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 Motion of the State of New York for Leave to File Counterclaims

OPPOSITION OF PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, 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, THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA AND VIRGINIA, AND THE DISTRICT OF COLUMBIA TO MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE COUNTERCLAIMS

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OPPOSITION OF PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, 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, THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA AND VIRGINIA, AND THE DISTRICT OF COLUMBIA TO MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE COUNTERCLAIMS

The Plaintiff-Intervenor States of Alabama, *et al.*, Texas, *et al.*, California, Michigan, Maryland and Nebraska, and the District of Columbia (collectively, the "Intervenors"), through their undersigned counsel, herein oppose the Motion of the State of New York for Leave to File Counterclaims (Oct. 29, 1993) ("N.Y. Motion").[1]

After defending itself in the instant litigation for more than five years, New York now moves this Court for leave to file counterclaims in order to "offset" amounts the Intervenors may recover under their respective Amended Complaints. N.Y. Motion ¶ 14. But the possibility that New York may be required to turn over unclaimed property to another State under the decision in this case has existed from the outset. New York's Motion —which seeks to expand vastly the scope of this matter and have this Court supervise the disposition of 49 new claims—is little more than a retaliatory measure designed to harass its adversaries. It should be denied as (1) inexcusably late, (2) lacking any factual predicate, (3) in direct contradiction of New York's prior factual representations, (4) unduly prejudicial to 48 sovereign States and the District of Columbia, each of which would be subject to massive amounts of discovery, and (5) inconsistent with this Court's standard for exercising its original jurisdiction. Moreover, the proposed counterclaims are permissive; their denial would not deprive New York of any rights.

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[1] Alabama, *et al.* are the States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming, and the Commonwealths of Kentucky and Pennsylvania. Texas, *et al.* are the States of Texas, Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, Oregon, South Carolina, Tennessee and Wisconsin, and the Commonwealth of Virginia.

STATEMENT

A. New York's Delay

This case commenced in February 1988 when Delaware claimed entitlement, under the backup rule of *Texas v. New Jersey,* 379 U.S. 674 (1965), to custody of unclaimed securities distributions taken by New York from brokerage firms incorporated in Delaware when the brokerage firms disclaimed knowledge of the identity or address of the owners of the distributions (hereafter "unclaimed securities distributions," "property" or "funds").[2] New York defended its taking of the distributions under the primary rule of *Texas v. New Jersey,* arguing that—although the property was reported to it as owner-unknown—the last-known addresses of the creditors of those distributions are in New York.[3] New York did not assert in its Answer a counterclaim against Delaware to offset amounts Delaware might recover.

On February 21, 1989, this Court granted the intervention motion of the State of Texas, which made subject to this suit unclaimed securities distributions New York had seized from all brokerage firms, wherever incorporated, as well as from banks and depositories.[4] Texas—and 40 additional intervenors—asserted that the State entitled to custody of the unclaimed securities distributions taken by New York was, under the *Texas v. New Jersey* backup rule, the State of incorporation of the issuer of

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[2] Complaint of the State of Delaware (Feb. 9, 1988), motion for leave to file granted, 486 U.S. 1030 (1988).

[3] Answer of the State of New York ¶ 21 (July 27, 1988). New York contended that the brokerage firms holding the funds (referred to as "debtor brokers") owed those funds to other brokerage firms (referred to as "creditor brokers") that could be shown through a sampling technique to have New York addresses in most cases.

[4] *See* Complaint in Intervention of the State of Texas (Jan. 6, 1989), motion for leave to file granted, 489 U.S. 1005 (1989).

the security on which the distributions were paid.[5] In its Answers to these Complaints in Intervention, New York once again did not assert counterclaims to offset amounts these intervenors might recover.[6]

In the three-year period between the appointment of the Special Master and the issuance of his Report on January 28, 1992, New York continued to abide by its decision not to assert counterclaims. Indeed, even ten months after the Special Master issued his Report, in which he recommended that this Court adopt a variation of the initial position of Alabama, *et al.* and Texas, *et al.*,[7] New York chose not to assert counterclaims. Only on December 22, 1992—almost five years after the case began, almost four years after the Texas intervention motion was granted, eleven months after the Master issued his Report, and two weeks after the Supreme Court heard oral argument on Exceptions—did New York first move for leave to file counterclaims. *See* Motion of the State of New York for Leave to File First Amended Answers and

