No. 111 Original

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

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

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

BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN RESPONSE TO EXCEPTIONS OF INTERVENING PLAINTIFF STATES OF ALABAMA, *ET AL.*

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May 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN RESPONSE TO EXCEPTIONS OF INTERVENING PLAINTIFF STATES OF ALABAMA, *ET AL.*

Plaintiff, State of Delaware ("Delaware"), respectfully submits this brief in response to the Exceptions of the Intervening Plaintiff States of Alabama, *et al.*[1]

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[1] The Intervening Plaintiff States of Alabama, *et al.*, comprise the District of Columbia and every State in the Union except (1) Delaware, which is the Plaintiff; (2) New York, which is the Defendant; and (3) Massachusetts, which is an Intervening Plaintiff that has a claim against New York similar to that which Delaware had made until Delaware's settlement agreement with New York. For convenience, we shall refer to the parties filing the Exceptions as the "Intervenors."

STATEMENT

The Plaintiff Delaware has moved for leave to dismiss its Complaint in this action without prejudice in accordance with a settlement agreement with the Defendant New York. New York has consented to Delaware's Motion. Delaware has not sought relief or recovery against any party to this litigation other than New York, and no party in this litigation has sought relief or recovery from Delaware.

The Special Master has recommended the grant of Delaware's Motion for Leave to Dismiss its Complaint Without Prejudice, after this Court referred that Motion to him. *See* Report and Recommended Disposition of Motions with Respect to Complaints at 6-7 (March 15, 1994) ("Report").

All fees due the Clerk and other taxable costs have been paid.[2] *Cf.* this Court's Rule 46.2.

Since the filing of Delaware's Motion on January 21, 1994, through their recent Exceptions, the Intervenors have now presented five pleadings to the Court and the Master claiming that the dismissal without prejudice of Delaware's Complaint against New York pursuant to a bilateral settlement between those two States "might" or "could" prejudice the Intervenors in some yet-to-be-identified way. The Master rejected this assertion as nothing more than unsubstantiated and idle "musings," and the Court should, too. The Intervenors have presented no factual or legal basis to support their opposition to Delaware's Mo-

[2] The Intervenors earlier objected to Delaware's dismissal of its Complaint on the frivolous ground that Delaware might not pay its share of the Master's fees when the Master applied for them. *See* Intervenors' Objections to Delaware's Motion for Leave to Dismiss its Complaint Without Prejudice, filed February 7, 1994, at 5 n.6. Since that objection was made, the Master has made such an application; the Court has ordered the fees paid in accordance with the recommendation contained in the application; and Delaware has remitted payment in full to the Master of its share of the fees due to him.

tion (*see* pp. 14-19, *infra*); and their objective in opposing this Motion appears to be to advance their legislative agenda—an objective to which this Court should not lend its aid (*see* pp. 19-20, *infra*).

1. *The Procedural Posture of the Case Through the Settlement.*—In February 1988, Delaware filed a motion for leave to file a Complaint against New York; the Court granted the motion on May 31, 1988. 486 U.S. 1030. Delaware's claims for pecuniary and injunctive relief were based on this Court's decisions in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), which established a "primary rule" and a "backup rule" to resolve the States' conflicting claims to escheat unclaimed intangible property.[3]

The property claimed by Delaware in this case consisted of dividends, interest, and other distributions on securities ("securities distributions") held by brokers incorporated in Delaware, which the brokers had remitted to New York and reported as "owner/address unknown" over the course of many years. New York answered Delaware's Complaint on July 27, 1988, asserting that the securities distributions in the hands of the brokers were "owner/address *known*," with every address being in New York, and therefore subject to the primary rule, rather than the backup rule.

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[3] In short, unclaimed intangible property is subject to escheat "only by the state of the last known address of the creditor, as shown by the debtor's books and records." *Texas* v. *New Jersey*, 379 U.S. at 681. "If [the creditor's last known] address does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds 'until some other State comes forward with proof that it has a superior right to escheat.'" *Pennsylvania* v. *New York*, 407 U.S. at 210-11 (quoting *Texas* v. *New Jersey*, 379 U.S. at 682). These rules were reaffirmed in *Delaware* v. *New York*, No. 111 Original, slip op. at 6-7, 113 S. Ct. 1550, 1556 (March 30, 1993).

