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 Exceptions to the Special Master's Report and Recommended Disposition of Motions With Respect to Complaints

EXCEPTIONS 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

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EXCEPTIONS

The Plaintiff-Intervenor States of Alabama, *et al.*, Texas, *et al.*, Michigan, *et al.* and California, and the District of Columbia (collectively, the "Intervenors"),[1] take exception to (1) the Special Master's recommendation that this Court grant the Motion of Plaintiff, State of Delaware, for Leave to Dismiss its Complaint Without Prejudice (Jan. 21, 1994) ("Del. Motion"), and (2) the Master's denial of the Intervenors' Motion to Direct Delaware and New York to Produce Their Settlement Agreement ("Motion to Produce"). The recommendation and denial are contained in the Master's Report and Recommended Disposition of Motions With Respect to Complaints (March 15, 1994) ("Report").

JURISDICTION

This Court has original and exclusive jurisdiction pursuant to Article III, section 2 of the United States Constitution and 28 U.S.C. § 1251(a).

STATEMENT

Delaware filed its Motion for Leave to Dismiss Its Complaint Without Prejudice in accordance with a settlement agreement with New York that purports to resolve Delaware's claims against New York in this action. The Intervenors, however, are also asserting claims against New York and believe that the dismissal of Delaware's

[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. Michigan, *et al.* are the States of Michigan, Maryland, and Nebraska.

Complaint pursuant to that settlement agreement could prejudice those claims.

In recommending that Delaware's Motion be granted, the Special Master erred by failing to obtain and consider all or any part of the Delaware-New York settlement agreement before issuing his Report. Until the entire agreement is reviewed, and the parties are permitted to brief the issue of prejudice before the Master, any recommendation with respect to Delaware's Motion is premature. Delaware's Motion should be remanded to the Master with instructions to obtain the complete settlement agreement and, after review of the agreement and briefing by the parties, submit his recommendation to the Court.

A. The Intervenors' Claims

In its March 30, 1993 decision, this Court permitted all States to assert two types of claims to the approximately $1 billion of unclaimed securities distributions seized by New York. The Court granted New York and "any other claimant State" the right to establish 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." 113 S. Ct. 1550, 1561. In addition, while rejecting the Special Master's recommendation —supported by the 48 Intervenors—as to how the backup rule should be applied to the unclaimed securities distributions, the decision permitted all States to assert backup rule claims to the funds New York seized. *Id.* at 1557-60.

In accordance with the terms of the Court's opinion, the Intervenors filed Amended Complaints asserting both primary and backup rule claims.[2] Their primary rule claims extend to funds seized by New York from all intermediaries, including Delaware-incorporated brokerage

[2] Delaware filed a motion seeking dismissal of the Amended Complaints, which this Court denied on October 4, 1993. 114 S. Ct. 48.

firms. At the same time the Intervenors were pursuing their claims on remand, Delaware continued to assert the claim set forth in its initial Complaint: its entitlement to custody, under the backup rule, of unclaimed securities distributions taken by New York from Delaware-incorporated brokerage firms. The claims of the Intervenors and Delaware are therefore intertwined. Both assert a claim to the same funds seized by New York, with Delaware's claim subordinate to that of the Intervenors.[3]

On December 10, 1993, Delaware filed a motion for summary judgment against New York, claiming $891 million, including prejudgment interest, under the backup rule. Four days before oppositions to Delaware's summary judgment motion were due, Delaware filed its Motion for dismissal without prejudice. Delaware simultaneously informed the Special Master that it was withdrawing its motion for summary judgment under the backup rule as well as a motion for summary judgment under the primary rule that it filed the previous day. *See* Letter from Dennis G. Lyons to the Special Master (Jan. 21, 1994) (App. 1a).

B. Delaware's Motion For Leave To Dismiss Its Complaint Without Prejudice

The substance of Delaware's Motion is set forth in four sentences:

> Delaware and New York have settled the dispute between them in the action on a basis mutually satisfactory to them. The settlement does not involve the entry of a decree by the Court. In accordance with the terms of the settlement, Delaware seeks an order from the Court dismissing its Complaint without prejudice. This order would dispose completely of any claims involving Delaware; and it would not in

[3] Like Delaware, the Commonwealth of Massachusetts has asserted only backup rule claims on remand, and has a summary judgment motion pending before the Master.

> any way affect the claims (both pending and proposed) between New York on the one hand and the Intervenors (or any of them) on the other.

Del. Motion at 5.

Delaware filed its Motion without providing this Court, its Special Master or the Intervenors any information regarding the terms and conditions permitting the reinstatement of Delaware's Complaint, pay back provisions to New York, the source and treatment of the funds paid, or other contingencies and conditions precedent and subsequent. Delaware and New York made public at that time only the bare numbers of their settlement through press releases issued by their respective Governors: Delaware settled its $891 million claim for $200 million, $35 million of which New York has already paid, with the remainder to be paid out in five annual installments of $33 million.[4] The annual payments and finality of the dismissal without prejudice appear to be contingent on future litigation and legislative events, the specifics of which have not been made public.[5]

In early February, counsel for Delaware and New York each denied a written request by counsel for the States of Alabama, *et al.* that the Intervenors be provided with a copy of the entire settlement agreement. Because review of the settlement agreement is needed to evaluate the extent to which the Intervenors would be prejudiced

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[4] *See* Press Release of the State of New York, Executive Chamber, dated Jan. 21, 1994 (App. 3a); Press Release of the State of Delaware, Office of the Governor, *Delaware Reaches $200 Million Settlement With New York,* dated Jan. 21, 1994 (App. 5a); *see also* Nancy Kesler, *Del. wins $200 million in unclaimed funds,* [Wilmington] News Journal, Jan. 22, 1994, at 1.

[5] *See* Kesler, *supra* note 4, at 1 ("Delaware officials contend the legislation [introduced in Congress to reinstate the Special Master's recommendation] would not affect the settlement with New York. However, the outcome threatens about $24 million in prospective annual payments Delaware is scheduled to receive from New York, based on the outcome of the court case.").

by the granting of Delaware's Motion, the Intervenors filed with this Court on February 7, 1994 an Objection to Delaware's Motion. The Objection requested that Delaware's Motion be remanded to the Special Master, to obtain the settlement agreement and rule upon the Motion in light of the agreement. This Court accordingly referred Delaware's Motion to the Master. 114 S. Ct. 1044 (Feb. 22, 1994).

C. The Delaware-New York Settlement Agreement

On March 7, 1994, the Intervenors filed with the Special Master a Motion to Direct Delaware and New York to Produce Their Settlement Agreement (App. 7a). Counsel for Delaware responded that "in order to put an end to the specious claims . . . that the settlement by Delaware and New York of their dispute in [this] action might somehow affect the rights of the Intervenors, I enclose a copy of the *documentation* of the agreement for the settlement of this action." *See* Letter from Dennis G. Lyons to the Special Master (March 14, 1994) (emphasis supplied) (App. 11a); *see also* Letter from Jerry Boone to the Special Master (March 14, 1994) (App. 32a) ("we have agreed with Delaware to supply the settlement *documentation*") (emphasis supplied). Counsel's March 14, 1994 letter crossed in the mail with the Master's March 15, 1994 Report.

