No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF DELAWARE

Plaintiff,

STATE OF TEXAS, et al.

Intervening Plaintiffs,

v.

STATE OF NEW YORK

Defendant.

REPORT AND RECOMMENDED DISPOSITION OF MOTIONS WITH RESPECT TO COMPLAINTS

THOMAS H. JACKSON
Special Master

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March 15, 1994

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Thomas H. Jackson, Special Master:

Several issues with respect to the pleadings in this matter have been referred to me; one related motion has been lodged directly with me. This Report sets forth recommended dispositions on certain matters ripe for consideration at this time.

1. Delaware's motion for leave to dismiss its complaint and the Intervenors' related motion to direct Delaware and New York to produce their settlement agreement;

2. New York's motion for leave to amend its answer to assert certain counterclaims; and

3. Intervenors' motion with respect to partnerships, unincorporated associations, and foreign entities.

For the reasons articulated below, Delaware's motion for leave to dismiss its complaint should be granted; Intervenors' motion to direct Delaware and New York to produce the settlement agreement and New York's motion for leave to amend its answer to assert certain counterclaims should be denied. The recommendations with respect to Intervenors' motion with respect to partnerships, unincorporated associations, and foreign entities is contained herein.

1. Delaware's Motion to Dismiss and Intervenors' Motion to Compel Production. On January 21, 1994 Delaware filed with the Supreme Court its motion pursuant to Rule 46 for leave to dismiss the complaint in this action without prejudice. This application followed hard on the heels of public announcement of the fact of a settlement between Delaware and New York. New York joined in supporting the motion, Response of the Defendant, State of New York, January 24, 1994, at 2, but the intervening states except for Massachusetts, have opposed the application. After referral of Delaware's motion to me, Intervenors moved, on March 7, 1994, to direct Delaware and New York to produce their settlement agreement.

A. Posture of the Proceeding.

A brief capitulation of the posture of the litigation is set forth in the Delaware papers quite succinctly:

> In February 1988, Delaware filed a motion for leave to file a Complaint against New York; the Court granted the motion on May 31, 1988. 486 U.S. 1030. Delaware's claims for pecuniary and injunctive relief were based on this Court's decisions in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), which set out a "primary rule" and a "backup rule" to resolve the States' conflicting claims to escheat unclaimed intangible property.[1]
>
> The property claimed by Delaware in this case consisted of dividends, interest and other distributions on securities ("securities distributions") held by brokers incorporated in Delaware, which the brokers remitted to New York and reported as "owner/address unknown" over the course of many years. New York answered Delaware's Complaint on July 27, 1988, asserting that the securities distributions in the hands of the brokers were "owner/address *known*," with every address being in New York, and therefore subject to the primary rule, rather than the backup rule.

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

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

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

The Court also granted all pending motions to intervene, *id.*, slip op. at 4, 113 S.Ct. at 1555, and, after amended complaints were filed by the Intervenors, denied Delaware's motion, joined in by New York to strike them. *Delaware v. New York*, No. 111 Original, 114 S.Ct. 48 (October 4, 1993). The amended complaints all assert primary-rule claims and backup-rule claims against New York; they do not seek relief against Delaware. No amended complaint alleges any claim of any kind against any State other than New York, the sole defendant in this action. New York answered the Intervenors' amended complaints and also filed counterclaims against the Intervenors. The Court struck New York's counterclaims without prejudice to New York's filing a motion for leave to assert them, *id.*, and New York on October 29, 1993, filed such a motion, which has been referred to the Special Master. (*Delaware v. New York*, No. 111 Original, 62 U.S.L.W. 3409 (December 13, 1993). . . .

New York's proposed counterclaims assert primary-rule and backup-rule claims against all Intervenors, but not against Delaware; New York did not seek leave to assert a counterclaim against Delaware. Thus, overall there are two sets of claims being asserted in the case: Delaware's claim against New York; and the Intervenors' claims against New York. New York has sought leave to asset a third set of claims, but they do not involve Delaware's dispute with New York; they are solely directed against the Intervenors.

Motion of Plaintiff, State of Delaware, January 21, 1994, at 1-5.

The motion is opposed by the States of Alabama, *et al.*,[2] Texas, *et al.*,[3] Michigan, *et al.*,[4] as well as California and the District of Columbia (hereinafter, the "Intervenors"); these jurisdiction (minus the District of Columbia) have filed a related motion to compel production of the settlement agreement.

