No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STATE OF DELAWARE

Plaintiff,

STATE OF TEXAS, et al.

Plaintiff-Intervernors,

v.

STATE OF NEW YORK

Defendant.

RESPONSE OF THE STATES OF MICHIGAN, MARYLAND AND NEBRASKA AND THE DISTRICT OF COLUMBIA TO THE MOTION OF PLAINTIFF, STATE OF DELAWARE, TO STRIKE AMENDED COMPLAINTS IN INTERVENTION

Don Stenberg
Attorney General
Dale A. Comer
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509

Attorneys for the State of Nebraska

James F. Flug
[Counsel of Record]
Lee E. Helfrich
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W., Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan, Frank J. Kelley Attorney General, and Maryland, J. Joseph Curran, Jr. Attorney General

(continued on inside cover)

John Payton
Corporation Counsel
Charles L. Reischel
Deputy Corporation Counsel
Lutz Alexander Prager
Assistant Deputy Corporation Counsel
One Judiciary Square
441 - 4th Street, N.W.
Washington, D.C. 20001

Attorneys for the District of Columbia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Federal Rules

Miscellaneous

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STATE OF DELAWARE

Plaintiff,

STATE OF TEXAS, et al.

Plaintiff-Intervenors,

v.

STATE OF NEW YORK

Defendant.

RESPONSE OF THE STATES OF MICHIGAN, MARYLAND AND NEBRASKA AND THE DISTRICT OF COLUMBIA TO THE MOTION OF PLAINTIFF, STATE OF DELAWARE, TO STRIKE AMENDED COMPLAINTS IN INTERVENTION

The States of Michigan, Maryland and Nebraska (hereafter the "Designated States") and the District of Columbia submit the following response to the Motion of Plaintiff, State of Delaware, To Strike Amended Complaints In Intervention. For the reasons set forth below, Delaware's motion should be denied.

SUMMARY AND COUNTER-STATEMENT

The Designated States and the District of Columbia, Intervenor-plaintiffs, pursuant to leave to file granted by the Special Master under the Court's remand, have filed amended complaints to conform their claims more fully to the legal framework articulated in the Court's decision of March 30, 1993. Delaware has moved to strike these and the amended complaints of all the other Intervenor-plaintiffs.[1]

It is the position of the Designated States and the District of Columbia that the amended complaints of the Intervenor-plaintiffs do not enlarge the scope of the case, consciously conform to the Court's remand to the Master, and are appropriate under any reasonable construction of the applicable federal rules. Delaware's motion ignores the procedural posture of the case as it was presented to the Court under the framework of the Master's January 28, 1992, Report,[2] and mischaracterizes the claims and positions of the parties, particularly the Designated States. At bottom, Delaware's motion is based on speculative interpretations of the Court's rulings and remand, is devoid of textual support, is at odds with simple logic, and is contrary to the Court's very words. In order that this motion can be considered within the proper perspective, a description of the historical and procedural posture of the case is necessary.

a. The Scope of the Case. Delaware acknowledges that as of the date Texas was granted leave to intervene, "the universe of unclaimed distributions in controversy" was enlarged to include all "those taken by New York from all intermediaries." Motion of

---

[1]New York has filed a "Response" in partial support of Delaware's motion. However, New York's submission contradicts Delaware's by conceding that, under the Court's remand, intervenors are permitted to assert primary rule claims. Understandably, New York would like this process to exclude property remitted by New York-incorporated entities, but there is no support for such a position in the history of the case or in the Court's opinion.

[2]Report of the Special Master, No. 111 Orig. (January 28, 1992) [hereafter referred to as "Mas. Rep."].

Plaintiff, State of Delaware, to Strike Amended Complaints in Intervention, at 4 (hereafter referred to as "Del. Mot."). Like that of Texas, all of the Intervenor-plaintiffs' complaints made claims to the enlarged universe of distributions. Each also alleged a wrongful taking by New York of the unclaimed distributions held by all intermediaries including brokers, banks and depositories, and asserted entitlement generally under their respective unclaimed property laws and the Court's escheat rules. While various States may have espoused distinct legal theories, the variations in theory do not affect the broad scope of their claims.[3]

Delaware's effort to narrow the Intervenor-plaintiffs' rights to relief particularly mischaracterizes the original complaint of the Designated States.

Like all the Intervenor-plaintiffs, the Designated States stated claims to all the unclaimed distributions improperly taken by New York from all types of financial intermediaries. Moreover, the Designated States did not stake their claim "squarely within the confines of the backup rule," as Delaware asserts. Del. Mot., 6. Nor did the Designated States fail to "claim that New York had improperly taken *primary-rule* property belonging to them...." *Id.* (emphasis supplied).

---

[3]In their original complaints, none of the Intervenor-plaintiffs identified particular distributions to which they were entitled, or the locus of particular creditors or debtors. The absence of such allegations did not cause the Court to reject the initial complaints of the Intervenor-plaintiffs. Indeed, the absence of such allegations was a function of the nature of New York's taking. For example, as explained in the Designated States' motion for leave to file complaint: "[t]he amount of Unclaimed Funds in issue in this litigation that the Designated States are entitled to claim is presently unknown, but, upon information and belief, is substantial." Motion of the States of California, Michigan, Nebraska, Ohio, and Rhode Island for Leave to File Complaint in Intervention; Complaint in Intervention; and Brief in Support of Motion for Leave to File Complaint in Intervention, at 3, ¶ 5 (November 17, 1989) [hereafter referred to as "Designated States' Complaint"]. The State of Maryland incorporated by reference the complaint of the Designated States on October 30, 1990. Motion of the State of Maryland for Leave to File Complaint in Intervention; Complaint in Intervention, and Brief in Support of Motion for Leave to File Complaint in Intervention, at 7 (October 30, 1990).