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[5] *See, e.g.*, 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 ¶¶ 5, 7 (April 21, 1989), motion for leave to file granted, 113 S. Ct. 1550, 1555 (1993). The two groups of intervenors that advocated this position were Alabama, *et al.* and Texas, *et al.*

[6] *See, e.g.*, Answer by the State of New York to Amended Complaint of the States of Alabama, *et al.* (Nov. 17, 1989). Another group of States asserted a theory of recovery against New York, based upon each State's relative percentage of certain commercial activities. *See, e.g.*, Complaint in Intervention of the States of California, Michigan, Nebraska, Ohio, and Rhode Island (Nov. 17, 1989), motion for leave to file granted, 113 S. Ct. 1550, 1555 (1993). New York's Answer to that Complaint (dated July 20, 1990) also did not assert counterclaims.

[7] The Master rejected New York's statistical sampling approach to the primary rule, and recommended that the State entitled to custody of the distributions under the backup rule be the State of the principal executive offices of the issuer.

Leave to File Counterclaims (Dec. 22, 1992) ("First N.Y. Motion").

B. New York's Counterclaims

New York described its December 22, 1992 counterclaims as "a minor technical amendment" and stated that its delay in asserting them was "excusable" because the need for an "offset" against successful claims of other States "has only become apparent with the Special Master's recommendation" (First N.Y. Motion ¶¶ 11, 14), which, as noted, had been issued eleven months earlier. Having waited nearly five years before moving to file a counterclaim, New York elected to do so while the case was *sub judice*. Not surprisingly, on January 19, 1993, this Court denied New York's motion without prejudice to refile after the Court issued its decision. 113 S. Ct. 1041.

On March 30, 1993, this Court announced the rules governing the disposition of the unclaimed securities distributions taken by New York. 113 S. Ct. 1550. The Court rejected the statistical sampling proposal advocated by New York 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 Master's recommendation with respect to the backup rule, holding that—as New York and Delaware had argued—the issuer is not the "debtor" of the unclaimed securities distributions at issue once its debt to the record owner has been satisfied. *Id.* at 1557-60. The Court remanded the matter to the Special Master "for further proceedings consistent with this opinion." *Id.* at 1562.

In accordance with the terms of the March 30 opinion —which expressly authorized the Intervenors to assert

primary rule claims to property taken by New York and implicitly authorized Intervenor backup rule claims to such property—the Intervenors filed Amended Complaints asserting such claims by the July 8, 1993 deadline imposed by the Special Master. These Amended Complaints expressly conformed the claims of the Intervenors to the legal principles recently announced by this Court. Several aspects of these claims bear noting (insofar as they contrast with New York's proposed counterclaims). First, they pertained to the very property that had already been in dispute, *i.e.*, unclaimed securities distributions taken by New York.[8] Second, it had already been established that New York had seized more than $630 million of unclaimed securities distributions, much of it from entities incorporated outside that State.[9] Third, Delaware had requested backup rule discovery, and New York primary rule discovery, with respect to that very property.[10]

In its August 6, 1993 Answer to the Amended Complaints, New York, without moving the Court for leave to file them, asserted counterclaims against the Intervenors. On October 4, 1993, this Court issued an Order rejecting Delaware's motion to dismiss the Amended Complaints and dismissing without prejudice New York's counterclaims. 114 S. Ct. 48. The Court stated that, if New York intends to assert counterclaims, it first must

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[8] *See, e.g.*, Amended Complaint in Intervention of the States of Alabama, *et al.* ¶¶ 9-11 (July 7, 1993).

