Court the opportunity to resolve Delaware's Complaint and New York's Answer to it.

In denying New York's and Delaware's motions to reconsider the expansion of the issues permitted by LMO No. 6, the Master said "when the Court writes that 'upon remand the parties may look at X,' these parties are also reading this as if it also said 'and the parties may not look at things other than X.' . . . In that context, when the Court states that 'the parties may look at X' which is what the report it is reviewing also said, there is no reason to view that statement as precluding treatment of

[25] The Intervenors also argued to the Master that they are entitled to pursue whatever claims they wish because the Court did not enter judgment dismissing the Complaints in Intervention. But New York did not take exception to the Master's failure to recommend dismissal of the Complaints in Intervention. Because the issue was not squarely before the Court, the remand cannot be said to demonstrate any conclusion by the Court as to whether the Intervenors should be allowed to expand the subject matter of the case beyond that in the initial Complaints, though the language the Court used suggests that they should not.

other things that are not 'inconsistent with this opinion.' " LMO No. 7, App. 33a-34a. But surely the fact that this Court's opinion did not foresee the possibility that the Master might decide to permit the filing of amended complaints greatly expanding the issues in the case, and hence did not expressly *prohibit* it, is not a basis for saying that the Court *authorized* these extensive amendments to the complaints.

(b) *The Prejudice to Delaware.*—The Intervenors have done more than attempt to effect a radical expansion of the case from one involving a limited class of property to one requiring an examination of every item of unclaimed property ever taken by New York from every entity in the securities industry. They have argued strenuously and repeatedly to the Master that Delaware (which has evidence that New York has wrongfully seized property worth approximately $350 million) may not recover a single penny until the Intervenors have examined every single transaction giving rise to every single item of unclaimed property that New York has ever taken. They have also stated that a myriad of legal issues—mostly of a hypothetical nature—must also be decided before Delaware may recover anything from New York.[26]

If allowed to stand, these added claims will greatly expand the scope of the proceeding, turning it into a commission of inquest into every item of unclaimed property ever remitted to New York. The Court has "taken a distinctly jaundiced view of appointing an agent or functionary to implement [its] decrees." *Texas* v. *New*

[26] For example, they view it as necessary to litigate the "disposition of funds remitted by an intermediary with multiple states of incorporation." Response of Texas to Motion for Scheduling of Status Conference, ¶ 7 at 3 (May 26, 1993); Response of Michigan, *et al.*, to Motion for Scheduling of Status Conference at 4 (May 27, 1993). There is no evidence that there are any such hydra-headed animals or, if any exist, that they have escheated any property to New York. In any event, before seeking advisory opinions on such issues, the Intervenors might have identified for the Master the facts giving rise to the need for decision on them.

Mexico, 482 U.S. 124, 134 (1987).[27] This would seem particularly the case where the Court's decree, like that of March 30, 1993, in this case, does not announce any new principle but simply reaffirms the bright-line rules set down in two leading precedents more than twenty years old. But the Master has started the parties down this path, ordering New York to identify every item of unclaimed property that it has taken from every securities-industry intermediary over the last twenty-one years. LMO No. 6, § 4, App. 11a-12a.[28] New York has submitted evidence to the Master claiming that the added investigation by the Intervening Plaintiffs into transactions of intermediaries other than Delaware-incorporated brokers will lead to considerable additional delay and complexity in the prosecution of the action on remand.[29]

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[27] Indeed, because of the tedious and time-consuming nature of the proof required under the primary-rule proposal put forward by the Intervenors, the remand proceedings might continue indefinitely, as newly remitted escheats accumulate faster than the old ones can be resolved. Aside from constituting an unfair life sentence of the Master, it would appear to violate the Court's admonition that such commissions exceed the limits imposed by Article III. *Vermont* v. *New York,* 417 U.S. 270, 277 (1974) (*per curiam*).

[28] The initial requirement of LMO No. 6 that the issuer of each securities distribution be identified in the initial log was later modified: "I modify the requirements of the log production to make it clear that issuer identification is not *required* at this stage." (LMO No. 7, at 5; emphasis in original.) The "at this stage" is portentous.

[29] Robert Griffin, New York's Director of Audits, Office of Unclaimed Funds, submitted an affidavit to the Master detailing the additional work that would be required if the non-Delaware intermediaries are included in the program; his statements indicate that such inclusion would more than double the volume of materials that would be processed and evaluated. Affidavit of Robert Griffin, sworn to July 7, 1993, ¶¶ 3, 5. More recently, New York argued to the Master that it cannot even estimate the time it will take to provide evidence central to the resolution of Delaware's claims until New York is finished responding to the Master's disclosure order directed to assist the Intervenors in determining whether they have claims at all. Opposition by Defendant, State of New York, to Motion of

III. PERMITTING THE AMENDMENTS TO THE COMPLAINTS IS NOT CONSONANT WITH THE STANDARDS GOVERNING THIS COURT'S EXERCISE OF ORIGINAL JURISDICTION

As we have discussed, the Intervenors have operated on the assumption that they may grossly expand the scope of the proceedings before the Court. As counsel for the largest group of Intervenors told the Master, shortly before he permitted the Intervenors to file Amended Complaints,

> This case is not at the end of the process, this case is now commencing a new beginning. . . . [T]he parties have an absolute right to go forward [in this action] to determine which sums of money they are entitled to under the standard of law articulated by the Court [30] . . . [E]ach party who so wishes has an absolute fundamental right to go forward with appropriate discovery, against appropriate parties, within appropriate time frames.

Transcript of Hearing before the Special Master at 84-85 (June 2, 1993) (App. 31a).

Time and time again, this Court has explained that no state has an "absolute fundamental right" to invoke its original jurisdiction:

> We have said more than once that our original jurisdiction should be exercised only "sparingly." See *Wyoming* v. *Oklahoma,* 112 S. Ct. 789, 798 (1992); *Maryland* v. *Louisiana,* 451 U.S. 725, 739 (1981); *Arizona* v. *New Mexico,* 425 U.S 794, 796 (1976). Indeed, Chief Justice Fuller wrote nearly a century ago that our original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity

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Plaintiff, State of Delaware, to Compel Discovery and for Sanctions, ¶ 19 (July 23, 1993).

[30] The same standard, of course, that had been articulated in 1965 and reiterated in 1972.

> was absolute." *Louisiana* v. *Texas,* 176 U.S. 1, 15 (1900). Recognizing the "delicate and grave" character of our original jurisdiction, we have interpreted the Constitution and 28 U.S.C. § 1251(a) as making our original jurisdiction "obligatory only in appropriate cases," *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972), and as providing us "with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas* v. *New Mexico,* 462 U.S. 554, 570 (1983).

Mississippi v. *Louisiana,* 113 S. Ct. 549, 552 (1992).[31] If one goes so far as to adopt the position that a suit between the states under this Court's original jurisdiction is reserved for cases that would be a *"casus belli"* between nations (*see, e.g., Mississippi* v. *Louisiana,* 113 S. Ct. at 553), one might find such a case where a state had systematically taken $350 million that belonged to another state and its method of justifying this was held to be contrary to Court precedent; one would not find it in a desire by a group of states to look through all of another state's records in an effort to see whether perhaps there might be evidence that some particular takings of money were erroneous.

These limitations on the exercise of the original jurisdiction have been applied by the Court not only in connection with the *initial* decision whether to grant leave to file a complaint, but also in connection with requests to expand the scope of cases already before it. *See, e.g., California* v. *Nevada,* 447 U.S. 125, 132-33 (1980) (after determining central issue on which complaint was

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[31] *See Washington* v. *General Motors Corp.,* 406 U.S. 109, 113 (1972) ("[t]he breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired"); *Ohio* v. *Wyandotte Chems. Corp.,* 401 U.S. 493, 499 (1971) ("Our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities").

filed, declining to adopt Master's recommendation to allow filing of amendment to complaint, which would "expand the Master's reference" to ancillary questions better resolved in other forums); *Ohio* v. *Kentucky,* 410 U.S. 641, 644, 651-52 (1973) (declining to allow amendment even though it would be allowed under "[a]ccepted procedures for an ordinary case"); *Utah* v. *United States,* 394 U.S. 89, 95 (1969) (*per curiam*) (declining to allow alleged necessary party to intervene, because "original jurisdiction should be exercised sparingly"); *Texas* v. *New Jersey,* 379 U.S. 674, 677 n.6 (1965) (case that originally established the rules at issue here; allowing only those states with an actual, identified stake in the limited funds at issue to intervene). In this very case, earlier this year the Court denied New York's motion for leave to file an amended Answer with Counterclaims that would have greatly expanded the scope of the litigation. 113 S. Ct. 1041 (January 19, 1993).