On December 12, 1988, the Court appointed Thomas H. Jackson as Special Master in the case, 488 U.S. 990, and on February 21, 1989, the Court granted leave to the State of Texas to file a complaint in intervention. 489 U.S. 1005. Following the grant of Texas' motion for leave to file a complaint in intervention, the forty-seven other States and the District of Columbia sought leave to file complaints in intervention.

On January 28, 1992, the Special Master issued a Report recommending that the rules governing this body of law be revised radically and rejecting New York's factual defense as it related to the Master's proposed rule changes. On exceptions filed by Delaware and New York, the Court declined to adopt the Master's invitation to revise the law. The Court also declined Delaware's request that judgment be entered in its favor, remanding the case to the Master for further proceedings, with the instruction that "if New York can establish by reference to debtors' records that the creditors who were owed particular securities distributions had last known addresses in New York, New York's right to escheat under the primary rule will supersede Delaware's right under the secondary rule." *Delaware* v. *New York*, No. 111 Original, slip op. at 16, 113 S. Ct. 1550, 1561 (March 30, 1993).

The Court also granted all pending motions to intervene, *id.*, slip op. at 4, 113 S. Ct. at 1555, and, after amended complaints against New York were filed by the Intervenors, denied Delaware's motion (joined in by New York) to strike them. *Delaware* v. *New York*, No. 111 Original, 114 S. Ct. 48 (October 4, 1993). The amended complaints all assert primary-rule claims and backup-rule claims against New York; they do not seek relief against Delaware. No amended complaint alleges any claim of any kind against any State other than New York, the sole defendant in this action. New York answered the Intervenors' complaints and also filed counterclaims against the Intervenors. The Court struck New York's counter-

claims without prejudice to New York's filing a motion for leave to assert them, *id.*, and New York filed such a motion on October 29, 1993. The Court referred that motion to the Special Master. *Delaware* v. *New York*, No. 111 Original, 114 S. Ct. 631 (December 13, 1993). The Master's recommendation that New York's motion be denied at that time, without prejudice, was presented in his March 15 Report, at 9. No party has excepted to it.

New York's proposed counterclaims asserted primary-rule and backup-rule claims against all Intervenors. New York did not seek leave to assert a counterclaim against Delaware. Thus, at that point there were two sets of claims being asserted in the overall case: (1) Delaware's claim against New York, and (2) the Intervenors' claims against New York. New York had sought leave to assert a third set of claims, but New York's request did not involve Delaware's dispute with New York and did not seek to make claims against Delaware. Thus, no party in the litigation was making any claim against Delaware and Delaware was making no claim against any party other than New York, a posture which still exists.

2. *The Intervenors' Legislative Agenda.*—Almost immediately after the Court on March 30, 1993, rejected the rule changes pressed by the Intervenors, the Intervenors announced that they would seek congressional reversal of the decision. The Intervenors have even gone so far as to inject their legislative agenda into their presentations to the Master as to his handling of the *litigation.*

On June 2, 1993, approximately two months after the Court's March 30 decision rejecting the merits of the Intervenors' initial complaints, counsel for the Intervenors told the Master that the Intervenors' "strategic approach" and "global desire" was to negotiate a settlement, and, if a settlement could not be reached, "the Congress of the United States has indicated an interest, and at some point in time there will be legislation . . . that will set the rule"

for disposition of the case. Transcript of Hearing Before the Special Master (June 2, 1993) at 43-44.

As promised by the Intervenors' counsel, on June 17, 1993, Representative Henry Gonzalez of Texas introduced H.R. 2443 in the House of Representatives. The bill (along with its companion, S. 1715, introduced by Senator Kay Bailey Hutchison, also of Texas) seeks retrospectively to reverse the Court's decision of March 30, 1993. Two days later, a story about the proposed legislation appeared in the Wilmington *News Journal* in which counsel for the Intervenors was quoted as saying " 'Delaware won't see a nickel for several years' if it doesn't back down and agree to spread the wealth." Joseph DiStefano, "Legislation Could Cost Delaware Millions," Wilmington *News Journal* (June 19, 1993), at A1.

