No. 111 Original

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF DELAWARE,
Plaintiff,
and
STATE OF TEXAS, *et al.*,
Plaintiff-Intervenors,
v.
STATE OF NEW YORK,
Defendant.

On Bill of Complaint

OPPOSITION OF PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, AND THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA AND VIRGINIA TO MOTION OF PLAINTIFF, STATE OF DELAWARE, TO STRIKE AMENDED COMPLAINTS IN INTERVENTION

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The Plaintiff-Intervenor States of Alabama, *et al.*, Texas, *et al.*, and California (collectively, the "Intervenors"), through their undersigned counsel, oppose the State of

Delaware's Motion to Strike Amended Complaints in Intervention (August 1993) ("Del. Motion"), which New York has joined. *See* Response of the State of New York to Delaware's Motion (August 18, 1993).

Delaware's Motion to Strike raises two fundamental questions. *First,* should this Court intercede in what is essentially a discovery dispute among parties in an original jurisdiction proceeding when the Special Master has not yet made his recommendation to the Court? *Second,* are modern rules of pleading so strict that 48 sovereign States and the District of Columbia should be prevented from amending their complaints to conform their claims to legal principles recently announced in this very case by the Court, thereby compelling them to file 49 separate lawsuits with respect to the property at issue in this case? We respectfully submit that the answer to each question is a resounding no.

COUNTERSTATEMENT

A. The Intervenors' Claims

At issue in this original jurisdiction action is which States are entitled to escheat a particular fund of unclaimed property—specifically, unclaimed securities distributions that New York seized from financial intermediaries (*e.g.*, brokerage firms, banks and depositories), when such intermediaries disclaim knowledge of the identity or address of the owners of the distributions (hereinafter "unclaimed securities distributions," "property" or "funds").

Delaware initiated this case on February 9, 1988 by moving for leave to file a complaint seeking to recover from New York unclaimed securities distributions New York had seized from Delaware-incorporated brokerage firms. Less than a year after this Court granted Delaware's Motion for Leave to File Complaint, 486 U.S. 1030 (1988), the Court granted the intervention motion of the State of Texas. 489 U.S. 1005 (1989). As Delaware concedes (Motion at 4), Texas' Complaint made subject

to this suit unclaimed securities distributions New York had seized from all brokerage firms, wherever incorporated, as well as from banks, depositories and other intermediaries. *See* Complaint in Intervention of State of Texas (filed January 7, 1989). Shortly thereafter, additional intervention motions were filed—later granted by the Court —which also made subject to this suit unclaimed securities distributions New York had seized from all intermediaries, wherever incorporated.[1]

In proceedings before the Special Master, and before this Court on exceptions, the parties asserted various legal theories as to how the primary and backup rules of escheat established in *Texas v. New Jersey*, 379 U.S. 674 (1965), should be applied to the unclaimed securities distributions placed in issue by the parties. The dispute centered around two questions: was New York entitled to take the unclaimed securities distributions held by certain intermediaries, wherever incorporated, under the primary rule; and who is the "debtor" in a multi-party securities transaction for purposes of applying the backup rule.

In an effort to resolve the litigation in the most efficient manner possible given the array of legal theories asserted, the large amount of money at stake and the number of transactions at issue, the Special Master established a bifurcated procedure under which the governing legal rules would be established first, and allocation of the unclaimed securities distributions in accordance with those rules afterward. Discovery was similarly bifurcated, and the proceedings are now before the Special Master for discovery, proof and recommendation with respect to allocation of the distributions at issue.[2]

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[1] *See, e.g.*, Complaint in Intervention of States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and Commonwealths of Kentucky and Pennsylvania ¶ 5 (filed April 21, 1989), motion for leave to file granted, 113 S. Ct. 1550, 1555 (1993).

[2] *See* Litigation Management Order No. 2 (July 16, 1990) ("LMO No. 2") at 2 (App. 3a) (allowing "sharply limited" dis-

The first phase of the litigation concluded with this Court's March 30, 1993 decision. 113 S. Ct. 1550. In that decision, the Court granted all outstanding intervention motions. *Id.* at 1555. The Court rejected New York's statistical sampling proposal to establish its rights under the primary rule, but granted New York and "any other claimant State" the right to prove primary rule entitlement to the unclaimed securities distributions "on a transaction-by-transaction basis or [through] some other proper mechanism for ascertaining creditors' last known addresses." *Id.* at 1561. It also rejected the recommendation of the Special Master, supported by the Intervenors, that the entity that issued the security on which an unclaimed securities distribution was paid is the "debtor" of that unclaimed distribution. The Court instead concluded that the holder is the "debtor" of the unclaimed securities distribution at issue. *Id.* at 1557-60. The Court remanded the matter to the Special Master "for further proceedings consistent with this opinion." *Id.* at 1562.

On remand, the Intervenors have continued to press claims to the property at issue—unclaimed securities distributions seized by New York from all types of intermediaries (*e.g.*, brokerage firms, banks and depositories), wherever incorporated, when such intermediaries disclaim knowledge of the identity or address of the owners of the distributions. The Court's decision expressly authorized the assertion of primary rule claims on remand and, accordingly, the Intervenors have been participating on remand in discovery to determine their primary rule entitlement to unclaimed securities distributions taken by New York from intermediaries, whether or not incor-

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covery which "essentially bear[s] on the establishment of the legal rules governing this litigation"); *id.* (App. 2a) ("the motions envisioned at this stage have never been considered to be full-blown summary judgment motions, disposing of all factual contentions and potentially ending this litigation in its entirety").

porated in Delaware.[3] These distributions have been at issue since 1989. The Intervenors also have sought the right to establish their entitlement under the backup rule, as definitively established by the Court in its recent opinion with respect to multi-party securities transactions.[4]

B. Efforts By Delaware And New York To Exclude Or Limit The Intervenors' Participation

Although Delaware contends in its Motion to Strike that this Court's decision effectively dismissed the Intervenors from the case, Delaware previously acknowledged that the decision did no such thing. At a June 2, 1993 status conference, counsel for Delaware stated:

> I cannot say that [Intervenor discovery of unclaimed securities distributions taken from Delaware-incorporated brokerage firms under the primary rule] is beyond the Remand Order because the takings from the Delaware Brokers, under the Remand Order, clearly in Justice Thomas' Opinion, are open to Primary Rule assertions, both by New York and by the intervenors.

Transcript of Hearing Before the Special Master (June 2, 1993) ("Transcript") at 9 (App. 7a).[5] Delaware argued that the Court's Remand Order authorized the Intervenors to assert primary rule claims only with respect to unclaimed securities distributions New York seized from Delaware-incorporated brokers (and not brokers incorpo-

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[3] There is no principled distinction between the securities distributions New York has been claiming under the primary rule—property it seized from brokerage firms (whether or not incorporated in Delaware)—and property New York seized from banks and depositories.

[4] New York's limited discovery responses to date demonstrate that it took unclaimed securities distributions from intermediaries incorporated in States other than New York and Delaware.

[5] *See also* Response of Plaintiff, State of Delaware, to Scheduling Proposals of Defendant and Intervenors at 8 (June 1, 1993).

rated elsewhere or other intermediaries), and further that it did not authorize the assertion by the Intervenors of backup rule claims. Transcript at 15, 73 (App. 7a-8a, 9a). Delaware also argued that the Intervenors' Complaints did not encompass such primary rule or backup rule claims. *Id.* at 64-65, 73 (App. 8a, 9a).

New York did not dispute the Intervenors' right to establish primary rule claims to unclaimed securities distributions New York had seized from brokerage firms—including firms incorporated outside Delaware—but argued that that right did not extend to unclaimed securities distributions it took from banks and the Depository Trust Company. *Id.* at 20 (App. 8a). It further argued that only New York should be allowed to undertake primary rule discovery, the results of which it would "share" with others. *Id.* at 82-83 (App. 9a). New York would similarly limit the Intervenors' backup rule claims to unclaimed securities distributions New York had seized from brokerage firms.