B. Discussion of Issues on the Motions.

The first asserted grounds for opposing Delaware's motion, and the primary basis of the responding motion to direct production of the settlement agreement, is that the Intervenors have only the "bare numbers" of the settlement reached between Delaware and New York.[5] Objection to Motion of Plaintiff, February 7, 1994, at 2. Intervenors contend that it "may be highly prejudicial" were the Court to grant leave for dismissal of the Delaware complaint. *Id.*

The mere recitation of the concept of prejudice, however, cannot suffice, and Intervenors have not advanced circumstances warranting the unusual relief of blocking the dismissal of an action between litigants who have settled their dispute, when all other parties' claims can remain pending and can be effectively adjudicated by the Court. Nor have they made any plausible showing of any real reason why the motion to dismiss must be held in abeyance while the settlement agreement is first produced and examined; a production that runs counter to the traditional Anglo-American reticence to force settling parties to disclose the full terms of their understanding. See Reply Memorandum of Plaintiff, at 7, for a sampling of these notions. While the motion to compel production is technically a motion in its own right, I see no need to hold all this in suspension while that motion is briefed in traditional fashion. The grounds for the motion are all contained in Intervenors' opposition to the motion to dismiss and, at this stage, I see no further benefit to delay for further briefing when Intervenors' papers, on their face, do not make a case, in my view, for granting of Intervenors' motion *or* for denying Delaware's motion to dismiss.

Intervenors assert that they have "been claiming the same funds in this litigation as Delaware," *id.*, at 3. It appears that the theory of this prejudice grows out of the primary rule assertions Intervenors have advanced, since it is stipulated that the claims based on the state of

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[2] Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming, and the Commonwealths of Kentucky and Pennsylvania.

[3] Texas, Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, Oregon, South Carolina, Tennessee, and Wisconsin, and the Commonwealth of Virginia.

[4] Michigan, Maryland, and Nebraska.

[5] Intervenors recite their understanding, premised upon press releases and other public disclosures made by representatives of Delaware and New York on January 21 and 22, 1994, that the settlement is in the gross amount of $200 million, comprised of some $35 million paid initially, and five annual installment payments of $33 million per year. Objection to Motion of Plaintiff, February 7, 1994, at 2-3 and n. 2.

incorporation of funds remitters as to which Intervenors advance claims are *other* than those incorporated in Delaware. *Id.*, at 3-4.

In large part the Intervenors appear to fear the unilateral option of Delaware to reinstate this litigation, "possibly many years hence," with support from New York. This fear is not attenuated by the fact that the proposed dismissal of the Delaware claims is "without prejudice," but in a legal regime without supervening statute of limitations measures, this fear appears exaggerated. To the extent that Intervenors raise the specter of Delaware's case rising Phoenix-like in the future, it suffices to note that permission from the Court would be required (See Sup. Ct. Rule 17) and the disposition sought here would not purport to curtail the discretion of the Court in reviewing such a maneuver. See generally, *Mississippi v. Louisiana*, 113 S.Ct. 549, 552 (1992).

At bottom, of course, the fear of the Intervenors is that the settlement of matters between Delaware and New York will adversely affect their own claims. See Objection to Motion of Plaintiff, February 7, 1994, at 5. However, as Delaware has pointed out, at no time during the past six years has any of the Intervenor states advanced a claim against Delaware, and Delaware has made no claims against them. None of the pending amendment motions involves a claim against Delaware. Thus, there is no claim of the Intervenors involving Delaware that would be affected by granting the dismissal to implement the settlement between Delaware and New York. Nor is any claim or defense that applies to the litigation as between the Intervenors and the defendant, State of New York, at all affected. The Intervenors' have conceded as much: "The Intervenors will continue litigating their claims—and New York's counterclaims against them—even if Delaware's Motion is granted." *Id.*, at 4. New York's support for the Delaware motion included the representation that "the dismissal will not affect New York's claims against the intervening plaintiffs, nor will it affect an of their claims against New York." New York's Response to Motion, at 2. The Intervenors assert that this "self-serving assertion[]" is "hardly sufficient" to dispel the Intervenors' concerns. Objection to Motion of Plaintiff, February 7, 1994, at 6.