The "documentation" provided by Delaware consists of a Dismissal and Payment Agreement, a Quitclaim and Release Agreement, a Covenant by New York, and a Covenant by Delaware Not to Sue (App. 14a-31a). These documents provide for (1) payment by New York to Delaware of $35 million simultaneous with delivery and execution of the documents, plus five installments of $33 million each, to be paid on June 15 in each of the years 1994 through 1998, and (2) dismissal by Delaware of its Complaint and release of its claims to distributions New

York had seized from Delaware-incorporated brokerage firms.[6]

A review of Delaware's "documentation," however, suggests that the Intervenors were not provided with the complete agreement between Delaware and New York. For example, as noted, statements attributable to Delaware officials in the January 22, 1994 [*Wilmington*] *News Journal* suggest that approximately $24 million that Delaware is to receive from New York is "threatened" depending upon the outcome of the litigation and/or pending legislation. Yet none of the documentation provided by Delaware reflects such an understanding or agreement.

Counsel for Alabama, *et al.* therefore requested that counsel for Delaware either confirm that the entire settlement agreement had been produced or produce it. Letter from Leslie R. Cohen to Dennis G. Lyons (March 16, 1994) (App. 34a). Counsel for Delaware refused, stating that "that sort of information is none of your or the Intervenors' business." Letter from Dennis G. Lyons to Leslie R. Cohen (March 18, 1994) (App. 36a).

D. The Special Master's Report And Recommended Disposition Of Motions With Respect To Complaints

Because the selected portions of the settlement agreement produced by Delaware crossed in the mail with the Special Master's Report and Recommended Disposition of Motions With Respect to Complaints, the Master had not received or reviewed any portion of the agreement before making his recommendation with respect to Delaware's Motion. Nor had the Master permitted Intervenors to submit briefs on the merits of the Motion, relying instead solely on the Intervenors' Objection to this Court.

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[6] Although these documents do not address the source of the funds to be paid by New York, a newspaper article cited an aide to New York Governor Mario Cuomo as stating that "[t]he payments will come out of a special contingency fund set up by the state last year to cover adverse court decisions." *New York Pays Delaware in Securities Settlement,* N.Y. Times, Jan. 22, 1994, at 27.

The Master concluded that review of the settlement agreement was unnecessary (and that the Intervenors' Motion to Produce should be rejected) because:

> there is no claim of the Intervenors involving Delaware that would be affected by granting the dismissal to implement the settlement between Delaware and New York. Nor is any claim or defense that applies to the litigation as between the Intervenors and the defendant, state of New York, at all affected.

Report at 5.

According to the Master, New York's statement that Delaware's "dismissal will not affect . . . any of [the Intervenors'] claims against New York" is "more than self-serving; it states the appropriate legal posture to be granted to this settlement agreement." *Id.* The Master continued:

> There is no contention advanced by the Intervenors that the initial payment made to Delaware, or any of the payments Intervenors understand to be contemplated in the future, come from an existing "fund" as to which the present litigation features competing claims. New York has, pointedly, not segregated the amounts it has taken pursuant to its custodial remittance procedures over the years . . . .

Id. The Master therefore recommended that this Court grant Delaware's Motion and denied the Intervenors' Motion to Produce.[7]

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[7] The Report made two additional recommendations: (1) denying New York's Motion for Leave to File Counterclaims against the Intervenors, and (2) applying the backup rule to unclaimed distributions when the debtor is a partnership or other unincorporated entity, or a foreign entity. Report at 7-11. The Intervenors do not take exception to either of these two recommendations. The States of Michigan, *et al.*, however, by letter to the Special Master dated April 4, 1994, requested that the Master revise ¶ 3 of the Draft Order, pertaining to the second additional recommendation set forth above, and await a reply. These separate concerns of

ARGUMENT

THE SPECIAL MASTER'S RECOMMENDATION THAT THIS COURT GRANT DELAWARE'S MOTION TO DISMISS WAS BASED UPON INSUFFICIENT INFORMATION AND THEREFORE SHOULD BE REJECTED

The Special Master's recommendation that this Court grant Delaware's Motion for Leave to Dismiss its Complaint Without Prejudice is premised on his conclusion that the Intervenors would not be prejudiced. *See* Report at 4-6. That conclusion, however, was reached without review of all or any part of the settlement agreement and without permitting the Intervenors to brief the issue of prejudice. Analysis of the complete Delaware-New York settlement agreement is a prerequisite to determining the extent to which Delaware's Motion prejudices the Intervenors. The Master did not engage in that analysis and prevented the Intervenors from doing so by refusing to order Delaware and New York to disclose all or any part of the agreement. Delaware's Motion will be ripe for a recommendation by the Special Master only after full disclosure is made and the Special Master evaluates its impact, following briefing by the parties.

It is well established that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party." *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986). Consistent with that principle, courts may deny motions made pursuant to Fed. R. Civ. P. 41(a)(2)—or impose conditions on the dismissal—where the motion would prejudice another party. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 2364, 2366 (1971).[8]

Michigan, *et al.* are set forth in their letter to the Master, a copy of which Michigan, *et al.* will provide the Court by separate cover.

[8] Fed. R. Civ. P. 41(a)(2) provides that, except in circumstances inapplicable here, "an action shall not be dismissed at the plaintiff's

It remains impossible to gauge the full extent to which the Intervenors would be prejudiced by the granting of Delaware's Motion for dismissal without prejudice. Counsel for Delaware's statement that it is "none of the Intervenors' business" whether Delaware has produced the entire settlement agreement strongly suggests a calculated decision to produce only part of the agreement. It is probable that the part or parts of the settlement agreement deliberately withheld are those which would be most revealing on the issue of prejudice.

The Special Master's conclusion that the settlement agreement could not affect the claims of the Intervenors against New York is wrong. Review of the complete agreement would permit analysis of, among other things, (1) whether the agreement could be construed to impact the Intervenors' ability to obtain a full and timely recovery of funds they claim, and (2) the grounds for and timing of Delaware's reentry to this action (given that Delaware followed the highly unusual course of seeking dismissal *without* prejudice). Because the Intervenors do not know the conditions precedent to such a reentry, they cannot determine whether the agreement would permit Delaware to reenter the action at a time prejudicial to the Intervenors.[9] Delaware's potential reentry might also contravene this Court's policy of seeking to extinguish its role in original actions. *See Vermont v. New York*, 417 U.S.

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instance save upon order of the court and upon such terms and conditions as the court deems proper." Under Rule 17.2 of the Rules of this Court, the Federal Rules of Civil Procedure, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court."

[9] The Covenant by Delaware Not to Sue (App. 26a) permits Delaware to reinstate its claim against New York if New York defaults on any of its payment obligations. The Intervenors do not know whether other agreements between Delaware and New York permit reinstatement at other times.

270 (1974) (rejecting proposed decree under which Court's Master would oversee its execution for many years into the future).