The Special Master rejected the arguments of both Delaware and New York, describing their view of the case as "curiously narrow" and their reading of this Court's opinion as "particularly tendentious." Litigation Management Order No. 6 (June 8, 1993) ("LMO No. 6") at 6 (Del. Motion App. 8a). Understanding that the jurisdiction conferred upon him in this case encompassed the "authority to fix the time and conditions for the filing of additional pleadings," 488 U.S. 990 (1988), he granted leave to all parties who intended to file amended complaints to do so by a specified date (July 8, 1993), LMO No. 6 at 8 (Del. Motion App. 11a).[6] Among the factors

[6] In doing so, the Master clearly understood that the filing of amended complaints was subject to this Court's approval after he filed an appropriate Report. This was the procedure followed with respect to the original Complaints in Intervention. *See* Report of the Special Master at 4-5 (Jan. 28, 1992); Report of the Special Master on Motions to Intervene (Sept. 13, 1989) (Appendix C to the January 28, 1992 Report).

pointed to by the Special Master in reaching that conclusion were:

—the Court's opinion does not support Delaware's effort to drastically curtail the rights of 49 sovereigns who were granted full party status in the case, *id.* at 6 (Del. Motion App. 8a-9a);

—it is appropriate to amend complaints after applicable definitive legal rules are established, *id.* at 6-7 (Del. Motion App. 10a);

—"it would be artificial and wasteful of party energies and judicial resources to suggest that intervenors file a separate lawsuit," *id.* at 7 (Del. Motion App. 10a);

—"amendment raises no specter of undue delay" because backup rule discovery is already being pursued by Delaware and primary rule discovery is already being pursued by New York, *id.* at 3, 7 (Del. Motion App. 4a, 10a-11a); and

—dismissing the Intervenors from the case would contravene the policies of the modern rules of pleading, *id.* at 7 (Del. Motion App. 10a-11a).

Although the Intervenors' respective Complaints each requested "such other and further relief as this Court deems just," in light of Delaware's challenge to their sufficiency, the Intervenors filed Amended Complaints by the July 8 deadline which remove any doubt that the Intervenors seek recovery under the primary and backup rules as established in this Court's decision of the same unclaimed securities distributions put in issue in their original Complaints.

The Master agreed with the Intervenors and Delaware that discovery should be undertaken in as efficient a manner as possible, and established a narrowly circumscribed schedule with respect to, *inter alia,* two remaining aspects of this case: determining as an initial matter whether primary rule recovery by New York or any other State is

feasible (with additional discovery if the Master concludes that it is), and determining the amount of unclaimed securities distributions New York seized from various intermediary holders (for backup rule purposes). *See* LMO No. 6 (Del. Motion App. 1a-24a). Under that schedule, discovery as to both primary and backup rule claims is to proceed along parallel tracks, with a goal of determining whether primary rule claims are feasible at an early date. *Id.* at 9-11 (Del. Motion App. 13a-17a).

New York moved the Special Master to modify the discovery schedule set forth in LMO No. 6, and to limit the scope of the Intervenors' claims under the primary rule to funds held by brokerage firms (wherever incorporated).[7] Delaware did not so move, but stated in its response to New York's papers that the Intervenors should be dismissed from the case altogether.[8] In Litigation Management Order No. 7 (August 4, 1993) ("LMO No. 7") at 1-2 (App. 11a-12a), the Master denied New York's motion.

C. Delaware's Motion To Strike

While the Amended Complaints filed by the Intervenors do not assert any claims against Delaware, Delaware nevertheless moves to strike them in an attempt to preclude the Intervenors' participation in discovery because such participation purportedly would "prejudice" Delaware. *See* Del. Motion at 14, 23-24. Because Delaware cannot demonstrate prejudice, it argues that the Special Master lacked authority to permit such amendments, that the amend-

[7] Motion by Defendant, State of New York, to Modify Litigation Management Order No. 6, ¶¶ 1-9 (July 7, 1993).

[8] *See* Response by Plaintiff, State of Delaware, to New York's Motion to Modify Litigation Management Order No. 6 at 2-5 (July 15, 1993). Delaware misstates the record when it asserts that it "moved before the Master for a modification of the portions of LMO No. 6" addressing this issue. Del. Motion at 13. Delaware filed no such motion.

ments expand the scope of the case, and that the amendments do not comport with the Federal Rules of Civil Procedure. For the reasons set forth below, this Court should not accept Delaware's invitation to intercede in what is essentially a discovery dispute; if it does, the Court should reject Delaware's crimped reading of this Court's opinion and the modern rules of pleading.

ARGUMENT

I. DELAWARE'S REQUEST THAT THE COURT INTERCEDE IN A DISCOVERY DISPUTE PRIOR TO THE SPECIAL MASTER'S ISSUANCE OF A RECOMMENDATION TO THE COURT SHOULD BE REJECTED

Delaware does not disguise the fact that it seeks to exclude the Intervenors from discovery, and that the only reason it filed its Motion to Strike was to accomplish that objective. *See* Del. Motion at 23-24 (describing purported "prejudice" to Delaware). In fact, Delaware's Motion to Strike is no more than an artifice through which it seeks to obtain piecemeal review by this Court of a discovery dispute that the Court otherwise would not entertain.

The Special Master is overseeing this litigation pursuant to the remand "for further proceedings consistent with [the Court's] opinion," 113 S. Ct. at 1562, and the initial Order of reference, which provided him

> with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for.

488 U.S. 990 (1988). Accordingly, the Special Master has established parameters for discovery, including a strict schedule. A corollary to the discovery schedule, and pursuant to his authority to "fix * * * time[s] and condi-

tions," was the requirement in LMO No. 6 that any amendments to complaints be submitted by July 8, 1993.[9] LMO No. 6 at 8 (Del. Motion App. 11a). In accordance with that deadline, the Intervenors amended their Complaints and submitted them to the Court, referencing the Master's Order.

Not only did the Special Master not accept or purport to accept, in lieu of the Court, the Amended Complaints for filing, he has not yet reported to this Court his recommendations as to how the Court should treat such submissions.[10] Nevertheless, Delaware has concocted a dispute over whether the Master has authority to accept these filings on behalf of the Court—an argument that Delaware never made to the Master. The result, if Delaware has its way, will be this Court's reviewing piecemeal a discovery and litigation management dispute among the parties without a recommendation by its Master.

Among the principal reasons this Court appoints special masters in original jurisdiction cases is to spare the Court from deciding the myriad procedural issues that arise in litigation at the trial court level.[11] Were the Court to begin accepting motions on the multitude of orders made by its masters, not only would the Court be inefficiently using its time, but its masters' ability to oversee proceed-

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[9] As noted, the Special Master established the deadline in response to Delaware's contention at the June 2, 1993 status conference that the Intervenors' Complaints were insufficient.

[10] Delaware's presumptuous view that the Master is unaware of the Court's prerogatives is belied by the Master's issuance of formal recommendations to this Court on the Intervenors' original intervention motions. *See supra* note 6.

[11] It is indeed ironic that Delaware discusses at length the need to protect this Court from devoting excessive time to original jurisdiction cases (Del. Motion at 25-31), yet asks the Court to resolve a discovery dispute in an ongoing original jurisdiction action.

ings would be significantly hampered. After each motion to this Court, the special master would have to decide whether to hold current proceedings in abeyance pending the Court's decision, or whether to proceed in the hope that the Court would affirm his actions. In either event, the flexibility that masters have traditionally been accorded would suffer dramatically.[12]

While this Court ultimately should allow the Intervenors' Amended Complaints, Delaware's motion first should be referred to the Special Master for a recommended decision. The Master's recommendation would then be reviewed by this Court on exception, if any, at the appropriate time. Should this Court nonetheless decide to address the merits of Delaware's Motion to Strike, Part II of this brief demonstrates that Delaware's objections are meritless.

