No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE FIRST AMENDED ANSWERS AND LEAVE TO FILE COUNTERCLAIMS

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December 22, 1992

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The defendant State of New York, by its Attorney General Robert Abrams, hereby respectfully moves pursuant to Rule 17.2 of the Rules of this Court for leave to file the annexed First Amended Answers and leave to file compulsory counterclaims under Rule 13(f) of the Federal Rules of Civil Procedure. The Federal Rule allows a pleader, by leave of court, to set up counterclaims by amendment which were omitted through oversight, inadvertence, or excusable neglect, or when justice requires. New York proposes only minor technical amendments in order to plead compulsory counterclaims to offset its potential monetary liability if the Court adopts the Report of the Court-appointed Special Master (or any other theory which retroactively invalidates New York's prior escheat of abandoned intangible property). By its counterclaims, New York seeks

to collect abandoned intangibles which have been taken by other jurisdictions but would be owed to New York under new escheat rules. Thus, New York's counterclaims seek to achieve fairness by applying the Court's pronouncements equally to all escheated property in all other jurisdictions. The omission of these claims from New York's previously filed answers was excusable because the need for such relief has only become apparent with the issuance of the Special Master's Report, which raises the possibility that New York will have to pay out the property it has escheated in conformity with well-established principles of commercial and escheat law. Finally, New York's assertion of its counterclaims at this juncture will not prejudice any jurisdiction or burden the Court.

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

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

3. The State of Texas moved for leave to file a complaint as a plaintiff-intervenor, which the Court granted on February 21, 1989. 489 U.S. 1005. Texas asserted a competing claim to the property sought by Delaware whenever the issuers of the underlying securities were domiciled in Texas, and laid claim to other property taken by New York — unclaimed securities distributions paid by Texas-incorporated issuers and Texas municipalities to New York-domiciled banking institutions, including The Depository Trust Company (DTC), a securities depository incorporated under the New York Banking Law.[1]

[1] Texas' claims for the property remitted to New York by New York banking institutions were set forth in an amended complaint in intervention lodged in October 1989. The Report of the Special Master recommends that the Court grant Texas' motion for leave to file this pleading. Report at A-2.

4. On November 17, 1989, other jurisdictions — the States of California, Michigan, Ohio, and Rhode Island (subsequently joined by the District of Columbia) — moved for leave to intervene to assert a claim to a portion of the unclaimed securities distributions remitted to New York by New York debtor brokers and banks, and DTC. These jurisdictions articulated a "commercial activities" theory which accorded the right to take custody of (or escheat) the property to the presumed domiciles of the beneficial owners of the underlying securities.[2]

5. All other States have moved for leave to file complaints in intervention and, with the exception of the Commonwealth of Massachusetts, adopted one of the pending intervention theories.[3] The Special Master has recommended that the Court grant all applications to intervene. Report of the Special Master at A-2. The Massachusetts motion, brought after the issuance of the Report, was granted by the Court in its order dated October 5, 1992.

6. New York answered Delaware's complaint on July 27, 1988. It lodged an answer to the Texas complaint in intervention on April 21, 1989, and to Texas' amended complaint on November 17, 1989. Also on November 17, 1989, New York answered the complaint of various States led by the State of Alabama, which was modeled on the Texas pleading. Finally, on July 20, 1990, New York interposed an answer to the complaints in intervention of the States initially advocating the commercial activities theory. New York has not been required to answer any other complaints in intervention. *See* Litigation Management Order No. 1, dated October 18, 1989, at ¶ 10.

7. Under the Court's escheat precedents, the jurisdiction with the right to escheat abandoned intangibles is the State of

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[2] The States of California, Ohio, and Rhode Island have abandoned this theory in favor of the one advocated by Texas.

[3] Massachusetts merely asserted that it was "entitled to share in any remedy fashioned by the Supreme Court in this case." Motion of the Commonwealth of Massachusetts for Leave to File Complaint in Intervention and Complaint in Intervention, dated March 31, 1992, at 14.

last known address of the creditor as shown by the debtor's books and records (the primary rule). *Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972). In the event that the primary rule cannot be applied, the right is conferred upon the debtor's state of incorporation (the backup rule). *Id.* During the more than 20 years that elapsed between the announcement of the *Texas v. New Jersey* rules and the onset of this case, all States whose abandoned property laws provided coverage for unclaimed securities distributions uniformly defined the creditor as the apparent owner shown by the debtor's books and records, and the debtor as the holder of the payment obligation.

8. On January 28, 1992, the Special Master issued a Report which recommended a completely novel interpretation of the terms "creditor" and "debtor" in the *Texas v. New Jersey* rules as applied to the property in question. Adopting a theory devised by the State of Texas, the Master concluded that the creditor of an unclaimed distribution is the beneficial owner of the underlying security, not the apparent owner as shown by the debtor's books and records. Since the beneficial owner can not be determined from the debtor's books, the Master's result requires that all of the property in question escheat under the *Texas* backup rule.

9. With regard to the *Texas* backup rule, the Master defined the debtor as the corporate or municipal issuer of the underlying security regardless of whether the issuer had discharged its debt by paying the distribution to the record owner of the security — a brokerage firm, custodian bank, or securities depository holding title to the security for another in the institution's nominee name. In addition, the Master recommended that the Court change the standard for locating the debtor under the backup rule, from its State of incorporation to its State of chief or principal executive office. All of the Report's innovations were placed before the Court with the further recommendation that they be made fully retroactive.

