No. 111 Original

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

STATE OF DELAWARE,
Plaintiff,
and
STATE OF TEXAS, *et al.*,
Intervening Plaintiffs,
v.
STATE OF NEW YORK,
Defendant.

On Bill of Complaint

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

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Having filed—with the Clerk of the Court—Amended Complaints that would grossly expand the scope of this action, the Intervening Plaintiffs now ask the Court to ignore its standards for determining whether to allow these amendments—and indeed affirmatively ask the Court *not* to evaluate whether the amendments should be allowed in exercise of the Court's " 'substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court.' " *Mississippi* v. *Louisiana,* 113 S. Ct. 549, 552 (1992) (quoting *Texas* v.

New Mexico, 462 U.S. 554, 570 (1983)). Instead, the Intervenors have raised a number of red herrings and side issues in an effort to divert the Court from confronting the *merits* of whether their Amended Complaints should be allowed. Thus, no Intervenor cites (let alone discusses) any case in which the Court has set out the standards for when it will permit amendment of a complaint in an original action, *see, e.g., Ohio* v. *Kentucky,* 410 U.S. 641, 644 (1973); *California* v. *Nevada,* 447 U.S. 125, 132-33 (1980), or otherwise permit the exercise of its original jurisdiction, *see, e.g., Mississippi* v. *Louisiana,* 113 S. Ct. at 552-53; *Massachusetts* v. *Missouri,* 308 U.S. 1, 18-19 (1939); *Alabama* v. *Arizona,* 291 U.S. 286, 291-92 (1934). *See* Delaware's Motion to Strike 25-31.[1]

I. THE INTERVENORS ARE ASSERTING NEW CLAIMS

A. *The Intervenors' Purported* In Rem *Action.*—The fundamental premise underlying the Intervenors' refusal to confront the Court's standard for the exercise of its original jurisdiction (which, by their silence, they effectively concede they cannot meet) is the notion that they have put in issue a *res,* as though this were an interpleader action (or a children's party where everyone gets a chance to swing at the piñata until it bursts and the contents are shared by all present).[2] The alleged *res* or "fund" is

[1] Instead of acknowledging the controlling law, the Intervenors mistakenly assert that they should not be subject to standards stricter than those governing parties in district court. Ala. Opp. 17-19; Mich. Opp. 17-20. The Alabama group even asserts that "[t]he Court has already exercised its original jurisdiction" and therefore need not evaluate, under the standards governing the exercise of original jurisdiction, whether to allow the amendments. Ala. Opp. 14. This Court held exactly the contrary in *Ohio* v. *Kentucky,* 410 U.S. at 644, which none of the Intervenors cite.

[2] The Intervenors therefore mistakenly state the case as presenting the question of "which States are entitled to escheat a particu-

every securities distribution that New York has ever taken from any securities intermediary—broker, bank or the DTC—as "owner unknown" property.

Throughout their papers, the Intervenors assert that a "fund" has been dragged into the Court, so that every entity that might think that it might have a claim is now entitled (indeed, has an "absolute fundamental right" in the Intervenors' words) to conduct discovery in the hope of coming up with a theory under which a claim on the "fund" might be made.[3] It is as if, having failed to prevail in a negligence action arising out of an auto accident, the plaintiff then tells the court that the defendant might conceivably have been doing something

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lar fund" (Ala. Opp. 2), erroneously arguing that "distributions seized by New York have been at issue in this action since early 1989" and "States have been claiming entitlement to the same fund" or "a portion of that fund" (Ala. Opp. 13).

[3] To support this frivolous theory, the Intervenors make flatly false statements about Delaware's supposed "concessions": the Alabama group claims that Delaware "concedes" that "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." Ala. Opp. 2-3, 12-13. And the Michigan group quotes our brief out of context, stating: "Delaware acknowledges that as of the date Texas was granted leave to intervene, 'the universe of unclaimed distributions in controversy' was enlarged to include all 'those taken by New York from all intermediaries.' " Mich. Opp. 2. The text of our Motion reveals that the Intervenors have created a "concession" where none was given. Delaware was making the opposite point of the one supposedly conceded. The text in question reads: "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. . . . [A] purpose of [Texas'] Complaint was to enlarge the universe of the unclaimed distributions in controversy . . . . [T]he scope of the case would have been greatly expanded had Texas' theory been accepted on the merits." Motion to Strike 4-5 (emphasis in original). The Texas theory was *not* accepted on the merits, so the universe of unclaimed distributions was *not* enlarged.

else wrong and that, since the defendant's bank account has been "put in issue" anyway, the plaintiff has an "absolute fundamental right" to examine the defendant's books and records to see if there might be a way he can force the defendant to disgorge some of the money in it to him.[4]

At the time of the original Complaints in Intervention, starting with the one lodged with the Court by Texas on January 7, 1989, the Intervenors never sought or obtained leave to file an action *in rem*. They sought leave to file complaints that sought *no* recovery under the primary rule and that sought backup-rule recovery *only* under the "issuer-as-debtor" or "equitable allocation" theories, which the Court rejected in its March 30, 1993,