II. THE INTERVENORS SHOULD BE PERMITTED TO AMEND THEIR COMPLAINTS

Delaware's Motion to Strike is premised upon a series of misstatements of the record, this Court's decision, the modern rules of pleading and the course of discovery. The Intervenors' Amended Complaints do not expand the scope of this case; this Court's opinion authorized the Intervenors' continued participation; leave to file amended complaints is "freely given," Fed. R. Civ. P. 15(a); it

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[12] Past proceedings in this case are illustrative. Leading up to his January 28, 1992 Report, the Special Master issued numerous Litigation Management Orders and Discovery Orders to narrow the issues being addressed and, accordingly, the scope of discovery. He also recommended that the Court allow the intervention of 47 jurisdictions and requested briefing on various issues. During the entire time, this Court was not called upon to resolve a matter that would—like Delaware's Motion to Strike—traditionally be viewed as interlocutory. Only when the Special Master issued his recommendations on the merits of controlling legal principles was this Court called upon to review his procedural decisions.

would be an absurd waste of judicial and State resources to force the Intervenors to bring new actions; and the delay that Delaware complains would flow from allowing the amendments does not constitute cognizable prejudice.

A. The Intervenors' Amended Complaints Do Not Expand The Scope Of This Case

Delaware's Motion to Strike rests on the unfounded premise that the "Amended Complaints broadly expand the scope of this case." Del. Motion at 2. In fact, the Amended Complaints neither increase the number of States that are participating in the case, nor expand the unclaimed securities distributions they are claiming. The Amended Complaints merely advance alternative theories of recovery in accordance with this Court's opinion on the appropriate legal standards governing the Intervenors' claims. Delaware's assertion to the contrary is based on an intentional misconstruction of the history of this case and on a skewed reading of this Court's March 30 opinion.

1. *The Intervenors' claims to unclaimed securities distributions seized by New York from all intermediaries, wherever incorporated, have been before this Court since 1989*

There was a brief time when this case concerned only the narrow range of property that Delaware claims is at issue. From February 9, 1988, the date on which Delaware sought leave to file a Complaint against New York, to January 6, 1989, the date on which Texas similarly sought leave, this case pertained only to unclaimed securities distributions New York seized from Delaware-incorporated brokerage firms. Texas' Complaint, and those of the other Intervenors, made subject to this case unclaimed securities distributions New York seized from all brokerage firms (wherever incorporated) as well as from banks, depositories and other intermediaries (wherever incorporated). As Delaware concedes (Motion at 4), all such

distributions seized by New York have been at issue in this action since early 1989. *See supra* pp. 2-3.[13]

Delaware tries to run around this deficiency in its argument by suggesting that there actually have been two separate cases, one involving Delaware and one involving the Intervenors. Del. Motion at 6-7. That is ludicrous. In this single action, sovereign States have been claiming entitlement to the same fund under competing legal theories. Each party's entitlement to a portion of that fund depended upon the resolution of competing legal theories. Delaware's claims cannot be extracted from the claims of the Intervenors.

This Court's opinion did not resolve all the legal or factual issues pertaining to the disputed property, and, indeed, it could not. The Special Master had established a strict bifurcated litigation schedule under which the governing legal rules would be established first, and allocation of and discovery regarding the funds in accordance with those rules afterward.[14] With the first phase of the litigation concluded, the second phase—the allocation of the distributions seized by New York—began upon is-

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[13] The Amended Complaints also do not expand the reachback period, contrary to Delaware's implication. Del. Motion at 2, 14. Delaware itself proposed that New York disgorge property dating back 21 years—the reachback period being applied by the Master—on the ground that Delaware's unclaimed property statute took its present form in 1972. *See* LMO No. 6 at 5 (Del. Motion App. 7a). Delaware's concern about New York's alleged burden apparently extends only to alleged burdens purportedly imposed by States other than Delaware.

[14] *See* LMO No. 6 at 6 (Del. Motion App. 9a) ("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."); LMO No. 2 at 2 (App. 2a-3a).

suance of this Court's decision. Although the Intervenors' interpretation of the backup rule was not adopted, the Intervenors still have an interest in the distributions under the primary and backup rules as elucidated by the Court in its decision.

Delaware's lengthy digression (Motion at 25-31) on this Court's standard for exercising its original jurisdiction misses the point. The Court has already exercised its original jurisdiction in this case to include the claims of the Intervenors to unclaimed securities distributions New York has seized from all financial intermediaries as to which the intermediaries disclaim knowledge of the identity or address of the owners. Given this history, Delaware's motion does not raise whether the Intervenors' claims should be *added* to the case—they are already there. Rather, the motion raises whether 49 sovereigns should be prevented from continuing to assert those claims under the rules of law pronounced by this Court in its March 30, 1993 decision. There is no basis in this Court's opinion, the Federal Rules of Civil Procedure, or the management of this case that supports any conclusion other than that the Intervenors have as much right as Delaware to seek disgorgement from New York.

2. *The claims asserted in the Amended Complaints are within the scope of this Court's Remand Order*

Delaware's attempted deconstruction of this Court's opinion notwithstanding, several facts remain undisputed. *First,* the opinion expressly granted all outstanding motions to intervene. 113 S. Ct. at 1555. *Second,* the Court did not thereafter dismiss the Intervenors from the case or limit their participation in any way. *Third,* the Court expressly afforded "any other claimant State" the right to assert claims under the primary rule to unclaimed securities distributions seized by New York. *Id.* at 1561. For all Delaware's attempts to divine hidden meanings in, and suggested readings of, the Court's language, one prop-

osition remains clear: if the Court wanted to dismiss the Intervenors from the case, it could have done so expressly, either by denying the intervention motions or by stating that only Delaware may still assert claims against New York. The Court did neither. Instead, the Court explicitly acknowledged the Intervenors' right to participate in the case and to offer proof of their claims under the primary rule.

Delaware's reading of the Court's opinion ultimately rests on a series of conjectures, reflecting more Delaware's wishes than the Court's writings. Thus, Delaware tries to explain away the Court's statement that:

> [i]f New York or any other claimant State fails to offer [primary rule] 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.

113 S. Ct. at 1561-62.[15]

At the June 2, 1993 status conference before the Master, Delaware conceded that this language authorized the Intervenors to assert primary rule claims to property New York seized from Delaware-incorporated brokerage firms. *See supra* p. 5. Hoping to exclude the Intervenors from discovery, Delaware now contends that the Intervenors do not have even these limited rights, and that the Court merely was referring to the rights of "any other claimant State" to assert primary rule claims against Delaware in other forums at an unspecified time in the future (if Delaware recovers the property from New York). Surely, allowing primary rule claims to be asserted in this

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[15] Delaware also hypothesizes as to why the Court granted the intervention motions (Motion at 7), yet that hypothesis has no support in any language in the Court's opinion.

proceeding is more consistent with the rules of priority established by the Court.[16]

In the alternative, Delaware grudgingly concedes (Motion at 21) that the Court's language "*could* be construed as allowing participation by the Intervenors" in determining whether they have primary rule claims against New York, but attempts to limit this participation to securities distributions New York seized from Delaware brokers. Why the Intervenors' right to continue asserting claims should encompass only property to which Delaware also claims an interest is left unclear. The Court's opinion envisions full participation by all parties, and there is no reason why the Intervenors' participation should be circumscribed by Delaware's claims.[17]

The Master's conclusions on this point bear repeating:

> When the Court writes that "upon remand, the parties may look at X," [Delaware and New York] 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

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[16] Moreover, had the Court intended the Intervenors to claim from Delaware (rather than New York) under the primary rule, it could have entered judgment for Delaware without prejudice to the filing of primary rule claims with Delaware.

[17] To support its crimped reading of the Court's opinion, Delaware relies almost exclusively on that portion of the opinion in which the Court rejected New York's broker-specific primary rule statistical sampling methodology but also rejected Delaware's "invitation" to enter judgment against New York as to broker-held property. Any reference by the Court to brokers, or to Delaware and New York, must be read in that context.