Before deciding whether to launch this case on a "new beginning," we suggest that the Court would wish to examine " 'the nature and interest of the complaining State,' *Massachusetts* v. *Missouri,* 308 U.S. 1, 18 (1939), focusing on the 'seriousness and dignity of the claim,' *City of Milwaukee, supra,* 406 U.S. at 93." *Mississippi* v. *Louisiana,* 113 S. Ct. at 552-53. *See Wyoming* v. *Oklahoma,* 112 S. Ct. 789, 812 (1992) (Thomas, J., dissenting) ("it is also critical to examine the extent to which the sovereigns actually have clashed"); *Alabama* v. *Arizona,* 291 U.S. 286, 291-92 (1934) ("A state asking leave to sue another . . . must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree"); *see also Florida* v. *Mellon,* 273 U.S. 12, 18 (1927) (denying leave to file complaint alleging "purely speculative" injury).

More than half a century ago, the Court, per Chief Justice Hughes, cautioned the states against bringing actions under its original jurisdiction that involve merely

garden-variety failures of citizens to remit taxes (or, by implication, other obligations incident to sovereignty) to the proper state:

> To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of *facts showing the necessity for such intervention,* would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it.

Massachusetts v. *Missouri,* 308 U.S. 1, 19 (1939) (emphasis supplied).

A full examination of the facts "showing the necessity for [the Court's] intervention," or demonstrating the "extent to which the sovereigns actually have clashed" is impossible here, because the Amended Complaints of all the Intervenors save Massachusetts are singularly devoid of factual allegations upon which the claims for relief are made. These Amended Complaints do not even meet the requirements of the Federal Rules of Civil Procedure. Professors Wright and Miller have observed that Rule 8(a)(2) requires, " 'in a practical and sensible way, that [the plaintiff] set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery.' . . . [I]t is clear that in order to satisfy the requirements of Rule 8(a) the pleading must contain something more by way of a claim for relief than a bare averment that the pleader wants compensation and is entitled to it . . . ." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 at 161-63 (2d ed. 1990) (quoting *Daves* v. *Hawaiian Dredging Co.,* 114 F. Supp. 643, 645 (D. Haw. 1953)). Yet that is all we have in these complaints—a "bare averment that the pleaders want compensation and [are] entitled to it." None of the multi-state groups of Intervenors has identified which state has incorporated

any brokers or banks from which New York is said to have seized securities distributions, let alone identified the brokers or banks. Neither have they identified any facts lending support to their assertion that they might have primary-rule claims to property remitted by Delaware-incorporated brokers—or by other intermediaries—to New York as "owner/address unknown." [32]

Presumably, they will assert that the "seriousness and dignity" of their claims can be explored *following* discovery, which they claim to have an "absolute fundamental right" to pursue in search of facts that might support a claim. But, in general, even the district courts do not allow discovery to go forward without a demonstration that a plaintiff has some legal and factual basis for recovery. As the Court observed in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 741 (1975), allowing "a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence . . . is a social cost rather than a benefit." [33] The Intervenors have not presented the Court with factual allegations that would be

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[32] Indeed, the Intervenors have come perilously close to saying that they are *not* aware of any basis for the assertion of their claims under the primary and backup rules. *See* pp. 10-12 & n.11, *supra.*

[33] *Accord Sutliff, Inc.* v. *Donovan Cos.,* 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.) (where the complaint is inadequate, "[t]he heavy costs of modern federal litigation . . . and the mounting caseload pressures on the federal courts, counsel against launching the parties into pretrial discovery"); *Decker* v. *Massey-Ferguson, Ltd.,* 681 F.2d 111, 114 (2d Cir. 1982) ("plaintiffs with groundless claims . . . abuse liberal federal discovery provisions," and, in doing so, achieve " '*in terrorem*' increments in the settlement values of the alleged claims"); *Crystal* v. *Foy,* 562 F. Supp. 422, 424 (S.D.N.Y. 1983), (Weinfeld, J.) (early dismissal of meritless claims "minimize[s] potential strike suits which . . . serve as an *in terrorem* force to augment the settlement value of such actions").

adequate in district court, let alone of a serious violation of their rights to support the exercise of this Court's original jurisdiction.

In determining whether to exercise its original jurisdiction, the Court also "explore[s] the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi* v. *Louisiana,* 113 S. Ct. at 553 (citing *Illinois* v. *City of Milwaukee,* 406 U.S. at 93; and *Arizona* v. *New Mexico,* 425 U.S. at 797); *Massachusetts* v. *Missouri,* 308 U.S. at 19-20 (availability of relief in Missouri state courts weighed in favor of declining to exercise original jurisdiction). However, the Court has declined to exercise jurisdiction under this heading even when complete relief cannot be given in any other forum. *See Louisiana* v. *Mississippi,* 488 U.S. 990, 990-91 (1988); *see ibid.* (White, J., dissenting); *Arizona* v. *New Mexico,* 425 U.S. 794, 795 (1976) (*per curiam*).

Here, there are additional, and, we respectfully suggest, superior, methods to resolve the transaction-by-transaction disputes that the Intervenors wish to pursue against New York and Delaware. It has always been a feature of the rules of priority set out in the *Texas* case that a state takes custody of intangible property under the backup rule subject to the rights of any other state to come forward at some later date with proof of a primary-rule claim. *Delaware* v. *New York,* slip op. at 16, 113 S. Ct. at 1561; *Pennsylvania* v. *New York,* 407 U.S. at 210-11; *Texas* v. *New Jersey,* 379 U.S. at 682. Consistent with that rule, states have enacted laws or established administrative procedures for other states to make claims under the primary rule. *See* Uniform Unclaimed Property Act of 1981 § 25, 8A U.L.A. 617, 663 (1983 & Supp. 1991).[34] Delaware has consistently hon-

[34] *See also* N.Y. Aband. Prop. L. § 1417 (McKinney's 1991) (authorizing New York Comptroller to enter into reciprocal agreements with other states concerning the distribution of abandoned property).

ored the legitimate claims of its sister states to superior rights of custody under the rule of *Texas* v. *New Jersey,* without incident or controversy.

Surely the state unclaimed property administrators, appointed for the express purpose of processing these claims and subject to judicial review by state courts bound to enforce the Supremacy Clause and ultimately subject to this Court's review, are better equipped than the Court to resolve the transaction-by-transaction disputes (on transactions dating back to the early 1970s) that the Intervening Plaintiffs have indicated to the Special Master that they may put in issue with the hope of identifying some that will give rise to a recovery. It makes little sense to impose this task on the Master and ultimately on the Court itself, which undertakes "the duty of making an independent examination of the evidence, a time consuming process which interferes with the discharge of [its] ever-increasing appellate duties." *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439, 470 (1945) (Stone, C.J., dissenting). In the event that some state fails to honor an appropriate demand for payment under the *Texas* rule as reaffirmed by the Court in this case and elucidated by the Master's findings of fact contemplated by the remand instructions, appropriate relief could be sought in a separate action—either in state court or in this Court alleging "facts showing the necessity for [this Court's] intervention." *Massachusetts* v. *Missouri,* 308 U.S. at 19.

IV. THE AMENDED COMPLAINTS DO NOT EVEN SATISFY THE REQUIREMENTS FOR AMENDMENT IN DISTRICT COURT

In the district courts, once a complaint has been answered, the plaintiff must seek leave of court to amend the complaint. Fed. R. Civ. P. 15(a). Had the Intervenors made such a motion, though, it would have been appropriately denied, even under the liberal standards applied to such motions. As the Court explained in *Foman* v. *Davis,* 371 U.S. 178, 182 (1962), leave to

amend a complaint is properly denied where there has been "undue delay, bad faith or dilatory motive on the part of the movant . . . [or] undue prejudice to the opposing party." Dilatory behavior on the part of the moving party is a form of prejudice that this Court has held *must* be considered. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-32 (1971).