Having disclosed parts of their settlement documentation to the Intervenors and the Special Master, Delaware and New York have waived any objection to disclosure of the remainder of the documentation. Cf. *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989) ("a waiver of the privilege in an attorney-client communication extends 'to all other communications relating to the same subject matter' "). The Special Master's previous reluctance to compel production—based upon "the traditional Anglo-American reticence" (Report at 4)—has been overtaken by events. Delaware and New York cannot pick and choose for strategic purposes which parts of the agreement to disclose and which to conceal.[10]

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[10] In any event, neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure support the Master's reluctance. Federal Rule of Evidence 408 limits the evidentiary use of settlement agreements, but only narrowly. The rule makes inadmissible (1) the agreements themselves if the agreements are used "to prove liability for or invalidity of the claim or its amount," and (2) "conduct or statements made in compromise negotiations." When these two limitations are inapplicable—as is the case here—the liberal policy of discovery embodied in Fed. R. Civ. P. 26(b) counsels in favor of discovery. *See Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739, 749 (D.D.C. 1983) ("While [Rule 408's] intent is to foster settlement negotiations, the sole means chosen to effectuate that end is a limitation on their admission . . . for the purpose of proving liability at trial, not the application of a broad discovery privilege."); *NAACP Legal Defense & Educ. Fund, Inc. v. Department of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985); 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 408[01], at 408-18 to 408-19 (1993).

Thus, in *Bennett v. La Pere*, 112 F.R.D. 136 (D.R.I. 1986), the court compelled—at the request of nonsettling parties—the disclosure of an agreement reached between plaintiffs and some of the defendants. As the court stated, "[Rule 408] addresses the *admissi-*

Whether Delaware's Motion should be granted is discretionary with the Court. Delaware should not be permitted to withhold information critical to the issue of prejudice, which is exclusively within its control and which is necessary to an informed decision on how that discretion should be exercised, yet expect this Court to find that there is no prejudice. This Court previously referred Delaware's Motion to the Special Master, following the Intervenors' Objection to the Motion on the ground that the Delaware-New York settlement agreement must be analyzed to determine the extent of prejudice to the Intervenors. Delaware's Motion should again be referred to the Master, with instructions to obtain the complete settlement agreement and permit briefing on the issue of prejudice.

CONCLUSION

For the foregoing reasons, the Intervenors respectfully request that this Court reject the Special Master's recommendation that Delaware's Motion for Leave to Dismiss its Complaint Without Prejudice be granted, and that it remand Delaware's Motion to the Special Master with instructions to order Delaware and New York to produce their settlement agreement in its entirety to the Intervenors, and to submit his recommendation after briefing by all parties.

---

bility of compromise negotiations and the like into evidence; the Rule cannot be read so broadly as to bar discovery in the same sweeping fashion." *Id.* at 139-40. Among the reasons why the settlement agreements in *Bennett* "seem relevant to the surviving litigation" was that they may affect what damages can be collected by the plaintiff and that "the shape and form of the partial settlement may illumine the viability (or strategic wisdom) of an attempt by [non-settling defendant] to rejoin the [settling defendants] as third-party defendants." *Id.* at 138-39.

Respectfully submitted,

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May 9, 1994

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

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APPENDIX

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DENNIS G. LYONS
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January 21, 1994

VIA FAX AND FEDERAL EXPRESS

Thomas H. Jackson, Esq.
School of Law
University of Virginia
580 Massie Road
Charlottesville, VA 22903-1789

Re: *Delaware v. New York*, No. 111 Original
United States Supreme Court

Dear Provost Jackson:

I enclose a copy of the Motion of Plaintiff, State of Delaware, for Leave to Dismiss its Complaint Without Prejudice, filed this day with the Clerk of the United States Supreme Court. You will note that Delaware and New York have settled their dispute. Accordingly, Delaware hereby withdraws its (a) motion for summary judgment on backup-rule claims, dated December 10, 1993, and currently pending before you, and (b) its motion for summary judgment on primary-rule claims, dated January 20, 1994, which is en route to you.

Respectfully yours,

/s/ Dennis G. Lyons
DENNIS G. LYONS
Counsel for Plaintiff,
State of Delaware

Enclosures

cc: Prof. Kent L. Sinclair
All Counsel

STATE OF NEW YORK
EXECUTIVE CHAMBER
MARIO M. CUOMO, GOVERNOR

Press Office
518-474-8418
212-417-2126

FOR RELEASE:
IMMEDIATE, FRIDAY
January 21, 1994

Governor Mario M. Cuomo announced today that he has endorsed a package of agreements with the State of Delaware to resolve litigation concerning escheat rights —the right to take custody of unclaimed funds in brokerage accounts where the owner of the funds cannot be located.

The settlement follows a decision by the Supreme Court of the United States last March that determined the priorities among states seeking to take custody of these owner-unknown funds in brokerage accounts. The decision made New York State liable to Delaware based on funds escheated to New York by brokerage firms incorporated in Delaware over the past 22 years.

"We are pleased that it was possible to resolve this issue on a cooperative basis, in a mutually advantageous way," Governor Cuomo said. "This settlement provides New York State with a significant reduction in liability, and permits the State to discharge its obligation in a fiscally sound fashion."

Under the settlement, New York will make total payments of $200 million to the State of Delaware, with the first payment of $35 million taking place with the signing of the agreements. The balance will be paid in five equal annual installments, with no interest charged.

In return, Delaware has agreed to release any claims that it may have against New York, and has also agreed to drop all further action on this matter in the Supreme Court.

"In light of the Supreme Court's decision, New York must turn over a portion of the escheated funds to Delaware. New York faced the potential of having to make a single payment of $891 million. This settlement averts what could have been a budgetary calamity," said Attorney General G. Oliver Koppell.

The settlement does not affect claims against New York State by other states that intervened in the litigation. While their principal claims have been rejected by the Supreme Court, they have continued legal proceedings and sponsored legislation in the Congress to alter rules on state priorities governing escheat of owner-unknown funds, rules that the Supreme Court reaffirmed in its decision last year.

The effect of that legislation would be to redistribute to these other states funds that New York and Delaware are entitled to receive under the Supreme Court rulings.

"I have asked the New York delegation in the Congress to work with the Delaware delegation and take all appropriate action to see that this unjustified attempt to seize New York's rightful resources is not enacted," Governor Cuomo said.

[State Emblem]

STATE OF DELAWARE
OFFICE OF THE GOVERNOR

NEWS

Thomas R. Carper
Governor

FOR IMMEDIATE RELEASE
Friday, January 21, 1994

FOR FURTHER INFORMATION
CONTACT: Sheri L. Woodruff
(302) 577-3711 Wilm
(302) 378-7800 Home
(302) 575-6800 Pager

DELAWARE REACHES $200 MILLION SETTLEMENT WITH NEW YORK

(Wilmington, Del.)—Governor Thomas R. Carper and Attorney General Charles M. Oberly, III today announced that Delaware and New York have settled a six-year dispute over certain intangible abandoned property which, beginning in the 1970s, New York took from Delaware-incorporated brokers. The dispute was the subject of an action filed in the U.S. Supreme Court by Delaware against New York, in which other U.S. states intervened in an attempt to secure the properties for themselves. In March of 1993, the Supreme Court rejected these efforts by the other states and reaffirmed the existing "escheat" principles which hold that Delaware is entitled to receive abandoned property held by Delaware-incorporated brokers where the owner is unknown or cannot be found.

In a settlement reached today, Delaware will receive $200 million, before deductions for expenses, from New York: $35 million immediately and the remainder in installments, paid over the next several years.