In their original complaint, the Designated States in no way restricted their claim to the backup rule. They claimed, *inter alia*, that the funds taken by New York "are demanded by and are remitted to New York without any determination by such firms [the intermediaries] that New York is the state of the last known address of the beneficial owner";[4] that they were entitled to "an allocation ... in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states";[5] and that "relevant books and records are maintained in a form from which the pertinent information is readily ascertainable."[6] In addition to their specific requests, they sought "such other and further relief as this Court deems just and proper."[7] As explained in the brief accompanying the Designated States' complaint, their understanding of the relevant commercial activity included a primary rule focus:

> The State of the relevant commercial activity is the state:
> - of the last known address of the *last known beneficial owner* (as it appears on the books and records of the holder, or of any intermediary acting for such holder or owner) of the underlying security....[8]

---

[4]Designated States' Complaint at 10, ¶ 7(a). The District of Columbia complaint, which had been filed earlier, did not contain this language. In ¶ 4, it claimed entitlement "under principles of law enunciated in *Texas v. New Jersey*, 379 U.S. 674 (1964), and *Pennsylvania v. New York*, 407 U.S. 207 (1972)," but did not specifically allege that owners of the unclaimed property could be identified. However, the District of Columbia has adopted the positions of the Designated States in later filings before the Master and the Court, and joins in this filing.

[5]*Id.* at 11, ¶ 9.

[6]*Id.*

[7]*Id.* at 4, ¶ 6.

[8]*Id.* at 20 n.3 (emphasis supplied).

Any doubt concerning the nature or breadth of the Designated States' claims was dispelled during the first stage of discovery, where the Designated States explained that their claims were cognizable under the primary rule.[9] Defendant New York, whose understanding certainly should carry substantial weight on any issue of fair notice, recognized the primary rule aspects of the Designated States' claims. *See, e.g.*, Motion of the State of New York for Leave to File First Amended Answers and Leave to File Counterclaims, at 3 (December 22, 1992) (describing Designated States' claims as based on "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.")[10]

While the Designated States accepted the Special Master's invitation to amend their complaints, their core allegations, noted above, were maintained in the amended complaint for the very reason of their continued viability. Only through artificial pigeonholing -- at odds with the liberal pleading rules -- can Delaware contend that only its dispute with New York remains before the Master.

b. The First Stage Proceedings before the Master. At the very outset, the Master recognized that orderly resolution of the

---

[9]Response of the States of California, Michigan, Nebraska, Ohio, and Rhode Island to the First Set of Interrogatories Propounded by the States of Alabama, *et al.*, and to the First Request for the Production of Documents from the States of Alabama, *et al.*, at 6-7, 7 n.3, 14-15 (filed July 18, 1990). [Excerpts attached as Appendix A.] The District of Columbia's answers to the same set of interrogatories expressly adopted the California group's response in relevant part. Response by the District of Columbia to First Request for Documents by the "Alabama Group" of States, at 5 (July 18, 1990).

[10]In *Texas v. New Jersey*, 379 U.S. at 681, the Court opted for the State of the creditor's last known address, *i.e.* the primary rule, in part, because it "will tend to distribute escheats among the States in the proportion of the *commercial activities of their residents.*" (Emphasis supplied). The Designated States' original complaint mirrored this general primary rule principle, and its later filings set forth a particular non-transactional application methodology which was rejected by the Master and not discussed by the Court.

competing claims of the States would depend in the first instance on clarification of the Court's broad principles applicable to equitable distribution of unclaimed securities distribution among the States. *See* Litigation Management Order No. 1 (October 18, 1989). In order to move expeditiously on those issues, the Master narrowly limited discovery to that designed to illuminate the core legal principles in dispute among the parties, specifically refusing to permit transaction-specific discovery aimed at identifying actual recoverable claims. After this limited, preliminary discovery, motions directed at resolving the broader legal issues were invited, and it was the Master's rulings on those motions, culminating in his January 28, 1992, Report and the exceptions thereto, that formed the framework of the Court's decision. *Delaware v. New York*, 113 S. Ct. 1550 (1993). At all times, it was understood by the parties that a decision on their preliminary motions would not resolve all of the issues in the case, particularly each party's right to recovery.

The Master made the limitations of his Report clear to the Court, carefully outlining the limited nature of the discovery that had occurred. "[T]he parties were directed in written Discovery Orders to limit factual exploration to the general and structural matters bearing on the broader legal issues, and not to attempt to ascertain the status of any particular distribution, the exact amounts of unclaimed property held by any specific entity, or similar details." Mas. Rep., 6. The limited nature of the issues explored by the Master was also explained to the Court. "It is clear that the motions envisioned at this stage have never been considered to be full-blown summary judgment motions, disposing of all factual contentions and potentially ending this litigation in its entirety." Mas. Rep., 7 n.6 *quoting* Litigation Management Order No. 2 (July 16, 1992).

Most importantly, the Master reported to the Court concerning "significant issues of implementation [that] should ... be remanded ... for further proceedings, party comment, and, if appropriate, for a subsequent recommendation and proposed decree." Mas. Rep., 77. Although obviously not intended to be exclusive, the implementation issues highlighted by the Master for

future proceedings on remand involved primary rule claims generally. Nothing in the Master's language limits primary rule inquiries to New York.