10. If the Court adopts the Master's Report in its entirety, New York will be liable to the 50 States and the District of Columbia

for most of the unclaimed securities distributions remitted by New York's institutional record holders. New York would be entitled to retain only the property paid by issuers whose chief executive offices were in New York at the time of the escheat. Even if the Court preserved the State of incorporation provision of the *Texas* backup rule to locate the debtor's jurisdiction, New York would still be liable for most of the funds since it claimed this property according to the uniform understanding of the record owner, not the issuer, as the debtor. Thus, under either scenario, New York's financial burden would be extraordinary.

11. As an offset to its potential monetary liability, New York now seeks leave to amend its answers to assert compulsory counterclaims against all other jurisdictions that are or will be made parties to this action. The counterclaims address the property which these jurisdictions have escheated according to the States' uniform understanding of the *Texas v. New Jersey* rules, but which property would be owed to New York if the Court adopts the Special Master's Report or retroactively changes the rules in any other way. In other words, New York is requesting no more than a minor technical amendment to its pleadings to ensure that any changes in the escheat rules which the Court may adopt retroactively are applied equally to all escheated intangibles in all other jurisdictions, not just to the property remitted to New York. As will be demonstrated here, New York's prior omission of these counterclaims was excusable. In addition, the relief it seeks is completely consistent with the concern for justice that underscores the granting of permission to file omitted counterclaims. *See* F.R.C.P. Rule 13(f). Finally, New York's counterclaims will not prejudice the parties nor burden the Court since they raise no new legal issues nor require further briefing, and will only affect the implementational phase of the case.

12. Rule 13(f) of the Federal Rules of Civil Procedure gives the courts considerable discretion in granting parties leave to amend their answers to file omitted counterclaims, in order to further the Rule's overall goal of resolving disputes insofar as possible on the merits and in a single judicial proceeding. The

courts should be liberal in permitting amendments to include compulsory counterclaims since such claims may be barred in subsequent actions on the ground of res judicata. *See Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214, 220 (5th Cir. 1975); *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960). In denying leave to amend a pleading, delay alone is not a sufficient ground. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Mercantile T. C. N. A. v. Inland Marine Products Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976). The courts may, however, consider such other factors as prejudice to the non-moving party, the strain on the court's docket, and whether additional discovery will be required. *See Barnes Group, Inc. v. C&C Products, Inc.*, 716 F.2d 1023, 1035 n.35 (4th Cir. 1983). New York's request for leave to amend satisfies the discretionary criteria under Rule 13(f) and does not entail any of the factors that might warrant denial of its motion.

13. Consistent with Rule 13(f), the Court should allow New York's counterclaims because their omission was excusable. New York's claims concern property which would be owed to New York in the event that the Court retroactively adopted one of the legal theories proposed by the intervenors. Since those theories are novel - contradicting the Court's escheat precedents, uniform commercial law principles and the States' own escheat practices — it was reasonable for New York to omit counterclaims requiring the assumption that one of the theories in intervention would be adopted *and* be given retroactive effect.

14. The need for New York to assert its counterclaims has only become apparent with the Special Master's recommendation that the Court adopt the issuer-debtor theory advocated by Texas and Alabama, *et al.*, and apply it retroactively along with a change in the locator under the *Texas* backup rule. Although New York, Delaware, and *amici curiae* representing financial institutions throughout the country, have vigorously opposed the Master's Report, its existence now requires New York to take steps to pursue its own remedial options. In addition, it would have been impossible for anyone to predict that the Master would propose a retroactive change in the locator under the *Texas* backup rule

from the debtor's State of incorporation to that of its chief executive office.

15. A further and independent ground for granting New York's motion under Rule 13(f) is the provision allowing for omitted counterclaims "when justice requires." In this regard, it would be patently unfair to subject only New York to the retroactive application of new escheat principles while permitting other jurisdictions to retain property owed to New York under those very same principles. Since all jurisdictions followed escheat practices that coincided with New York's, none should be exempt from the practical consequences of invalidating those practices in the context of this action. Moreover, the Master's recommendation that New York "disgorge" all of the property it escheated (unless congruent with the new principles), if adopted, will create a fiscal drain of monumental proportions and generate statewide economic hardship. The proposed counterclaims will enable New York to obtain some limited mitigation of its potential liability by allowing it to reciprocally claim the property to which it is entitled from other jurisdictions.

16. Finally, New York's counterclaims do not raise any new legal issues, will not require the submission of additional briefs, and will not create any increased burdens for the Court. The counterclaims seek only the equal application of any retroactive rulings by the Court to the escheat practices of all jurisdictions, not just to those of New York. Since the motion follows on the heels of the Master's Report and before the Court's resolution of the jurisdictions' competing legal theories, the filing of New York's counterclaims at this juncture neither prejudices the parties nor burdens the Court. Indeed, the Master has provided that the action be remanded to him for continued supervision, *inter alia*, over "the allocation of specific distributions under the principles of this Court's decision and this Decree." Report at A-4 to 5. Thus, New York's counterclaims should be allowed because they pertain only to the implementational phase of this case, for which the Master has already reserved additional proceedings.

WHEREFORE, the State of New York respectfully moves this Court that leave be granted to file the annexed First Amended Answers and counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

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APPENDIX

No. 111 ORIGINAL

IN THE

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OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO THE COMPLAINT OF THE STATE OF DELAWARE

The State of New York, defendant, by its counsel, for its first amended answer to the complaint of the State of Delaware, says:

1. It admits the allegations in paragraph 1 of the complaint.

2. It admits the allegation in paragraph 2 of the complaint that there is a dispute between the two states but denies that the dispute is ripe and within the original jurisdiction of this Court.