New York's assertion, however, is more than self-serving; it states the appropriate legal posture to be granted to this settlement agreement, no matter what words Delaware and New York chose to write into it. There is no contention advanced by the Intervenors that the initial payment made to Delaware, or any of the payments Intervenors understand to be contemplated in the future, come from an existing "fund" as to which the present litigation features competing claims. New York has, pointedly, not segregated the amounts it has taken pursuant to its custodial remittance procedures over the years, and hence if there is risk from the effectuation of the settlement with Delaware, it is that of New York, which cannot defend against claims of the Intervenors because it chose to pay sums towards a settlement with Delaware. As New York emphatically states in its Reply in Support of the Motion of the Plaintiff, February 11, 1994:

> [T]he fact that New York and Delaware have settled their dispute does not and cannot relieve New York of its obligation to pay the Intervenors' [*sic*] all of the property at issue to which they demonstrate an entitlement under the Court's

> escheat rules announced in *Texas v. New Jersey*, 379 U.S. 674 (1965)(less any offset permitted by counterclaim). That means: under the *Texas* primary rule, the Intervenors have a superior right to any unclaimed securities distributions escheated by New York which are owed to creditors whose last known addresses on the debtors' records are in the Intervenors' respective jurisdictions; under the *Texas* backup rule, any owner-unknown securities distributions escheated by New York from debtors incorporated in the Intervenors' respective jurisdictions are owed to those jurisdictions. Neither the settlement agreement, nor the sum of money that New York has agreed to pay Delaware in settlement of Delaware's claims against New York, can alter this. *New York remains obligated to pay any judgment that the Intervenors obtain against it in the exercise of their rights under the Court's escheat jurisprudence.*

Id., at 3 (emphasis added). It is clear that no private agreement between Delaware and New York could affect other jurisdictions' claims against New York to, at the end of the day, money that is not segregated, held in a special account, or otherwise somehow "unique" enough to think that it somehow "disappears" effective with the consummation of the settlement agreement. Production of the settlement agreement, while perhaps satisfying the curiosity of all concerned, is not necessary to reinforce this essentially legal point. And I deem New York's concession of this point, made through its chosen counsel in papers filed with the Court, as binding for purposes of this litigation, thus ensuring that this door is closed. In that context, production of the settlement agreement would serve no function relevant to the ongoing litigation in this case.

The same is true of the "without prejudice" nature of the dismissal sought. Since the claims asserted by Delaware were solely against New York, only New York could be thought to incur an added risk by agreeing to make settlement payments without the res judicata bar a disposition "with prejudice" would provide. Since Delaware made no claims against the Intervenors in the present suit, the failure to release them with prejudice as part of Delaware's settlement with New York is hardly prejudicial (or threatening, or even such as to raise a contingent risk not otherwise extant) for the Intervenors.

Finally, there is the matter of costs. It appears clear that all previously processed costs have been paid, and that the Intervenors are not being left to pay a disproportionate share of the costs accrued to date but as yet unallocated. I am forwarding to the Court contemporaneously with the present report a fee application for the period from February of 1992 through February of 1994. Delaware has stipulated that it is obligated to contribute its share of any sums approved by the Court in this regard. Reply Memorandum of Plaintiff, February, 1994, pp. 1-2 at n.1. Hence this minor ministerial matter, also, fails to raise grounds for concern that permitting implementation of the settlement between Delaware and New York would prejudice the remaining parties in any way.

Thus, nowhere in the musings of the Intervenors is there a cognizable showing of even the slightest prejudice, or any legitimate fear of contingent future prejudice, from the granting of the motion lodged by plaintiff Delaware for leave to dismiss its complaint. Hence I recommend that it

be granted. Conversely, of course, I deny Intervenors' motion to compel production of the settlement agreement.

2. **New York's Motion for Leave to Plead Counterclaims.** New York has sought leave to file a four-paragraph set of counterclaims. *See* Motion of the State of New York, October 29, 1993 at appendix A-1. The counterclaims, though set forth in short compass, cover the waterfront. They include primary rule claims against all intervenor states for situations where the debtor intermediary's books identify a creditor incorporated in New York (*id.*, ¶ 1), and backup rule claims as well (*id.*, at ¶¶ 2, 3). The counterclaims conclude with a catch-all provision seeking to recover funds wrongfully taken by other jurisdictions under "any ruling, principle or determination announced or to be announced by the Court." *Id.*, ¶ 4.

It is my view that these counterclaims are not appropriate for litigation in the present suit.