> These issues [of implementation] include (i) the extent of the burden resting *on a jurisdiction* asserting that an address or identification is in fact known (is the burden preponderance of the evidence or, as is common in equity, proof of a clear and convincing nature) and (ii) whether a convenient mechanism can be established for resolution by the Special Master of batches of disputed items (such as whether addresses are unknown in particular cases) or whether submission of such disputes to trial courts in the various states as the issues arise would be preferable.

Mas. Rep., 77 (emphasis supplied). There is no suggestion that these implementational considerations would be altered or vanish in the event that the Court disagreed with the Master's interpretation of the backup rule. Indeed, it is clear that these implementation issues were viewed as independent of the broader legal issues, the resolution of which formed the core of the Master's Report and the Court's decision.

c. The Court's Remand. As demonstrated, when the Court received the Master's January 28, 1992, Report, it was clear that the Master was addressing preliminary legal issues, and that the case had not been prepared for the entry of judgment. While the Court ultimately rejected the Master's recommendations regarding the interpretation of its prior precedents involving the backup rule, the Court said nothing to suggest that, in so doing, it believed it was resolving either the remaining primary rule or backup rule issues which had not been addressed in the earlier discovery or the Master's Report.

Rather, the Court issued a general remand "to the Master for further proceedings consistent with this opinion and for the preparation of an appropriate decree." *Delaware v. New York*,

113 S. Ct. at 1562. There was no instruction to the Master to truncate or terminate the fact-finding and allocation processes necessary to complete the case, or any hint that these implementation processes, explicitly contemplated by the Master, were beyond the scope of the case or outside the dignity of original jurisdiction. *Cf.* Del. Mot., 23-24. Indeed, the rejection of Delaware's request for judgment against New York, and the remand instruction -- that Delaware acknowledges -- to permit New York to proceed on primary rule claims, demonstrate otherwise. 113 S. Ct. at 1561.

In language similar to that of the Master on the implementational considerations remaining after decision, the Court advised that "[i]f New York or any other claimant State fails to offer such [primary rule] proof on a transaction-by-transaction basis or to provide some other proper mechanism for ascertaining creditors' last known addresses, the creditor's State will not prevail under the primary rule, and the secondary rule will control." *Id.* at 1561-62. New York clearly was to pursue primary rule claims in the proceedings remanded to the Master and so were the "other claimant States." Moreover, the Court was aware that Intervenor-plaintiffs had alleged claims to non-brokerage and non-Delaware incorporated brokerage remittances, and nothing in its language bars Intervenor-plaintiffs from pursuing claims to those funds.

Finally, while the Court rejected the Master's recommendations on the backup rule, which had been supported by all but one of the Intervenor-plaintiffs, the Court did not deny the intervention motions. Rather, those motions were granted, with no limitations, no restrictions on the Intervenor-plaintiffs' participation after remand, and no instructions to the Master other than to require "other claimant State[s]" to submit the appropriate proof on their claims. 113 S. Ct. at 1561.

d. The Second Stage Proceedings before the Master. After the remand, on June 2, 1993, the Special Master held a conference to review the positions of the parties as to future proceedings. All parties, including Delaware, agreed that further discovery directed at transaction-specific claims of recovery was necessary. *See e.g.*,

Delaware's Motion for Scheduling of Status Conference and for Entry of a Scheduling Order, at 6 (April 27, 1993). Both Delaware and the Intervenor-plaintiffs indicated a need to take discovery aimed at determining the identity and incorporated status of the intermediaries who had remitted unclaimed distributions to New York. Both New York and the Intervenor-plaintiffs, consistent with the Court's remand language, indicated a need to take discovery, mainly of the third party intermediaries, in order to solidify their claims. *See* Litigation Management Order No. 6, 3-4, 7 (4a-6a, 10a-11a) (June 8, 1993) (hereafter referred to as "LMO No. 6").[11]

In order to expedite the case and minimize the burden on non-parties, the Master allowed a carefully limited, staged discovery process. *See* LMO No. 6, 2-4, 15-16 (3a-6a, 23a). This approach followed the suggestions of the Intervenor-plaintiffs supporting a threshold discovery process to determine whether full-scale transactional discovery would be worthwhile. But neither they nor the Master had any doubt that the limitations of the prior discovery and the explicitness of the Court's primary rule remand direction not only justified but required further discovery.[12] Contrary to Delaware's representations (Del. Mot., 10), the Designated States indicated to the Master that even under the limited discovery of the first stage some proof had emerged that demonstrated the possibility of uncovering relevant last known

---

[11]Page references in parentheses are citations to the reprint of LMO No. 6 in Del. Mot. Appendix A.

[12]That legal issues regarding implementation of the Court's decision would arise during the course of further proceedings was foreshadowed in the Master's January 28, 1992, Report. Mas. Rep., 77. The Intervenor-plaintiffs candidly stated this fact before the Master after remand. In fact, some of the legal issues regarding implementation may arise out of Delaware's dispute with New York. *See* Response by Plaintiff, State of Delaware, to New York's Motion to Modify Litigation Management Order No. 6, at 3 n.1 (July 15, 1995).

addresses.[13] New York, of course, had consistently taken the position that relevant addresses were recoverable from debtor records.