> 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."

LMO No. 7 at 2 (App. 11a).

B. Dismissing The Amended Complaints Would Be Inconsistent With The Policies Of The Federal Rules Of Civil Procedure

Absent any statement in the Court's opinion limiting the Intervenors' participation in this case—and, indeed, with statements to the opposite effect—the question becomes why that opinion should be construed in the manner most injurious to 49 sovereign parties and to judicial economy. Delaware argues that the rules of pleading require such a narrow interpretation. Yet, as the Special Master recognized, "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." LMO No. 6 at 7 (Del. Motion App. 11a).

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to file amended complaints "shall be freely given when justice so requires." The liberal treatment of amended pleadings in Rule 15(a) is designed to promote judicial economy while ensuring that all parties are treated fairly. *See generally Foman v. Davis,* 371 U.S. 178, 182 (1962). Consequently, in applying the Rule, courts have rejected formalistic rules of pleading, choosing only to bar amendments that unfairly impact on the non-moving party. *See, e.g., id.*[18] When the facts or circumstances relied on in a party's amended pleading are

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[18] Thus, courts may not deny a motion to amend solely on the ground that the amendment alleges a new cause of action. 3 James Wm. Moore & Richard D. Freer, *Moore's Federal Practice* ¶ 15.08[2], at 15-52 (2d ed. 1993).

a proper subject of relief, absent undue prejudice, the party is allowed to pursue the amended claim. *Id.*

Delaware's opposition to the Intervenors' Amended Complaints flatly contradicts these well settled principles for two fundamental reasons. First, as the Special Master concluded, "it would be artificial and wasteful of party energies and judicial resources" to require the Intervenors to file separate lawsuits to pursue claims covering the very property at issue in this case. LMO No. 6 at 7 (Del. Motion App. 10a).[19] Second, as discussed in Part II (C), *infra,* Delaware has altogether failed to satisfy its burden of demonstrating that the Amended Complaints would subject it to any undue prejudice.[20]

Finally, Delaware's objection to the specificity in the Intervenors' Amended Complaints has no basis under the modern pleading rules. Under Fed. R. Civ. P. 8(a)(2), a pleading is sufficient if it contains a short statement that gives the defendant notice of the plaintiff's claim and the grounds on which it rests. *Conley v. Gibson,* 355 U.S. 41, 47 (1957); *see* 2A James Wm. Moore, *et al., Moore's Federal Practice* ¶ 8.13 (2d ed. 1993).[21] It is preposter-

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[19] Delaware's suggestion that the Intervenors can resolve their primary rule claims through the good graces of the Delaware and New York unclaimed property administrators is not credible. Delaware has rigidly insisted that transaction-by-transaction primary rule claims to the property at issue cannot be made, yet it now proposes that the Intervenors go, hat in hand, to a Delaware official asking for satisfaction of such claims. As to New York, this case demonstrates the lengths to which it will go to keep unclaimed property to which it is not entitled.

[20] The cases cited by Delaware (Del. Motion at 32-33 n.35) are easily distinguishable on this ground.

[21] It bears repeating that this Court granted the intervention motions of the Intervenors even though the Intervenors' Complaints did not identify any particular distributions seized by New York

ous to assert—as Delaware apparently does on behalf of New York—that New York does not have notice as to what the Intervenors are claiming. Indeed, limited discovery provided by New York to date has already revealed that New York seized owner-unknown unclaimed securities distributions from intermediaries not incorporated in New York or Delaware. The Amended Complaints make clear —and New York plainly knows—that the Intervenors assert claims under the backup rule to that property (subordinate, of course, to successful primary rule claims to the same property). Likewise, New York plainly knows that the Intervenors are asserting claims under the primary rule to unclaimed securities distributions that have long been at issue in this case.

C. Permitting The Amended Complaints Will Not Unduly Delay Resolution Of This Action

The only prejudice Delaware asserts it will sustain if the Intervenors' Amended Complaints are allowed is a delay in its ability to obtain judgment against New York. Del. Motion at 23-24. The specter of added delay, however, is grossly exaggerated, based as it is upon a wanton mischaracterization of the Intervenors' claims and the strict guidelines for discovery established by the Special Master. Delaware's chief concern appears to be the purported delay caused by primary rule discovery. *Id.* Thus, it asserts that the Special Master will be involved "indefinitely" in "a commission of inquest into every item of unclaimed property ever remitted to New York," in effect placing the Master under "an unfair life sentence" reviewing "tedious and time-consuming" proof under the primary rule. *Id.* at 23-24 & n.27.

In so arguing, Delaware has conveniently ignored the fact that New York will be undertaking primary rule dis-

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that were issued by companies or governmental bodies located in the respective jurisdictions. 113 S. Ct. at 1555.

covery irrespective of the status of the Intervenors' claims, and that such discovery must be completed before it is known whether Delaware is entitled to recover any of the funds it seeks under the default provisions of the backup rule.[22] The Special Master's Order carefully addressed Delaware's concern that primary rule discovery—be it conducted by New York or by both New York and the Intervenors—not unduly delay the final resolution of this case. The Master therefore established a schedule under which he carefully circumscribed allowable primary rule discovery, and provided that such "core" primary rule and backup rule discovery be completed within one month of each other. LMO No. 6 at 9-11 (Del. Motion App. 13a-17a). The objective of the limited core primary rule discovery is to determine the feasibility of primary rule recovery of the disputed property.[23] To allow such a determination to be efficiently made, the Master limited primary rule discovery from non-parties to five representative intermediaries with respect to each of two, two-month sampling periods, ten years apart. LMO No. 6 at 9-10

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[22] Delaware advances the erroneous view that it is entitled to recover from New York under the backup rule before primary rule rights are established because "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." Del. Motion at 20 (emphasis added). Whatever the merits of the presumption when the State of corporate domicile of the holder has taken the property, that is not the case here. Delaware's attempt to elevate its status as a backup rule claimant to one with priority over primary rule claimants turns the rules of priority on their head.

[23] The Master ordered primary rule discovery to proceed "on a restricted sampling basis * * * 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." LMO No. 6 at 9 (Del. Motion App. 13a).

(Del. Motion App. 13a-15a); *see also* LMO No. 7 at 3-4 (App. 14a-15a).[24]

After this limited discovery is concluded, the parties asserting primary rule claims must provide the Master with sufficient information to enable him to rule "as a matter of law on the sufficiency of the forms of proof, as well as focus the nature of further [primary rule] discovery (if any)." LMO No. 6 at 14 (Del. Motion App. 21a-22a). If the Master then concludes that New York and the Intervenors can prove primary rule entitlement to the property at issue, it plainly would be premature to turn the funds over to Delaware under the *backup* rule. Further primary rule discovery would be justified and would be undertaken. On the other hand, if the Master reaches the opposite conclusion—that the core primary rule discovery fails to demonstrate the ability to prove primary rule entitlement—then primary rule discovery would be concluded and backup rule rights would control.

This approach reflects a proper balance between the dual objectives of ensuring that the States with priority to the distributions recover the property, while resolving this billion dollar case expeditiously. This reasoned approach to discovery would take place even if the Intervenors were not in this case, and it is equally reasonable with the Intervenors present.

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[24] New York was also required to provide a detailed log of remittances to New York with respect to this limited time period. A summary log was required with respect to all other remittances. LMO No. 6 at 8 (Del. Motion App. 11a-12a); LMO No. 7 at 4-5 (App. 16a-18a). The Master did not order New York to identify every item of unclaimed property it took from every securities industry intermediary over the last 21 years, Delaware's contention to the contrary notwithstanding. Del. Motion at 24. In LMO No. 7, the Master restated the requirements of the summary log in accordance with Delaware's request for clarification to make clear he never ordered any such thing. LMO No. 7 at 4-5 (App. 16a-18a).