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[4] Actually, there is almost *no* chance that any Intervenor will recover anything under the primary rule. The evidence in the record reveals that the phenomena that give rise to unclaimed property reported as "owner/address unknown" are all a result of institutional trading and activity, rather than *retail* activity. *See* Brief for Plaintiff, State of Delaware, in Response to Exceptions of Putative Intervenors and Defendant (filed July 27, 1992) at 18-19, 24-27. The natural consequence of that is that any last-known addresses that are identified will be of large institutions (or, conceivably, wealthy individuals). Such persons do not become "lost" in the way that, for example, small stockholders of record or persons who fail to cash checks or Western Union money orders do. *Compare Pennsylvania* v. *New York*, 407 U.S. 206, 208-09 (1972) (money orders); *Texas* v. *New Jersey*, 379 U.S. 674, 675-76 & n.4 (1965) (various small debts). The Intervenors acknowledged that any "discovery" of last-known addresses would not likely lead to recovery for them, but asserted that their efforts would not be wasted, because owners would be identified. Transcript of Hearing Before the Special Master at 42 (Mr. Nash, Alabama, *et al.*, counsel: "[T]he bottom line result of this tracing mechanism may well be that funds are not properly escheated under [either rule] . . . such a tracing indeed would return funds to actual owners of those funds . . . . [T]he States are not adverse to achieving that result."). This hardly rises to the level of an actual stake in the litigation consonant with the "case" or "controversy" requirement.

Opinion.[5] The Intervenors cannot claim that a *res* or "fund" has been put in issue: all that was put in issue was a set of claims that the Court found meritless.

B. *The Intervenors' Purported Claims under the Primary and Backup Rules.*—Besides advancing their *res* or "fund" theory, the Intervenors take historical liberties. They say that they have been making claims all along under the primary rule and under the backup rule, as traditionally construed—even though their original complaints were stone silent on this mode of recovery. Mich. Opp. 4-5; Ala. Opp. 7. Nothing could be further from the truth. *First,* no Intervenor has ever asserted a claim under the primary rule in the five years that this case has been pending. Thus, the Intervenors' failure to conduct (or request) so-called "transactional" discovery had nothing to do with any supposed "phased" approach to the case. *See* pp. 10-13, *infra.* They conducted no such discovery because they not only eschewed making any primary-rule claims, but also argued affirmatively that no such claims *could* be asserted by anyone. The Alabama subgroup told the Court that New York's theory was "a distortion of the primary rule," which the Master "correctly rejected." Brief for the Plaintiff-Intervenor States of Alabama, *et al.* (filed July 27, 1992) at 34-35. Similarly, the Texas subgroup advised the Court that it had shown "in detail" why the primary-rule theory put forward by New York is "factually insupportable." Reply Brief of the Plaintiff-Intervenor States of Texas, *et al.,* (filed July 27, 1992) at 42. Even the freewheeling Michigan group concluded that "the New York version of the primary rule [now purportedly adopted by all In-

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[5] Appended hereto, as examples, are the original Complaint in Intervention lodged by the private counsel representing the greatest number of states, the so-called Alabama group (App. A, 1a-6a) and the original Complaint in Intervention lodged by the private counsel now representing the Michigan group (App. B, 7a-13a).

tervenors other than Massachusetts] not only produces a result which is illogical and unequitable, it depends on factual assumptions for which there is no evidence in the record." Reply of the States of Michigan, *et al.* (filed July 27, 1992) at 35.[6] Nowhere do the Intervenors at-

[6] The Michigan group says that its theory of the case all along has had a "primary rule focus." Mich. Opp. 4. The language in its original complaint belies this assertion (App. B, ¶ 8 at 10a (claiming funds "received by holders who do not themselves have a claim to such funds *and to whom the beneficial owners, if any, are unknown*")), so the Michigan group quotes a series of *non sequiturs* from other papers as well. As presented to the Court in its Exceptions to the Master's Report, the Michigan group's theory was that the Court should scotch the old rules completely, decline to articulate new ones, and force the parties into a massive settlement conference along the lines of a mini-constitutional convention. Exceptions of the States of Michigan, *et al.* (filed May 26, 1992) at 10-24; *id.* at 3 (disclaiming any intention to trace "each individual item to a particular state"). This theory was so far off the charted territory that the Michigan group apparently feels that it can call it whatever it wishes, although the *Court* did not understand the Michigan group to be asking it to alter the primary rule. *Delaware* v. *New York,* slip op. at 7, 113 S. Ct. at 1556 ("[n]one of the parties contests the primary rule"). In no filing did any present or former member of the Michigan group ever tell the Master or the Court that it was entitled to recovery under the primary rule as traditionally understood in *Texas* and *Pennsylvania.* Whatever the Michigan group's theory might now be designated, it was a more radical mutant of the *Texas* rule than the other Intervenors' theory, was rejected by the Master (Rep. at 50-55), was not presented to the Court at oral argument, and was rejected by the Court without comment. Yet the Michigan group blithely asserts that its original complaint still has "continued viability"! Mich. Opp. 5. Finally, it is hard to know what the Michigan group means when its asserts (Mich. Opp. 9-10 & n.13) that its counsel made "pointed statements" to the Master in 1993 that discovery in the 1989-91 era of this case had "demonstrated the possibility of uncovering relevant last known addresses," since no page of the transcript is cited, and most of counsel's arguments were hard to follow rather than "pointed." If that were what discovery had in fact revealed, counsel should have shared that information with the Court on the briefing on the merits. *See Fusari* v. *Steinberg,* 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) ("This Court must rely on counsel to present issues fully and fairly . . . .").

tempt to explain how the primary-rule theory they now embrace differs in any respect from the "factually insupportable" theory that they condemned last Term. Certainly there is nothing in the Court's opinion that could support such a radical change in position: the Court expressed only skepticism on New York's factual theory. *Delaware* v. *New York,* slip op. at 15, 113 S. Ct. at 1561. Indeed, when the Master asked the Intervenors in May of this year to state a theory on which they might recover something under the primary rule, they demurred, asserting that it would be "purely speculative" to do so until *after* discovery had been conducted—a strategy that would not leave a plaintiff in district court for very long and should not be countenanced here.