The Master agreed that in a "proceeding involving sovereign states, with hundreds of millions of dollars at stake," it was "premature" to preclude primary rule inquiry as a matter of law based on speculation about the ultimate results. LMO No. 6, 3-4 (3a-6a). He acknowledged that the scarcity of evidence was the natural result of the ordering of the litigation. "Delaware participated actively in the lawsuit prior to the Supreme Court's recent review of the legal issues, and (through its former counsel) is well aware that many issues during the first round of discovery were set aside in order to facilitate structured presentation of certain important, logically precedent, legal issues framed for disposition." *Id.* at 6 (9a). The Master granted all the parties leave to amend, within this context, to conform the pleadings to the proceedings to date, including both the Court's decision and the first stage discovery, and because "it would be artificial and wasteful of party energies and judicial resources to suggest that intervenors file a separate lawsuit to pursue claims not clearly spelled out in initial filings here." *Id.* at 6-7 (10a).

But the Master carefully balanced this conclusion against his desire to move the case forward promptly and to minimize third-party burdens. He therefore ordered a "limited 'trial run' effort, to test feasibility and to permit focused legal issues to be framed" (*id.* at 3 (4a)), which was to be completed in the time frame parallel to that necessary to complete the discovery needed to resolve the sub-dispute between New York and Delaware. The Master noted "no cognizable prejudice" to Delaware under this limited discovery program:

---

[13]Response of the States of Michigan, Maryland, Nebraska and the District of Columbia to the State of Delaware's Motion for Scheduling of Status Conference and for Entry of a Scheduling Order, at 5 (Corrected Copy of May 27, 1993). It is noted that Delaware's citations to the June 2, 1993, hearing before the Master studiously ignore the pointed statements in this regard by Counsel for Michigan and Maryland. *See* Del. Mot., 10 n.11.

> It is difficult for me to fathom why exploration by intervenors under the backup rule, occurring simultaneously and generally off the same database, should be sufficiently prejudicial to Delaware for me to preclude it. Too, as Delaware knows, if primary rule inquiry is to be permitted at all ..., New York clearly can pursue primary rule discovery. Again, while New York pursues that, it is difficult to fathom why parallel (indeed, perhaps, joint with New York) discovery by intervening jurisdictions under the primary rule slows down or otherwise unduly burdens the process.

Id. at 3 (5a).

In order to expedite the proceedings further, the Master ordered New York to make specific disclosures in the form of a log from its unclaimed property files within 30 days. He noted that New York retained its right to seek appropriate protective relief from its disclosure obligations, but otherwise set no special time table for comment, objection or response to LMO No. 6 itself. Any amended complaints filed by a party were also due within 30 days of LMO No. 6. The potential for interim relief to particular parties after the ordered discovery trial run remained open. *See* LMO No.6, 4 (6a).

No party filed any objection to LMO No. 6 until New York moved on July 7, 1993 -- one day before its 30 day disclosure deadline -- for modification of the order. New York sought an extension due to various alleged burdens, certain protective relief, and a modification precluding Intervenor-plaintiffs from pursuing claims for bank and depository remittances to New York. Delaware filed a response to New York's motion arguing that New York's claim of discovery burdens was not credible, but supporting New York's request to preclude inquiries into banks and depository funds. Delaware, however, notwithstanding its suggestions to the contrary, Del. Mot., 13, did not independently move for any modifications to LMO No. 6.

On August 4, 1993, the Master issued Litigation Management Order No. 7 (hereafter "LMO No. 7") denying New York's request to modify LMO No. 6 to exclude banks and depositories. The Master also questioned New York's claims of discovery burden, noting that the State's assertions made "no sense as a matter of interpreting ... the language of LMO No. 6" (LMO No. 7, 4), and agreeing that "*Delaware* seems clearly correct in observing that New York creates the burdens of which it complains ...." *Id.* at 5 (emphasis supplied). Nonetheless, the Master limited New York's disclosure obligations to expedite the proceedings. *Id.*

ARGUMENT

I. Delaware's Motion is Untimely

As a non-defendant, the only basis Delaware can claim for relief through its motion to strike is that the Master's June 8, 1993 order extending the parties leave to amend their complaints, and the amended complaints of the Intervenor-plaintiffs, all filed on or before July 8, 1993, may prejudice it by delaying issuance of a judgment against New York for an, as yet, undetermined amount of unclaimed securities distributions remitted to New York by Delaware-incorporated brokers and not subject to other States' primary rule or backup rule claims. However, even apart from the fact that Delaware's claims cannot be adjudicated without adjudication of the competing claims, Delaware's own delay in seeking relief belies its claims of prejudice. Indeed, its motion to strike should be deemed untimely, and accordingly denied.

There is no specific Supreme Court rule setting the time limit for a non-defendant's motion to strike an amended complaint in an original action. S. Ct. Rule 17.2 provides that "[t]he form of pleadings *and motions prescribed by the Federal Rules of Civil Procedure should be followed* in an original action to be filed in this Court. In other respects, those Rules, when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." (Emphasis supplied.) In the course of this case, except where the Clerk or the Master have set due dates, the

time limits in the Federal Rules have applied. Two federal rules offer guidance as to the time limit applicable here. Under Fed. R. Civ. P. 12(f), certain motions to strike pleadings, where no responsive pleading is permitted, are required to be filed "within 20 days after service of the pleading upon the party." Under Fed. R. Civ. P. 15(a), a response to an amended pleading must be filed within 10 days after service of the pleading. Delaware did not meet either of those time limits with its August 9 motion in response to amended complaints filed on or before July 8.