According to Carper, "I am pleased to have settled this dispute with New York in a constructive manner. Now that this settlement has been reached, New York and Delaware have also agreed to stand together to oppose

those states who, inspired by a contingency-fee attorney, have caused legislation to be introduced in Congress to change the long-established laws affecting abandoned property with the hope of seizing the property for themselves. The proposed legislation would result in inefficiencies and increased bureaucracy for the banking and securities industries nationwide—to the detriment of *all* states and their residents. Delaware's and New York's Congressional delegations will spearhead an effort to defeat the legislation in Congress and to protect our states' interests in the future. Meanwhile, we will work diligently to resolve the remaining litigation involving other states as cooperatively as the dispute between Delaware and New York was settled."

Carper continued, "This agreement presents Delaware with a rare opportunity to focus on investing in the long-term future of our state. Because it is 'one-time' money which would be imprudent to spend for recurring annual expenses, we will identify long-term investments in our state and its people which will make us more productive and which will leverage private sector funds wherever possible. I look forward to unveiling those investment strategies in my State of the State address to the legislature at the end of the month."

Attorney General Oberly, who initially brought this suit against the State of New York and actively participated with counsel throughout the past six years, hailed the compromise. The settlement guarantees that Delaware will receive a significant sum of money, believed to be the largest amount ever won through litigation in the state's history. Attorney General Oberly further added that he hoped a resolution could be reached with the opposing states who are pursuing a legislative solution that will benefit themselves at the expense of settled legal precedent. Regardless of the outcome of the legislative battle which has united Delaware and New York's Congressional delegations, this settlement protects Delaware by guaranteeing that New York must return a large amount that it unlawfully appropriated to itself.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 111 Original

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

On Remand to the Special Master

MOTION OF THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, *ET AL.*, TEXAS, *ET AL.*, MICHIGAN, *ET AL.* AND CALIFORNIA TO DIRECT DELAWARE AND NEW YORK TO PRODUCE THEIR SETTLEMENT AGREEMENT

The States of Alabama, *et al.*, Texas, *et al.*, Michigan, *et al.* and California (collectively, the "Intervenors") hereby move that the Special Master direct the States of Delaware and New York to produce to the Intervenors a copy of the settlement agreement they have entered in this case.

If the Intervenors do not obtain the agreement, they will be unable to respond fully and knowledgeably to Delaware's Motion for Leave to Dismiss its Complaint Without Prejudice (Jan. 21, 1994) ("Del. Motion").

Counsel for Delaware and New York each have denied a written request by counsel for the States of Alabama, *et al.* that the Intervenors be provided with a copy of the agreement. The Intervenors, therefore, filed with the Supreme Court, on February 7, 1994, an Objection to Delaware's Motion on the ground of prejudice. The basis of the Intervenors' Objection was that, absent review of the secret agreement between Delaware and New York, the extent of prejudice to the Intervenors stemming from Delaware's Motion for dismissal without prejudice cannot be evaluated. While Delaware and New York protested to the Court that no prejudice to the Intervenors was conceivable, the Court concluded otherwise and declined to grant Delaware's Motion.[1] Instead, over the objection of Delaware and New York,[2] it granted the Intervenors' request that Delaware's Motion be referred to the Special Master for a recommendation.

The Intervenors now request that the Special Master direct New York and Delaware to produce a copy of their settlement agreement, and establish an appropriate briefing schedule so that the Intervenors can present to the Special Master an informed position as to the extent to which Delaware's Motion, if granted, would prejudice them.[3]

---

[1] The Court did this notwithstanding Delaware's request that its Motion be considered "as one to be submitted to the full Court." *See* Letter from Dennis G. Lyons to Honorable William K. Suter (Feb. 3, 1994) (appended hereto as Exhibit 1).

[2] Reply Memorandum of Plaintiff, State of Delaware, in Support of its Motion (Feb. 14, 1994); Reply of Defendant, State of New York, in Support of Delaware's Motion (Feb. 11, 1994).

[3] It is beyond cavil that the Special Master is empowered to obtain the settlement agreement. *See* 488 U.S. 990 (1988) (order appointing Special Master and empowering him to issue subpoenas and direct proceedings).

This remains impossible if the Intervenors are not afforded the opportunity to review the settlement agreement.

Dated: March 7, 1994 Respectfully submitted,

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EXHIBIT 1

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DENNIS G. LYONS
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February 3, 1994

BY HAND

Honorable William K. Suter
Clerk of the Court
Attn: Francis J. Lorson, Chief Deputy Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Delaware v. New York*, No. 111 Original
United States Supreme Court

Dear Mr. Suter:

This refers to the "Motion of Plaintiff, State of Delaware, for Leave to Dismiss its Complaint Without Prejudice," filed on January 21, 1994.

Pursuant to my telephone conversation with Chief Deputy Clerk Lorson on Wednesday, February 2, 1994, please consider the Motion as one to be submitted to the full Court, and we request that it be so submitted. We understand that no additional copies of the Motion are required.

Respectfully yours,

/s/ Dennis G. Lyons
DENNIS G. LYONS
Counsel for Plaintiff,
State of Delaware

cc: All counsel of record

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March 14, 1994

VIA FEDERAL EXPRESS

Thomas H. Jackson, Esq.
Vice President and Provost
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903-1789

Re: *Delaware v. New York*, No. 111 Original
United States Supreme Court

Dear Provost Jackson:

We did not understand your Order of March 1 to call for further briefing, and none appears necessary in order to resolve Delaware's Motion for Leave to Dismiss its Complaint Without Prejudice.

However, in order to put an end to the specious claims, renewed by the Intervenors in their Motion of March 7, 1994, that the settlement by Delaware and New York of their dispute in the above-referenced action might somehow affect the rights of the Intervenors, I enclose a copy of the documentation of the agreement for the settlement of this action. It consists of:

1. Dismissal and Payment Agreement.
2. Quitclaim and Release Agreement.
3. Covenant by New York.

4. Covenant by Delaware Not To Sue.

As is obvious from these papers, New York remains fully responsible for all claims of the Intervenors.

As noted in our Motion, the parties do not seek to use the processes of this Court in order to effectuate the settlement. All Delaware seeks from the Court is a dismissal of the complaint without prejudice, as prayed for. Accordingly, the enclosed are not being submitted to the Master or the Court for approval, but simply to put at rest the dilatory objections raised by the Intervenors.

We should also point out that the Intervenors' assertion that "the Court concluded" that "prejudice to the Intervenors was conceivable," despite "Delaware's request that its Motion be considered 'as one to be submitted to the full Court' " (Intervenors' Motion to Direct Delaware and New York to Produce, at 2), is quite misleading. The Court, of course, said nothing of the kind. Obviously, the Master is well aware that an order of reference is no expression of the Court's views on the merits of the requested relief. But the Intervenors attempt to get some mileage out of the request that the Motion be submitted to the Court is nonsense. The issue resolved by the undersigned's letter of February 3, 1994, to Mr. Suter was whether the Court or the *Clerk* would act on Delaware's motion. The Chief Deputy Clerk was of the view that the Clerk did not have the authority to act himself on Delaware's motion under Rule 46, and requested that Delaware consent to its submission to the Court. Therefore, the motion was submitted to the Court, the Court referred the motion to the Master for a recommendation, and it is the Court that will act on the Motion upon receipt of the Master's recommendation.

No purpose would be served by delay of the resolution of the present Motion, and certainly no "briefing schedule" is needed or warranted. If the Intervenors have something to say—and thus far they have not—they should say it

promptly. The Intervenors' latest pleading once again contains no suggestion of a theory on which any supposed "prejudice" appears to rest.