Second, the Intervenors' position on the backup rule is just as bad. The only backup-rule claims that the Intervenors ever made in the first five years of this litigation were on their novel theory that the issuer, rather than the holder of the property and state-law debtor, was the "debtor" for purposes of this case—a theory that the Court rejected as impractical and inequitable. *Delaware* v. *New York,* slip op. at 14, 113 S. Ct. at 1560. Although the Intervenors tell the Court that "New York seized owner-unknown unclaimed securities distributions from intermediaries not incorporated in New York or Delaware," Ala. Opp. 19, 22, they do not advise the Court that discovery indicates that there are only five states that appear to have backup-rule claims (apart from Massachusetts, which we referred to in our Motion at pp. 10 n.10 and 15 n.17): in one of the five cases (Maryland) the cash claim is for only $5; in two others (New Jersey and Rhode Island) it is for less than $15,000; and in the remaining two (Connecticut and Ohio) it is for about $1.3 million and half a million dollars, respectively. These five claims do not appear to meet the *casus belli* test suggested by *Mississippi* v. *Louisiana,* 113 S. Ct. at 553.

In sum, the Intervenors have utterly failed to rebut our demonstration that the Amended Complaints grossly changed the dimensions of the case. Two efforts were to be made on remand: Delaware was to prove up the damages that it suffered on its claim that New York improperly took "owner/address unknown" property from Delaware-incorporated brokers (now shown by discovery to exceed $300 million); and the Master was to make findings of fact addressing whether New York could identify last-known addresses of "lost" state-law creditors of Delaware-incorporated brokers.[7] (As discussed in our Motion to Strike—without response from the Intervenors—a remand for specific findings of fact was necessary because the Master had made findings only on whether the *beneficial owners* of the underlying securities could be identified, and such owners might or might not be the state-law creditors, Motion to Strike 8 & n.7, 19.) If the Intervenors have their way, the remand will instead become a case in which every "owner/address unknown" item ever taken by New York—over a billion dollars worth—may be examined (through third-party discovery) to see whether there really is a name and a last-known address for the rightful owner on the books and records of the intermediaries, despite the holders' Reports filed with New York stating that there is not. Indeed, New York's Answers to the Amended Complaints—also filed with the *Court* pursuant to an "order" of the *Master*—seek to assert *counterclaims* to every "owner/address unknown" securities distribution ever taken by every single one of the Intervenors. These counterclaims simply track the sweeping and unfocused language of the claims asserted against New York. (A side-by-side comparison of the two claims is appended hereto as App. C at 14a.)

[7] *Delaware* v. *New York*, slip op. at 16, 113 S. Ct. at 1562 ("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.").

They are a logical extension of the Master's allowance of the Amended Complaints, in what is rapidly turning into a free-for-all in which the Master will apparently serve as a Federal Commissioner of Escheats, reviewing—if the Intervenors and the related New York counterclaims are permitted to continue—every item of unclaimed property ever taken by any State to see if it was properly taken.[8] To claim that what the Master has done here does not grossly expand the parameters of the case is fatuous.

II. THE MOTION SEEKS TO DISPOSE OF THE COMPLAINTS IN INTERVENTION ON THEIR MERITS; IT IS NOT ABOUT A "DISCOVERY DISPUTE"

Delaware, joined in relevant part by New York, has moved to strike the Amended Complaints and has asked the Court to direct the Master to prepare an appropriate decree dismissing the Complaints of the Intervenors. The issue presented by the Motion is thus whether the case should be grossly expanded by the Master, without authority from the Court, to include a vast new variety of claims not made in the first five years of the case. To be sure, discovery is underway on these broad issues, to the prejudice of Delaware.[9] But Delaware's demonstration

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[8] On August 27, 1993, the Master denied New York's request to conduct discovery on its counterclaims, "without prejudice to reapplication after the Supreme Court rules upon or refers to the [Master] the [present] motion." Scheduling & Discovery Order, ¶ 6 (August 27, 1993). It is plain that New York's Answer (and with it its Counterclaims) will fall if the Court grants our Motion to Strike.

[9] Even limiting their focus to the standards under Rule 15 of the Federal Rules of Civil Procedure, Intervenors simply ignore the prejudicial delay that their eleventh-hour *volte face* has caused to Delaware, whose crisply defined claim is being immersed in the free-for-all that the Intervenors wish to pursue. Where Delaware has been diligent in attempting to move the case forward, the Intervenors have been dilatory. Procedural dates that the Master originally contemplated have already been put back twice: the first

that the Intervenors' "participation" prejudices Delaware does not make the motion one about *discovery*. In addition, the prejudice to New York is obvious. It is confronted by a massive discovery program, with forty-eight jurisdictions making primary-rule claims that they had expressly disclaimed during the first five years of the case and backup-rule claims against it under a theory that all Intervenors except Massachusetts (which took no position on any issue in the case) argued against during those five years.