3. It admits the allegation in paragraph 3 that brokers doing securities brokerage business in New York and incorporated in Delaware ("debtor brokers") hold or held monies and other intangible property, but it denies that it wrongfully escheated such property. It is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 3 that the debtor brokers have no identification or last known address of anyone claiming to be the *beneficial* owner of the distributions held or formerly held for the account of customers.

4. It denies the allegations in paragraph 4 of the complaint that Delaware is entitled to escheat distributions held or formerly held by debtor brokers. The remainder of paragraph 4 states legal conclusions to which no response is required.

5. It admits the factual allegations in paragraph 5 of the complaint except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that no other state besides New York is asserting a right contrary to Delaware's claims.

6. It denies the allegations in paragraph 6 of the complaint to the extent that they suggest that no brokerage corporation with a New York trading address incorporated in Delaware would be entitled to claim any of the abandoned property at issue in this case and states that the terms of section 1404 of the New York Abandoned Property Law speak for themselves.

7. It admits that the corporations listed in paragraph 7 have offices in New York, conduct business in New York, and were incorporated in Delaware at the time the complaint was filed, except for The First Boston Corporation, which has been incorporated in Massachusetts since 1932. It is without knowledge or information sufficient to form a belief as to the truth of the allegation that each of their predecessors were incorporated in Delaware.

8. It admits the allegations in the first and second sentences of paragraph 8 of the complaint. It admits that debtor brokers regularly allocate to the accounts of their customers amounts equal to the distributions to which they are beneficially entitled, but denies that these allocations always occur as payments are received from the issuer of the underlying securities.

9. It admits that, in certain instances, the debtor brokers may be unable to identify the *beneficial* owners of distributions. It admits the allegation that a debtor broker may sell its customer's securities in the open market and that a broker ("creditor broker") buying such securities in its own name (assuming that this is what the plaintiff means by "ultimate acquiror") may fail to remove the debtor broker's name as record owner of such securities before the record date on which a distribution becomes payable to that debtor broker. It is without knowledge or information sufficient to form a belief as to the truth of the allegation in the third sentence of paragraph 9 concerning the circumstances under which a debtor broker will know who the *beneficial* owner of a distribution may be after the sale of the underlying security to a creditor broker or the address of that *beneficial* owner. It denies that when no claim is made for a distribution that the debtor broker holds property of unknown creditors or creditors whose address cannot be determined from the books and records of the debtor broker.

10. It denies the factual allegations in paragraph 10 of the complaint except that it admits that since July 13, 1971, Delaware has had an Escheat Law which provides for the escheat of the property claimed by Delaware at issue in this case and states that the terms of sections 1198(6), (8), and (10) of the Delaware Escheat Law speak for themselves.

11. It admits the factual allegation in paragraph 11 of the complaint to the extent that New York has taken custody of abandoned property held by debtor brokers, but denies the remaining allegations of that paragraph.

12. It admits that since April 1, 1952, New York has provided that its Comptroller may take custody of personal property held by any corporation engaging in New York in the purchase, sale, or exchange of securities for or on behalf of any customers, but states that the terms of article V-A of the New York Abandoned Property Law speak for themselves.

13. It admits the factual allegation in paragraph 13 of the complaint that New York formerly published and disseminated a book entitled *Abandoned Property Law Handbook for Brokers and Dealers*, but states that this book has been superceded by a volume entitled *Handbook for Reporters of Unclaimed Funds* (2d ed. 1988), a copy of which has been lodged with the Clerk.

14. It admits that the text of the superceded *Abandoned Property Law Handbook for Brokers and Dealers* quoted in paragraph 14 of the complaint is accurate, but it denies that the characterization of New York's position is accurate.

15. It admits that the text of the superceded *Abandoned Property Law Handbook for Brokers and Dealers* quoted in paragraph 15 of the complaint is accurate, but denies that New York claims that it is entitled to retain custody of property abandoned by creditors which do not have New York addresses.

16. It admits the allegations in the first sentence of paragraph 16 of the complaint to the extent that New York has taken custody pursuant to its Abandoned Property Law of abandoned property held by debtor brokers and denies the remainder. It admits the allegations of the second sentence of that paragraph to the extent that most of the debtor brokers have complied with their obligations under the Abandoned Property Law but is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the reasons that debtor brokers may have given for refusing payment to Delaware of abandoned property. The terms of section 1404 of the Abandoned Property Law speak for themselves.

17. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in paragraph 17 of the complaint, but states that at the time the complaint was filed, at least three debtor brokers had refused to turn over abandoned property to the Comptroller.

18. It admits the allegation in the first sentence of paragraph 18 of the complaint to the extent that Paine Webber Incorporated ("Paine Webber") has declined to deliver abandoned property to the Comptroller, but denies that Delaware has correctly characterized Paine Webber's position. It admits that New York has commenced an administrative proceeding which is still pending against Paine Webber seeking recovery of abandoned property.

19. It admits the allegation in the first sentence of paragraph 19 of the complaint to the extent that Smith Barney, Harris Upham & Co. Incorporated ("Smith Barney") has refused to deliver abandoned property to the Comptroller, but it is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the reasons for the refusal. It states that New York has not yet commenced an administrative proceeding against Smith Barney to recover abandoned property in Smith Barney's possession.

20. It admits the allegation in the first sentence of paragraph 20 to the extent that Kidder Peabody & Co. Incorporated ("Kidder Peabody") has refused to deliver abandoned property to the Comptroller, but is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the reasons for the refusal. It states that New York has not yet commenced an administrative proceeding against Kidder Peabody to recover abandoned property in Kidder Peabody's possession.