[9] *See* Exceptions of the State of New York to the Report of the Special Master at 91 (New York seized approximately $631 million of the property at issue between 1985 and 1991). New York has never denied that it seized many such funds from entities incorporated in other States. *See, e.g.*, Brief [of New York] in Opposition to Motion for Leave to File Complaint at 30 (May 9, 1988) (acknowledging that it seized property at issue from brokerage firms incorporated outside of New York).

[10] *See* Litigation Management Order No. 6 § 2 at 3 (June 8, 1993) (stating that the Intervenors' discovery with respect to property taken by New York can be conducted at the same time that Delaware and New York take discovery as to that property).

move for leave to file them, and that such a motion would be referred to the Special Master. *Id.*

Twenty-five days later, New York filed its Motion for Leave to File Counterclaims against every other State but Delaware. New York's proposed counterclaims seek recovery under the primary and backup rules, as well as under rules yet to be established, of "Distributions" taken by other States. According to New York, the counterclaims are needed as an "offset" to potential recovery by the Intervenors and only became necessary when the Intervenors amended their Complaints to conform to the principles announced in this Court's March 30 decision. N.Y. Motion ¶¶ 13-15. Neither the Motion nor the proposed counterclaims state that New York is aware that any State has taken custody of any property subject to New York's claims. Nevertheless, New York seeks to begin a program of intense written and documentary discovery from 49 sovereigns, initially with respect to its backup rule claims only. *Id.* ¶ 16. New York, more candid now, no longer describes its proposed counterclaims as being "a minor technical amendment."

C. The Status Of Discovery

As noted, the Amended Complaints of the Intervenors set forth claims to the very property that was already at issue in this case, and entailed discovery that could be—and has been—conducted at the same time Delaware and New York conducted discovery with respect to that property. By contrast, New York's proposed counterclaims would dramatically broaden the scope of this case, which until now has involved a discrete fund held entirely by New York. New York's proposed counterclaims would result in 49 new waves of discovery pertaining to unspecified property allegedly held by 49 other sovereigns for an unlimited amount of time.

New York already has demanded discovery of the 49 jurisdictions, stating that "[t]he focus of [its] discovery

at this time" will be to pursue its backup rule claims. N.Y. Motion ¶ 16. This first-stage discovery would consist of a "search of the [49] intervenors' records," and service of "written interrogatories and document production" in order to "determine the property which the [49] intervenors have escheated in violation of the Court's precedents and which is owed to New York." *Id.*

It is New York's position that "[s]ince New York's proposed discovery will be limited to the backup rule, the [49] intervenors should be able to comply within the existing discovery timetable." *Id.* However, discovery before the Special Master on remand has been underway for approximately six months, and review of New York's records nears completion.[11]

D. New York's Previous Position That Its Proposed Counterclaims Were Unnecessary

New York's proposed discovery would investigate whether other States have recovered unclaimed securities distributions from intermediaries incorporated in New York, *i.e.*, in violation of this Court's March 30 holding with respect to the backup rule. Not only, however, has New York never provided any evidence justifying such an investigation, New York has repeatedly stated that such an investigation would be fruitless. New York's position throughout this litigation has been that the other States have recovered unclaimed securities distributions in accordance with the backup rule this Court enunciated on March 30.

To bolster its position that a State of incorporation of the holder backup rule reflected the accepted state of the law, New York strenuously argued before the Special Master and this Court that the Intervenors applied that rule to unclaimed securities distributions. *See* Comments

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[11] In accordance with Litigation Management Order No. 6 § 6(e) (June 8, 1993), limited backup rule discovery from third parties has been requested.

on the Draft Report of the Special Master by Defendant State of New York at 23-29 (Aug. 12, 1991); Exceptions of the State of New York to the Report of the Special Master at 57 n.46 (May 26, 1992) (stating that the Intervenors "have applied the *Texas* rules to the property at issue in the same way that New York has"); *id.* at 56-60.

Indeed, the other States' adherence to the backup rule as enunciated by this Court on March 30 was the very ground New York proffered as to why its December 1992 motion for leave to file counterclaims should have been allowed. New York asserted—when it feared the Special Master's recommendations might be adopted by this Court—that "it would be patently unfair to subject only New York to the retroactive application of new escheat principles * * * [s]ince all jurisdictions followed escheat practices that coincided with New York's." First N.Y. Motion ¶ 15. New York has provided no new evidence contradicting its prior statements on that point.