The Intervenors' assertion that Delaware is seeking this Court's intervention in a so-called "discovery dispute" simply cannot be squared with the substance of the motion: if granted, it will not result in a modification of a discovery order. It will result in the striking of the Intervenors' Amended Complaints or indeed the dismissal of the Intervenors' Complaints *in toto*.

The Intervenors attempt to obfuscate this simple fact by claiming repeatedly that in 1990 there was some sort of "bifurcation" of the issues, supposedly ordered by the Master in an interlocutory "litigation management order." However, the order (Litigation Management Order No. 2

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time at the request of New York, which asserted that it could not comply with the Master's schedule because of the burdensome participation of the Intervenors; the second time because the Intervenors themselves asked for massive extensions based on inchoate and unidentified problems they claimed they were likely to encounter in discovery. Thus, where all primary-rule discovery was to be completed within 105 days of the Master's Litigation Management Order No. 6 (set out in Delaware's Motion to Strike App. A, at 15a, 11a), that discovery will not be completed now until December 4, 1993, at the earliest—180 days after Litigation Management Order No. 6—and then only in the unlikely event that the Intervenors do not concoct additional grounds for delay. Scheduling & Discovery Order, ¶ 1 (August 27, 1993). Their attempt to "distinguish" (Ala. Opp. 18 n.20) the authority Delaware cited demonstrating the prejudice caused by the eleventh-hour addition of new claims requiring significant additional preparation (Motion to Strike 32-33 & n.35) is therefore unavailing.

("LMO No. 2")), which for some reason they append to their opposition to the motion to strike, alludes to no reservation of primary-rule claims by the Intervenors—quite obviously because they never made any primary-rule claims—or backup-rule claims under the traditional backup rule. Instead, the order puts to one side the *quantification* of the Intervenors' claims under the theory that they were asserting (which the Master recommended, but the Court rejected). Because recovery under the Intervenors' theory would have required detailed information regarding the location of innumerable issuers, discovery of those facts was postponed. In contrast, Delaware sought and received from New York discovery as to the amount that had been remitted up to then by Delaware-incorporated brokers.

If anyone has misstated the record in this regard (Ala. Opp. 11), it is the Intervenors. They ignore the history of the dispositive motions made against them. They do not acknowledge that New York submitted—to the Court—a motion for judgment on the pleadings against Texas (the only Intervenor whose Motion for Leave to File a Complaint in Intervention had been granted at that time), on May 26, 1989. Delaware filed a Statement supporting New York's motion on June 7, 1989. That Motion sought dismissal of the Texas Complaint on the merits for failure to state a claim on which relief could be granted, based on grounds ultimately adopted by the Court in its Opinion of March 30, 1993. The Court referred New York's motion to the Special Master on June 12, 1989. 490 U.S. 1104.

On October 30, 1990, the earliest date permitted by the Master, New York renewed its Motion for Judgment on the Pleadings against Texas (and against the other Intervenors). On the same date, Delaware also moved before the Master for judgment on the pleadings and summary judgment dismissing the complaints of all states intervening in the action. By these motions, Delaware

and New York put the Intervenors on notice that they sought to end the Intervenors' involvement in the litigation, because their entire theory of the case was meritless (as the Court ultimately agreed). The Intervenors responded in kind, seeking dismissal of Delaware's Complaint, rejection of New York's defenses, and judgment, as a matter of law. As one group of intervenors stated in support of their "dispositive motion" for judgment on the pleadings, only the quantification of their claim was to be "reserved for later proceedings." Brief in Support of Motion of the States of Arizona, *et al.* [including Texas], for Judgment on the Pleadings 5 & n.2 (Oct. 30, 1990).[10]

The Intervenors completely ignore this history when they discuss the "phases" of the litigation as contemplated by their own motions to the Master. Ala. Opp. 3-4 & n.2; Mich. Opp. 5-7. They also fail to acknowledge that the Master contemplated additional proceedings on remand *only* because he adopted the Intervenors' theory of the case, which was rejected by the Court. Their recitals (Mich. Opp. 6-7) of what the Master intended to do following remand (if their theory of the case had been adopted) therefore could not be more irrelevant and misleading. The so-called "bifurcation" would only have been required if the Master *and* the Court had adopted the Intervenors' issuer-as-debtor theory of the case or the Michigan group's "equitable allocation" proposal. As events transpired, the Court rejected these innovations and adhered to its longstanding rules. It thus adopted Delaware's and New York's theory of the case; therefore, no more proceedings are required to dispose of the Intervenors' Complaints.

The Intervenors were well aware of the relief sought by Delaware and New York, and never suggested in the first five years of the case that they should be entitled to pur-

[10] No Intervenor objected that it should be permitted to pursue recovery under the traditional backup or primary rule.

sue new and expanded modes of recovery if the motions for judgment on the pleadings and summary judgment filed by Delaware and New York were granted. And until June 8, 1993, when he directed the Intervenors to file Amended Complaints, the Master never suggested that additional proceedings would be conducted on the Intervenors' Complaints if the Court *rejected* the Intervenors' theories. Indeed, his Report simply did not anticipate that eventuality at all.[11] Now that it has happened, the proper course is to dismiss the Complaints in Intervention.