At the next status conference, on November 15, 1993, counsel for the Intervenors, without any request from the Master, undertook to "report" as follows:

> I'm pleased to report that legislation has been introduced in the House of Representatives, namely HR 2443. I would be happy to provide a copy since one can take additional notice of it to the Master if he—if he would like. And that that legislation now has two hundred and thirty-two (232) co-sponsors which is clearly a majority of the House of Representatives, and that legislation would reinstate Your Honor's recommendation and would do so in a fashion so as to dispose of this case and to reallocate, pursuant to the legislation, the funds taken by the State of New York which are at issue in this case. . . . The legislation, in my opinion, would also dispose of the Primary Rule contentions.

Transcript of Status Conference before the Special Master (November 15, 1993) at 88. Thus, the Intervenors have made their agenda plain for the Master and the Court to see: delay the resolution of the litigation, and press for legislation.

3. *The Bilateral Settlement and Delaware's Motion for Leave to Dismiss.*—On January 21, 1994, Delaware and New York 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 bilateral settlement, Delaware filed its Motion with the Court seeking dismissal of its Complaint without prejudice. The grant of the Motion and the Order recommended by the Master would dispose of any claims involving Delaware; and it would not in any way affect the claims (either pending or proposed) between New York on the one hand and the Intervenors (or any of them) on the other.

On January 24, 1994, New York filed a Response to Delaware's Motion, requesting that it be granted. New York confirmed that "[t]he dismissal will not affect New York's claims against the intervening plaintiffs, nor will it affect any of their claims against New York."

Notwithstanding the lack of a present justiciable controversy between Delaware and New York, and despite the utter lack of any effect that the dismissal of Delaware's complaint would have on any of the claims of any of the Intervening Plaintiffs (all of which have asserted claims against New York, but none of which have asserted claims against Delaware), on February 7, 1994, the Intervenors filed an Objection to the Motion and requested that the Objection and Delaware's Motion be referred to the Special Master. The Intervenors premised their Objection on what might generously be called speculation—baldly asserting that there might somehow be prejudice to them by the grant of the Motion. In their February 7 Objection, the Intervenors did not and could not point to any concrete prejudice that might befall them as a result of the withdrawal of one of their co-plaintiffs from the case.

4. *Reference to the Master.*—On February 22, 1994, the Court referred Delaware's Motion to the Special Master. The Intervenors made no effort before the Master

to expand on their reasons, expressed to this Court in their Objections on February 7, 1994, for not granting Delaware's Motion to Dismiss its Complaint. On March 1, 1994, the Master issued a Scheduling Order, mainly dealing with other matters, in which he advised the parties that "[a] decision on Delaware's motion [to dismiss] will be forthcoming in due course." Scheduling Order (March 1, 1994) at 1.

The Intervenors, thus faced with this indication that the Master viewed the record before him as sufficient to decide Delaware's Motion, containing as it did such substantive objections as the Intervenors had made before this Court and their request that the settlement agreement between New York and Delaware be produced, nonetheless made no effort to submit any further substantive arguments to the Master. Instead they submitted a short motion, on March 7, 1994, requesting production of the New York-Delaware settlement agreement (Exceptions App. 7a-9a), which simply tracked the request they had made before the Court a month earlier in their Objections. (*Compare* Exceptions App. 7a-9a *with* Intervenors' Objections, filed February 7, 1994, at 2, 6-7.) Thus, once again, the Intervenors let the opportunity to demonstrate actual prejudice pass.

On March 14, 1994, counsel for Delaware and New York provided copies of the documentation of the agreement settling the litigation to the Master, in order to put a stop to the specious claims of the Intervenors. The submission to the Master made it plain that the agreements "enclosed are not being submitted to the Master or the Court for approval, but simply to put to rest the dilatory objections raised by the Intervenors." Letter from Dennis G. Lyons to Thomas H. Jackson (March 14, 1994) (Exceptions App. 12a).