The fact that *New York* moved the Master to modify the underlying order, LMO No. 6, authorizing the filing of amended complaints, did not extend the otherwise applicable time limit for *Delaware* to move to strike the actual amended complaints. By the time of New York's July 7 motion to modify the order, some of the amended complaints had already been filed, and by the time of Delaware's July 15 response, in which it partially supported New York,[14] all had been filed and served. Nevertheless, Delaware neither responded to the complaints nor moved to strike them at that time. Moreover, the relief requested by New York in its motion to the Master was narrower than that sought by Delaware here.[15] Indeed, Delaware's apparent attempt to piggyback on New York's efforts to modify LMO No. 6 is in stark contrast to its complaint that New York had failed "to respond timely" in seeking those modifications.[16]

---

[14]Delaware mischaracterizes its support for New York's motion as constituting a motion by Delaware. Del. Mot., 13. Delaware *never* moved for modification of LMO No. 6.

[15]New York requested only that primary rule discovery be limited "to the transactions of debtor brokers." Motion by Defendant, State of New York, to Modify Litigation Management Order No. 6 at 6 (July 7, 1993). Here, Delaware seeks to preclude Intervenor-plaintiffs from any primary rule relief.

[16]Response By Plaintiff, State of Delaware, To New York's Motion To Modify Litigation Management Order No. 6, at 13 (July 15, 1993). If Delaware's motion were treated as a challenge to the grant of leave to file contained in LMO No. 6, it would also be untimely. The analogous civil rules governing objections to reports or orders of both masters and magistrates (Fed. R. Civ. P. 53(e) and 72(a)) provide parties 10 days to serve such objections.

While the published procedures to be followed in original actions are not always clear[17], a party that waits over 20 days to move to strike particular pleadings and over 60 days to challenge the order authorizing the filing of those pleadings, should not be heard to complain of any prejudice to it caused by necessary time to complete the logical process contemplated by the Court.

II. The Amended Complaints of the Intervenor-Plaintiffs are Well Within the Boundaries of this Case and the Scope of the Court's Remand.

The Court's decision provides a general direction to conduct "further proceedings" that are "consistent with this opinion." 113 S. Ct. at 1562. Such unrestrictive remand language leaves lower courts -- and by implication Masters[18] -- free to proceed with the case so long as nothing is done that is contrary to the decision or in violation of any mandate. *Quern v. Jordan*, 440 U.S. 332, 346 & n.18 (1979); *Jones v. Lewis*, 957 F.2d 260 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 125 (1992); *Hicks v. Gates Rubber Co.*, 928 F.2d 966 (10th Cir. 1991); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943 (3d Cir. 1985).

Certainly, actions that simply implement the relief a decision affords to the parties in the case are not inconsistent with a general remand direction. *See Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d at 950 ("... upon a reversal and remand for further consistent proceedings, the case goes back to the trial court and there stands for a new determination of the issues presented as though they had not been determined before, pursuant to the

---

Yet Delaware did not file the present objections to the Master's June 8, 1993 order until August 9, 1993. Nothing in LMO No. 6 extended the otherwise applicable deadlines for parties to object to that order.

[17]*See* Robert L. Stern, *et al.*, *Supreme Court Practice*, 614, 620 (5th ed. 1978).

[18]*Cf. Nashua & L.R. Corp. v. Boston L.R. Corp.*, 49 F. 774 (D. Mass. 1892).

principles of law enunciated in the appellate opinion ...."). Indeed, such actions are consistent with the federal rules. Under the logical interpretation of the remand, the Master is to prepare the case for entry of a final judgment granting "the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c). Indeed the purpose of Rule 54(c) is to prevent the very result Delaware espouses. "A party should not have to discover at trial that a chosen legal theory is the 'wrong' one, and the choice of the 'wrong' theory will not preclude recovery under the 'correct' one." 2A Moore's *Federal Practice* ¶ 8.14 at 8-74--8-75 (1993). Delaware's argument that the Court's rejection of one theory of recovery precludes relief to Intervenor-plaintiffs, full parties to this case, under the principles governing recovery set forth by the Court has no support under the rules of federal practice.

Delaware's interpretation of the Court's remand language directed at primary rule claims contradicts the Court's plain words. The Court was quite specific that, on remand, "New York or any other claimant State" could offer proof "on a transaction-by-transaction basis or ... provide some other proper mechanism for ascertaining creditors' last known addresses...." *Id.* at 1561.

Delaware concedes -- as it must in face of the Court's refusal to enter judgment against New York -- that the Court intended to permit New York to make last known address claims on remand. Del Mot., 20-21. But since the Court placed "any other claimant State" on a par with *New York* (113 S. Ct. at 1561), Delaware cannot seriously contend that New York may offer proof in these proceedings, but that other claimant States must begin anew.[19]

---

[19]Delaware "acknowledges" that the remand language could be construed to permit Intervenor-plaintiffs to make primary rule claims to the remittances of Delaware-incorporated brokers. Del. Mot., 21. How this "acknowledgement" squares with its claim that the Court "conclusively resolved the Complaints in Intervention, foreclosing the possibility that any of the relief sought in them could be granted" (Del. Mot., 7) is unfathomable. Of course, as shown in the