Setoffs distinguished. New York has, quite apart from these recently proffered counterclaims, indicated that as to some payments it has taken over the years there were refunds or other payments made by the State of New York in response to claims of superior entitlement to the funds, such as claims by a purported creditor or another jurisdiction. Those claims are being pursued, and earlier orders and discovery events were calculated to be sure that if New York is required to disgorge funds previously taken custodially, it will be open for New York to demonstrate the "net" amount of the funds held with respect to the particular distributions, by carrying a burden of showing that claims against the fund were in fact paid. The counterclaims now before the Court are *not* intended to redress the credit due to New York on account of such claims payments, nor are they necessary for that end.

Takings by other states. Rather, the counterclaims are seen by New York as advancing with elegant symmetry the right of New York to retroactively straighten out any improvident escheat takings by sister jurisdictions, just as Delaware and the intervenors have been seeking to do in the present action since 1988 with respect to takings by New York.

It is true that the claims articulated by New York, by design, spring from the same theoretical base as those being litigated in this case as it has been shaped for the last several years. But this symmetrical purity, while attractive at first glance, would dramatically alter the scope and focus of this litigation. Two salient points merit observation in beginning to discuss this motion. First, all efforts to date have sprung from the issue of whether *New York's* admittedly substantial custodial taking of unclaimed securities distributions over the past several decades have been proper. Second, the issue of *primary rule entitlement* to unclaimed funds, virtually all that remains in the current litigation, is itself fraught with substantial factual and legal uncertainty. The reason for permitting "sampling" discovery, now underway, is to test whether it is even plausible to make primary rule determination of funds already determined to be, at least by reporting intermediaries, owner-unknown. No sound formal or legal basis for making such determination has yet been presented, or accepted. This at least suggests that New York's motion, although symmetrically pure, is at best an expansion that is very premature, at least in this respect.

While aspects of the Intervenors' opposition to the New York motion are overblown, see Opposition of Plaintiff-Intervenor States, December 1, 1993, at, e.g., 15 (counterclaims would require 49 times the discovery investment in the litigation), on the whole the opposition is well-founded: without the slightest indication that there is a factual basis for the claims being asserted (cf. F.R.Civ.P. 11), the New York counterclaim proposal would require diversion of the present litigation from its tracks just as it approaches concluding phases.

The proposed counterclaims are not compulsory under the federal rules, since they do not arise from the same transactions being litigated in other aspects of the case. I do not conclude that the standards of Rule 13 are applicable to the present context, given the sovereignty of the parties and the inherently re-visitable nature of the custodial takings process. But the fact that these claims do not arise from the same subject matter as the pending phases of the litigation, combined with the fact that the claims New York may well have against other states are not barred by limitations notions, suggests that there will be no prejudice from denial of leave to assert these claims in the present case. And while judicial economy may suggest that there is no reason to commence another original action, it is unclear in the extreme, at this point in this litigation, that the suit would be worth the candle. This litigation may yet convince the parties, or find for them, that further primary rule pursuit is not a warranted expenditure of public funds, because the likelihood of recovery is so small. Conversely, if some primary rule claims are deemed worth pursuing, there is every reason to believe that the jurisdictions could then develop consensual mechanisms for resolving such claims, again potentially obviating a need for a further suit to set up the same processes for primary rule claims involving other jurisdictions.

The discovery to date in this action has explored takings by New York, and the amended complaints in intervention seek to test whether some of the takings by New York from entities incorporated under New York law can be shown to represent transactions where a creditor's location in another state can be demonstrated. Preparations, including a controlled window for discovery from specified third parties, are well advanced in the exploration of these claims, and the litigation is nearing the point when a hearing may be scheduled to determine whether re-analysis of the transactions can yield non-speculative reconstructions of the creditors in any fashion sufficient to merit further efforts along these lines.

To countenance diversion of attentions to address New York's counterclaims, in this context, would be stunning. There are no specific payments articulated in the four paragraphs of the counterclaims, and not even a general pattern or principle to suggest that New York conceives that any particular state or group of jurisdictions collected funds in a fashion inconsistent with the Court's custodial takings jurisprudence.

Thus the New York counterclaims would amount to a complete fishing expedition. Of course, nothing prevents the investment of its own auditors' energies in this direction if New York is so inclined, and there is a history of cooperation and of reciprocal statutory provisions respecting the study of other jurisdictions' custodial takings. Thus, if it is so advised, New York could seek cooperatively to explore these matters with other states, and failing such facilitation

(or, indeed, if exhaustion of those efforts actually provides a factual basis for the assertion of a claim in a litigated forum), New York could seek leave to commence an action against any state or grouping of jurisdictions on the basis of some articulable factual predicate. But in the management of the Court's original jurisdiction docket, where all parties from time to time have adverted to the principle that actions should be commenced sparingly (see *Mississippi v. Louisiana*, 113 S.Ct. 549, 552 (1992) (citing several earlier decisions to the same effect)), and not constructed in a fashion so as to "strain" the Court's docket (see New York's own Motion, at ¶ 13), I cannot but find that the prospect of opening this proceeding up at this particular stage for a completely new investigation of the practices of 49 other jurisdictions would be improvident. Allowing this amendment would not only completely change the focus of the litigation, but would inordinately delay disposition of the matters heretofore being litigated.