5. *The Master's Report.*—On March 15, 1994 (the day that he received the documentation of the settlement agreement), the Master agreed completely with Delaware and New York that the Intervenors' "mere recitation of

the concept of prejudice . . . cannot suffice, and Intervenors have not advanced circumstances warranting the unusual relief of blocking the dismissal of an action between litigants who have settled their dispute, when all other parties' claims can remain pending and can be effectively adjudicated by the Court." Report at 4.

The Master rejected the notion that the documentation of the settlement agreement should be examined for potential prejudice and rejected the suggestions of potential prejudice made by the Intervenors in their initial round of pleadings to the Court and to the Master (and now renewed once again in their Exceptions). He concluded that "nowhere in the musings of the Intervenors is there a cognizable showing of even the slightest prejudice, or any legitimate fear of contingent future prejudice, from the granting of the motion lodged by plaintiff Delaware for leave to dismiss its complaint." *Id.* at 6.

Also in his March 15 Report, the Master tendered recommendations that would resolve two other issues that were before him, neither of which has even the slightest bearing on any rights asserted by Delaware in the litigation—let alone on the very narrow question presented by the Intervenors' "musings" in their Objection to Delaware's Motion for leave to dismiss its complaint without prejudice. No exceptions have been taken in respect of these two other recommendations.[4] The Court's disposition of these other recommendations should not affect its ruling on Delaware's motion.

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[4] Counsel for a small group of the Intervenors, who joined the Intervenors' Exceptions, also filed a letter with the Clerk under date of May 9, 1994, enclosing a copy of a letter that he had sent to the Master under date of April 4, 1994. The letter does not purport to constitute exceptions to the Master's Report; while we have difficulty understanding the intent of the letter, we do not believe that Delaware has any interest in its subject matter, and whatever issues it may seek to raise should not, we submit, be permitted to delay the Court's action on Delaware's Motion to Dismiss.

6. *Delaware's Renewed Motion.*—Because the two other recommendations in the March 15 Report were wholly separate and independent from Delaware's Motion for leave to dismiss, on March 21, 1994, Delaware filed a Renewed Motion seeking leave to dismiss its complaint. Even though the Intervenors now had in their possession the documentation of the agreement between Delaware and New York for the settlement of this action, again they let pass an opportunity to point to some actual prejudice that would befall them if the Motion to Dismiss were granted. Instead of filing an opposition to the Renewed Motion setting forth the basis of the alleged prejudice to them, they moved for a procedural "clarification." This Motion for Clarification sought delay of their time to file a substantive pleading with the Court demonstrating such prejudice and urged that the Master's Report and recommendation of the grant of Delaware's Motion be considered on Exceptions and Replies on a schedule to be ordered by the Court. When Delaware filed a Memorandum in Response to this Motion suggesting that it was made for purposes of delay, the Intervenors filed yet another pleading (this one a Reply Memorandum) that was again mute on the subject at the heart of the Intervenors' objection to the dismissal—some demonstration of actual prejudice to the Intervenors by the granting of the motion. Again, this opportunity was neglected despite the fact that the Intervenors had before them the documentation of the agreement between Delaware and New York for the settlement of this action. Presumably, if it contained anything that suggested prejudice to the Intervenors from the dismissal, they would have pointed it out to this Court.

Including their Exceptions, the Intervenors have now filed five pleadings with the Court and the Master in which they have asked for delay of the Court's adjudication of Delaware's Motion. They claim—without any basis in fact—that they might somehow suffer prejudice from the dismissal without prejudice of a Complaint that seeks nothing from the Intervenors by a party that they have made no claims against.

7. *The Intervenors' Efforts to Extract Information About the Delaware/New York Legislative Strategy.*— Immediately after learning of the bilateral settlement of the litigation between Delaware and New York, the Intervenors began their campaign to extract information about the Delaware/New York legislative strategy. (In this regard, it is useful to recall that although Delaware and New York are Plaintiff and Defendant in the litigation, they presented unified support for the Court's established rules of escheat, which were reaffirmed in the March 30, 1993 Decision; the proposed legislation is therefore inimical to the interests both of Delaware and of New York.)