More fundamentally, however, Delaware's construction of the scope of the Court's remand ignores the posture of the case at the time of the Court's decision. As the Master noted: "[a]s is beyond peradventure, the *entire* lawsuit was not before the Supreme Court." LMO No. 7, 2 (34a) (emphasis in original). This fact was clear from the January 28, 1992, Report of the Special Master, the predicate to the Court's decision. *See* discussion pp. 5-6 *supra*. In that Report, the Master specifically highlighted primary rule claims as "significant issues of implementation [that] should ... be remanded ... for further proceedings, party comment, and, if appropriate, for a subsequent recommendation and proposed decree." Mas. Rep., 77. The similarity between the Master's unexcepted to implementational prescriptions and the Court's remand language is undeniable. As a totality it is clear that the Master, the parties, and, most importantly, the Court understood that what remained after the Court's decision was "to actually determine which particular transactions gave rise to escheatable funds under the applicable legal tests." Mas. Rep., 6. It is this -- the actual historical, factual, and procedural background leading up to the Court's decision -- that informs the remand language, not Delaware's personal beliefs (Del. Mot., 4) and unfounded speculations. And, it is this background that demonstrates that the amended complaints are within both the "letter and the spirit of the Court's remand instructions." Del. Mot., 19.[20]

Counter-statement above, the funds remitted by non-Delaware entities were placed within the scope of the case through the original intervenor complaints.

[20]Delaware also asserts that the Court granted the intervention motions only as a means of depriving Intervenor-plaintiffs of a right to recover in this action. However, nothing in the Court's decision on the intervention motions supports Delaware's interpretation. Indeed, the Court could have achieved this result directly by simply denying the intervention motions. Delaware's "belief" (Del. Mot., 4) that the Court granted all intervention motions only to bind the Intervenor-plaintiffs to the, as yet unentered, "judgment of the Court" (Del. Mot., 7) in order to assure that some States would not enforce certain State laws contrary to the Court's decision is fantastical. For example, this theory would not apply at all to the Court's grant of the intervention motions of those States that did not change their unclaimed property laws, including the Designated States.

III. The Amended Complaints Satisfy the Requirements of Fed.R.Civ.P. 15 and do not Prejudice Delaware.

As shown above, both the plain meaning of the Court's remand language and its historical, procedural context support the position that the Court intended, on remand, that other claimant States be able to seek recovery under the rules set forth by the Court, and, particularly, have an opportunity to submit primary rule claims. Under these circumstances, the refusal of a district court -- had one been involved -- to implement the remand order by allowing amendment of the complaints would most probably, absent compelling reasons, have been clear error. *See Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F. 2d 1506, 1511 (11th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

In addition, the express direction of Fed. R. Civ. P. 15(a) that leave to amend be "freely given" counsels in favor of permitting parties to take advantage of any benefits to them a court decision may confer. Standing alone, the fact that the amendment presents a different theory of recovery would not be sufficient grounds for denying leave to amend, even after a remand by an appellate court. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).[21]

---

[21]Delaware's broadsides as to the sufficiency of the Intervenor-plaintiffs' amended complaints are unavailing. The Intervenor-plaintiffs' amended complaints are well within the notice pleading requirements of the federal rules. There is no requirement that specific evidence be alleged in a complaint; only that fair notice of a claim be provided. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). *See also e.g., Walker v. South Central Bell Telephone Co.*, 904 F.2d 275, 277-278 (5th Cir. 1990); *Williams v. United Credit Plan of Chalmette, Inc.*, 526 F.2d 713, 714-715 (5th Cir. 1976); *Thompson v. Allstate Insurance Co.*, 476 F.2d 746, 749 (5th Cir. 1973); *Asher v. Rupps*, 173 F.2d 10, 12 (7th Cir. 1949). The original complaints of the Intervenor-plaintiffs clearly informed the Defendant (and the original Plaintiff) that claims were being made to all "excess receipts" remitted to New York regardless of the type or domicile of the remitter. Indeed these complaints were accepted by the Court without the identification of specific distributions owed to each jurisdiction.

The only objection that Delaware can interpose to attempt to defeat the liberality of Rule 15(a) is that the amended complaints may cause a delay in the entry of what Delaware hopes will be a substantial judgment in its favor. Delay alone, of course, without a concrete showing of specific undue prejudice to the party, is not a sufficient basis for denying leave to amend. *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (delay of 3.5 years alone not enough to defeat amendment); *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981) (delay of 9 years alone not enough to defeat amendment); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980), *cert. dismissed*, 448 U.S. 911 (1980) (delay alone insufficient; must prove "specifically resulting prejudice"); *Silberblatt v. East Harlem Pilot Block*, 608 F.2d 28, 42-43 (2d Cir. 1979).

Delaware's claims of prejudice are simply dressed up complaints about the time necessary to complete the case, complaints which ignore the realities of the case. Some delay related to the revised theory of recovery or allegations conforming to the law is to be assumed, which is undoubtedly why delay alone does not preclude amendment. *See e.g., Silberblatt v. East Harlem Pilot Block, supra* (estimate of time it may take to complete discovery is insufficient to defeat leave to amend). And, as noted, the Intervenor-plaintiffs have not enlarged the universe of unclaimed distributions put in play under their original complaints; they have simply set forth revised theories of recovery conforming to the Court's legal decision. The parties merely are being given an opportunity to litigate issues that have not been previously tested. This case will continue on remand in the procedural manner envisioned by the Master in his January 1992 Report -- albeit under distribution rules different from those he recommended -- a second stage of discovery proceedings, and motions aimed at identifying and resolving specific claims.[22]

---

[22]Delaware's assertion that the implementation phase is somehow beyond the original jurisdiction of the Court and the use by it of a Master (Del. Mot., 23-24) lacks merit. The Court does not shy away from reaching a final judgment simply because a case involves highly complex, technical facts (*see e.g., Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390 n.7 (1980); *Nebraska v. Wyoming*,

Like so much of Delaware's motion, its claim of prejudice ignores what every other entity connected with this case understood: that the events leading up to the Court's decision were only the first stage in the resolution of this case. Delaware has long been on notice that the Court's decision was only the conclusion of the first "general rule" stage of this case, and that the application of those rules to determine the parties' specific relief remained to be resolved. Delaware cannot be prejudiced by what it was on notice to expect.