The extraordinary lapse of five years before the Intervenors pursued this grossly expanded case would strongly counsel for denial of a motion for leave to amend, even if the case were in district court. As the Seventh Circuit has explained, "[e]leventh hour additions . . . [are] bound to produce delays that burden not only the parties to the litigation but also the judicial system." *Perrian* v. *O'Grady*, 958 F.2d 192, 195 (7th Cir. 1992) (quoting *Campbell* v. *Ingersoll Milling Mach. Co.*, 893 F.2d 925, 927 (7th Cir.), *cert. denied*, 498 U.S. 844 (1990)). Indeed, in some of the Circuits, delay alone can be a sufficient ground for denial unless the movant affirmatively demonstrates "good cause" for the delay. *See, e.g., Little* v. *Liquid Air Corp.*, 952 F.2d 841, 846 (5th Cir. 1992); *First City Bank, N.A.* v. *Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133 (10th Cir. 1987). Here, the Intervenors waited for years, pursuing relief directly contrary to that which they now purport to desire.[35]

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[35] Moreover, allowing the Intervenors to pursue the backup-rule recovery along the path they propose would be unfairly prejudicial. See pp. 22-24 & n.28, *supra*. As Professor Wright and his colleagues have explained, "if the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation, the court may deem it prejudicial." 6 Charles A. Wright, *et al., Federal Practice & Procedure* § 1487 at 623 (2d ed. 1990); *accord Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). *See, e.g., Jackson* v. *Bank of Haw.*, 902 F.2d 1385, 1387-88 (9th Cir. 1990) (new claims advancing new legal theories and requiring proof of different facts than those examined in discovery on original theories would have been prejudicial); *McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 809 (9th

The Master viewed this Court's general instruction to the district courts that leave to amend should be freely given, *Foman* v. *Davis,* 371 U.S. at 182, as counselling for allowing amendment here. LMO No. 6, § 3, App. 11a & n.1. But *Foman* cuts the other way: even in light of the Court's instruction to the lower courts that they are to freely allow amendment, the lower courts generally have not allowed amendment in these circumstances. Here, in the original jurisdiction, where the Court's precedents counsel for "sparing," rather than "freely given," leave to amend, this case is an *a fortiori* one. *See Ohio* v. *Kentucky,* 410 U.S. 641, 644 (1973) (denying leave to amend, though it would have been allowed in district court).

Cir. 1988) (new claims, requiring new discovery, would have resulted in delay and expense to the prejudice of defendants, "who were entitled to rely on a timely close of discovery and a near-term trial date"); *Deasy* v. *Hill,* 833 F.2d 38, 42 (4th Cir. 1987) ("Belated claims which change the character of the litigation are not favored."), *cert. denied,* 485 U.S. 977 (1988); *Isaac* v. *Harvard Univ.,* 769 F.2d 817, 829 (1st Cir. 1985) (affirming denial of leave to amend where amendment would have added new claim four years into the proceeding and would have required development of new evidence); *Ross* v. *Houston Indep. Sch. Dist.,* 699 F.2d 218, 229 (5th Cir. 1983) (amendment of pleadings that would have added "new and complex issues to a case already protracted and complicated," requiring new discovery and additional hearings was concededly prejudicial); *McGoffin* v. *Sun Oil Co.,* 539 F.2d 1245, 1248 (10th Cir. 1976) ("plaintiff cannot completely restructure his case" by moving for leave "to substitute an entirely new theory"); *Izaak Walton League of Am.* v. *St. Clair,* 497 F.2d 849, 854 (8th Cir.) (late amendment that "injected new issues" would have required "extensive preparation and consumed voluminous amounts of trial time to the detriment of a speedy resolution"), *cert. denied,* 419 U.S. 1009 (1974); *Troxel Mfg. Co.* v. *Schwinn Bicycle Co.,* 489 F.2d 968, 971 (6th Cir. 1973) ("to put Schwinn through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial"), *cert. denied,* 416 U.S. 939 (1974).

CONCLUSION

The Master erred both in authority and in substance in allowing the Intervenors to file Amended Complaints. The Court should strike the Amended Complaints. In addition, it should direct the Master to prepare an appropriate decree dismissing the Complaints of the Intervenors; or in the alternative, the Master should be directed to allow the Intervenors to pursue only those primary-rule claims involving securities distributions taken by New York from Delaware-incorporated brokers.

Respectfully submitted,

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August 1993

APPENDICES

APPENDIX A

In The
SUPREME COURT OF THE UNITED STATES

No. 111 Original

STATE OF DELAWARE
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
v.
STATE OF NEW YORK,
Defendant.

LITIGATION MANAGEMENT ORDER NO. 6

Thomas H. Jackson, Special Master:

Following the disposition by the Supreme Court of the various exceptions to the Report of January 28, 1992, and the remand of the action to me, a conference was held in Charlottesville, Virginia, on June 2, 1993, to review the parties' positions on the future course of the litigation. Plaintiff had moved for the establishment of a schedule. Defendant and numerous intervenors had expressed views on discovery or other needs and on the scheduling issues, in papers exchanged in advance of the conference pursuant to directions given to the parties in a Scheduling Order of May 11, 1993. A motion by intervenors made shortly before the conference to adjourn the proceedings for a few weeks was denied on May 28th. Responses to the previous submissions occurred in the course of a spate

of faxed letters exchanged by the parties prior to the conference, and in plaintiff's response brief of June 1st.

Extensive oral argument was taken on the record at the June 2, 1993 conference. Upon a review of the parties' written submissions and the matters explored in the oral presentations at the conference, this Litigation Management Order sets forth directions in several categories for the next stages of preparation in the proceeding. The principal features of the preparation plans are separable into these areas: (1) settlement discussions; (2) an overview of discovery plans and the rationales therefor; (3) amendment of pleadings; (4) core disclosure required of New York; (5) primary rule discovery; (6) backup rule discovery; (7) burdens, presumptions, and a caution against speculation; and (8) motions and conference schedule.

1. Settlement Discussions.

It has been represented that many of the parties have engaged in settlement discussions in round-robin format during recent weeks, and that a willingness exists to push forward with face-to-face discussions to which all participants in this lawsuit are welcome. As I expressed at the conference when this topic was raised, these discussions should be pursued. I request that Alabama, et al., who recounted these developments in a motion made May 24, 1993, and in correspondence thereafter, arrange for personal conferences to be held during the next five weeks, such that a report may be submitted to me on or about July 6, 1993, on the question whether any significant aspect(s) of the litigation may be resolved on a consensual basis. In addition to the participation of all intervenors active in the litigation, the constructive participation of representatives of both Delaware and New York should be a key part to these discussions.

The mere possibility (or hope) of settlement, however, should not be allowed to cause delay in making practical

progress toward judicial disposition of the lawsuit; indeed, the information and arguments heard at the conference and expected to be unveiled during the pendency of discovery may themselves focus and advance settlement discussions on at least some issues. For these reasons, as well as because of the perception that concrete deadlines for adjudicatory resolution are often the most helpful steps a (quasi) judicial officer can take in encouraging the parties to abandon litigation posturing and to explore settlement realistically, I follow this initial direction with a detailed program of preparation, including plans for motions and discovery.

2. **Overview of Discovery Plans and the Rationale Therefore.**

Several subsequent section of this Litigation Management Order proceed from core premises that should perhaps be explicitly stated. *First,* I find that discovery is warranted on the several matters addressed below. In so structuring the preparations, I continue to harbor substantial doubts and misgivings to which I gave voice at the conference: There is every likelihood that much of the exploration down the path of the so-called "primary rule" will lead to blind alleys or to levels of productivity that, at some point, will cause some or all of the contending jurisdictions to recognize that the investment of personnel and other resources is not warranted by the outcomes. But I have made the judgment that at this stage of the proceeding it cannot be said, as a matter of law, that the parties' efforts at analyzing records and reconstructing transactions cannot yield sufficiently non-speculative results as to entitle them to relief as to specific transactions. Whether "last-known addresses" can be reconstructed with some frequency, or so rarely that it will be perceived all around as economically unwise for anyone to pursue them, is not ripe for legal determination at this time, as Delaware argues. While I remain skeptical of the practical fruitfulness of such inquiry, the issue at this point is whether parties should be precluded as a

matter of law from pursuing such claims. Absent a further inquiry into actual transactions, it is premature to reach the issue as a matter of law. However, the concerns over the fruitfulness of the efforts suggest a limited "trial run" effort, to test feasibility and to permit focused legal issues to be framed and, as outlined below, I will structure discovery with this in mind.

