No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS, et al.,

Intervening Plaintiffs,

vs.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE COUNTERCLAIMS

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The defendant State of New York, by its Attorney General Robert Abrams, hereby respectfully moves for leave to file counterclaims in its answers to the amended complaints in intervention.[1] This Court, by order entered October 4, 1993,

[1] The amended complaints in intervention consist of:

(1) Amended Complaint in Intervention of the Plaintiff-Intervenor States of Texas, Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, Oregon, South Carolina, Tennessee, Wisconsin, and the Commonwealth of Virginia (July 7, 1993); (2) Amended Complaint in Intervention of the States of Alabama,

(Footnote continued)

inter alia, referred the answers of New York to the Special Master but *sua sponte* struck the counterclaims pleaded in the answers "without prejudice to move for leave to file such counterclaims in this Court." New York's proposed counterclaims are the following:

> New York claims entitlement to the custodial possession of Distributions wrongfully taken by [intervening plaintiff(s)] which are owed to creditors whose last known addresses on the debtor intermediaries' books and records are in New York.
>
> New York claims entitlement to the custodial possession of Distributions wrongfully taken by [intervening plaintiff(s)] from debtor intermediaries incorporated in New York when the creditors' last known addresses are not shown by the debtor intermediaries' books and records.
>
> New York claims entitlement to the custodial possession of Distributions wrongfully taken by [intervening plaintiff(s)] 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.
>
> New York claims entitlement to the custodial possession of Distributions wrongfully taken by [intervening plaintiff(s)] and owed to New York pursuant to any ruling, principle or determination announced or to be announced by the Court.

Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming, and the Commonwealths of Kentucky and Pennsylvania (July 7, 1993); (3) Amended Complaint in Intervention of the State of California (July 9, 1993); (4) Amended Complaint by the District of Columbia (July 8, 1993); (5) Amended Complaint of the States of Michigan, Maryland and Nebraska (July 8, 1993); and (6) Commonwealth of Massachusetts' First Amended Complaint (July 1, 1993).

New York seeks leave to plead these counterclaims in each of its answers to the amended complaints in intervention.[2] New York's motion for leave should be granted because its counterclaims: (1) are pleaded in response to new claims by the intervening plaintiffs raised for the first time in their amended complaints in intervention; (2) neither prejudice the intervening plaintiffs nor burden the Court since the counterclaims raise no new legal issues and require no discovery beyond an accounting of the unclaimed securities distributions which the intervenors have escheated in violation of New York's rights under the Court's escheat precedents; and (3) are warranted in the interests of justice and judicial economy.

1. This is a case of original jurisdiction brought by the State of Delaware against the State of New York. The Court granted Delaware leave to file its complaint on May 31, 1988. 486 U.S. 1030. The Court appointed Thomas H. Jackson as Special Master in an order dated December 12, 1988. 488 U.S. 990.

2. In its complaint, Delaware disputed New York's right to take custodial possession of unclaimed dividend and interest overpayments on stocks and bonds paid by the issuers of the underlying securities (or their agents) to brokerage firms trading in New York but incorporated in Delaware.

3. The State of Texas moved for leave to file a complaint as a plaintiff-intervenor, which the Court granted on February 21, 1989. 489 U.S. 1005. Texas asserted a competing claim to the property sought by Delaware whenever the issuers of the underlying securities were domiciled in Texas, and laid claim to other property taken by New York — unclaimed securities distributions paid by Texas-incorporated issuers and Texas municipalities to New York-domiciled banking institutions,

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[2] Annexed to this motion are New York's proposed counterclaims as they would appear in the answer to the amended complaint in intervention of the States of Texas, et al. Each of New York's answers to the amended complaints of the other intervening plaintiffs would contain identical counterclaims as against those intervenors.

including The Depository Trust Company (DTC), a securities depository incorporated under the New York Banking Law.[3]

4. On November 16, 1989, other jurisdictions — the States of California, Michigan, Ohio, and Rhode Island (subsequently joined by the District of Columbia) — moved for leave to intervene to assert a claim to a portion of the unclaimed securities distributions remitted to New York by New York debtor brokers and banks, and DTC. These jurisdictions articulated a "commercial activities" theory which accorded the right to take custody of (or escheat) the property to the presumed domiciles of the beneficial owners of the underlying securities.