Similarly, the limited discovery required to establish claims under the backup rule will not prejudice Delaware. Delaware itself is pursuing backup rule discovery against New York with respect to Delaware-incorporated brokerage firms. Comparable discovery by the Intervenors "occurring simultaneously and generally off the same database" will not unduly prejudice Delaware. LMO No. 6 at 3 (Del. Motion App. 5a). As noted, the partial discovery New York has already provided since the remand demonstrates that it took unclaimed securities distributions from intermediaries incorporated in States other than New York and Delaware.[25] There is no justification for allowing Delaware full backup rule discovery while denying it to the other 49 sovereign jurisdictions whose status as parties is equal to that of Delaware.

Delaware's assertion that "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" (Motion at 24) is disingenuous at best. In opposing New York's motion for additional time to respond to discovery requests, Delaware sharply criticized the credibility of the evidence New York submitted on which it now purports to rely.[26] New York's self-serving assertions as to the burden imposed on it, rejected by the Special Master, LMO No. 7 at 4-6 (App. 14a-19a), do not gain in credibility merely because Delaware now believes it to be in its interests to embrace them. The Master properly rejected Delaware's claim of prejudice.

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[25] New York's initial production was made on August 9, 1993. It has confirmed that by September 3, 1993 it will complete production that LMO No. 7 required by that date.

[26] *See* Response by Plaintiff, State of Delaware, to New York's Motion to Modify Litigation Management Order No. 6 at 7-12.

CONCLUSION

For the foregoing reasons, Delaware's Motion to Strike Amended Complaints in Intervention, supported by New York, should be referred to the Master. Alternatively, Delaware's motion should be denied.

Respectfully submitted,

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August 23, 1993

[Attorneys General of Alabama, *et al.* and Texas, *et al.* Listed on Inside Cover]

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. 2

THOMAS H. JACKSON, SPECIAL MASTER:

In the July 1 "progress reports" submitted by the parties pursuant to Discover[y] Order No. 5, several parties have raised issues concerning the scope and timing of the motions contemplated at the conclusion of the round of discovery authorized by Litigation Management Order No. 1. In addition, several parties have also raised the possibility that discovery for this purpose may not be completed by the July 30th date noted in Discovery Order No. 5.

Because I believe the parties are entitled to know the precise contours of the rules and timetable they will be operating under once the discovery date passes, it is prudent, I believe, to set forth, prior to July 30th, these basic ground rules. The timetable that I annouce in this Litiga-

tion Management Order No. 2 will (i) afford the parties an automatic two week grace period running to August 15, 1990 for wrap-up of pending matters, (ii) set dates for any applications for limited extension of the discovery period in this action, and (iii) establish a briefing schedule which automatically commences to run from August 15, 1990 (or if it unfortunately proves necessary, from a discovery completion date extended briefly beyond August 15th).

A. *Discovery and Nature of the Contemplated Motions*

By letter of June 29, 1990, Texas/Alabama, et al., noted that they "have been giving serious consideration to seeking the resolution of this matter by the filing of cross-motions for summary judgment (regarding the adoption of a rule of law governing the entitlement of the States to the unclaimed property at issue)." These states then suggest that, since motions of this nature were "not contemplated by Litigation Management Order No. 1," a more extended briefing schedule be established. (Judith E. Schaeffer and David A. Talbot, Jr., letter of June 29, 1990, at page 7.) Delaware and New York both oppose any change to accommodate cross-motions for summary judgment, although at least New York appears to agree that, under any circumstances, the timetable for motions and briefing needs to be revised. (Robert A. Forte letter of July 10, 1990; Richard L. Sutton letter of July 5, 1990.)

As I indicated in Discovery Order No. 10, it is important not to become mired in a semantic discussion as to what the contemplated motions should be designated. It is clear that the motions envisioned at this stage have never been considered to be full-blown summary judgment motions, disposing of all factual contentions and potentially ending this litigation in its entirety. Thus, for example, there has been little or no discovery permitted as to the degree to which names and addresses were in fact

"lost." Nor have I permitted, in the case of what appears to be the theory behind the complaint of California, et al., discovery into the exact percentages of various commercial activities appropriately allocated to each state.

What has been permitted, and is the thrust of Litigation Management Order No. 1, is discovery into the basic mechanism of the flow of securities, so that the parties could reasonably frame motions where factors such as who was the agent of whom might have some probative value. Additionally, to accommodate the distinct complaint of California, et al., I have permitted discovery that bears on an issue such as the ease of discerning an appropriate "commercial activities" test, which presumably might be probative to an argument that this test should be used in lieu of another.

In each case, however, this discovery is in fact sharply limited. It may allow motions to be framed that rely on a legal test in which who is the relevant "debtor" is of paramount importance or that uses a "commercial activities" basis for allocation on the ground that it is fairer than other alternatives. These essentially bear on the establishment of the legal rules governing this litigation, although the factual warp and woof of the securities distribution system may well provide the details of the backdrop against which the legal issues must play. Put another way, the motions contemplated at this point are ones that will test the basic legal theories of the various parties in light of applicable precedent. Even if one or more of the various motions are granted, at best what will remain will be at least two parties, and perhaps more, who will then be poised to explore the actual mechanics of how allocation of the escheatable funds will be made.

All of this seems appropriataely within the notion of motions for judgment on the pleadings, as contemplated by Litigation Management Order No. 1 and the ability to incorporate limited factual issues via Fed. R. Civ. P. 12(b). In this respect, therefore, no modification of Li-

tigation Management Order No. 1 is necessary or appropriate.

B. *Scheduling*

I take it that the parties do not loudly protest the notion that the timetable contemplated by Paragraphs 12 and 13 of Litigation Management Order No. 1 is perhaps tighter than appropriate at this point. Thus, parties wishing to file dispositive motions directed at certain positions shall have sixty (60) days from the close of the discovery period (as modified in the next paragraph) to file such motions and supporting matter. Given the possibility of motions running in various directions, the time for any party to file material in opposition shall be forty-five (45) days from the close of this sixty (60) day period, even for material in opposition to motions that have been filed earlier. Movants may file reply briefs within twenty (20) days after service of an opposition brief, and parties opposing a motion will have ten (10) days after service of a reply in which to serve a surreply brief (only if the party feels it beneficial to submit a surreply).

If any party believes that necessary discovery has not been completed by the July 30 deadline, that party can request, in writing, a short extension of the deadline, coupled with reasons why such an extension is viewed as necessary, on or before August 7, 1990. Parties opposing any such extension shall file a letter outlining such opposition not later than August 13, 1990. Because of the possibility of a request for an additional extension, the timetable enunciated in the prior paragraph will commence (i) no earlier than August 15, 1990 (if no extension is asked for or granted), and, (ii) if an extension is granted, from the date such extension ends. (So that the parties may plan accordingly, I should perhaps indicate that I am ill disposed to grant any extension that would run much beyond the end of August, or mid-September at the latest.) This action, of course, effectively grants

an additional fifteen day period for discovery; hence a party that needs an additional week or so to wrap up loose discovery ends after July 30th, need not submit any application for an extension.

Other than as specified herein, Litigation Management Order No. 1 remains in effect. In light of the modifications announced in this Litigation Management Order No. 2, I see no necessity at this point for a status conference, as suggested in the Schaeffer & Talbot letter of June 29, 1990, at page 8.

DATED: Charlottesville, VA
July 16, 1990

/s/ Thomas H. Jackson
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,
STATE OF TEXAS, *et al.*,
Plaintiff-Intervenors,

v.

STATE OF NEW YORK,
Defendant.]

STATUS HEARING BEFORE
THOMAS JACKSON
SPECIAL MASTER

June 2, 1993

1:00 P.M.

* * * *

[8] SPECIAL MASTER: At this stage it's not clear to me that adding in all other forty-nine (49) jurisdictions to that hunt changes the inquiry that New York's going to be undertaking. That is New York's going to want to parse through, and there may be an economic limit [9] to what New York's going to do, a particular transaction to discover whether or not the creditor in the case, is owner, or address known, that is . . .