21. It admits the allegations in the first sentence of paragraph 21 to the extent that New York has taken custody of substantial amounts of abandoned property held by debtor brokers which

remains unclaimed by creditor brokers whose trading addresses, as shown by the books and records of the debtor brokers, are in New York, but denies that it took custody of such property wrongfully. It admits the allegations in the second sentence of the paragraph. It is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence of that paragraph concerning what information the plaintiff received. It admits the allegations in the remainder of the paragraph except that it denies New York took property rightfully belonging to Delaware or that the creditors or their addresses cannot be determined from the books and records of the debtor corporations.

22. It admits the allegations in paragraph 22 of the complaint to the extent that there is a dispute between Delaware and New York concerning abandoned property but denies that the dispute is a "controversy" within the meaning of article III, section 2 of the United States Constitution.

23. It denies the allegations in paragraph 23 of the complaint.

24. It denies the allegations in paragraph 24 of the complaint.

25. It denies the allegations in paragraph 25 of the complaint.

26. It denies the allegations in paragraph 26 of the complaint.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the two states is not ripe since Delaware failed to file a claim with the New York State Comptroller before commencing this action.

2. Delaware has failed to exhaust administrative remedies.

3. Delaware's claims are barred by laches and waiver.

4. Delaware has failed to state a claim upon which relief can be granted.

5. Under existing law, Delaware is not entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that the addresses of the creditors cannot be determined from the books and records of the debtor brokers.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to the State of Delaware under its abandoned property law, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to the State of Delaware under its abandoned property law, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its

paying agent to the State of Delaware under its abandoned property law, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to the State of Delaware under its abandoned property law, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to the State of Delaware under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking

of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to the State of Delaware under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the complaint or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

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VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO THE AMENDED COMPLAINT OF THE STATE OF TEXAS

The State of New York, defendant, by its counsel, for its first amended answer to the amended complaint of the State of Texas, says:

1. It admits the allegation in paragraph 1 of the amended complaint that the State of Texas ("Texas") has invoked the original jurisdiction of this Court under article III, section 2 of the Constitution of the United States and section 1251 of title 28 of the United States Code, but denies that this Court has jurisdiction

on the ground that the dispute is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. It admits the allegations in paragraph 2 of the amended complaint.

3. It admits the allegations in paragraph 3 of the amended complaint.

4. It admits the allegations in paragraph 4 of the amended complaint.

5. It admits the allegations in the first sentence of paragraph 5 to the extent that the litigation at the time Texas filed its motion for leave to file a complaint in intervention involved a dispute concerning which state was entitled to the custodial taking of abandoned property ("abandoned dividends"), and denies the remainder. It denies that the definition of "Excess Receipts" in paragraph 5 is accurate except that it includes "Distributions" received by brokerage firms incorporated in various states for the benefit of their customers which exceed the amounts to which the brokerage firms which received the "Distributions" were entitled. It denies the allegations in the last sentence of paragraph 5, except it admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute.

6. It admits that the first two sentences of paragraph 6 accurately describe the relief which Texas is seeking, but denies that "Additional Excess Receipts" involve the same issues as "Excess Receipts." It denies the allegations in the third sentence of paragraph 6, which defines "Additional Excess Receipts" inconsistently with the definition on page 11, except that it admits that The Depository Trust Company ("DTC"), a trust company incorporated in New York, is a national clearinghouse for the

settlement of trades in corporate and municipal securities and that DTC currently remits abandoned dividends owed to non-DTC participants to New York. New York also denies the accuracy of the definition on page 11 and states that the failure of Texas throughout the complaint to specify which of the two inconsistent definitions of "Additional Excess Receipts" is meant makes much of the amended complaint incomprehensible. It states that unclaimed principal and interest payments on municipal and state bonds which have been made to record owners of the bonds — such as DTC, brokers, or bank personal trust departments — where the creditor has abandoned them should be routinely remitted to Texas pursuant to section 72.101 of its Property Code. In such cases, since the obligation of the issuer to pay the record owner has been satisfied, the unclaimed principal and interest payments are no longer "debt obligations attributable to corporate and Governmental Issuers." On the other hand, principal and interest payments held by paying agents of corporate and governmental issuers which have not been paid to record owners remain "debt obligations attributable to corporate and Governmental Issuers." New York does not take custody of such funds under current law although Texas may do so under section 72.101 of its Property Code and at least 33 other states have coverage which is similar to that of Texas. It denies the allegations in the fourth sentence of paragraph 6.

7. It denies the allegation in paragraph 7 that the abandoned dividends at issue in this case constitute a debt of the issuers of the underlying securities to the beneficial owners, whose claims to dividends and distributions are satisfied in the ordinary course of business by brokers. The remainder of paragraph 7 states legal conclusions to which no response is required, but if a response is required it denies the allegations. It incorporates by reference here its response to paragraph 6.

8. Paragraph 8 for the most part states legal conclusions to which no response is required, but if a response is required, it denies the allegations. It denies the allegation in the second sentence of this paragraph that under existing practice a debt

of identical character is remitted to the issuer's state of incorporation when held by the issuer's paying agent. A paying agent of the issuer reports unclaimed dividends which have not been paid to record owners to the state where the issuer (debtor) is incorporated when the address of the unpaid record owner (creditor) cannot be determined from the books and records of issuer. Unclaimed funds held by record owners — such as DTC or brokers — are of an entirely different character.

9. It admits that paragraph 9 accurately characterizes the relief which Texas is seeking, but it otherwise denies the allegations in this paragraph. It incorporates by reference here its response to paragraph 6.