Second, I do not mean by embarking on this program of limited discovery to foreshadow decision on any of the motions noted below, or others the parties may elect to make. Rather, the goal is to gain assurance that motions challenging the legal sufficiency of one or another of the claims or forms of proof are fairly contested and have sufficient factual basis, based on actual transactions, to be ripe for some resolution (if not settlement). We need to see, in some instances, what form of proof or level of demonstration can be attained in addressing the relevant factual issues to which the Supreme Court's decision points us. Motions by plaintiff or others may then be appropriate to argue that certain proofs are inadequate, as a matter of law, to affect the disposition of funds under the primary or backup rules for custodial taking of intangible personal property such as is involved in the present case. So, too, at that time will it be possible to test, by motion, legal theories, such as whether an identifiable "last-known address" needs to be shown or whether some other substitute showing may do for purposes of the Supreme Court's analysis of the primary rule in this and prior cases.

Third, I have concluded that there is no cognizable prejudice to the plaintiff in particular from the systematic exploration of several factual matters, in the controlled and limited fashion hereinafter set forth. Among the considerations leading to this view are the fact that Delaware itself needs limited discovery of New York, and hence some time will be accorded to the discovery process in any event. *See* "Second Set of Interrogatories by Plaintiff, State of Delaware, to Defendant, State of New York,"

dated and lodged with me on June 2, 1993, at the status conference, and its accompanying document request. These inquiries are under the so-called "backup rule." It is difficult for me to fathom why exploration by intervenors under the backup rule, occurring simultaneously and generally off of the same database, should be sufficiently prejudicial to Delaware for me to preclude it. Too, as Delaware knows, if primary rule inquiry is to be permitted at all (and I am permitting in the limited fashion detailed below), New York clearly can pursue primary rule discovery. Again, while New York pursues that, it is difficult to fathom why parallel (indeed, perhaps, joint with New York) discovery by intervening jurisdictions under the primary rule slows down or otherwise unduly burdens the process.

Independently, New York and the intervenor jurisdictions have set forth in preconference submissions some reasonable topics of discovery need, albeit overly generalized at this point and in need of the coordination noted below. Plaintiff has made much of the fact that the suit was commenced in 1988, and attempts to characterize the submissions of almost all other parties as thinly veiled maneuvers to seek delay, suggesting that delay is sought principally to permit legislative intervention. But I cannot now speculate on legislative intervention, or whether it would (or could) reach retroactively to the transactions involved in this dispute. It is enough that the intervenors may have valuable claims to pursue and, despite some vagueness about these claims, the time prejudice at this point for allowing them to pursue this is minimal in light of New York's and Delaware's own explorations.

While I credit (and, indeed, consider appropriate) plaintiff's efforts to insist on the most prompt schedule feasible for the disposition of the remaining aspects of this litigation, I find that some expenditure of time and effort on a discovery program is essential to the fair resolution of the claims and defenses of other jurisdictions. In a proceeding involving sovereign states, with

hundreds of millions of dollars at stake, and dealing with a pattern of escheat practice stretching back decades, the decision to take the relatively brief time needed to allow the parties to present the issues on an adequate factual base for informed decision cannot seriously be questioned.

Having said this, I am concerned of the effects of the delay that, while necessary and inevitable, is real. My concern focuses particularly on interest with respect to funds currently held by New York that, under the law of the case established by the Supreme Court decision, must now pass to other jurisdictions under the backup rule. It is preferable, however, in my view to seek to address this issue of the costs of delay directly, rather than by essentially concluding the whole case at this point—an event certain to provoke exceptions to the Supreme Court and ultimately a real likelihood of further delay if the Supreme Court then rejects that recommendation and remands. In this regard, I establish mechanisms below for express consideration of the possibility discussed briefly at the June 2nd conference regarding any appropriate interim relief with respect to uncontestable transactions and funds. Whether or not it ultimately appears that such relief is appropriate when the matter is properly presented for consideration, the establishment of a mechanism to bring the matter on for consideration should signal to all parties that the driving thesis in the management of the lawsuit is to nail down any clear or uncontested items while an appropriate record is developed to allow intelligent decision on the genuinely contested issues.

For similar reasons, summarized in § 3 below, I am affording leave to all parties to amend their pleadings now that the Supreme Court has ruled on the issues presented in the prior Report.

Fourth, we must deal generally with the extent of the "reach back" into old records and the payments they represent. Perhaps because of uncertainty as to what the state of the records will be, or what otherwise will be

found (although that is truer under the primary rule than under the backup rule), this issue has been treated in a rather unfocused manner to date. Unfortunately, to fashion discovery orders, the issue must be confronted. Even recognizing that the relevant statutes have always contemplated late claims of entitlement, and that for the matters being raised in the present suit there is no applicable limitations window, the burdens are palpable and it would be irresponsible to proceed without at least marking the issue. The New York representation that computer records exist only from 1986 onward is not in itself conclusive. At last week's conference, it was made clear that earlier records are accessible, though greater effort will be involved to net out repayments that reduce the amount of funds actually retained as a result of a particular custodial taking. The legal relations of the parties did not change in 1986, only New York's recordkeeping system. And, indeed, it appears that for most purposes (at least in the case of primary rule inquiry) it will be the records of non-party holders and remitters of funds that determine the viability of claims from earlier years and, at this point, there is no reason to believe that *these* systems changed dramatically in 1986—although they probably have at some (or several) point(s) over the relevant period.

Since no party has essayed estimates of staff time or other quantifiable burdens in connection with this aspect of the process (*compare* Griffin Aff., May 5, 1988 at ¶ 12 ("36 people working full time for one year" needed to reconstruct transactions for which brokers filed unclaimed property reports for any one calendar year)), we are left only oblique references to the 1970's in some of the papers as a range of exploration. *See, e.g.,* State of California's Response to Scheduling Order, May 26, 1993 at 2 ("early 70s"). At oral argument June 2, 1993, Delaware requested relief reaching to 1972, predicated on the date its unclaimed property statute took its current form, while Massachusetts requested relief reaching back to 1975, owing to the incorporation in Massachusetts of

two significant firms in the securities industry in that year. Neither of these years, however, is dispositive either, as both are sui generis to the particular jurisdiction.

In this light, it is my initial determination that records to be comprehended in the proceeding should include those going back to and including 1972—not because Delaware's year is legally significant across the board, but because it is the earliest year yet suggested and may still be manageable in terms of available records. To the extent called for in discovery requests, in the present Litigation Management Order, or in other directions from me, New York shall respond with information as old as 1972. New York retains the option to make a protective order application after assiduous good faith efforts to comply, based on specially documented burdens in complying with parts of the discovery burdens beyond a particular year.

3. Amendment of Pleadings.

In its brief faxed to the court and parties immediately before the June 2nd argument, Delaware advances the position that the complaints of the intervening jurisdictions are inadequate to plead claims for recovery under some of the alternative theories now being discussed. Stripped of meretricious citations to sanction authorities and to Rule 11 of the Fed.R.Civ.P., the argument invites a curiously narrow view of both the present litigation and the options of intervenor states.

I do not accept the fundamental premise (which at argument New York stated that it shares with Delaware) that the remand directions of the Supreme Court circumscribed the "primary rule claims" of intervenors, for example. One would need to accord a particularly tendentious reading to the words of the Court to come to the view that proceedings at the present stage are so limited. The decretal language at the conclusion of the Court's opinion itself directs only that the "further proceedings" be "consistent with this opinion," *Delaware v. New York,*

113 S. Ct. 1550, 1562 (1993). As noted at oral argument on June 2nd, the body of the Supreme Court's opinion also supports a broader rather than narrower view of the viability of claims by the intervenors. In the passage rejecting the statistical sampling procedure New York had advanced, the Court declined to enter judgment for Delaware, because of the possibility of transaction-by-transaction (or other) proof of last-known addresses for creditors of the parties holding unclaimed funds, *id.* at 1561. Justice Thomas quoted from *Texas v. New Jersey*, 379 U.S. 674, 682 (1965), the language establishing that the right of any "other State" under the primary rule supersedes the fall-back allocation of custodial taking rights under the backup rule, and he wrote in that very paragraph of the possibility that in the present case "New York *or any other claimant State*" could offer such proof, thereby prevailing over the default outcome of the secondary rule, *id.* (italics added).

I also believe that the jurisdiction conferred upon me in this case stems in part from the original referral of the lawsuit for my supervision generally. Delaware participated actively in the lawsuit prior to the Supreme Court's recent review of the legal issues, and (through its former counsel) is well aware that many issues during the first round of discovery were set aside in order to facilitate structured presentation of certain important, logically precedent, legal issues framed for disposition. Discovery and other preparations were tailored to raising the basic definitional questions under the Court's precedent. Core issues were dealt with in the January 28, 1992, Report and formed the focus of the Court's opinion, but other matters were and are before me.