Even assuming Delaware had been justified in ignoring the explicit forecasts of the stages to come, it could never have legitimately expected the entry of judgment in its favor without any further discovery proceedings. The Court refused Delaware's request for entry of judgment and left open discovery by New York on primary rule claims. Indeed, because of the limited nature of the first stage of discovery, Delaware itself needs to conduct further discovery to solidify its claims. *See* LMO No. 6, 7 (10a).

Moreover, Delaware's argument is inconsistent with the course of the carefully structured discovery actually ordered by the Master after remand, through which the Master strove to minimize any potential for undue delay or prejudice. The Master restricted the scope of the threshold discovery, ordered immediate disclosure from New York to facilitate consideration of backup rule issues, and ordered that core discovery by all parties proceed within a short time frame. At the conclusion of this restricted discovery segment, the possibility of interim relief to Delaware was left open. Thus, in a real sense, the Intervenor-plaintiffs' ability to pursue the relief under their amended complaints will be tested expeditiously, contemporaneously with the proceedings on the narrower disputes between New York and Delaware. The prejudice to Delaware under this discovery scenario is not

---

325 U.S. 589, 616 (1945)), and use of the services of a master in such a situation is typical, not unusual. *See* Fed. R. Civ. P. 53(b) (authorizing explicit use of masters "in matters of account and of difficult computation of damages"). *See also* 5A Moore's *Federal Practice* ¶ 53.05[2] (1993).

apparent. A fairer resolution of the competing sovereign interests is hard to imagine.[23]

IV. The Master did not Exceed his Authority by Granting the Parties Leave to Amend.

In referring this case to the Special Master, the Court conferred on him, *inter alia*, the full "authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings." *Delaware v. New York*, 488 U.S. 990 (1988). There is no suggestion in this language that it would not include full authority to issue pretrial and other routine orders, such as extending parties leave to amend their complaints pursuant to Fed. R. Civ. P. 15(a). *See e.g.*, *Pagano v. Frank*, 983 F. 2d 343 (1st Cir. 1993).

> In the light of Rule 15 providing for liberal amendment ..., the master should be able to allow amendments to the pleadings that affect issues referred to him whenever such an amendment would be clearly allowed by the court as a matter of course. A contrary conclusion would lead to additional expenditure of time in applying to the court for leave to amend, and would defeat the expedition intended by reference to the master.

---

[23]Delaware's reliance on New York's request for an extension to comply with its discovery obligations under LMO No. 6 (Del. Mot., 24) is misplaced. Delaware itself argued that the reasons given by New York for delay were "flawed" and not credible. Response by Plaintiff State of Delaware to New York's Motion to Modify Litigation Management Order No. 6 at 2, 7-12 (July 15, 1993). The Master noted that New York's request and the burdens it alleged were based on a fundamental misunderstanding as to the disclosures it was required to make under LMO No. 6. Nonetheless, he limited New York's discovery obligations in order to expedite disclosure and the remaining proceedings. LMO No. 7, 4-5. Certainly, any delay attributable to the dilatory practices of one party cannot serve as grounds for striking the amended complaints of other parties. *See e.g., Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d at 280 (in a ruling in favor of amendment, noting that "there is nothing in the record to lay the dilatoriness" existing in the case to the party seeking to amend).

> Where a case has been remanded by an appellate court with definite directions the master should proceed in accordance therewith even though some of the matters are beyond the pleadings.

5A Moore's *Federal Practice* ¶ 53.06 at 53-81 (1993) (footnotes omitted). Here, the Court defined the rules governing the parties' claims, remanded the case to the Master without restriction, and specifically noted the right on remand of "New York or any other claimant State" to submit proof of claims under the primary rule. In authorizing the amendments, the Master was simply proceeding in accordance with the directions of the Court.[24] Under the circumstances, the procedure advocated by Delaware (submission of motions to the Court, referral to the Master, report recommendations by the Master, exceptions by the parties, and decision by the Court) would have been a time-consuming, expensive formality that likely would have resulted in more delay to the ultimate resolution of this case than the order issued by the Master.

Delaware's assertion that the Master's actions are a threat to the Court's control over its original jurisdiction docket (*see* Del. Mot., 16) is a strawman. There is no reason to believe or basis to assert that any of the Master's orders or other actions are unreviewable by the Court at the appropriate time. *See e.g.*, Fed. R. Civ. P. 53 and 72. The Master's order no more threatens the

---

[24]The cases Delaware cites (Del. Mot., 17) as examples of the conventional wisdom on Supreme Court practice all involve situations where the issue of leave to amend arose in a manner procedurally distinct from the situation here. Moreover, the Court does not purport to set down generally applicable procedural rules in any of those cases. For example, in *California v. Nevada*, 447 U.S. 125, 132-133 (1980), leave to amend, presented on motion, was refused because the amended claim proposed to resolve a dispute that was "not in the offing" between the two State parties; would involve making the United States and private citizens parties, and involved quieting title to lands not involved in the original dispute. In this case, a dispute exists between the Intervenor-plaintiffs and New York, the amended complaints assert claims to the same property as the original complaints, and no new or non-state parties are proposed to be added.

integrity or control of the Court's docket than does reference to the Master of a motion for leave to amend.