Respectfully yours,

/s/ Dennis G. Lyons
DENNIS G. LYONS
Counsel for Plaintiff,
State of Delaware

Enclosures

cc (w/enclosures):
Prof. Kent L. Sinclair
All Counsel of Record

DISMISSAL AND PAYMENT AGREEMENT

THIS DISMISSAL AND PAYMENT AGREEMENT (the "Agreement") is made this 21st day of January, 1994, by and between the State of Delaware ("Delaware") and the State of New York ("New York").

WHEREAS, on February 9, 1988, Delaware commenced an action against New York in the Supreme Court of the United States entitled *State of Delaware v. State of New York,* No. 111 Original (the "Action"), alleging that New York has wrongfully taken owner-unknown securities distributions from Delaware-incorporated brokers; and

WHEREAS, every other State in the Union and the District of Columbia (the "Intervenors") has intervened in the Action and pleaded claims against New York; and

WHEREAS, New York has sought leave to plead counterclaims against every Intervenor, but has not pleaded or sought leave to plead any counterclaim against Delaware; and

WHEREAS, no Intervenor has pleaded or sought leave to plead any crossclaim or any other kind of claim against Delaware; and

WHEREAS, the Court issued a decision in the Action on March 30, 1993, reaffirming the "primary" and "backup" rules of escheat priority laid down in *Texas v. New Jersey,* 379 U.S. 674 (1965), and adhered to in *Pennsylvania v. New York,* 407 U.S. 206 (1972), and remanding the Action to the Special Master appointed in the Action for further proceedings; and

WHEREAS, Delaware has moved for Summary Judgment against New York on its backup-rule claim (the "Motion for Summary Judgment"); and

WHEREAS, Delaware and New York wish to avoid further litigation between them in connection with the Action and to resolve the dispute between them;

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, and for the other good, adequate and sufficient consideration described herein and the instruments herein referred to, the parties to this Agreement hereby agree that:

1. Simultaneously with the execution and delivery of this Agreement, New York is paying to Delaware Thirty-Five Million Dollars ($35,000,000.00) in New York Clearing House funds.

2. In addition, New York hereby covenants and agrees that it will further pay to Delaware in like funds, and without offset or reduction of any kind for any reason, five installments of Thirty-Three Million Dollars ($33,000,000.00) each, the first such installment to be paid on June 15, 1994, and the remaining four installments to be paid on June 15 of each of the years 1995, 1996, 1997, and 1998. New York unconditionally and absolutely promises duly and punctually to make payment of the amounts in this paragraph provided, without any offset or deduction, and regardless of any change in circumstances. The obligations by this paragraph 2 created are not for borrowed money, but reflect part of the consideration for a valuable Quitclaim and Release and a valuable Covenant by Delaware Not To Sue. This consideration is being paid in installments at New York's request in order to ease the impact on the budget of the State of New York and on the citizens of the State of New York by spreading the payments to be made by New York over an agreed-upon number of years, to which request Delaware has agreed on the terms and conditions specified herein and in the other instruments referred to herein, and in exchange for New York's absolute and unconditional promise and undertaking to make the payments provided for in this paragraph 2.

3. In the event of any default in the due and punctual payment of any installment provided for in paragraph 2,

New York covenants and agrees to pay interest on such defaulted payment at the lesser of (i) the coupon issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date on which such defaulted payment was due and payable, such determination of the coupon issue yield equivalent to be as determined by the Secretary of the Treasury if such determination is available, and such interest to be computed daily to the date of actual payment and to be compounded annually; or (ii) the aggregate borrowing rate of the State of Delaware at its current or most recent (at the time of default) sale of tax-exempt general obligation securities or comparable securities, having a maturity of at least 52 weeks; or (iii) the maximum lawful rate permitted under applicable law. It is the intent of the parties that the rate specified in clause (i) in the preceding sentence is the rate provided for in Section 1961(a) and (b) of Title 28 of the United States Code as in effect on the date hereof, and, that as long as published, the notice referred to in the final sentence of such Section 1961(a) shall be evidence of such rate.

4. Delaware shall forthwith file a motion for dismissal of its complaint in the Action without prejudice, and shall forthwith withdraw its Motion for Summary Judgment. The parties are also executing and delivering herewith a Quitclaim and Release Agreement and Covenant by Delaware Not To Sue. New York is also executing and delivering to Delaware herewith a Covenant by New York.

5. No amendment, modification, waiver, or termination of this Agreement or any of the instruments referred to in paragraph 4 shall be binding unless executed in writing and executed by the party to be bound thereby.

6. This Dismissal and Payment Agreement may be executed and delivered in counterparts, with one party executing one counterpart and the other party another, and

when each of the parties has delivered to the other party a counterpart of this Dismissal and Payment Agreement executed by the delivering party, this Dismissal and Payment Agreement shall come into force between them; and such delivery may be made by sending a copy of an executed counterpart by facsimile transmission, or alternatively by physical delivery of an originally executed counterpart. In the case of execution and delivery in counterparts, the parties shall, as soon as practical thereafter, see to it that each party has a fully executed signed original of this Dismissal and Payment Agreement bearing execution by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this Dismissal and Payment Agreement to be executed by their respective Governors and Attorneys-General, thereunto duly authorized, and to be delivered, all on the day first above written.

STATE OF DELAWARE	STATE OF NEW YORK
/s/ Thomas R. Carper THOMAS R. CARPER Governor	/s/ Mario M. Cuomo MARIO M. CUOMO Governor
/s/ Charles M. Oberly, III CHARLES M. OBERLY, III Attorney General	/s/ G. Oliver Koppell G. OLIVER KOPPELL Attorney General

QUITCLAIM AND RELEASE AGREEMENT

THIS QUITCLAIM AND RELEASE AGREEMENT is made this 21st day of January, 1994, by and between the State of Delaware ("Delaware") and the State of New York ("New York") in accordance with the terms of the Dismissal and Payment Agreement between the parties of even date herewith.

In consideration of the premises and the mutual covenants contained herein, and for the other good, adequate and sufficient consideration described herein and in the Dismissal and Payment Agreement between the parties of even date herewith and the instruments therein referred to, the parties to this Quitclaim and Release Agreement hereby covenant and agree that, subject only to the due performance of the Dismissal and Payment Agreement:

1. Delaware hereby quitclaims, releases and remises unto New York the property that New York received or took in escheat or custodial taking under authority or purported authority of the New York Abandoned Property Law ("NYAPL") from brokers with respect to owner-unknown securities distributions, to the extent that such receipts or takings occurred prior to March 30, 1993, and related to a reporting year under the NYAPL and to a broker which are either:

(i) Listed under such broker and NYAPL reporting year on the amended and restated log served by New York on September 3, 1993, in that certain proceeding in the United States Supreme Court entitled *State of Delaware, et al.* v. *State of New York,* No. 111 Original (such proceeding being hereinafter called the "Action," and such log being hereinafter called the "Log") as having been taken from such broker named in such Log as a Delaware broker in respect of a particular NYAPL reporting year identified in such Log; or

(ii) Claimed by Delaware with respect to such broker and NYAPL reporting year on that certain Motion for Summary Judgment of Delaware against New York dated December 10, 1993, in the Action (the "Summary Judgment Motion") as being taken from a Delaware-incorporated broker in respect of a particular NYAPL reporting year identified in the Summary Judgment Motion or the accompanying Letter Report and Attachments of Deloitte & Touche.