SUMMARY OF ARGUMENT

In support of its extraordinarily late counterclaims, New York relies (Motion ¶ 13) on Rule 13(f) of the Federal Rules of Civil Procedure, which provides that:

> [w]hen 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.

While courts have applied this rule liberally to prevent legitimate claims from being defeated by rigid formalism, courts have not hesitated to reject untimely counterclaims when the pleader failed to proffer an adequate explanation for the delay, *see, e.g., Carroll v. Acme-Cleveland Corp.*, 955 F.2d 1107, 1114 (7th Cir. 1992), or when the counterclaims would result in a new wave of discovery, prejudice other parties, strain the court's docket or were made in bad faith, *see, e.g., Rohner, Gehrig & Co. v. Capital City Bank*, 655 F.2d 571, 576 (5th Cir. 1981);

Owens-Illinois, Inc. v. Lake Shore Land Co., 610 F.2d 1185, 1188 (3d Cir. 1979). All of these deficiencies are present in New York's belated claims.[12]

New York's proposed counterclaims meet neither of the two prongs of Rule 13(f). New York's five-year delay in filing its counterclaims was not caused by "oversight, inadvertence, or excusable neglect." To the contrary, New York's stated excuse for failing to plead the counterclaims at an earlier date—that it only recently became aware of the need for an offset—is absurd. It is also contradicted by New York's prior motion, itself in violation of the dictates of Rule 13(f). *See* Part I(A), *infra.*

Allowance of New York's proposed counterclaims would not be in the interests of justice. Rather, it would require 48 sovereign States and the District of Columbia to expend significant resources to conduct a massive search—even as this case winds towards final resolution—the results of which New York does not claim to know,

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[12] Likewise, in *Foman v. Davis*, 371 U.S. 178, 182 (1962)—a case upon which New York also relies (Motion ¶ 13)—this Court stated that untimely amendments to pleadings should not be sanctioned when there is "undue delay, bad faith or dilatory motive on the part of the movant * * * [or] undue prejudice to the opposing party by virtue of allowance of the amendment." *Foman* addressed the application of Fed. R. Civ. P. 15(a), which concerns the amendment of pleadings generally. While courts have disagreed as to whether Rule 15(a) even applies to omitted counterclaims, *compare Tomoegawa (U.S.A.), Inc. v. United States*, 763 F. Supp. 614, 618 (Ct. Int'l Trade 1991) ("caselaw and the commentators teach that the specific standards of Fed. R. Civ. P. 13(f) * * * govern and not the general language of Rule 15(a)") *with Mercantile Trust Co. Nat'l Ass'n v. Inland Marine Products Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976) (applying Rule 15(a) to motion for leave to file omitted counterclaim), there is agreement that the rules use the same standard. *See Mercantile Trust Co. Nat'l Ass'n*, 542 F.2d at 1012 n.5; 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1430, at 227 (1990). As New York did not cite Rule 15(a), and Rule 13(f) is specific to untimely counterclaims, this Opposition will focus on cases applying Rule 13(f).

and which New York previously argued would be futile. In light of that prior admission and New York's decision not to assert counterclaims against Delaware—which New York would have done had it truly been interested in obtaining an offset—the underlying objectives of New York's Motion become clear: retaliation against, and harassment of, the Intervenors in response to their participation in this action. Those objectives do not bespeak justice. *See* Part I(B), *infra.*

Indeed, New York's Motion, by asking this Court to supervise the disposition of 49 new claims against, and a nationwide search of unclaimed property recovered by, 49 sovereigns—notwithstanding the conceded absence of factual foundation for the claims—conflicts with the standards for this Court's exercise of its original jurisdiction. *See, e.g., Mississippi v. Louisiana,* 113 S. Ct. 549, 552-53 (1992) (this Court's original jurisdiction is exercised "sparingly"); *Illinois v. City of Milwaukee,* 406 U.S. 91, 93-94 (1972) (stating this Court's interest in conserving its resources for its appellate docket). *See* Part II, *infra.*

ARGUMENT

I. NEW YORK'S MOTION DOES NOT MEET THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 13(f)

A. New York's Delay Was Not Caused By "Oversight, Inadvertence, Or Excusable Neglect"

New York attempts to excuse its five-year delay in asserting counterclaims on the ground that, until the Intervenors amended their respective Complaints this past summer,

> 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.