MR. LYONS [COUNSEL FOR DELAWARE]: Uh huh.

SPECIAL MASTER: . . . the address can be found, and if so, try to prove it's in New York. That same process, it seems to me, will show the address to be unknowable.

MR. LYONS: Uh huh.

SPECIAL MASTER: Or in New York or in Pennsylvania, or in California, or in some other jurisdiction. And, it's not clear, to me at least at this stage, absent some effort to coordinate, that there's any incremental burden on Delaware, or anyone else, including non parties, at this point, to allow all the States to sort of piggyback on what New York's doing.

MR. LYONS: In terms of that narrow issue, and as Your Honor has put it, what you have, I think, is the possibility of delay. In other words I think there must be a very tight coordination as to that. I cannot say that that is beyond the Remand Order because the takings from the Delaware Brokers, under the Remand Order, clearly in Justice Thomas' Opinion, are open to Primary Rule assertions, both by New York and by the intervenors.

* * * *

[15] [MR. LYONS:] What we would ask for is that on the Primary Rule that this case be confined to the takings from the Delaware brokers. Which is what New York has prepared a defense for. A defense which we say is inadequate, but which at least they are indicating that they would like to proceed with. We would like to early

file a motion precluding that defense, but that's, I think, for another day. But that the issue should not go beyond what was taken from the Delaware brokers.

* * * *

[20] MR. FORTE [COUNSEL FOR NEW YORK]: May it please the Master, my name is Robert Forte, for the State of New York. With regard to Delaware's presentation, we do have one thing that we do share in common, and that is with regard to the scope of the Remand. New York is fully in agreement with Delaware, that that scope should not be extended to include any of the property that is held by DTC, or by banks that are chartered in New York, or in any other way incorporated in New York.

For purposes of the Primary Rule, the record is absolutely clear and uncontroverted, that this property is owner unknown and could not possib[ly] go under the Backup Rule, under the Primary Rule. Therefore I think this property is definitely out of the case, and to the extent that [] you might entertain any limiting motion with that regard, I think that would be appropriate.

* * * *

[64] [MR. LYONS:] Of course, all the intervenors' complaints seek all of the distributions that New York ever got, including the DTC, including the New York banks and the brokers. But, [65] they cannot sit here, or stand here, in whatever posture, and tell Your Honor, that those complaints were addressed to getting them under the Primary Rule. What they were addressed to was their theory that the issuer was the debtor, which of course would put everything into the pot, including the New York brokers, the New York DTC, and the New York banks.

So, we have no complaints on file, from the intervenors, that seek the relief that they are asking, however vaguely, before you today.

* * * *

[73] [MR. LYONS:] We believe that no State has, with the possible exception of Massachusetts, pleaded a complaint broadly enough to seek recovery under the Court's Backup Rule, the Rule that was reaffirmed by the Court. To be sure, the intervenors pleaded a recovery under the theories that they put forward which were their versions of the Backup Rule, but no one pleaded the current theory, the State of incorporation of the holder. And, the possibility of other States raising that claim in this proceeding is not touched upon in the part of Justice Thomas' opinion where he addresses what is going to happen going forward. So, we would say that it would unduly protract the proceedings and burden the proceeding to do that.

* * * *

[82] [MR. FORTE:] I would also want to state very briefly, that the suggestion that such a tracing process should be undertaken through a consortium of States, belies the fact that New York is the one that first proposed this. That New [83] York is the one that, whose auditors have the expertise in doing this, and that such a process is probably going to delay it, as well as burden the third parties that would be involved in the tracing.

SPECIAL MASTER: Would you propose to share your information with the other jurisdictions?

MR. FORTE: Definitely, and that there would obviously be oversight as to the results of the tracing process. But, that the tracing should be done by New York, and it will be done as expeditiously as possible, in the first phase of tracing. Thereafter, depending on the results of that tracing, there may be other, again, the elusive other proper mechanism that the Court has referred to, which may involve the funds that are not traced in the first round of tracings.

* * * *

APPENDIX C

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:

New York moved on July 7, 1993 for modification of Litigation Management Order No. 6 and for a protective order with respect to some aspects of the second set discovery demands of plaintiff Delaware. Supporting and opposition papers were filed by various parties through July 28, 1993. In the course of these filings, Delaware moved to compel discovery and for sanctions. Response by Plaintiff, State of Delaware, July 15, 1993. Intervening jurisdictions also sought various relief. See Motion of Plaintiff-Intervenor States of Alabama, et al., July 21, 1993; Reply of the States of Michigan, et al., July 21, 1993.

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. 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.

2. Delaware and various intervenor states argue for parallel tracks of discovery activity that, while perhaps proceeding apace, also clearly contemplate some priority given to preparations of one sort or another. The concept underlying LMO No. 6 was to further preparations on the remaining issues in a coordinated fashion, simultaneously, and without arbitrary prioritization. There was, perhaps, a *logical* (or *practical*) priority in that the log (on which more is said below) to be prepared first might well be expected to be the principal document on which backup rule claims would in fact be fashioned but it would, at best, only be the starting document on which the intermediaries selected for limited primary rule discovery might be determined.

Because this logical order is important, let me restate what I see it to be. The general thrust behind requiring preparation of the log is to provide the parties, in the first instance, with a document through which it is possible to come to some conclusions about claims they might have under the *backup* rule. It has been clear for some time that assertions under the *primary* rule are going to be much more time intensive and, indeed, uncertain enough in productivity terms, to require a limited testing device first—but one that could be started from the same base point as the inquiry under the backup rule.

The structure of LMO No. 6, then, was designed to get at the "easier" *backup* rule claims, to allow them to be tested, and then go after (if the parties still desired) the more individualized and complex primary rule claims. Indeed, this point was the reason underlying a request for the parties to help the Master think through whether, and

under what circumstances, some form of "interim" relief might be granted so that funds identified under the backup rule might find their custodially-appropriate home while the longer inquiry under the primary rule proceeded. But this was a predicted consequence of difficulties of proof, not a legal determination that discovery on one type of inquiry had priority over discovery on another type of inquiry. And there is a danger, at this stage, of having this simple point obscure an even simpler point: The log was to be the starting point for both paths of discovery. I do not think that LMO No. 6 was particularly ambiguous about this intent, and I wish here to make it clear.

In light of that, New York's apparent request (New York Motion, July 7, 1993, at p. 9) to hold up full discovery related to backup rule claims (i.e., the logs) until sampling directed at the primary rule was concluded has matters precisely backwards. (I put aside the problem that determination of which entities were to be the subject of that sampling was to come from examination of the logs that New York apparently seeks to postpone indefinitely.) Even if I were to conclude, "based on the sampling effort, that further primary rule discovery is legally or factually precluded," that would have no bearing on the discovery directed at the backup rule claims. Too, New York is incorrect in suggesting that the purpose of the log was to "accommodate primary rule discovery" (New York Opposition, July 23, 1993, at p.6), at least in anything but the most general way. While the log was to be the basis by which other parties determined whether they might have backup rule claims, LMO No. 6 was quite clear that it was *service* of that log that was to "commence" primary rule discovery; the logs thus precede that discovery (LMO No. 6, at p. 9). The relevance of the log to the primary rule discovery, at least as LMO No. 6 intended, was to be the basis from which the parties might, over the 15 days following its service, decide which inter-

mediary holders were the ones from whom that discovery should be sought.

Thus, New York's request for deferral of portions of the log preparation and other steps proceeds from a failure to accept the understanding that *both* primary and backup rule claims will be aided by initial cataloguing of payments as contemplated in the core disclosure obligation imposed upon New York. If (inexplicably) this was not clear in LMO No. 6, it is restated. It is not necessary to rule, at this point, on which (if any) of the many claims herein may be *determined* before others. At this stage, the goal is to advance preparations on the relevant theories in a logical and efficient basis.