As the Court explained in *Ohio* v. *Kentucky,* 410 U.S. at 644, "[o]ur object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." Here, as in *Ohio* v. *Kentucky,* the only "controversy presented" by the Intervenors' Complaints was disposed of as a matter of law. Now, having lost, the Intervenors seek, by amending their complaints, to reap the benefit of a fresh exercise of the original jurisdiction. This is not a case of conforming the pleadings to the evidence; it is, as counsel for the Intervenors put it, a "new beginning." *See* Motion to Strike 25. The Intervenors' "new beginning" is premised on a primary-rule theory they have not articulated, but that appears to be indistinguishable from New York's; of course, they attacked New York's theory relentlessly, in briefs before the Master and on the merits filed with this

[11] He does appear to have acknowledged this possibility in LMO No. 2, noting that a grant of Delaware's and New York's motions could leave the case as having only "two parties." LMO No. 2, App. to Ala. Opp. 3a. Regrettably, the Master never made an express recommendation on New York's Motion for Judgment on the Pleadings, which had been referred to him for recommendation. It is clear from his Report that his recommendation would have been that the motion be denied; if he had done so, an exception would have then been in order, and the motion would have been squarely before the Court.

Court, from the beginning of the case to 1992. The "new beginning" is also premised on a backup-rule theory that only a handful appear to have an actual stake in, even if we consider $5 claims sufficient. They have offered no evidence that they meet the standards for the exercise of the Court's original jurisdiction.

III. THE MOTION TO STRIKE IS PROPERLY DIRECTED TO THE COURT, NOT THE MASTER

In their desperation to avoid the merits of whether the Court should allow the amendments, the Intervenors grossly misrepresent what the Master has done, saying that "he has not yet reported to this Court his recommendations as to how the Court should treat [the Amended Complaints]." Ala. Opp. 10. That is astonishing. A review of the record on this point reveals the following. As soon as the Intervenors' time to petition the Court for rehearing of its March 30, 1993, Opinion had expired, Delaware requested, by motion directed to the Master, a Status Conference and Scheduling Order. Motion for Scheduling of Status Conference and for Entry of a Scheduling Order (April 27, 1993). The Master ordered any party claiming the right to assert primary-rule claims to set forth in writing the "nature and mechanics" by which it proposed to make the proof required of it. Scheduling Order, ¶ 3 (May 11, 1993). The Intervenors requested a delay in the proceedings,[12] and, when delay was not forthcoming, told the Master that it would be "purely speculative" for them to set forth a concrete theory of recovery under the primary rule.[13] In response to the surprising news that the Intervenors were planning a massive discovery campaign to see whether they might develop a

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[12] Motion for Extension of Time (May 24, 1993).

[13] Response of Alabama, *et al.*, to Scheduling Order at 2 (May 26, 1993). See the Intervenors' statements of their desire to explore matters, to see what might turn up, quoted in note 11, at pages 10-11, of our Motion to Strike.

theory under which they could assert primary-rule claims, Delaware pointed out to the Master that the Intervenors never sought such relief from the Court before, and that allowing them to amend their complaints to seek it now would be inappropriate.[14]

The Master disagreed. In Litigation Management Order No. 6 ("LMO No. 6"), he rejected Delaware's argument on this point in no uncertain terms. *See* Appendix to Motion to Strike at 8a-11a. On June 8, 1993, he decided that "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." LMO No. 6, Appendix to Motion to Strike at 11a. When Massachusetts filed, with the Master, an Amended Complaint, the Master wrote to Counsel for that State directing her to file any amended pleadings with the *Court*:

> I have received the amended complaint that you enclosed with your letter of June 29th. Since the action is an original action pending in the Supreme Court of the United States, I believe it is necessary and appropriate to file the amended complaint with the Clerk's office at the Supreme Court.

Letter from Thomas H. Jackson, Esq. to Pasqua Scibelli, Esq. (July 1, 1993) (appended hereto as App. D at 15a). The Master could not have stated his view more clearly that pleadings were to be filed in this Court.[15]

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[14] Response of Plaintiff, State of Delaware, to Scheduling Proposals of Defendant and Intervenors at 17-19 (June 1, 1993).

[15] Although the Alabama group effectively concedes that the Master has no authority to have done so, the Michigan group asserts that the Master "did not exceed his authority." Mich. Opp. 20-21. It cites a passage from *Moore's Federal Practice* for the proposition that "the master should be able to allow amendments to the pleadings . . . *whenever such an amendment would be clearly allowed by the court as a matter of course.*" Mich. Opp. 20 (quoting 5A J. William Moore, *et al., Moore's Federal Practice* ¶ 53.06 at 53-

Thus, there is no foundation in the record of this case for the Intervenors' unsupported statement that "the Master clearly understood that the filing of the amended complaints was subject to this Court's approval after he filed an appropriate Report." Ala. Opp. 6 n.6.