N.Y. Motion ¶ 15. Not only is this contention nonsensical, it is directly contradicted by the counterclaims New York proposed almost a year ago. Those counterclaims sought relief under virtually any outcome in this case other than a complete New York victory. Indeed, New York's express reason for proposing them was to "offset" the Intervenors' recovery in the event the Intervenors' positions were adopted by this Court. *See* First N.Y. Motion ¶ 11.[13]

A defendant is required to assert counterclaims when it files its Answer. Fed. R. Civ. P. 13(a) and (b). Despite the plain language of those Rules, New York is not of that view. Last year, New York argued that counterclaims need be asserted by a defendant only when it appears that the defendant may lose the case. Thus, in its December 1992 motion for leave to file counterclaims, New York stated that the "omission of these claims from New York's previously filed answers was excusable because the need for such relief has only become apparent with the issuance of the Special Master's Report." First N.Y. Motion at 2. (New York nevertheless waited eleven months after the Master issued his Report before it filed that motion.)

New York now argues the opposite. After its position in many respects prevailed,[14] New York seeks for the first time to assert counterclaims in accordance with that position. Such counterclaims could have—and should

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[13] Such an offset is simple to envision. While New York would have been turning over unclaimed securities distributions it had taken to the various States of the principal executive offices of the issuers, New York would have claimed from other States unclaimed securities distributions as to which New York was the State of the principal executive offices of the issuers.

[14] This Court adopted New York's backup rule position and, while rejecting the statistical sampling methodology advocated by New York, has given New York the opportunity to prove primary rule entitlement to the property it has taken. 113 S. Ct. at 1557-61.

have—been made on day one had New York wished to assert them. New York attempts, therefore, to link its counterclaims to the Amended Complaints filed in July 1993 by the Intervenors. N.Y. Motion ¶¶ 13-15. That linkage, however, is specious. New York's purported need for an offset and the legal theories underlying its proposed counterclaims existed well before the Amended Complaints were filed.[15]

Many courts have held that the absence of an adequate excuse for the delay is sufficient ground to deny an omitted counterclaim. *See Carroll v. Acme-Cleveland Corp.*, 955 F.2d 1107, 1110, 1114 (7th Cir. 1992) (motion to file omitted counterclaim denied where the plaintiff's complaint notified the defendant of the potential need for a set-off); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1518-19 (10th Cir. 1990) (motion to file counterclaim three months late denied where failure to assert it timely a tactical decision); *McLemore v. Landry*, 898 F.2d 996, 1003 (5th Cir.), *cert. denied*, 498 U.S. 966 (1990) (denying motion filed almost three years after commencement of action and six weeks after court ruled on summary judgment motions); *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15, 19-20 (1st Cir. 1979) (two-year delay sufficient ground to deny omitted counterclaim where movant failed to explain basis for delay), *cited in Quaker State Oil Refining Corp. v. Garrity Oil Co.*, 884 F.2d 1510, 1518 (1st Cir. 1989).[16] The same

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[15] *See Health Corp. of America v. New Jersey Dental Ass'n*, 77 F.R.D. 488, 492 (D.N.J. 1978) ("the absence of new facts is a legitimate factor to consider in deciding a [Rule 13(f)] motion").

[16] *See also Little v. Liquid Air Corp.*, 952 F.2d 841, 846-47 (5th Cir. 1992) (applying Rule 15(a)); *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133 (10th Cir. 1987) (same). Other courts require another ground to be present, such as undue prejudice to other parties or improper motive. New York's Motion founders on such additional grounds. *See* Part I(B), *infra*.

result should obtain here, in light of New York's extreme and inexcusable tardiness.