One of the issues the Court placed before me was leave to file complaints and hence amendment matters as well. Several aspects of the present posture of the case lead me to afford leave for any interested party to amend pleadings at this stage if that party believes it is necessary or desirable to do so, and if the amendment is designed to

bring into sharper focus the range of contentions that were the subject of the June 2nd conference. I do this for several reasons. The fact that the Supreme Court has just made definitive statements about the operation of the controlling doctrines is a primary consideration suggesting that the parties should be afforded the opportunity to make their pleadings take cognizance of the governing law thus expounded. Secondly, over time the parties have discovered corrections, differences, and nuances that could be resolved. Even Delaware allows that the listing of brokerage firms in its own complaint is incomplete, that is has found additional firms, and seeks to discover more. Third, it would be artificial and wasteful of party energies and judicial resources to suggest that intervenors file a separate lawsuit to pursue claims not clearly spelled out in initial filings here. This is particularly true in a domain of law such as escheat, which has no statute of limitations. I cannot countenance the suggestion that a separate suit (or series of suits) would be appropriate in this light, much less necessary. Here amendment raises no specter of undue delay because: (i) the timetable specified here will run in tandem with other preparations, so it may actually impart no delay whatsoever; and (ii) New York has leave to pursue primary rule claims during the immediately ensuing period, which will serve—with proper coordination—to illuminate the like claims of any other jurisdicton pleading for such relief. Again I do not believe Delaware can adduce cognizable prejudice sufficient to warrant relief of the sort it requests at this point.

While "late amendment" in some decisions has been seen as a sleeping on rights sufficient to bar relief, I do not believe the circumstances here support that outcome. Unlike some of the cases cited, no extensive program of discovery completed before amendment will need to be redone if the amendments proceed. And given the fact that New York's search of the Delaware broker records will take place at the same time as intervenors' exploration of

similar recordkeeping and tracing issues, subject to similar temporal and scope restrictions, the time and cost impositions on Delaware do not rise to a level sufficient to warrant barring otherwise viable claims. After all, the fundamental goal of modern systems of pleading is to reach decisions on the merits, rather than to enforce rigid pleading formalism to the point of creating Dickensian traps for parties acting in good faith.[1]

Hence plaintiff and any intervening parties may file amended pleadings within 30 days of the present order, and New York may file an amended response 30 days thereafter.

4. Core Disclosure by New York.

New York shall, within 30 days from the date of this order, serve on each party a log of the custodial remittances it has received for the years from 1972 to date. The log shall contain as many columns of identifying

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[1] Ironically, Delaware cites *Foman v. Davis*, 371 U.S. 178 (1962), in opposition to amendment at this stage, a case in which the Supreme Court reversed the lower court for taking too uncharitable a view of the papers, and which is generally taken as the broadest statement of the liberal philosophy toward amendment. The Court observed that pleadings that do not mislead or prejudice the adversary, even if arguably inept, should be construed to reach the merits the party intends to raise, *id.*, at 181. As the court summarized it:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48 . . . The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Id., at 181-82.

information as can reasonably be gleaned from the forms used in various periods, but at a minimum shall contain the remitter's name, listed address, the amount of the remittance, the date, the security or account identified as the source of the funds (if any is listed), and the remitter's jurisdiction of incorporation (if a jurisdiction is identified anywhere in the forms filed in respect of the payment).

I realize from colloquy at the June 2nd conference that pre-1986 records of New York may indicate "gross" remittances, where in fact subsequent to the initial filings there were claims presented and paid by New York that reduced the amounts it ultimately holds arising from the remittances. It is *not* necessary for New York to complete the accounting work necessary to compute the corrected net amount in order for New York to respond to this discovery. The purpose of this disclosure is to identify the largest payors and to permit *other parties* to review the list in order to determine whether they have a claim that any of the entities remitting funds was incorporated in some state other than New York for a relevant period. Thus service of the log will be without prejudice to New York's right to demonstrate later that refunds or claims payments were made against particular gross remittances.

New York shall also prepare and serve within 30 days of the present order a statement in affidavit form from appropriate personnel describing the nature and extent of records it has available with respect to the custodial takings for the period from 1972 to date. This statement should be in sufficient detail to inform interested parties of the scope of the undertaking involved in reviewing the various categories of records New York maintains. If New York prefers to make its personnel available for deposition in lieu of preparing this statement, it shall notify the parties within 10 days of this order that it elects that approach.

5. Primary Rule Discovery.

Discovery will proceed, on a restricted sampling basis, even before any amendment of pleadings to further adumbrate primary rule claims. The purpose of the sample is to discover whether such inquiry is feasible and to provide factual material to permit various contentions (legal and factual) to be articulated and contested with a view towards decisions regarding the appropriateness of, and contours of, full-scale discovery under the primary rule.

(a) Service of New York's log of custodial takings will commence discovery into primary rule claim issues.

(b) Discovery respecting the approved roster of non-parties (discussed next) shall be limited to two, two-month periods. These periods will be March and April of 1987, and March and April of 1977. The intent in selecting the periods is to provide sufficient contiguous weeks so that discovery may illuminate the parties' theories about floating certificates and various reasons for missed payments around dividend and payment dates. A recent, but pre-litigation, year is selected, and a comparable period a decade earlier, to assist in determining the comparative difficulty of performing the examinations for transactions in the early days of back-office automation in the securities industry. These periods also encompass recordkeeping regimes in the State of New York, prior to and after computerization—and, perhaps more importantly, should capture significant recordkeeping changes by non-party intermediaries during that decade. Indeed, 1977 may test whether intermediaries even maintain records beyond the period required by recordkeeping requirements.

No party is required to conduct efforts to trace transactions in these periods, or to use the full two-month window in the years selected if a shorter test period suffices, in the party's judgment, to prepare it to make evidentiary submissions by affidavit and documentation

as contemplated in § 8 below. However, no independent discovery of non-parties may be undertaken without my permission in advance.

(c) Within 15 days after service of New York's log, the parties shall meet to agree upon five intermediary holders against whom discovery will be sought to test the viability of the records reconstruction and transaction tracing approaches of the parties. (I recognize that intermediaries change, and those preferred for 1987 may not also have been in existence (in precisely the same form) in 1977. To the extent that is so, the parties may substitute one intermediary for another in the two "test" periods.) I reject Delaware's request that the posture of the case be interpreted to limit the parties to Delaware brokers in pursuing primary rule claims, for reasons articulated above, although I have no objection, should the parties believe it is preferable, to having the sample consist exclusively of intermediaries incorporated in Delaware. At the conference on June 2nd, two groups of jurisdictions pressed for inclusion of Depository Trust Company among the entities to be included in transaction checking efforts, and it was noted at argument by counsel for Alabama, et al. that no judgment has been entered setting DTC formally aside. While New York has consistently contended that DTC is in a different status, I am not prepared to conclude that the record at this stage precludes parties from looking into DTC, if any think it might be fruitful. Nor should New York-incorporated brokers and banks be automatically excluded from consideration.

The parties should discuss selection criteria to promote maximum fruitfulness of the reconstruction efforts. *See, e.g.,* Forte letter, May 26, 1993 at ¶ 3. If agreement cannot be reached on suitable entities for this discovery, despite diligent efforts to designate these information sources consensually, the parties shall report their requested disclosure targets and the reasons for selecting

them, so that I can review the competing demands and select a roster of appropriate entities. In addition to which entities, the mode and scope of discovery of non-parties shall be discussed among all of the parties, such that, if possible, agreement may reached about the scope, form, and substance of such discovery—and, where possible, joint discovery requests formulated with an eye toward minimizing burdens on non-parties. Failing agreement within such 15 days, the parties shall promptly notify me in writing of the dispute(s); I will provide directions to resolve disagreements on the manner in which these ends will be pursued. I do not contemplate holding oral argument on these issues unless extraordinary circumstances are shown.

(d) Within 75 days after service of the log by New York, discovery and analysis of the records of the non-party witnesses contemplated under ¶¶ (b) and (c) above shall be completed.

6. Backup Rule Discovery.

As I indicated at the conference, and no party seemed fundamentally to disagree, discovery—and independent work of the parties—in support of claims under the backup rule should prove straightforward. It will proceed at the same time as other preparation activities.

(a) New York's log served in response to the core disclosure obligation I am imposing in § 4 above will also serve to initiate preparations for backup rule claims.