As used in this Quitclaim and Release Agreement, "owner-unknown securities distribution" means money or other intangible property (including without limitation a dividend, interest payment, redemption payment, principal payment, warrant, or right) (i) held by a broker for an owner or creditor as a result of a distribution made with respect to the broker by reason of its status as a holder of record of a security or securities (including in the term "record" not only a record maintained by or on behalf of an issuer of securities but also a record maintained by a depository or other intermediate holder, including records of one depository or other intermediate holder that is shown on the records of another) (ii) remitted and reported to New York by such broker under the NYAPL, and (iii) as to which such broker did not report the name of the owner or creditor.

All such owner-unknown securities distributions so taken in escheat or custodial taking prior to March 30, 1993, by New York as in either item (i) or item (ii) above provided are herein called the "Quitclaimed Escheats."

2. The terms of the aforesaid quitclaim, release and remise by Delaware are that New York shall have and hold all such Quitclaimed Escheats, forever free of any claim by Delaware, subject to the terms hereof, and that Delaware renounces any and all right to audit a Delaware-incorporated broker with respect to owner-unknown

securities distributions for any year prior to 1993 for which such broker filed a Report of Abandoned Property reporting and remitting owner-unknown securities distributed to New York's Office of Unclaimed Funds prior to March 30, 1993, except in any case in which a broker reported and remitted owner-unknown securities distributions both to New York and to Delaware where such owner-unknown securities distributions were received by such broker (within the meaning of the NYAPL) during the same year in which the period of dormancy began to run (within the meaning of the Delaware Unclaimed Property Law). Notwithstanding the foregoing, however, if for any given reporting year under the NYAPL, a Delaware-incorporated broker did not file a Report of Abandoned Property with the New York Office of Unclaimed Funds prior to March 30, 1993, then no owner-unknown securities distributions of such broker which were first reportable in such NYAPL reporting year shall ever constitute any part of Quitclaimed Escheats for purposes of paragraph 1 or this paragraph.

3. New York hereby releases and forever discharges Delaware from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bills, covenants, contracts, bonuses, controversies, agreements, promises, claims, charges, complaints and demands whatsoever in law or equity, that New York ever had against Delaware, now has or hereafter can shall or may have for, upon or by reason of any matter, cause or thing relating to claims of ownership of or superior priority (whether under the "primary rule" promulgated by the United States Supreme Court and reaffirmed in *Delaware v. New York*, 113 S. Ct. 1550 (March 30, 1993), or under any other claim of superior priority or right) to the Quitclaimed Escheats or any of them asserted by any person or entity (including, without limitation, any State or other governmental entity) other than New York. New York hereby covenants and agrees, without limiting the generality of the foregoing, that it will respond to,

defend against, and settle, discharge or satisfy any and all claims of rightful owners or purported rightful owners to any of the Quitclaimed Escheats, without recourse of any kind to Delaware.

4. New York further covenants and agrees that it will respond to, defend against, and settle, discharge or satisfy all assertions of superior claim to any of the Quitclaimed Escheats by any State or other governmental entity (whether under the "primary rule" or "secondary" or "back-up rule" promulgated by the Supreme Court or under any other claim of superior priority), without recourse to Delaware.

5. Delaware hereby covenants and agrees that it will not make any assertion of superior priority (whether under the "primary rule" promulgated by the Supreme Court or under any other claim of superior priority) with respect to the Quitclaimed Escheats.

6. The parties expressly reserve, and nothing herein shall be deemed a waiver or a release of, any other claims that either of the parties might have against the other.

7. This Quitclaim and Release Agreement may be executed and delivered in counterparts, with one party executing one counterpart and the other party another, and when each of the parties has delivered to the other party a counterpart of this Quitclaim and Release Agreement executed by the delivering party, this Quitclaim and Release Agreement shall come into force between them; and such delivery may be made by sending a copy of an executed counterpart by facsimile transmission, or alternatively by physical delivery of an originally executed counterpart. In the case of execution and delivery in counterparts, the parties shall, as soon as practical thereafter, see to it that each party has a fully executed signed original of this Quitclaim and Release Agreement bearing execution by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this Quitclaim and Release Agreement to be executed by their respective Governors and Attorneys-General, thereunto duly authorized, and to be delivered, all on the day first above written.

STATE OF DELAWARE	STATE OF NEW YORK
/s/ Thomas R. Carper THOMAS R. CARPER Governor	/s/ Mario M. Cuomo MARIO M. CUOMO Governor
/s/ Charles M. Oberly, III CHARLES M. OBERLY, III Attorney General	/s/ G. Oliver Koppell G. OLIVER KOPPELL Attorney General

COVENANT BY NEW YORK

THIS COVENANT BY NEW YORK is made this 21st day of January, 1994, by the State of New York ("New York") in favor of the State of Delaware ("Delaware"), and delivered to Delaware, in accordance with, and in further support of, the Dismissal and Payment Agreement between the parties of even date herewith (the "Dismissal and Payment Agreement") made in connection with the action entitled *State of Delaware, et al. v. State of New York*, No. 111 Original (United States Supreme Court, complaint tendered for filing February 9, 1988) (the "Action").

In consideration of the premises, the mutual covenants, and the other good, adequate and sufficient consideration described herein, and in the Dismissal and Payment Agreement and the instruments therein referred to, New York hereby irrevocably covenants and agrees as follows:

1. As long as the decision of the United States Supreme Court rendered March 30, 1993, in the Action remains in effect unmodified by explicit further rulings by the Court on the subject of backup-rule escheat or custodial taking of owner-unknown securities distributions or by pertinent Federal legislation changing the rules reaffirmed in the March 30, 1993, decision on this subject in the Action:

(a) New York will not request or require any Delaware-incorporated broker to file any Report of Abandoned Property with New York as to owner-unknown securities distributions except (i) on the basis that in the particular case there exists on the books and records of such Delaware-incorporated broker a name and address in fact showing the rightful owner of a securities distribution asserted to be "owner-unknown," and that such address is in New York or (ii) a Supplemental Report (for the same reporting year as the original Report) with respect to any Report of Abandoned Property which was filed by a Delaware-incorporated broker with New

York prior to March 30, 1993, reporting owner-unknown securities distributions, where such owner-unknown securities distributions reported on the original Report so filed prior to March 30, 1993, are part of the "Quitclaimed Escheats" under the Quitclaim and Release Agreement of even date herewith between the parties;

(b) New York will not seek to obtain the escheat or custodial taking from any Delaware-incorporated broker of any owner-unknown securities distributions, directly or indirectly, except (i) on the basis that in the particular case there exists on the books and records of the Delaware-incorporated broker a name and address in fact showing the rightful owner of a securities distribution asserted to be "owner-unknown," and that such address is in New York or (ii) with respect to property which should have first been reported to New York under the New York Abandoned Property Law in a reporting year for which such broker in fact filed a Report of Abandoned Property with New York prior to March 30, 1993, reporting owner-unknown securities distributions, if and to the extent that as to such Report New York has reserved the right to require the filing of Supplemental Reports under exception (ii) in subparagraph (a) above;

(c) New York will not make any claim against any Delaware-incorporated broker under the "primary rule" articulated by the Court in its opinion in the Action except on the basis that in the particular case there exists on the books and records of such Delaware-incorporated broker a name and address showing the rightful owner of a securities distribution asserted to be "owner-unknown," and that such address is in New York; and

(d) New York will not require any Delaware-incorporated broker to apply statistical sampling methods in determining addresses for any primary-rule escheat or custodial taking purposes.