5. All other States moved for leave to file complaints in intervention and, with the exception of the Commonwealth of Massachusetts, adopted the intervention theories of the State of Texas. Massachusetts merely asserted that it was "entitled to share in any remedy fashioned by the Supreme Court in this case." Motion of the Commonwealth of Massachusetts for Leave to File Complaint in Intervention and Complaint in Intervention, dated March 31, 1992, at 14.

6. New York answered Delaware's complaint on July 27, 1988. It lodged an answer to the Texas complaint in intervention on April 21, 1989, and to Texas' amended complaint on November 17, 1989. Also on November 17, 1989, New York answered the complaint of various States led by the State of Alabama, which was modeled on the Texas pleading. Finally, on July 20, 1990, New York interposed an answer to the complaints in intervention of the States advocating the commercial activities theory.

7. On January 28, 1992, the Special Master issued a Report recommending that the right to escheat the funds at issue be awarded to the State in which the principal executive offices of the securities issuer are located, unless a State could establish

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[3] Texas' claims for the property remitted to New York by New York banking institutions were set forth in an amended complaint in intervention lodged in October 1989.

a superior right to the property as the jurisdiction of the beneficial owner's last known address on the books and records of the intermediary broker, bank or securities depository. Thus, the Master adopted the principal theories of the Texas complaint. Exceptions to the Report were lodged by New York,[4] Delaware, and the jurisdictions advocating the commercial activities theory.

8. This Court rendered its opinion on March 30, 1993, sustaining two of Delaware's exceptions in their entirety and one in part and one of New York's exceptions, granting all pending motions to intervene, and remanding for further proceedings before the Special Master. *Delaware v. New York*, 113 S. Ct. 1550. Adhering to the creditor (primary) and debtor (secondary) rules announced in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), the Court held that under the secondary rule, the "debtor" is the intermediary with the contractual duty to transmit distributions to the beneficial owner, and that the State in which the debtor intermediary is incorporated has the right to escheat funds belonging to creditors who cannot be identified or located. *Id.*, at 1559. Accordingly, the Court rejected the Texas theory in intervention (also advocated as a fallback position by the proponents of the commercial activities theory) that the debtor is the securities issuer after the issuer has discharged its liabilities to the beneficial owner by payment to a record owner.

9. With regard to the primary rule, the Court denied Delaware's request for judgment against New York for distributions which New York escheated from Delaware-incorporated

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[4] New York subsequently moved on December 22, 1992 in this Court for leave to file first amended answers and leave to file counterclaims, asserting New York's right to property escheated by other States but belonging to New York under the Special Master's proposed rules for the disposition of unclaimed securities distributions. On January 19, 1993, the Court entered an order denying New York's motion "without prejudice to renewal following the issuance of the opinion of this Court on the Report of the Special Master." That motion was not renewed in the light of the Court's opinion sustaining exceptions to the Master's recommendations and remanding the matter for further proceedings. *Delaware v. New York*, 113 S. Ct. 1550 (1993).

debtor brokers. 113 S. Ct. at 1561. Thus, the Court rejected Delaware's arguments, and those of the intervening plaintiffs, that the Master's findings were sufficient to conclude, as a matter of law, that the last known addresses of the creditors of the property at issue cannot be identified from the debtors' books and records. The Court stated that "[o]n 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." *Id.*[5]

10. On June 2, 1993, a conference was held before the Special Master on the remand of the action to him. Thereafter, on June 8, 1993, the Master issued Litigation Management Order No. 6 which, *inter alia*, permitted plaintiff and any intervening parties to file amended pleadings in this Court within 30 days of the order, and permitted New York to file an amended response 30 days thereafter. Litigation Management Order No. 6, § 3 at 8. All of the intervening plaintiffs subsequently filed amended complaints (*see* footnote 1, *ante*), and New York filed answers to each on August 6, 1993.