The bilateral settlement was announced on a Friday, January 21, 1994; the following Monday, January 24, 1994, counsel for the Intervenors, stating that the settlement "dramatically alter[ed] the landscape" of the litigation, advised the Master "that House Hearings on H.R. 2443 are scheduled for February 1, with passage expected in February in the absence of a global settlement." [5] Letter from Bernard Nash to Thomas H. Jackson (January 24, 1994) at 1-2. This communication was in keeping with the Intervenors' practice of linking legislative activities and efforts to affect the Master's scheduling of the progress of the action.

On March 14, 1994, following the reference to the Master (*see* pp. 7-8, *supra*), counsel for Delaware wrote to the Special Master "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." Letter from Dennis G. Lyons to Thomas H. Jackson (March 14, 1994) (Exceptions App. 11a). Counsel therefore enclosed copies of "the documentation of the agreement for the settlement of this action," and added, "[a]s is

[5] As of the filing of this brief, H.R. 2443 has not passed the House, and its companion, S. 1715, has not passed the Senate.

obvious from these papers, New York remains fully responsible for all claims of the Intervenors." (*Id.* at 12a.) The same day, counsel for New York confirmed in a letter to the Master that

> 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.

Letter from Jerry Boone to Thomas H. Jackson (March 14, 1994) (Exceptions App. 32a-33a).[6]

The documentation thus submitted to the Master purported to be, and indeed was, the documentation of the "agreement for the settlement of this action." Counsel for the Intervenors, two days later, on March 16, 1994, wrote to counsel for Delaware complaining that the settlement documentation provided to the Master did not "contain any documentation regarding obligations and undertakings with respect to H.R. 2443, S. 1715 or similar legislation." The letter referred to a newspaper article of some months

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[6] At about the time when counsel for the Intervenors sought before this Court and the Master to obtain copies of the settlement agreement between New York and Delaware, Representative Stephen L. Neal of North Carolina developed an interest in receiving copies as well. (Representative Neal is Chairman of the Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Committee on Banking, Finance and Urban Affairs, the Subcommittee to which H.R. 2443 had been referred.) On March 1, 1994, Chairman Neal sent a letter to New York's Attorney General requesting copies of it. New York, under cover of a letter dated March 11, 1994, from Attorney General G. Oliver Koppell, furnished copies of the documentation of the agreements for the settlement of this action to Chairman Neal.

earlier, which the letter said reported that "New York and Delaware have agreed to fight the legislation in Congress." The letter complained that "[t]he documentation submitted to the Special Master does not appear to reflect such an understanding or agreement." Letter from Leslie R. Cohen to Dennis G. Lyons (March 16, 1994) (Exceptions App. 34a-35a). Although a copy of the letter was sent to the Special Master, as though it were some kind of pleading, no explanation was offered as to why the Court or its officers should be involved in an effort by the Intervenors to extract from Delaware and New York documents—if any exist—concerning their strategy as to opposition to the legislation.

In response to this inappropriate request, counsel for Delaware replied to counsel for the Intervenors that the request "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.' " The letter took the position that any "documentation regarding obligations and undertakings [between New York and Delaware] with respect to H.R. 2443, S. 1715 or similar legislation" was "none of your or the Intervenors' business." Letter from Dennis G. Lyons to Leslie R. Cohen (March 18, 1994) (Exceptions App. 36a-37a).[7]

In their Exceptions, the Intervenors have once again renewed their remarkable attempt to learn about Delaware and New York's legislative strategy under the

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[7] We note that this letter is misleadingly quoted in the Intervenors' Exceptions, at page 10. Delaware did not say, as the Intervenors assert, that " 'it is none of the Intervenors' business' whether Delaware has produced the entire settlement agreement." Delaware stated that information " 'regarding obligations and understandings [between Delaware and New York] with respect to H.R. 2443, S. 1715 or similar legislation' . . . is none of your [Intervenors' counsel] or the Intervenors' business." (Exceptions App. 36a.)

auspices of Court-ordered discovery.[8] They seek yet another remand to the Master, for Court-ordered discovery, in which any understandings or agreements between Delaware and New York concerning their opposition to the pending legislation (which is inimical to the interests of Delaware and New York) would be revealed to those promoting the legislation.