As used in this Covenant, "owner-unknown securities distribution" means money or other intangible property (including without limitation a dividend, interest pay-

ment, redemption payment, principal payment, warrant, or right) held by a broker for an owner or creditor as a result of a distribution made with respect to the broker by reason of its status as a holder of record of a security or securities (including in the term "record" not only a record maintained by or on behalf of an issuer of securities but also a record maintained by a depository or other intermediate holder, including records of one depository or other intermediate holder that is shown on the records of another) as to which such broker asserts that its books and records do not indicate the name of the owner or creditor.

2. New York warrants that it has not received any Reports of Abandoned Property covering owner-unknown securities distributions from and after March 30, 1993 (or any Supplemental Report except any permitted by exception (ii) of subparagraph 1(a) hereof), from any Delaware-incorporated broker and covenants and agrees that if it in fact has received any (or shall receive any such reports at any time during which the decision in the Action rendered on March 30, 1993, is in effect as described in Paragraph 1), it will forthwith turn the said Report or Supplemental Report over to Delaware along with all funds and securities that accompanied it.

IN WITNESS WHEREOF, the State of New York has caused this Covenant by New York to be executed by its Governor and Attorney General, thereunto duly authorized, and to be delivered to the State of Delaware, all on the day first above written.

STATE OF NEW YORK

/s/ Mario M. Cuomo
MARIO M. CUOMO
Governor

/s/ G. Oliver Koppell
G. OLIVER KOPPELL
Attorney General

COVENANT BY DELAWARE NOT TO SUE

THIS COVENANT BY DELAWARE NOT TO SUE is made this 21st day of January, 1994, by the State of Delaware ("Delaware") in favor of the State of New York, and is accepted and agreed to by the State of New York ("New York"), in accordance with, and in further support of, the Dismissal and Payment Agreement between the parties of even date herewith (the "Dismissal and Payment Agreement") made in connection with the action entitled *State of Delaware, et al. v. State of New York*, No. 111 Original (United States Supreme Court, complaint filed February 9, 1988) (the "Action").

In consideration of the premises, the mutual covenants, and the other good, adequate and sufficient consideration described herein, and in the Dismissal and Payment Agreement and the instruments therein referred to:

A. Delaware hereby covenants, subject to the conditions precedent stated herein, as follows:

1. Subject to the remaining terms and conditions hereof, Delaware shall not pursue any claims made in the Action against New York in connection with New York's taking under the New York Abandoned Property Law ("NYAPL") of owner-unknown securities distributions from Delaware-incorporated brokers prior to March 30, 1993, in the United States Supreme Court or in any other forum. As used in this Covenant, "owner-unknown securities distribution" means money or other intangible property (including without limitation a dividend, interest payment, redemption payment, principal payment, warrant, or right) (i) held by a broker for an owner or creditor as a result of a distribution made with respect to the broker by reason of its status as a holder of record of a security or securities (including in the term "record" not only a record maintained by or on behalf of an issuer of securities but also a record

maintained by a depository or other intermediate holder, including records of one depository or other intermediate holder that is shown on the records of another) (ii) remitted and reported to New York by such broker under the NYAPL, and (iii) as to which such broker did not report the name of the owner or creditor. Delaware shall promptly file with the United States Supreme Court a motion to dismiss its complaint in the Action without prejudice.

2. Whether or not the Court promptly grants Delaware's motion to dismiss its complaint without prejudice, Delaware shall take no further steps against New York in the Action. Delaware shall promptly advise the Special Master appointed to supervise the Action that it withdraws its Motion for Summary Judgment. In the event that the Special Master or the Court does not permit the withdrawal of the Motion for Summary Judgment, Delaware hereby agrees that it shall support any and all request or requests by New York for an extension of time, from time to time, or *sine die*, to respond to Delaware's Motion for Summary Judgment.

B. The Parties hereto agree that this Covenant of Delaware Not To Sue is expressly conditioned on the following provisions, and the Parties agree as follows:

1. If New York does not well and truly make the payments specified in the Dismissal and Payment Agreement on or before the dates and in the amounts and funds specified therein, then, notwithstanding anything contained herein to the contrary:

(a) Delaware shall be immediately and unequivocally entitled to bring suit against New York for the defaulted payment, and

(b) if the defaulted payment remains unpaid (i) until the end of the New York legislative session in progress at the time of the default or

(ii) if the New York legislature is not in session at the time of the default, until the end of the calendar year in which such default occurs, then Delaware shall be entitled on written notice to New York's Governor to declare the entire set of remaining installment payments specified in the Dismissal and Payment Agreement immediately due and payable, without discount, and to bring suit for them.

2. New York hereby agrees in the case of any such suit referred to in paragraph B.1. preceding that it submits to the jurisdiction of, waives any defense to the jurisdiction of (including, without limitation, defenses of sovereign immunity), and is hereby estopped from contesting or challenging in any way the jurisdiction of: either (i) the New York Court of Claims (or other New York State Court if jurisdiction is not available in the New York Court of Claims) or (ii) the United States Supreme Court. New York further agrees that if any such suit is brought in a New York State Court, it will not contest or challenge Delaware's choice of forum, and that if any such suit is brought in the United States Supreme Court, that it will not contest or challenge the choice of forum or assert in any way that the Court should not exercise its jurisdiction. New York hereby stipulates and agrees that any default described in paragraph B.1. preceding or breach of the Dismissal and Payment Agreement would constitute a *casus belli* between independent states, within the meaning of the United States Supreme Court's original jurisdiction jurisprudence.

3. At Delaware's option, if New York's default in any payment under the Dismissal and Payment Agreement shall continue (i) until the end of the New York legislative session in progress at the time of the default or (ii) if the New York legislature is not in session at the time of the default, until the

end of the calendar year, then Delaware may elect on written notice to New York's Governor to terminate this Covenant of Delaware Not To Sue and may bring suit in either of the forums described in paragraph B.1. above, under the same terms as set forth therein, on the claims made in the Action and any subsequent similar claims. The parties agree that all statutes of limitation or claims of laches or similar doctrines of repose with respect to such claims shall be suspended during the period from which the original complaint in the Action was tendered to the Supreme Court through and including the date on which such election is made. New York further agrees that the Quitclaim and Release Agreement of even date herewith shall in no way be a bar to an action under this paragraph B.3. in the event of default by New York of its obligations in the Dismissal and Payment Agreement and that such election shall terminate such Quitclaim and Release Agreement.

4. The remedies provided in paragraphs B.1., B.2., and B.3. above may be pursued simultaneously and alternatively, but only a single recovery may be obtained as between them, and any payments already collected by Delaware under the Dismissal and Payment Agreement shall be credited against any recovery under paragraph B.3.