B. Disclosure by New York

3. New York shall produce by August 9, 1993 those items it represented in its July 7, 1993 motion (and its reply papers served July 23, 1993 and July 28, 1993) could be produced by that date.

4. For the purpose of sample exploration of the feasibility of various forms of event reconstruction in connection with the primary rule, LMO No. 6 required more detailed disclosure with respect to two, two-month time periods (March and April, 1977 and 1987). New York correctly requests confirmation that the disclosure and study of transactions should focus on the securities transactions taking place during these discovery windows (not the abandoned property reports filed during these time frames). In accord with ¶ 1 above, the disclosure with respect to the sampling periods will not be limited to brokerage entities.

5. New York seeks protective relief from the requirement that it provide a core of disclosure information on custodial remittances it received from 1972 through 1985. See LMO No. 6, ¶ 4. The grounds for the motion are

that this disclosure cannot be accomplished in the contemplated time frame. See New York's motion, July 7, 1993, at p. 7.

This entire motion, at least as expressed in the earlier submissions by New York over the past month, seems to stem from a burden New York deems to have had imposed on it that makes no sense as a matter of interpreting either the language of LMO No. 6 or the obvious underlying purposes of the log, which was designed (a) to facilitate identification of intermediaries that other jurisdictions might claim as incorporated outside New York and (b) to provide a basis for deciding which intermediaries might be approached for sampling purposes in connection with primary rule discovery. These purposes called for a log, not 18 (or 39) boxes of undifferentiated, detailed, records.

New York's approach to its responsibilities under LMO No. 6 makes one sympathetic with the curmudgeonly view of the human condition espoused by H.L. Mencken or, perhaps, W.C. Fields. It waited until the final hours allotted for compliance with what should have been construed as relatively simple obligations, and then announced an onerous view of those obligations and the means for pursuing the identified ends that it—alone among the parties to this case—understood to be appropriate. Now, after the parties have expended energy responding, New York has clarified its intention to provide much of what was directed, self-limited in some respects and out of time. All this instead of seeking clarification at the front end, if New York genuinely thought there to be a serious ambiguity as to the scope of the required log.

LMO No. 6 required New York to prepare a log of remittances, containing only four categories of information: (i) an identification of the payor in whatever form the standard reports lodged with New York permit on their face (name, address, state of incorporation if listed on the unclaimed property report), (ii) the amount of

the remittance, (iii) the date [of the payment to New York], and (iv) any identification of the source of the unclaimed property indicated on the face of the filing (account or security name were suggested). LMO No. 6, at § 4. It was apparent from this—as well as the purposes of the log, which LMO No. 6 also discussed—that this was to be a summary log of information easily gleaned from the reports as maintained ("if listed" and "if . . . identified" being the approach required).

New York initially expressed its understanding of its obligations under LMO No. 6 in a fashion which gave the impression that it intended to proffer solely a production of records rather than to compile certain of the logs contemplated under LMO No. 6. Under Rule 33(c), F.R. Civ.P. (excusing the failure to provide a newly-created testimonial response by making available for inspection a pre-existing documentary record), such a transposition is within the prerogative of a party responding to interrogatories if certain conditions are met. However, neither that Rule nor other aspects of federal procedure permits New York to make this election unilaterally when confronted by an order requiring preparation of a log. New York's plan to produce dozens of cartons of paper defeats the purposes of the log, which I believe were as plain in LMO No. 6 as they should be now. If viewed as an exclusive form of response, New York's approach would be viable only if this process were neither appreciably slower than that contemplated in the subject order nor more burdensome. It appears that the document production approach suffers from both of these defects when compared to the log contemplated in LMO No. 6. Indeed, Delaware seems clearly correct in observing that New York creates the burdens of which it complains in proffering the extensive records production program it wishes to undertake, and then adumbrates those burdens with perceived "redaction" needs as to these documents.

But despite the pleas of undue burdens, matters may be further along than suggested from the perspective of the papers filed through the first two-thirds of July. In its reply papers (July 23, 1993; July 28, 1993), New York emphatically asserts that it is preparing both summary and detail logs of payments received, apparently in addition to its efforts to ready the underlying documentation for review as needed. It represents that it will be serving by August 9, 1993 summary sheets or logs with respect not only of Delaware brokers, but other brokers as well. July 23, 1993 Opposition, at p. 8. Copies of these logs shall be lodged with me and my deputy as well. This may or may not eliminate most of the fuss created by New York's July 7th motion. New York's papers in the present round of briefing are less than clear as to the projected contents of the summary logs, and I will not speculate about the adequacy of these summary logs in meeting the thrust of § 4 of LMO No. 6 until they have been produced and another party undertakes to demonstrate their inadequacy.

Because of some concern over the burdens of "source" identification, I should restate the requirements I seek in the production of the log. The log, as I conceived it and as the parties now seem to contemplate it, should be relatively brief: essentially one line for each remitter in each year (or other relevant time period). I had hoped further detail, available on the face of reports, might seamlessly be included—but it makes no sense to have the tail wag the dog. To the extent the parties have construed LMO No. 6 as *requiring* tens of thousands of entries (i.e., separate lines for each issuer giving rise to unclaimed funds in the hands of each remitter), this is not key to the examination at this stage. And to the extent this springs from a construction of the requirement in LMO No. 6 that there be an identification of the source of payments if apparent from the face of the relevant filings, I modify the requirements of the log production to make it clear that issuer identification is not *required* at this

stage. Again, without passing on the adequacy of what it is preparing until it is provided, the briefer (and appropriate) "remitter-as-source" log appears to be what New York is preparing under the nomenclature of a summary log or summary sheets.

I have indicated in ¶ 3 above that New York should proceed to serve the materials it has proposed on August 9, 1993. In light of the denial of modification in the scope of this action, as set forth in ¶ 1 above, I further direct that within 30 days from the date of the present order, New York shall serve a comparable summary log for the banking and depository institution remitters of funds (and for remittances by any brokers not comprehended in the logs to be served on August 9, 1993), for the period 1972 to date, complying with the concepts of § 4 of LMO No. 6 as restated in the present order.

6. Most of New York's argumentation is in support of the proposition that production of its underlying records, running to dozens of thousands of pages, is burdensome. Omitting discussion of how burdensome it indeed would be, the simple point is that such was not required anywhere in LMO No. 6. True, that order did in § 5 make provision for more in depth exploration of the payments made with respect to transactions in two, two-month test periods. New York appears to have realized that other parties' ability to seek discovery from non-parties with respect to selected payments arising from transactions in the study window may require more information than the summary log will contain. Preparation for exploration of facts with non-parties would benefit from an opportunity to review New York's records for leads and background information. No "detailed log" was directed in the order, however, and New York simply could have expected to make its records available for inspection by parties interested in pursuing specific payments. It may be that New York's decision to prepare a detailed recapitulation will prove useful (whether for

its own expected contests with Delaware or for the illumination of the claims of others is not clear), but it does not strike me ex ante that having undertaken this effort New York will insulate itself from the obligation to make the unrefined records available for inspection.[1] Nor does the self-defined undertaking of New York, and the grossly estimated time burdens it entails, excuse non-compliance with express obligations imposed upon it by LMO No. 6.

At the moment, Delaware's discovery requests, which include several document production categories, are the only disclosure obligations resting on New York which demand immediate production of records. Apart from minor protective order disputes resolved below, those discovery steps are nearing fruition.

For backup rule purposes, the identification of the intermediary holders is of central significance under the Court's recent decision, and no effort by New York to analyze its records (beyond assuring that they log accurately the name and location information with respect to the remitter itself) will be of assistance to the other parties.