Finally, even if the Court were to agree with Delaware as to the more technically appropriate course for the Master and the parties to follow as to amendments, any theoretical defect in the Master's authority to accept amendments would be easily curable. The Court can treat the Intervenor-plaintiffs' amended complaints as motions for leave to amend and refer their resolution to the Master, the very procedure Delaware has suggested must be followed. Del. Mot., 16-17. *See also*, Del. Mot., 15 n.17, suggesting that Massachusetts' Amended Complaint might be deemed a motion for leave to file.

CONCLUSION

The ultimate position advanced by Delaware, if accepted, is that sovereign States before this Court in an original jurisdiction matter should be subject to "rigid pleading formalism"[25] that does not govern private parties before a district court. Such a proposition should disturb the Court as offending simple notions of fairness. For the foregoing reasons, the motion of the State of Delaware to strike the amended complaints of the Intervenor-plaintiffs should be denied.

---

[25]LMO No. 6, 7 (11a).

Respectfully submitted,

Don Stenberg
Attorney General
Dale A. Comer
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509

Attorneys for the State of Nebraska

James F. Flug
[Counsel of Record]
Lee E. Helfrich
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W., Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan, Frank J. Kelley Attorney General, and Maryland, J. Joseph Curran, Jr. Attorney General

John Payton
Corporation Counsel
Charles L. Reischel
Deputy Corporation Counsel
Lutz Alexander Prager
Assistant Deputy Corp. Counsel
One Judiciary Square
441 - 4th Street, N.W.
Washington, D.C. 20001

Attorneys for the District of Columbia

APPENDIX

APPENDIX A

[EXCERPTS FROM:] IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989
BEFORE THOMAS H. JACKSON, SPECIAL MASTER

State of Delaware, Plaintiff,	)	
v.	)	No. 111 Original
State of New York, Defendant.	)	

RESPONSE OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND TO THE FIRST SET OF INTERROGATORIES PROPOUNDED BY THE STATES OF ALABAMA, ET AL., AND TO THE FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS FROM THE STATES OF ALABAMA, ET AL.

Pursuant to Discovery Order No. 9, the States of California, Michigan, Nebraska, Ohio, and Rhode Island ("the Designated States"), through undersigned counsel, submit these responses to the First Set of Interrogatories ("Contention Interrogatories") propounded by the States of Alabama, et al., and to the First Request for the Production of Documents from the States of Alabama, et al.

As noted in the respective responses of Alabama, et al., Texas, et al., and the District of Columbia to prior contention interrogatories in this case, because no brokerage house or bank has yet been deposed, the answers provided here may require revision or supplementation based on the results of the forthcoming discovery.

[Page 2] INTRODUCTION AND GENERAL RESPONSE

....

[Page 6] ....

B. A particular intermediary which receives excess receipts typically does so because an entity or person for whom it was acting transferred ownership, or custody of the evidence of ownership, in the words of the DTC witness, "around the time of" [footnote omitted] the record date for a particular distribution. The data bases of each broker contain the information needed to make an actual statistical allocation among the states of the group of [Page 7] transactions from which a particular excess receipt most likely arose. A broker can identify its customers' transactions in each security on any given date. Thus, for example, if it appears that the time period most relevant to the creation of an excess receipt is a three-day period before the record date (or the ex-dividend date), even though the broker cannot determine, from its own records, which particular transaction gave rise to the excess receipt, it could - if necessary - compute the percentage, of the group of transactions which gave rise to that receipt, which were initiated by customers in a particular state, or through branch offices in a state.[3] (An example of such a manual computation for four randomly selected stocks on a particular day at one brokerage firm is appended as Exhibit 3.) ....

[Page 10]

INTERROGATORIES

....

[Page 14] ....

3. With respect to paragraph 9 of California, et al.'s complaint in Intervention, state

(a) the basis for the assertion that "[s]uch allocations are administratively feasible";

---

[3] Even though we believe that the Court would look more to the goals and principles it enunciated in 1965 rather than the specific formula applied in that particular fact situation, another advantage of the Designated States' approach is that it can be framed in terms of using the last known addresses of the group of last known beneficial owners of the securities which gave rise to the excess receipts, as shown on the books and records of the holders of the property.

Response to 3(a): See paragraphs B-C of the Introductory Statement.

As indicated there, if the Court required a high level of precision in the allocation formula, a broker could identify the particular customers who initiated transactions in a security on specific days, and compute the geographical distribution of such customers, weighted by the size of their transactions. However, the Designated States do not believe that the Court's principles require that level of precision, and have suggested examples of other extant data from which allocation approximations can be derived. See paragraphs D-E of the Introductory Statement.

(b) the basis for the assertion that "relevant books and records are maintained in a form from which the pertinent information is readily ascertainable";

Responseto 3(b): See response to 3(a) above. The addresses of their customers are basic business information which brokers and other financial institutions necessarily must have readily available for their own internal purposes, such as collections, payments, and issuance of required customer statements, as well as for external audits and investigations. If for any reason those addresses are not available, then substitute information, such as the location of [Page 15] the customer's branch office or of the customer's registered representative, would be readily available.

and (c) the identity of the relevant books, records, or other documents referred to, and the identity of the person(s) maintaining such books, records, or documents.

Response to 3(c): These are the relevant customer records of the brokers and financial institutions and are in their custody. ....