(b) I also recognize that Delaware has proffered second-set interrogatories and document production requests at the June 2 conference, which in many respects entail only supplementation and updating of previously exchanged information. Based on the characterization of their goals by counsel at the conference, and my perusal of the discovery instruments themselves, I direct that New York also respond to these requests within 30 days from

the present order. To the extent that any of the Delaware questions is *fully* answered by the log directed in § 4 of the present order, New York may answer by cross-reference. If documents are produced pursuant to Rule 33(c) of the Fed.R.Civ.P. certain of the questions or subparts may be appropriately answered by a designation under that Rule. With respect to Interrogatory 18, I hope and assume New York will not feel unduly tweaked by the puckish inquiry. Perhaps in discussions with counsel for Delaware agreement could be reached on disclosure of any tabulations or compilations of data relating to the estimate, without the need to create a further, political sideshow. Finally, if New York in good faith believes that it requires protective relief (with respect to Interrogatory 18 or other aspects of the second-round requests of Delaware), it may apply in writing for an order modifying in specified respects the discovery requests Delaware has propounded, based on a concrete showing of burden or other basis for objection; after affording Delaware and any other party an opportunity to respond to such an application, it will be decided upon the papers submitted without oral argument.

(c) Upon service of the log of receipts by New York, all interested parties will have 30 days in which to designate entries thereon which it is contended reflect payments of funds properly escheatable under the back-up rule by the designating state, rather than New York. The basis for this (*e.g.*, incorporation in the jurisdiction) should be indicated, as should the source for that conclusion. At this stage, and to limit burdens on non-parties, non-party discovery under the backup rule is not permitted. Rather, I expect parties to use available public sources for determining jurisdictions of incorporation.

(d) New York and all other parties shall then have 20 days from service upon it of such designations to acquiesce in or object to the designated claims of entitlement. The basis for any objection should be succinctly set forth.

(e) At the end of the 80 days contemplated in ¶¶ (a), (b), (c) and (d) of this section, the parties shall meet to resolve any disagreements about the payments identified in these steps. If any discovery of non-parties is to be requested, it shall be discussed among all of the parties, and if possible agreement reached about the scope, form and substance of such discovery.

(f) The parties shall report the results of these efforts in writing on or before September 1, 1993.

7. Burdens, Presumptions and a Caution Against Speculation.

(a) On primary rule claims, any jurisdiction contending that there is actually an ascertainable address which makes that jurisdiction the appropriate entity to take unclaimed payments custodially will have the burden of coming forward with proof to demonstrate that entitlement.

(b) On backup rule claims, the log of remittances being prepared by New York will provide the baseline. Any jurisdiction of incorporation information ascertained by New York from its own records and included in the log will be accepted as binding, unless some other jurisdiction comes forward with proof that for all or part of the relevant periods the remitting entity was incorporated in that other jurisdiction. For remittances or entities as to which New York's log discloses no jurisdiction of incorporation, any jurisdiction may come forward with proof that the remitter was incorporated therein during the relevant period.

(c) All burdens of persuasion in this case are to be traditional preponderance of the evidence tests, rather than requirements for clear, convincing proof or other elevated proof thresholds such as are used in fraud, paternity, or criminal actions.

(d) The parties will need to address the proper application of the backup rule if there are remitting entities

other than corporations, such as partnerships or associations. Similarly, I invite the parties to address the issue of the appropriate disposition of unclaimed funds held by federally-chartered banks.

(e) As noted above, in due course New York will have the opportunity to reduce the gross amount of allegedly unwarranted takings by being credited with the amounts of payments made on claims to all or part of the amounts initially remitted to New York. The burden of locating and presenting evidence on the claims paid must rest with New York. Under the backup rule, payments from holders incorporated in Delaware, for example, are appropriately accorded to Delaware. If New York seeks to reduce the amount it must transfer because of claims it has paid with respect to those remittances, it must bear the burden of going forward with proof and the burden of persuasion to demonstrate that the claims were paid. There are two reasons for this. First, New York is the party which stands to benefit from establishing those claims payments, which are in the nature of an adjustment to the basic amount of the remittance by the non-party holder of unclaimed funds. Second, New York is the party with the records from which any claims payments could be demonstrated, and hence it is appropriate to place the responsibility for making appropriate proof upon New York if it seeks such credit.

(f) As I expressed at the conference on June 2, 1993, the proof I understand the Supreme Court to have contemplated is evidence which works to identify the last-known address of a creditor. The Court's opinion speaks expressly of proof directed to "ascertaining creditors' last known addresses," 113 S. Ct., at 1561. I would suggest that any party contending that record and data formats amounting to less than what would be recognized as a precise address, should illustrate the proposed formats with concrete, real-life examples taken from the test discovery I authorize in the present order. While I can

foresee the possibility of city or ZIP code references being arguably sufficient for some purposes, we will need to have a full range of concrete examples so that all parties can argue intelligently about the sufficiency of each for the purposes of the Court's escheat jurisprudence. If, as advanced at the conference, some parties wish to pursue legal theories concerning "other proper mechanism[s]" for determining primary rule outcomes, such as the matching of a transaction with one of two (or ten) possible transactions and then "splitting" the results among the two (or ten) potential jurisdictions, again those theories will need to be spelled out in detail, including reasoning as to why this would be consistent with Supreme Court jurisprudence, and concrete examples given.[2]

(g) I share to some extent the misgivings expressed by counsel for Delaware about the sangfroid with which New York (and perhaps other parties) approach the question of what, at the end of the day, one has established by identifying (assuming for now one can get to this identification) a trading partner of the holder, a partner whom New York might argue was the next link in the chain of distribution of the unclaimed payment. Delaware has asked for an opportunity to brief the question whether, as a matter of law, proof that a certificate was "shipped out" upon the stream of commerce can support a conclusion that the first (and only) known recipient was the owner of the underlying security on the record date for a distribution. That issue may be presented at the

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[2] Dean Witter told the parties in this case in earlier discovery that it had over 2 million customers. How many of these customers may have traded IBM stock (back then, at least) around the cusp of dividend date? How will a party's proof negate the possibility that a convenient trade is selected to match an unclaimed payment, leading to a transaction participant in a specific state, when there might be dozens of other trade combinations yielding similar numbers and pointing elsewhere for custodial takings purposes? Issues such as these will need to be addressed under most primary rule claims.

hearing scheduled in accord with § 8 below. I am also concerned with the premise, broadly asserted in the early going during this case, and as I recall well-documented in the deposition testimony already of record, that the downstream broker will, if asked, state that it did *not* have an underage on its own books, and that it paid its own customers or counterparts in the industry. The impression given by prior depositions is that if there was an underage, the brokers pursued it until they came out whole, while in the case of overages they sat expectantly, prepared to review any claims made upon them for payments due.

At the conference on June 2nd, counsel for Delaware seemed to envision a moment in the claims resolution process in this litigation when someone would ask the downstream participant in the transaction whether the payment was in fact "due" or whether it was "disclaimed." Delaware's presumption, which on the surface seems reasonable to me, is that if we knew as a factual matter that this next link disclaims entitlement, no "creditor" has been found. New York, on the other hand, quite evidently does not envision such a disclaimer event, or even that the addressee identified by the pending labors would be asked. The premise of New York seems to be that if the purchaser in a trade is a New York entity (or represented by one, etc.) the inquiry stops. I am troubled by the prospect of presuming that the downstream participant was unpaid, and hence really is a creditor for purposes of escheat analysis. On the other hand, moving to notions of subrogation or commencing a search that cascades from one reconstructed transaction participant to the next looking for one who will turn out to be owed money raises substantial issues that, if to be pursued, need to be briefed and argued first. The parties will need to address these issues in their briefing, with whatever concrete examples can be gleaned from the discovery I am permitting in the current phase of the case.

8. Motions and Conference Schedule.

(a) A conference will be held before me on Tuesday, October 5, 1993, at 1 p.m. in Charlottesville, Virginia. On or before September 24, 1993, all parties are requested to notify me by fax [(804) 924-1497] of the nature of issues needing immediate resolution. Such submissions shall include a report on the status of preparations under §§ 1, 3, 4, 5, and 6 of this Litigation Management Order. A copy of these communications should also be directed to my deputy, Kent Sinclair, whose fax line is (804) 924-7536. These communications should identify issues but are not intended to be briefing documents (nor should they be the length of briefing documents).

(b) If possible, at the October 5, 1993 conference a schedule for such motions as might be appropriate after the limited discovery authorized in this Litigation Management Order will be established, pointing toward argument in December, with an appropriate briefing schedule preceding that. It will be helpful if prior to the October conference parties will provide me with information to facilitate thinking about whether paper submissions can be tailored to frame relevant issues. I think an evidentiary hearing would be a tremendous burden on the parties, and I solicit mechanical and other suggestions for summary mechanisms that will allow all parties to make full and fair use of the concrete factual information developed in the next few months, while presenting legal issues crisply highlighted for decision.