In light of the Master's orders and other indications of his views on the subject (Motion to Strike App. 8a-11a, 33a-34a; App. hereto 15a), the only conclusion possible is the opposite one. The Master did not simply indicate that he will, in time, make a recommendation to the Court, and he did not simply direct that proposed amended complaints be lodged with him for the time being. Therefore, the Intervenors' suggestion (Ala. Opp. 11) that the Court "refer[] [Delaware's Motion to Strike] to the Special Master for a recommended decision" is particularly sophistic: the Master has made an unequivocal instruction that Amended Complaints be filed *with the Court,* and six Amended Complaints and six Answers with Counterclaims, all seeking to put in issue a host of new controversies,

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81 (2d ed. 1993) (emphasis supplied)). The treatise, which of course is addressing district-court cases, itself cites no authority for this proposition, instead relying on the liberal standards of Rule 15 itself, which have no application in original jurisdiction cases. *Ohio* v. *Kentucky,* 410 U.S. at 644. In any event, it is beyond cavil that the motion in this case would not "be clearly allowed by the Court as a matter of course." The Michigan group's assertion that allowing the amendment of a complaint is merely a "routine order" is inconsistent with this Court's jurisprudence on the subject, which is, in fact, uncited and undiscussed in the Michigan Opposition or that of any other Intervenor.

The Michigan group's first argument as to why the Court should ignore the merits and allow the Amended Complaints to stand is even more specious: the Michigan group asserts (Mich. Opp. 12-14) that the motion was "untimely" under Rules 12 and 15 of the Federal Rules of Civil Procedure. As even Michigan concedes, the Master's "due dates" have been followed rather than the time limits in the Federal Rules of Civil Procedure. Here, a response to the Amended Complaints was due on August 9, 1993 (LMO No. 6, App. to Motion to Strike 11a; S. Ct. R. 30.1), the date on which Delaware filed its Motion to Strike.

have already been filed with the Court at the Master's direction. A recommendation at this point would be superfluous.[16] We all know what the Master wants to do, and the Intervenors have taken action based on it. A reference to the Master would present the Court with a *fait accompli* of a grossly expanded case, after completion of (perhaps years of) discovery.[17]

Simply put, the Intervenors' misunderstand the nature of the Court's control over its docket: the Master is not the functional equivalent of a district court. He is not "free to proceed with the case so long as nothing is done that is contrary to the decision or in violation of any mandate." Mich. Opp. 14. (Indeed, there is no "mandate," only a remand order, the text of which the Inter-

[16] We do not understand how the Michigan group can assert that we have "suggested" that the Court "refer [the amended complaints for] resolution to the Master." Mich. Opp. 22. We suggested no such thing. We requested that the Amended Complaints be stricken and that the Master be directed to prepare a decree dismissing the Complaints in Intervention.

[17] Although the Intervenors protest that they do not really seek years of delay, their argument to this effect rests on the presumption that the Master will, at some point, cut off their claims. Ala. Opp. 21. It is odd indeed for a plaintiff to assert that a test-run of its proof will not prejudice others because the test might lead to the denial of the relief the plaintiff seeks. The Intervenors are also incorrect when they assert that Delaware's backup-rule recovery must await their "testing" on the primary rule. If this were correct, no state would ever be entitled to hold moneys under the backup rule. Of course, one would have thought that, if the Intervenors were serious about recovery under the backup rule, they would not be attempting to block recovery under it. Indeed, when the Master suggested that it might be appropriate to grant relief on all backup-rule claims pending resolution of the primary-rule claims, the Intervenors objected vigorously. Their strategy seems to be, at every turn, to gum up the litigation for private purposes not related to the proof of their claims in the litigation; certainly they have given the Court and the Master no indication that the process they envision might lead to relevant evidence. This behavior should not be permitted. *See* Motion to Strike 29 & n.33.

venors refuse to evaluate.) The Court, not the Master, controls the scope of the disputes that are to be taken under its original jurisdiction. Motion to Strike 16-19. In contrast, cases in district court are not directly supervised by the Supreme Court or the Courts of Appeals, but instead take place within the broad confines of rules promulgated by the Court in accordance with the various Rules Enabling Acts and the powers of the district courts to control their dockets. There is no concomitant power of a Special Master appointed by the Supreme Court to permit the expansion of original-jurisdiction proceedings simply because the Court has not given him a direct order *not* to do so.

The general proposition that "actions that simply implement the relief a decision affords to the parties in the case are not inconsistent with a general remand direction" (Mich. Opp. 14) is of no help to the Intervenors, for the Court *denied* every material item of relief they sought. The only action that could "implement" that decision would be the "preparation of an appropriate decree" dismissing their complaints. *See Southern Pac. Transp. Co.* v. *San Antonio*, 748 F.2d 266, 270-71, 273 (5th Cir. 1984) (district court's stay of judgment granting relief ordered by Supreme Court undermined the Court's judgment and therefore constituted an abuse of discretion, warranting *mandamus*). That is the relief we have prayed for.

* * * *

The Intervenors have run away from the merits of our motion. They purport to be plaintiffs, but they are not behaving as plaintiffs behave. They have asked the Court *not* to decide whether they should be permitted to participate in a grossly expanded litigation before identifying any prospect of recovery. That request rests on a gross distortion of what the Master has done. He has permitted the Intervenors to file Complaints with this Court making claims they never made before and indeed fought against for five years. With the exception of

Massachusetts, they have made no showing that a substantial amount of money can be awarded to them or that a question of national importance should be resolved by the Court. Indeed, on the primary-rule claims, they have presented no theory of recovery at all, and instead have induced the Master to use the Court's process for a "testing" period as a prelude to *possibly* going forward; they have utterly refused to identify any way in which the theory they now purport to need discovery on differs from the theory they told the Court was factually unsupportable.