Hence I recommend that New York's application for leave to assert the counterclaims annexed to its current motion be denied. This is without prejudice to New York reasserting these counterclaims if the primary rule proceedings currently underway suggest real prospects of recovery in this action—and, of course, assuming that New York can lay a factual predicate for believing that "improper" custodial takings have occurred in other jurisdictions. (By that time, I suspect, each jurisdiction might appropriately want to lodge similar claims against each other jurisdiction, and it is my fervent hope that the procedures, if any, developed in pursuing the primary rule claims already in this case will lead the way to consensual methods of further determination.)

3. **Intervenors' Motion with Respect to Partnerships and Other Unincorporated Brokerage Firms, and Foreign Intermediaries.**

On January 6, 1994, Intervenors moved before me, seeking a recommendation on the appropriate treatment for owner-unknown securities distributions where the intermediary found with the unclaimed funds is a partnership, or another form of unincorporated association.

Intervenors' seek a ruling that an intermediary firm's principal place of business should be employed as the jurisdiction entitled to the custodial taking. It is suggested that the principal place of business is reflected for brokerage firms on the "facing page" of its annual SEC Form X-17A-5, and otherwise would be determined as a factual matter. Motion of Plaintiff-Intervenor States, January 6, 1994, at 2; Reply of Plaintiff-Intervenor States, March 10, 1994, at 4-5. For the "rare case" in which the intermediary/debtor holding such unclaimed funds is a foreign entity (such as a bank or brokerage firm), movants propose that the State of the entity's principal place of U.S. business be entitled to "backup rule priority."[6]

New York filed a Response to the motion, January 24, 1994, taking the position that in the case of a limited partnership the jurisdiction in which the certificate of limited partnership is

[6] No information is provided in the moving papers as to whether the discovery and investigation undertaken to date in this action has instantiated the theoretical possibility of unclaimed funds being held by such entities.

filed is closely analogous to the state of incorporation test and this analogy is fully appropriate for backup rule purposes. For general partnerships where no certificate is filed, New York advanced the view that the jurisdiction of the entity's "headquarters" should be entitled to the custodial taking of funds. For foreign intermediaries, New York suggested that "the State in which such entity registers to do business" should be selected (assuming, apparently, that there is only one State with which such an entity might register with a State banking authority, Secretary of State, or Corporation Commission). New York also suggests, *id.*, at 10-11, that if any other rules are adopted, these rules be applied prospectively only. I recommend rejection of any prospective application of the locational rules being discussed here, not only for the reasons indicated in my prior Report, at 70-77 (discussing retroactivity), but also because there is no firm rule that New York argues is being deviated from. At best, its argument is that the absence of a prior rule allows it to keep what it has taken. Nothing being recommended here is so novel as to warrant such an outcome.

Limited Partnerships. With respect to limited partnerships, which under the provisions of the Revised Uniform Limited Partnership Act, § 201 (1976) [adopted in almost all states] are created though the filing of a certificate of limited partnership filed with a Secretary of State or comparable state office, it is evident that this state most closely approximates the state of incorporation for a corporation and thus best implements the Court's decision in *Delaware v. New York*, 113 S.Ct. 1550, 1559-60 (1993). It should be used for backup rule purposes.

General Partnerships or Associations not Created by Certificated Filings. General partnerships, formed under the current Uniform Partnership Act, § 105 (1992), or equivalent regimes, may not be "created" by a certification procedure in the same sense as limited partnerships. For these, and for the reasons articulated in my prior Report, at p. 41-49, an easily-administered locational test is appropriate. Intervenors' have proposed the following rule:

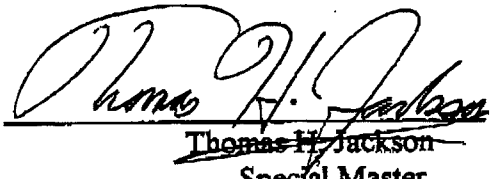
> When the debtor of an owner-unknown unclaimed securities distribution is an unincorporated brokerage firm, and an SEC Form X-17A-5 is available, the State identified thereon as the location of the broker's principal place of business will be entitled to backup rule priority. When a Form X-17A-5 is unavailable from the SEC . . . the State of the brokerage firm's *headquarters*, determined as a factual matter, will be entitled to backup rule priority.