10. It admits that Texas is asserting its claim pursuant to chapter 72 of the Texas Property Code, Tex. Prop. Code Ann. § 72.001 *et seq.* (Vernon Supp. 1989) ("Texas Property Code"), but states that the terms of this statute speak for themselves.

11. It admits the allegations in the first sentence of paragraph 11. It denies the allegation in the second sentence that the process by which securities distributions are made is generally understood only by persons within the "Distribution System." It denies that the two charts attached as exhibits "1" and "2" are accurate.

It denies that the definition of "Additional Excess Receipts" is accurate and incorporates by reference here its response to paragraph 6. The last sentence in the definition of "Additional Excess Receipts" states a legal conclusion to which no response is required. On information and belief, it denies that "Distributions," as defined by Texas, received by DTC for its participants in transactions between its participants give rise to unclaimed funds which are deemed abandoned and turned over to the Comptroller.

It denies that the definition of "Customer" is accurate and states that "customer" is defined in section 510(6) (a) of the New

York Abandoned Property Law, but admits that the definition of "Beneficial Owner" is accurate, but only if qualified in the context of this case to indicate that these economic rights to distributions are routinely satisfied by brokers on the record date and, therefore, the Beneficial Owner has no economic right against the issuer.

It admits that the definition of "Book Entry Accounting" is accurate.

It admits that the definition of "Book Entry Certificate System," to the extent it is limited to DTC, is accurate, except that physical certificates are registered for DTC only in the name of its nominee, Cede & Co., but it otherwise denies the allegations in this paragraph.

It admits that "Cede & Co." is the principal nominee used by DTC.

It admits that the description of DTC in the first two sentences of the definition is accurate but it is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the number of clearinghouses operating in the United States. On information and belief, it denies the allegation in the third sentence of the definition of DTC to the extent that it states that DTC provides the system described by making federal wire transfers to banks for accounts of DTC participants. It admits the allegations in the fourth sentence. The last sentence is too vague to permit a response, but if a response is required it denies the allegations in this sentence. It states that brokers actively trade for themselves or their customers; DTC is owned by its members and transfers issues between its members, but does not trade. Brokers are defined in section 510(4) of New York's Abandoned Property Law and banking organizations are defined in section 103(c) of that law.

It admits that the definition, "Distributions," as used in the complaint, means dividends, profits, principal, and interest and

securities representing any of the foregoing, but it otherwise denies the allegations in this paragraph.

It admits that the definition, "Distribution System," accurately describes how this term is used in the complaint.

It admits that the definition of "DTC Participant" is accurate and that all of the brokerage firms identified in Delaware's complaint are listed as DTC Participants in the December 31, 1987 DTC Annual Report.

It admits that, as used in the complaint, "Excess Receipts" means "Distributions" received by brokerage firms incorporated in Delaware for the benefit of their "Customers" which exceed the amounts to which the brokerage firms which received the "Distributions" were entitled. It admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute. It denies the remainder of the allegations in this definition.

It denies that the description of "Ex Dividend Date" or "Ex Date" is accurate and states that the explanations in New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* 133-35 and Committee on Stockbrokerage Auditing, American Institute of Certified Public Accountants, *Audits of Brokers and Dealers in Securities* 198-99 (1973) are recognized in the industry. New York lodged copies of these publications with the Court.

It admits that the definition of "Governmental Issuer" accurately describes how this term is used in the complaint.

It admits that "Intermediary" accurately describes how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Issuer" is accurate.

It admits that the definition of "Nominee" is generally accurate, but is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation that the usual form of a "Nominee" is a general partnership.

It admits that the first sentence of the description of "Paying Agent" is accurate. It denies that the second sentence of the description of "Paying Agent" is accurate. The third sentence of the description of "Paying Agent" states a legal conclusion to which no response is required. It admits the allegations in the remainder of this paragraph.

It admits that the definition of "Physical Certificate" is substantially accurate.

It admits that the description of "Physical Certificate System" accurately reflects how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Record Date" is accurate.

It admits that the definition of "Record Owner" is accurate, except that a "Beneficial Owner" is not a "Record Owner" and a "Customer" rarely is a "Record Owner."

12. Paragraph 12 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph.

13. It admits the allegations in paragraph 13.

14. It admits the allegations in paragraph 14.

15. It admits the allegations in paragraph 15.

16. It admits the allegations in paragraph 16, except that it denies that interest is paid in all cases by check mailed to the record owner by the issuer's paying agent, although this is true in most cases.

17. It admits the allegations in paragraph 17.

18. It admits the allegations in paragraph 18, except that it denies, on information and belief, the allegations in the fourth sentence of this paragraph to the extent that they state that DTC participants deal with each other by re-registering all physical certificates in the name of Cede & Co. and by depositing all these physical certificates at DTC.

19. It admits the allegations in paragraph 19, but is without knowledge or information sufficient to form a belief as to the truthfulness of the percentage of new issues in which physical certificates are available to customers.

20. It admits the allegations in the first sentence of paragraph 20, but the remainder of the paragraph states legal conclusions to which no response is required, but if a response is required it denies the allegations in the remainder of the paragraph. The pleadings and briefs of Delaware and New York speak for themselves.

21. Paragraph 21 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The complaint and motion for leave to file a complaint of Delaware speak for themselves.

22. Paragraph 22 states legal conclusions to which no response is required, but if a response is required New York's position is that the abandoned property which Delaware claims consists mainly of dividend and interest overpayments owed by one broker ("debtor broker") to another broker or bank ("creditor broker"). They are not owed to the customers (beneficial owners) of creditor brokers because the customers have been fully satisfied by creditor brokers and, therefore, have no right to claim these overpayments. The majority of these creditor brokers have trading addresses in New York. The answer and brief in opposition to the motion for leave of New York speak for themselves.