B. Allowance Of New York's Counterclaims Would Not Be In The Interests Of Justice

Courts have stated repeatedly that the "interests of justice" prong of Rule 13(f) " 'should not be construed as an open-ended mechanism for avoiding the timely filing of counterclaims.' " *See, e.g., Technographics, Inc. v. Mercer Corp.*, 142 F.R.D. 429, 430 (M.D. Pa. 1992) (quoting *Preferred Meal Systems v. Save More Foods, Inc.*, 129 F.R.D. 11, 13 (D.D.C. 1990)); *Health Corp. of America v. New Jersey Dental Ass'n*, 77 F.R.D. 488, 491 (D.N.J. 1978). Consequently, courts have denied omitted counterclaims when assertion of those claims would unduly prejudice other parties by causing a new wave of discovery, *see Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1188 (3d Cir. 1979); were made in bad faith, *id.*; *Health Corp. of America*, 77 F.R.D. at 491; or would strain the court's docket, *Rohner, Gehrig & Co. v. Capital City Bank*, 655 F.2d 571, 576 (5th Cir. 1981). New York's counterclaims suffer from each of these infirmities, and justice would not be served by allowing their assertion at this late date.

This is particularly true because New York would not lose the opportunity to adjudicate its claims if its Motion were denied. New York's proposed counterclaims are permissive—a factor on which courts place weight when evaluating Rule 13(f) motions. *See Northwest Diesel Repair, Inc. v. Oil Screw "West I,"* 94 F.R.D. 61, 64 (W.D. Wash. 1982) (denying Rule 13(f) motion where such denial "will not extinguish the subject matter of the counterclaims"); 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1430, at 223-25 (1990) (courts less willing to grant leave to assert permissive omitted counterclaims).[17]

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[17] Incredibly, New York does not reveal whether it characterizes its counterclaims as permissive or compulsory. In its December

1. *Undue Prejudice.* There can be no denying that the proposed counterclaims would initiate a new wave of discovery. Just when discovery from New York with respect to backup rule claims is nearing completion, after six months, New York would have that process begin anew, 49 times over. New York itself argued in submissions to the Special Master that the burden of responding to the escheat claims is immense.[18] Now, without any factual support for its proposed counterclaims, New York would impose that burden on all but one of its sister States.

New York's counterclaims contrast dramatically in this respect with the claims asserted in the Amended Complaints of the Intervenors. As discussed *supra* pp. 6, 7, the Intervenors' claims were grounded in the already established fact that New York had seized hundreds of millions of dollars of unclaimed securities distributions, much of it from intermediaries incorporated in States other than New York. Further, the claims set forth in the Amended Complaints were directed to the property held by New York already at issue, and dovetailed with ongoing discovery. *See id.* The same cannot be said of New York's proposed counterclaims, which would vastly expand the scope of this case and considerably delay its resolution.

2. *Bad Faith.* New York's extraordinarily late motion is all the more outrageous in that New York had previously argued that there is no basis for its proposed backup rule counterclaims (and concomitant discovery).

22, 1992 motion (at 1 and ¶¶ 11, 12), New York contended that its proposed counterclaims were compulsory. New York has apparently backed away from that position, presumably out of fear of conceding that it has forfeited its claims should its Motion be denied. In any event, under Fed. R. Civ. P. 13(a), a counterclaim is compulsory only when "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." That is manifestly not the case here.

[18] *See* Motion by Defendant, State of New York, to Modify Litigation Management Order No. 6 at 7-14 (July 7, 1993).