ARGUMENT

I. THE MASTER WAS CORRECT THAT THE MOTION SHOULD BE GRANTED BECAUSE THE INTERVENORS CANNOT DEMONSTRATE PREJUDICE

Delaware seeks the dismissal of its Complaint without prejudice, as called for in the settlement agreement with New York. This is a common and well-accepted method of resolving litigation. As Professors Wright and Miller have observed, "[t]he power to drop some plaintiffs or some defendants from the suit plainly exists, either in the rules or in the inherent power of the court." 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 2362 at 150 (1971). Because of the strong federal policy encouraging the settlement of litigation, "the courts have generally followed the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit." 9 Wright & Miller, § 2364 at 165. The policy has special force in original jurisdiction litigation, in which the Court is "mindful" of its "often expressed preference that, where possible, States settle their controversies by 'mutual accommodation and agreement.' " *Arizona* v. *California*, 373 U.S. 546, 564 (1963)

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[8] Despite the clear representations in the letters to the Master made on behalf of Delaware and New York (Exceptions App. 11a-33a) to the contrary, the Intervenors also suggest that Delaware and New York have not provided the Master with the complete documentation of the agreement for the settlement of this action. Exceptions at 7, 11. That suggestion is false.

(quoting *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943), and *Nebraska* v. *Wyoming*, 325 U.S. 589, 616 (1945)); *accord Oklahoma* v. *New Mexico*, 111 S. Ct. 2281, 2292 (1991) (to be reported at 501 U.S. 221).

Here, of course, the Defendant fully supports the request for a dismissal without prejudice. The only question is whether there is "plain legal prejudice" to the Intervenors. The Intervenors seek no relief against Delaware, and Delaware seeks no relief against the Intervenors in this action. The Intervenors have now presented five pleadings to the Court and the Master talking about the possibility of prejudice but never demonstrating any. Three of these pleadings have been filed after they received the documentation of the agreement between New York and Delaware for the settlement of this action.

The Master correctly rejected the Intervenors' speculation that they might somehow suffer prejudice. In this Court, as they did before the Master, the Intervenors point to two types of supposedly threatened prejudice. Both were considered and rejected by the Master. Both are further undercut by the settlement documentation, which the Intervenors appended to their Exceptions, but which they have not deigned to discuss in those Exceptions.[9]

First, the Intervenors assert that as a result of the dismissal they might not be able "to obtain a full and timely

[9] While the Master received the settlement documentation provided by Delaware and New York on the day he released his Report, the Report does not recite any examination of the agreements by the Master. The Intervenors speculate that the letter submitting the agreements to the Master crossed in the mails with the Master's Report (Exceptions at 6). Whether this is so or not, we do not know. In any event, the documentation of the settlement of the action covers only 18 printed pages (Exceptions App. 14a-31a). Despite having this material for close to two months, the Intervenors do not point to anything in it which causes them any sort of prejudice which could be a basis for requiring Delaware to remain in this litigation against its will.

recovery of funds they claim" against New York. Exceptions at 10. That is nonsense. New York has confirmed that it remains answerable to the Intervenors for any legitimate claims. *See* p. 12, *supra.*

The Master unequivocally rejected this argument, stating "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. *The Intervenors have conceded as much.*" Report at 5 (emphasis supplied). The Master observed that New York's representation that it will remain responsible for the legitimate claims of the Intervenors stated "the appropriate legal posture to be granted to this settlement agreement, no matter what words Delaware and New York chose to write into it." *Id.*[10]

Surely the Master was correct that "no private agreement between Delaware and New York could affect other jurisdictions' claims against New York to, at the end of the day, money that is not segregated, held in a special account, or otherwise somehow 'unique' enough to think that it somehow 'disappears' effective with the consummation of the settlement agreement. Production of the settlement agreement, while perhaps satisfying the curiosity of all concerned, *is not necessary to reinforce this essentially legal point.*" *Id.* at 6 (emphasis supplied).

The text of the settlement agreement, in fact, fully confirms the accuracy of New York's representations and the propriety of the Master's conclusion. The documentation calls for the payment of specified sums of money by New

[10] The Intervenors complain that the settlement documentation does "not address the source of the funds to be paid by New York" to Delaware. (Exceptions at 7 n.6.) How the source of the funds to be used could conceivably prejudice the Intervenors, we cannot imagine, and the Intervenors do not explain.