5. In the event of any material breach by New York (otherwise than in the payment of money), or any material breach by Delaware, of (i) the Quitclaim and Release Agreement, (ii) this Covenant by Delaware Not to Sue, or (iii) the Covenant by New York, all of even date herewith, the aggrieved party may bring suit in the courts of the state of the allegedly breaching party or in the United States Supreme Court to obtain relief in respect of such breach. If suit under this paragraph B.5. is brought in a state court, the breaching party agrees not to contest the

jurisdiction of the court and agrees that it has waived any claim of sovereign immunity from such suit, under the same terms as set forth in paragraph B.2. If suit under this paragraph B.5. is brought in the United States Supreme Court, the allegedly breaching party agrees not to contest or challenge the choice of forum or to claim that on a discretionary basis jurisdiction should not be asserted by the Court, and the parties stipulate that any material breach of this Agreement or the other agreements identified in this paragraph B.5. is of such nature that it would constitute a *casus belli* between independent states within the meaning of the Court's original jurisdiction jurisprudence.

C. When New York has duly made all of the payments required to be made to Delaware by it under the Dismissal and Payment Agreement, Delaware shall, upon New York's request, execute and deliver a suitable release or releases to New York (a) as to the claims set forth in paragraph A.1. of this Agreement (but in the form of a release and not simply of a covenant not to sue) and (b) of all obligations of New York under the Dismissal and Payment Agreement; and, if Delaware has not then been successful in causing the dismissal of its Complaint in the Action without prejudice, Delaware shall seek to dismiss the same with prejudice.

D. This instrument reflects the entire covenant from Delaware to New York as to its subject matter and the terms and conditions of New York's acceptance thereof and agreement thereto.

E. This instrument is a covenant not to sue, and not a release.

F. This Covenant by Delaware Not To Sue may be executed and delivered in counterparts, with one party executing one counterpart and the other party another, and when each of the parties has delivered to the other

party a counterpart of this Covenant by Delaware Not To Sue executed by the delivering party, this Covenant by Delaware Not To Sue shall come into force between them; and such delivery may be made by sending a copy of an executed counterpart by facsimile transmission, or alternatively by physical delivery of an originally executed counterpart. In the case of execution and delivery in counterparts, the parties shall, as soon as practical thereafter, see to it that each party has a fully executed signed original of this Covenant by Delaware Not To Sue bearing execution by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this Covenant by Delaware Not To Sue to be executed by their respective Governors and Attorneys-General, thereunto duly authorized, and to be delivered, all on the day first above written.

STATE OF DELAWARE	STATE OF NEW YORK
/s/ Thomas R. Carper THOMAS R. CARPER Governor	/s/ Mario M. Cuomo MARIO M. CUOMO Governor
/s/ Charles M. Oberly, III CHARLES M. OBERLY, III Attorney General	/s/ G. Oliver Koppell G. OLIVER KOPPELL Attorney General

[State Emblem]

STATE OF NEW YORK
DEPARTMENT OF LAW
120 Broadway
New York, N.Y. 10271
(212) 416-8020

G. OLIVER KOPPELL
Attorney General

JERRY BOONE
Solicitor General

March 14, 1994

Thomas H. Jackson, Esq.
Vice President and Provost
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903-1789

Re: *Delaware v. New York*, No. 111 Original
United States Supreme Court

Dear Provost Jackson:

By motion dated March 7, 1994, the Intervenors have asked that New York and Delaware be compelled to produce the litigation settlement agreement through which New York and Delaware resolved the issues between them in *Delaware v. New York*. The Intervenors' motion relies on a vague assertion that a grant of Delaware's Motion for Leave to Dismiss its Complaint Without Prejudice (January 21, 1994) ("Delaware Motion") may prejudice the pending claims of the Intervenors against New York, and that review of the litigation settlement agreement between New York and Delaware somehow will assist in evaluating the "extent of prejudice" that would result.

As New York and Delaware have stated, the litigation settlement agreement entered into by our States resolves

only the issues between New York and Delaware in the pending litigation. New York remains fully responsible for the claims of the Intervenors to the extent they are substantiated in the ongoing proceeding. A grant of the Delaware Motion would simply permit Delaware to withdraw from a proceeding in which it no longer is the proponent or the object of any claim. It is inconceivable to us that the Intervenors could be prejudiced by such a development.

Nevertheless, in order to dispel any suggestion that the litigation settlement agreement between Delaware and New York could prejudice the Intervenors in the ongoing proceeding or should interfere with the granting of the Delaware Motion, we have agreed with Delaware to supply the settlement documentation, and it is being forwarded this day by Delaware's counsel.

We are confident that your review of these papers will confirm New York's assurance that the Intervenors' claims are unaffected by the bilateral litigation settlement agreement we have entered into with the State of Delaware. With this question resolved, we believe that it will be clear that the Intervenors' objections to granting the Delaware Motion are without foundation, and we would respectfully request that a grant of the Delaware Motion accordingly be recommended.

Respectfully yours,

/s/ Jerry Boone
JERRY BOONE

JB:wr

cc: Professor Kent L. Sinclair
Service List

DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
202 785-9700

LESLIE R. COHEN
Direct Dial
202 828-2225

March 16, 1994

VIA TELECOPY

Dennis G. Lyons, Esq.
Arnold & Porter
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Re: *Delaware v. New York*, No. 111 Original

Dear Dennis:

We are in receipt of your March 14, 1994 letter to Special Master Jackson enclosing a copy of the documentation of the agreement for the settlement of this action. Before responding to this submission, and that of New York of the same date, we would appreciate confirmation that the documentation produced consists of all agreements executed by Delaware and New York in connection with settlement of the dispute between Delaware and New York regarding entitlement to owner-unknown, unclaimed securities distributions. Neither Delaware's nor New York's March 14, 1994 submission is clear and unequivocal in this regard; nor do they contain any documentation regarding obligations and undertakings with respect to H.R. 2443, S. 1715 or similar legislation. By way of example, though not of limitation, statements attributable to Delaware officials in the January 22, 1994 *News Journal of Wilmington* suggest that approximately $24 million that Delaware is to receive from New York is "threatened," depending upon the out-

come of the litigation and/or related legislation, and that New York and Delaware have agreed to fight the legislation in Congress. The documentation submitted to the Special Master does not appear to reflect such an understanding or agreement.

We look forward to your response.

Very truly yours,

/s/ Leslie R. Cohen
LESLIE R. COHEN

cc: (Via Telecopy)
Provost Thomas H. Jackson
Professor Kent L. Sinclair
All Counsel Of Record

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1200 New Hampshire Avenue, N.W.
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(202) 872-6700

DENNIS G. LYONS
Direct Line: (202) 872-6865

March 18, 1994

VIA FAX

Leslie R. Cohen, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Re: *Delaware v. New York*, No. 111 Original
United States Supreme Court

Dear Leslie:

I have your letter of March 16, 1994, which seems to be driven by an intense yearning to review "documentation regarding obligations and undertakings [between New York and Delaware] with respect to H.R. 2443, S. 1715 or similar legislation."

I was in the process of composing a reply, which would have developed the obvious theme that that sort of information is none of your or the Intervenors' business, when I received the Master's Report and Recommended Dispositions dated March 15, 1994, recommending to the Court that our Motion to Dismiss be granted. Accordingly, your request seems to me to be moot.

For some reason, you sent a copy of your letter to me to the Master and served it on all counsel, as if it was some sort of pleading. Since you have done that, I am likewise sending a copy of this letter to the Master and counsel.

Sincerely yours,

/s/ Dennis G. Lyons
DENNIS G. LYONS

cc: Provost Thomas H. Jackson
Professor Kent L. Sinclair
All Counsel of Record