11. In their amended pleadings, all of the intervening plaintiffs except Massachusetts asserted primary rule claims for the first time, alleging a superior right to escheat unclaimed distributions remitted to New York from brokers, banks and DTC if the creditors' last known addresses identified on the intermediaries' books and records were in their respective jurisdictions. Thus, these intervening plaintiffs reversed their prior litigation position that the creditors of the property at issue were always unknown,[6] and expanded the scope of the remand proceedings

[5] The Court did, however, reject New York's proposal to use statistical sampling techniques in furtherance of its primary rule claims. 113 S. Ct. at 1561.

[6] As this Court noted in its opinion, New York did not contest the intervenors' contention "that 'the creditors of unclaimed distributions' held by depositories and custodian banks 'are always unknown.' " 113 S. Ct. at 1560-61 (citing Exceptions of Defendant New York at 81).

(which the Court directed for New York's pursuit of its primary rule claims to the remittances of Delaware-incorporated brokers) to include the intervenors' new primary rule claims to property remitted to New York from any intermediary wherever domiciled. Failing proof on their primary claims, the intervening plaintiffs (and Massachusetts) also alleged for the first time in their amended complaints that their right to escheat unclaimed distributions under the secondary debtor rule was based not on the issuer's domicile but on the debtor intermediary's State of incorporation, as this Court held, or principal place of business if not incorporated in any State.

12. Delaware moved to strike the amended complaints in intervention on various grounds. Motion of Plaintiff, State of Delaware, to Strike Amended Complaints in Intervention (August 1993). New York joined Delaware's motion in part. Response of the State of New York to Motion of the State of Delaware to Strike Amended Complaints (August 18, 1993). The Court denied the motion to strike by order entered October 4, 1993.

13. By its counterclaims, New York seeks to recover from the intervenors unclaimed distributions escheated by them in violation of New York's rights under the Court's rules announced in *Texas v. New Jersey*, and reaffirmed in *Pennsylvania v. New York* and again in its opinion in this case. New York's counterclaims are in direct response to the claims raised by the intervenors for the first time in their amended complaints, and will assure a fair resolution of the case by limiting the intervenors' recovery, if any, to the property actually owed to them. As the Special Master stated in support of the intervenors' amendments: "After all, the fundamental goal of modern systems of pleading is to reach decisions on the merits, rather than to enforce rigid pleading formalism to the point of creating Dickensian traps for parties acting in good faith." Litigation Management Order No. 6, § 3 at 7 (also citing *Forman v. Davis*, 371 U.S. 178 (1962)). This liberal philosophy toward amendment

is similarly evident under Rule 13(f) of the Federal Rules of Civil Procedure governing omitted counterclaims.[7] The Rule gives the courts considerable discretion in granting parties leave to amend their answers to file omitted counterclaims, in order to further the goal of resolving disputes insofar as possible on the merits and in a single judicial proceeding. *See Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214, 220 (5th Cir. 1975); *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960). In denying leave to amend a pleading, delay alone is not a sufficient ground. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Mercantile T.C.N.A. v. Inland Marine Products Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976). The courts may, however, consider such other factors as prejudice to the non-moving party, the strain on the court's docket, and whether additional discovery will be required. *See Barnes Group, Inc. v. C&C Products, Inc.*, 716 F.2d 1023, 1035 n.35 (4th Cir. 1983).

14. In this case, the principle of liberality toward the amendments of pleadings supports New York's request for permission to respond to the intervenors' amendments with counterclaims of like nature. The intervenors' amendments assert for the first time that New York has taken custody of unclaimed distributions owed to them under the *Texas v. New Jersey* primary rule, and under the backup rule as the States of incorporation of debtor intermediaries. New York, in turn, believes that the intervenors have taken unclaimed distributions to which New York is entitled under the very same rules. Fairness dictates, therefore, that New York be given the opportunity to assert its claims now as an offset to the intervenors' newly pleaded claims, and to recover any additional property which the intervenors may have

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[7] Rule 13(f) of the Federal Rules of Civil Procedure states:

> When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

wrongfully appropriated in derogation of New York's escheat rights.