Indeed, New York devoted an entire section of its Exceptions to its contention that the Intervenors had applied the backup rule in accordance with New York's position (ultimately adopted by the Court) that the State entitled to custody of owner-unknown unclaimed securities distributions is the State of the intermediary holder of the distributions.[19] New York now seeks to broaden the scope of this case and take discovery with respect to all unclaimed securities distributions ever taken at any time by any State (other than Delaware) in order to assert claims that do not exist according to New York's prior contention. New York should not be permitted to pursue discovery on claims that it has admitted are baseless.[20]

The bad faith underlying New York's Motion is further illustrated by its decision not to assert counterclaims against Delaware. Should primary rule claims not be successfully asserted with respect to the property at issue, discovery has preliminarily indicated that Delaware is the State to which New York likely will be required to turn over the vast majority of funds it must disgorge under the backup rule. Although New York unquestionably knew this at the outset, it chose not to file a counterclaim in its Answer to Delaware's Complaint and persists in not seeking an offset against backup rule funds recovered

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[19] *See* Exceptions of the State of New York to the Report of the Special Master at 56-60; *see also* Comments on the Draft Report of the Special Master by Defendant State of New York at 23-29.

[20] New York's self-serving change in its litigation position, based on no new facts or rulings of this Court, is far different from the Intervenors' position with respect to primary rule claims (averred to by New York in ¶ 14 of its Motion). Under the position advanced by the Intervenors in this Court, all unclaimed distributions were considered to be owner-unknown. The Court did not adopt that position, and specifically allowed the States to pursue claims under the primary rule on a "transaction-by-transaction basis or [through] some other proper mechanism." 113 S. Ct. at 1561. The Intervenors, accordingly, have pursued such claims.

by Delaware. Obtaining an offset—New York's purported justification for filing its Motion—is thus clearly a facade; retaliation and harassment of the Intervenors are New York's true objectives.

II. NEW YORK'S MOTION IS INCONSISTENT WITH THE STANDARDS GOVERNING THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION

New York acknowledges that an important consideration in determining whether to allow an untimely counterclaim is "the strain on the court's docket." N.Y. Motion ¶ 13. New York's counterclaims are particularly troubling in this regard, given this Court's oft-stated and long-standing policy that its original jurisdiction should be exercised only "sparingly." *Mississippi v. Louisiana,* 113 S. Ct. 549, 552 (1992) (citing *Wyoming v. Oklahoma,* 112 S. Ct. 789, 798 (1992); *Maryland v. Louisiana,* 451 U.S. 725, 739 (1981); *Arizona v. New Mexico,* 425 U.S. 794, 796 (1976); *Louisiana v. Texas,* 176 U.S. 1, 15 (1900)).

Since this Court established the rules of escheat in *Texas v. New Jersey,* the States have resolved among themselves the overwhelming majority of State claims to unclaimed property.[21] New York's Motion seeks to reverse that practice and install this Court as supervisor of more than four dozen unclaimed property lawsuits, without presenting a single reason why this Court's resources should be so expended. This Court accepted jurisdiction over the instant dispute in the face of New York's refusal to apply the rules of *Texas v. New Jersey* to unclaimed securities distributions. Agreeing to resolve the States' respective entitlement to that fund—including its allocation once the governing legal rules were set forth—is a far cry from agreeing to resolve claims such as those

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[21] This case is only the second unclaimed property dispute before this Court since *Texas,* the other being *Pennsylvania v. New York,* 407 U.S. 206 (1972).

New York now asserts, to an unspecified array of property as to which no legal or factual dispute currently exists.

New York's Motion is all the more at odds with the standards governing this Court's exercise of its original jurisdiction in that the Motion not only lacks a factual predicate, it conflicts with New York's prior representation of the facts. A critical factor applied by this Court in deciding whether to exercise its original jurisdiction is the "seriousness and dignity of the claim." *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972), *quoted in Mississippi v. Louisiana,* 113 S. Ct. at 552-53. New York's request that this Court oversee a nationwide search for unclaimed property held by all but one of the 49 other States and the District of Columbia, given that factual background, hardly meets that test.

Whether analyzed under the Federal Rules of Civil Procedure or this Court's original jurisdiction practice, New York's proposed counterclaims should be rejected. Had New York raised these counterclaims initially, they would not have had the "seriousness and dignity" to merit this Court's jurisdiction. Allowing them to lie dormant for five years has not improved their condition.

CONCLUSION

For the foregoing reasons, New York's Motion for Leave to File Counterclaims should be denied.

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