Reply of Planitiff-Intervenor States, March 10, 1994, at 4-5. In what is likely to be a very small category anyway—broker-dealers that are general partnerships or unincorporated associations—such a test makes pragmatic sense in an area where there is no good analogy to the corporate jurisdiction of incorporation, and is quite unlikely to diverge from a pure "headquarters" or other conceivable rule. Hence I recommend that such a test be employed with respect to general partnerships and unincorporated entities. (As should be clear from the recommendation with respect to limited partnerships that are created through the filing of a certificate of limited partnership, I do not agree with Intervenors' view that ease of reviewing an SEC "facing page" is sufficient reason to determine location via a principal place of business test with respect to such limited partnerships. *Id.*, at 5. The analogy of the jurisdiction of filing of that certificate to the

jurisdiction of incroporation of a corporation is simply too strong to deviate from the Court's recently-reaffirmed adherence—in the face of arguments of equity and convenience made at that time—to the jurisdiction of incorporation in unclaimed fund cases. *Delaware v. New York*, 113 S.Ct., at 1559-60.)

Foreign Entities. While I am skeptical that foreign entities would necessarily seek qualification to function under the laws of only one jurisdiction, the papers submitted by the parties raise the distinct aura of unreality about these prospects in the universe of businesses involved in the present action. And, clearly, in any circumstance where New York is correct that there is only one state which has authorized a foreign entity to function in the U.S., that state is the direct analogue of the state of incorporation for domestic entities, and would be the appropriate state to take custodially any unclaimed securities distributions under the Court's decisions. Thus I recommend that the New York proposal be adopted for entities formally qualified in only one jurisdiction; Intervenors do not disagree. Reply of Plaintiff-Intervenor States, March 10, 1994, at 6. In the event that there actually is a foreign entity qualified under the laws of two or more jurisdictions within the United States that are holding funds subject to the present law suit, the principal executive offices in this country should be used to define the location of the equivalent of its domicile. While Intervenors might slightly prefer to use a principal place of business test, my understanding is that they "would not take exception" to a principal executive office test. *Id.*, at 6.

DATED: Charlottesville, Virginia
March 15, 1994



Thomas H. Jackson
Special Master

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Defendant.

DRAFT ORDER

This cause having come before the Court to be heard on the Report and Recommended Disposition of Motions with Respect to Complaints, submitted by Special Master Thomas H. Jackson under date of March 15, 1994, and the parties having had an opportunity to file any objections thereto,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The motion by the State of Delaware for leave to dismiss its complaint without prejudice is Granted.

2. The motion of defendant, the State of New York, for leave to amend its answer to assert counterclaims, is Denied without prejudice.

3. In the application of the back-up rule construed in this Court's decision in this proceeding dated March 30, 1993, 111 S.Ct. 1550, where an intermediary found in possession of owner-unknown distributions subject to this litigation is not an incorporated entity, the jurisdiction entitled to custodial taking of the unclaimed funds shall be as follows:

A. For limited partnerships, the jurisdiction where the certificate of limited partnership is filed.

B. For general partnerships created by certificated filings, the jurisdiction where such certificate is filed.

C. For general partnerships or associations not created by certificated filings, the jurisdiction identified on any SEC Form X-17A-5 applicable to such debtor, and in the absence of such form, the jurisdiction in which the entity has its headquarters.

D. For foreign-based entities, the jurisdiction in which such entity has qualified to do business in the United States; if there is more than one jurisdiction in the United States in which a foreign entity has qualified to do business, the jurisdiction in which the entity has its principal executive offices in the United States shall be entitled to make the custodial taking.

4. This cause shall remain pending, and it is hereby remanded to the Special Master for further supervision of the remaining issues, including the disposition of procedural matters, hearing of evidence and/or motions, and preparation of further reports and recommendations as appropriate.

CERTIFICATE OF SERVICE

Copies of the foregoing Report and Recommended Disposition of Motions With Respect to Complaints by the Special Master in this action have been mailed on the date entered below to the persons, States and entities listed on the attached Distribution List.

Kent Sinclair

Date: 3/15/94

DELAWARE v. NEW YORK

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