15. New York's motion should be granted for the further reason that on the basis of the intervenors' past pleadings, New York had no reason to assert the proposed counterclaims to offset a potential judgment in favor of the intervenors, since their prior legal and factual claims, if successful, would have precluded any relief on behalf of New York. It is only with the advent of the Master's order permitting the intervenors to amend their pleadings to assert legal and factual claims consistent with the Court's precedents that New York's proposed counterclaims become essential. Since the intervenors chose to wait five years to raise the new claims, New York should be permitted to respond fully with the interposition of its proposed counterclaims.[8]

16. Additionally, New York's counterclaims will not burden the Court with new legal issues or generate undue delay, further justifications for granting New York leave to plead the counterclaims in its answers to the intervenors' amended complaints. New York has already informed the Master of the limited nature of the discovery it intends to prepare in furtherance of its counterclaims:

> New York requests authorization to serve discovery on the intervenor States in the form of written interrogatories and document production. The purpose of the discovery is to determine the property which the

[8] Although the Master believed that the intervenors' "late amendment" should not be viewed as a "sleeping on rights," in fact the intervenors made a clear choice in advocating novel legal theories and omitting claims for relief such as those asserted now for the first time against New York. Thus, in rejecting the intervenors' theories, this Court stated that it was adhering to the rules it set down long ago in *Texas v. New Jersey* and *Pennsylvania v. New York*, and made it quite clear that its precedents should have been applied to the property at issue here. *See Delaware v. New York*, 113 S. Ct. at 1557-59.

> intervenors have escheated in violation of the Court's precedents and which is owed to New York.

Letter of Robert A. Forte, dated August 13, 1993. Moreover, New York's search of the intervenors' records will concentrate on remittances escheated from New York-domiciled intermediaries in violation of the *Texas v. New Jersey* backup rule, a discovery program that can take place at the same time that the intervenors pursue their search of New York's records:

> The focus of New York's discovery at this time will be the identification of the debtor intermediaries who have remitted unclaimed securities distributions to the intervenor States, and the amounts of property involved. New York's request thus tracks the opportunity accorded the intervenors to examine New York's records for property to which they may be entitled. Since New York's proposed discovery will be limited to the backup rule, the intervenors should be able to comply within the existing discovery timetable.

Ibid.

17. Finally, it would be patently unfair to require New York to seek relief from the intervenors in separate lawsuits while relieving the intervenors of that very same burden in pursuing its newly pleaded claims against New York. As the Master stated:

> It would be artificial and wasteful of party energies and judicial resources to suggest that intervenors file a separate lawsuit to pursue claims not clearly spelled out in initial filings here.

Litigation Management Order No. 6, § 3 at 7.[9] There is no justification for treating New York differently. In addition,

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[9] The Master added: "This is particularly true in a domain of law such as escheat, which has no statute of limitations. I cannot countenance the suggestion that a separate suit (or series of suits) would be appropriate in this light, much less necessary." Litigation Management Order No. 6, § 3 at 7.

the intervenors' new claims include a request for relief to property to which they would be entitled according to new principles or subsequent rulings announced by the Court. *See, e.g.*, Amended Complaint in Intervention of the Plaintiff-Intervenor States of Texas, et al., ¶¶ 10, 11. New York's proposed counterclaims appropriately address this possibility as well, and seek like relief from the intervenors.

WHEREFORE, the State of New York respectfully moves this Court that leave be granted to file counterclaims.

Dated: New York, New York
October 29, 1993

Respectfully submitted,

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APPENDIX

COUNTERCLAIMS

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

2. New York claims entitlement to the custodial possession of Distributions wrongfully taken by Texas, 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.

3. New York claims entitlement to the custodial possession of Distributions wrongfully taken by Texas, 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.

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

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