(c) One goal of this stage of the process will be to provide New York and any other interested state with the opportunity—and responsibility—to set forth "best case" examples of the forms of proof that can be made toward identifying and providing addresses of entitled recipients of unclaimed funds, together with an elucidation of the appropriate legal theory under which a claim of entitlement is made, so that rulings can be made as a matter

of law on the sufficiency of the forms of proof, as well as focus the nature of further discovery (if any).

(d) I make no ruling at this stage on the request for consideration of flexible groupings of jurisdictions, such as the suggestion of Michigan, et al., that if all other jurisdictions formed a compact to share funds ratably, it might be sufficient to negate a Delaware address for the creditor. But I expressed clearly, I hope, my unwillingness to engage in free-form efforts to do equity, since I take from the Court's sustaining the rejection of New York's efforts to engage in statistical sampling, limits in this area on that which is permissible in the name of equity. This means, at a minimum, that at the time of hearing the motions and arguments contemplated here, only concrete, existing relations between jurisdictions will be cognizable, and even then they may not prove sufficiently close to the debtor/creditor address model envisioned by the Court to have any impact on the outcome.

(e) Delaware (or any other party) may include, in its submissions contemplated under this section of the present order, any pertinent motions for interim relief based on stipulations of all parties, summary judgment or other adjudication of all or part of the pending claims. Other parties may not only oppose such applications (*see* Nash letter, June 7, 1993), but may propose lesser forms of such relief. Legal and practical objections to any potential result under Rule 54(b) or other mechanisms of the Fed.R.Civ.P. should be spelled out if, as Delaware seems interested in doing (*see* Lyons letter of June 4, 1993), pursuit of that suggestion is undertaken. I remain concerned about the economic consequences of delay following the Supreme Court's decision regarding the backup rule, particularly since disputes involving backup rule claims are likely to be much less complicated and quicker to resolve than are primary rule claims. But I am also aware of the potential difficulties relief based on backup rule claims alone might produce, such as the need to en-

gage in further amendments to cross-claim primary rule claims against jurisdictions other than New York who, because of such a ruling, then hold funds. Since resolution of even the backup rule claims awaits certain discovery at this point, there is ample time to brief and consider this possibility before action is needed. Too, the parties may wish to address why pre-judgment interest, perhaps dating from the Supreme Court's March 1993 decision, or some other appropriate point, would not be sufficient to protect all concerned in lieu of other forms of interim relief.

(f) To the extent that a party makes reference to items several years old in the course of upcoming briefing, for convenience and effective advocacy copies should be annexed in tabbed appendices, thus facilitating easy recourse in understanding your submissions. *Cf.* Response of the States of Michigan, Maryland, Nebraska, and the District of Columbia to the State of Delaware's Motion for Scheduling of Status Conference, at p. 5 (citing 1990 discovery response); Forte letter, May 26, 1993, ¶ 5 (citing 1998 [*sic*] affidavit originally lodged as an appendix to 1988 brief in opposition to Delaware's motion for leave to file a complaint).

(g) I continue to harbor the concerns I expressed at the conference on June 2nd with counsel, that attention should be paid to the yield of these activities. While it is well and good that jurisdictions pursue these claims without rigorous cost-benefit analysis for whatever mix of economic and governmental stewardship reasons, there are significant transaction costs in this process and some of these burdens will fall on the non-party intermediaries. The degree of imposition on the business of these non-parties will need to be assessed at various points in the process, and may be drawn to my attention by one or more of the subpoenaed discovery sources before long. Protective relief may take a variety of forms, starting with limitations on the scope of inquiries where feasible.

Party jurisdictions should think hard now, however, about the cost implications of these efforts.

Dated: Charlottesville, Virginia
June 8, 1993

/s/ Thomas H. Jackson
Special Master

APPENDIX B

[Excerpts from]:

[No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF DELAWARE,
Plaintiff,

and

STATE OF TEXAS, *et al.*,
Intervening Plaintiffs,

v.

STATE OF NEW YORK,
Defendant.]

STATUS HEARING BEFORE
THOMAS JACKSON
SPECIAL MASTER

June 2, 1993
1:00 P.M.

* * * *

[31] [MR. NASH, COUNSEL FOR ALABAMA, *ET AL.*:] May it please the Court. Not withstanding the desires, and opinions, of distinguished Counsel for Delaware, and from New York, the United States Supreme

Court, rejected the position of the intervenor States, and found that the Backup Rule provides for the funds to go to the State of the intermediary. And, at the same time rejected Delaware's motion for the entry of a decree in it's favor. And, at the same time rejected the oppositions of both Delaware, and of New York, to bar our status as party interveners.[1] We were granted party status, that means to the intervening States that we have the same rights, as well as the same responsibilities, as [32] does Delaware, as does New York. This Court did not say to the intervenor States, that we should pursue our claims in a different form, it could have but it did not. The Court did not say that we should file a separate lawsuit and burden the Courts, and Federal District Court, with respect of certain aspects and certain of the property in question. This Court remanded, not part of the proceeding, but the entire proceeding, to the Master for purposes of allowing the parties, not just New York, but the parties to trace, if they wish to, if they believe that could be fruitful, funds in question. The case did not come out as we thought it should, but the Court has spoken. Our client States, therefore, wish to avail itself of the normal judicial processes to carry out the Court's mandate. The normal process is, you commence with discovery.

When this case first started we opposed bifurcation of the case. We therefore were precluded from engaging in the kind of discovery that we must engage in, and request to be allowed to be engaged in, presently, to determine whether under the Primary Rule, some, or all, or none of the property in question, can be allocated.[2] Until we

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[1] NOTE: This is a misstatement. Neither New York nor Delaware took exception to the Master's recommendation that Mr. Nash's clients be permitted to file their original Complaints in Intervention.

[2] NOTE: This, too, is a misstatement. Mr. Nash wrote to the Special Master on October 6, 1989 (shortly after the Master solicited suggestions on how to proceed with the case), suggesting "limited discovery within a finite discovery period." The record in the case contains neither an "objection" to "bifurcation" by Ala-

commence the discovery process, and I'll turn to how we would like to commence it in a moment. We cannot even tell the Master whether or not there is quote, "some other proper mechanism", unquote for ascertaining creditors last [33] know[n] addresses.

While this Court rejected New York's statistical sampling approach, it did not categorically reject any and all other mechanism's short of a case by case tracing, which the Master was concerned might take his and his successor's, and that successor's, lifetime. The Court allowed for the presentation back to the Master, and back to the Court, of this quote "some other proper mechanism". I do not know today what that mechanism is, or indeed if there is any such of the proper mechanism. That is for a later date. * * * *

SPECIAL MASTER: Just to make sure that we have the scope of the Supreme Court language here correct. When it talks about a transaction by transaction basis, or to provide some other proper mechanism, both those qualify for ascertaining creditors last known addresses. I assume that all this leads up to, whatever this phrase means, [34] provide some other proper mechanism which I claim, I don't know what it means either. But, the end result needs to come up with a uniquely identified creditors addresses. Is that correct? That is, it's not in rejecting the sampling notion of New York. I took from that the notation that you cannot take away, or get away from, the underlying need to uniquely identify individual creditors associated with individual transactions. Now it may be that the process by which you do that is not transaction by transaction. But, the end result is creditors ad-

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bama nor a request that a search be conducted for last-known addresses under the primary rule. Indeed, such a request would have been nonsensical, because the original Complaints in Intervention sought recovery only under the backup rule, and because it was the consistent position of those Intervenors who were before the Master prior to the rendition of the Master's report that all the property in the case was backup-rule, owner-unknown property.

dresses that is you can specify someone lived at or did business at 1245 East Main Street. And, that person is entitled, that person would have been entitled to ten thousand dollars ($10,000.00) worth of dividends, but that they are no longer there. Is that right, or not?

MR. NASH: I do not believe it is correct. Because I think the qualifier another proper mechanism for ascertaining a last known address, means that it need not be traced. Means that it need not necessarily be traced, it need not necessarily be ascertained with certainty. It means that, in my mind, it could mean, that once we get into the process of tracing, and you get further along then stage number one, that there's reasonable enough probability to make a judgment, short of a broad statistical sample. So, I believe that that qualify [35] could mean something short of stopping at the last known address. That if the frame of reference is narrow enough, the universe is narrow enough, and the probabilities are high enough, that the Court left the door open to stop short of the transaction by transaction.