For purposes of primary rule claims, I have not authorized discovery from non-parties outside of the limited program set forth in § 5 of LMO No. 6 and adverted to above. New York appears to have concluded that at least all payments by brokers will need to be litigated, hence its willingness to undertake a study of those records. Particularly since New York has previously expressed an intention to attempt reconstruction of at least some transactions in which Delaware incorporated brokerage concerns came to possess unclaimed funds, it may be that

[1] Rule 34 is not equipped with a form of transpositional authority comparable to that in Rule 33(c). That is, a party required to produce underlying records may not, absent a court order, *elect* to substitute a specially-created form of documentation instead. And, as indicated elsewhere in the text, a party under a direct order to make a specified form of disclosure makes unilateral decisions to substitute alternatives at its peril.

New York acknowledges the need for full exploration of brokerage-related records. Discussions between counsel for New York and counsel for other jurisdictions may have given rise to the conclusion that exploration of records pertaining to non-Delaware incorporated brokers is ineluctable.

New York's obligations to produce information (facts and documents) with respect to Delaware incorporated brokers stems from the pending discovery requests (enforced in substantial part in the present order). After completing all of the required logs, New York may elect to complete disclosure of records with respect to other brokerage institutions, and must do so if it intends to offer proof on future motions or hearings with respect to remittances from non-Delaware incorporated broker remitters of unclaimed property. On the other hand, New York may elect to pursue the hope it has espoused elsewhere in these papers, that upon completion of the presently required discovery steps, and exploration of the third-party issues under § 5 of LMO No. 6, I may find that further attempts to reconstruct or reconstrue older transactions do not merit further efforts. Indeed, it is possible in light of the oft-stated desire of other states to piggy-back on the examination of these issues, that after review of the initial summary log of all remittances, no state will request the opportunity to explore the underlying records with respect to transactions involving entities other than Delaware incorporated brokers.

7. The logs and other production shall reflect the records as they have been received and maintained by New York, and shall not be obscured by editing to restate amounts, alter listed states of incorporation, or "correct" other entries. Similarly, to the extent that production of underlying records is permitted, unilateral redactions changing entries will not be permitted. Corrections may be made in a fashion which clearly indicates what the original records reflected, and the nature of each purported alteration. This is not inconsistent with the repre-

sentation of New York that it "will provide the parties with the data as originally reported and the corrected data." Opposition of Defendant, July 28, 1993, at p. 8. Finally, any redactions thought necessary on privacy, privilege, or similar grounds will only be permitted in the event that the producing party first obtains a protective order recognizing the need for such redactions under applicable law, and upon a record permitting the court an in camera inspection of samples of the materials in original and proposed redacted form. If any such protective order motion is made, it shall be incumbent upon the movant to demonstrate why stipulations of confidentiality would not be sufficient to protect the affected interests, thus obviating the extensive burdens (on both disclosing and reviewing parties) of redaction.

8. Alabama et al. seek an order directing New York to comply with the intent of LMO No. 6, at p. 8, where I directed New York to supply all parties with an affidavit describing the nature and extent of the records it has available for the period 1972 to date. While the Griffin Affidavit annexed to New York's July 7, 1993 motion is not calculated to respond directly to that direction, I fail to see the utility in light of all of the subsequent papers that New York has filed in requiring an additional affidavit. If other parties think a brief deposition of Griffin is necessary, they may so advise me in an application for leave to undertake that form of discovery.[2]

9. To the extent that New York must prepare summary logs, it shall bear the cost of copying the logs for each of the other coordinating counsel. Where its disclosure obligations are to be satisfied by production of documents and records, New York's understanding of the

[2] I previously afforded New York the right to select the means by which Mr. Griffin could provide information on the nature and extent of the records. Since New York did not offer him for deposition, and did not file an affidavit setting forth a general description of the records universe, the right of election whether to undertake a deposition is now shifted to other interested parties.

allocation of copying charges (New York Motion, ¶22) is correct. To the extent that "detail logs" amount to excerpts from records, copying should be at the expense of the discovering parties, not New York.

10. In light of the nature of New York's records (See Griffin Aff., at ¶13), at least for the time being New York is relieved from the obligation of identifying each payee on refund claims; other means of pursuing the issue shall be explored by Delaware. I am not persuaded that no reconstruction of these refund transactions is required, only that ab initio some consideration should be given to alternative means of achieving that reconstruction. The fact that New York has the burden to establish such reductions in the initial sums received pursuant to unclaimed property reports does not, however, suggest that other parties are not entitled to discovery such that litigation on the issue is fully informed.

C. Pending Delaware Discovery Demands

11. New York requests an extension of time, until August 9, 1993, to respond to Interrogatories No. 4 and 11. That request is granted.

12. New York sought relief from Interrogatory No. 5 to the extent that it could be interpreted to require with respect to pre-1986 filings an accounting of subsequent refunds and other payments credited against the initial remittance of unclaimed funds. This effort, which can apparently be accomplished by computer for "the period 1986 forward" (New York Motion, p. 16 at n. 4), must be undertaken since it bears directly on the amounts of property at stake. Nor is there any reason why the updating and completion of disclosure entailed in responding to Interrogatory No. 5 should be dependent upon the other discovery steps presently underway.

13. Delaware's apparent request for an order compelling response to Interrogatory No. 18, which seeks to explore the background circumstances surrounding a

statement made by Governor Cuomo to the press on March 30, 1993, is denied. Information relevant to Delaware's claims can be pursued in many ways more directly calculated to illuminate the issues than this. Cf. F.R.Civ. P. 26(a) and (b). If pending document requests are not broad enough to capture any "estimates, summaries or requests" [or like documents] supplied to the Governor in advance of his statement, I will entertain the promulgation of a supplemental document production request so limited as to focus on the existence of items that can be produced.[3]

14. Delaware's request for an order directing New York to produce any "estimates, summaries and reports" of claims paid by New York (embodied in Document Requests 6 and 7) is granted. New York's burden objections are inapplicable here, and if any such materials exist they shall be produced within 30 days of the present order.

15. Delaware's request for sanctions in the present context (Response of Plaintiff, pp. 20-23) is denied. I would be remiss, however, not to caution New York, and indirectly other parties. Various movants have noted that New York waited until the due date for certain of its obligations under LMO No. 6 before serving papers seeking clarification, modification and protective relief with regard to those obligations. In the present circumstances I deny sanctions in large part because New York represents that it is proceeding with the initial steps of disclosure while seeking further direction from the master's office. New York's reading of the concepts of LMO No. 6 is materially flawed, however, and I should not fail to signal to all

[3] I would imagine that any documents supplied to the Governor in contemplation that they would be used in dealing with the press would thereby lose any work product or attorney-client privilege protections that might otherwise obtain. But that sort of issue must await a determination whether such items are requested in the first place, and withheld under claim of one of the protective doctrines in the second place. Then waiver issues might appropriately be evaluated.

parties that substantial compliance with express obligations, and good faith in pursuing the thrust of required preparations, will be enforced as needed in the period ahead.

I should also note, in passing, that I continue to find it somewhat ironic that New York contests, as unduly burdensome, the nature of preparing logs by which the jurisdictions can ascertain whether they have any cognizable claims under the backup rule, as the jurisdictions of incorporation of relevant debtors, while continuing to press what must be the unbelievably more complex nature of (presumably) examining each individual transaction to determine whether the last known address of a creditor can yet be ascertained. I again remind New York and other jurisdictions that the exercise under the primary rule should be one that gives some attention to whether it is a game that is worth the candle.

16. Finally, in light of the current motions and the resolutions in the present order, it is likely that the tight timetable set forth in LMO No. 6 will need to be modified in some respects, although with extra efforts perhaps that is not so. At this stage, however, I believe it appropriate for the parties to consult with each other, after New York has produced whatever it is planning to produce on August 9th, and discuss an appropriate timetable for the remainder of the matters discussed in LMO No. 6. If the parties can agree, I would like a summary of that agreement filed with me by August 20th. Failing agreement, I ask each party (or cluster of parties) to file with me a brief summary of its proposed timetable and reasons therefor by that date.

Dated: Charlottesville, Virginia
August 4, 1993

/s/ Thomas H. Jackson
THOMAS H. JACKSON
Special Master