CONCLUSION

For the foregoing reasons, and the reasons stated in Delaware's Motion to Strike and New York's joinder in Delaware's Motion to Strike, the Motion should be granted.

Respectfully submitted,

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September 1993

APPENDICES

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF ALABAMA,
HAWAII, ILLINOIS, INDIANA,
KANSAS, LOUISIANA, MONTANA,
NEVADA, OKLAHOMA, SOUTH DAKOTA,
UTAH AND WASHINGTON, AND COMMONWEALTHS OF
KENTUCKY AND PENNSYLVANIA,
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

The States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania, Plaintiffs in Intervention, by

and through their Attorneys General and counsel, file this Complaint in Intervention and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firm and non-brokerage firm intermediaries.

III. INTEREST AND CLAIM OF PLAINTIFFS IN INTERVENTION

4. Plaintiffs in Intervention are the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania ("States").

5. The States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Excess Receipts," as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (regardless of where incorporated). Excess Receipts are Distributions received by these brokerage firms for the benefit of the entities or individuals who possess the economic rights to the securities, including the entitlement to Distributions ("Beneficial Owners"), but which do not reach the Beneficial Owners. Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time they generally are demanded by and are remitted to New York.

(b) "Additional Excess Receipts" consist of (i) Distributions presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as banks and clearinghouses for the settlement of trades in securities; and (ii) Distributions consisting of unclaimed principal and interest payments on state and municipal obligations. Additional Excess Receipts come into being in the same manner as Excess Receipts.

6. The Excess Receipts and Additional Excess Receipts (collectively "Funds") claimed herein constitute unclaimed property which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities ("Issuer") do not reach the Beneficial Owner. Intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, act on behalf of the Issuer and the Beneficial Owner with respect to Distributions.

7. If the identity of the Beneficial Owner is unknown, Distributions by corporations ("Corporate Issuers") and state and local governmental entities ("Government Issuers") that are unclaimed should be remitted to the state in which the Corporate Issuer is incorporated, or to the state of the Government Issuer, pursuant to each such

state's unclaimed property statute. Each State claims such Distributions by Corporate Issuers incorporated within that State and by Government Issuers of that State.

8. Upon information and belief, portions of the Funds presently being remitted to New York are being commingled with the general funds of New York, are being expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners.

PRAYER FOR RELIEF

WHEREFORE, the States pray:

1. That New York be restrained and enjoined from expending any Funds collected but presently unspent, and any Funds it may collect in the future, until such time as this controversy is resolved, and that all such Funds be kept in a segregated account;

2. That judgment be entered declaring 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;

3. That New York be directed to pay or deliver to each of the States all Funds it has received and may receive, where the Beneficial Owners of the Funds are unknown, that are attributable to Corporate Issuers incorporated in each such State and to Government Issuers of each such State, which presently are deemed abandoned pursuant to the applicable dormancy period under each such State's unclaimed property statute;

4. That New York be directed to pay or deliver to each of the States all remaining Funds it has received and may receive, where the Beneficial Owners of the Funds

are unknown, that are attributable to Corporate Issuers incorporated in each such State and to Government Issuers of each such State, as such Funds become abandoned pursuant to the applicable dormancy period under such State's unclaimed property statute; and

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

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April 21, 1989

APPENDIX B

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF CALIFORNIA, MICHIGAN,
NEBRASKA, OHIO, AND RHODE ISLAND,
Plaintiffs in Intervention.

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND

The states of California, Michigan, Nebraska, Ohio, and Rhode Island, Plaintiffs in Intervention, by and through their Attorneys General, file this Complaint in Intervention through which they seek a judgment that New York pay to Plaintiffs in Intervention all Excess Receipts and Additional Excess Receipts attributable to commercial activities in their respective states, and that New York be enjoined from interfering with their right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts, and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property (the "Excess Receipts") held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

4. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for leave to File Complaint in Intervention. The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firm and non-brokerage firm intermediaries (the "Additional Excess Receipts").

5. Shortly thereafter, numerous other jurisdictions filed motions to intervene and on September 13, 1989, the Special Master filed with the Court the Report of the Special Master on Motions to Intervene in which he recommends that the various motions to intervene be granted.[1]

[1] The Special Master recommended that the intervention motions of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah, Washington, Kentucky, Pennsylvania, the District of Columbia, Idaho, New Mexico, Tennessee, Virginia and Wisconsin be granted. On October 16, 1989 the Court ordered the Special Master's September 13, 1989 Report to be filed.

III. INTEREST AND CLAIMS OF PLAINTIFFS IN INTERVENTION

6. Plaintiffs in Intervention are the States of California, Michigan, Nebraska, Ohio, and Rhode Island (the "Designated States").

7. The Designated States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Excess Receipts" (collectively, "Unclaimed Funds") as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of certain unclaimed payments[2] of dividends, profits, principal, interest, and securities[3] representing any of the foregoing (collectively "Distributions"), held or formely held by brokerage firms (regardless of where incorporated). Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the New York dormancy period, after which time they generally are demanded by and are remitted to New York without any determination by such firms that New York is the state of the last known address of the beneficial owner, resulting in an allocation among the states which is not in proportion to the commercial activities which gave rise to the unclaimed payments.