23. Paragraph 23 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The pleadings and briefs of the parties speak for themselves.

24. Paragraph 24 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. This Court's decisions and the federal statutes speak for themselves.

25. It admits the allegations in the first sentence of paragraph 25 of the complaint. The second sentence does not require a response, but if a response is required it denies the allegations in that sentence.

26. On information and belief, it denies the allegations in paragraph 26, on information and belief, it admits that generally trades of physical certificates between DTC participants occur on the books and records of DTC.

27. On information and belief, it admits the allegations in the first sentence of paragraph 27, except it denies that there are no circumstances in which DTC might have legal ownership rights in the physical certificates. It denies the allegations in the second sentence of paragraph 27.

28. It admits the allegations in the first sentence of paragraph 28 except it states on information and belief that purchases of securities held at DTC are also made through firms other than brokerage firms who are, or act through, DTC participants. It denies on information and belief the allegations in the second sentence to the extent that they suggest that all these purchases are made in book entry form only. It denies on information and belief the allegations in the third sentence to the extent that they suggest "customers" may never receive physical certificates from the issuer or from DTC participants. It denies on information and belief the allegations in the fourth sentence of paragraph 28 except that it admits that each "Customer" may maintain

an account at a DTC participant or other brokerage firm. It denies on information and belief the allegations in the fifth sentence of paragraph 28 except that it admits that, in some cases, the books and records of the DTC participant or other brokerage firm may constitute the only evidence of each "Customer's" legal ownership. It denies on information and belief the allegations in the sixth sentence of paragraph 28 except that it admits that when "Customers" purchase beneficial ownership from a DTC participant or other brokerage firm, they may send their "Customers" transaction statements confirming and setting forth the terms of the purchase. It admits the allegations in the seventh sentence of paragraph 28. The last sentence of paragraph 28 states legal argument to which no response is required, but if a response is required it denies on information and belief the allegations in that sentence.

29. It admits the allegations in the first two sentences of paragraph 29. It denies on information and belief the allegations in the last sentence of paragraph 29.

30. It admits the allegations in the first four sentences of paragraph 30, except it denies on information and belief the allegations in the third sentence to the extent that they state that the books and records of DTC evidence the amount and identity of physical certificates which are held by DTC participants. It denies on information and belief the allegation in the last sentence of that paragraph that there are three sets of "Record Owners" for the same securities.

31. It admits on information and belief the allegations in the first four sentences of paragraph 31. It denies on information and belief the allegations in the fifth sentence of this paragraph. It denies the allegations in the sixth sentence of this paragraph to the extent that they state that customers must wait until their brokers receive distributions in order to be paid.

32. It admits the allegations in paragraph 32, except denies on information and belief the allegations to the extent that they

state that there are three sets of books and records which indicate record ownership.

33. It denies the allegations in the first sentence of paragraph 33 to the extent that they suggest that brokers credit their customer accounts after receiving dividends from DTC. It denies the allegations in the remainder of the paragraph.

34. It denies on information and belief that the example in paragraph 34 accurately describes a typical transaction between two DTC participant brokers which gives rise to unclaimed abandoned dividends.

35. It denies on information and belief that the allegations in the first four sentences accurately describe the method of settling transactions between DTC participants. It admits the allegation in the final sentence of paragraph 35.

36. The first sentence of paragraph 36 does not require a response, but if a response is required it denies the allegations in the first sentence. It admits the allegations in remainder of that paragraph.

37. It admits the allegations in the first sentence of paragraph 37 except it denies on information and belief the allegations concerning the method of payment. It admits the allegations in the remainder of paragraph 37, except it denies on information and belief the allegation in the last sentence of that paragraph that the records of the issuer, DTC, and "DTC Participants" each reflect a different "Record Owner."

38. It denies on information and belief the allegations in the first sentence of paragraph 38. It admits the allegations in the second sentence of that paragraph. It denies the allegations in the last sentence of paragraph 38 except that it admits that in some cases abandoned dividends include physical certificates registered to Cede & Co., but usually such certificates are registered in the name of the broker.

39. It denies the allegations in the first sentence of paragraph 39 except it admits that DTC and DTC participants may function as agents of the "Beneficial Owner." It admits DTC has not claimed any legal ownership interest in the dividend overpayments at issue in this case, but denies that DTC participants have not claimed any right to abandoned dividends in the custody of the New York State Comptroller. It denies that brokerage firms are neither creditors nor debtors with respect to abandoned dividends in the custody of the Comptroller. The fourth sentence states legal argument to which no legal response is required, but if a response is required it denies the allegations in that sentence.

40. It denies the allegations in paragraph 40, except that it admits there may be a few cases in which a beneficial owner may not have received dividends or interest owed to the beneficial owners by the record owner.

41. It denies the allegations in the first sentence of paragraph 41 except that it admits that Delaware identified 15 DTC participants. It admits the allegations in the second and third sentences of paragraph 41. It denies the allegations in the fourth sentence of paragraph 41. It admits the allegations in the fifth and sixth sentences accurately describe the claim Texas is making in this case, but denies that Texas is entitled to any of the abandoned property claimed.

42. The first sentence of paragraph 42 states legal argument to which no response is required, but if a response is required it denies the allegations in that sentence. It denies the allegations in the second sentence of that paragraph.

43. It admits the allegations in paragraph 43 accurately describe the claim that Texas is making in this case, but denies that it should be considered by this Court and incorporates by reference here its response to paragraph 6.

44. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the first and

second sentences of paragraph 44. The third sentence of that paragraph is too vague to call for a response, but if a response is required it denies the allegations in the third sentence. It incorporates by reference here its response to paragraph 6.

45. It denies the allegations in the first sentence of paragraph 45. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of the paragraph, except that it admits that DTC denied Texas access to its books and records. The allegations in the third and fourth sentences of paragraph 45 are legal argument to which no response is required, but if a response is required it denies the allegations in those sentences. It admits that a copy, with typographical errors, of the November 28, 1988 letter of Patricia Trainor is attached to the complaint, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

46. It denies on information and belief the allegations in the first sentence of paragraph 46 except to the extent that it admits the letter describes the "Cede Float." It admits the allegations in the remainder of the paragraph, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

47. It admits the allegations in the first sentence of paragraph 47 to the extent that the quotation is accurate, but states that the contents of the letter speak for themselves. It admits the allegations in the second sentence of paragraph 47 to the extent that it states that funds in the "Unclaimed Dividends" account do not belong to DTC, but denies on information and belief the remainder of the allegations in that sentence. It admits the allegations in the third sentence of paragraph 47 to the extent that funds remaining in the "Unclaimed Dividends" account after three years that are deemed abandoned are remitted to New York, and denies the remainder, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

48. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the first sentence of paragraph 48 concerning the sufficiency of the information provided by DTC to Texas. It admits the allegations in the second sentence of paragraph 48, except that it denies the amount attributable to Texas issuers is $32,511 and the period covered is correctly stated and states that the correct amount is $32,514 and the period covered is from July 31, 1981 through June 30, 1982. It admits the allegations in the first two sentences of footnote 7 of paragraph 48. It admits the allegations in the third sentence of footnote 7 of paragraph 48 that the Texas Treasury asked New York for a complete copy of an annual unclaimed property report filed by DTC for any one year between 1978 and 1985 and states that on August 8, 1986, New York sent a copy to Texas of sample pages from such a report. It admits the allegations in the fourth sentence of footnote 7 of paragraph 48. It denies the allegations in the fifth sentence of footnote 7 of paragraph 48. It incorporates by reference here its response to paragraph 6.

49. It admits that the allegations in the first sentence of paragraph 49 accurately state the claims Texas is making in the complaint, but otherwise denies the allegations in that sentence. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of paragraph 49. It incorporates by reference here its response to paragraph 6.

50. It denies on information and belief the allegations in the first two sentences of paragraph 50 and states that DTC is not a paying agent for issuers including any of the issuers listed in the Patricia H. Trainor letter attached as Exhibit 3 to the amended complaint. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the last sentence of paragraph 50.

51. It denies the allegations in the first four sentences of paragraph 51 and incorporates by reference here its response

to paragraph 6. It denies the allegations in the fifth sentence of paragraph 51 except that it admits that it is enforcing the amendments to section 300 of the New York Abandoned Property Law which became effective April 21, 1987. It incorporates by reference here its response to paragraph 6.

52. It denies the allegations in paragraph 52 and incorporates by reference here its response to paragraph 6.

53. It admits that paragraph 53 accurately states the position of Texas, but it otherwise denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

54. Paragraph 54 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

55. The first three sentences of paragraph 55 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies that inclusion of the claim to "Additional Excess Receipts" will not broaden the issues or unduly complicate the pending litigation. It incorporates by reference here its response to paragraph 6.

56. Paragraph 56 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

57. The first two sentences of paragraph 57 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies the allegations in the third and fourth sentences of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the fifth sentence of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the

remainder of paragraph 57 concerning how each office of a DTC participant operates or whether each DTC participant has offices in each state, but admits that these allegations describe typical branch or regional offices.

58. Paragraph 58 states legal conclusions to which no response is required except that New York denies on information and belief that DTC functions as a paying agent or registrar and it admits that several states have informally supported the Texas motion to intervene. If any further response is required it denies any other allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

59. Paragraph 59 states legal argument to which no response is required, except that New York denies that persons do not make claims for "Excess Receipts," and if any further response is required, it denies the remaining allegations in that paragraph.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the two states is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. Texas has failed to exhaust administrative remedies.

3. Texas' claims are barred by laches and waiver.

4. Texas has failed to state a claim upon which relief can be granted.

5. Under existing law, Texas is not entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that the addresses of the creditors cannot be determined.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to the State of Texas under its abandoned property law, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to the State of Texas under its abandoned property law, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its paying agent to the State of Texas under its abandoned property law, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to the State of Texas under its abandoned property law, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to the State of Texas under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to the State of Texas under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to

recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the amended complaint by the State of Texas or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

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No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO AMENDED COMPLAINT OF THE STATE OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

The State of New York, defendant, by its counsel, for its first amended answer to the complaint in intervention of the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania ("applicants for intervention") says:

1. It admits the allegation in paragraph 1 of the complaint that the applicants for intervention have invoked the original jurisdiction of this Court under article III, section 2 of the Constitution of the United States and section 1251 of title 28 of the United States Code, but denies that this Court has jurisdiction on the ground that the dispute is not ripe since the applicants for intervention failed to to file a claim with the New York State Comptroller before filing their complaint in intervention.

2. It admits the allegation in paragraph 2 of the complaint in intervention, but states that the dispute between Delaware and New York also concerns abandoned property held by New York.