York to Delaware at specified times, in consideration of a quitclaim and release by Delaware and a covenant by Delaware not to sue. (*See* Dismissal and Payment Agreement, ¶ 2) (Exceptions App. 15a). The escheats, New York's taking of which from the Delaware-incorporated brokers Delaware complained of in the case, are the subject of a quitclaim, release and remise by Delaware to New York. See Quitclaim and Release Agreement, ¶ 1, Exceptions App. 18a-19a. New York is thus left in possession of them. New York assumes all obligations to rightful owners or purported rightful owners with respect to these escheats and with respect to the claims of the other States as to them. *Id.* ¶¶ 3, 4 (Exceptions App. 20a-21a). The text of the agreement is very plain: New York "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 [*i.e.*, those at issue in the litigation] 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." Quitclaim and Release Agreement ¶ 4 (Exceptions App. 21a).[11]

Second, the Intervenors assert—as they did before the Master—that Delaware might seek "reentry to this action." (Exceptions at 10.) Here, too, the Master found the Intervenors' objection specious:

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[11] As noted in its Motion, Delaware is not seeking this Court's approval of the settlement agreements; it is not seeking the entry of any sort of consent decree; and it views the documentation of the agreement for the settlement of this action as a private matter between it and New York. Delaware has quoted from the agreements to this Court simply to respond to the repeated suggestions, made without substantiation, from the Intervenors that the settlement somehow could, or does, prejudice them. The Master's ruling that it was determinable without looking at the settlement documentation that the settlement could not prejudice the Intervenors is, nonetheless, entirely correct.

> [t]o the extent that Intervenors raise the specter of Delaware's case rising Phoenix-like in the future, it suffices to note that permission from the Court would be required (See Sup. Ct. Rule 17) and the disposition sought here would not purport to curtail the discretion of the Court in reviewing such a maneuver. *See generally, Mississippi* v. *Louisiana,* 113 S. Ct. 549, 552 (1992).

Report at 5. Again, the Master was correct. The Court's discretion is exercised at all material stages of an original case, not just at the outset.[12]

Here, again, the documentation further undercuts the Intervenors' speculation. The Covenant By Delaware Not to Sue sets out in detail the circumstances under which Delaware is permitted to bring suit against New York under the settlement. (Exceptions App. 27a-30a.) Delaware's right to sue is triggered by non-payment or non-compliance with the agreement. If Delaware attempted to sue by re-entering, or seeking to revive, the present suit, control over that attempt would be lodged in this Court and any objections that the Intervenors might have to its substance or timing would presumably be raised then. If Delaware attempted to sue New York on the settlement agreements or on the original claims in a

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[12] *See, e.g., Delaware* v. *New York,* 113 S. Ct. 1041 (1993) (denying New York leave to file amended Answer and Counterclaims); *California* v. *Nevada,* 447 U.S. 125, 132-33 (1980) (after determining central issue on which complaint was filed, declining to adopt Master's recommendation to allow filing of amendment to complaint, which would "expand the Master's reference" to ancillary questions better resolved in other forums); *Ohio* v. *Kentucky,* 410 U.S. 641, 644, 651-52 (1973) (declining to allow amendment even though it would be allowed under "[a]ccepted procedures for an ordinary case"); *Utah* v. *United States,* 394 U.S. 89, 95 (1969) (*per curiam*) (declining to allow alleged necessary party to intervene, because "original jurisdiction should be exercised sparingly"); *Texas* v. *New Jersey,* 379 U.S. 674, 677 n.6 (1965) (case that originally established the rules at issue here; allowing only those states with an actual, identified stake in the limited funds at issue to intervene).

fresh action in this Court, that obviously would be subject to this Court's control also. The suggestion of prejudice to the Intervenors is baseless.