(b) "Additional Excess Receipts" consist of Distributions as described in (a) except that they (1) are presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as banks and clearinghouses for the settlement of trades in securities, or (2) are unclaimed principal and interest payments

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[2] Including, but not limited to, reorganization, redemption, and maturity payments.

[3] The term "security" is defined as it is in the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10).

on state and municipal obligations not otherwise included in (a) that are held either by brokerage or nonbrokerage intermediaries.

8. The Unclaimed Funds claimed herein consist of unclaimed property (under each of the Designated States' relevant unclaimed property law) which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities giving rise to the Distributions, are received by holders who do not themselves have a claim to such funds and to whom the beneficial owners, if any, are unknown. Such holders are intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, which do not act on their own behalf, but receive, hold, and/or remit distributions on behalf of, or for the benefit of, others who have or have had an interest in the underlying security.

9. Each Designated State claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount"). Such allocations are administratively feasible because relevant books and records are maintained in a form from which the pertinent information is readily ascertainable.

10. The Designated States assert their claims pursuant to their respective unclaimed property laws which provide for the escheat of abandoned or unclaimed tangible and intangible personal property when the owner of the property cannot be found by the holder of the property, and no claim to the property has been made within the applicable dormancy period.[4]

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[4] See, California Code of Civil Procedure §§ 1500-1582; Michigan Code of Escheats, Act No. 329 of the Public Acts of 1947, as

11. Upon information and belief, portions of the Unclaimed Funds presently being remitted to New York are being commingled with the general funds of New York, are being expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners or by other states with superior claims to the funds.

PRAYER FOR RELIEF

WHEREFORE, the Designated States pray:

1. That New York be restrained and enjoined from demanding or collecting such Unclaimed Funds, and from expending any such sums collected, but presently unencumbered and unspent, which are attributable to Unclaimed Funds being claimed by the Designated States through this action, and that all such Unclaimed Funds be segregated and turned over to the custody of the Special Master until such time as this controversy is resolved;

2. That judgment be entered declaring that, in the circumstances described herein, if the addresses of the beneficial owners are unknown, the Allocated Amount of Unclaimed Funds held by brokerage firms and other intermediaries attributable to corporate and governmental issuers is subject to the claim of each state where the commercial activities occurred which gave rise to the Unclaimed Funds;

3. That computation of an Allocated Amount in accordance with such judgment be deemed for all purposes as, and be accepted as satisfying any state demands for, a report or allocation in accordance with the last known address of the person entitled to such property on the books and records of the holder;

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amended, Michigan Compiled Laws, §567.1 *et seq.*; Nebraska Revised Statutes, § 69-1301 *et seq.* (Reissue 1986); Ohio, Rev. Code Ann. § 169.01 *et seq.*; Rhode Island, Gen. Laws, § 33-21-11, *et seq.*

4. That New York be directed to account for, and pay or deliver to each of the Designated States, the respective Allocated Amounts of all Unclaimed Funds it has received and may receive, where the addresses of the beneficial owners of the Unclaimed Funds are unknown, and the Funds are deemed abandoned pursuant to the applicable dormancy period under each such Designated State's unclaimed property law;

5. That a reasonable fund be created from Unclaimed Funds presently being held by New York to cover the compensation of the Special Master, his technical, stenographic, and clerical assistants, the cost of printing his reports to this Court, the retention of experts to advise the Special Master as he deems necessary and appropriate and for all other proper expenses. Such funds may be credited against any interest adjudged owing with respect to such Unclaimed Funds.

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

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APPENDIX C

Claims of Alabama, et al. from Amended Complaint filed July 7, 1993

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 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.

Counterclaims of New York from Answer to Amended Complaint filed August 9, 1993

16. New York claims entitlement to the custodial possession of Distributions wrongfully taken by Alabama, *et al.* which are owed to creditors whose last known addresses on the debtor intermediaries' books and records are in New York.

17. New York claims entitlement to the custodial possession of Distributions wrongfully taken by Alabama, *et al.* from debtor intermediaries incorporated in New York when the creditors' last known addresses are not shown by the debtor intermediaries' books and records.

18. New York claims entitlement to the custodial possession of Distributions wrongfully taken by Alabama, *et al.* from debtor intermediaries whose principal places of business are in New York when the debtor intermediaries' books and records do not show the creditors' last known addresses and the debtor intermediaries are not incorporated in any State.

19. New York claims entitlement to the custodial possession of Distributions wrongfully taken by Alabama, *et al.* and owed to New York pursuant to any ruling, principle or determination announced or to be announced by the Court.

APPENDIX D

[SEAL]

UNIVERSITY OF VIRGINIA
Office of the Vice President and Provost
Charlottesville, Virginia 22906

July 1, 1993

Pasqua Scibelli, Esq.
Assistant Attorney General
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Re: Delaware v. New York, No. 111 Original

Dear Ms. Scibelli:

I have received the amended complaint that you enclosed with your letter of June 29th. Since the action is an original action pending in the Supreme Court of the United States, I believe it is necessary and appropriate to file the amended complaint with the clerk's office at the Supreme Court.

Sincerely yours,

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

cc: Counsel of Record