3. It admits the allegations in paragraph 3 of the complaint in intervention.

4. It admits the allegations in paragraph 4 of the complaint in intervention.

5. It admits the allegations in the first sentence of paragraph 5 to the extent that the litigation involves a dispute concerning which state is entitled to the custodial taking of abandoned property ("abandoned dividends"), and denies the remainder. It denies that the definition of "Excess Receipt" in paragraph 5 accurately describes the abandoned dividends. It denies the allegations in the last sentence of paragraph 5 (a) except that it admits the brokers sometimes maintain their funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute. The remainder of paragraph 5(a) states legal conclusions to which no response is required, but if a response is required it denies the allegations.

It denies the allegations in paragraph 5(b) except that it admits that the Depository Trust Company ("DTC"), a trust company incorporated in New York, is a national clearing house for the settlement of trades in corporate and municipal securities and that DTC currently remits abandoned dividends owed

to non-DTC participants to New York. The remainder of paragraph 5(b) states legal conclusions to which no response is required, but if a response is required it denies the allegations.

6. Paragraph 6 states legal conclusions to which no response is required, but if a response is required, it denies the allegations.

7. Paragraph 7 states legal conclusions to which no response is required, but if a response is required it denies the allegations.

8. It denies the allegations in paragraph 8 and states that it is the policy of the State of New York, while protecting the interest of the owners in the abandoned dividends, to use the abandoned dividends for the benefit of all the people of the State.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the states is not ripe since the applicants for intervention failed to file a claim with the New York State Comptroller before commencing this action.

2. The applicants for intervention have failed to exhaust administrative remedies.

3. The claims of the applicants for intervention are barred by laches and waiver.

4. The applicants for intervention have failed to state a claim upon which relief can be granted.

5. Under existing law, the applicants for intervention are not entitled to escheat any abandoned property in the custody of the Comptroller when they have neither alleged nor shown that the addresses of the creditors cannot be determined.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in

their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to any of the applicants for intervention under their abandoned property laws, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to any of the applicants for intervention under their abandoned property laws, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its paying agent to any of the applicants for intervention under their abandoned property laws, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that

entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to any of the applicants for intervention under their abandoned property laws, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to any of the applicants for intervention under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to any of the applicants for intervention under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the complaint by the States of Alabama, Hawaii, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

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No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO COMPLAINT IN INTERVENTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO AND RHODE ISLAND

The State of New York, defendant, by its counsel, for its first amended answer to the complaint in intervention of the States of California, Michigan, Nebraska, Ohio and Rhode Island (the "Designated States") says:

1. It admits the allegation in paragraph 1 of the complaint in intervention that the Designated States have invoked the original jurisdiction of this Court under Article III, Section 2

of the Constitution of the United States and Section 1251 of Title 28 of the United States Code, but denies that this Court has jurisdiction on the ground that the dispute is not ripe since the Designated States failed to file a claim with the New York State Comptroller before commencing this action.

2. It admits the allegations in paragraph 2 of the complaint in intervention, but denies the Designated States' characterization of the Delaware complaint.

3. It admits the allegations in paragraph 3 of the complaint in intervention.

4. It admits the allegations in paragraph 4 of the complaint in intervention.

5. It admits the allegations in paragraph 5 of the complaint in intervention.

6. It admits the allegations in paragraph 6 of the complaint in intervention.

7. It asserts that the allegations in paragraph 7 of the complaint in intervention do not require a response because they characterize the Designated States' contentions, but if a response is required, it answers the subparagraphs of paragraph 7 as follows:

It admits the allegations in the first sentence of 7(a), except denies that the Distributions at issue here include profits, and denies the remainder of the subparagraph, except admits that brokers sometimes maintain unclaimed funds in a separate account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute.

It admits the allegations in 7(b), except denies that the Distributions at issue here include profits, denies any allegations incorporated by reference or otherwise from 7(a) which were previously denied, and denies that unclaimed principal and

interest on state and municipal obligations that are held by a financial intermediary, who is not a paying agent, constitute a debt of the issuers of the underlying securities.

8. It denies the allegations in paragraph 8 of the complaint in intervention, except it admits that the unclaimed funds at issue here consist of Distributions paid by issuers (or their agents) to record owners who do not themselves have a claim to such funds because they are owed to another entity, which may or may not be a beneficial owner, which entity is entitled to the funds pursuant to a trade in the underlying securities.

9. It asserts that the allegations in the first sentence of paragraph 9 of the complaint in intervention do not require a response because they characterize the Designated States' contentions, but if a response is required, it denies that the States are entitled to the Allocated Amount. The allegations in the second sentence are too broad and conclusory to formulate a response, but to the extent that one is required, it is without information or knowledge to form a belief as to them.

10. It asserts that the allegations in paragraph 10 of the complaint in intervention do not require a response because they characterize the States' interpretation of various state laws, but if a response is required, it denies the allegations set forth in that paragraph.

11. It denies the allegations set forth in paragraph 11 of the complaint in intervention, and asserts that a separate abandoned property fund is maintained in accordance with the provisions set forth under Section 103(a) of the New York Abandoned Property Law.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the states is not ripe since the Designated States failed to file a claim with the New York State Comptroller before commencing this action.

2. The claims are barred by laches and waiver.

3. The Designated States have failed to state a claim upon which relief can be granted.

4. Under existing law, none of the Designated States is entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that it is the State of the creditor's last known address or, if that address cannot be determined from the debtor's books and records, that it is the debtor's state of incorporation.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to any of the Designated States under their abandoned property laws, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to any of the Designated States under their abandoned property laws, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its paying agent to any of the Designated States under their abandoned property laws, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to any of the Designated States under their abandoned property laws, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to any of the Designated States under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to any of the Designated States under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the Complaint in Intervention by the Designated States or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

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