SPECIAL MASTER: What surprises me about that is that I read this in light of the Court's prior paragraph in which it explains it's reasons for rejecting. Which I took to be quite consistent with my reasons for rejecting New York's statistical claims. And, I would have thought that New York was not given a chance to show, under its statistical sampling basis, that the probability was high enough. That is, we don't know whether under New York's statistical sampling, the probability would have been ninety-nine (99) percent, or fifty-two (52) percent.

But, the Court, as I did, cut New York off from that opportunity. And, it seems to me, that leads to, in light of my reading of the prior opinions, and I'm inviting you to disagree with that, and disabuse me of it at this point. My reading of that in light of the prior opinions, is that whatever the Court means by provide some other proper mechanism, it is not falling away from it's discussion in the prior paragraph, with what needs to be shown are

actual addresses. I don't know how to square the two (2) paragraphs otherwise, and the Court's refusal to [36] allow New York to show that its statistical sampling method would have a very high probability, for example.

MR. NASH: That is not incorrect, but by the same token, I do not know what another proper mechanism means, if something other than tracing transaction by transaction. Bases . . . .

SPECIAL MASTER: I don't know either, other than cautious lawyer[ing at] the Supreme Court. . . .

MR. NASH: And, well, that is why I'm not prepared to, at the moment, at least, short of discovery, and seeing what records look like, to know if anything credible can be put forth.

* * * *

We may have a better view, as to what the options are for that to mean, or we [37] may not, as I said, after we commence discovery. But, our proposal, well, before I lay out the proposal. By the same the token the Court has [had] the opportunity to enter judgment in favor in New York with respect to DTC monies, and it did not. We do not see, in light of the Court's opinion, that there was any judgment made by this Court to permit discovery and tracing with respect to one category of funds, mainly a brokerage intermediary funds. And, not with respect to the two (2) other categories of holders, mainly bank intermediaries, nor DTC, as the depository intermediary. Similarly we do not see as distinguishable Delaware Incorporated brokerage firms from New York, or Minnesota, or Massachusetts, for example, incorporated brokerage firms. If tracing can take place, they can take place with respect to wherever the brokerage firm intermediary is incorporated. And, when the Court granted the other jurisdictions party status, the Court did not foreclose the right of those other parties to identify funds that would otherwise rightfully belong to those other States.

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[46] MR. MATTAX [COUNSEL FOR TEXAS, *ET AL.*]: Good afternoon, Mr. Jackson. My name is David Mattax, I represent the State of Texas, and the liaison counsel for it's membership States. I'll be brief during this section of the discussion, because Texas at this stage, has not taken a stand on whether or not it does intend to pursue this discovery, for the very reasons that are being discussed in Court today. We do not know whether or not it would be beneficial. However, I do want to mention a couple of things, that I think this hearing has brought out, and is certaintly helping me focus my own views on what, how matters would be best to proceed.

First, of course, Delaware is taking the standpoint that even if you do transaction by transaction basis, all you're going to find is another broker/dealer who is owed the money. So, in effect New York will get nowhere. They'll just be tracing money to credtiors in their own State. Well, we don't know that for a fact, but obviously that's Delaware's position, because they don't want that to occur, because if it happens they lose the money. Now, maybe New York doesn't benefit, maybe the intervenors don't benefit, Delaware is hurt. So, certainly it's going to be their position that that's what you're [47] going to find. We just, as a matter fact, don't know.

Secondarily, at this stage, I want to address the other mechanism concept. I think this comes into where the Master was discussing what happens in the thousand (1,000) shares transaction, when you have maybe three (3) or four (4) groups of that. That might be where the Court is thinking or where the other mechanism might come into play. Maybe there's a way to figure out what is a way to accurately, or at least equitably, divide up money you've traced that far. Again, at this state, we simply don't know, because we don't know how many instances there is of that.

What Texas, I think, is prepared to do at this stage, would be to join in some discovery of New York. And,

perhaps New York can begin their ability to do a transaction, by transaction basis on a limited effort. We could look at the records, perhaps propose one (1), maybe two (2) brokers, and as opposed to doing it as straight time period, where the records might have changed over the years, limit it to just one (1) or two (2) brokers. And, come back after a few months and say, this is how we think we can proceed, or perhaps Texas will say at that time simply, we don't think it's worth our effort any more, and withdraw.

We believe at this stage it's just simply [48] premature to foreclose any discovery. At the same time we think it's premature to let all the discovery continue. So, an intermediary position of taking some discovery from New York, letting the intervenor States see if in fact, if they think they can come up with something, and do a sampling, would be the position that Texas would opt for now.

* * * *

[84] MR. NASH: May it please the Court, what is occurring here is a misconception about where this case is. This case is not at the end of the process, this case is now commencing a new beginning. It was a bifurcation, the bifurcation was what is the legal standard by which the rights of the parties would be determined. The Court in its wisdom has told us that standard. Now, under that standard the parties have an absolute right to go forward to determine which sums of money they are entitled [85] to under the standard of law articulated by the Court. Because, the matter was bifurcated. Had it had not been bifurcated, the discovery process would have been completed. But, that is not what occurred. So, each party who so wishes has an absolute fundamental right to go forward with appropriate discovery, against appropriate parties, within appropriate time frames.

In counsel's zeal to somehow pursue discovery for one client, but preclude it, you know, for others. Counsel has

forgotten that Justice Thomas, you know, had a second sentence following his first sentence, you know, on page 1561, of the written, of the published opinion. You know, which didn't limit the sentence to on remand if New York can establish by reference. That sentence is a truism, as far as it goes, but two (2) sentences later, Justice Thomas said, the use of this junctive term or, O R, twice said, if New York or any other claimant State, failed to offer such proof, transaction, by transaction. Or, to provide some other proper mechanism, you know, and so on. So, Justice Thomas, in his opinion, did not limit it discovery and subsequent proceedings to Delaware as implied by the one sentence that was quoted to the Court.

Secondly, in light of Justice Thomas' decision as to what these other States are entitled to, these other intervenor States have a theory of the case. They are [86] entitled to funds under the Primary Rule, in such amounts as they may be able to prove, upon completion of discovery. That is our theory, because the Court told us that the initial theory, as to what the standard of law is, is wrong. The Court said no, this is the theory, go back to the Master and you can collect what you can prove. That is what we are endeavoring to do.

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APPENDIX C

[Excerpts from]:

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS, *et al.*,
Intervening Plaintiffs,

v.

STATE OF NEW YORK,
Defendant.

LITIGATION MANAGEMENT ORDER NO. 7

Thomas H. Jackson, Special Master:

* * * *

A. Structure and Planning Concerns

1. New York argues that LMO No. 6 should be recast so as to limit the issues to those respecting brokerage institutions. Delaware filed a memorandum, in part supporting New York's motion to modify LMO No. 6. See Response by Plaintiff, at pp. 2-5. [2] This application for modification of LMO No. 6 is denied. There is, in my view, an error in the structural reading of the Supreme Court's opinion that those seeking a restricted view on remand are making. When the Court writes that "upon

remand, the parties may look at X," these parties are reading this as if it also said "and the parties may not look at things other than X." Nothing in the logic of the opinion, however, or the context of what the Court was reviewing, suggests this structure. As is beyond peradventure, the *entire* lawsuit was not before the Supreme Court. The Court, rather, was responding to exceptions to a report that dealt with some, but by no means all, of the issues in this case. In that context, when the Court states that "the parties may look at X," which is what the Report it is reviewing also said, there is no reason to view that statement as precluding treatment of other things that are not "inconsistent with this opinion." My Report did not bar exploration of the issues now sought to be explored and exceptions were not taken to those issues not decided. In that context, negative inferences (stretched at that) from the Court's opinion on issues not before it make no sense. What went up to the Court on exception were various legal issues; what remains at this stage is essentially discovery to discern the factual state of affairs, and implementation. And while the Court, agreeing with the Report in this respect, pretermitted use of New York's "statistical proof" approach to this essentially factual issue, it did not otherwise preclude factual exploration within its legal constraints. This, together with considerations of the efficient disposition of the parties' claims, counsels strongly in favor of resolving matters in the fashion set forth in LMO No. 6. Thus the requests for modification of LMO No. 6 as it deals with primary and backup rule claims cognizable at this stage of the proceedings, and insofar as it declines to exclude banks and depository institutions from consideration, are denied.

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