II. ACCEDING TO THE INTERVENORS' REQUEST FOR "ADDITIONAL DISCOVERY" WOULD INJECT THE COURT INTO THE LEGISLATIVE PROCESS

The Intervenors' request that Delaware's Motion be re-referred to the Master for "discovery" is driven *not* by concern about prejudice in the litigation, but by an effort to find out the content of any "obligations and undertakings [of New York and Delaware] with respect to H.R. 2443, S. 1715 or similar *legislation*." Letter from Leslie R. Cohen to Dennis G. Lyons (March 16, 1994) (emphasis supplied) (Exceptions App. 34a). Such a desire may be understandable in light of the intense legislative battle being waged by the Intervenors and their counsel in an effort to reverse the Court's decision, but the discovery demand is wholly inappropriate.

Delaware and New York provided the Master with all documentation of the agreement between them for the settlement of this action. At the most, that is all that can be of any conceivable legitimate concern to the Intervenors. Delaware and New York have remained unwilling to discuss with the Intervenors the existence or substance of any arrangements that might relate, as the Intervenors suggest, to the response and defense of Delaware and New York against the legislation that the Intervenors are promoting in Congress.

Obviously it would be of interest to the Intervenors and their counsel to learn what, if any, arrangements Delaware and New York may have made with respect to their defensive posture and negotiating strategies with respect to the threat of the legislation. A look at one's opponent's hole cards is always advantageous if one can take it. While in Delaware's judgment (with which the Master agreed) the documentation of the settlement of

the litigation was irrelevant to Delaware's pending Motion, Delaware decided to make it available in order to avoid any implication, however baseless, that the voluntary dismissal of Delaware's complaint could be prejudicial to the Intervenors. Any documentation of any agreement respecting the defense against the *legislation* (as sought by the Intervenors) would be completely irrelevant to the issue before the Court.

We respectfully submit that the Court would not wish itself or its Master to become involved with inquiry into any such agreements—should they exist—for such involvement would be a violation of the separation of powers principles observed since the day that the framers of our Constitution rejected a proposal that members of the Supreme Court render advice concerning pending legislation.[13] In a variety of circumstances, the federal courts have made every effort to avoid involvement in the legislative process. *See, e.g., Spallone* v. *United States*, 493 U.S. 265, 280 (1990) (vacating order of contempt against individual members of City Council of Yonkers in desegregation case as an untoward intrusion into legislative process); *Coleman* v. *Miller*, 307 U.S. 433, 469-70 (1939) (Opinion of Frankfurter, J.) (for more than 200 years, it has been the policy of Anglo-American jurisprudence to "leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts"); *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 231 (1908) (Holmes, J.) (precluding challenge to State legislative process prior to final legislative action). These considerations unite with the utter irrelevancy of any arrangements between Delaware and New York concerning the legislative battle with the Intervenors to the question whether Delaware should be permitted, with New York's consent, voluntarily to dismiss its complaint against New York without prejudice.

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[13] 1 Records of the Federal Convention 21 (Farrand ed. 1911).

CONCLUSION

For the reasons stated herein, in the Motion and Renewed Motion, and in the Master's Report, the Court should overrule the Exceptions and grant the Motion by the State of Delaware for Leave to Dismiss its Complaint Without Prejudice. Paragraph 1 of the Order recommended by the Master (Report App. 1) should be entered.[14]

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May 1994

[14] In the event that the Court declines to enter any part of the Master's Draft Order that does not concern Delaware's Motion to Dismiss (Report App. ¶¶ 2, 3), we respectfully request that the Court enter the suggested form of Order appended hereto.

APPENDIX

Suggested Form of Order

This cause having come before the Court to be heard on the Motion of Plaintiff, State of Delaware, for Leave to Dismiss its Complaint Without Prejudice, and the Renewed Motion of Plaintiff, State of Delaware, for Leave to Dismiss its Complaint Without Prejudice, and the Court having considered the Motion and the Renewed Motion, the Objections thereto, the Report and Recommended Disposition of Motions with Respect to Complaints, submitted by Special Master Thomas H. Jackson under date of March 15, 1994, and the Exceptions to such Report, and the Court having considered the respective positions of the parties,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion by the State of Delaware for Leave to Dismiss its Complaint Without Prejudice is granted, and the Complaint of Delaware in this matter be and it hereby is dismissed without prejudice.